

September 4, 2020

Board of Trustees
State Bar of Montana
P.O. Box 577
Helena, MT 59624

Re: ABA Virtual Annual Meeting Report

Dear Board:

Along with this digital report please find the following bookmarked enclosures:

1. E-Book of Resolutions with Reports to the House of Delegates;
2. The Daily Journal for the ABA House of Delegates 2020 Virtual Annual Meeting held August 3-4, 2020; and
3. The Select Report from the ABA House of Delegates 2020 Virtual Annual Meeting held on August 3-4, 2020.

2020 Virtual Annual Meeting of the House of Delegates – August 3-4, 2020

The 143rd Annual Meeting of the American Bar Association, and the first ever Virtual Annual Meeting of the House of Delegates, was held on August 3-4, 2020. William R. Bay of Missouri, Chair of the House, presided. The meeting was held virtually over the Zoom platform, and members of the House in attendance were allowed to vote on resolutions virtually using the Sync platform.

Many of the calendared resolutions considered by the House during the 2020 Virtual Annual Meeting were concentrated on the COVID-19 pandemic that is still spreading across the country. One resolution (10D) sought to ease financial hardship on recent law school graduates who have been unable to take a bar exam and are, thus, unable to seek employment as licensed attorneys. Another resolution (10H) sought to address the COVID-19 eviction and housing crisis by (1) providing rental assistance to rental property owners where tenants are facing pandemic-related economic hardship, and (2) precluding in tenant screening practices the use of nonpayment of rent eviction records that occur during a specific state's COVID-19 pandemic state of emergency.

Perhaps the most significant pandemic-related resolution considered by the House, as it pertains to the membership of the State Bar of Montana, was Resolution 10G. A summary of resolution 10G has been copied below for ease of reference:

Urges that the highest court or bar admissions authority in each jurisdiction cancel the in-person bar examinations currently scheduled for September 9-10, 2020, and September 30-October 1, 2020, and not administer any other in-person bar examination until and unless public health authorities determine that the examination can be administered in a manner that ensures the health and safety of bar applicants, proctors, and other staff.

This proposed resolution was an expansion of the resolution adopted earlier in the year by the ABA Board of Governors urging states to adopt emergency provisional licensing procedures – with which Montana complied. In doing so, the Montana Supreme Court granted a one-year provisional license to recent law school graduates, pursuant to a petition from this Board. This provisional admission allowed individuals to appear in courts of record, administrative tribunals, arbitration hearings, and other judicial and quasi-judicial proceedings in all civil and criminal matters – provided that each provisionally-licensed individual was under the supervision of a licensed attorney who met certain criteria. Essentially, this provisional license would allow recent law school graduates who were fearful of the adverse health complications that might come with sitting for the July 2020 exam to defer that exam for up to one year, and still practice with a provisional license in the meantime.

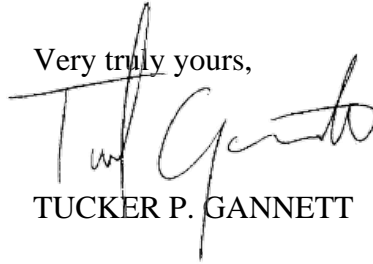
After the Supreme Court issued its ruling on the one-year provisional license, the Montana Board of Bar Examiners (“BBE”) determined that the July 2020 in-person bar exam could be conducted in accordance with the May 28, 2020 Order of the Missoula City & County Health Officer and that Order’s Appendix A: Events and Gatherings with more than 50 People. Specifically, the BBE employed the following precautions for administration of the July 2020 Exam: The Montana Law Seminar was presented electronically to eliminate the need for a third day of in-person attendance; face masks were required at all times; all public areas, including restrooms, were sanitized; additional signage was created to direct the flow of foot traffic in and out of the examination room; and hand sanitizer was readily available. Additionally, the Exam was conducted in the University Center Ballroom, which is 10,437 square feet in area and has a seating capacity of 1,000. 89 individuals sat for the July 2020 Exam, each of them at their own table appropriately distanced from every other table.

The proposed resolution 10G came *after* Montana had issued its provisional-license ruling and *after* the BBE had conducted its July 2020 bar exam, and just shortly before the 2020 Virtual Annual Meeting. As a result, and because it seemed to me that the Supreme Court and BBE had actually complied with every bit of guidance contained in the 10G report, I voted against this resolution. The resolution was hotly debated for a whole slew of reasons, but it was ultimately adopted by a slim margin. This was unfortunate, in my observation, because it seems that this might be an area of post-COVID litigation around the country, as recent law school graduates in almost every state have attempted to use the pandemic as leverage to reinstitute diploma privilege and avoid taking a bar exam altogether. Resolution 10G might give those litigants a toe-hold, as it specifically mentions implementing “a form of diploma privilege.”

For a complete summary of the resolutions considered, please see tabs two and three to this digital report.

Once again, it is my pleasure and honor to be serving the State Bar as its Delegate to the ABA's House of Delegates. Please feel free to contact me at the information above to discuss any of the topics mentioned here. I will also be attending the Board of Trustees virtual meeting on September 11, 2020 – at which time I would also be pleased to field any questions or comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "T. Gannett", written over the printed name.

TUCKER P. GANNETT

TPG/gb
Encs.

Resolutions with Reports to the House of Delegates



AMERICAN **BAR** ASSOCIATION™

2020 ANNUAL MEETING • JULY 29 - AUGUST 4, 2020

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<http://www.americanbar.org>

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**Resolutions with Reports
to the House of Delegates**



2020 ANNUAL MEETING • JULY 29 – AUGUST 4, 2020

NO RESOLUTION PRESENTED HEREIN REPRESENTS THE POLICY OF THE ASSOCIATION UNTIL IT SHALL HAVE BEEN APPROVED BY THE HOUSE OF DELEGATES. INFORMATIONAL REPORTS, COMMENTS AND SUPPORTING DATA ARE NOT APPROVED BY THE HOUSE IN ITS VOTING AND REPRESENT ONLY THE VIEWS OF THE SECTION OR COMMITTEE SUBMITTING THEM.

RESOLUTIONS WITH REPORTS TO THE HOUSE OF DELEGATES

2020 Virtual Annual Meeting

August 3-4, 2020

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*The Treasurer's Report will be sent electronically prior to the opening session of the House of Delegates meeting.

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**PRELIMINARY CALENDAR
of the
HOUSE OF DELEGATES
of the
AMERICAN BAR ASSOCIATION**

2020 Virtual Annual Meeting

August 3-4, 2020

All sessions of the Virtual House of Delegates meeting will be held on Monday, August 3 and Tuesday, August 4, 2020. The first session of the House meeting will begin at 10:00 a.m. CDT on Monday morning and adjourn at 1:00 p.m. CDT. The second session will take place on Monday afternoon from 2:30 p.m. until 4:30 p.m. CDT. On Tuesday morning, the meeting will reconvene at 10:00 a.m. CDT, and will adjourn at 1:00 P.M. CDT, or when the House has completed its agenda.

The Final Calendar of the House of Delegates meeting will be posted on the ABA's website no later than Sunday evening, August 2. Sections, committees, delegates, affiliated organizations and bar associations, which have submitted Resolutions with Reports, oral information or late reports authorized by the Committee on Rules and Calendar, will be calendared.

The index, which appears at the end of this book, will assist House members in locating reports received by the May 5, 2020 filing deadline. Resolutions with Reports numbered 100A through 117, 400A and 400B appear in this book. Proposals to amend the Association's Constitution, Bylaws and House Rules of Procedure are numbered 11-1 through 11-5 and also appear in this book. Informational Reports can be found on the ABA's website at https://www.americanbar.org/groups/leadership/house_of_delegates/2020-annual-meeting/ (click on *Informational Reports*).

Any late Resolutions with Reports, those received after May 5, 2020, will be considered by the House if the Committee on Rules and Calendar recommends a waiver of the time requirement and the recommendation is approved by a two-thirds vote of the delegates voting. Late Resolutions with Reports will be posted to the ABA website prior to the opening session of the House, along with any additional Resolutions with Reports submitted by state or local bar associations.

The preliminary calendar of the House of Delegates meeting is as follows:

**The Chair of the House of Delegates,
William R. Bay, Presiding**

1. Report of the Committee on Credentials and Admissions
Eileen M. Letts, Illinois
Approval of the Roster
2. Report of the Committee on Rules and Calendar
Christina Plum, Wisconsin
Approval of the Final Calendar
3. Report of the Secretary
Mary L. Smith, Illinois
Approval of the Summary of Action
4. Statement by the Chair of the House of Delegates
William R. Bay, Missouri
5. Statement by the President
Judy Perry Martinez, Louisiana
6. Statement by the Treasurer
Michelle A. Behnke, Wisconsin
7. Statement by the Executive Director
Jack L. Rives, Illinois
8. Presentation of Resolutions with Reports which any State or Local Bar Association Wishes to Bring Before the House of Delegates
9. Presentation of Proposals to Amend the Association's Constitution and Bylaws
11-1 through 11-5
10. Presentation of Resolutions with Reports of Sections, Committees and Other Entities
100A-117 Resolutions with Reports
300 Late Resolutions with Reports
400A-B Resolutions with Reports on Archiving

ADJOURNMENT

**AMERICAN BAR ASSOCIATION
2019-2020
BOARD OF GOVERNORS**

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President	Judy Perry Martinez, New Orleans, LA
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Treasurer	Michelle A. Behnke, Madison, WI
Immediate Past President	Robert M. Carlson, Butte, MT
Executive Director	Jack L. Rives, Chicago, IL

BOARD OF GOVERNORS

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Sixth District	2020 Lee A. DeHihns III, Marietta, GA
Seventh District	2022 William K. Weisenberg, Westerville, OH
Eighth District	2022 Laura B. Sharp, Austin, TX
Ninth District	2021 Susan M. Holden, Minneapolis, MN
Tenth District	2022 Patrick Goetzinger, Rapid City, SD
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Twelfth District	2020 Randall D. Noel, Memphis, TN
Thirteenth District	2022 Charles J. Vigil, Albuquerque, NM
Fourteenth District	2021 Andrew J. Demetriou, Los Angeles, CA
Fifteenth District	2021 Mark H. Alcott, New York, NY
Sixteenth District	2021 David W. Clark, Jackson, MS
Seventeenth District	2021 Rew R. Goodenow, Reno, NV
Eighteenth District	2022 Christine H. Hickey, Indianapolis, IN
Nineteenth District	2020 David L. Brown, Des Moines, IA

BOARD OF GOVERNORS (cont.)

Goal III LGBT Member-at-Large	2022	James J.S. Holmes, Los Angeles, CA
Goal III Minority Members-at-Large	2020	Myles V. Lynk, Phoenix, AZ
	2021	Michele Wong Krause, Dallas, TX
Goal III Women Members-at-Large	2022	Lynn M. Allingham, Anchorage, AK
	2020	Eileen A. Kato, Seattle, WA
Judicial Member-at-Large	2021	Hon. Frank J. Bailey, Boston, MA
Law Student Member-at-Large	2020	Michaela Posner, Camarillo, CA
Section Members-at-Large	2020	Lynne B. Barr, Boston, MA
	2020	Tom Bolt, St. Thomas, VI
	2020	Michael H. Byowitz, New York, NY
	2022	Michael W. Drumke, Chicago, IL
	2022	James M. Durant, Lemont, IL
	2022	Bonnie E. Fought, Hillsborough, CA
	2021	H. Russell Frisby, Jr., Washington, DC
	2021	Howard T. Wall, Franklin, TN
	2021	Steven J. Wermiel, Washington, DC
Young Lawyer Members-at-Large	2021	Sheena R. Hamilton, St. Louis, MO
	2020	C. Edward Rawl, Jr., North Charleston, SC

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Daniel Warren Van Horn, Memphis
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Juan Hoyos, Minneapolis, MN
Jennifer Meling-Aiko Jensen, Boise, ID
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Providence E. Napoleon, Washington, DC
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**REPORT OF THE
ABA PRESIDENT
TO THE
HOUSE OF DELEGATES**

The report of the President will be presented at the time of the Annual Meeting of the House of Delegates.

**REPORT OF THE TREASURER
TO THE
HOUSE OF DELEGATES**

To permit the presentation of current financial data, the written report of the Treasurer will be sent electronically prior to the opening session of the Annual Meeting of the House of Delegates.

**REPORT OF THE EXECUTIVE DIRECTOR
to the
HOUSE OF DELEGATES**

This report highlights American Bar Association activities
from November 23, 2019 to June 2, 2020

Introduction

December 6, I last submitted a written report to the House of Delegates. We lived in a different world. We went about our daily business -- unaware that soon so many aspects of our lives, from going to work to eating at restaurants, was about to abruptly and dramatically change.

On December 7, a patient in Wuhan, China sought medical assistance for pneumonia-like symptoms. The rest, as we now know, is history. As the coronavirus pandemic spread globally, society scrambled to address the crisis. While many governments, businesses, and organizations were ill-prepared to deal with such a massive disruption to operations, the American Bar Association was ready to act. For years, the Association had been developing the right tools to quickly implement measures and assure business continuity in the event of a major crisis. Our Business Continuity Management Plan covers more than 20 types of disaster scenarios, including pandemics. We have regularly updated and tested the Plan through the years, and the ABA staff was able to perform our work remotely when the pandemic hit.

Over a period of several days in mid-March, as more than 90% of Americans faced stay-at-home orders, the ABA successfully transitioned to telework. All but a very few staff members now accomplish their responsibilities from “virtual offices,” and they do so substantially as well as in pre-pandemic days. Certainly, there are challenges with remote work, but our preparations enabled us to adapt successfully.

With most of our members also teleworking, the ABA quickly enhanced our value proposition to meet their new needs. For more than three years, we worked carefully to develop our new membership model, and we implemented it over the past year. We have expanded and enhanced key aspects of the value proposition and made them accessible online. For instance, since March 16, we have produced more than 120 CLE programs, all at no additional cost to members, spanning a range of legal issues, such as insurance, labor and employment, cybersecurity, remote workforces, and access to the courts. COVID-19 courses comprised eight of the top 10 CLE programs in our Free Library and had a total of 63,800 member registrations by the end of May.

On the fiscal side, the ABA’s budgetary cuts in recent years have positioned us better than most organizations and businesses to cope with the financial implications of the pandemic. It’s worth emphasizing that the pandemic was not the trigger for us to initiate budget cutting; we started making serious reductions to our expenses five years ago. In Fiscal Year 2015, our general operations expense budget was \$116 million, or nearly 50% higher than next year’s expected budget of \$78.5 million. In nominal dollars, that’s a \$37.5 million budget reduction since FY 2015; adjusted for inflation (or “real dollars”) the reduction is about \$48 million over that period. The ABA’s decision to reduce expenses in recent years helps alleviate the need for even more difficult pandemic-linked cuts in the near and long-term. And it’s worth noting that at the end of April, we had about \$250 million in investments.

In his first annual address to Congress, President George Washington noted, “to be prepared for war is one of the most effectual means of preserving peace.” Effective preparation has proven critically important for the ABA during the current emergency conditions. Thanks to years of planning, we have been able to respond to the crisis thoughtfully and successfully rather than having to rush to make critical decisions. Faced with a stark new reality and a country largely in quarantine, we have developed innovative new ways to conduct our operations, communicate with our members, and advance the goals of the Association within the confines of a largely virtual environment. We will build upon what we have learned and use that experience to make the ABA’s programs and services ever more beneficial and engaging for America’s lawyers.

Membership

We continue to monitor three key metric targets to help determine the new value proposition’s progress and effectiveness: total dues-paying members; new dues-paying members; and dues revenue. Our FY 2020 data as of May 31:

- Dues-paying Members: Target = 179,359; Current: 168,165 (94%) Remaining: 11,194 (6%);
- New Dues-paying Members: Target = 10,696; Current: 23,021 (215%); Surpassed Target by: 12,325; and
- General Operations Dues Revenue: Target = \$42,695,900; Current: \$39,389,000 (92%); Remaining: \$3,306,000 (8%).

As the pandemic worsened in April, we gained a better understanding of the negative impact it would have on our progress toward the targets. Clearly, the resulting economic fallout creates some additional headwinds as we work toward those goals. While we reached the new dues-paying member target in November 2019, it has become more clear the overall economic impact is hindering our ability to achieve the two remaining goals -- the dues collection target in particular.

Of course, the longer the pandemic causes economic disruption, the greater the challenge. While membership historically dips during a recession, our new pricing and benefits should position us to better retain members. Our new, 12-month recruiting strategy continues and will help us attract additional dues-paying members throughout the year. Our Membership and Finance staffs are closely examining how the evolving national economic crisis is affecting the ABA’s short, medium, and long-term growth objectives.

CLE

We’ve seen a significant increase in live member benefit webinar participation since launching the free CLE Library in May 2019. In the first 10 months of the new model, average monthly registrations for free member benefit webinars grew 2.3 times. COVID-19 has increased that attendance significantly -- more than 10 times in March and nearly 14 times in April. Here’s a snapshot of monthly averages:

- May 2018 – April 2019: 1,291 monthly average

- May 2019 – February 2020: 3,003 monthly average
- March 2020: 13,056
- April 2020: 17,816

Our overall online usage (live webinars and on-demand, both free to members and paid) also increased dramatically during the pandemic. In February, total online registrations were 14,911; in April that number increased 4.5 times to 67,802.

The Library's offerings continue to grow and, as a result, so do the number of unique programs viewed, driven in part to the coronavirus. As of May 31, we have 602 unique programs in our CLE Library, all available to members as part of their membership, at no additional cost. In addition, attorneys in 43 of the 46 states with mandatory CLE can fulfill their entire requirement with our free Library.

We are also heavily promoting the ABA's [coronavirus CLE page](#) through social media and direct communications. Each Friday, we are sending a special coronavirus CLE email to both members (approximately 80,000 attorney members -- those who have not opted out of emails) and non-members (approximately 600,000 additional attorneys in our database) with unique messaging for each group. Nineteen State Membership Chairs met via conference call on March 25 to discuss how they can share information through their personal social media accounts about the ABA's pandemic CLE programming.

As part of the ABA's Goal III commitment to diversity and inclusion, the Association has implemented a major improvement for CLE program accessibility. As of January 2020, *every* new CLE webinar and on-demand program we create includes transcription and captions.

Full Firm and Group Membership

Through May 31, Full Firm membership stands at 114 firms compared to 100 this time last year, a 14% increase. Their participation resulted in 27,357 individual Full Firm members, a 6.6% increase from the same period in 2019. Overall Group membership is at 68,044 members, just 336 members less than this time last year. FY 2020 Full Firm dues revenue is at \$5,489,855 which is down less than 1% from this time last year due to the reduction of flat rates for firms whose dues needed to be lowered because of the new dues structure. FY 2020 Group dues revenue is at \$16,170,355, down 14.8% from this time last year, primarily due to the ABA's reduced dues rates launched this year.

Membership staff has compiled information about our largest Full Firm and Group billed accounts related to their response to the pandemic, which saw many enact pay and staff reductions. ABA Officers are contacting Redbook leaders at these firms to seek insights into the financial health of the firms and learn such things as when the right time will be to bill them for the upcoming membership year.

President Judy Perry Martinez sent an email to the managing partners and chairs of Full Firms with information on how the ABA has addressed emerging legal issues stemming from the COVID-19 pandemic. Similar emails were sent from the ABA President to more than 300 Chief Legal Officers at in-house law departments.

ABA Member Advantage

We are closely monitoring our affinity relationships for negative impacts on sales and revenue resulting from the COVID-19 pandemic. We're most closely analyzing our top revenue-producing partners, Bank of America, Hertz, Mercedes-Benz, and Ricoh. Hertz is our longest continuous ABA Advantage partner. We are currently evaluating our contractual options in light of the company's May 22 bankruptcy filing.

ABA Email

We continue to improve our new email automation platform to provide a personalized ABA experience through targeted, dynamic email messaging to each member. This approach allows content to display based on member preferences, such as practice area or entity membership. A single email campaign thus delivers content that is most relevant to the member. Over time, as we have learned more about the preferences of our members and prospective members, our ability to serve personalized dynamic content and products has improved. More detailed information on the personalized emails is in the *Digital Content* section of this report on page 12.

Our new email program is a huge step forward in our efforts to enhance the member experience. Advanced consumer technology is allowing us to monitor the effectiveness of our messages and adjust accordingly. We are also refining our new email Preference Center, which will empower members to customize their ABA experience based on their interests.

ABA Website and Information Technology (IT)

In January, the ABA implemented a major reorganization of IT operations to improve its capabilities, structure, security, and staffing. Consequently, IT programs are now much more effectively aligned with our business priorities and recognize IT as a full strategic partner as we enhance our technological capabilities.

A major part of the reorganization was the creation of a new Chief Technology Officer (CTO) position who reports directly to me and provides on-scene, daily leadership for the Association's IT efforts. On March 2, Peter Markos began serving in that position. Peter previously led IT programs at Tekno Telecom L.L.C. and Rotary International, and he has a proven record building teams that are agile, results-oriented, and culturally diverse, traits that match the Association's priorities and values.

Peter's qualifications include experience in strategic and operational planning; IT performance optimization; technology and business process alignment; IT infrastructure management; and technology architecture and integration. This knowledge has been a tremendous asset for the Association as we enhance and upgrade our abilities to utilize technology to deliver a first-class, personalized experience to our members targeted to their interests.

As CTO, Peter works closely with member leaders, entities, and staff to establish and direct the ABA's strategic long-term goals, policies, and procedures related to IT, and ensure our technological resources align closely with our business needs. He also has a proven record

building teams that are agile, results-oriented, and culturally diverse, traits that match the Association's priorities and values.

The last few months were a very busy and productive time for ABA IT. In addition to assisting our staff's online transition to virtual offices, IT continues to evaluate the Association's current technological capabilities and staff structure. As we develop long-term plans to enhance our online abilities and services, the ABA's website and resolving its lingering issues and bugs remain a top priority.

During the weekends of April 17 and May 1, IT performed several significant improvements to the website's infrastructure and data storage capabilities. To address ongoing errors with saving transactions and updates, IT consolidated critical data to a single, high performance cloud storage area. The deployment went smoothly, and is expected to significantly reduce synchronization issues, particularly during high-volume website updates.

In April and May, IT also made numerous website improvements to address unresolved software bugs and functional issues. These updates, which will continue into future months, focused on login/authentication improvements, eBook accessibility enhancements, email notification and redirection improvements, and other minor issues. IT continues to prioritize login/authentication related enhancements, eBook and CLE issues, search optimization, as well as monitoring and triaging any eCommerce problems as they are identified.

In May, IT performed several releases to the website to support membership renewal. There were several improvements including: addressed online renewal issues for Sections with dues increases, fixed an issue preventing online renewal caused by address validation, updated sales tax codes, and improved the renewal flow when changing membership products. The latest data shows that approximately 75% of those that start renewing online complete the process successfully.

Another IT priority has been resolving data integrity glitches between the website and Personify, the ABA's association management (membership) system. In April, the focus was to fix data to ensure effective renewal of ABA and Section memberships. Five new processes were designed to clean-up website data, and thousands of membership records were corrected. These processes will run on a regular basis to keep the data clean. IT is also examining a long-term solution to the data integrity challenges; it has conducted a proof of concept for a real-time integration project that could improve data integration between the website and Personify and solve many of the remaining issues between the two platforms.

Peter has also spent time building on Vid Byanna's recommendations as presented to the Board of Governor's at the Midyear meeting. Specifically, significant progress has been made on IT/business alignment and demand management through the IT Steering Committee (ITSC). Peter has allocated staff into two technology workstreams focused on 1) operations and 2) projects. The operations team will continue to provide the care and feeding that all websites need as well as provide minor enhancements based on business priorities. The projects team will begin a project to enhance Paywall functionality for the ABA website. This project was approved by the ITSC and it will begin upon completion of the website stabilization effort this summer. Additionally, Peter is currently interviewing for a Director of Infrastructure and

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Security, a position that will help pivot the organization from the rigid/high cost contracts in place today to a more flexible and cost-effective structure. Peter expects an offer to be made in June and for the individual to begin shortly thereafter.

In addition to the larger efforts above, the items below have been completed by IT or are in progress:

- Deployed Microsoft OneNote to all staff. Microsoft OneNote is a digital notebook staff can use to keep electronic notes and stay organized;
- Continued implementation of a new event management system, Cvent, that will improve the member experience when registering for and attending ABA in-person events. Integration work has begun between the vendor and the ABA to ensure that meeting registration information is available within the membership database, and the ABA website; and
- Completed migration of users from Intercall to Zoom for teleconferencing, resulting in cost savings of up to \$30,000 per month. IT created a Zoom Security Tips intranet page to guide staff on securing their Zoom conferences.

In April, ABA IT and Digital Content staff completed our longstanding Website Cleanup Project -- a six-month long effort that will help improve search results, user navigation, and enhance the effectiveness of web authors. At the time of the project launch in November 2019, the ABA had nearly 70,000 webpages; in April 2020 that dropped about 20% to 55,000, following the removal of thousands of outdated and unpublished pages that had encumbered the system. The project also added metadata to more than 11,000 webpages to improve website searches and make it much easier for users to find content in which they are interested.

Marketing

Following a months-long nationwide search, Ken Zinn was hired as our Chief Marketing Officer (CMO), and he began work on December 2. Ken brings nearly 30 years of experience in brand marketing, advertising, e-commerce, and information technology to the Association. His background, experience, and knowledge provide us with a wealth of strategic and tactical leadership as we market our value proposition and enhanced ABA benefits to America's lawyers.

Ken joined the ABA after serving as Vice President of Marketing at Zurich North America, where he managed a team of 25 for the \$14.5 billion revenue insurance company. His responsibilities included oversight of marketing technology and events, consumer research, digital outreach, and advertising. Prior to Zurich, Ken was a marketing executive and director at numerous prominent companies, such as US Cellular and Procter and Gamble.

As our CMO, Ken collaborates closely with ABA leaders, entities, and membership staff to market the Association's value through cost-effective, high-impact initiatives. He also serves as our subject matter expert on such topics as market conditions; potential products and services; market demographics; and industry trends that contribute to membership growth.

The Advertising Research Foundation notes that social distancing has increased social media use, and there is growing cynicism toward traditional advertisements. ABA Marketing

continues to retrofit existing imagery and increase our use of digital. Competition for online lawyer attention has increased, and several measurements indicate ABA’s digital communications are increasingly successful. Our Marketing Team is also retrofitting existing imagery to remove certain visuals that were likely to get a positive reaction in the past, such as people sitting close in an office meeting room, and people shaking hands or hugging. Such imagery now has the potential to portray the ABA as insensitive.

In April, for the first time, our Marketing team began running paid online media for our renewal efforts. We had not used programmatic ads in the past; we relied solely on direct contact for renewals (postal mail, telemarketing, and email). The objective is to supplement direct contact with ads the renewal audience will see as they go about their day on apps, search engines, and websites. These ads also help drive lawyers to our website to become members and set an important baseline the Retention Team can compare to post-recovery and other actions in the future. Early results will be shared at the June Board meeting.

In March, we initiated a “Warm Leads” automated email to non-members who had interacted with the ABA over the past three years. The recipients were about 150,000 non-members who have all interacted with the ABA in the past three years through the purchase of any product including online CLE. We hope to inspire non-members to join with themes such as how to manage coronavirus-related legal risk and the ABA’s new value proposition offerings.

On April 30, ABA Membership and Marketing staffs launched the “Gift of Membership.” Family and friends can now easily provide the lawyers in their lives with ABA membership. We expect the program to be especially attractive for law students and recent graduates. Information on how to gift membership can be found [here](#).

As part of efforts to win back ABA members, we are surveying attorneys who have not renewed their membership so we can better understand the reasons. By the end of April, 32,145 former and lapsed members were contacted, and 332 responded. According to the respondents, key reasons for non-renewal include ABA benefits did not meet their needs (24%), financial hardship (12%), they no longer practice law (12%), and their employer stopped reimbursing their dues (8%).

As you may have seen at the Midyear Meeting, our Membership and Marketing staffs created an [“elevator pitch”](#) guide for current ABA members, leaders, state membership chairs, and anyone willing to serve as an “ambassador” for the ABA. Helping our leaders and members develop an influential elevator pitch can be of critical assistance to our recruiting and retention efforts. The guide provides simple and helpful tips to promote the ABA in the form of a two-sided, four panel “pocket” brochure which is available to all members and was shared with 2020 Midyear attendees. We also developed a [website landing page](#) and other materials detailing the ABA’s value proposition to help ambassadors advocate for the Association.

Member Practice Groups

Antitrust Law Section

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The Antitrust Law Section convened its first Virtual Spring Meeting (VSM) on April 17-May 1, after cancelling the in-person Spring Meeting in the wake of the pandemic. The VSM offered 36 online programs via livestream, podcasts and videocasts and virtual receptions spread out over the 11 days. Course materials were made available to Section members free of charge and available for purchase by non-members in the ABA bookstore.

In December, the Section launched its new Women.Connected Committee and inaugural leadership, which will be focused on the recruitment, involvement, integration, and contributions of women in the work of the Section, as well as promoting increased awareness and understanding of the ways in which gender issues are implicated in competition, consumer protection, and data privacy law. The establishment of the Committee underscores the Section's deep commitment to breaking down the barriers to inclusion of women in the legal profession, at a time when women represent over half of the current law student population yet continue to be underrepresented at the partnership level.

Business Law Section

The Section's annual Banking Law Committee Meeting was held on January 17-18 in Washington, D.C. The event featured 13 CLE programs and networking events, and two extremely popular non-CLE sessions -- an opening address by Heath P. Tarbert, Chairman, Commodity Futures Trading Commission and the keynote luncheon speaker, Randal K. Quarles, Vice Chair for Supervision, Board of Governors of the Federal Reserve System. 255 registrants participated in the event.

Civil Rights and Social Justice Section (CRSJ)

In response to the pandemic, CRSJ quickly organized 19 webinars related to COVID-19's impact on civil rights issues. On average, the webinars had 787 registrants (with two topping 3,000) and covered such issues as how the pandemic impacted child welfare cases, Native American communities, and disabled students. CRSJ also created a [COVID-19 website](#) containing information on the webinars' content.

Section on Environment, Energy and Resources

The world's leading environmental lawyers from across North and South America gathered to discuss environmental and energy issues at the Environmental Summit of the Americas on January 15-16 in Mexico City. Keynote speakers include Dr. José Sarukhán Kermez of the National Commission for the Knowledge and Use of Biodiversity; Dr. Maria Amparo Martinez Arroyo of the National Institute of Ecology and Climate Change; and ABA President Martinez. Program highlights included roundtable discussions on Addressing Global Climate Change Issues Across the Americas, Anticorruption, Social Integrity, and Parent Company Liability in Environmental Projects, Plastics -- National and International Approaches, and Contaminated Sites and Remediation.

Government & Public Section Lawyers Division

On April 28, the Division presented the program “Stay-at-Home Orders in the Wake of COVID-19.” The program had 596 registrants, and it examined such issues as how to determine essential employees and functions; when government entities can enforce stay-at-home orders; and how to handle inconsistencies between local, state, and federal orders.

Health Law Section

The Section hosted the 17th Annual Washington Health Law Summit, December 9-10, at the Ritz-Carlton Washington, D.C. The conference featured two sessions, “Inside Washington: Industry Priorities for 2020” and “Inside the Halls of Congress: Legislative Priorities for 2020” hosted on Capitol Hill at the Everett M. Dirksen Senate Office Building. In addition, David Eppstein from ABA Government Affairs Office addressed attendees about the ABA’s lobbying efforts and ways the Association is making a difference on the Hill. ABA President Martinez also addressed the summit, which had 270 in attendance.

International Law Section

The International Law Section had to cancel its 2020 Annual Meeting in New York that would have taken place April 21-24, as well as the annual ABA Day at the United Nations on April 20. The Section moved most of the CLE programs to webinars that will begin on May 26 and continue over the next six weeks.

The Section formed a COVID-19 International Task Force, designed to complement the ABA COVID-19 Task Force, with a specific focus on the international implications and ramifications of the pandemic. For the next 18-24 months, the Task Force will consider opportunities to address the crisis in the international arena.

The International Law Section held a program on human rights in Pakistan on January 24 as part of “Day of the Endangered Lawyer” activities. The panelists provided a report on the current state of attacks on the judiciary, bar, and other human rights defenders in Pakistan.

Intellectual Property Law Section

The Section provided [comments](#) to the World Intellectual Property Organization of the United Nations on the most pressing questions likely to face intellectual property law policy makers as artificial intelligence increases in importance. Among issues addressed were issues of patent inventorship and ownership, artificial intelligence’s ability to be an author and own a copyright, and issues of artificial intelligence in data sets, trademark law, and trade secrets.

On April 23, the Supreme Court issued its [opinion in *Romag Fasteners, Inc. v. Fossil, Inc.*](#), (No. 18-1233). The justices held that proof of willful infringement under the Lanham Act is not a prerequisite for an award of infringer’s profits for a violation of Section 43(a). The opinion sides with the position in the [ABA’s amicus brief](#) which was filed in this case, which argued that proof of willful infringement is not required, but may be taken into account among the equitable considerations relevant to whether a prevailing plaintiff should recover an infringer’s profits.

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Judicial Division

In April, the Division co-sponsored a free webinar with several other ABA entities looking at the impact of the pandemic on survivors of domestic violence. The 90-minute session drew over 1,300 attendees.

Also in response to the pandemic, the Division presented a 90-minute webinar entitled “COVID-19 and Safe Access to the Courts: Strategies and Future Planning” on March 24. The webinar had 494 registrants and over 300 people called in for the live airing of the webinar.

The Division, in conjunction with the National Center for State Courts, met by video conference with four members of the Myanmar Judicial system in January to discuss judicial education. The judges were in the United States on a two-week judicial training study tour. Division leaders provided insights into how the ABA supports judicial education and how the states and federal systems oversee judicial ethics.

The Division, in cooperation with the Commission on Diversity in the Educational Pipeline recruited judges to participate in the 20th Annual Judicial Clerkship Program (JCP) at the Midyear Meeting. Over 30 judges participated with 75 students in the program, designed to expose diverse students to clerkship opportunities. For the first time, several tribal court judges participated in the JCP.

Law Student Division

The Division team has been especially proactive in keeping up with pandemic resources and news as it affects students. Since the second week of March, when many of the stay-at-home orders were first given, the Division has curated and published a [resources page](#) with a wealth of content for law students displaced, disheartened, and otherwise affected by the coronavirus pandemic. It features content spanning multiple issues; from tips for online learning and exams, to resources for law professors moving their classes online. It also includes a curated series called, “[Quarantine Diaries](#),” which explores personal stories of affected law students.

On April 28, the Division collaborated with the Office of the President to coordinate a Zoom Q & A session for law students across the country. President Martinez and Law Student Division Chair Johnnie Nguyen addressed issues and concerns of students confronting the COVID pandemic. It was simultaneously live-streamed through the Division’s Facebook page. Over 175 registered for the webinar, about 75 attended live, and the video recording on Facebook gathered over 1000 views in the first 24 hours. The video is available [here](#).

Section of Litigation

The Section's Insurance Coverage Litigation Committee, working with ABA CLE, provided a free webinar for members entitled, "Coronavirus and Insurance Coverage - What Attorneys Need to Know" on March 20 for 535 participants. The Section hosted a complimentary Roundtable entitled, "COVID-19: Force Majeure, Impossibility and Frustration of Purpose" on March 25 with 304 registrants.

Solo, Small Firm, and General Practice (GPSolo) Division

GPSolo's total membership doubled from April 2019 to April 2020 (7,500 members to 15,000 members). As part of the ABA's value proposition, membership in the Division is now complimentary, giving members free access to its 400 CLE titles, career resources, networking events, and more.

The Division's new weekly virtual roundtables via Zoom provide a new way for members to connect with each other. COVID-19 has been the focus of the roundtables and allowed for immediate support to members to discuss a variety of issues they were facing due to the pandemic. GPSolo also continues to curate a variety of resources to keep our members informed on how the COVID-19 virus is impacting our industry on our [resources webpage](#).

Taxation Section

From January 30-February 1, the Section held its Midyear Meeting in Boca Raton, Florida. The event drew 1,183 registrants. IRS Chief Counsel Michael Desmond spoke at the Plenary Luncheon on Saturday, February 1. ABA President-Elect Trish Refo also spoke at the event.

In response to recent legislation aimed at easing the economic impact of the pandemic, the Section presented six complimentary webinars during April that provided especially timely and relevant information, particularly for those attorneys who provide service to low-income taxpayers. The six webinars attracted a total attendance of 5,356, a figure far in excess of the 2,000 registrants for webinars offered in the wake of the 2017 Tax Act.

Young Lawyers Division (YLD)

Assisting young lawyers during the pandemic has been a top priority of the Division. The Division worked with the Standing Committee on Disaster Response and Preparedness to provide resources for attorneys and the public, and collaborated with RingCentral to set up a [national hotline](#) to help with access to state and local resources and assistance. The Division also collaborated with Paladin, an online volunteer management program, to launch a new online [disaster relief portal](#) to provide pro bono legal services for victims. The portal leverages Paladin's cutting-edge pro bono software, which is currently used by top pro bono programs around the country.

This spring saw the one-year anniversary of the Division's [After the Bar blog](#). The digital publication was built specifically to provide critical resources to the key audiences of recent law school grads, and the newly-licensed attorneys who are beginning their careers. *After the Bar* now

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has more than 100 pieces of content, including original articles and resurfaced content from across the ABA.

On April 29, YLD marketing staff spearheaded the production of a virtual ceremony to recognize the three recipients of the ABA-SoFi-USI “Student Loan Relief Scholarship” contest. The winners received a total of \$50,000 to help pay student loan debt after submitting essays on how the scholarship would impact their lives.

Digital Content

For the past two months, our Digital Content Team has developed ABA-wide coverage of COVID-19 on web, email, and social media. COVID-19 content ranked in the top tiers of performance for all channels. On a per-post basis, articles on americanbar.org that referenced “COVID-19,” “coronavirus,” or “pandemic” in their titles were viewed at more than 10 times the rates of other content on the ABA website.

The ABA’s new personalized, automated content email launched on March 24 as part of ongoing efforts to increase the effectiveness of our email programs. The content email is the second of five planned emails that will deliver different elements of the ABA value proposition to members on different days of the week. It follows the successful launch of a product email in September 2019. Insights from the content email launch will inform the strategy of other automated email products scheduled to launch in 2020. The content email delivers high-quality, member-generated content to members based on their areas of interest and their membership profiles. To date, the average open rate for the personalized email is 31%, which is about 76% above the benchmark of 17.8% set prior to the launch of the product. The average click-through rate is 4.1%, which is about 57% above the benchmark of 2.6% set prior to the launch. (The benchmarks were based on industry standards.)

The ABA has been working to increase the reach and engagement of member-generated content by strategically coordinating content publication and promotion efforts. As part of those efforts, the Digital Content Team initiated a project in March to increase the reach and engagement of ABA audio content such as podcasts. Currently, many ABA entities produce regular podcasts that live across the ABA website and other platforms. In addition, there is no coordinated page that makes it easy for users to find and navigate the world of audio content produced by the ABA. Using existing components on americanbar.org, the ABA will develop a hub for ABA podcasts.

Career Center

The Career Center should be a real leader for the profession and is an important facet of our efforts to offer meaningful benefits to our members. Our job board currently has more than 4,100 jobs posted and 10,375 resumes of legal professionals.

On March 26, the Career Center pulled together a non-CLE webinar, “Managing Your Life and Work during Coronavirus,” in less than one week for some 150 registrants.

Advocacy

ABA Day Digital – April 22-23, 2020

Due to the coronavirus pandemic, the Governmental Affairs Office (GAO) and ABA Day Planning Committee turned this year’s ABA Day on April 22-23 into the Association’s first fully digital advocacy event. During “ABA Day Digital,” thousands of legal professionals engaged online through live panels, TED Talk-like presentations, Twitter takeovers, and Tweetstorms. Participants also mobilized into action by sending letters, making calls, and sending tweets directly to members of Congress. Using online tools, ABA members were able to effectively advocate for funding for the Legal Services Corporation (LSC), preserving the Public Service Loan Forgiveness program, allowing the Department of Veterans Affairs to fund legal aid to homeless veterans, and increasing access to broadband/high speed internet for rural America, with many members of Congress responding to ABA Day participant messages. In all, more than 1,500 messages were sent to congressional offices through the Grassroots Action Center’s [Quorum advocacy tools](#), including over 1,300 emails and 200 tweets sent.

In addition to tools for direct advocacy actions, ABA Day included a digital conference on Twitter where participants learned more about ABA Day issues through panel discussions, live videos, written materials, and more. These generated 6,000 views on the videos posted throughout the day, including over 900 people who watched President Martinez’s opening statement.

Digital participants were extremely engaged on Twitter, and many retweeted ABA Day posts to their networks. The [@ABAGrassroots](#) Twitter account had over 1,100 interactions, including about 400 retweets (RTs) and about 700 likes. Across Twitter, over 15,000 people joined the online conversation to discuss at least one of the topics covered and generating 29,000 likes and RTs. The promotion leading up to ABA Day Digital through the end of the event was seen a total of 115,000 times.

Other Advocacy News

In April, President Martinez sent a [letter](#) to House Judiciary Committee Chairman Jerry Nadler (D-NY) thanking him for the introduction of H.R. 6414, the COVID-19 Correctional Facility Emergency Response Act of 2020. The bill, if enacted, would reduce prison overcrowding and increase public safety by establishing the Pandemic Jail and Prison Emergency Response grant program. The program would offer funding to states to promote the use of risk-based citation and release for persons accused of crimes and urge the early release of prisoners who present no risk to public safety who are at significant risk of experiencing severe cases of COVID-19.

On March 12, ABA President Martinez sent a [letter](#) to the House and Senate urging them to include associations, nonprofits, and other tax-exempt organizations within any federal aid packages or supplemental appropriations measures pursued as a result of the coronavirus.

On March 19, ABA President Martinez sent a [letter](#) to the leaders of the House and Senate Appropriations Committees urging them to act quickly to pass supplemental emergency appropriations for the LSC to help address the increasing legal needs of low-income Americans

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caused by the pandemic. Congressional leaders subsequently included \$50 million of supplemental LSC funding in the third stimulus bill, and it was signed into law on March 27.

As a new initiative, GAO's Digital Advocacy Team created an online Election Center to help members find useful election information that was showcased as part of a Vote Your Voice Booth at the Midyear Meeting. The booth helped members register to vote, receive the [Washington Letter](#), and showed how they can make a difference by engaging in online campaigns designed to amplify the ABA's voice on behalf of the legal profession.

The ABA [Washington Letter](#), published by the GAO, won a 2019 Trendy Award in the Monthly Newsletter and Communication category from [Association TRENDS](#). Redesigned last year in a digital, mobile-friendly format to allow GAO to track analytics of member interest, the Washington Letter updates members on legislative and governmental developments of interest to the legal profession. It includes sections that highlight an Advocate of the Month, Legislative Research Tips, and ways ABA members can get involved.

On December 4, the GAO and the National Creditors Bar Association met with the Legislative Director for Rep. Alex Mooney (R-West Virginia) to discuss strategies for recruiting House Judiciary Committee cosponsors for new draft legislation known as the "Restoring Court Authority Over Litigation Act of 2019." The ABA-supported bill would help protect the courts' primary and inherent authority to regulate and oversee the litigation process by exempting attorneys and their law firms from liability under various federal statutes and from federal agencies' regulatory jurisdiction over attorneys' litigation-related activities.

On December 20, the President signed into law the following appropriations passed by Congress and important to the ABA and several of our grant-funded programs:

- \$440 million appropriation for the Legal Services Corporation (LSC), the highest funding level ever and a \$25 million increase over the current \$415 million funding amount;
- \$2 million for the John R. Justice Student Loan Repayment Program that incentivizes law school graduates to serve as prosecutors or public defenders in their communities by offering student loan repayments in exchange for a three-year commitment;
- \$7.48 billion in discretionary funding for the federal judiciary, which is \$234 million more than FY 2019 funding;
- \$18 million for the Legal Orientation Program in Department of Justice funding, for legal rights presentations, self-help workshops, and other services to thousands of immigrant detainees;
- \$2.4 billion for Democracy Programs that include human rights and rule of law programs around the world; and
- \$25 million to fund research into the causes of gun violence, the first-time federal funds can be used for this purpose in over 20 years.

Media Relations (MR)

With the coronavirus spreading across the country, ABA President Martinez established the [Task Force on Legal Needs Arising Out of the 2020 Pandemic](#) to address the legal fallout from the crisis, as shared nationwide with reporters in a March 13 [news release](#) prepared by the MR

Division. The creation of the Task Force got extensive media pick up and was reported by news outlets such as [Law360](#), [The Indiana Lawyer](#), [11Alive](#), [The Global Legal Post](#), and [LawFuel](#).

In the days following the formation of the Task Force, MR arranged one-on-one interviews with reporters from [The Atlanta Journal Constitution](#), [Reuters](#), and other media outlets, during which President Martinez further detailed the priorities of the new group. In addition, MR set up a [Law360](#) interview published on March 23 with the Task Force Chair, Jim Sandman, who spoke on the expected effects of the novel coronavirus.

MR also prioritized proactive outreach on the ABA's response to the coronavirus. On March 12, the Division compiled and offered reporters a [slate of ABA member thought leaders](#) from the Section of State and Local Government Law ready to provide insight and expertise on the legal ramifications of the viral outbreak, informing the coverage of nearly a dozen reporters. MR recently added nearly a dozen of these issue experts to its media referral database, which now includes more than 1,200 ABA members.

MR broadly promoted several newsworthy ABA resources related to COVID-19. For example, MR conducted extensive outreach on Association CLEs, such as a March 17 [news release](#) for a Standing Committee on Law and National Security webinar on cybersecurity and working from home. This resulted in reporter registrations from media outlets such as the Connecticut Law Tribune, Inside Cybersecurity, and the Global Legal Post, as well as coverage by [Policy & Medicine](#) and [Law360](#) on other Association CLEs related to the coronavirus.

MR published a timely [April 22 post](#) on ABA Legal Fact Check examining the constitutional and case law guiding states' authority during a health emergency, as some members of the public push back against states' restrictions to contain the coronavirus. It was noted in the Chicago Daily Law Bulletin and attorney-journalist Dan Abrams' Law & Crime news site, which maintains a full archive of ABA Legal Fact Check entries [here](#).

MR highlighted hundreds of events during the Association's Midyear Meeting in Austin, Texas. Its media pitching included promotion of events and speakers that reached 830 reporters at nearly 500 news outlets nationwide through personalized outreach, more than a dozen targeted press releases, two dozen staff-produced stories, and nearly 30 video clips. Throughout the meeting, the Division posted its daily content online to the [ABA news webpage](#) and on its Twitter feed (43,300 followers). Afterward, the Division showcased highlights of its news coverage in the two Midyear Meeting editions of YourABA ([February 18](#) and [March 2](#)), each received by about 140,000 ABA members via email. An archive of the Division's coverage is available [here](#).

National Public Radio, NBC News, Bloomberg, The Christian Science Monitor, American Lawyer, and Law360 were among news outlets that registered for onsite media credentials at the Midyear Meeting. Several others covered the meeting remotely, some following the Division's live coverage of the House of Delegates on MR's [resolution results webpage](#).

With the release of new bar-passage data from the Section of Legal Education and Admissions to the Bar, MR distributed a February 18 [news release](#) that highlighted findings, such as the rise in bar passage between 2018 and 2019 for first-time test takers. News outlets covering

the ABA data included those reporting on the numbers on a nationwide basis, such as [The National Law Journal](#), [Above the Law](#), [Bloomberg](#), and The National Jurist.

Three recent ABA amicus briefs to the U.S. Supreme Court informed news coverage following outreach by MR. News outlets, including the [Washington Times](#), [Forbes](#), and [Catholic Courier](#), took note of an MR-issued [press release](#) distributed in December on the Association's call for the reversal of a federal ruling that upheld a Louisiana law on certain requirements for physicians who perform abortions. And, Law360 reported on two other ABA amicus briefs. A January 13 [news release](#) on a brief that urges the justices to clarify when a wrongly convicted person can seek damages resulted in a [January 14](#) article; and a January 22 [news release](#) on an amicus that asks the High Court to stop the expedited removal of noncitizens without judicial review was covered by the legal news outlet on [January 27](#).

A major Division project, the [ABA Profile of the Legal Profession](#), continues to be used as a resource in news stories several months after its debut, illustrating its ongoing utility to journalists. Statistics from the MR-compiled Profile were used in stories published by [Bloomberg](#), [The Washingtonian](#), and [Duluth News Tribune](#).

ABA Operations and Finance

Financial Update

When we began the FY 2021 budget process last fall, we targeted \$1.3 million in expense reductions (or "cost-take-outs"). By January, we had increased concerns over revenue shortfalls and thereafter briefed Finance Committee members at the Midyear Meeting that we were targeting \$3 million in cuts. Since then, to offset the lower revenues related to the pandemic, we've worked with our member-leaders and have more than tripled targeted expense reductions to over \$9 million for FY 2021.

The immediate effect of the pandemic has been on our meetings. For FY 2020, we budgeted about \$36 million in meeting fees and sponsorship revenue. Most sponsorships are related to meetings, and about two-thirds of this revenue is in the Sections/Divisions/Forums. About \$20 million in meeting revenue was expected in the second half of this fiscal year (March-August). While revenue will drop significantly, the net financial impact will not be so severe. Although cancellations result in lost revenue, we also avoid the expense of conducting meetings, and most of our meetings either lose or make very little money. Since March 11, the ABA has cancelled 95 meetings and rebooked 31 of them. We are very pleased to note that our Meetings and Travel and General Counsel teams have done a magnificent job canceling the meetings in an orderly fashion -- without triggering any monetary obligations to the ABA.

The pandemic also clearly adversely impacts many of our members, both individuals and firms. We all are aware of law firms forced to respond with such actions as pay reductions, employee furloughs, and terminations. These firms will be closely scrutinizing all their costs, including ABA dues. As such, it is possible we may experience a severe dip in membership, which would in turn impact our dues revenue. While it's still too early to tell the degree to which that will happen, we are making plans for a range of possibilities.

Should a serious drop in membership occur, we are far better positioned today than we were in 2009 during the Great Recession, because we are far less reliant on dues. Our overall annual revenue has been relatively flat at some \$200 million over the past 12 years, but its composition has changed. In FY 2008, the fiscal year just prior to the beginning of the Great Recession, dues revenue made up 41% of ABA's operating revenues. In the FY 2020 budget, dues were only 25% of operating revenues.

On February 23, President Martinez appointed an Allocation Working Group to examine fiscal options and help the Board of Governors decide how to best approach budget choices for FY 2021. Needless to say, it will not be easy (or popular) to defund certain areas, and clearly, the length and extent of the economic shutdown may require we take additional actions at some point.

On a positive note, our GAO is leading efforts to try for some Congressional assistance. We hope to be included in subsequent relief packages to be approved by Congress for a 501(c)(6) organizations of our size. Any relief provided would reduce the financial pressure on the ABA.

Meetings & Travel

In April, the Meetings and Travel Department formed a Staff Working Group (later supplemented with member leaders appointed by President Martinez) on the 2020 Annual Meeting to consider the feasibility of meeting July 29-August 4, 2020 in Chicago, considering the evolving COVID-19 pandemic. As a result of Working Group discussions, at a special meeting on April 30, the Board of Governors approved an all-virtual Annual Meeting. We are taking advantage of this unique and unprecedented opportunity to create an innovative experience that will allow participants to enjoy the meeting from the comfort of their homes and offices.

COVID-19 has also had an impact on the ABA Leverage, which has already had 50 cancellations. The total projected financial loss for Leverage commissions is \$303,000 thus far in the current and next fiscal years.

ABA Fund for Justice and Education (FJE)

I am very pleased to note that Lea Snipes, who has been with the FJE for 14 years in various capacities, was named our permanent FJE Director on January 14, 2020. Throughout her tenure, Lea has helped build a business case for expanded charitable growth, assist with a feasibility study, and implement a successful four-year Resource Development Initiative. The FJE has experienced a higher-than-normal level of internal changes over the last year, and Lea has worked with leadership and staff to move our fundraising initiatives forward without losing momentum. Lea has the experience, dedication, and capabilities to move the FJE forward to exceptional achievements.

As the pandemic continues, the need for legal services will be critical in the short and long-term recovery efforts. FJE is strategizing with entities looking to host fundraising events between now and the end of the calendar year. Many of those entities rely heavily on such events to fund their programmatic work. For instance, FJE has collaborated with the Death Penalty Representation Project, Commission on Women, CRSJ, and other entities on contingency plans for their fundraising events. The net proceeds from these events often provide core programmatic

support for the entities and are vital to their ongoing operations. Further, FJE has worked closely with the Committee on Pro Bono and Public Service on raising funds to expand its services.

FJE participated in [Giving Tuesday Now](#) on May 5, working with entities including the Commissions on Domestic and Sexual Violence, Homelessness and Poverty, and Immigration, to develop informational emails and social media posts with inspiring stories. These efforts underscore the ABA's commitment to protect human rights.

On December 9, FJE hosted its first CLE. The session, entitled [Best Strategies for You and Your Clients to be Charitable Under the New Tax Reform](#) was free to ABA members and drew about 130 participants.

Public Interest Law

While the ABA focuses on helping our members weather the pandemic crisis, we have not forgotten what may be termed our “greater obligations.” Our Public Interest Law staff has moved aggressively over the past two months to promote and facilitate access to justice for vulnerable populations endangered by the coronavirus emergency.

Children's Issues

In response to the pandemic, the Center for Children and the Law launched numerous resources to help those in legal need. The Center's Family Justice Initiative launched a [COVID-19 page](#), which includes sample motions, court orders and guidance on providing high quality legal representation during the pandemic period. “[The Grandfamilies Project](#)” also launched a COVID-19 page, which focuses on family caregivers and their legal needs as they care for children both within and outside the child welfare system. Finally, the Center's Capacity Building Center for Courts team developed a guide to [Conducting Effective Remote Hearings in Child Welfare Proceedings](#), which includes information for attorneys, judges, court personnel, and parties to the proceedings.

On April 9, the Center for Children and the Law, along with the CRSJ, hosted a webinar on [COVID-19 and Child Welfare Cases](#). The webinar had 2,400 live participants and has been viewed by more than 3,600 registrants through the CRSJ platform and YouTube.

The Center for Children and the Law's project titled the Family Justice Initiative (FJI) published six [implementation guides](#) that explain how to implement the system attributes contained in the FJI Attributes of High-Quality Legal Representation. The mission of the FJI is to ensure all children and parents have high quality legal representation when child welfare courts make life-changing decisions about their families.

Death Penalty

In partnership with capital defense community leaders, the Death Penalty Representation Project participated in two national working groups related to COVID-19's impact on death penalty representation on equitable tolling and warrant litigation. Project staff led a warrant litigation working group in April, hosting calls with capital defenders from throughout the United

States to discuss strategy to obtain stays of execution during this time. The Project has helped compile a number of resources for capital defenders to assist them with making arguments

During the month of April, the Death Penalty Representation Project placed five high-priority pro bono death penalty matters with its law firm partners. These matters included cases with pending executions where no resources existed to provide representation, and cases where the client had been abandoned by counsel. In each, the client would have faced virtually certain execution and loss of access to the courts if pro bono counsel had not stepped in to assist. The Project's volunteer firms have committed to provide representation in these matters under challenging and unprecedented circumstances and have shown remarkable dedication to continuing these essential efforts.

Domestic and Sexual Violence

In April, the Commission on Domestic and Sexual Violence hosted its first training webinar since the pandemic began, on "Privacy and Security in Remote Representation for Domestic Violence Survivors." The webinar had over 1,100 registered participants, with 700 attending to completion.

The Commission on Domestic and Sexual Violence partnered with the National Clearinghouse on Abuse in Later Life for a five-part webinar series: "Abuse in Later Life: A Webinar Series for Civil Attorneys and Legal Advocates." The series, which began on February, concluded its last session on April 16.

Homelessness and Poverty

Commission on Homelessness and Poverty staff participated in an April call with representatives from the U.S. Interagency Council on Homelessness (USICH) to discuss coronavirus crisis response. Participants discussed ways to collaborate and co-advertise COVID-19 resources and programming. USICH staff asked the Commission to gather best practices in legal services delivery to hold up as models.

The Commission on Homelessness and Poverty held planning calls on for its Homeless Court Best Practices publication. The Commission has been instrumental in establishing homeless courts across the country, has developed many educational resources, and routinely provides technical assistance to communities interested in implementing a homeless court. The Best Practices Manual will help new and established homeless courts better serve their clients, further institutionalize homeless courts, invite new stakeholders to the conversation, and strengthen the national network.

Immigration

On April 16, the Commission on Immigration sponsored a webinar titled "Immigration Policy and Practice during the Coronavirus Pandemic." Over 800 individuals registered for the webinar and over 600 individuals attended the entire conference to completion.

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The Commission on Immigration also recently finished a [15-minute video](#) featuring four former unaccompanied youth called, “Tu Futuro, Tu Voz” (Your Future, Your Voice). Three of the four youth participants were previous clients of the Pro Bono Asylum Representation Project. The purpose of the video is to allow young people who have completed the legal process to provide advice and encouragement to those who will be undergoing immigration proceedings.

Law and Aging

The Commission on Law and Aging held its spring meeting on April 17 via Zoom and approved a resolution for submission to the House of Delegates urging Congress to create a Guardianship Court Improvement Project. The Commission participated in a National Center on Law and Elder Rights webinar “The Role of Adult Protective Services in Elder Abuse Cases: Leveraging Strengths Across Disciplines,” focusing on challenges during the pandemic, with 2,604 attendees.

ABA Free Legal Answers (FLA)

In early March, ABA FLA surpassed the milestone of 100,000 questions submitted to the pro bono site. As of the end of May, it had registered 109,000 questions and more than 7,800 volunteer attorneys since its launch. From March 1 through the end of May alone, FLA received over 11,000 questions, most on pandemic-related issues. The Standing Committee on Pro Bono continues to collect and update information on the pro bono response and available resources for those needing legal assistance and is available [here](#).

As most of the nation sheltered in place, FLA offered a valuable pro bono resource for attorneys and clients, as it requires no human contact and can address many of the basic legal questions that arise, both long-standing and pandemic related. FLA’s continued presence and operations also mitigate the flood of cases otherwise bound for courthouses.

On March 31, in response to the pandemic crisis, the following changes were made to the FLA site:

- The income eligibility question was updated to clarify that users who were recently laid off as a result of COVID-19 should indicate their *current* household income as opposed to income they were receiving on an annual basis.
- The number of questions eligible site users could ask per year was increased from three to five.

Law Day 2020

The [2020 National Law Day program](#) was held online on April 30, with more than 400 participants. A key event was a panel discussion entitled “Social Movement Changing America: The Legacies of the 19th Amendment.” [Kimberly Atkins](#) (Senior News Correspondent, WBUR-Boston and Contributor, MSNBC, and member of the Advisory Commission to the Standing Committee on Public Education) was the moderator.

In preparation for this year’s Law Day observance, MR conducted its second annual [Survey of Civic Literacy](#), which includes the U.S. public’s views on a range of issues, including the 19th Amendment, the Electoral College, and constitutional rights. The results also include significant findings on changing public attitudes toward voting in light of the COVID-19 pandemic. MR released the results during a MR-produced live online event, featuring President Martinez and Judge M. Margaret McKeown of the U.S. Court of Appeals for the 9th Circuit.

GAO also contributed to Law Day, working closely with the White House to obtain a Law Day [proclamation](#) signed by the President on April 29, 2020 (in the midst of the current COVID-19 emergency).

Diversity and Inclusion

In April, the ABA launched a new dynamic online software platform designed by Microsoft and implemented in conjunction with Coffee & Dunn and the Law School Admission Council (LSAC), that assists with data collection and analysis associated with the ABA Model Diversity Survey. The new platform will provide law firms with a better and more user-friendly experience in completing the Survey.

The ABA Model Diversity Survey initiative began four years ago and it has garnered backing from 114 general counsels of Fortune 1000 companies, universities, nonprofits, and government and local agencies (as signatories) to support [Resolution 113](#) and request that law firms providing their legal services share their diversity, equity and inclusion data. Nearly 500 law firms have completed the Model Diversity Survey in each of the last two years.

The Center for Diversity and Inclusion in the Profession (Diversity Center) and its constituent entities hosted 20 events during the 2020 ABA Midyear Meeting in Austin, Texas. This included eight business meetings; five CLE programs covering subject such as the School-to-Prison-Pipeline; Diversifying Law Firms; LGBTQ State of the Union; Men in the Mix: How to Engage Men on Gender Issues, and the 2020 Census; three Member Caucuses (Women’s, Minority, and LGBT); and four signature Midyear Programs, including the Judicial Clerkship Program, Alexander Awards for Pipeline Excellence/SOE Reception, Spirit of Excellence Luncheon, and the Stonewall Awards Reception.

On April 15, the Diversity Center facilitated President Martinez’s third quarterly conference call with the Presidents of the Hispanic National Bar Association; National Asian Pacific American Bar Association; National Native American Bar Association; National LGBT Bar Association, and the Deaf and Hard of Hearing Bar Association. The meeting provided a critical forum for the ABA and National Affinity Bar Associations to strengthen their partnership

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through discussion of our shared priorities and areas for collaboration. It also included an insightful discussion on how bar associations are identifying and addressing current and future challenges associated with the global pandemic.

On April 30, the Diversity Center facilitated ABA President-elect Trish Refo's participation in the LSAC inaugural April 30 webinar for law school admissions professionals and administrators focused on how to address diversity issues during the pandemic. The webinar was available exclusively to members of LSAC's Minority Network, which is comprised of about 300 law school admissions professionals and administrators. President-elect Refo delivered opening remarks on how the legal profession and the ABA are addressing pandemic-related challenges.

The Diversity and Inclusion Center and its constituent entities are also working with CRSJ to spearhead several webinars designed to identify and address specific challenges facing the disproportionate impact of the pandemic on diverse communities.

ABA Journal

Last November, John O'Brien was selected as the new Editor and Publisher of the ABA. He is a graduate of the University of Notre Dame and has a master's degree in Public Affairs Reporting from the University of Illinois. He has more than 25 years of experience as an editor and writer, primarily in print journalism.

John came to the ABA from [The Real Deal Chicago](#), a national real estate news organization with an audience of millions of readers. John served as the magazine's Senior Editor beginning in March 2018, supervising reporters and assisting the publication's expansion into the Chicago media market. Prior to The Real Deal, John was a senior editor at such major media groups as DNAinfo and Sun-Times Media.

John's distinguished career within the evolving media sector makes him especially well qualified to lead our ABA Journal into the future. His extensive experience juggling many responsibilities, meeting tight deadlines, and motivating large reporting staffs has already been a tremendous asset to our flagship publication, its readers, and our staff.

For the first time in the 105-year history of the Journal, staff produced an edition of the magazine with everyone working remotely. As the pandemic escalated in March, staff began implementing the Journal's Business Continuity Plan and worked with IT, the Design team, and other ABA departments to set up a system to produce the Vol. 106, No. 3. edition of the magazine remotely. Staff adapted to the new reality and worked through a variety of complications inherent in the virtual production process. By the end of April, a number of pages of the June-July issue had already been sent to the printer, and the staff completed the entire magazine in advance of the May 8 deadline.

In April, the Journal saw a 22% increase in visitors to its website compared to the same period last year, a 17% increase in sessions (essentially, visits to the website), and a 5% increase in pageviews (someone clicking on an individual story/other element on the website). These figures are even more notable given the cyber-attack that dramatically reduced our traffic on April 10 -- a Friday, which is the busiest day off the week for Journal traffic.

Since January 1, the Journal has seen a 31% increase in users from the same time in 2019, and a 12% increase in sessions, while pageviews are basically flat. Those numbers are noteworthy given they come on the heels of last year, when there was virtually no change in the number of users over 2018, and sessions dropped 8% and pageviews diminished by 17%.

Global Programs

This year, the ABA's Center for Human Rights (CHR) and Rule of Law Initiative (ROLI) kept busy promoting justice, economic opportunity, and human rights around the globe. While the coronavirus pandemic has markedly affected our international programs' conduct of operations, their programs continue (albeit with some halts or interruptions in some cases) and new grant opportunities are being identified and solicited. Staff for both CHR and ROLI have shifted to telework successfully, although in some of our African field offices some technology upgrades are required. Below are just a few examples of our global programs' work.

CHR

In April, the Justice Defenders Program supported the head of a migrant rights organization in North Africa who faced a deportation order and remains detained in apparent retaliation for his work. After meeting with the country's Director of Borders and Foreigners Affairs, the deportation order was suspended.

Also in April, CHR assisted local counsel in the Middle East to get a government to investigate the misuse of office by public officials engaging in sex trafficking. Center staff was recently informed that an anti-corruption commission had successfully moved to have the case transferred to a specialized anti-corruption court.

In March, the Justice Defenders Program sent an observer to monitor the Tunisian trial of a human rights attorney who was accused by the President of the Military Court of First Instance in Tunis of charges related to defamation. The Program also enlisted the support of an international human rights attorney to draft an expert declaration to the court detailing the frivolity of the case. After both interventions, the defendant received a symbolic fine equivalent to five American dollars.

In India, the Justice Defenders Program responded to the arrest of several prominent activists and lawyers who advocated for the rights of marginalized communities by issuing a [preliminary review](#) of the procedural irregularities, abuse of process, and violations of fundamental human rights related to the arrest of the activists. The report received significant press, including from one of India's most circulated English language news outlets, [the Hindu](#). The report was also publicized by other Indian news outlets [here](#) and [here](#).

In Kuwait, the Justice Defenders Program monitored the proceedings against a human rights defender representing Kuwait's stateless, Bidun minority community. He has been held in detention without charge, allegedly for his involvement in advocating for the rights of the Bidun. The Program briefed the United Kingdom, Dutch, Australian, and Canadian embassies on the details of the case, after which each embassy sent representatives to observe the most recent

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hearing in November. Defense counsel reported that the significant international presence allowed them to present their arguments in their entirety and without fear. On January 28, the defendant was acquitted.

ROLI

On April 8 in the Central African Republic (CAR), ROLI convened a meeting with key justice sector partners including the Inspector General for Judicial Services, the CAR Bar Association, the Bangui court president, and other international organizations like the UN Development Program, to develop a strategy for continuing activities during the pandemic.

In the midst of strict lockdown conditions, ROLI's work in the Philippines with civil society organizations continues, seeking ways to protect and promote the rights of the most vulnerable. ROLI is making plans to meet a request by the Supreme Court of the Philippines for training over 2,000 judges on changes to the civil procedure and evidence rules, and assistance in court automation, building on previous similar work in the country.

ROLI is implementing a program to prevent and advance tolerance of religious and ethnic minorities (REM) in the North Africa Region, specifically Tunisia, Yemen, Libya, and (pending USAID mission approval) Morocco. ROLI staff and consultants are currently in the research phase of the program.

A ROLI-led global consortium highlighted in my Midyear Meeting remarks to the House of Delegates, "Women and Girls Empowered" (WAGE), recently launched a new program in Sri Lanka. The initiative aims to empower local women leaders in the fight against gender-based violence. WAGE also worked on concept and proposal development for potential programs in Burma, Moldova, Jordan, Sudan, and Central Asia.

National Security Law

On March 19, the Standing Committee on Law and National Security co-sponsored a CLE webinar with the Cybersecurity Legal Task Force and the Health Law Section titled "Remote Working in a Time of COVID-19: Cybersecurity Issues You Need to Know." Over 600 people registered and 400 people attended the live webinar, and it is now available on-demand on Shop ABA for members, or for purchase by non-members.

Center for Professional Responsibility (CPR)

CPR has formed a New Lawyer Steering Committee, which held its first meeting on April 9. The goal is to fully integrate members of the YLD and the Law Student Division as substantive participants in the ABA community. Its objective is to engage the Divisions' members as part of the CPR community at the beginning of their studies, earn their ongoing membership by framing and articulating a compelling value proposition, and lay a foundation for lifetime membership in the ABA and the CPR.

Legal Education

On April 6, William “Bill” Adams, who has served as Deputy Managing Director of the Section of Legal Education and Admissions to the Bar, was promoted to Managing Director of the Section. Bill succeeds Barry Currier, who served the ABA as the Section’s Managing Director since 2013.

Bill worked as the Deputy Managing Director for that past 5 ½ years, and he is a very experienced legal education administrator. Prior to the ABA, he served as a dean, associate dean, and professor of law for a quarter of a century. His appointment comes after a nationwide search that considered a number of candidates for the job.

As the Managing Director, Bill will lead the Section’s governing Council, which acts as an independent arm of the ABA and is recognized by the U.S. Department of Education as the sole national accreditor of U.S. law schools. In that capacity, he will assist the Council to regulate legal education to assure the graduates of ABA-approved law schools are prepared for the legal sector.

As a result of delayed bar examinations in many jurisdictions, on April 7, the ABA Board of Governors adopted a special [resolution](#). The highest court or bar admission authority of each jurisdiction was urged to act urgently and adopt emergency rules that would authorize 2019 and 2020 law graduates who have not yet taken a bar examination, and who apply for admission to the bar, to engage in the limited practice of law, if the July 2020 bar examination in their jurisdiction is cancelled or postponed due to pandemic-related public health and safety concerns.

Conclusion

According to legend, the British army band played a song called “The World Turned Upside Down” after the colonials’ victory in the Battle of Yorktown. That was an acknowledgment of the profound implications of an independent American nation. The old world order had been uprooted. The future was very uncertain. The founders of our Nation could not know of the great days to come.

Perhaps a band should play a few verses of “The World Turned Upside Down” to underscore today’s uncertainties. As with the United States at the close of the Revolutionary War, our society and the ABA face an ambiguous future. While the short-term challenges of the pandemic are obvious, including economic anxiety and major healthcare obstacles, we also have a new long-term opportunity to shape a better world.

I firmly believe the best days of the ABA are ahead. Thanks to effective planning, we successfully transitioned to the new virtual reality of telework, online meetings and events, and an improved value proposition that gives our members the tools and services to weather the current storm. We will continue to adapt and improve to the changing environment.

ABA’s operations and services may be virtual, but they rest on our strong mission and goals. We remain dedicated to America’s lawyers and the people they serve. As the voice of the legal profession, our leadership is more vital than ever as we work to promote attorneys’ success through the pandemic and beyond.

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Please let me know of any questions or concerns on any issue. Please continue to stay safe and remain healthy. I look forward to engaging with you at our virtual Annual Meeting.

Respectfully submitted,

Jack L. Rives
Executive Director

AMERICAN BAR ASSOCIATION
COMMITTEE ON SCOPE AND CORRELATION OF WORK
INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES

The following are the activities in which the Committee on Scope and Correlation of Work (“Scope”) has engaged since its last report to the House of Delegates at the American Bar Association’s 2020 Midyear Meeting. Scope has continued to fulfill its constitutional mandate as a Committee of the House of Delegates, and the only one elected by it. It has carried forward its review of the structure, function and activities of Association committees and commissions to evaluate the effectiveness of their functioning and determine if overlapping functions exist.

Scope held its last meeting Tuesday, April 21, 2020 via video telephone conference. Scope will meet again in conjunction with the ABA’s Annual Meeting on Monday, July 20, 2020, via video telephone conference.

Scope reviewed the following entities since the 2020 Midyear Meeting:

- Coalition on Racial and Ethnic Justice
- Commission on Disability Rights
- Commission on Hispanic Legal Rights and Responsibilities
- Commission on Racial and Ethnic Diversity in the Profession
- Commission on Sexual Orientation and Gender Identity
- Commission on Women in the Profession
- Council for Diversity in the Educational Pipeline
- Diversity and Inclusion Center
- Task Force on Gatekeeper Regulation and the Profession

Coalition on Racial and Ethnic Justice

Scope concluded the Coalition on Racial and Ethnic Justice is active and not engaging in a function that unnecessarily overlaps or duplicated the activities of other ABA entities. Scope commends the Coalition on the completion of the Digital Justice Initiative and encourages the Coalition to capitalize on the ideas developed from the project’s Hackathons. Additionally, Scope encourages the Coalition to develop a strategic long-term plan that assures continuity from chair to chair. The ability to recruit talented, committed and determined leadership, particularly for the chair of the Coalition, will ensure the longevity of this entity.

Commission on Disability Rights

Scope concluded the Commission on Disability Rights is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. Further, the Committee commends the Commission for helping improve the quality of the Association and its work to level the playing field for disabled persons within and outside the legal profession.

Commission on Hispanic Legal Rights and Responsibilities

Scope concluded the Commission on Hispanic Legal Rights and Responsibilities is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. Further, the Committee commends the Commission for developing well received and high-profile programs for the ABA.

Commission on Racial and Ethnic Diversity in the Profession

Scope concluded that the Commission on Racial and Ethnic Diversity in the Profession is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. Scope commends the Commission for the continuing growth and visibility of its programs; for streamlining management and promoting more cohesive interaction between staff and Commission members; for creative and thoughtful fundraising efforts that advance program support; and for its continued staff support of the ABA Minority Caucus.

Commission on Sexual Orientation and Gender Identity

Scope concluded that the Commission on Sexual Orientation and Gender Identity is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. Scope commends the Commission for its cooperation with the Hispanic Commission following the realignment under the Center for Diversity and Inclusion. Additionally, Scope recommends the Commission continue the development of its well-produced strategic plan initiative.

Commission on Women in the Profession

Scope concluded that the Commission on Women in the Profession is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. Scope commends the Commission for its significant collaborations with non-ABA entities on research initiatives that seek to advance and retain women lawyers in the profession.

Council for Diversity in the Educational Pipeline

Scope concluded the Council for Diversity in the Educational Pipeline is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. Scope commends the Council for finding sources of funding to advance program support for its collaboration across the ABA's diversity entities. Whether through partnerships, scholarships or collaboration, the Pipeline Council is meeting the challenge of the ABA's Goal III.

Diversity and Inclusion Center

Scope concluded the Diversity and Inclusion Center is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. The Committee commends the Diversity Center for making great strides to meet the task set out for it in the

Board's reorganization of the Association's diversity entities: increased cooperation between all Goal III entities and increased cooperation with other entities both within and outside the Association. The members of the diversity entity leadership are committed on finding ways to coordinate and collaborate on diversity activities, while maintaining the distinct missions of all the Goal III entities. Scope encourages this collaboration going forward.

Task Force on Gatekeeper Regulation and the Profession

Scope concluded that the Task Force is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. The Committee commends the Task Force for its significant efforts to provide a reasoned ABA voice regarding the legal profession's role in acting as a gatekeeper in international financial and business transactions. The operation and work of the Task Force could be a model for other ABA entities that focus on a specific set of legal issues of relevance to ABA members.

Scope is continuing its review of the following entities:

- ABA Journal

Scope's 2020 Annual Meeting agenda will include:

The following Rule of Law Initiative entities will be reviewed during the 2020 Annual Meeting:

- Rule of Law Initiative
- Africa Law Initiative Council
- Asia Law Initiative Council
- Central European and Eurasian Law Initiative Council
- Latin America and Caribbean Law Initiative Council
- Middle East and North Africa Law Initiative

Respectfully Submitted,



W. Andrew Gowder, Jr., Chair
 Amelia Helen Boss
 José C. Feliciano, Sr.
 Harry S. Johnson
 Linda Randell
 Hillary Young, Chair, SOC
 William Bay, *ex-officio*
 Kevin Shepherd, *ex-officio*

**REPORT OF THE SCOPE NOMINATING COMMITTEE
TO THE AMERICAN BAR ASSOCIATION
HOUSE OF DELEGATES**

The Committee on Scope and Correlation of Work ("Scope") consists of five members of the Association, one of whom is elected each year by the House of Delegates to serve a full (5 years) term beginning with the adjournment of the Annual Meeting during which he or she is elected.

Association policy provides that the Scope nominations are presented to the House of Delegates by the Scope Nominating Committee ("Nominating Committee") consisting of the Chair of the House of Delegates as Chair, and as members: the Scope Committee Chair, the Board of Governors Profession, Public Service and Diversity Committee Chair, the member of Scope with the longest continuous service on the Committee who is not the chair, and the Section Officers Conference Chair.

The Nominating Committee was fortunate to have the difficult task of selecting from nine (9) exceptional applicants with impressive credentials. However, only one nominee could be selected. The Nominating Committee voted to nominate *Amy Lin Meyerson* of Weston, Connecticut to fill the vacancy that will occur at the conclusion of the 2020 Annual Meeting.

It is the belief of the Nominating Committee that the breadth of Ms. Meyerson's extensive background in bar activities and knowledge of the Association qualifies her for membership on the Committee on Scope and Correlation of Work.

Respectfully Submitted,



William R. Bay, Chair
W. Andrew Gowder, Jr.
Hon. Frank J. Bailey
José C. Feliciano
Hilary Hughes Young

/cb

Dated: June 2020

SPONSOR: Edward Haskins Jacobs

PROPOSAL: Amends 1.2 of the Constitution to include the following language as one of the purposes of the Association: "to defend the right to life of all innocent human beings, including all those conceived but not yet born."

Amends 1.2 of the Constitution to read as follows:

1 **§1.2 Purposes.** The purposes of the Association are to uphold and defend the
 2 Constitution of the United States and maintain representative government; to defend the
 3 right to life of all innocent human beings, including all those conceived but not yet born;
 4 to advance the science of jurisprudence; to promote throughout the nation the
 5 administration of justice and the uniformity of legislation and of judicial decisions; to
 6 uphold the honor of the profession of law; to apply the knowledge and experience of the
 7 profession to the promotion of the public good; to encourage cordial intercourse among
 8 the members of the American bar; and to correlate and promote the activities of the bar
 9 organizations in the nation within these purposes and in the interests of the profession
 10 and of the public.

(Legislative Draft - - Additions underlined; deletions struck-through)

1 **§1.2 Purposes.** The purposes of the Association are to uphold and defend the
 2 Constitution of the United States and maintain representative government; to defend the
 3 right to life of all innocent human beings, including all those conceived but not yet born;
 4 to advance the science of jurisprudence; to promote throughout the nation the
 5 administration of justice and the uniformity of legislation and of judicial decisions; to
 6 uphold the honor of the profession of law; to apply the knowledge and experience of the
 7 profession to the promotion of the public good; to encourage cordial intercourse among
 8 the members of the American bar; and to correlate and promote the activities of the bar
 9 organizations in the nation within these purposes and in the interests of the profession
 10 and of the public.

**Report to the
House of Delegates of the
American Bar Association**

by
Edward Haskins Jacobs

On a Proposal to Amend the ABA Constitution to
Add this as a fundamental ABA purpose:

***To defend the right to life of all innocent human beings, including all those
conceived but not yet born.***

For consideration at the August 3 and 4, 2020, Annual Meeting

The undersigned proposes that the American Bar Association Constitution, Article 1, Section 1.2 - Purposes - be amended by inserting the following language (between the quotation marks) after the first semicolon: "to defend the right to life of all innocent human beings, including all those conceived but not yet born;".

Article 1 of the ABA Constitution is entitled "Name and Purposes." Section 1.2 is entitled "Purposes." Once amended, section 1.2 would read in full as follows:

The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government; **to defend the right to life of all innocent human beings, including all those conceived but not yet born;** to advance the science of jurisprudence; to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the profession and of the public. [The new language is in bold for the purpose of highlighting.]

Once again, God willing, I will move for the adoption of this proposal at the House of Delegates in Chicago, Illinois, in August 2020. I made the same motion before the House of Delegates the last nineteen years in a row. My hope continues that some day our culture of death will be overcome. We lawyers must not turn a blind eye to our children being poisoned to death and torn apart in our midst. I may be crying in the wilderness, but the cry – and the thirst for justice it represents – will never die.

If adopted, the proposal would require the American Bar Association to stand up for the God-given right to life of all innocent human beings, a right that must be protected in the man-made law of all just societies. As Alexander Hamilton wrote, "[T]he first and primary end of human laws, is to maintain and regulate ... absolute rights of individuals. ... The sacred rights of mankind are ... written ... by the hand of the divinity itself and can

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never be erased or obscured by mortal power.”¹

Given everything that has been happening lately in U.S. States allowing abortion up to the moment of birth, and then infanticide, how long will it be before we start seeing letters like this, a hypothetical future letter from daughter to mother, found (except for the end) on the internet:

January 22, 2023 Dear Mom,

Sorry we haven't really chatted since Christmas. I have some difficult news.

It's about Timmy. He's been a real problem, Mom. He's a good kid, but quite honestly he's an unfair burden at this time in our lives. Ted and I have talked this through and finally made a choice. Plenty of other families have made it and are much better off.

Our pastor is supportive and says sometimes hard decisions are necessary. He told us to be prayerful, consider all the factors, and do what is right to make the family work.

He said that even though he probably wouldn't do it himself, the decision really is ours. He was kind though to refer us to a children's clinic near here, so at least that part's easy.

I'm not an uncaring mother. I do feel sorry for the little guy. I think he overheard Ted and me talking about "it" the other night. I turned around and saw him standing at the bottom step in his pj's with the little bear you gave him under his arm and his eyes sort of welling up.

Mom, the way he looked at me just about broke my heart. I honestly believe this is better for Timmy, too. It's not fair to force him to live in a family that can't give him the time and attention he deserves.

And please don't give me the kind of grief Grandma gave you over your abortions. It's the same thing, you know.

Your daughter, Nancy

¹ Alexander Hamilton, *The Farmer Refuted*, February 23, 1775.

I now leave our horrifying glimpse into the future to address my proposal:

In none of the meetings of the House of Delegates where my proposal was considered was there an actual vote on the proposal.² Every year there has been a motion postpone action on the proposal indefinitely and every year that motion has been approved. Those moving to postpone action indefinitely typically claimed that the proposal is inconsistent with the ABA purpose to uphold and defend the Constitution of the United States, and usually added that it would be inappropriate to include the language of the proposal as a purpose of the ABA, putting it right in the ABA constitution. I have given more detailed accounts of earlier House of Delegates action on the proposal in previous reports to the House.

I want to see the House pass this proposal, but I realize passage now would take a miracle. This is driven home in each annual meeting when new members of the House who have never been members before stand up in order to be introduced to the assemblage. Each year there are fewer than twenty new members who have never been members before. And the House quite a few years ago defeated a term limits proposal. It would seem, then, that the House of Delegates is a pretty closed club with lots of long-term members. In addition to looking for that miracle, I am also hoping that the consciences of a few of the members will be pricked enough that they will be willing to “submit a salmon slip” and stand up in the House and speak out for the right to life of the innocents in the face of embarrassment and possible ostracism. Only once has a member of the House come close to supporting the adoption of the proposal. In 2019 a House member submitted a salmon slip and appeared to acknowledge in front of all of his colleagues in the House the wrongfulness of killing innocent children, although ultimately he seemed to come out against the ABA taking positions on controversial issues, as this proposal does. His heart was in the right place, though, I am sure of it, and I am hoping the next step - full-fledged support of the proposal by someone, anyone - will emerge, and maybe sooner than we think.

Even if I have no chance short of a miracle for passage of the proposal, if we can just “get the ball rolling” with a little bit of courage from members who agree, who knows? The ABA House of Delegates is a speck, but an important speck in the process. Maybe before too many more years, or at least, eventually at some point in the future when sanity is restored, baby-killing-in-the-womb (or upon emergence from the womb)³ will go

² Of course, even if the proposal were voted upon and rejected, it could continue to be made year after year. At the 2018 meeting, the Chair confirmed that if rejected, the proposal could be made the next year.

³ The human tragedy addressed by this proposal and the abandonment in the United States of the most basic rule of law demanded of any sane society has been highlighted by the failure in the United States Senate several times, and as late as February 2020 (This report is being finalized March 3, 2020, to be timely filed with the ABA.), to have sufficient votes in favor of the Born-Alive Abortion Survivors Protection Act to protect the effort to bring the bill to a vote free from filibuster by getting 60 votes or more; as well as by State legislative acts to allow for abortion up to the moment of birth, and for abandonment of care for abortion survivors. When a society labels intense evil as a good, we are truly beyond the pale. Hundreds of times in the United States abortions have failed to kill the child as intended before the child is delivered, and protection of the child who survives the “hit” on its life is sorely needed in law.

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the way of slavery. It could happen.

“My section [bar association, committee, etc.] does not want its representative to vote on this kind of social issue” is not a legitimate position to take, is it? The House of Delegates addresses these kinds of issues dealing with human rights and legislative proposals every annual meeting. The current ABA policy manual includes ABA policies: supporting legislation on the federal and state level to finance abortion services for indigent women (adopted August 1978); (2) supporting state and federal legislation which protects the right of a woman to choose to terminate a pregnancy before fetal viability, or thereafter, if necessary to protect the life or health of the woman; and (3) opposing state or federal legislation which restricts this right. (Adopted August, 1992.) Other related and likely still current ABA policies are listed toward the end of this report.

The representative of your section, etc., must be ready to address fundamentally important legal issues if your section, etc., is to be fully represented in the House. If you are not up to taking on this mantle as a fully functioning delegate to the House, shouldn't you resign your position? Please, stand up and be counted. If you don't, won't you regret it in the end, when you look back on your life seeking evidence of courage? I write as I do in this paragraph because I sense there must be those in the House who agree with me - and a couple of times or more on the side some have expressed sympathy for the proposal privately to me - but just have not been able to get up and say it and explain it clearly in front of the whole House. So, once again, on to the meat of the issue:

Feminism - here meaning the conviction that women's government-enforced rights and privileges have been neglected in the past and now need augmentation - begs the question, how far should women's "rights" go? If you are a mother with a child in your womb, and if bearing your child to term or keeping your child after birth would be embarrassing, inconvenient, career-killing, poverty-causing, husband-limiting, depressing, or physically more than normally risky, do you have the right to kill your child as a legally-approved exit from motherhood, as long as you do it before your child fully emerges from the protection of your body? Or, doing the killing even after birth through obvious infanticide, if positive law keeps moving the way it is in the United States? And if the positive law of the society forbids you from killing your child, do you have a higher right to take the matter into your own hands by clandestinely hiring a hit- man (or hit-woman) or using a coat hanger to do the job yourself or with an associate?

Or does your child, by her mere humanity, have a sacrosanct right to live, and continue to develop and grow in liberty and pursue happiness as she comes to know it? The answer: Human life, including that of our littlest ones, is sacred. This realization was one of the greatest advances of Christianity over the paganism that condoned exposing unto death the unwanted child. Abortion in our society is quicker than exposure, and is hidden away in the womb (or at the end of the birth canal) so that we can lie to ourselves about what we are doing. But respect for innocent human life must be fundamental to civilized society, as "Thou Shalt Not Kill" signifies.

We should know that human life is sacred and to be defended against all competing claims of "right." Our nation's declaration of birth - the *Declaration of*

Independence of July 4, 1776 - set forth the *raison d'être* for the United States of America as a separate nation. The *Declaration* asserted that it is self-evident that all men are endowed by their Creator with the unalienable right to life; and that governments are instituted among men to secure the rights to life, liberty, and the pursuit of happiness. This insistence upon governmental protection of the right to life of all innocent human beings must be a fundamental function of any legitimate government.

The Creator referenced in the *Declaration of Independence* chose to have each new child begin life within his or her mother. The child in the womb has her own unique set of DNA. She is a separate human being - not simply part of her mother. On April 23 and 24, 1981 a United States Senate Judiciary subcommittee held hearings on the question: When does each new human life begin? The internationally known group of geneticists and biologists had the same conclusion - each person's life begins at conception.

The stories one hears about mothers on their way to have a child in the womb poisoned to death or ripped apart by an abortionist, suddenly having a change of heart when they see another mother walking by holding and cuddling her baby, or seeing a poster of a baby with the words "Abortion kills," are heart-warming, but they also underscore how the general discussion of the abortion problem in the media depersonalizes the separate human being held by God's design in the vessel of her mother. That's another, separate human being in there - one who has the right to life, liberty, and the pursuit of happiness, just as we do, no matter how deeply we stick our heads in the sand.

Shouldn't we recognize the zygote, the embryo, the fetus in the womb of a human mother as another human being - one who has rights? I recommend you check out the website for the journal *First Things* and go to the Menu, then Issues Archive, and then to the May 2003 issue. There you will find an article by Maureen L. Condic, who is a professor of neurobiology and anatomy, and adjunct associate professor of pediatrics, at the University of Utah. She points out (in her May 2003 article, "Life: Defining the Beginning by the End") that the common arguments about when human life begins are only of three general types: arguments from form, arguments from ability, and arguments from preference, and that these arguments are all highly subjective, amounting to arguments that the new organism growing in the womb is not a human being worthy of protection in law because it is tiny, or because it is not a "person," or because it is early in its development.

Dr. Condic rightly rejects the use of these three flawed arguments about when life begins. Instead, she cogently argues that we should determine when the new human organism begins, because that is the true beginning of the human being. She points out that one must distinguish between mere living cells that are not organized into an organism, and living *organisms*. Dr. Condic points out that "[o]rganisms are living beings composed of parts that have separate but mutually dependent functions. While organisms are made of living cells, living cells themselves do not necessarily constitute an organism. The critical difference between a collection of cells and a living organism

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is the ability of an organism to act in a coordinated manner for the continued health and maintenance of the body as a whole. ... Unlike other definitions, understanding human life to be an intrinsic property of human organism does not require subjective judgments regarding 'quality of life' or relative worth. A definition based on the organismal nature of human beings acknowledges that individuals with differing appearance, ability, and 'desirability' are, nonetheless, equally human. ... Once the nature of human beings as organisms has been abandoned as the basis for assigning legal personhood, it is difficult to propose an alternative definition that could not be used to deny humanity to virtually anyone." The zygotes, the embryos, the fetuses in the wombs of human mothers are all human organisms; that is to say, human beings.⁴

But can any of us, with what we know about the child's unique set of DNA beginning at conception, even pretend now that this is not true? The possibility of twinning does not diminish the recognition that upon conception there is brand new, separate, unique human life in the mother's body – a new person or persons. The mother is responsible for taking care of that child, but she does not own the child – God does. Slavery made the mistake of thinking that one human being can own another. We now know that no man should be permitted under man's law to own another. But how can one justify killing another innocent human being if one does not own him? The inconvenience and burden of the other's life on one's own is not enough. The burden of the dependent relation does not end at the birth canal. How far should the right to kill those dependent upon us go? Should the standard evolve from the complete dependence of the womb to the excessive dependence of severe mental retardation and severe physical handicaps? The "right" to kill an already born baby by lack of ordinary care is the new advocacy for those who want all preborn baby rights denied.

Just because the child is held and nourished within her mother does not give her mother the right to kill her. To the contrary, the mother with a child in the womb has a special responsibility to protect and care for her child. In the language of the law, the mother, the parents, have a fiduciary duty to the child. The generally recognized principle that parents must take care of their children once they are born applies as well to the children while they are growing and developing in the womb. I am not judging here the status of the soul of those who have had abortions or who commit abortions. I leave that (and the judging of my own soul) to God. But what we must judge as a people is what actions are so intrinsically evil, and do such harm to others who are innocent of wrongdoing (such as killing them), that the State, any decent State, must prohibit those actions from being inflicted on their victims. Obviously, the baby in the womb is the victim of abortion.

⁴ In her May 23, 2013 testimony before the Committee on the Judiciary of the U. S. House of Representatives on H.R. 1797, which would require a 20 week fetus to be protected from pain, Dr. Condit noted that "it is *entirely* uncontested that a fetus experiences pain in some capacity, from as early as 8 weeks of development." She further noted, "Imposing pain on any pain-capable living creature is *cruelty*. And ignoring the pain experienced by another human individual for any reason is *barbaric*." Dr. Condit went on to note, "Given that fetuses are members of the human species - *human beings like us* - they deserve the benefit of the doubt regarding their experience of pain and protection from cruelty under the law." [Italics in original.]

I do not want to offend the women who have been bamboozled by our abortion culture, but is not abortion the ultimate hate crime - the turning of legendary motherly love to the hatred of, and the killing of, one's own child? Perhaps it is indifference to the child rather than hatred of the child, but this may be worse in its own way, as they say the opposite of love is not hate, but apathy. Abortion is the ultimate betrayal: the mother's betrayal of her own child.

Motherly love was known through the centuries until recently as the gold standard of love – unselfish and without limit – the willingness to give one's very life for one's child. Remember the question from Isaiah 49:15, "Can a woman forget her sucking child, that she should have no compassion on the son of her womb?" attesting to this love. Motherly love is the foundation for a culture of life. Abortion, and now infanticide, is the foundation for our culture of death. Speaking of being bamboozled, recall the serpent in the Garden of Eden, enticing Eve to eat the forbidden fruit on the promise that she would become like God. Now mothers are enticed into abortion with the lie that they can become like men, and needn't be burdened with a child in the womb or that child after birth. Eat the fruit of hatred of the life of your child and abandonment of your child, and freedom is yours. A Faustian bargain if ever there were one.

The United States of America fails in its fundamental mission if it refuses to secure for the weakest and most vulnerable innocent people amongst us the rights to life, liberty, and the pursuit of happiness. The ABA fails in its mission if it fails to stand up for the rights of the powerless. If we deny the right to life for children in the womb because they are developmentally immature (and therefore, in the eyes of some, not "persons"), then we not only tragically deny these children their rights - we open the door to infanticide and the killing of other weak and infirm people. This open door has already resulted in U.S. legislation in favor of infanticide, and our very U.S. Senate refuses to allow anti-infanticide legislation to come to a vote - just as the ABA has refused this proposal the right to come up for a vote in the House of Delegates. There is a crisis in the United States over the loss of our moral roots. The ABA, which claims to be the voice of the legal profession, and to be an advocate of the protection of fundamental rights, and the Rule of Law, should become a strong voice for all the weak and vulnerable innocents who so desperately need champions now.

We would do well also to realize that the Constitution of the United States - and the Supreme Court's interpretation of it - is not the fundamental source of human rights within the United States. Our rights to life, liberty, and the pursuit of happiness do not arise out of our own "social contract" - the Constitution. To the contrary, as the Declaration asserts, these rights are endowed upon us by our Creator. The rights of the child are a burden to the mother, but fundamental rights of others are a burden we must bear.

Because the proposal is every year postponed indefinitely on the false claim that defending the right to life of all innocent human beings, including all those conceived but not yet born, is inconsistent with upholding and defending the Constitution of the United States, I hereafter explain again why defending the right to life of all innocent human

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beings, including all those conceived but not yet born, is consistent with supporting and defending the Constitution of the United States. Later in this report I explain why the language I propose does belong in the purposes section of the ABA constitution, which positioning has also been opposed by the Standing Committee on Constitution and Bylaws.

So, the inconsistency contention has no merit. First the obvious: Nowhere does the actual language of the United States Constitution specify that the States may not defend the right to life of each and every innocent human being within their respective jurisdictions (including all those conceived but not yet born). So the claim that the defense of such life is inconsistent with defending and upholding the Constitution is on its face highly suspect. If the inconsistency argument does not rest on the actual language of the Constitution, let us go beyond the actual language of the Constitution and try to articulate the argument.⁵ The inconsistency argument could be so stated:

1. *Roe v. Wade*, *Doe v. Bolton*, and *Planned Parenthood v. Casey* prohibit each State from defending the right to life of each and all innocent human beings conceived but not yet born, within the State's jurisdiction.⁶
2. The Supreme Court has determined that the Constitution's penumbra of privacy rights attendant to the pregnant mothers is what prohibits the States from defending the right to life of each and all those conceived but not yet born.
3. Therefore, it is the Constitution itself that prohibits the defense by the States of the right to life of all those conceived but not yet born.
4. Therefore, advocating the defense of the right to life of all those conceived but not yet born is inconsistent with upholding and defending the Constitution since the Constitution prohibits that defense.

⁵ Like St. Thomas Aquinas, I construct the argument against my position. Finally last year the Standing Committee on Constitution and Bylaws briefly commented on why it claims that defending the right to life of all innocent human beings including all those conceived but not yet born is inconsistent with upholding and defending the Constitution of the United States, stating that the proposal "is incompatible with the Supreme Court's interpretation of the Constitution of the United States that the Association is committed to uphold and defend". The problem with this position is that, according to the ABA constitution, the ABA is committed to uphold and defend the United States Constitution, not the Supreme Court's interpretation of it. For instance, would the House of Delegates agree that the ABA must support the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), ending unconstitutional muzzling of free speech regarding elections? Doubtful. If the Committee is going to identify a particular Supreme Court decision with the Constitution, it needs to explain why that Supreme Court decision correctly interprets the Constitution, especially where the decision is hotly contested. The Committee made no effort to do this, thus once again failing to truly explain why it always moves or gets someone else to move to postpone the proposal indefinitely. For this reason, I construct an argument for the Committee and refute it herein.

⁶ 410 U.S. 113 (1973); 410 U.S. 179 (1973); and 505 U.S. 833 (1992).

But it cannot be reasonably be said (1) that the holdings of *Roe v. Wade* and *Doe v. Bolton*, as modified by *Planned Parenthood v. Casey* are the Constitution itself – and that if one opposes *Roe*, *Doe*, and *Planned Parenthood*, one is opposing the Constitution itself - and failing to uphold and defend it. The lack of identity of particular Supreme Court interpretations of the Constitution with the Constitution itself should be rather self-evident. No doubt you (the members of the House) are aware that legal conclusions underlying many Supreme Court decisions - including those interpreting the Constitution - have been rejected by later Supreme Court decisions although the relevant language of the Constitution has not changed in the interim. Thus, generally, contending that opposition to a particular Supreme Court interpretation of the Constitution constitutes opposition to the Constitution itself is stretching language and logic to the breaking point.

Now, maybe a persuasive argument could be made that although some Supreme Court interpretations of the Constitution are subject to later change, some are so indisputably correct that in some real sense the interpretation could be said to be the Constitution itself. If the Supreme Court rationale for *Roe v. Wade*, *Doe v. Bolton*, and *Planned Parenthood v. Casey* were so rock-solid and accepted by American society in general as the proper articulation of a virtually undisputed fundamental individual right grounded in the Constitution, one could argue that in effect these Supreme Court decisions are equivalent to the Constitution; but that is certainly not the case with *Roe v. Wade*, *Doe v. Bolton*, and *Planned Parenthood v. Casey*. (And note that *Planned Parenthood* itself modified fundamental holdings of *Roe* and *Doe*.)

The truth is quite to the contrary of the typical position of the Standing Committee on Constitution and Bylaws. The reality is that the rationale underlying these two Supreme Court decisions deserves no support from an organization pledged to uphold and defend the Constitution of United States.⁷ This is because the underlying rationale for the decisions is bogus, even if one accepts the concept of the privacy rights penumbra. The Supreme Court's opinion in *Roe v. Wade* takes the position that neither Texas nor any other State may legislatively determine that human life begins at conception, since (the Court asserted) there is uncertainty over the legitimacy of that claim - that human life does begin at conception. But this claimed uncertainty is a figment of the Supreme Court's imagination. There is no real uncertainty over the point at which each human life begins - we all have our own unique set of 46 chromosomes. This set is forged at the moment of conception. The new child (or, perhaps, eventually, the new twins) is new human life - residing within the child's mother, but not simply a part of her.

Based on the faulty contention that the child in the womb cannot properly be

⁷ As one wise observer has noted, "Roe v. Wade has deformed a great nation. The so-called right to abortion has pitted mothers against their children and women against men. It has sown violence and discord at the heart of the most intimate human relationships. It has aggravated the derogation of the father's role in an increasingly fatherless society. It has portrayed the greatest of gifts – a child – as a competitor, an intrusion, and an inconvenience.... Human rights are not a privilege conferred by government. They are every human being's entitlement by virtue of his humanity. The right to life does not depend, and must not be declared to be contingent, on the pleasure of anyone else, not even a parent or a sovereign."

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legislatively determined to be a human being, the Supreme Court denigrated the child to the status “potential life,” stripping the child of her rightful status under the law as a human being. The Court then set up a false dichotomy of competing rights: the mother’s “right to privacy” right to kill the non-human blob in her womb verses the State’s interest in protecting the “potential life” in the womb and the health of the mother.⁸ (Referring to a living being with its own DNA as “potential life” is doublespeak at its best.) The hand dealt the child in the womb by the Supreme Court was dealt from a stacked deck - based upon the lie that the child in the womb is not really a child. As a “potential life” rather than a real, live human being, the child’s real rights get pushed aside by the Supreme Court. The rationale of *Roe v. Wade* is **not** indisputable (and thus, one might argue, the Constitution itself); rather, the rationale of *Roe v. Wade* is fatuous.

Finally, the proposal (and all already articulated purposes in ABA Constitution Section 1.2) presupposes the ABA defense of the right to life of the innocents will be undertaken by lawful means. Suppose the ABA as an organization were to advocate a change through lawful means in the language of the United States Constitution (or in a Supreme Court interpretation of the Constitution). Would this mean the ABA had abandoned its purpose to uphold and defend the Constitution? Of course not. We have an obligation to address constitutional issues that need addressing. We honor the Constitution by doing so. So, even if I were advocating change in the language of the Constitution by lawful means, my proposal would not conflict with the ABA purpose to uphold and defend the Constitution.

Several times, the ABA Committee on Constitution and Bylaws has suggested that what I advocate should be proposed as a policy position for the ABA, not a purpose of the ABA, and therefore my proposal should be rejected on the ground that it does not belong in Section 1.2 of the ABA Constitution. Putting aside the absurdity of suggesting a policy that is supposedly inconsistent with the ABA constitution, I disagree with this contention also. After all, what is a purpose? A purpose is simply a fundamental policy. The innocent human beings in the wombs of their mothers (many of whom have become mortal enemies of their own children) cry out for our country to renew its commitment to the basic principles of the Declaration of Independence - that every innocent human being has the **right** to life, liberty, and the pursuit of happiness. And it is not just the innocents in the womb who cry out for champions. We are sliding down the slippery slope of disregard for the sanctity of human life for many outside the womb as well - the abortion survivors, the old, the infirm, and the disabled. If we do not wake up and start standing up for what is right, soon many of these innocents will have to be justifying why their lives should be spared - why we should be spending money and effort on their

⁸ Nor does basing a supposed constitutional right to abortion upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (“... nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”), as advocated by Justice Ginsburg and three other Justices in the Ginsburg dissent in *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) make any more sense. The child in the womb is still a human being; a child; and her right to life trumps the mother’s interest in having her killed, whether based on a supposed right to privacy or upon the Equal Protection Clause. See also, Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, *Harvard Journal of Law & Public Policy*, vol. 34, no. 3, Summer 2011.

inconvenient and bothersome lives. The intentional killing of hundreds of thousands of innocent human beings by abortion in the United States each year in recent years (and even more before) is such an affront to justice that the ABA should make defending the rights of those (and other) innocent beings one of its fundamental policies – one of its very purposes.

Remember the argument over the propriety of amending the U.S. Constitution with the Bill of Rights shortly after the approval of the Constitution itself? There were those who argued that it is unnecessary and inappropriate to articulate in the Constitution these rights of the people and of the States against intrusion by the federal government, since the federal government was permitted to exercise only those powers granted to it in the Constitution anyway. But those rights articulated in those first ten amendments were considered so fundamental that they should be explicitly set forth in the Constitution itself.

Well, our country has abandoned its fundamental argument for its own formation when it denies to some innocents the inalienable God-given right to life itself, allowing others with the sanction of law to kill off innocents. This is a fundamental perversion of what the United States should be. The ABA should make the correction of this deviation one of its bedrock, fundamental policies – that is, one of its very purposes of being. The ABA goes on and on nowadays about its support of “the rule of law,” but where is that support when it comes to children in the womb? Where are their lawyers defending their rights? Where is the defense and pursuit of justice here?

The Committee claimed that the subject of the proposal is not fundamental enough - or is not of the right character - to be included in the purposes section of the ABA constitution. But compare a stance against stripping the right to life from millions of innocents to the purposes that are in the ABA constitution. Defending the right to life of innocents when it is being denied by our “law” is much more fundamental than even the upholding and defending of our hallowed U.S. Constitution and representative government. The ABA purpose I propose goes to the very heart of what an association of American lawyers should be all about. We are supposed to be the upholders of the law. We are supposed to champion those whose rights are being disrespected. Incredibly, a fundamental disrespect for a category of persons’ rights has been incorporated as a fundamental tenant of our American “law.” A stand against this cries out for inclusion in the purposes section of the ABA constitution.

Matters of much lower import and importance to our law and our role as lawyers are already included in the articulation of ABA purposes. My proposal is more fundamental than the ABA constitution existing purposes to “advance the science of jurisprudence”, “promote the uniformity of legislation and of judicial decisions”, “uphold the honor of the profession of law”, and to “encourage cordial intercourse among members of the American bar.” The Committee is wrong when it says that my proposal does not belong in the purposes section of the ABA constitution.

At the House of Delegates in August 2001, the speaker who advocated

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postponing the proposal indefinitely said that the proposal “changes fundamentally the purpose of the American Bar Association and the Constitution and Bylaws, and has ramifications over a wide array of policy that the Association has adopted and implemented.’ I have reviewed the ABA *Policy and Procedures Handbook* and note here policy positions taken by the ABA that are, or may be regarded as, inconsistent with the proposal being made hereby.

The last ABA *Policy and Procedures Handbook* I have been able to get my hands on, listed hundreds of standing policies adopted by the ABA over the years, although action has been taken to ‘archive’ some policies over ten years old, taking them off the list of current policy positions. Way back in 1978, the ABA adopted a policy, still in the 2013-2014 *Handbook*, supporting federal and state legislation to “finance abortion services for indigent women.’ In 1991, the ABA adopted a policy supporting legislation to promote ‘full counseling and referrals on all medical options’ in federally funded family planning clinics. In 1992, the ABA adopted a policy, still in the *Handbook*, opposing federal legislation restricting abortions prior to viability and thereafter if the abortion is ‘necessary to protect the life or health of the woman’ And in 1994, the ABA adopted a policy recommending that the United States, at the Fourth World Conference on Women in Beijing, China, in 1995, “actively support the inclusion in the Platform for Action of [e]ffective measures to accelerate the removal of the remaining obstacles to the realization of women’s basic rights.’ At the annual meeting in 2001 the ABA adopted a policy provision opposing the Mexico City Policy, which prohibits overseas funding by the United States of nongovernmental organizations that provide abortion-related health or medical services. The ABA House of Delegates has also fairly recently adopted a policy implicitly approving government-funded killing of innocent human beings in their embryonic stage for stem cell and other research work.

If the proposal is adopted, inconsistent policies would be revoked by implication. Legal protection for all innocent human life is essential to a properly ordered society. Advocacy of such protection should be fundamental ABA policy.

In John F. Kennedy’s 1961 inaugural address he rightly said, “The rights of man come not from the generosity of the state, but from the hand of God.’ Professor Robert P. George of Princeton University gave an address at Georgetown University the day after President Obama’s initial presidential inauguration. In urging his listeners to pray for an end to legal abortion in the United States, Professor George said, “We must ask God’s forgiveness for our great national sin of abandoning the unborn to the crime of abortion and implore His guidance and assistance in recalling the nation to its founding ideals of liberty and justice for all.”

Feel free to join me as a sponsor next year, or at least to submit a salmon slip to speak in favor of the proposal. Email me at edwardjacobs@yahoo.com.

SPONSORS: Aastha Madaan (Principal Sponsor), Monique Bhargava, Anuradha Gwal, Keya Koul, Aneesh Mehta, Ramana Rameswaran, Rippi Gill

PROPOSAL: Amends Section 6.8 of the ABA Constitution to provide for representation of the South Asian Bar Association of North America as an affiliated organization in the House of Delegates.

Amends Section 6.8 of the ABA Constitution to provide for representation of the South Asian Bar Association of North America as an affiliated organization in the House of Delegates

1 **§6.8 Delegates from Affiliated Organizations.** (a) The following organizations are
2 entitled to be represented in the House of Delegates as affiliated organizations: The
3 American Immigration Lawyers Association, the American Law Institute, the Association
4 of American Law Schools, the Association of Life Insurance Counsel, the Conference of
5 Chief Justices, the Energy Bar Association, the Federal Bar Association, the Federal
6 Circuit Bar Association, the Federal Communications Bar Association, the Hispanic
7 National Bar Association, the Judge Advocates Association, the Maritime Law
8 Association of the United States, the National Asian Pacific American Bar Association,
9 the National Association of Attorneys General, the National Association of Bar
10 Executives, the National Association of Criminal Defense Lawyers, the National
11 Association of Women Judges, the National Association of Women Lawyers, the
12 National Bar Association, the National Conference of Bar Examiners, the National
13 Conference of Commissioners on Uniform State Laws, the National Conference of
14 Women's Bar Associations, the National District Attorneys Association, the National
15 Legal Aid and Defender Association, the National LGBT Bar Association, the National
16 Organization of Bar Counsel and the National Native American Bar Association.

(Legislative Draft – Additions underlined; deletions struck through)

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13 Conference of Commissioners on Uniform State Laws, the National Conference of
14 Women's Bar Associations, the National District Attorneys Association, the National
15 Legal Aid and Defender Association, the National LGBT Bar Association, the National
16 Organization of Bar Counsel ~~and~~, the National Native American Bar Association and
17 the South Asian Bar Association of North America.

REPORT

The effect of this proposed amendment to §6.8 of the ABA Constitution would be to include The South Asian Bar Association of North America as an affiliated organization with representation in the House of Delegates. The South Asian Bar Association of North America would thereby join the other unique national specialty bar associations as an affiliated organization, thus furthering the American Bar Association's commitment to encourage greater access to and participation for the national bar associations in the ABA.

Background

We write on behalf of the South Asian Bar Association of North America ("SABA") to provide you with information regarding SABA and our application for Affiliated Organization Admission to the ABA House of Delegates under Section 6.8 of the ABA Constitution.

As set forth below, the history of South Asian immigration to the United States, the growth of the South Asian American community, and the distinctive traits of the South Asian American business and legal communities play a significant role in most aspects of our nation. It is our belief that as set forth below, affiliation of SABA with the ABA will only serve to further the missions and growth of both organizations, as well as the broader legal community.

History

The history of the arrival of South Asians in the United States is distinct from virtually every other large immigrant group. This unique story, and the commonality of circumstances, time, education and culture have contributed significantly to what has involved into an internationally distinct community described as the South Asian American diaspora.

By definition the term South Asian refers to individuals with ancestry from the sub- Himalayan southern region of Asia. This includes individuals from the modern day countries of India, Pakistan, Sri Lanka, Bhutan, Nepal, Bangladesh, Maldives, and in some instances Afghanistan.ⁱ There are hundreds of languages spoken, and dozens of religions practiced within this diaspora alone. Despite this intra-segment diversity, South Asian cultures have a historical commonality of language, religion, rituals and other cultural norms.ⁱⁱ Historically these South Asian cultures developed in parallel, but apart from East Asian cultures such as Chinese, Koreans and Japanese and

ⁱ"The World Factbook: South Asia", https://www.cia.gov/library/publications/the-world-factbook/wfbExt/region_sas.html (retrieved August 12, 2015).

ⁱⁱ See e.g., Khandelwal, Madhulika S., Becoming American, Being Indian: An Immigrant Community in New York City (Cornell University Press 2002); see generally CIA World Fact Book, South Asia.

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Southeast Asian cultures such as the Vietnamese, Laotians and Malaysians.

South Asian Immigration to the United States

While the individual South Asians may have immigrated to America in the colonial era, the first wave of South Asian immigrants arrived in the late 19th century and early 20th century.ⁱⁱⁱ This initial immigrants worked primarily as laborers on farms and in lumber mills.^{iv} However, the largest wave of immigrants started in the mid-1960's with passage of the Luce-Celler Act in 1946, and the elimination of federal anti-Asian exclusion laws with the passage of the Walter-McCarran Act in 1952.^v This wave resulted in the immigration of a large number of highly educated who sought further education opportunities and financial stability. A large majority of this wave of immigrants settled in the United States and their growing families gave rise to a large and diverse population of South Asian Americans.

As a result, by 2010 the Census counted over 3.4 million South Asians in the United States.^{vi} Indeed, these figures reflected an 81% increase in the South Asian American population from the prior decades census count.^{vii} From 1990-2000, South Asians were also the largest growing U.S. ethnic group with a growth rate of 105.9%.^{viii} These growth rates exceed any other immigrant group over the decade including Hispanics and Chinese.^{ix} There is also a wide geographical distribution of diversity among South Asians all over the United States.^x As a result, South Asian Americans have become an increasingly powerful segment of the electorate with U.S. citizens of voting age increasing between 99% and 471% since 2000.^{xi}

As a minority group, South Asians are among the most highly educated racial or ethnic groups in the United States, and have median income levels substantially higher than Asian Americans and all U.S. households.^{xii} There are high concentrations of South Asian Americans in a variety of industries from technology, banking and medicine, to local small businesses and hospitality.^{xiii} Indeed, although South Asian Americans make up approximately 1% of the U.S. population, over 5% of professionals in STEM fields are South Asian Americans.^{xiv} The burgeoning size of the South Asian American

ⁱⁱⁱ Echoes of Freedom: South Asian Pioneers in California 1899-1965 at Ch. 9 (The Library, University of California Berkeley)(www.lib.berkeley.com/SSEAL/echoes/toc.html)

^{iv} Id.

^v Daniels, Roger, Immigration and the legacy of Harry S. Truman (Truman State Univ. Press 2010).

^{vi} See A Demographic Snapshot of South Asians in the United States (July 2012 Update) (<http://saalt.org/wp-content/uploads/2012/09/Demographic-Snapshot-Asian-American-Foundation-2012.pdf>) (hereinafter "SAALT Demographic Snapshot").

^{vii} Id.

^{viii} Id.; see also Data from the 2000 Census.

^{ix} SAALT Demographic Snapshot

^x Id.; see also Pew Research Center, The Rise of Asian Americans (April 4, 2013).

^{xi} Ibid.

^{xii} Pew Research Center, The Rise of Asian Americans (April 4, 2013).

^{xiii} See generally Scott Ingram, South Asian Americans (World Almanac Library 2007); see also S. Mitra Kalita, Desi vs. Desi, (The Wall Street Journal, October 20, 2009).

^{xiv} Id.; see also Pew Research Center, The Rise of Asian Americans (April 4, 2013).

diaspora has resulted in the children and grand-children of South Asian immigrants to enter professions such as the law. Indeed, the number of South Asian American attorneys has grown exponentially over the past 25 years.

What is SABA?

SABA is a nonprofit, nonpartisan, membership organization that represents the interests of South Asian legal professionals in North America. We foster professional development, ensure improved recruitment, retention and advancement of South Asian legal professionals and provide legal education and access to resources to the South Asian community in the United States and Canada. We are also committed to advocating for policy solutions that promote justice, equity and opportunity for South Asians.

SABA's Mandate

Today, SABA's mandate comprises of four major principles:

- Professional Growth: to provide mentorship and support for our regional chapters and create a networking medium and professional development opportunities for individual law students and attorneys
- Diversity and Inclusion: to promote diversity and inclusion efforts that ensure equal participation in the legal profession and greater representation in the judiciary
- Civil Rights: to combat efforts to limit and marginalize the South Asian and immigrant communities
- Access to Justice: to educate the South Asian community by providing legal information and access to a network of pro bono services

As set forth in our mandate, SABA seeks to provide a platform for the promotion of South Asian American attorneys. This includes supporting a variety of individuals seeking public office, as well as those seeking judicial and other public-service appointments. The membership of SABA is almost as diverse as that of the South Asian diaspora. Within our ranks are federal and state judges, United States Attorneys, members of the Department of Justice, prosecutors, public defenders, solo practitioners, large and small firm attorneys, and in-house counsel. These members, and our organization have also developed significant relationships with other South Asian American business and professional groups, as well as prominent South Asian individuals in other fields, including senior officials in federal and state governments, corporate executives, as well as leaders of public service organizations and religious and cultural groups.

SABA's History

Many of the first South Asian American attorneys joined with broader Asian bar

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associations and groups. However, as the numbers of South Asian American attorneys grew, so did differences with other organizations in the broader Asian community. Local SABA chapters formed independently in different parts of the country in the early 1990s including Northern California and New York City.^{xv} Eventually, in response to the backlash that many South Asian Americans experienced following the September 11, 2001 terrorist attacks, eight local SABA chapters came together to form SABA North America. At that time, there was no affinity bar organization that was willing to provide a strong voice for South Asian legal professionals and the South Asian community. SABA North America sought to ensure a seat at the proverbial table and a voice for the unique representational interests of the South Asian American diaspora.

SABA's Growth and Membership

Since its founding, the South Asian Bar Association of North America has experienced rapid and exponential growth. There are currently twenty-six chapters in nineteen states, in addition to multiple chapters in Canada and we continue to grow and expand. Among these chapters SABA North America estimates approximately 8,000 members. As the organization has grown, so has its influence and its scope. We currently operate on a budget of approximately \$700,000.00 per year, and are supported by one Executive Director and one Executive Assistant.

SABA Sections and Committees

We continue to serve our core purposes of professional growth and service to our community, but through our committees and sections, we are able to provide niche services to members in their chosen practice areas and environments. Some of our sections and committees include Amicus, Advocacy, Corporate Counsel, Endorsements and our Young Lawyers Division (which is an affiliate of the ABA's Young Lawyers Division).

SABA's Annual Conference

We hold a conference annually for members and chapters which, in recent years, has been held in Atlanta, New York and Washington D.C. Our 2020 Annual Conference, which was scheduled to be held in San Francisco, has been rescheduled to June 2021 due to health and safety concerns surrounding COVID-19. The conference attracts hundreds of South Asian attorneys and provides an opportunity for attendees to network, build ties in the South Asian community, and strengthen their career knowledge through continuing legal education. Events at the conference traditionally include a welcome reception, gala, panels and networking events and serves as the place to learn and network with the best of the South Asian legal community.

SABA's Lobby Day

Our annual lobby day is an opportunity for SABA to advocate for our community at our nation's capital. SABA members from across the United States come to Washington, D.C. to meet with members of Congress about issues important to the

^{xv} See www.southasianbar.org; www.sabany.org

South Asian legal community. We address a range of topics, including civil rights, equity under the law, immigration and diversity – many of which overlap with ABA’s priorities.

SABA’s Naturalization Drive

Our naturalization drive event allows our chapters and membership to help South Asians participate fully in American life by helping them in their naturalization process. Through this effort, SABA members have helped hundreds take the next step towards citizenship by answering questions and helping to complete naturalization applications.

SABA SAWAN Bootcamps

In 2019 we began holding a series of professional development panels aimed at women, focusing on topics such as negotiating compensation and promotions, how to successfully pitch in-house counsel, and networking skills for business development. These panels allow us to support our membership as we seek parity between the genders in the legal profession.

SABA Foundation – SABA’s Charitable Arm

SABA Foundation is the charitable arm of SABA, which identifies and supports organizations that provide critical services to the most vulnerable members of the South Asian community. The SABA Foundation supports a wide variety of community-based organizations that provide legal services, advocate for policies that protect the rights of South Asians, or promote access to justice for our community. In recent years, a majority of SABA Foundation’s funding has gone to organizations that support victims of domestic violence, provide immigration services, promote access to justice and fight racial and religious discrimination in communities across North America.

South Asian Professional and Affiliate Organizations

South Asian communities face unique issues from other minority groups, arising from different cultural backgrounds, immigration histories, and shared community concerns, particularly after the events of September 11, 2001. Professional organizations throughout the country have recognized the unique contribution of South Asians within these professions, most notably the American Medical Association’s House of Delegates which recognized the American Association of Physicians of Indian Origin (AAPI) as a Professional Interest Medical Association.^{xvi} Indeed, South Asian organization begins at the law school level. The North American South Asian Law Students Association (NASALSA) is a 501(c)(3) non-profit organization that was established in 1997 to create a network South Asian for law students and legal professionals.^{xvii} NASALSA is an active affiliate of SABA, has over 15 active chapters

^{xvi} See <https://www.ama-assn.org/house-delegates/hod-organization/member-organizations-ama-house-delegates>

^{xvii} See <https://www.nasalsa.org/about>

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throughout the country and holds a separate annual conference.

SABA's Goals and Reciprocal Benefits as an Affiliate of the ABA

SABA members have been active within the ABA, including holding leadership positions and participation at ABA meetings. In 2017, SABA applied to be recognized as a National Affiliate and was successful in joining the ABA Young Lawyers Division. SABA is now applying for representation in the ABA House of Delegates as an affiliated organization under Section 6.8 of the ABA Constitution

Through affiliation with the ABA, SABA seeks to have a meaningful and mutually beneficial relationship. For example, SABA will devote energy to assist the ABA in its goal to open the legal market in the Asian sub-continent to foreign attorneys and firms. In addition, as an affiliate member of the ABA, SABA would like to provide reciprocal benefits to ABA members for attendance at SABA's annual conference. We welcome the opportunity to further discuss opportunities for collaboration between our organizations.

Conclusion

For the reasons set forth above, we respectfully submit that SABA's approval as an affiliate of the ABA would satisfy goals of both organizations, allow them to expand together and serve the broader community within the United States. If you have any questions or need more information, please do not hesitate to contact us.

Respectfully Submitted,



Aastha Madaan
SABA – North American Executive Council Member
2020, Principal Sponsor

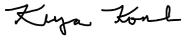
Sponsor Consent

Proposal to Amend Section 6.8 of the American Bar Association Constitution to provide for the representation of the South Asian Bar Association of North America as an affiliated organization in the House of Delegates.

By signing below, I indicate my consent to sponsor the above-named Proposal:



Monique Bhargava



Keya Koul

DocuSigned by:
Rippi Gill
AE2D4D5ABEB9463...

Rippi Gill



Aneesh Mehta



Anuradha Gwal



Ramana Rameswaran

SPONSORS: Theodore A. Howard (Principal Sponsor), Barbara Bergman, Randall Chapman, Walter Eggers III, Patrice James, Hon. Mark Juhas, Hon. Maria A. Kahn, Carlos J. Martinez, Alanah Odoms Hebert, Robert N. Weiner, Brendon Woods, Nikole M. Nelson, Miriam S. Gohara

PROPOSAL: Amends Article 31, § 31.7 of the Constitution concerning the Standing Committee on Legal Aid and Indigent Defendants

Amends §31.7 of the Constitution to read as follows (additions underlined, deletions struck through):

1 **§31.7 Legal Aid and Indigent ~~Defendants~~Defense.**
2 The Standing Committee on Legal Aid and Indigent ~~Defendants~~Defense, which consists
3 of not more than eleven members, ~~has~~shall have jurisdiction over matters
4 ~~relating~~related to the creation, maintenance, and enhancement of effective civil legal aid
5 and ~~defender~~criminal indigent defense delivery systems and services respecting;
6 including by: (a) advocating for meaningful access to the justice system for all; (b)
7 supporting viable and effective plans to increase funding for legal aid and indigent
8 defense delivery systems and services; and (c) developing standards and policy,
9 disseminating best practices, and providing training and technical assistance.
10 ~~(a) the administration of justice as it affects the poor;~~
11 ~~(b) remedial measures intended to help the poor protect their legal rights; and~~
12 ~~(c) the establishment and efficient maintenance of legal aid and defender organizations~~
13 ~~and cooperation with other interested agencies, whether public or private.~~

REPORT

We, the appointed members of the Standing Committee on Legal Aid and Indigent Defendants (SCLAID), propose the foregoing amendment of the Standing Committee's jurisdictional statement contained within the ABA Bylaws under Article 31, § 31.7. The proposed, amended statement reads:

Legal Aid and Indigent Defense. The Standing Committee on Legal Aid and Indigent Defense, which consists of not more than eleven members, shall have jurisdiction over matters related to the creation, maintenance, and enhancement of effective civil legal aid and criminal indigent defense delivery systems and services, including by: (a) advocating for meaningful access to the justice system for all; (b) supporting viable and effective plans to increase funding for legal aid and indigent defense delivery systems and services; and (c) developing standards and policy, disseminating best practices, and providing training and technical assistance.

In the decades since SCLAID's jurisdictional statement was last amended, both the committee itself and the environment in which it operates have evolved significantly. In marking the 100th anniversary of its founding at the 2020 Annual Meeting, SCLAID believes that this is the ideal time to reexamine its jurisdictional statement and to revise it to more accurately reflect the committee's current and future mission within the Association. The key substantive changes to the statement are set forth below:

- 1) Name Change: The committee's name should be revised to change the word "Defendants" to "Defense." Not only does such a change reflect a better parallel construction ("Legal Aid" and "Public Defense"), it also corrects what SCLAID believes is an inappropriate focus: The emphasis in the name should be on the practice of public defense, not on the defendants themselves as individuals. Note that this change does not affect the existing SCLAID acronym.
- 2) Access to Justice: The core function of funded legal representation today is commonly understood and framed as the provision of meaningful access to the justice system. The term-of-art "access to justice" is comprehensible and commonly used, which was not the case the last time SCLAID's jurisdictional statement was amended. Provision (a) has been amended to both utilize these current concepts and terminology as well as to directly align SCLAID's mission with ABA Goal IV's objective: "Assure meaningful access to justice for all persons." Thus, provision (a), in part, replaces the language "the administration of justice as it affects the poor" in order to clarify that the concept of access to justice, and SCLAID's mission to support it, pertains to addressing and overcoming all barriers to the justice system experienced by the clients served by legal aid and public defender programs, barriers which usually include—but may not be exclusively—those of a financial nature. Furthermore, in the context of access to justice, SCLAID's focus continues to be on legal service delivery through civil legal aid and public defender programs and the clients that they serve, though with the recognition that there are a number of entities within the ABA also carrying out Goal IV in other areas or with different ranges of focus,

such as by the Standing Committee on Pro Bono and Public Service or the Criminal Justice Section. Accordingly, SCLAID's use of "access to justice" here is nonexclusive, as the work of all ABA Goal IV entities is complementary to SCLAID's area of focus and continues to present opportunities for collaboration and cooperation, which are priorities for the committee.

- 3) Funding for Legal Aid and Public Defense: Adequate and appropriate public funding for civil legal aid and public defense has emerged as a growing policy priority for the ABA.¹ A particular focus has been on enhancing and defending Congressional funding for the Legal Services Corporation.² SCLAID has been a primary proponent of these policies and a key entity in carrying out the ABA's advocacy in this regard. Provision (b) has been amended in the proposal to expand upon and to better articulate SCLAID's central role in promoting the availability of funding necessary to ensure access to justice. Furthermore, in both this provision and in the language preceding clause (a), the more expansive term "delivery systems and services" is used rather than simply "services" with the intent to reflect the evolution in the means and manner by which legal services may be delivered by legal aid advocates and public defenders, particularly through innovative uses of technological systems. Throughout the amended provision, however, the use of "delivery systems" is limited solely to mean systems that deliver legal services from civil legal aid and indigent defense staff to members of the public.
- 4) Supporting both Systems and Lawyers: Over the years, SCLAID has focused on promulgation of a wide range of standards, policies, studies, and reports as a means of carrying out its mission to both support and promote improvement of civil legal aid and public defender programs. SCLAID has also exerted enormous influence on state and local bar associations through initiatives such as its Bar Improvement Program, focused on improvement of public defense systems, and its Resource Center for Access to Justice Initiatives, focused on development of the types of Access to Justice Commissions that have now proliferated across the country. SCLAID will continue its long-standing advocacy for constant improvement of these systems, but at the same time it is evolving to also focus directly on the lawyers delivering representation within in these systems and examining how it can better support their training and professional development needs through membership in the ABA. The existing provision (c) has been adapted and moved into the amended language's initial statement of SCLAID's jurisdiction, and a new provision (c) has been added to reflect all of the work SCLAID has done, and will continue to do, to support ongoing improvement in the systems delivering legal aid and public defender services, as well as the lawyers themselves.

¹ See, e.g., ABA House of Delegates adopted policies 01M106A, 05A107, 06A112A and B, 10A105, 12A107C, 18M114.

² See, e.g., ABA House of Delegates adopted policies 89M8F, 11M10E, 13M10A.

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In summary, SCLAID's continually evolving mission to carry out ABA Goal IV in an ever-changing landscape of funded legal service delivery necessitates the long-overdue and significant update of its jurisdictional statement in the ABA Constitution set forth above.

Respectfully submitted,

Theodore A. Howard, Chair
ABA Standing Committee on Legal Aid and Indigent Defendants

SPONSORS: Christina Plum (Principal Sponsor), Aurora Austriaco, Roula Allouch, William D. Johnston, Tommy Preston, Jr.

PROPOSAL: Amends §44.2(b) of the Rules of Procedure of the House of Delegates to give a presenter five minutes to present a resolution when the Chair of the House of Delegates invokes the rules of limited debate.

§44.2 Time Limits.

1 (b) A person presenting a resolution (either as a main motion or as a motion to
2 substitute) or a minority report may speak for not more than ten minutes in making such
3 presentation, in addition to any right such person may have to close debate. A
4 person may not otherwise speak for more than five minutes on the same question. No
5 person may speak for more than five minutes in closing debate. If there is no opposition
6 to a resolution, at the discretion of the Chair of the House of Delegates, the presenter
7 will have three minutes to present; each subsequent speaker will have a maximum of
8 two minutes; and the presenter may have two minutes to close. On recommendation of
9 the Committee on Rules and Calendar, the House may, by a vote of two-thirds of the
10 delegates voting, extend or reduce the time limitations provided for in this Section.

(Legislative Draft – Additions underlined; deletions struck through)

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9 of the Committee on Rules and Calendar, the House may, by a vote of two-thirds of
10 the delegates voting, extend or reduce the time limitations provided for in this Section.

REPORT

This amendment to §44.2(b) of the Rules of Procedure of the House of Delegates (“House Rules”) makes a modest change to the rules of limited debate, providing the presenter two additional minutes to speak. As explained below, this amendment does not affect the Chair’s discretion to invoke the rules of limited debate. Instead, the amendment ensures that every presenter will have a minimum of five minutes to present the Resolution with Report, even if the rules of limited debate are invoked.

Background

At each meeting of the ABA House of Delegates, between twenty-five and forty-five resolutions are considered. Most resolutions are not formally opposed, meaning that no one files a “salmon slip” indicating a desire to speak in opposition to the resolution or to amend the resolution. If there is no opposition to a resolution, the Chair of the House of Delegates (“Chair”) has the option to invoke the rules of limited debate as the debate on that resolution begins.

Under the rules of limited debate, the presenter of a resolution has three minutes to present the resolution, each subsequent speaker has two minutes to speak, and the presenter has two minutes to close. See House Rules, §44.2(b). In contrast, if the rules of limited debate are not invoked, the presenter has ten minutes to present the resolution, each subsequent speaker has five minutes to speak, and the presenter has two minutes to close. See *id.*

There are benefits and downsides to invoking the rules of limited debate. The obvious benefit is that debate on an unopposed resolution generally takes three to seven minutes—as opposed to ten or more minutes under the time limits for full debate—depending on whether there is more than one speaker and whether the presenter chooses to waive the right to close. Saving time on unopposed matters provides the House additional time to consider contested matters and other business. Further, as a practical matter, it is not possible to spend ten or twenty minutes on every debate and still finish the work of the House in eight to twelve hours.

One downside of invoking the rules of limited debate is that the proponents of a resolution have significantly less time to explain the resolution and bring attention to the important issues on which the ABA is taking a position. Both proponents of resolutions and members of the House have, at times, expressed concern that three minutes is an insufficient amount of time for the presenter to fully explain a resolution and the issues it addresses. They have also expressed concern in the significant difference in debate time provided when the rules of limited debate are invoked for some unopposed resolutions and not others.

Another downside of invoking the rules of limited debate is that the presenter does not know if the Chair will invoke the rules of limited debate until the debate begins. Therefore, the presenter is required to prepare a short version of remarks (up to three minutes) and a long version of remarks (up to ten minutes). To reduce this uncertainty, presenters have, at times, approached the Committee on Rules and Calendar in advance to ask that the Chair commit not to invoke the rules of limited debate. Some even offer not to have second or third speakers or pledge that their presenter will use less than the allotted ten minutes allowed for a full debate.

Proposed Amendment

Having considered the benefits and downsides associated with invoking the rules of limited debate, and being mindful of the need to preserve the Chair's discretion to invoke the rules of limited debate as needed, the individual members of the Committee on Rules and Calendar propose this modest amendment to §44.2(b) of the House Rules. If this amendment is adopted, the presenter will be guaranteed five minutes to explain the resolution and the issue it addresses. This will enable presenters to better prepare their remarks and will also provide the House additional information on the unopposed resolution.

It is worth repeating that this amendment will not require the Chair to invoke the rules of limited debate. The Chair will continue to have discretion to invoke the rules of limited debate when he or she believes it is appropriate, including when the press of other business requires that less time be spent on an unopposed resolution.

Further, this amendment does not change any of the time limits for other speakers. Specifically, under the rules of limited debate, speakers after the presenter will continue to have two minutes each.

In conclusion, this modest change to the House Rules will address some of the concerns raised about the rules of limited debate while still preserving the benefits afforded by use of the rules of limited debate and the Chair's discretion to invoke those rules as needed.

Respectfully Submitted,

Christina Plum
Aurora Austriaco
Roula Allouch
William Johnston
Tommy Preston, Jr.

August 2020

SPONSORS: Bob Carlson (Principal Sponsor), Nate Alder, Deborah Enix-Ross, Paula Frederick, Tom Grella, Scott LaBarre, Jennifer Parent, Wendy Shiba, Mary Torres, Gene Vance, Janet Welch, Sheila Willis, Amie Martinez, Eileen Letts, Hilary Young

PROPOSAL: Amends §45.1 and §45.2 of the Rules of Procedure of the House of Delegates to add the requirement that a resolution must advance one or more of the ABA's Four Goals.

1 **§45.1 Resolutions with Reports Generally.**
2

3 A resolution with report must be concise, in writing and submitted to the Secretary not
4 later than the date prescribed by the Committee on Rules and Calendar. Unless
5 authorized by the Committee on Rules and Calendar, the report accompanying a
6 resolution may not exceed 15 pages in length. The Secretary shall have the material in
7 the body of the resolution and report printed and shall distribute resolutions and reports
8 at least 15 days before the meeting of the House at which they are to be considered.
9 Appendices need not be printed.

(Legislative Draft – Additions underlined; deletions struck through)

1 **§45.1 Resolutions with Reports Generally.**
2

3 A resolution with report must be concise, in writing and submitted to the Secretary not
4 later than the date prescribed by the Committee on Rules and Calendar. The proponents
5 of a resolution must provide a rationale setting forth how the resolution advances one or
6 more of the Association's Four Goals. Unless authorized by the Committee on Rules and
7 Calendar, the report accompanying a resolution may not exceed 15 pages in length. The
8 Secretary shall have the material in the body of the resolution and report printed and shall
9 distribute resolutions and reports at least 15 days before the meeting of the House at
10 which they are to be considered. Appendices need not be printed.

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§45.2 Resolutions.

(a) A resolution of a delegate, section, committee, state or local bar association, affiliated organization or member may be considered by the House of Delegates only if:

(1) the resolution proposes new policy or a change of policy, or reaffirms existing Association policy that has not been approved within the last ten years;

(2) the resolution is accompanied by a written report;

(3) the report accompanying the resolution contains a statement of the reasons for the resolution;

(4) the resolution is set forth at the beginning of the report so as to distinguish the resolution clearly from the body of the report, is in a style that facilitates consideration without confusion, and contains no recitals or supporting arguments;

(5) the report contains no language that commits the Association to a policy not set forth in the resolution;

(6) the report shows that it has been approved by the governing body of the sponsoring entity;

(7) in the case of a resolution proposing or opposing specific legislation, the report includes a complete summary of the phase of legislation under consideration together with relevant excerpts from the proposed bill, and five copies of the bill have been provided for the use of the Chair; and

(8) in the case of a resolution calling for action that may result in expenditures, the amount needed is shown.

(Legislative Draft – Additions underlined; deletions struck through)

§45.2 Resolutions.

(a) A resolution of a delegate, section, committee, state or local bar association, affiliated organization or member may be considered by the House of Delegates only if:

(1) the resolution proposes new policy or a change of policy, or reaffirms existing Association policy that has not been approved within the last ten years;

(2) the resolution must advance one or more of the Association's Four Goals;

~~(2)-(3)~~ (3) the resolution is accompanied by a written report;

~~(3)-(4)~~ (4) the report accompanying the resolution contains a statement of the reasons for the resolution;

~~(4)-(5)~~ (5) the resolution is set forth at the beginning of the report so as to distinguish the resolution clearly from the body of the report, is in a style that facilitates consideration without confusion, and contains no recitals or supporting arguments;

~~(5)-(6)~~ (6) the report contains no language that commits the Association to a policy not set forth in the resolution;

~~(6)-(7)~~ (7) the report shows that it has been approved by the governing body of the sponsoring entity;

~~(7)-(8)~~ (8) in the case of a resolution proposing or opposing specific legislation, the report includes a complete summary of the phase of legislation under consideration together

20 with relevant excerpts from the proposed bill, and five copies of the bill have been
21 provided for the use of the Chair; and
22 ~~{8}~~ (9) in the case of a resolution calling for action that may result in expenditures, the
23 amount needed is shown.

REPORT

In October 2019, a Working Group on House Operations was appointed by the Chair of the House of Delegates, William R Bay, in response to the challenges several bar associations are facing, or anticipate facing, in connection with full participation in the agenda of the House of Delegates.

The Working Group has been soliciting comments from individuals and entities and reviewing issues regarding the participation of state bars in the work of the House of Delegates as it relates to resolutions, the calendar, recusals and related issues. To facilitate the collection of suggestions and input, the Working Group established the HODworkinggroup@americanbar.org mailbox.

In addition, during the 2020 Midyear meeting in Austin, on Saturday, February 15, 2020, the Working Group conducted a listening session for those wishing to express their comments and concerns. A common theme that arose from this session was the need to establish whether proposed resolutions for the House of Delegates advance one or more of the ABA's Four Goals. This resolution amends the House Rules of Procedure to add the requirement that the proponents of a resolution must identify, at the time of submission, how the resolution advances one or more of the ABA's Four Goals.

The proposed procedure for administering this change is outlined below:

A question will be added to the General Information Form and/or Executive Summary asking proponents of a resolution to identify which of the ABA's Four Goals the proposed resolution seeks to advance, along with a brief rationale. The Rules and Calendar Committee ("Committee"), upon receipt of a proposed resolution and its accompanying forms, will evaluate the response to this question and make a determination regarding whether the resolution does advance one or more of the ABA's Four Goals. The Committee's determination shall be shared with the proponents of the resolution in writing along with any comments/feedback generated from the Committee's standard resolution review process.

If the Committee determines the proposed resolution **does not** advance one or more of the ABA's Four Goals and the proponents agree, the proposed resolution will not be calendared. If the proponents disagree with the Committee's determination, the proponents may appeal the Committee's ruling to the House of Delegates. The decision to appeal the Committee's determination must be communicated in writing to the ABA Secretary no later than 14 days after receipt of the Committee's determination. To allow for adequate review by the House of Delegates, resolutions that the Committee has determined should not be calendared will still be included in the HOD Book of Resolutions with reports. As a part of the Summary of Resolutions sent approximately six weeks prior to the House of Delegates meeting, any resolutions determined by the Committee to not advance one or more of the ABA's Four Goals shall be clearly marked as such and considered "not calendared."

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At the commencement of the House of Delegates meeting, during the report of the Chair of the Committee, prior to the adoption of the Final Calendar, a full House vote shall be taken on those resolutions that were “not calendared.” A presenter from the Committee will introduce and move to *not* calendar the resolution in question on the basis of *failure to establish advancement of one or more of the ABA’s Four Goals*. A presenter from the proponents will be given an opportunity to present his/her argument that such resolution does advance one or more of the ABA’s Four Goals. The presenter from the Committee will then be given an opportunity to close.

A majority vote of the House shall be required to “overrule” the determination of the Committee. Those resolutions which receive the required number of votes shall be included with those presented for adoption in the Final Calendar and heard in the order in which they would have appeared before the House had they been originally calendared. Those resolutions for which the required number of votes was *not* obtained shall *not* be included in the House of Delegates Agenda for that meeting.

Respectfully Submitted,

Bob Carlson
Nate Alder
Deborah Enix-Ross
Paula Frederick
Tom Grella
Scott LaBarre
Jennifer Parent
Wendy Shiba
Mary Torres
Gene Vance
Janet Welch
Sheila Willis
Amie Martinez
Eileen Letts
Hilary Young

August 2020

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON CONSTITUTION AND BYLAWS
REPORT TO THE HOUSE OF DELEGATES

The Standing Committee on Constitution and Bylaws is directed by the Bylaws to study and make appropriate recommendations on all proposals to amend the Constitution and Bylaws, except for certain specified proposals that are submitted by the Committee on Scope and Correlation of Work.

Since its last report at the 2019 Annual Meeting, the Committee received and reviewed five proposals to amend the Association's Constitution and Bylaws and House Rules of Procedure. The Committee met during the Midyear Meeting on February 15, 2020 in Austin, Texas, and on April 27, 2020, via video conference call. Subsequent to the Committee's April 27, 2020 meeting, one proposal was withdrawn by the proponent. The Committee herewith makes its recommendations on the proposed amendments as follows:

Proposal 1

The Committee considered a proposal to amend §1.2 of the Constitution to include the following language as one of the purposes of the Association: "to defend the right to life of all innocent human beings, including all those conceived but not yet born." The Committee voted to recommend to the House that the proposal is out of order and, accordingly, that it not be approved because (i) it is incompatible with the Supreme Court's interpretation of the Constitution of the United States that the Association is committed to uphold and defend, (ii) it would be redundant and unnecessary if the Court were to adopt the interpretation of the U. S. Constitution advocated by the proponent, and (iii) the Association's Constitution is designed to state the overarching purposes of the Association; it is not the appropriate place to enumerate specific rights or articulate positions of the Association on specific issues of law or policy within the overarching purposes already stated.

Proposal 2

The Committee considered a proposal to amend §6.8 of the Constitution to include the South Asian Bar Association of North America (SABA) as an affiliated organization of the American Bar Association and be represented in the ABA House of Delegates accordingly. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.

Proposal 3

The Committee considered a proposal to amend §31.7 of the Constitution to change the name of the Standing Committee on Legal Aid and Indigent Defendants to the Standing

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Committee on Legal Aid and Indigent Defense and to amend its jurisdictional statement. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.

Proposal 4

The Committee considered a proposal to amend §44.2(b) of the Association's House Rules of Procedure to provide a presenter five minutes to present a resolution when the Chair of the House of Delegates invokes the rules of limited debate. The Committee approved the proposal as to form and substance.

Respectfully submitted,

Michael Haywood Reed, Chair
Hon. John Preston Bailey
M. Joe Crosthwait, Jr.
Hon. James S. Hill
Joseph D. O'Connor
Barbara Mendel Mayden
Cynthia Nance
Mary L. Smith,
Board of Governors Liaison

**AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION
REPORT TO THE HOUSE OF DELEGATES**

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges all employers in the legal
- 2 profession to implement, maintain, and encourage the use of paid family leave policies
- 3 for the birth, adoption, or foster placement of a child.

REPORT

This resolution urges all employers in the legal profession to implement, maintain, and encourage the use of paid family leave policies for the birth, adoption, or foster placement of a child.

Relevance to this Association

The ABA is committed to the elimination of bias and the enhancement of diversity in the legal profession. This commitment is not only recognized in prior resolutions passed by the House of Delegates, but also by the adoption of Goal III, which promotes full and equal participation in the Association, the legal profession, and the judicial system.

The Association has long recognized the importance of equal rights for women and the need to protect women against employment discrimination because of their childbearing role, as well as the need for leave protections in the workplace. In 1987, the House of Delegates passed a resolution endorsing a public policy, in the form of a federal minimal requirement, of *unpaid*, leave for a reasonable time following the birth or adoption of a child or to care for infants, newly-adopted children, or seriously ill children.¹ In 1988, the House endorsed a resolution that endorsed a broader public policy of job protection for leave related to one's own disabilities and leave to care for family.²

While this resolution is similar to this long line of related Association policies, it does not have the same legislative language and scope as these prior resolutions. Rather, this resolution calls upon all employers, only within the legal profession, to implement, maintain, and encourage the use of paid family leave policies for the birth, adoption, or foster placement of a child. This resolution specifically calls for leave related to these specific circumstances, rather than the broader framework of the Family and Medical Leave Act (FMLA). This is not to dismiss the need for paid parental leave, and indeed paid family and medical leave period, in the broader legal framework of the country, but it is to encourage paid leave within a segment that needs the measure now and that is directly within the scope of this Association's policies and members.

Importance of Paid Parental Leave in Improving the Legal Profession

Paid parental leave supports gender equality and working parents. It gives working parents the support they need to be there for their families and to adapt to their "new normal" during the first few months after a child's birth, adoption, or foster placement.³ It also allows new parents time to bond with and encourage the growth and well-being of their children. Employers adopting paid parental leave telegraph that they care about the

¹ See 87A119, which was proposed by the ABA Young Lawyers Division.

² Resolution 88M111, which was proposed by the ABA Section on Individual Rights & Responsibilities.

³ Michelle P. Wimes, *Trends in Paid Parental Leave Come to the Legal Industry: A Call to Action for Law Firms?*, Ogletree Deakins Insights (Jan. 23, 2018), <https://ogletree.com/insights/2018-01-23/trends-in-paid-parental-leave-come-to-the-legal-industry-a-call-to-action-for-law-firms/>.

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health and wellness of not only the attorneys who are crucial to the employers' success but also the attorneys' families. Full and equal access to paid leave for the birth, adoption, or foster placement of a child by employees of all genders aids in the retention of diversity of the profession by reducing turnover while boosting productivity and employee morale.

Lack of Institutional Support for Working Parents

According to the U.S. Department of Labor, in 2018, less than 17 percent of private sector workers in the United States work for employers that offer paid family leave.⁴ Employees of many employers may have access to up to 12 weeks of unpaid leave for the birth or adoption of a child under the Family and Medical Leave Act, depending on the size of the employer.⁵ Nevertheless, it does not apply to about 40 percent of workers,⁶ and millions of people cannot afford unpaid leave.⁷ Further, the U.S. is one of only two countries in the world, along with Papua New Guinea, that have no statutory national policy of paid maternity leave.⁸

This is not to say that state-mandated paid family leave across all professions is not gaining support. A number of states have adopted their own laws providing for paid family leave⁹ (not specific to but certainly inclusive of the legal profession), including: California, Connecticut, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Washington, and the District of Columbia.¹⁰ These programs vary in application and requirements, but all provide at a minimum that leave for new parents be at least partially paid, funded mostly through employee contributions.¹¹

⁴ Bureau of Labor Statistics, *Employee Benefits Survey- Leave Benefits Access- Table 32* (March 2018), available at <https://www.bls.gov/ncs/ebs/benefits/2018/ownership/civilian/table32a.htm>.

⁵ Family and Medical Leave Act, DOL.gov (2019), <https://www.dol.gov/whd/fmla/> (last visited April 15, 2020).

⁶ FMLA is Working, DOL.gov (2019), https://www.dol.gov/whd/fmla/survey/fmla_survey_factsheet.pdf (last visited April 15, 2020).

⁷ Family and Medical Leave in 2012: Detailed Results Appendix, available at <https://www.dol.gov/asp/evaluation/fmla/FMLA-Detailed-Results-Appendix.pdf> (last visited April 15, 2020).

⁸ Gretchen Livingston and Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, Pew Research Center (Dec. 18, 2019), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/>; see also *America is the Only Rich Country without a Law on Paid Leave for New Parents*, The Economist (July 18, 2019), <https://www.economist.com/united-states/2019/07/18/america-is-the-only-rich-country-without-a-law-on-paid-leave-for-new-parents>

⁹ This leave is not limited to parental leave; it is defined as family and medical leave and typically allows employees to take leave that can be used to bond with a child within one year of the child's birth or placement for foster care or adoption, to care for a family member with a serious health condition, to address certain military family needs, or to address certain medical and non-medical needs arising from domestic violence, also known as "safe time." See, e.g., Conn. Gen. Stat. § 31-51pp *et seq.*; N.J. Stat. Ann. § 43-21-25 *et seq.*; see also *infra* note 8.

¹⁰ R.I. Gen. Laws § 28-3901 *et seq.*; Cal. Unemp. Ins. Code § 2601 *et seq.*; N.J. Stat. Ann. § 43-21-25 *et seq.*; N.Y. Workers' Comp. Law § 200 *et seq.*; D.C. Code Ann. § 32-541.01 *et seq.*; Wash. Rev. Code *et seq.* 50A.04.005; Conn. Gen. Stat. § 31-51pp *et seq.*; Or. Enrolled H.B. 2005-B.

¹¹ See *Comparative Chart of Paid Family and Medical Leave Laws in the United States*, A Better Balance, available at <https://www.abetterbalance.org/resources/paid-family-leave-laws-chart/> (updated Jan. 27, 2020; last visited April 15, 2020).

For the most part, these policies are gender-neutral. However, a look at the Chamber Associate Work/life chart shows that secondary caregiver leave is often a mere fraction of primary caregiver leave. Often, societal pressures have a chilling effect on employees—especially male employees—from taking parental leave under the Family Medical Leave Act, relevant state parental leave laws, or employer leave policies. In a survey by Dove Men+Care, 73 percent of fathers said there is little workplace support for them, and 21 percent said they feared losing their job if they took the full paternity leave available.¹²

Several states have enacted legislation that attempts to address these important issues. For instance, the Connecticut and Massachusetts laws provide 12 weeks of leave in any 12 month period—which can be taken intermittently or all at once—to any worker who works for an employer that employs at least one employee, regardless of sex or gender identity. Because the program is funded by a small payroll tax, it is the government, and not the employer, who pays benefits to the worker when the worker is on leave—in effect, treating the parental leave program similar to an insurance fund.¹³

The problem, however, cannot be cured simply by having leave being available. Many parents also struggle with the intense pressure to sacrifice everything for their jobs and taking leave can often be perceived as a lack of commitment to that job—which can have devastating effects on career progression and advancement. According to a PwC survey, 48 percent of new mothers said they were overlooked for advancement because they had children, and 42 percent said they were nervous about what having a child would do to their careers.¹⁴ These factors—no access to paid or unpaid leave policies, inability to afford unpaid leave and societal pressures have created a scenario where many parents lack the support needed to survive and thrive in the workplace.

Turning to the legal profession specifically, more employers are developing paid family leave policies.¹⁵ Law firms are increasing their paid leave,¹⁶ and a few governmental

¹² Promundo Global, *Helping Dads Care*, available at <https://promundoglobal.org/resources/helping-dads-care/#> (last visited April 15, 2020).

¹³ See Conn. Public Act No. 19-25; Mass. St. 2018, c.121.

¹⁴ PWC, *Time to talk: What has to change for women at work*, available at <https://www.pwc.com/gx/en/about/diversity/iwd/international-womens-day-pwc-time-to-talk-report.pdf> (last visited April 15, 2020).

¹⁵ Chambers Associate, *Work/life and Benefits*, available at <https://www.chambers-associate.com/law-firms/worklife-and-benefits> (last visited April 15, 2020).

¹⁶ Staci Zaretsky, *Biglaw Firm Announces 'Industry-Leading' Parental Leave Policy*, AboveTheLaw.com (Aug. 6, 2019), <https://abovethelaw.com/2019/08/biglaw-firm-announces-industry-leading-parental-leave-policy/>; Roy Strom, *Sidley Austin Increases Paid Parental Leave for U.S. Lawyers*, BigLawBusiness.com (Aug. 2, 2019), <https://biglawbusiness.com/sidley-austin-increases-paid-parental-leave-for-u-s-lawyers>; Joe Patrice, *Firm Offering Unlimited Parental Leave for All Parents*, AboveTheLaw.com (Oct. 2, 2018), <https://abovethelaw.com/2018/10/firm-offering-unlimited-parental-leave-for-all-parents/>.

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entities are even following suit.¹⁷ Yet, law firms are not immune from the internal and external forces that plague other industries and impact the way leave is taken.

The gender-role stereotypes exist in the legal professional as well. As *Above the Law* Editor Joe Patrice wrote,

[s]o when making the rational decision as a family unit knowing that there's a sentiment — so engrained in the machismo of the legal industry that it's asserted as a no-brainer by the legal press — that attorneys all but deserve to have their careers derailed for taking leave, then dad's going to be the one to keep working.¹⁸

Gender-neutral, paid parental leave is critical to providing support to working parents in the legal profession.

While the ABA already has an active voice in seeking to eliminate the gender wage gap, the adoption of this Resolution will amplify that position. The voice of the American Bar Association is an important part of the effort to eliminate the gender wage gap. Through this policy, the ABA will be provide a means by which legal employers may lessen the gender wage gap in their organizations and continue to promote one of its goals in eliminating bias in the legal profession.

Respectfully submitted,

J. Logan Murphy
Chair, Young Lawyers Division
August 2020

¹⁷ Joe Killian, *Judicial branch expanding parental leave*, The Progressive Pulse (Sept. 10, 2019), available at <http://pulse.ncpolicywatch.org/2019/09/10/judicial-branch-will-work-with-new-parents-on-court-schedules-in-addition-to-paid-family-leave/>.

¹⁸ Patrice, *supra* note 15.

GENERAL INFORMATION FORM**1. Summary of Resolution**

This resolution urges all employers in the legal profession to implement, maintain, and encourage the use of paid family leave policies for the birth, adoption, or foster placement of a child.

2. Approval by Submitting Body

The ABA Young Lawyers Division Assembly approved this resolution on February 15, 2020.

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

No.

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

[Resolution 104D from the 2018 Annual meeting](#) encouraged governments to enact legislation providing employees with job-guaranteed paid sick days and job-guaranteed paid family and medical leave. See 18A104D. This is ancillary to that resolution and that policy would not be affected by adoption of this resolution.

Resolution 119 from the 1987 Annual Meeting supported legislation for minimum requirements for unpaid parental leave. See 87A119. This outdated policy would be supplanted in part by the paid provisions of this resolution.

[Resolution 111 from the 1988 Midyear meeting](#) supported legislation for minimum requirements for reasonable, unpaid, family and medical leave act. See 88M111. This resolution builds on the issues identified in that 1988 resolution by urging legal employers to provide paid leave.

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.

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After adoption, the Young Lawyers Division will work with the Governmental Affairs Office to determine the most effective way to advocate for this Resolution.

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

None.

9. Disclosure of Interest.

None.

10. Referrals

Business Law Section
Center on Children and the Law
Criminal Justice Section
Government and Public Sector Lawyers Division
Judicial Division
Law Student Division
Section of Civil Rights and Social Justice
Section of Family Law
Section of Labor and Employment
Section of Litigation
Tort, Trial, and Insurance Practice Section
Commission on Women in the Profession
Solo, Small Firm and General Practice Division (GPSolo)
Law Practice Division
Civil Rights and Social Justice
National Association of Women Lawyers
National Conference of Women's Bar Associations

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

Dana M. Hrelc
ABA YLD Representative to the ABA House of Delegates
Horton, Dowd, Bartschi & Levesque, P.C.
90 Gillett Street
Hartford, CT 06105
860-522-8338
dhrelc@hdblfirm.com

Sheila M. Willis
ABA YLD Representative to the ABA House of Delegates

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803-740-7676
swillis@fisherphillips.com

Jamie Davis
ABA YLD Speaker
Walmart, Global Ethics & Compliance Dept.
479-531-4810
Jamie.davis@walmart.com

Christopher Jennison
ABA YLD Clerk - Author
301.538.5705
Chris.s.jennison@gmail.com

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House?)

Dana M. Hrelac
ABA YLD Representative to the ABA House of Delegates
Horton, Dowd, Bartschi & Levesque, P.C.
90 Gillett Street
Hartford, CT 06105
860-522-8338
dhrelac@hdblfirm.com

EXECUTIVE SUMMARY

1. Summary of the Resolution.

This resolution urges all employers in the legal profession to implement, maintain, and encourage the use of paid family leave policies for the birth, adoption, or foster placement of a child.

2. Summary of the issue that the resolution addresses.

Reasonable paid leave for the birth, adoption, or foster placement of a child is limited within the legal profession. Use of paid leave for those fortunate to have the option is often stigmatized. This resolution seeks to have more employers in the legal profession adopt and encourage use of paid leave.

3. Please explain how the proposed policy position will address the issue.

This policy seeks to have more employers in the legal profession adopt and encourage use of paid leave.

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

No minority or opposing views have been identified.

AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION
SECTION OF CIVIL RIGHTS & SOCIAL JUSTICE
LAW STUDENT DIVISION
SECTION OF STATE & LOCAL GOVERNMENT LAW
CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association supports the interpretation that
2 “race,” as included in antidiscrimination statutes, be not limited to the color of
3 one’s skin, but rather, includes other physical and cultural characteristics
4 associated with race;

5
6 RESOLVED, That the American Bar Association urges federal, state, local,
7 territorial, and tribal governments to enact legislation banning race discrimination
8 on the basis of the texture, style, or appearance of a person’s hair;

9
10 FURTHER RESOLVED, That American Bar Association encourages all federal,
11 state, tribal, territorial, and local court systems, in conjunction with state,
12 territorial, tribal and local bar associations, to carefully review their discrimination
13 policies and provide implicit bias training to eradicate discrimination on the basis
14 of the texture, style, or appearance of a person’s hair;

15
16 FURTHER RESOLVED, That the American Bar Association supports enactment
17 of the Creating a Respectful and Open World for Natural Hair Act of 2019 (S.
18 3167, H.R. 5309, 116th Congress) or similar legislation that advances
19 antidiscrimination on the basis of the texture, style, or appearance of a person’s
20 hair.

REPORT

Nappy. Kinky. Too curly. Too messy.

Across the country, Black women and men are asked to change their appearance to meet Eurocentric standards. One of the most common standards that is policed is within traditionally Black hairstyles. These changes often impact career opportunities and discrimination in school settings. This problem is not isolated to Black people outside of the legal profession. Indeed, the legal profession is often a microcosm for issues that Black people face in every other professional or school setting. Black lawyers have voiced this concern within the profession as well. Indeed, Tsedale Melaku, a Black woman attorney, wrote a book entitled “You don’t look like a lawyer: Black Women and Systemic Gendered Racism” where she outlines some of the micro- and sometimes macroaggressions that Black women face in the legal profession. Natural and traditionally Black hairstyles are far too often used as an implicit or explicit rationale for discriminatory practices towards Black people in legal settings. These practices likely contribute to the fact that Black lawyers constitute less than two percent of attorneys at 232 law firms across the country.¹

In 2010, Chastity Jones, a Black woman residing in Alabama, received a job offer as a customer service representative at a call center in Mobile. After Ms. Jones received her offer, she had a meeting with a Human Resources representative to discuss a scheduling conflict. During the meeting, Ms. Jones wore her hair in short, natural locs and was dressed in a business suit and pumps. Before Ms. Jones got up to leave, the Human Resources representative asked her whether she had her hair in dreadlocks. Ms. Jones said yes, and the HR representative noted that her job offer would cease “with the dreadlocks.”² When Ms. Jones asked what the problem was, she was told “they tend to get messy, although I’m not saying yours are, but you know what I’m talking about.”³ Her job offer disappeared when Ms. Jones said that she would not cut her hair.

At the time, the call center had an alleged race-neutral grooming policy:

All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines.... [H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable[.]⁴

Consequently, the Equal Employment Opportunity Commission (“EEOC”) filed a complaint on behalf of Ms. Jones. The complaint alleged that the call center’s use of its

¹ “2018 Vault/MCCA Law Firm Diversity Survey”, MCCA, (Nov. 2018) *available at* <https://www.mcca.com/wp-content/uploads/2018/11/2018-Vault-MCCA-Law-Firm-Diversity-Survey-Report.pdf>.

² *Equal Employment Opportunity Comm’n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1021-22 (11th Cir. 2016).

³ *Id.*

⁴ *Id.*

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race-neutral grooming policy to rescind Ms. Jones' job offer—after she declined to cut off her dreadlocks as a prerequisite for employment—was discrimination based on race and a violation of Title VII.

The district court dismissed the EEOC's complaint and concluded that the complaint did not adequately allege facts that demonstrated the call center racially discriminated against Ms. Jones.⁵ Further, the district court determined that “Title VII prohibits discrimination on the basis of immutable characteristics, such as race, color, or natural origin,” and “[a] hairstyle, even one more closely associated with a particular ethnic group, is a mutable characteristic.”⁶

Upon appeal, the Eleventh Circuit Court of Appeals upheld the dismissal. In its opinion, the court noted that the facts the EEOC alleged failed to prove that the respondent used the race-neutral grooming policy to discriminate against job applicants on the basis of race.⁷ Additionally, the court reasoned that based on precedent that states Title VII merely prohibits employers from discriminating against an employee or job applicant who is in a protected class on the basis of immutable characteristics, it does not prohibit discrimination against an individual's cultural practices. Further, the court suggested, that while the EEOC asserted, “if individual expression is tied to a protected trait, such as race, discrimination based on such expression is a violation of the law,” Title VII, despite having been enacted for more than fifty years, does not define the term “race” and therefore, it is difficult to ascertain what the term “race” covers under Title VII.⁸

After an appeal to the Supreme Court, the petition for writ of certiorari was denied.⁹

RELEVANCE TO THIS ASSOCIATION

The American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, and sexual orientation. The Association has adopted policies calling upon local, state, and federal lawmakers to prohibit such discrimination in employment, housing, public accommodations, credit, education, and public funding while seeking to eliminate such discrimination in all aspects of the legal profession.¹⁰ Additionally, the ABA Diversity and

⁵ *E.E.O.C. v. Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139 (S.D. Ala. 2014), *aff'd sub nom. Equal Employment Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 837 F.3d 1156 (11th Cir. 2016), opinion withdrawn and superseded, 852 F.3d 1018 (11th Cir. 2016), and *aff'd sub nom. Equal Employment Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (11th Cir. 2016).

⁶ *Id.* at 1023.

⁷ *Id.* at 1030.

⁸ *Id.* at 1026.

⁹ *E.E.O.C. v. Catastrophe Mgmt. Sols.*, 138 S. Ct. 2015, 201 L. Ed. 2d 244 (2018)

¹⁰ 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

Inclusion 360 Commission, a one-year presidential initiative established by past President Paulette Brown, explored the existence of implicit bias and what can be done to combat it. The ABA's fundamental position condemning such discrimination is based on its underlying commitment to the idea of equal opportunity – that no person should be denied basic civil rights because of the person's minority status. Employment, education, housing, and public accommodation decisions should be made only on the basis of individualized facts, not on the basis of presumptions arising from mere status.

Pursuant to this commitment and various policies within the Association, the ABA has actively participated in lobbying for effective federal anti-discrimination legislation.¹¹ The Association additionally has filed numerous Supreme Court amicus briefs urging the adoption of strong anti-discrimination positions.¹²

Black people who have natural hairstyles – referring to the texture of hair that may be kinky, tight curl patterns, braids and locs, and other traditional Black hairstyles – may face discrimination in the workplace, in education, and in other accommodations. This resolution reaffirms the ABA's commitment to ensuring that decisions about employment, education, housing, and public accommodations are made on the basis of bona fide qualification rather than mere stereotypes or prejudices.

DISCRIMINATION IN THE WORKPLACE

In early 2019, Unilever PLC, which creates Dove products, in coordination with the National Urban League, Color of Change and Western Center on Law and Poverty, formed the Creating a Respectful and Open World for Natural Hair (CROWN) Coalition with the goal of expanding legal protections for people of color who choose to wear their natural hair.¹³ The Coalition conducted a study surveying 2,000 working women aged 25 – 64, who are employed in an office setting, or had been employed in a corporate office within the last six months.¹⁴ The findings of this study revealed that Black women are 80 percent more likely to change their natural hair to conform to Eurocentric norms or

educational and employment opportunities regardless of race, color, religion, national origin, sex or sexual orientation); 8/06 (urging legislation prohibiting gender identity discrimination); 2/18 (supporting interpretation that Title VII includes prohibition on sexual orientation and gender identity discrimination); 1/19 (affirming that discrimination on the bases of sexual orientation, gender identity/expression, sex stereotyping, or pregnancy is sex discrimination prohibited by the Civil Rights Act of 1964 and other federal statutes).

¹¹ For example, prior to the enactment of the Americans with Disabilities Act of 1990 (the "ADA"), the ABA House of Delegates resolved to support "federal legislation which prohibits discrimination on the basis of disabilities." ABA Section on Individual Rights & Responsibilities and the Young Lawyers Division, Recommendation, 89A128.

¹² For example, in *State v. Georgia*, the ABA filed an amicus brief urging the Court to hold that Title II of the ADA lies within the scope of congressional authority under Section 5 of the 14th Amendment. See 2005 WL 1812486. In 2003, the ABA filed an amicus brief in *Lawrence v. Texas*, urging the Court to overturn its 1986 decision in *Bowers v. Hardwick*. See 2003 WL 164108.

¹³ *The Official Campaign of The CROWN Act*, THECROWNACT.COM, <https://www.thecrownact.com/> (last visited Mar. 29, 2020).

¹⁴ *The CROWN Research Study*, THECROWNACT.COM, <https://www.thecrownact.com/research> (last visited Mar. 29, 2020).

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expectations at work, and that Black women's hair is approximately three times more likely to be perceived as unprofessional in the workplace.¹⁵ Black women reported receiving formal grooming policies at a rate 30 percent higher than white women.¹⁶

Employees are protected from discrimination based on race, national origin, and color under VII of the Civil Rights Act of 1964.¹⁷ Title VII was specifically enacted to protect individuals based on their race and color. The natural and immutable characteristics of a person must be encompassed within that assessment.¹⁸

Failing to assimilate to majority white culture because an individual wears traditionally Black hairstyles based on a person's hair texture should be part of the evaluation regarding adverse action based on race.¹⁹ For example, when an employer expressly bars a hairstyle, fails to hire or promote based on "mutable characteristics," or adopts policies with "conservative" business images, those incidents should also violate Title VII.²⁰ Natural hairstyles and hairstyles worn traditionally by Black women and men are physical and cultural characteristics that are deeply tied to a person's race.²¹ Indeed, Black hair typically grows in a way that is tightly coiled and can be groomed into locs or other traditional Black hairstyles.²² As stated in the "Good Hair Study," "women of other races and ethnicities who have curly or textured hair may experience pressure to conform to these beauty standards; but black women, in a sense, are often pitted against them."²³ It is therefore important to consider, when analyzing the scope of protection under federal statutes, how adverse action against a Black individual on the basis of the texture, style, or appearance of that person's hair impacts Black people more generally in our society.

In 2016, the Perception Institute, "a consortium of researchers, advocates and strategists, conducted what they titled the "'Good Hair' Study," the first study to examine implicit and explicit attitudes related to black women's hair.²⁴ The Good Hair Study asked

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 42 U.S.C. §§ 2000(e)-2 to – 2000(e)-17 (2018).

¹⁸ Greene, D. Wendy, *Title VII: What's Hair (And Other Race-Based Characteristics) Got To Do With It?*, 79 COLO. L. REV. 1355 (2008).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009) (Title VII recognizes unlawful discrimination that encompasses discrimination for failure to conform to stereotypes and assumed stereotypes based on their group); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (Under the Immigration and Nationality Act, the inherent and immutable nature of a person's identity such as hair satisfies protected membership); Alexis m. Johnson, et al., *The "Good Hair" Study: Explicit And Implicit Attitudes Toward Black Women's Hair* 6, Perception Institute (Feb. 2017), <https://perception.org/wpcontent/uploads/2017/01/TheGood-HairStudyFindingsReport.pdf>.

²² Greene, D. Wendy, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair* in *EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987, 999- 1000 (2017).

²³ Alexis M. Johnson, et al., *The "Good Hair" Study: Explicit And Implicit Attitudes Toward Black Women's Hair* 6, Perception Institute (Feb. 2017), <https://perception.org/wpcontent/uploads/2017/01/TheGood-HairStudyFindingsReport.pdf>.

²⁴ *The "Good Hair" Study Results*, THECROWNACT.COM, <https://www.thecrownact.com/research> (last visited Mar. 29, 2020).

over 4,000 participants to take an online implicit association test, which involved rapidly-changing photos of black women with smooth and natural hair, and rotating word associations with both. According to the study, "a majority of people, regardless of race and gender, hold some bias towards women of color based on their hair."²⁵ Implicit association tests are widely used as part of implicit bias trainings, and the Perception Institute has developed an online Hair Implicit Association Test, a computerized test assessing implicit attitudes toward Black hair, in an effort to identify and combat implicit bias towards Black hair.²⁶

Black women and men are not immune from discrimination in legal employment settings. In 2019, lawyers were more likely to call back potential clients with "white-sounding" names, meaning that the legal profession clearly holds biases that impact everyday decisions.²⁷ A Black female attorney, Joleena Louis, posted a blog about how her decision to have natural hair as an attorney led to her professionalism being questioned.²⁸ Harvard Business Review published an article explaining that people of color still get told that they do not "look like an attorney," and that part of the question of whether they look like an attorney is based on hairstyle decisions that they make.²⁹ The article outlines that the "inclusion tax" to be accepted in traditionally male and white spaces "include[s] the hours at the hair salon needed to conform to European standards of beauty."

It is not only explicit grooming standards that leads to discrimination in the workplace, but also implicit biases leading to different standards for work products. Understanding that people of color are often held to a higher standard, regarding their work product and their appearance, shows inherent implicit bias well-documented.³⁰ Hair has no place in an assessment of workplace performance or conduct.

²⁵ *Id.*

²⁶ *The Hair IAT*, Perception Institute, <https://perception.org/goodhair/hairiat/> (last visited May 31, 2020).

²⁷ "Would-be clients with white-sounding names got 50% more lawyer responses in California, report says" ABA Journal, (June 2019) available at <https://www.abajournal.com/news/article/study-of-california-lawyers-finds-racial-discrimination-against-would-be-legal-clients>.

²⁸ "Are Natural (Ethnic) Hairstyles Professional For Legal Practice?", Law Firm Suites, (Aug. 2015) available at <https://lawfirmsuites.com/2015/08/natural-ethnic-hairstyles-professional-legal-practice/>.

²⁹ Tsedale M. Melaku, Why Women and People of Color in Law Still Hear "You Don't Look Like a Lawyer" Harvard Business Review, (Aug. 2019) available at <https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer>.

³⁰ See Lisa Pruitt, *No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession*, 23 MICH. J. INT'L L. 545 (2002) available at <https://repository.law.umich.edu/mjil/vol23/iss3/2> ("Based on more than seventy-five interviews conducted in South Africa in 1999 and 2000, this Article both documents and critically examines the reasons for black attrition"); King, Shani M. (2008) "Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys," Cornell Journal of Law and Public Policy: Vol. 18: Iss. 1, Article 1 available at <http://scholarship.law.cornell.edu/cjlp/vol18/iss1/1> (this article addresses how racism impacts how Black lawyers are perceived and how structural racism impacts these decisions); "STUDY: Reviewers Find More Errors In Your Writing If They Think You're Black", NewsOne, (April 2014) available at <https://newsone.com/3006968/nexitions-study-racism-black-white-writers/> (This article addresses how Black lawyers and legal professionals are more likely to be deemed as poor writers based on implicit and explicit biases regarding their Blackness).

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These cases and studies highlight the need for Courts to provide legal guidance as to an expansion of Titles VI and VII to encompass the mutable characteristics of Black hair in its protective jurisprudence.

DISCRIMINATION IN EDUCATION

Discrimination based on hairstyles extends beyond the workplace and into the schoolhouse. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin by educational institutions that receive federal financial assistance.³¹

A 2016 report by Ohio State University's Kirwan Institute for the Study of Race and Ethnicity found that Black girls were being disciplined in the state's public schools because of natural hairstyles.³² The report, titled "Race Matters... And So Does Gender," pointed to "several recent high-profile examples involving Black female students being threatened with suspension and expulsion due to the 'disruptive' nature of their natural hair – an infraction involving nothing more than showing up to school with their own hair."

Report author Robin A. Wright, who leads Social Change initiatives in Student Affairs at the University of Cincinnati, told the publication *Diverse: Issues in Higher Education* that college students still tell her that they plan to change their hairstyles when they graduate in order to obtain employment. Wright said that she hears "more from young men, particularly, but also women, that they believe they have to cut off their dreads in order to get a job in corporate America."³³

Of additional note is the widely-publicized high school wrestling incident in New Jersey. In 2018, a 16-year-old Black wrestler named Andrew Johnson was given an ultimatum by a white referee before a match: your hair covering fails to conform to the rule book, so cut your dreadlocks or forfeit. Johnson chose the former option and soon a video of a white female trainer cutting off Johnson's hair went viral.³⁴ Unfortunately, this was not an isolated incident. Another example is Texas student Deandre Arnold, who was suspended for having locks and told he would have to cut them before being allowed to attend prom or graduate.³⁵

³¹ 42 U.S.C. § 2000d *et seq.* (2018).

³² Robin A. Wright, *Race Matters... And So Does Gender: An Intersectional Examination of Implicit Bias in Ohio School Discipline Disparities* (June 2016), available at <http://kirwaninstitute.osu.edu/my-product/race-matters-and-so-does-gender/>.

³³ Pearl Stewart, *California's 'CROWN' Act Follows Years of Academic Research*, DIVERSEEDUCATION.COM (July 10, 2019), available at <https://diverseeducation.com/article/149213/>.

³⁴ Laurel Wamsley, *Adults Come Under Scrutiny After HS Wrestler Told To Cut His Dreadlocks Or Forfeit*, NAT'L PUB. RADIO (Dec. 27, 2018), available at <https://www.npr.org/2018/12/27/680470933/after-h-s-wrestler-told-to-cut-his-dreadlocks-or-forfeit-adults-come-under-scrut>.

³⁵ Betsy M. Adeboyejo, *CROWN Act: Untangling Implicit Bias, One Strand at a Time*, NAT'L PUB. RADIO (May 13, 2020), available at https://www.americanbar.org/groups/state_local_government/publications/state_local_law_news/2019-20/spring/crown-act-untangling-implicit-bias-one-strand-a-time/.

These commonplace examples highlight the need for legislative fixes to address hairstyle discrimination.

LEGISLATIVE FIX

This recommendation would support and encourage the development and adoption of laws and policies that prohibit discrimination and harassment based on hairstyle or hair texture.

On July 3, 2019, California Governor Gavin Newsom signed SB 188 into law, which made California the first state to enact the Creating a Respectful and Open Workplace for Natural Hair (CROWN) Act.³⁶ California's CROWN Act went into effect January 1, 2020.³⁷ Senator Holly Mitchell, who introduced the CROWN Act in the California legislature, testified before the state assembly: "It's 2019, and from my perspective, any law that sanctions a job description that immediately excludes me from a position, not because of my capabilities or experience, but because of how I choose to wear my hair is long overdue for reform."³⁸

California's CROWN Act expands the definition of "race" under the California Fair Employment and Housing Act (FEHA) to include traits historically associated with race, such as hair texture, and natural or protective hairstyles such as braids, dreadlocks, and twists.³⁹ After January 1, 2020, employees who allege discrimination based on the appearance of their natural hair are permitted to seek remedies under California's FEHA which include back pay, front pay, reinstatement, out of pocket expenses, attorney's fees, and punitive damages.⁴⁰ California's CROWN Act applies to employers who employ five or more persons throughout the state.⁴¹ In addition, California added these definitions to its Education Code, where it outlines protections for students based on protected categories.⁴² Thus, in California, students can file lawsuits and administrative complaints based on the changes to the Education Code.

Other states and local jurisdictions have followed California's lead in enacting similar anti-hairstyle discrimination legislation, including Colorado, Virginia, New York, and New Jersey.⁴³ The State of Washington has passed such legislation in both its House and

³⁶ See Cal. Gov't Code § 12926(w).

³⁷ *Id.*

³⁸ Ray Sotero, *Senate votes to end hair discrimination in the workplace and schools*, Ca. Senate, <https://sd30.senate.ca.gov/news/press-releases/2019-04-22-april-22-2019-video-senate-votes-end-hair-discrimination-workplace> (last visited Feb. 13, 2020).

³⁹ Cal. Gov't Code § 12926(x).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Cal. Ed. Code § 212.1.

⁴³ Colorado enacted the CROWN Act of 2020 on March, 6 2020. See H.B. 20-1048, *Concerning a Prohibition Against Discrimination Based on a Person's Traits that are Historically Associated with Race*. Virginia enacted the CROWN Act of 2020 on March 4, 2020. See S.B. 50; H.B. 1514. New York's anti-hairstyle discrimination law went into effect July 12, 2019, and covers employers with four or more employees. N.Y. Exec. L. § 292.38. New Jersey's anti-hairstyle discrimination law went into effect on December 19, 2019 and the statute does not include an employee threshold. N.J. Stat. Ann. § 10:5-5.

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Senate and the legislation is awaiting the governor's signature.⁴⁴ The Maryland state legislature passed a statewide measure (Senate Bill 531) on March 16, 2020. This bill proposes to expand the term "race" to include "protective hairstyles," which is defined in the bill as a hairstyle designed to protect the ends of the hair by decreasing tangling, shedding, and breakage including braids, twists, and locks.⁴⁵ According to the CROWN Coalition, approximately 16 other states have introduced, or formally declared their intent to introduce, their own anti-hairstyle discrimination legislation such as Delaware, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Nebraska, Oregon, Pennsylvania, South Carolina, Tennessee, West Virginia, and Wisconsin.⁴⁶

Similar legislation has also been enacted at the local government level. Cincinnati, Ohio's law took effect on January 1, 2020, and applies to any individual who employs ten or more persons within the City of Cincinnati.⁴⁷ Additionally, on November 5, 2019, the Montgomery County, Maryland's Council unanimously voted to enact the CROWN Act.⁴⁸ Under this law, "race" includes traits historically associated with race, including hair texture and protective hairstyles, and "protective hairstyles" includes hairstyles such as "braids, locks, afros, curls, and twists." Montgomery County's CROWN Act is not limited to the employment context and applies to other places of public accommodation such as taxi services, and group homes.⁴⁹ On February 6, 2020, the law went into effect and applies to all employers in Montgomery County with one or more employees.⁵⁰

Anti-hairstyle discrimination reform was introduced at the federal level, too. On December 5, 2019, United States Senator Cory Booker of New Jersey, introduced a federal CROWN Act bill in the United States Senate,⁵¹ and companion legislation was also introduced in the House of Representatives by Representative Cedric Richmond of Louisiana.⁵²

Statutory prohibitions on hair texture and hairstyle discrimination send a strong message to Black people regarding what it means to have actual inclusion, and the natural characteristics that are an implicit component for Black people. Explicit protections are necessary to ensure that employers and providers of housing and other public accommodations know that this form of discrimination is prohibited. As the United States Supreme Court has explained: "Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply."⁵³

CONCLUSION

⁴⁴ See H.B. 2602 (*An Act Relating to Hair Discrimination*; amending RCW 49.60.040).

⁴⁵ S.B. 531, Gen. Assemb., Reg. Sess. (Md. 2020).

⁴⁶ The CROWN Coalition is an organization founded by the National Urban League, Color of Change, Western Center on Law & Poverty that sponsors anti-hairstyle discrimination bills nationwide. CROWN Coalition, <https://www.thecrownact.com/> (last visited Feb. 13, 2020).

⁴⁷ Cincinnati, Ohio, Code §914-1-T1.

⁴⁸ Montgomery, Md. Code §27-6.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ S. 3167, 116th Cong. (2020).

⁵² H.R. 5309, 116th Cong. (2020).

⁵³ *Romer v. Evans*, 517 U.S. 620, 628 (1996).

Black people wearing their natural hairstyles are disproportionately likely to face discrimination, including in the legal profession. The ABA has an obligation to speak out on behalf of all people who face invidious discrimination, and advocating for a prohibition of Black hairstyle discrimination is a needed, logical, and appropriate next step.

Respectfully submitted,

J. Logan Murphy
Chair, Young Lawyers Division
August 2020

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GENERAL INFORMATION FORM

Submitting Entity: Young Lawyers Division

Submitted By: J. Logan Murphy

1. Summary of the Resolution(s). This resolution encourages governments to enact legislation prohibiting discrimination based on the texture, style, or appearance of a person's hair, address interpretation of the word "race" in antidiscrimination statutes to also include characteristics typically associated with race, and encourage courts, bar associations, and legal employers to review their antidiscrimination policies and provide implicit bias training that includes information on natural hairstyles.
2. Approval by Submitting Entity. Approved by the Council for the Young Lawyers Division on April 30, 2020.
3. Has this or a similar resolution been submitted to the House or Board previously? The American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, and sexual orientation. It has approved many resolutions to that effect. However, the Young Lawyers Division believes that neither this nor similar resolutions have been submitted to the House or Board previously.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The Young Lawyers Division believes that there are not existing policies related to hairstyle or hair texture discrimination, and as such, existing policy would not be affected by adoption of this resolution. However, adopting this resolution would further the Association's commitment to opposing discrimination in all forms.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. While the resolution urges governmental entities to enact legislation prohibiting discrimination on the basis of hairstyle or hair texture, local and state legislation varies across the nation. Six states have adopted legislation, as well as Cincinnati, Ohio, and Montgomery County, Maryland. More than 20 states are considering the CROWN Act and have either pre-filed, filed, or formally stated an intent to introduce their own anti-hair discrimination legislation. An updated list can be found at thecrownact.com.

The second resolved clause of this resolution calls for legislation, but specifically delineates S. 3167 or H.R. 5309 in the 116th Congress. S. 3167 was introduced in the Senate on January 8, 2020, and was referred to the

Committee on the Judiciary. H.R. 5309 was introduced in the House of Representatives on December 5, 2019, and on January 30, 2020, was referred to the Committee on the Judiciary, Subcommittee on the Constitution Civil Rights, and Civil Liberties.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Young Lawyers Division and its Civic Engagement Team will coordinate with ABA Government Affairs to conduct outreach, education, and lobbying, including in-state advocacy days and ABA Day outreach in future years.
8. Cost to the Association. (Both direct and indirect costs) No known costs.
9. Disclosure of Interest. (If applicable) N/A
10. Referrals. The Young Lawyers Division has referred or will refer this resolution to the following ABA entities:
 - Section of Civil Rights and Social Justice;
 - Section of State and Local Government Law;
 - Law Student Division;
 - Solo, Small Firm, and General Practice Division (GPSolo);
 - Section of Labor and Employment Law;
 - Commission on Racial & Ethnic Diversity in the Profession;
 - Commission on Women in the Profession
 - Forum on Affordable Housing and Community Development Law;
 - Business Law Section;
 - Health Law Section;
 - Law Practice Division;
 - Section of Litigation;
 - Senior Lawyers Division;
 - Judicial Division.
11. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.)*

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

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EXECUTIVE SUMMARY1. Summary of the Resolution.

This resolution encourages governments to enact legislation prohibiting discrimination based on the texture, style, or appearance of a person's hair, address interpretation of the word "race" in antidiscrimination statutes to also include characteristics typically associated with race, and encourage courts, bar associations, and legal employers to review their antidiscrimination policies and provide implicit bias training that includes information on natural hairstyles.

2. Summary of the issue that the resolution addresses.

Despite EEOC guidance to the contrary, federal appellate precedent has not found hairstyle to be an immutable characteristic associated with race and encapsulated by Title VII. Hairstyle discrimination is currently arguably legal in many jurisdictions.

3. Please explain how the proposed policy position will address the issue.

By interpreting existing law to include hairstyles as a characteristic of race and encouraging jurisdictions to enact legislation opposing hairstyle discrimination, the ABA will work toward less invidious discrimination as outlined above.

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

No opposition is known at this time.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ELECTION LAW
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON DISABILITY RIGHTS
SENIOR LAWYERS DIVISION
SECTION OF STATE AND LOCAL GOVERNMENT LAW
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association adopts the *American Bar Association*
2 *Election Administration Guidelines and Commentary*, dated August 2020, to supplant all
3 earlier versions, and recommends that all election officials ensure the integrity of the
4 election process through the adoption, use, and enforcement of these Guidelines; and
5
6 FURTHER RESOLVED, That the American Bar Association urges that federal, state,
7 local, territorial, and tribal governments provide state, local, territorial, and tribal election
8 authorities with adequate funding to implement the Guidelines and Commentary.

AMERICAN BAR ASSOCIATION
ELECTION ADMINISTRATION GUIDELINES AND COMMENTARY
August 2020

- 1.0 Voter Education, Rights and Responsibilities**
 - 1.1** Voter Rights and Responsibilities
 - 1.2** Voter Education Programs
 - 1.3** Provision of Sample Ballots and Voting Instructions
- 2.0 Voter Registration**
 - 2.1** Lists
 - 2.2** Registration Procedure
 - 2.3** Voter Verification
 - 2.4** Notice of Inactive Status
 - 2.5** Reactivation
 - 2.6** Cancellation
- 3.0 Absentee Voting**
 - 3.1** Absentee Voting Procedures
 - 3.2** Counting Absentee Ballots
 - 3.3** Return of Absentee Ballots
 - 3.4** Cure of Absentee Ballots
 - 3.5** Counting of Absentee Ballots
 - 3.6** Resource Allocation
 - 3.7** Tracking
- 4.0 Alternative Voting Methods**
 - 4.1** Early Voting
 - 4.2** Vote Centers
- 5.0 Election Day**
 - 5.1** Election Day Officials
 - 5.2** Training
 - 5.3** Compensation
 - 5.4** Poll Watchers
 - 5.5** Observation by Poll Watchers
 - 5.6** Provisional Ballot
 - 5.7** Challenged Ballot
 - 5.8** Voting Assistance
 - 5.9** Polling Hours
 - 5.10** Polling Locations and Equipment
 - 5.11** Election Day Troubleshooting
- 6.0 Voter Verification**
- 7.0 Ballots**

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86	14.11	Provisional Ballot
87	14.12	Recount

Commentary to Election Administration Guidelines
Appendix A Model Statutory Language on Provisional Balloting and Commentary

ELECTION ADMINISTRATION GUIDELINES AND COMMENTARY

1.0 *Voter Education, Rights and Responsibilities*

1.1 *Voter Rights and Responsibilities*

State and local election authorities should be tasked with the responsibility of ensuring that voters are informed of their rights and responsibilities in participating in the electoral process through dissemination of information prior to Election Day, through various means of outreach, and at polling places on Election Day. All educational information should be translated into as many languages as practicable, and at a minimum those languages required by state or federal law.

Civic and political organizations can provide supplemental information, but the primary source of voter education and materials should be state and local election authorities.

At a minimum, voters should be informed that they have the following rights and responsibilities:

a. The Right to:

1. Inspect a sample ballot
2. Receive a demonstration or further instruction from a poll worker/officer of election of the voting mechanism at the polls
3. Receive language and accessibility assistance at the polls
4. Cast a provisional ballot if your status as a qualified voter is in question
5. Request a replacement ballot if you make a mistake or if your ballot is damaged
6. Vote if you are in line by the time the polls close
7. Vote for the candidate or issue of your choice on the ballot
8. Ask for help, at any point in the process, if you have questions

b. The Responsibility to:

1. Know your local voter registration requirements and register to vote
2. Notify the registrar of any change of address or circumstance that might affect your registration status
3. Figure out the voting option that will best suit your needs
4. Find out the hours and location of your polling place
5. Bring your identification or other supporting documentation to the polls, if required
6. Vote

1.2 Voter Education Programs

Voter education programs should be created to teach all citizens that voting is a responsibility as well as a right of citizenship. State and local election officials, working with schools, civic and political organizations, should have primary responsibility for creating and implementing these programs. Such programs should include instruction on the fundamental rights of voters, as outlined in Sec 1.1 a., voter registration, maintenance of registration, operation of the particular voting mechanism in that locality, language and accessibility assistance, and information on when and where to vote, including the options of early and absentee voting. Such programs should be made available and translated into as many languages as practicable, and at a minimum those languages required by state or federal law.

1.3 Provision of Sample Ballots and Voting Instructions

- a. In each jurisdiction the local election authority should send a sample ballot and voting instructions, translated into as many languages as practicable, and at a minimum those languages required by state or federal law, to each registered voter within a reasonable period of time before the election.
- b. Sample ballots and voting instructions should be made available at locations easily accessible to the general public. Copies should also be made available to civic organizations for dissemination.
- c. Sample ballots and voting instructions should be visibly posted at each polling place.

2.0 Voter Registration

2.1 Lists

- a. State and local election authorities should maintain a current and accurate roll of registered voters, including a centralized, electronic list maintained by the state government and readily accessible to all election officials at each polling place. States should authorize and encourage the use of modern technologies for this purpose. Applicants should be asked to supply an email address if they have one. The public should have broad access to voter registration lists, with appropriate limitations for privacy and security concerns.

- b. Pre-Election Day Challenges to Voter Lists

States should develop specific procedures related to pre-Election Day challenges to voter lists.

- 1) Any registered voter who resides within the jurisdiction of the applicable challenge should be allowed to challenge the registration of a registered voter.
- 2) The challenge should be made in writing to the chief election officer. The challenge must also be signed and affirmed by the challenger.
- 3) The challenge should be made no later than 5 days after the close of registration.
- 4) The challenge should be resolved in a hearing that is open to the public. The individual whose registration is being challenged and the individual who initiated the challenge should receive notice of the hearing and the disposition of said challenge.
- 5) If the voter does not receive notice of the hearing and contests the challenge at the polling place, he or she should be permitted to cast a provisional ballot.

2.2 Registration Procedure

- a. Voter registration applications should require the signature of the applicant.

Alternative methods of verification should be offered to those unable to sign their name. In addition, information bearing on the applicant's eligibility to vote and contact information should be required fields on the application. Applicants should also be asked to supply an email address.

- b. Each election authority should take the following steps to encourage and increase voter registration:
- improve and simplify state and local voter registration procedures;
 - streamline voter registration by mail;
 - enact preregistration for 16 and 17-year olds;
 - authorize and support voter registration efforts by civic and political organizations, including allowing such organizations to distribute voter registration applications and materials and return them to election officials;
 - provide for same-day voter registration during any early voting period and on Election Day;
 - explore new technology that improves the registration process;
 - extend the hours and time frame for voter registration;
 - provide additional registration facilities at locations that are easily accessible and open during convenient times; and
 - increase voter registration through state and local agencies that have direct contact with the public.

c. Voter Registration Drives

Voter registration drives conducted by individuals or community organizations should be encouraged and regulated only to the extent necessary to protect the public.

- 1) Individuals or organizations submitting voter registration forms on behalf of more than 25 voters should be required to register with the state election authority as volunteer registrars. Organizations that do so should be required to identify an agent who will be responsible if the election authority needs to contact the organization. All volunteer registrars should be required to satisfactorily complete a training on voter registration drives and sign an oath or affidavit of good faith.
- 2) The organization should exercise quality control over its volunteer registrars and keep records of basic information from each registration form, including who collected it.

3) Volunteer registrars should not duplicate, copy, or otherwise make use of information provided on the completed voter registration form, except basic contact information for the purpose of “Get Out the Vote” activities.

d. Applications for voter registration should request the last address at which the voter was registered. Upon recording the new registration, the election authority should cancel the prior registration if within the same jurisdiction. If outside the jurisdiction, the election authority should notify the prior jurisdiction that the voter has registered in the new jurisdiction so that the prior registration may be cancelled. States, counties, and local jurisdictions should work cooperatively to achieve this goal.

e. After receipt of a registration application, the election authority should mail to the voter a non-forwardable, return postage guaranteed notice containing a voter registration card if the registration is accepted. If the application is rejected, the applicant should be informed why and, if appropriate, instructed how to remedy the problem.

f. Election officials should issue registration cards to each registered voter. The card should advise the voter that registration is complete and provide polling place information and contact information for the local election authority. Voters should not be required to present their voter registration card at the polling place as a prerequisite to voting, but the card may be used by the voter as an acceptable means of identification at the polls, if the state requires identification.

2.3 Voter Verification

Current and correct registration lists of eligible voters should be maintained by the election authority through periodic voter verification programs. Failure to vote should not be the reason for initiating the voter verification process and may never be a factor in cancelling a voter's registration. State election authorities should widely disseminate advance public notice of an upcoming list maintenance procedure and how it will be conducted.

a. An on-going verification program should seek to identify unqualified voters. It should be uniform, non-discriminatory, and in compliance with the Voting Rights Act. It must be completed at least 90 days before an election.

b. The verification program should solely rely on address data gathered

from the National Change of Address (NCOA) system maintained by the Postal Service, the Electronic Registration Information Center (ERIC), a cooperative program in which 30 states share data that is based on the states' motor vehicle records and voter rolls that indicate interstate moves, or some comparable program. In addition, routine mailings from the election authority that are returned as undeliverable may be the basis for initiating a verification process. Death, incapacity, and criminal conviction records, where applicable, should be supplied by the appropriate government agencies.

- c. State election authorities should provide clear and consistent guidance to local election officials for voter verification activities. Guidance may include appropriate sources of information on eligible voters and protocols for notice, reactivation and cancellation. State election officials should provide easy access to all directives and advisories for reference by local election officials and the public on the agency's official website.

2.4 *Notice of Inactive Status*

A voter who appears to have changed address, as indicated by the NCOA, the ERIC system, or another comparable program, or mail returned to the election authority as undeliverable as addressed, should have his or her registration put on an inactive list, unless the voter moves to a different address within the same jurisdiction and the election authority has the authority to automatically update the voter's address for registration purposes. If a voter's registration is designated as inactive, a notice with forwarding instructions to the post office, should be sent promptly to the address of registration. The notice should also be sent by email, if available. The notice should advise the voter of the inactive designation, state the reason for the change, and list the steps the voter can take to reactivate the registration. A postage prepaid postcard pre-addressed to the election authority should be included with the notice. It may be used by the voter to reactivate the registration at the same address if an error was made or to request a transfer of address if the voter has moved to a new address within a jurisdiction that does not automatically update a voter's address for registration purposes. A voter who has not moved may so indicate and return the postcard, and the registration will be reactivated.

If the voter has moved to a location outside the election jurisdiction and confirmed in writing that he or she has moved from the jurisdiction, the voter should be removed from the voter roll and should be instructed how to register in the new jurisdiction.

2.5 *Reactivation*

An inactive voter who has not moved to a new address or has moved within the same election jurisdiction may be reactivated at the polling place during early voting or on election day simply by voting. The voter should be permitted to cast a regular ballot.

2.6 *Cancellation*

A voter may be removed from the voter roll only after the voter has not voted or otherwise interacted with the election authority for a period comprising two federal general elections following the voter's failure to respond to the notice. The voter should then be sent a notice of the cancellation at the last known address and by email, if available, and advised how to re-register. A public record of cancelled registrations should be maintained by the election authority for at least two years.

2.7 *Public Records*

Election authorities should maintain all records related to voter verification activities, including advance notices of the list maintenance procedure and cancelled registrations for at least two years and make these records available to the public to the fullest extent permitted by state law. Statewide voter registration databases should maintain the records of names removed from voter registration lists, including a record of who authorized removal. Lists of inactive and cancelled voters should be made available to third parties upon request, in the same manner as voter registration lists, and should be brought to the polls on Election Day.

3.0 *Absentee Voting*

3.1 *Absentee Voting Procedures*

- a. All registered voters should be allowed to vote by absentee ballot regardless of cause.
- b. Absentee voting procedures and instruction materials should be as simple as possible for those authorized to vote absentee. Absentee ballots should be distributed early enough to accommodate the deadline for return of the ballot.
- c. To assure the rights of persons who are blind or otherwise disabled to vote privately and independently, each election authority must provide the option of a ballot marking tool that allows voters to mark an electronic version of the absentee ballot on devices such as computers, tablets, or smart phones. Voters must still print and mail in these ballots.

- d. Each election authority should authorize and support requests for an absentee ballot or early voting application by civic and political organizations.
- e. To confirm their identity, absentee ballot applicants should be required to provide basic identification, including an address, date of birth, signature, and identifying number, such as their driver's license or state identification card number, the last four digits of the social security number, or other identification number provided at registration.
- f. States should implement an electronic verification process in connection with their voter database maintenance requirements under federal law, similar to that used for online voter registration, which would instantaneously confirm the identifying number of the voter, with either the state voter registration database or the driver's license system, in the process of a voter requesting an absentee or mail ballot.
- g. To reduce the number of individuals touching or handling voted or sealed absentee ballots, states should consider a law or regulation to authorize only family members, household members, supporters who help people with disabilities understand, make, and communicate their own decisions, or other caregivers to collect the absentee or mail ballots of a voter and return them to the election office for counting and tabulation.
- h. State and local election officials should develop new ways to confirm the identity of voters, such as using identification information provided by the voter when he or she registered, prior to counting the ballot.
- Signature comparisons between the registration application, absentee ballot requests, and returned ballots should be required by the election authority with confirmation that such comparisons have been completed.
- i. Lists of absentee ballots issued by the election authority should be available to the public prior to the election and to the precinct officials by Election Day. A voter who has requested an absentee ballot may vote in person on Election Day by surrendering the voter's unvoted absentee ballot and voting a regular ballot, or through a provisional ballot cast at the polling place instead, if the voter subscribes in writing that he or she did not return an absentee ballot to the election jurisdiction.
- j. The absentee ballot return envelope should indicate whether the voter had assistance and, if so, the assisting party and the voter

should be required to certify in writing that no coercion or influence was involved and that the ballot was cast secretly.

- k. The deadline to request absentee or mail ballots should be set in advance of Election Day to allow for the mail system to provide voted ballots by Election Night. The increase in mail ballots that arrive on or near Election Day has resulted in the delay of reporting of results for days and sometimes weeks after Election Day. This delay is often caused by the need to confirm voter identity by signature and research.

3.2 *Counting Absentee Ballots*

Poll watchers should be permitted to observe the counting of absentee ballots and to challenge individual absentee ballots. Challenged ballots should remain segregated until the validity of the challenge is determined.

3.3 *Return of Absentee Ballots*

As a standard practice, election authorities should require that absentee ballots be received by the close of polling hours on Election Day in order to be counted.

However, if states allow for return of absentee ballots, including military and overseas voters' ballots, after Election Day, they should provide clear standards for postmarking of such ballots.

3.4 *Cure of Absentee Ballots*

State laws should provide that for absentee ballots timely received by election officials, if there is an error or omission by the voter, a signature that does not match the signature on file for the absentee mail ballot voter, or the identifying number does not match the registrant, the election officials should notify the voter of the discrepancy and allow the voter to cure the signature problem by providing a missing signature or a signature that matches the voter's registration affidavit signature within a reasonable time before the canvass of the vote is completed.

3.5 *Counting of Absentee Ballots*

The processing of mail absentee ballots by election officials should start well in advance of Election Day, although no preliminary or unofficial results should be released to the public or political parties. To speed up the counting and release of unofficial results on election night, the envelopes of mail ballots should be evaluated promptly to confirm identifying or required information, and the canvassed ballots should be scanned prior to Election Night and the first reporting of results.

3.6 *Resource Allocation*

In addition, as the number of mail ballots delivered close to Election Day increases, an election office must be prepared to increase personnel and resources to promptly process and tabulate mail ballots and release results in a timely manner. This process should be transparent while protecting the secrecy of the mail ballots and open to observers representing the political parties or candidates in the election.

3.7 *Tracking*

To improve voter confidence in voting by mail, state and local election officials should provide online access to mail ballot processing information that will allow a voter to closely track the status of their ballot in all stages of the process – ballot request, ballot transmittal, ballot return, and ballot counting process – to permit voters to know if their ballot was received and counted, and if not, how the voter may attempt to remedy the problem.

4.0 **Alternative Voting Methods**

As innovations in voting and emerging technology create opportunities for improved voter participation and voting systems, election officials should periodically review and upgrade voting procedures and equipment as necessary.

4.1 **Early Voting**

States and localities that allow early voting should create specific guidelines in order to ensure that:

- a. An adequate number and location of polling places is assigned to each jurisdiction, and such polling places should afford reasonable and equitable access to all voting populations;
- b. Adequate notice of polling hours and location of polling places is given;
- c. An appropriate time frame for early voting is allowed, and an appropriate end period to voting is determined in order to ensure that the rolls may be adjusted for voters who have voted before Election Day;
- d. There is no announcement of results or tallying of early voting ballots until after the close of polls on Election Day,
- e. Laws and regulations that govern activity at polling places are applied and enforced during the early voting process;
- f. Voter accessibility for disabled voters is provided as required by

federal law and according to standards set forth in Section 5.8 of these Guidelines.

4.2 Vote Centers

- a. Where states employ vote centers in lieu of traditional precinct voting, vote centers should be equipped and linked to local election offices by secure electronic connection to facilitate voters' casting a ballot for all appropriate offices and resolving registration, re-registration, or other issues that might affect the voter's ability to cast a regular rather than a provisional ballot.
- b. Vote centers should be located as much as practicable to afford reasonable and equitable access to all voting populations.
- c. States implementing vote center systems should phase in use and provide ample public notice and education about the switch to new voting methods to minimize voter confusion.
- d. Voter accessibility for disabled voters is provided as required by federal law and according to standards set forth in Section 5.8 of these Guidelines.

5.0 Election Day

For purposes of this section, "Election Day" refers to the entire period during which a voter can vote in-person at a designated location (see also, Section 4.1 Early Voting).

5.1 Election Day Officials

- a. Election Day officials should be representative of diverse political parties. The official responsible for appointing Election Day personnel should solicit recommendations of civic and political organizations for the appointment of Election Day officials and should utilize civic and political organizations to recruit for Election Day officials, especially bilingual Election Day officials.
- b. Election Day officials should conduct themselves impartially in the execution of their responsibilities.
- c. Election Day officials should be well-versed in applicable federal and state laws related to voting rights.
- d. Election Day officials should utilize a "service model" approach to working poll sites on Election Day. Additionally, bilingual Election Day

officials in jurisdictions with language assistance requirements should proactively seek to engage voters.

5.2 *Training*

- a. All states should provide Election Day officials with formal training. Provisions also should be made to provide formal training for poll watchers.
- b. Training should include basic requirements of state and federal voting laws, including but not limited to those serving language minority voters and voters with disabilities. In jurisdictions with language assistance requirements, training must include compliance and what that means for Election Day officials.
- c. Training should include cultural competency training around assisting voters with disabilities and limited English proficiency. Training should include a role- playing component in order for Election Day officials to best understand how to properly engage with voters.
- d. Election Day officials must attend at least one training per election cycle in order to stay current on changing voting laws. Jurisdictions should offer online opportunities for training in addition to in-person trainings.

5.3 *Compensation*

Election Day officials should be adequately compensated for their services through the voting period. Extra compensation should be provided for the time actually spent in training.

5.4 *Poll Watchers*

Qualified political parties and candidates should be authorized to designate poll watchers at each polling place and central counting station. If poll watchers have not been designated by qualified political parties or candidates, then stakeholders in referenda or ballot initiatives should be authorized to designate poll watchers at each polling place and central counting station. Interested parties should also be authorized to designate poll watchers at each polling place. The numbers of poll watchers at each location should be limited to avoid undue crowding. Parties or candidates designating poll watchers should certify in writing that each designee has been instructed as to the responsibilities of the position. Poll watchers should not be limited to those who reside in the precinct or election jurisdiction.

5.5 *Observation by Poll Watchers*

Poll watchers should be permitted to observe all official acts and records used at the polling places, to challenge unqualified voters, and to challenge improper voting practices. Poll watchers should present all objections and challenges directly to the Election Day officials and affirm that the information provided is true and correct.

Poll watchers should not confront or harass voters. National origin or language ability shall never be a valid rationale to challenge a voter as unqualified. Methods should be developed to minimize the disruption and delay of challenge procedures. Election Day officials should keep a record of all challenges by poll watchers, including the names of the challenging poll watchers. States and the federal government should ensure that voters are not challenged in contravention of the Civil Rights Act of 1964 and Voting Rights Act.

5.6 *Provisional Ballot*

A voter must be allowed to vote with a provisional ballot in situations where the individual claims to be properly registered and eligible to vote at the election district, but whose name does not appear on the general register and whose registration cannot be determined by the election officials; the individual voter who is unable to produce required identification; the individual has applied for an absentee ballot but has not returned the absentee ballot; the individual presents a judicial order to vote; or an election official asserts the individual is not eligible to vote. The provisional ballots should be segregated and secured until a determination of validity is made. Where mechanical or electronic voting machines are used, an alternative method for segregating the provisional ballots should be established. Election officials should provide assurance that eligibility issues will be dealt with promptly and that voters will be notified of the disposition of the ballot in question.

See Appendix A, *Model Statutory Language on Provisional Balloting and Commentary*, dated August 2020 for specific details and model language.

5.7 *Challenged Ballot*

Challenged ballots should be counted and segregated and marked as such for purposes of appeal. Where mechanical or electronic voting machines are used, an alternative method for segregating the challenged ballots should be established.

Election officials should provide assurance that eligibility issues will be dealt with promptly and that voters will be notified of the disposition of the ballot

in question.

5.8 *Voting Assistance*

- a. Any voter who requires assistance to vote for reason of disability or due to an inability to read or write should be given assistance by a person of the voter's choice and offered the choice to use an accessible voting system.
- b. All voting places should be accessible. Any disabled or elderly voter assigned to an inaccessible polling place, should, upon advance notice by the voter, be assigned to an accessible polling place or provided alternative means of casting a ballot. Finally, all voting places must provide at least one accessible voting system for persons with disabilities and the accessible voting system must provide the same opportunity for access and participation, including privacy and independence, that other voters receive. Accordingly, such accessible voting systems that produce printed paper ballots must provide ballots of the same design and size as paper ballots that other voters receive.
- c. Voting materials should be provided by States or political subdivisions, at a minimum in the language of the statutorily-mandated minority language groups.

5.9 *Polling Hours*

States should undertake appropriate measures to ensure that polls are open to the public and that all registered voters are able to go through the voting process with minimal delay for the entire voting period.

Jurisdictions should be provided with appropriate funding to ensure that:

- a. polling hours are sufficient to allow all registered voters an opportunity to vote at a time convenient to their schedules;
- b. adequate polling equipment, locations, and personnel are provided; and
- c. registered voters who are in line by the time the polls close are allowed to vote.

5.10 *Polling Locations and Equipment*

- a. Jurisdictions must designate polling locations, including vote centers, for the entire voting process that equitably serve all voters and provide ample notice of these locations. Polling locations, including vote centers, during the entire voting process must be convenient and easily

accessible to voters by different modes of transportation, including public transportation, and do not introduce additional physical or psychological barriers to access (e.g. not located in a gated community or a police station).

- b. Jurisdictions must limit changes to polling locations barring extraordinary circumstances and must notify the public of any changes through various channels, including use of traditional, social, and ethnic media, as well as through stakeholder partners. (See Section 11.0 Emergency Management of Elections)
- c. Jurisdictions must equitably deploy their materials, Election Day officials, and equipment to polling locations in order to ensure each polling location is well- equipped to deal with the flow of voters, thus limiting the time needed to vote and lines of voters waiting to vote.

5.11 Election Day Troubleshooting

Jurisdictions should designate a person or process that will provide the public a mechanism to notify the election authority about problems on Election Day and receive real-time responses from the election authority.

6.0 Voter Verification

States should take necessary steps to ensure that the voter is the person registered to vote.

- 1. In jurisdictions where a signature is required, voters unable to sign because of disability or illiteracy should be verified by other reliable means, such as by producing acceptable identification, or by a registered voter in the same precinct signing a verification on the individual's behalf.
- 2. In jurisdictions where some sort of voter identification is required, only one piece of identification should be required. A variety of forms of identification should be accepted in order to meet this requirement. In the event that the voter is unable to produce a particular piece of identification, then the voter should be allowed to sign an affidavit of identity.

7.0 Ballots

7.1 Ballot Design

- a. Simplicity of Ballot

Ballots should be designed to be as simple and clear as possible in order to avoid voter confusion. Ballot designs that have been shown to have a high error rate should be eliminated.

b. Uniform Ballot Design

Jurisdictions should strive to present a uniform ballot design to the electorate. For each voting mechanism used, the ballot design for that mechanism should be the same throughout the jurisdiction.

c. Testing and Publication of Ballots

The ballots should be tested for usability by the appropriate election authority and made available for public inspection prior to approval of the ballots. Where electronic voting machines are used, usability standards also should be approved by the state election officer.

d. Approval of Ballots

Local ballot design standards should be approved by the state election officer.

e. Translation Issues

In jurisdictions where a significant percentage of the voting population is non- English speaking, translated ballots and assistance must be provided, at a minimum, as required by law, during the voting process.

7.2 *Ballot Machinery*

- a. States should implement testing programs to certify voting machines and vote counting machines and the software programs used in the systems for efficacy, security and for accessibility for disabled voters. States should require local election officials over whom they have general jurisdiction or supervision to submit for approval operational plans for election administration, voter outreach, conduct of canvass and audit programs, and compliance with federal and state cybersecurity best practices to ensure the integrity of voting systems.
- b. Electronic voting machines should be required to have a voter-verified paper record of each vote or non-vote cast by the voter that will be used for audit purposes. The voter-verified paper record should not contain any personally identifiable information.

- c. Voting machinery should identify an invalid vote or non-vote prior to the voter's final submission of the ballot; once identified, however, the voting machinery should allow a non-vote, and the non-vote should be reflected in the final tally. If the voting system is technologically unable to do that, the system should have a ballot design that allows the voter to see the actual votes cast.
- d. Election officials should eliminate voting mechanisms that have been shown to have a high error rate (e.g., undervote, overvote).
- e. States and the federal government should provide adequate funding to upgrade voting machinery and personnel to assist voters in understanding such machinery.
- f. Voting machinery should be appropriately maintained and tested for accuracy prior to an election.
- g. States should be encouraged to adopt and apply appropriate voluntary minimum standards for voting machinery and software.
- h. States should ensure that the right to cast a secret ballot is effectively implemented.

7.3 *Pre-Vote Checking*

- a. Precinct Election Day officials should certify that ballot receptacles are empty prior to voting.
- b. Precinct Election Day officials should certify that all mechanical and electronic vote counters are set at "0" prior to voting.
- c. All vote counting equipment should be certified as to its accuracy in counting and reporting votes cast for all offices, candidates, and issues.

7.4 *Observers*

- a. Observers should be allowed to observe all official tests and certifications.
- b. Poll watchers should be permitted to observe ballot counts and canvass of vote at the polling place or central counting location.
- c. The vote count should be publicly posted at the place of counting for at least 24 hours after the count is completed. A permanent record

must be maintained

7.5 *Ballot Collection and Count*

- a. Paper ballots should be placed in the ballot box in the presence of the Election Day official.
- b. The number of voters applying for ballots and the number of ballots cast should be recorded before counting the votes.

7.6 *Computerized Vote Counting*

- a. Blank ballots and test decks should be available to qualified observers who should be allowed to run accuracy tests. Verification of the computer accuracy of vote counting should be allowed before and after the official count.
- b. Where contract programmers are employed, they should be required to certify under oath to the accuracy of the program they have written or are operating. The election authority should certify the accuracy of any vote counting program both before and after the election.
- c. Where a computer counting error is discovered, a complete report should be given to the public, political parties, and candidates.
- d. A random sample manual recount of the computer count should be a part of the canvass of votes cast.

7.7 *Ballot Audit*

A system of ballot audit for each polling place should be established. The audit should account for all ballots or punch cards issued, the number of spoiled ballots, the number of ballots counted, and the number of ballots returned unused. Entries should be recorded in the poll book to account for spoiled ballots or voting machine failures. All voted ballots, unused ballots, spoiled ballots, and poll books should be returned to the election authority under seal with a copy of the results for the canvass.

7.8 *Physical Security of Ballots and Voting Equipment*

Election officials should ensure ballot security. In particular, voting equipment, ballots, and other election materials should be kept secured during the counting process and until the time for contesting the election has passed.

7.9 *Availability of Election Day Remedies*

Courts of competent jurisdiction and review should sit on Election Day to handle expedited actions relating to Election Day activities.

8.0 Recounts

8.1 Availability of Recounts

- a. States should establish a threshold for an automatic recount based on statistically sound data that would likely affect the outcome of the election.
- b. Candidates not meeting the threshold for an automatic recount should be allowed to request a recount within a certain period of time after election results are announced. Such candidates should bear the cost of funding the recount, unless the election result is changed as a result of the recount. States should permit a defeated candidate to request that a recount be suspended.
- c. State statutes should make clear the circumstances under which candidates or interested parties, in the case of a ballot initiative, may request a recount and, at a minimum, should explain the timing, form of filing, venue, and procedural steps required for the request and recount.
- d. The cost of a recount should be reasonable and not cost-prohibitive to those seeking a recount.

8.2 Methods of Recounts

- a. States should permit sufficient time to complete the recount. In setting the time frame, consideration should be given to the total number of votes to be counted, the method in which the votes were cast, and the manner in which the recount will be conducted.
- b. States should establish uniform recount standards for each separate voting technology.
- c. States should mandate that, generally, recounts should be performed for the entire jurisdiction affected by the race. If a recount is ordered as a remedy to an election challenge, then only those jurisdictions named in the order must participate in the recount.
- d. States should permit each candidate affected by the recount to have observers present throughout the entire process.

- e. States should specify the circumstances that would warrant a manual recount or a machine recount.

9.0 Challenges to an Election Result

State statutes should make clear under what circumstances candidates or interested parties may challenge an election result. At a minimum, the language should contain reference to the timing, form of filing, venue, procedural steps, and available remedies.

10.0 Election Administration

- a. Any officials supervising or certifying elections, recounts, or challenges should not be involved in any official capacity in any election in which they may be called upon to exercise their duties or in which they are a candidate.
- b. Members of canvassing commissions should be prohibited from being active in partisan political activity in any election in which they may be called upon to exercise their duties as a member of such an entity.

11.0 Emergency Management of Elections

11.1 Emergency Planning

State, local, territorial, and tribal governments should develop, enact, and disseminate written plans to preserve the election process in the event of an emergency.

11.2 Characteristics of Emergency Planning

- a. Emergency plans should include, at a minimum, the following components:
 - 1) Designation of alternative locations, times, and manner of conducting elections, including the voter registration process and methods of voting that differ from originally scheduled methods of voting, while balancing the need to ensure that such changes do not serve to further disenfranchise underrepresented or vulnerable populations
 - 2) Clear designation of the individual (for example the governor, secretary of state, or director of elections) or individuals who are given the statutory power to delay or reschedule an election or to enact emergency election procedures and authorization of one or more election officials to modify procedures and

- 1008 deadlines related to ballot access qualification
- 1009
- 1010 3) Provision for the back-up and preservation of election and
- 1011 voter data, including paper precinct registers in lieu of
- 1012 electronic poll books
- 1013
- 1014 4) Storage and testing of back-up of voting equipment to be
- 1015 used in an emergency, including paper ballots in lieu of
- 1016 touch-screen technology
- 1017
- 1018 5) Procedures to ensure the physical safety of polling places for voters
- 1019 and poll workers/officers of elections
- 1020
- 1021 6) Evacuation procedures for polling places
- 1022
- 1023 7) Establishment of systems that will assure continued reliable
- 1024 communication between election administrators and poll
- 1025 workers/officers of elections
- 1026
- 1027 8) Development of effective plans for communicating with
- 1028 voters through various media during emergencies
- 1029
- 1030 9) Recruitment and training of additional poll workers/officers of
- 1031 elections in the event of an emergency
- 1032
- 1033 10) Consideration of individuals who require additional assistance,
- 1034 due to either language or disability, to vote
- 1035
- 1036 11) Consideration of individuals directly impacted by an emergency
- 1037 or who are responding to an emergency
- 1038
- 1039 b. Emergency plans should be developed for different emergencies, as
- 1040 the remedy may vary depending on the situation, in order to maintain
- 1041 the safety and integrity of the electoral process.
- 1042
- 1043 c. Emergency plans should balance the safety of the public and election
- 1044 workers with ensuring that elections are conducted in as timely a
- 1045 manner as possible.
- 1046

1047 **11.3** *Types of Emergencies*

- 1048
- 1049 a. Natural or manmade disaster
- 1050
- 1051 b. Public health emergency
- 1052
- 1053 c. Cyber attack

- d. Armed conflict

11.4 *Coordination with Appropriate Governmental Agencies*

Depending on the scale of the emergency, there should be open communication and coordination with relevant federal, state, local, territorial, or tribal government agencies.

12.0 *Penalties and Notices*

- a. Appropriate sanctions should be established and enforced for violations of voter registration, balloting, and election procedures.
- b. Election officials should post notice of the penalties for violation of election laws and procedures at all polling places. Such notice should be placed on all voter registration forms, applications for ballots, and absentee ballots and envelopes. The notices should be coordinated for uniformity within the state.
- c. All election officials, deputies, and employees (including contract employees) should be advised as to the penalties that exist for violating election rules, laws and procedures and should subscribe in writing under oath to perform their duties.

13.0 *Bar Associations*

- a. Bar Associations should assign qualified attorneys on a voluntary basis to assist in development of local programs to ensure the integrity of the electoral process.
- b. Bar Associations should encourage attorneys to serve as Election Day officials.

14.0 *Definitions*

14.1 *Ballot*

A presentation by paper or other method (e.g., touch screen) that lists the candidates or issues to be voted on in an election.

14.2 *Challenge*

A motion made in dispute of the certified election results on the basis of alleged irregularities during the voting process.

14.3 *Challenge to Voter*

A voter's registration is questioned by an election official.

14.4 Challenged Ballot

A voted ballot which is questioned by a poll watcher on the basis of an improper voting practice on the part of the voter.

14.5 Election Authority

A clerk or a Board of Elections appointed and charged with the duty of conducting elections.

14.6 Election Day

The entire period during which a voter can vote in-person at a designated location (e.g., a traditional polling place or a vote center)

14.7 Election Day Official

A person appointed by election officials and assigned Election Day duties.

14.8 Election Official

A person assigned any official duty or function in the electoral process.

14.9 Jurisdiction

A political boundary of precincts which encompasses the entire scope of an election (e.g., the entire state for an election for the U.S. Senate, the district for an election for the U.S. House of Representatives).

14.10 Poll Watcher

An observer of all official actions and records at the polling place and challenger of unqualified voters and improper voting practices at the polling place.

14.11 Provisional Ballot

A voted ballot that is kept segregated and sealed and not counted until a voter's qualifications to vote have been determined. If the voter is determined qualified, the ballot is unsealed and counted in the canvass.

14.12 Recount

A process to verify the vote count in an election. A recount is ordered or requested prior to the certification of election results.

Commentary to Election Administration Guidelines

Commentary - 1.0 Voter Education, Rights, and Responsibilities

It is every citizen's civic responsibility and right to vote for the candidate or issue of their choice. State and local election officials have an obligation to make sure that all voters are informed of their rights and responsibilities as voters. Voter education should encompass all aspects of the voting process, including the fundamental rights of voters; voter registration; all methods available for voting; time, location and deadlines for registration and voting; language and accessibility assistance and information, as covered under Section 203 of the Voting Rights Act, the American with Disabilities Act, and other federal or state laws; and a basic understanding of the rights and responsibilities associated with voting. Voters have a right to choose their assistor, so long as the assistance is not provided by the voter's employer or union representative. Election officials should disseminate such information, translated in as many languages as practicable, at a minimum in those languages required by state or federal law, through a variety of means prior to an election, such as via mailings, email, the internet, and social media. Materials should also be readily available and in visible locations at polling places. The importance of voter education and all voter education materials should also be a component of online and in-person training of election officials.

Though state and local election administrators should bear the primary responsibility of providing voter education materials, the provision of such materials and information need not be limited to election officials. Schools, civic, and political organizations should also be involved the process. Voter education drives could be held in conjunction with voter registration and get out the vote drives. Additionally, a voter's "rights and responsibilities card" could be distributed during the registration process, at get out the vote drives, and at polling places. Although specific rights and responsibilities may vary slightly by jurisdiction, the American Bar Association believes that, at a minimum, voters should be informed of the basic rights and responsibilities afforded to all voters, as outlined in Section 1.1 of these Guidelines.

The provision of comprehensive, translated, and accessible voter education materials is critical to the success of the voting process. Studies and statistics have shown that first time voters, those likely to need the most education and resources, are less likely to vote again if they have a poor or unsuccessful experience voting.

Commentary - 2.0 Voter Registration

Applications for voter registration should require a signature and ask for data relating to the applicant's eligibility, as well as contact information. Email and cell phone (SMS) information should also be sought as they provide multiple options to reach voters. The postcard registration form included in the National Voter Registration Act provides a model for the content of the application.

Available modern technologies permit rapid addition, deletion, or cancellation of names from voter registration lists. Copies of the registration lists should be available to the public at reasonable or no cost, depending on the format of the list. The cost, if any, should reflect the cost of reproduction and should not be used to discourage availability.

Certainly, the Internet allows for many cost-efficient methods that can be used to make such lists available to the public. These methods must be balanced, however, against legitimate privacy and security concerns of registered voters and must be restricted to non-commercial usage. States should also be encouraged to develop standards for pre- Election Day challenges to voter lists.

Voter registration drives conducted by political parties, nonprofit organizations, and other interested individuals and organizations have served to increase the number of people registering to vote. In some instances, federal and state laws already govern the conduct of third-party voter registration drives, on issues such as permissible conduct and procedures. In the instance where a volunteer registrar submits the voter registration form for the prospective voter, states should adopt more stringent guidelines in order to ensure that there is some measure of accountability and safeguard that the registration forms will in fact be delivered and submitted in the appropriate manner. Voters who register through voter registration drives should also check with the appropriate election authority to verify their registration.

As more steps are being taken to increase voter registration, there is a concomitant responsibility on local election officials to verify the identity of people registering to vote. Verification of the eligibility of the registrant is necessary to protect the integrity of the election system. There are numerous suggested methods of verifying registration, including requiring the applicant to sign at registration. Difficulties in verification procedures arise partly because of mail registration, the desire to maintain the privacy of the individual seeking registration, and costs. Additional problems occur when voters, either because of social circumstance, illiteracy, or disability, do not possess a photo identification or are unable to sign and whose registration must be authenticated by others. In such instances, alternative verification procedures should be devised. States should not create an overly onerous verification process. States may prefer one form of identification over another, but should be forgiving of circumstances that may not allow a particular voter to conform to the preferred method. For instance, if a state requires a photo identification and a voter does not possess one, the voter should have an opportunity to provide what he has and sign a document attesting to his or her identity. There is a legitimate interest in verifying the identification of voters, but the process should not be one of repeated verification, which could be interpreted as a form of intimidation or harassment.

Voter verification programs should be dependable, accurate, and conducted with precision, care, consistency, and transparency. A person's failure to vote, even over multiple election cycles, should not raise an inference that the voter has moved or is otherwise ineligible to vote. Any process to verify a voter's address or other eligibility factors should not emanate from voter history, but rather from reliable public records, including change of address, death, criminal convictions, or returned mail from the Post Office. This being said, in 2018, the U.S. Supreme Court ruled that a jurisdiction may send return cards to registrants who have not engaged in certain "voter activity" for two consecutive years, while reiterating that in no circumstance may a registration be cancelled by reason of the person's failure to vote. An inactive voter who interacts with the election authority—whether by voting, attempting to vote, returning mail, or appearing at the election office for any reason—is no longer in inactive status.

The following should not be factors in initiating the voter verification process: (i) minor mismatches in a registrant's name across government records; (ii) similarities among registrants' names; or (iii) a registrant's failure to update Division of Motor Vehicle records upon being granted U.S. citizenship. State election authorities should not rely on data sources that have not been independently verified as reliable, such as the Social Security Administration's Death Master File.

Election authorities should also consider the use of new technologies to ensure the integrity of the registration lists. If there is a discrepancy with an individual's registration, election officials should flag and investigate the registration and require supplemental evidence of residence from that individual, if appropriate. If an election authority contracts with an outside vendor to verify the eligibility of registered voters, standards and safeguards must be adopted to ensure the reliability of such information.

These guidelines do not take the position that registration should be a required procedure. It is recognized that some jurisdictions have not found a need for registration or may adopt an enrollment system in the future.

Commentary - 3.0 Absentee Voting

Absentee voting is an important method of assuring that registered voters who are unable to go to the polls, for whatever reason, on Election Day are able to exercise their right to vote. This process must be secure and as uncomplicated as possible. States and localities must ensure that applications for absentee voting and ballots are distributed as early as possible, so as not to unduly burden the right of those entitled to vote in that manner.

The nature of absentee voting requires a stringent standard of ballot integrity, from the identification required on applications for absentee ballots and on voted ballot envelopes. Only in limited circumstances should a third party handle a ballot. Third parties, such as political or civic organizations, may be involved in

the absentee voting process to the extent that they facilitate requests for ballots. Localities upon receipt of the absentee application must mail the ballot directly to the registered voter and the completed ballots must be returned only by the registered voter or an identified relative or household member of the voter.

There must also be consideration given to military and overseas voters whose return of the ballot may be complicated by circumstances beyond their control, such as reliance on foreign mail service. Methods that might be considered to expedite the return of ballots include, but are not limited to, internet voting and a reduction in the time of transmittal of ballots back to the locality administering the election. Specifically, the Department of Defense should examine ways to facilitate the prompt return of ballots cast by servicemembers.

There should be methods to allow voters to cure problems with timely-delivered absentee ballots, such as absence of a signature or mismatched signatures, with notice to the voter of the deficiency and a defined deadline for the voter to correct the problem.

Methods should be adopted to allow the voter to ascertain whether the absentee ballot was received and counted, to increase voter confidence in the absentee ballot process.

Commentary - 4.0 Alternative Voting Methods

Alternative voting methods that serve to increase citizen access and participation should be supported, provided that issues of technology and funding can be adequately addressed. Authorities should also take care to assure that voting procedures and systems are reliable and do not increase opportunities for fraud. We recognize that efforts are already being undertaken in this area, such as early voting, mail voting, and vote centers, and we would encourage further study, testing, and careful implementation of new efforts to ensure that voters understand the changes being implemented and that implementation not result in voter confusion or discouragement. Methods such as telephone voting and Internet voting have been studied in the last decade, and the studies indicate challenges to administrative security and integrity of such voting methods under current technological standards

As instances of early voting have become a more popular alternative to in person voting on Election Day, states should develop guidelines in order to assure that the same laws and regulations that govern Election Day voting are applied to early voting. In order for early voting to become a fair and successful method of voting, guidelines should be developed that ensure adequate notice, number and equitable distribution of polling places, and time to vote and to assure that polling places are accessible to all voters. Additionally, the laws governing conduct at early voting locations should be the same as those that govern Election Day polling places (e.g., prohibitions on campaigning too close to or inside a polling place).

Vote center systems have evolved from early voting procedures as a substitute for traditional precinct-based voting. Many of the same recommendations applicable to early voting should apply to operation of vote centers. Studies indicate voters have difficulty transitioning from traditional precinct voting to vote center methods, and this difficulty threatens to affect voter turnout rates, so States that choose to adopt vote centers as a substitute for traditional precinct voting should phase in such programs and undertake substantial voter education about the transition to this new voting process.

Commentary - 5.0 Election Day

Election Day encompasses the merging of different individuals and machines with often differing roles. Voters, election officials and election observers each play a different role in the election, although they all share the same goal: ensuring and participating in an election that allows each registered voter to vote in an environment that is secure and free from intimidation and harassment. For example, in order to best serve American Indian populations, it may require that a polling location be located on a reservation.

Furthermore, in recognition of jurisdictions providing more days for in-person voting through early voting, the provisions in this section apply to the entire period during which a voter can vote in-person.

The processes involved on Election Day should be as seamless as possible. Training should be provided to Election Day officials and poll watchers in order to facilitate their understanding of their appropriate role and duties at the polling place and applicable state and federal voting laws. Election Day officials should be properly trained to assist language minority voters and voters with disabilities and should proactively seek to assist them.

Adequate funding of the electoral process is a key aspect of successful elections. States and localities must provide adequate polling hours, equipment, and personnel as a necessary component of any election. At the same time, it is critical that these resources are provided in an equitable manner across a jurisdiction in order to ensure that there are not certain segments of the population that experience long lines due to an insufficiency of equipment and materials in their polling locations. Additionally, jurisdictions with a history of excessive delay in the voting process should provide additional equipment and personnel in order to better facilitate the process. A study on factors contributing to delays in the voting process should also be conducted. For example, states could undertake studies to see if a per capita standard of voters per type of voting machinery can be established.

Additional concerns about equity require that polling locations must be located equitably within a jurisdiction, must be conveniently located and easily accessible to voters by different modes of transportation, including public

transportation, and do not introduce additional physical or psychological barriers to access. Furthermore, ample notice must inform voters about where the polling locations are and, barring extraordinary circumstances, the polling locations should not be changed before the election. In the rare instance where a change to the polling location must be made due to extraordinary circumstances, the jurisdiction is required to notify the public of any changes through various channels, including use of traditional, social, and ethnic media, as well as stakeholder partners.

Another important aspect of an election is the security of the ballots being cast. Poll watchers are tasked with the important role of challenging unqualified voters and improper voting practices. This role is a part of ensuring the integrity of the polling place, but most importantly, these duties must be carried out in a manner that is consistent with the Voting Rights Act and the Civil Rights Act of 1964. In no instance should selective challenges and minority voter intimidation be allowed to occur.

Voting assistance is an integral aspect of election administration. The right to assistance at the polls by a person of the voter's choice, as required by Section 208 of the Voting Rights Act and other applicable law, ensures that voters who require assistance to vote for reason of disability or due to an inability to read or write can exercise their right to vote without intimidation or manipulation. All voting places should be accessible, any disabled or elderly voter assigned to an inaccessible polling place should be assigned to an accessible polling place or provided alternative means of casting a ballot. Further, all voting places must provide at least one accessible voting system for persons with disabilities that provides the same opportunity for access and participation, including privacy and independence, that is afforded to voters without disabilities. Voters with a disability must be able to fully and freely exercise their fundamental right to vote as required by the Americans with Disabilities Act; the Voting Accessibility for the Elderly and Handicapped Act of 1984 (VAEHA); the Help America Vote Act of 2002, and other applicable laws. For example, ensuring that the size of ballots utilized for persons with disability is the same as those used by other voters regardless of the type of voting system used is critical to privacy for voters with disabilities. Finally, the provision of language assistance, including translated voting materials, as required by Section 203 of the Voting Rights Act and other applicable laws, ensures that voters who are not fully proficient in English are afforded the opportunity to be effectively informed of and fully participate in voting. The proper implementation of voting assistance will not only ensure all voters are able to fully exercise their fundamental right to vote but will also provide a more efficient and smoothly run Election Day.

Commentary - 6.0 Voter Verification

To prevent multiple voting and voting by those not qualified to do so, methods should be devised to verify that the person voting is the same person who is registered. One method is to obtain the voter's signature at the polling place.

Other methods must also be developed so that the rights of the disabled and nonreaders to vote will not be abridged.

Election officials should develop procedures to minimize disruption at the polls created by verification and challenge procedures and to reduce delay and other adverse impacts such procedures may have on those waiting to vote. The maintenance of a centralized list of registered voters that is broadly accessible to the public would improve the process. For example, voters could find out if they were properly registered prior to appearing at the polling place; a voter who appears at the improper polling place could be directed to the proper polling location. (See 2.1(a) of the Guidelines)

A variety of forms of identification should be permissible in jurisdictions that require identification. A voter registration card may be used as a method of voter verification, although a voter should not be required to present the card in order to vote.

Commentary - 7.0 Ballots

There are many components that make up the ballot that will be cast, such as the actual design of the ballot, individual ballot machinery, and the counting of the ballots. The successful integration of these components should result in a polling place where a voter casts a ballot with certainty as to the candidates or issues for which the voter intended to vote.

One important method of minimizing voter confusion is the development of uniform voting mechanisms, both ballots and machinery, within a jurisdiction. Statewide standards should be developed to provide a sense of uniformity, and thus less confusion, within the voting system, as well as a check and balance on local election official ballot designs (e.g., the butterfly ballot). The federal Election Assistance Commission and various other entities have developed and continue to update voting system standards that should be adopted by the states. At a minimum, an adequate number of poll workers must be available to provide assistance with voting machinery. States and localities must provide adequate funding to improve voting machinery and personnel at the polls. Certainly, there must be careful consideration of potential confusion on the part of the voter with respect to designing the ballot. For instance, punch cards should generally be discouraged, and ballots should be designed to ensure that all candidates running for the same office are included on the same page. The selection of voting mechanism should be made with an eye toward changes and improvements in technology.

Voter education is another key element to a successful ballot. Voters must receive assistance in operating voting machinery if necessary, and voters must also be informed that they are not required to vote for all issues or all candidates on the ballot.

In situations that require a judicial review on Election Day, the reviewing body must be adequately prepared to deal with such matters. The Supreme Court has adopted a prudential rule that last-minute orders modifying election processes should be avoided unless absolutely necessity is demonstrated.

Commentary - 8.0 Recounts

Recounts are ordered prior to the certification of election results. The “trigger” that determines the threshold for establishing an automatic recount should be based on whether or not a recount would likely affect the outcome of the election. Examples of situations that could trigger a recount include, but are not limited to, an election where there was a significant “undercount” (i.e., falloff in votes cast for down ticket candidates as compared with top-of-the-ticket candidates), different results are found during the auditing process, or the difference between the votes cast for each candidate in a race is 0.5% or less than the total number of votes cast. A recount of the entire jurisdiction should not be required if the candidate requesting the recount or on whose behalf a recount is sought agrees to limit the recount to selected precincts.

Commentary - 9.0 Challenges to Election Results

Challenges are made post-election. A challenge is made to the certified election results on the basis of alleged irregularities during the voting process. States and localities must establish clear and uniform standards within the jurisdiction regarding challenges.

Commentary - 10.0 Election Administration

In order to protect the integrity of the electoral process, there must be no appearance of bias on the part of those involved in the administration of elections. Any election official who will be involved in an election dispute or recount must avoid any apparent conflict of interest. Any election official who is a candidate in the election must be recused.

Statewide standards should be established that clearly delineate the forms of partisan activity, if any, in which election administration officials may participate. If an official is unsure of whether or not a particular activity is permitted under the standards of the state, that official should consult the appropriate governing body.

Commentary - 11.0 Emergency Management of Elections

The act of voting is a crucial element of any democracy and is a core component of the rule of law in a democratic society. The management of elections in the United States is not a federal function; instead election authority is vested at the local government level. Accordingly, state, local, territorial, and tribal governments should take steps to ensure that the management of the electoral process may continue unimpeded in the face of an emergency.

Most states have adopted emergency Election Day plans, which have traditionally been reactions to local or regional disasters, such as hurricanes or

even the horrific 9/11 terrorist attack. Thus, most plans generally revolve around finding different locations for polling places, due to the inability to access or wholesale destruction of existing polling places. For example, following Hurricane Katrina, New Orleans, Louisiana set up an enormous vote center in the Super Dome, which enabled voters to cast ballots in a central location that was accessible to all. The COVID-19 pandemic, which started globally in 2019 and became a national pandemic in 2020, revealed that a public health emergency presents different obstacles that must be surmounted in order to ensure that elections are able to be held on schedule, or at least as close to on time as possible. Simply put, how do you hold an election if voters are ordered to stay at home for their own health and welfare? How do you maintain the safety of the polling place? How do you contain the possible spread of a virus from human contact to polling machinery, ballots, or even pens and paper? Is all mail voting the solution? How do you reconcile the fact that historically, vote by mail has not been practical for all segments of the population? The rub lies in the fact that elections are not always a one-size fits all situation. Any remedy to conduct elections in an alternative fashion should consider methods of voting that will not further disenfranchise our most vulnerable populations, such as the elderly, language minorities, individuals with disabilities, or low-income communities.

It is indisputable that the challenge to ensure that elections can be conducted in close proximity to an emergency prior to or on Election Day is extremely difficult and a complex undertaking. It is for this reason that states, localities, territories, and tribal election authorities should take the proactive steps necessary to ensure that elections, under any circumstance, are conducted in the safest manner possible, for both the public and those administering our electoral process. Our democracy is at its most successful when our citizens can participate freely and without fear. It is also equally important to ensure that any changes to our electoral process allow ample opportunities for notice and communication, through timely and comprehensive education drives from all media platforms to inform voters of any changes and the options that are available to them.

Commentary - 12.0 Penalties and Notices

The vigorous enforcement of election laws may be necessary to ensure the efficacy of any voting system. Prosecution, even in isolated cases, may be necessary to create an environment in which norms of election conduct are established and to guarantee civil liberties.

Commentary - 12.0 Bar Associations

The American Bar Association has long been on record in urging all lawyers to register and vote and that all lawyers should encourage and assist employees in their offices and firms to participate in the electoral process by registering and voting in federal, state, local, and territorial elections. These Guidelines seek to take that commitment a step further and encourage state, local and territorial bar associations to assist in the development of programs that will ensure the integrity

1550 of the electoral process. Lawyers understand the need for due process and equal
1551 protection as a part of the electoral process and thus are well suited to serve as
1552 Election Day officials.

**MODEL STATUTORY LANGUAGE
ON PROVISIONAL BALLOTING AND COMMENTARY**
(August 2020)

SECTION I *PROVISIONAL BALLOTS AND ENVELOPES*

- 1) At all elections, the following individuals shall be permitted to cast a provisional ballot:
 - a) an individual who claims to be properly registered and eligible to vote at the election district, but whose name does not appear on the general register and whose registration cannot be determined by the election officials; or
 - b) an individual voting at the election district, but who is unable to produce required identification; or
 - c) an individual who has applied for an absentee ballot, but who has not returned the absentee ballot; or
 - d) an individual who presents a judicial order to vote; or
 - e) an individual whom an election official asserts is not eligible to vote.
- 2) Prior to casting the provisional ballot, the elector shall be required to sign a uniform affidavit, that shall be used by all jurisdictions within the state, on the provisional ballot envelope.
 - a) Each jurisdiction shall provide to each provisional voter printed information on the provisional ballot envelope notifying the voter that in order for the provisional ballot to be evaluated by the canvassing board, the elector must print his/her name and address and sign and date the affidavit.
 - b) A jurisdiction may place notice of penalties for violations of election laws and procedures on the provisional ballot envelope.
 - c) A jurisdiction may allow an elector to provide additional information, such as date, location or means of registration, on the provisional ballot envelope in order to facilitate the evaluation by the canvassing board, so long as the provision of such information is voluntary.
- 3) After the provisional ballot has been cast,
 - a) the elector shall

- i) place the provisional ballot in a secrecy envelope, and
 - ii) place the secrecy envelope in a sealed provisional ballot envelope;
- b) the election official shall
 - i) provide written information to the elector explaining the system for verifying ballots as well as a provisional ballot envelope number,
 - ii) ensure that all provisional ballots shall remain sealed in their provisional ballot envelopes for return to the canvassing board, and
 - iii) certify the number of provisional ballots delivered to the polling place and the number of sealed provisional ballot envelopes containing voted ballots.
- 4) Prior to the certification of the election, the canvassing board shall examine each provisional ballot envelope to determine if the individual voting that ballot was entitled to vote at the election district in the election. One authorized representative of each candidate in a primary or election, who is an elector in the county, shall be permitted to remain in the room in which the determination is being made if he does not impede the orderly conduct of the determination. Uniform standards shall be developed and applied for the purposes of verifying provisional ballots within a state.
- 5) If it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast,
 - a) the ballot should be placed with other ballots that are eligible to be counted,
 - b) the tabulation of eligible ballots should not occur until a determination of eligibility has been made for all provisional ballots submitted, and
 - c) such tabulation should be made in accordance with the rules governing normal ballot tabulation.
- 6) If it is determined that the elector voting the provisional ballot was not registered or otherwise failed to establish his or her qualifications to vote under applicable state law,

- a) the provisional ballot shall not be counted and the ballot shall remain in the provisional ballot envelope and shall be reflected as rejected as ineligible; and
 - b) a photocopy of the provisional ballot envelope shall be used by the election authority as a voter registration form if the information is properly submitted in accordance with state voter registration requirements.
- 7) If it is determined that the elector voting the provisional ballot was eligible to vote but not at the election district where the ballot was cast, the canvassing board shall open the envelope, with due regard to secrecy of the ballot, and only count the portion of the ballot that the elector would have been eligible to vote in the proper election district and at the election district where the vote was cast.
 - 8) The election authority shall establish a World Wide Web site and a toll-free telephone number to permit an elector who cast a provisional ballot to determine, by means of a unique, non-public personal identification number, whether the vote was counted and, if the vote was not counted, the reason that it was not counted.

SECTION II DETERMINING ELIGIBILITY OF PROVISIONAL BALLOTS

- 1) Prior to accepting any provisional ballot, the election official shall determine that the information provided on the provisional ballot envelope by the elector is properly completed.
- 2) When ballots are transferred from polling places to the election authority for tabulation, provisional ballot envelopes
 - a) should be segregated from other ballots and placed in separate containers; and
 - b) should be photocopied, upon delivery to the canvassing board, by teams of election officials, with a representative from each major political party, for purposes of determining the eligibility of the elector; and
 - c) should then be placed in a sealed container until tabulation.
- 3) The counting of provisional ballots shall not begin until the canvassing board has determined the eligibility of all provisional voters according to applicable state laws.
- 4) Determinations as to whether provisional ballots will be counted should be

based on

- a) the statewide voter registration database, or
- b) other state and local voter registration records, or
- c) where an elector has registered through an agency authorized to conduct voter registration pursuant to the National Voter Registration Act of 1993, the election authority should make an inquiry of the registration agency.

- 5) Once the canvassing board has made a determination as to whether or not a provisional ballot is eligible to be counted, the canvassing board shall provide documentation on the copy of the provisional ballot envelope verifying the eligibility or ineligibility of the elector. Such documentation should include
 - a) name of elector casting a provisional ballot,
 - b) name of reviewer,
 - c) date and time of review, and
 - d) description of evidence that supports eligibility or ineligibility of elector.
- 6) The canvassing board should record on a provisional ballot disposition list the provisional ballot identification number and notation marking it as accepted or rejected.
- 7) Once a review has been made by the canvassing board, determining eligibility or ineligibility of all provisional ballots, the provisional ballots and copies of provisional ballot envelopes, shall be delivered to bi-partisan counting teams for review and tabulation. A record of such delivery should be kept and shall include a signed receipt from two election officials, one from each major political party.
- 8) Challengers and watchers, as provided by applicable state law, may be present at all times that the bi-partisan counting team is reviewing and/or counting provisional ballots, provisional ballot envelopes and copies of provisional ballot envelopes. The election authority must give proper notification to the county chairs of each major political party in advance of the review and counting of provisional ballot materials.
- 9) If the elector is found to be duly qualified and registered to vote, the ballot envelope should be opened and the ballot placed in a ballot box to be counted with other eligible provisional ballots.

10) If the elector is found not to be duly qualified and registered to vote, the ballot envelope should not be opened and the ballot should not be counted.

a) The copy of the provisional ballot envelope should be submitted as an application for voter registration for future elections so long as:

i) The information serving as an application for voter registration is easily separated from the information requested to cast a provisional ballot (e.g., insufficient information on the voter registration application should not disqualify an otherwise sufficiently completed application to cast a provisional ballot); and

ii) The provisional ballot envelope contains identical information that is required for voter registration in the applicable state

b) In the event that the voter registration portion of the provisional ballot envelope is not complete, the provisional ballot envelope should be treated as a voter registration application by the prospective voter.

11) Following the determination of eligible provisional ballots:

a) all eligible provisional ballot materials should be sealed in a container, dated and signed by each member of the reviewing team, and marked as “voted provisional ballots and ballot envelopes;”

b) all rejected provisional ballot materials should be sealed in a container, dated and signed by each member of the reviewing team, and marked as, “rejected provisional ballots and ballot envelopes;” and

c) upon receipt of the returned materials, the election authority should tabulate the eligible provisional vote.

SECTION III DEFINITIONS

1) **Canvassing Board** means the entity established by state law that is charged with determining the validity of voter registration for purpose of counting provisional ballots or certifying elections, recounts, or challenges in an election.

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- 2) **Election Authority** means the state, local, territorial, or tribal entity responsible for the administration of elections (e.g., Department of Elections, Board of Election Commissioners, County Clerk, or Canvassing Board).
 - 3) **Election Official** means an official sworn to conduct an election.
 - 4) **Elector** means an individual who is eligible to vote.
 - 5) **Jurisdiction** means a political boundary of election districts in which the election is administered (e.g., the entire state for an election for the U.S. Senate, the congressional district for an election for the U.S. House of Representatives).
 - 6) **Provisional Ballot** means a ballot issued by an election official on Election Day to an individual who claims to be a registered elector when the individual's name does not appear on the general register or the individual's registration cannot be verified or where the individual is determined to be ineligible.
 - 7) **Provisional Ballot Envelope Number** means the number assigned to the provisional ballot envelope.

Commentary to Model Statutory Language on Provisional Balloting

A balance must be struck between encouraging participation in the electoral process and encouraging the orderly and fair administration of elections. When a provisional ballot is cast, an affidavit stating that an individual is registered to vote in the jurisdiction where the individual desires to vote and that the individual is eligible to vote is required by the Help America Vote Act of 2002 (P.L. 107-252, § 302(a)(2)). Accordingly, the affidavit should not require any additional information in order to verify the information contained on the provisional ballot envelope.

By way of example, the affidavit may state the following:

PROVISIONAL BALLOT ENVELOPE NUMBER **XXX**

I affirm, that I am:

and

i)

ii)

registered to vote in this jurisdiction

eligible to vote in this election.

Printed Name

Signature

Street Address

Date

City, State, Zip Code

The information in this box must be completed in order to process your provisional ballot.

Jurisdictions should, however, allow individuals to voluntarily provide additional information, such as date, location and method of registration, and/or the precinct in which the voter believes he or she is registered to vote, in order to facilitate the work of the canvassing board. Election officials should post notice of the penalties for violation of election laws and procedures on provisional ballot envelopes. The notices should be coordinated for uniformity within the state.

The presentation of affidavits should be uniform across the state. Uniform standards for verifying provisional ballots should be developed and applied to all ballots within a state in order facilitate the verification process and prevent confusion within the system.

As in all aspects of the electoral process, the secrecy of the ballot must be maintained during the provisional balloting process. The provisional ballot envelope number should only be associated with the provisional ballot

1835 envelope, including the verification of whether or not the ballot was counted,
1836 and not the provisional ballot itself.

REPORT

The American Bar Association has traditionally been an active and guiding voice in matters involving the electoral process. The Standing Committee on Election Law, whose members represent a balance of political party, non-partisan, and independent views, is charged with developing and examining ways to improve the electoral process. As changes in the electorate and the electoral process occur, the Standing Committee continues to make cogent responses to emerging electoral issues on behalf of the Association. In particular, the Standing Committee, on behalf of the Association, has maintained a strong and historic interest in improving the level of participation and integrity of the electoral process.

Association History on Electoral Reform

One constant area of study for the Standing Committee has been that of election reform. The Association first covered the subject of the administration of the electoral process with *Ballot Integrity Standards Applying to Election Officials*, dated August, 1989 (“*Standards*”) which were developed as part of the rationale that the success of a democratic system of government depends in part on the integrity of its election process. In 1989, the Standing Committee and the Association determined that an election system must have several attributes in order to preserve the integrity of the electoral process: 1) that citizens who are eligible to vote be provided with a fair opportunity to vote; 2) that the ability to vote should be confined to those eligible to vote; 3) that voters be able to cast ballots freely without intimidation or improper influence; and 4) that the ballot be secure from the time it is cast to the time it is counted. The *Standards*, subsequently archived and supplanted by newer policies, were developed as a means of creating an electoral system that would protect the integrity of the ballot, without deterring political participation and voting by eligible citizens.

The 2000 presidential election necessitated a revisiting of the issue. *Election Administration Guidelines and Commentary*, dated August 2001 (“*Guidelines*”) covered a broad range of electoral issues, including such topics as voter education, registration, voting, provisional balloting, and post-election issues, that can be applied to all elections. Although these *Guidelines* cover federal and state, local, territorial, and tribal elections, they are directed at the election administrators and officials at the state, local, territorial, and tribal level, who hold primary responsibility for election activities, both before, during, and after the actual election. The *Guidelines* are meant to enhance the integrity and public perception of the electoral process. As aspirations for the necessary reform of our electoral process, they are intended to ensure that all citizens who are eligible to vote have the greatest access to the ballot box. The *Guidelines* were updated in 2005, 2008, and 2009 to keep pace with changes in election law, technology, society, and the actual administration of elections.

Purpose of Current Report and Resolution

Based on our examination of the issue for the last decade, and in light of ongoing trends in voting and voter registration, advancements in technology, and the current COVID-19 pandemic, the Standing Committee has determined that it is necessary to revisit the

existing Guidelines with a fresh eye and seeks to adopt *Election Administration Guidelines and Commentary*, dated August 2020 (“2020 Guidelines”) to replace all earlier versions of the *Guidelines*.

New Features of the 2020 Guidelines

In general, this year’s comprehensive set of “best practices” for the administration of elections is similar to the prior version adopted by the House of Delegates in 2009. We have made minor edits for clarification, grammar, and punctuation. The only entirely new section is Section 11, devoted to Emergency Management of Elections. The need for this subject to be addressed at this time is obvious, though this is not the first time that the ABA has recognized that emergency situations demand more flexibility in planning for and administering elections. The provisions of Section 11 are not inconsistent with existing policy (14A113A), also sponsored by the Standing Committee, on the preservation of the electoral process during emergencies passed by the House in 2014. While the prior policy was focused more on conducting elections during natural disasters, the proposed resolution seeks to also provide a roadmap for conducting elections during public health and other emergencies.

Important additions have been made to several sections covered in the *2009 Guidelines* to acknowledge developments in alternative models for elections during the period since those *Guidelines* were written. For example, vote centers, which have become more frequently used in recent years, have been added to the Alternative Voting Methods (Section 4). The Election Day Section 5 has added provisions acknowledging that the early voting period should be subject to the same principles as Election Day with respect to polling locations and equipment, the equitable distribution of which has been a growing issue in election administration. Section 5 also provides for election day troubleshooting, recommending the designation of a go-to person or office where problems can be addressed immediately, in the interest of keeping small problems from becoming big ones. The Absentee Voting Section 3 has also been fleshed out in much greater detail, recommending procedures for the return, curing, and tracking of absentee ballots.

Finally, in Section 2, Voter Registration, the subsections devoted to voter registration and list maintenance, have been substantially reorganized in the interest of clarity. We have attempted to explain these processes in chronological order. We emphasize the acceptable predicates for inquiries as to whether the voter has moved and the process that may ensue for dropping a voter from the roll. Removal of a voter for failure to vote is not permitted under the Guidelines, though the commentary acknowledges recent case law to the contrary.

As a whole, the *2020 Guidelines* are more user-friendly and in a more logical sequence, and the Commentary has been updated to present time and is intended to substantively supplement the *2020 Guidelines*. We hope they will be disseminated widely to Secretaries of State and other election officials responsible for the ongoing review and improvement of the election process in their states and localities, as well as to the United States Congress, which has authority to enact legislation governing federal elections.

Conclusion

Federal, state, local, territorial, and tribal governments are constantly working to improve the administration of elections to ensure public confidence and trust in our electoral system. The Standing Committee believes that the *2020 Guidelines*, submitted for adoption by the House, are reflective of ongoing changes and trends in elections and will serve to enhance the administration and integrity of the franchise. The administration of elections is among the most underfunded of government activities, and the ABA should encourage the appropriation of necessary funding to election administration to ensure the integrity and efficiency of the electoral process, which is the foundation of our democratic society.

Respectfully Submitted,

Estelle H. Rogers
Chair, Standing Committee on Election Law
August 2020

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Election Law

Submitted By: Estelle Rogers, Chair

1. Summary of the Resolution(s).

Recommends that all election officials ensure the integrity of the election process through the adoption, use, and enforcement of these updated Guidelines and provide adequate funding in order to ensure the integrity and efficiency of the electoral process. These Guidelines supplant all prior versions approved by the House of Delegates: 01A112A, 05A101, 08A119A, and 09A116. The Guidelines were first adopted by the House in 2001 (01A112A) as a result of the 2000 presidential election and the need to provide uniform guidelines in election administration in order to enhance public trust and the integrity of our electoral process. The Guidelines were revised again in 2005 (05A101), 2008 (08A119A), and 2009 (09A116) due to changes and trends in election administration, including the need for standards for provisional balloting, which resulted in the inclusion of Appendix A, Model and Statutory Language on Provisional Balloting and Commentary, to the Guidelines.

2. Approval by Submitting Entity.

Approved at April 2020 Spring Meeting of the Standing Committee on Election Law.

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

This would replace all prior versions of the Guidelines: 01A112A, 05A101, 08A119A, and 09A116.

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

n/a

5. Status of Legislation. (If applicable)

There are numerous pending bills in Congress and in state legislatures regarding matters of election administration that are relevant to this resolution.

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

They will be disseminated widely to Secretaries of State and other election officials

responsible for the ongoing review and improvement of the election process in their states and localities, as well as to the United States Congress, which has authority to enact legislation governing federal elections. The Committee encourages their use by the ABA Governmental Affairs Office and Amicus Curiae Committee in advocacy on behalf of the Association.

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

none

8. Disclosure of Interest. (If applicable)

none

9. Referrals.

Civil Rights and Social Justice
Administrative Law Section
State and Local Government Law
Government and Public Sector Law
Disability Rights
Young Lawyers Division
Law Student Division
Senior Lawyers Division

10. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.)*

Estelle H. Rogers
Tel.: (202) 337-3332
E-mail: 1estellerogers@gmail.com

11. Name and Contact 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.*

Estelle H. Rogers
Tel.: (202) 337-3332
E-mail: 1estellerogers@gmail.com

EXECUTIVE SUMMARY

1. Summary of the Resolution.

Recommends that all election officials ensure the integrity of the election process through the adoption, use, and enforcement of these updated Guidelines and provide adequate funding in order to ensure the integrity and efficiency of the electoral process. This version of the Guidelines would supplant all prior versions: 01A112A, 05A101, 08A119A, and 09A116. The Guidelines were first adopted by the House in 2001 (01A112A) as a result of the 2000 presidential election and the need to provide uniform guidelines in election administration in order to enhance public trust and the integrity of our electoral process. The Guidelines were revised again in 2005 (05A101), 2008 (08A119A), and 2009 (09A116) due to changes and trends in election administration, including the need for standards for provisional balloting, which resulted in the inclusion of Appendix A, Model and Statutory Language on Provisional Balloting and Commentary, to the Guidelines.

2. Summary of the issue that the resolution addresses.

An election system must have several attributes in order to preserve the integrity of the electoral process: 1) that citizens who are eligible to vote be provided with a fair opportunity to vote; 2) that the ability to vote should be confined to those eligible to vote; 3) that voters be able to cast ballots freely without intimidation or improper influence; and 4) that the ballot be secure from the time it is cast to the time it is counted. The Standards were developed as a means of creating an electoral system that would protect the integrity of the ballot, without deterring political participation and voting by eligible citizens.

3. Please explain how the proposed policy position will address the issue.

The 2020 Guidelines are more user-friendly and in a more logical sequence, and the Commentary has been updated to present time and is intended to substantively supplement the 2020 Guidelines. They will be disseminated widely to Secretaries of State and other election officials responsible for the ongoing review and improvement of the election process in their states and localities, as well as to the United States Congress, which has authority to enact legislation governing federal elections. We also encourage their use by the ABA Governmental Affairs Office and Amicus Curiae Committee in advocacy on behalf of the Association.

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

None known.

AMERICAN BAR ASSOCIATION
INTERNATIONAL LAW SECTION
CRIMINAL JUSTICE SECTION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES
TORT TRIAL AND INSURANCE PRACTICE SECTION
WASHINGTON STATE BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, territorial and tribal
2 governments to enact and enforce legislation that prohibits and penalizes the possession,
3 sale, and trade of shark fins.

4
5 FURTHER RESOLVED, That the American Bar Association urges that all nations enact
6 laws that prohibit and penalize the possession, sale, and trade of shark fins, if they
7 have not already adopted such laws; and

8
9 FURTHER RESOLVED, That the American Bar Association encourages all
10 international, regional, national, and state bar associations, and international
11 organizations, to promote policies and laws that prohibit and penalize the possession,
12 sale, and trade of shark fins.

REPORT

Introduction

The Value of Sharks

In 2017 the United Nations proclaimed 2021 to 2030 as the “Decade of Ocean Science for Sustainable Development.”¹ The goal of this Decade is to ensure sustainable management of our oceans. The Decade will focus on the health of our oceans and attempt to reverse unhealthy cycles that may be induced as a result of human activity. The Decade will bring about an unprecedented opportunity for the international community to take action to protect a critical aquatic predator – the shark.

Sharks are considered “apex predators” and are vital to marine ecosystems for numerous reasons.² Sharks maintain other species through “spatial controls,” by removing the weak and sick as well as maintaining balance to “ensure species diversity.”³ Studies suggest that sharks also indirectly maintain seagrass and coral reef habitats.⁴ A decline in shark populations can also hurt the fishing industry as the elimination of an apex predator, like the shark, would allow room for “mid-level” predators to emerge and therefore deplete the fishing industry’s normal target species.⁵ The mid-level predators (e.g., cownose rays) become more abundant as a result of the decrease in the population of the top-level predators (sharks). They, in turn, consume the supply of the fishing industry’s target species (scallops, oysters, clams), often before the human beings can harvest it.⁶ Small marine life is “vital to sustaining the entire marine system” as it is estimated to provide 70% of our oxygen.⁷ In addition to causing direct harm to the fisheries industry, loss of sharks has other knock-on economic effects, including on industries that purchase from commercial fisheries (e.g, restaurants, hospitality) and the insurers who write policies for them.⁸

¹ G.A. Res. 72/73, Agenda item 77 (a) (Dec. 5, 2017).

² E. Griffin, K.L. Miller, *Predators as Prey: Why Healthy Oceans Need Sharks*, OCEANA (2008), https://oceana.org/sites/default/files/reports/Predators_as_Prey_FINAL_FINAL1.pdf.

³ Oceana, *The Importance of Sharks*, <https://eu.oceana.org/en/importance-sharks-0/> (last visited on Jan. 30, 2020).

⁴ Mark Meekan, *Killing sharks is killing coral reefs too*, THE CONVERSATION (Sept. 18, 2013), <https://theconversation.com/killing-sharks-is-killing-coral-reefs-too-18368>.

⁵ Patrick Mustain, Mariah Pfleger, Lora Snyder, *Shark Fin Trade; Why it Should be Banned in the United States*, OCEANA 5 (2016).

⁶ Ransom A. Myers, et al., *Cascading Effects of the Loss of Apex Predatory Sharks from a Coastal Ocean*, SCIENCE (Mar. 2007).

⁷ Joseph Hincks, *Peace Boat passengers consider the cost of shark fin soup*, NATIONAL GEOGRAPHIC (Mar. 7, 2015), <https://blog.nationalgeographic.org/2015/03/07/peace-boat-passengers-consider-the-cost-of-shark-fin-soup/>.

⁸ Although perhaps less well-known than insurance for other food industries, capture fisheries do utilize insurance. See, e.g., UNITED NATIONS FOOD & AGRICULTURAL ORGANIZATION, GUIDELINES FOR INCREASING ACCESS OF SMALL-SCALE FISHERS TO INSURANCE SERVICES IN ASIA: A HANDBOOK FOR INSURANCE AND FISHERIES STAKEHOLDERS (2019), <http://www.fao.org/3/ca5129en/ca5129en.pdf>. Interestingly, arguments have been made that an increase in the use of insurance for capture fisheries could itself

Oceana, an international advocacy organization dedicated entirely to ocean conservation, has reported that the eastern coast of the United States which was once abundant with sharks has now “declined to levels of functional elimination.”⁹ Sharks are “slow to mature and only have a small number of pups a year (or every other year); thus, population sizes of sharks don’t recover easily once they have been decimated.”¹⁰ Experts suggest that even if all commercial fishing of sharks were to cease at this moment, most large shark species would not recover within 50 years.¹¹ This is attributed to the reproductive cycles of sharks. Therefore, protecting these apex predators must be done with urgency.

The Problem of Shark Finning

This worldwide decline in the diversity of species of sharks is a result of shark finning. Shark finning occurs when a shark’s fin is sliced off and the rest of the still-living body is discarded into the ocean.¹² The shark, still conscious, dies from shock, blood loss, starvation, or predation.¹³ Finned sharks have a 100% mortality rate.¹⁴ Every year, 73 million sharks are reportedly killed in this way¹⁵ (and the inclusion of unreported killings would likely bring that figure closer to 100 million¹⁶). Sharks are generally caught through illegal operations or as bycatch. Bycatch refers to fish or other marine life that are caught while commercial fishing for other species. Essentially, while legal fishing expeditions may intend to catch tuna or billfish, sharks invariably end up in these nets and are then finned.¹⁷ A single shark fin fetches a significant sum of money, estimated anywhere between \$100 to \$10,000 depending on the type of shark, the buyer, and market it is sold in.¹⁸ However, the United Nations Food and Agriculture Organization has reported that “knowledge of the specific characteristics of domestic markets is . . . very limited, and there is little concrete information on such things as the types of

have a positive ecological effect by “protect[ing] revenue and encourage[ing] increased sustainability of fisheries and improv[ing] compliance with and enforcement of fisheries regulation.” J. Mumford, et al., *Insurance Mechanisms to Mediate Economic Risks in Marine Fisheries*, 66 ICES J. MARINE SCI., 950, 950 (June 5, 2009).

⁹ Griffin & Miller, *supra* note 2.

¹⁰ Shark Allies, *Why are Sharks Important?*, <https://www.sharkallies.com/shark-knowledge-1/2018/4/12/why-we-need-sharks> (last visited Jan. 28, 2020).

¹¹ *Id.*

¹² Caty Fairclough, *Shark Finning: Sharks Turned Prey*, OCEAN, <https://ocean.si.edu/ocean-life/sharks-rays/shark-finning-sharks-turned-prey>.

¹³ *Shark Fin Sales, Trading Becomes Illegal in New Jersey*, CAPE MAY COUNTY HERALD (Jan. 9, 2020), https://www.capemaycountyherald.com/news/environment/article_93820c96-3305-11ea-be13-f3149cb49cd5.html.

¹⁴ Worm, et al., *Global Catches, Exploitation Rates, and Rebuilding Options for Sharks*, Marine Policy 40.C 194-204 (2013).

¹⁵ Shark Research Institute, *Ending the Shark Fin Trade in the USA*, <https://oceanconference.un.org/commitments/?id=19799> (last visited on Jan. 29, 2020).

¹⁶ See *Shark Fin Sales*, *supra* note 13.

¹⁷ The University of Hong Kong, *Appetite for shark fin soup serious risk to threatened sharks*, SCIENCE DAILY (Sept. 13, 2018), www.sciencedaily.com/releases/2018/09/180913113841.htm.

¹⁸ Jared R. Wigginton, *Governing a Global Commons: Sharks in the High Seas*, 25 VILL. ENVTL. L.J. 431 (2014); available at <https://digitalcommons.law.villanova.edu/elj/vol25/iss2/2>.

products being marketed, the prices of these products at different points in the supply chain, the profile of the typical consumer, and the major demand drivers."¹⁹

The bulk of the demand comes from Asian markets that consider the shark fin valuable for various reasons. Shark fins are considered a "luxury" food item and served in high-end restaurants for wealthy people.²⁰ Shark fins are also alleged to have medicinal value. One of the driving factors for demand is the belief that shark fins contain anti-cancer properties.²¹ However, no such nutritional or medicinal values are known to be scientifically proven.²² The high value of shark fins is a major driver of shark mortality.²³ Regardless of specific types of quotas that may be in place to prevent overfishing, shark catches are largely unreported and fly under the radar.

There are several human rights violations associated with shark finning. "The global shark fin industry is rife with criminal activity and cannot be trusted to police itself effectively."²⁴ According to a recent study, criminal activity specifically related to shark fins has risen because of the demand from Asia. This has resulted in illegal fishing and overseas illicit markets.²⁵ Crime groups involved in illegal fishing activities inevitably link to other industries as the market becomes more lucrative. This allows for other illegal activities such as drugs, arms sales, people smuggling, and sex slavery to flourish.²⁶ The human rights abuses on the high seas have intensified as a result of "lax maritime labor laws and an insatiable global demand for seafood even as fishing stocks are depleted."²⁷

The shark is a prized catch in the ocean, as it has an 80 percent illegal catch rate.²⁸ The practice of illegally catching seafood, known as fish piracy, is a major factor in the destruction of the world's oceans. "It contributes to the overfishing of stocks around the globe by circumventing management systems and undermining the sustainability of all

¹⁹ FAO Fisheries and Aquaculture Technical Paper 590, *State of the global market for shark products* (2015), <http://www.fao.org/3/a-i4795e.pdf>.

²⁰ See Sebastien Strangio, *Rich Chinese are literally eating this exotic mammal into extinction*, PRI (Oct. 20, 2014), <https://www.pri.org/stories/2014-10-20/rich-chinese-are-literally-eating-exotic-mammal-extinction>. See also Shairp, Rachel, et. al, *Understanding Urban Demand for Wild Meat in Vietnam: Implications for Conservation Actions*, PLoS ONE (11)1 (2016), <https://doi.org/10.1371/journal.pone.0134787>.

²¹ Mark Tutton, *Traditional medicines continue to thrive globally*, CNN (June 24, 2009), <http://www.cnn.com/2009/HEALTH/06/24/traditional.treatment/index.html>.

²² Worm et. al., *supra* note 14.

²³ Shelley Clarke, et al., *Population Trends in Pacific Oceanic Sharks and the Utility of Regulations on Shark Finning*, 27.1 CONSERVATION BIOLOGY 197-209 (2013).

²⁴ University of Hong Kong, *supra* note 17.

²⁵ *Australia links organized crime to illegal fishing*, N.Y. TIMES (May 26, 2008), <https://www.nytimes.com/2008/05/26/world/asia/26iht-fish.1.13211096.html>.

²⁶ *Id.* See also *Sharks, fins and the migrants made to fish them*, REVEAL NEWS (June 30, 2018), <https://www.revealnews.org/article/sharks-fins-and-the-migrants-made-to-fish-them/>.

²⁷ Ian Urbina, *Sea Slaves: The Human Misery that Feeds Pets and Livestock*, N.Y. TIMES (July 27, 2015), <https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html>.

²⁸ Marine Resources and Fisheries Consultants, *Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries* (2005).

fisheries, the communities that depend on them, and food security.”²⁹ Joint enterprises or other “symbiotic relationships” between various state governments and the perpetrators of these illegal acts only serve to encourage such behavior. It is reported that in February 2018, Argentina caught Chinese boats in Argentina’s waters poaching a vast amount of seafood. The boats inevitably escaped back to international waters before Argentina could make appropriate arrests.³⁰

Current International Regime on Sharks

The international community attempts to protect oceanic life through various means. The main instrument is the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES), which is the only global treaty that aims to regulate the trade of threatened or endangered species. The parties to the treaty are obligated to “monitor the global trade in wildlife and wildlife products and take action on behalf of species that may be headed for trouble as a result of international trade.”³¹ The United States ratified the treaty in 1973.

CITES contains three appendices. If a species appears on any of the appendices, then parties to the treaty are obligated to implement import and/or export controls in listed species. Appendix I lists species threatened with extinction. Appendix II lists species that are not threatened with extinction but can become so without regulating trade. Appendix III allows parties to list their own native species to further protect those species globally.³²

Despite the fact that scientists have repeatedly called upon CITES to protect sharks and list them within the appendices, state parties continue to block efforts to afford all sharks protections.³³ Therefore, as of 2016, out of an estimated 500³⁴ species of sharks known to exist, twelve species of sharks and all manta rays³⁵ have been included in

²⁹ Jane Dalton, *World’s biggest ‘fish factory’ pirate ship ‘activity’*, THE INDEPENDENT (June 8, 2018), <https://www.independent.co.uk/news/world/americas/fish-factory-pirate-ship-seized-illegal-fishing-damanzaihao-worlds-biggest-peru-belize-mackerel-a8390321.html>

³⁰ *Surface forces: China Subsidizes Pirates*, STRATEGY NEWS (Mar. 25, 2018), <https://www.strategypage.com/htmwl/htsurf/articles/20180325.aspx>. See also Matthew Sedacca, *China has fished itself out of its own waters, so Chinese fishermen are now sticking their rods in other nations’ seas*, QUARTZ (Apr. 4, 2017), <https://qz.com/948980/china-has-fished-itself-out-of-its-own-waters-so-chinese-fishermen-are-now-sticking-their-rods-in-other-nations-seas/>.

³¹ Ginette Hemley, *International Wildlife Trade*, A CITES SOURCEBOOK (1994).

³² *Id.*

³³ See John Platt, *Shark fin soup : CITES fails to protect 5 species of sharks from overfishing and finning*, SCIENTIFIC AMERICAN (Mar. 25, 2010), <https://blogs.scientificamerican.com/extinction-countdown/shark-fin-soup-cites-fails-to-protect-5-species-of-sharks-from-overfishing-and-finning/>. See also Jessica Spiegel, *Even Jaws Deserves to Keep His Fins: Outlawing Shark Finning Throughout Global Waters*, 24 B.C. INT’L & COMP. L. REV. 409 (2001), <https://lawdigitalcommons.bc.edu/iclr/vol24/iss2/8>.

³⁴ Ocean Portal Team, *Sharks*, SMITHSONIAN, <https://ocean.si.edu/ocean-life/sharks-rays/sharks>, (last visited on Jan. 28, 2020).

³⁵ “For the purposes of this Resolution, the term ‘shark’ is taken to include all species of sharks, skates, rays and chimaeras, in alignment with the FAO International Plan of Action for the Conservation and Management of Sharks (IPOA-Sharks).” See UN FAO, International Plan of Action for Conservation and

Appendix II.³⁶ The CITES parties were instructed through Resolution Conference 12.6 to increase protections to preserve the shark species.³⁷ As a result, the import, export, and re-export of products derived from those twelve species of sharks all require permits granted by the Government.³⁸ It is important to highlight that this merely regulates legal fishing. "Even with the progress made since 2013, only 3.9 to 17.8 percent of the global fin trade is regulated" as a result of CITES.³⁹ During the August 2019 session of CITES Conference of Parties, a Consideration of Proposal was introduced to amend Appendices I and II to include regulation of one more shark species - the short fin and long fin Mako shark.⁴⁰ This was accepted by CITES parties and the Mako shark species is now listed in CITES Appendix II.⁴¹

The *United Nations Convention on the Law of the Sea* (UNCLOS)⁴² is a comprehensive legal framework that governs the world's oceans and seas and use of all its resources. The United States, while not a party, recognizes much of the treaty as customary international law.⁴³ "The real work of UNCLOS was to establish the final sea zone of jurisdiction, known as the exclusive economic zone (EEZ)."⁴⁴ UNCLOS also requires that coastal states protect against "over-exploitation" and "imposes a duty on coastal states to responsibly manage the living resources within its waters."⁴⁵ However, as one scholar notes, UNCLOS is silent with regards to fishing processes and does not define

Management of Sharks, <http://www.fao.org/ipoa-sharks/background/about-ipoa-sharks/en/> (last visited on Feb. 3, 2020).

³⁶ CITES, *Sharks and manta rays*, <https://www.cites.org/eng/prog/shark/more.php> (last visited on Jan. 28, 2020).

³⁷ CITES, *Conservation and management of sharks*, Conf. 12.6 (Rev. CoP17), <https://www.cites.org/sites/default/files/document/E-Res-12-06-R17.pdf>.

³⁸ *Id.* Art. 4.

³⁹ Jen Sawada, *Global Progress on Shark, Ray CITES Listings*, PEW (Mar. 19, 2019), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/03/global-progress-on-shark-ray-cites-listings>.

⁴⁰ See CITES, "Consideration of proposals for amendment of appendices I and II" Eighteenth Meeting of the Conference of Parties, COP18, Prop 42, CoP18 update, <https://cites.org/sites/default/files/eng/cop/18/prop/060319/E-CoP18-Prop-42.pdf>.

⁴¹ Project Aware, "Success for Mako Sharks at CITES CoP 18" August 29, 2019, <https://www.projectaware.org/news/success-mako-sharks-cites-cop18>.

⁴² United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

⁴³ Wigginton, *supra* note 18, at 437. The U.S. recognizes the EEZ provisions as customary law, "Under international law, each coastal State controls the waters and seafloor . . . This control is recognized by the international community and has its basis in the United Nations Convention on the Law of the Sea ("UNCLOS") and customary international law . . . Under the UN Convention on the Law of the Sea, every State has a right to establish a territorial sea . . . Within its territorial seas, a coastal State exercises sovereignty over the waters, airspace, and bed and subsoil. UNCLOS Art. 2. Beyond the territorial sea of a coastal State lies the EEZ. A State's EEZ extends from the outer limit of the State's territorial sea to 200 nautical miles from the coast. UNCLOS Art. 55." *Massachusetts Lobstermen's Association v. Ross* (Docket No. 1:17-cv-00406-JEB).

⁴⁴ Crystal Green, *An International SOS (Save Our Sharks): How the International Legal Framework Should Be Used to Save Our Sharks*, 27 *PACE INT'L L. REV.* 701 (2015); available at <https://digitalcommons.pace.edu/pilr/vol27/iss2/7>.

⁴⁵ *Id.* at 710.

the term over-exploitation.⁴⁶ The *United Nations Fish Stock Agreement* (UNFSA)⁴⁷ is a related international treaty and ensures conservation of highly migratory fish stocks. The UNFSA, to which the United States is a party, creates regional fishery management organizations (RFMO) which are meant to ensure that “stocks are fished sustainably” and “an ecosystem based approach” is utilized.⁴⁸ In the 2010 UNFSA Review Conference, member states agreed to increase conservation and management of sharks. “Shark conservation is not only an important responsibility for the RFMOs, but it also serves as a proxy for determining whether obligations to implement the ecosystem approach are fulfilled.”⁴⁹

Sadly, during the 2016 review, it was clear zero progress was made. “Four of the five RFMOs also have not taken sufficient steps to better protect threatened shark species found in the fisheries under their management. None has yet implemented science-based management plans for all shark species associated with its region’s fisheries.”⁵⁰ UNCLOS and UNFSA are two international treaties that are ineffective thus far at protecting the shark species.

U.S. Law

In the United States there is national legislation in place to protect sharks. In 2000, legislation titled the *Shark Finning Prohibition Act* was passed, which required the National Marine Fisheries Service to prohibit shark finning by any person under U.S. jurisdiction. The National Marine Fisheries Service was required to work with other nations to develop international agreements and collect data on shark finning.⁵¹

Shark finning was banned in 2000 within the United States. However, there was a loophole in the 2000 Act allowing transshipment of shark fins by American-flagged ships; i.e., vessels that merely bought fins that had been taken by other vessels could not be prosecuted. The loophole was identified during a Congressional debate on the 2000 bill, and theoretically resolved through an amendment to the definition of the term “fishing vessel.”⁵² However, in 2008, the Ninth Circuit Court of Appeals ruled that a vessel carrying shark fins that it had purchased from other vessels did not come under the act, and therefore the fins had been purchased legally.⁵³

⁴⁶ *Id.*

⁴⁷ United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, July 24–Aug. 4, 1995, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, U.N. DOCA/Conf. 164/37.

⁴⁸ *Global Progress Toward Implementing the United Nations Fish Stocks Agreement*, Pew (May 23, 2016), <https://www.pewtrusts.org/en/research-and-analysis/reports/2016/05/global-progress-toward-implementing-the-united-nations-fish-stocks-agreement>.

⁴⁹ *Id.* See also ERIKA TECHERA and NATALIE KLEIN, INTERNATIONAL LAW OF SHARKS: OBSTACLES, OPTIONS AND OPPORTUNITIES (LEGAL ASPECTS OF SUSTAINABLE DEVELOPMENT) (Martinus Nijhoff Pub., Apr. 2017).

⁵⁰ *Id.*

⁵¹ NOAA Fisheries, 2016 Shark Finning Report to Congress, <https://repository.library.noaa.gov/view/noaa/17060>.

⁵² See Mustain, et al., *supra* note 5, at 6-11.

⁵³ See *U.S. v. Approximately 64,695 Pounds of Shark Fins*, 520 F. 3d 976 (9th Cir. 2008).

So in 2011, *the Shark Conservation Act of 2010* was passed into law, which increased protections to stop shark finning and to specifically close the loophole in the 2000 Act. The 2010 Act requires that all sharks in the United States be brought to shore with their fins naturally attached. After the passage of this Act, several states, in addition to the American Samoa, Guam and North Mariana Islands territories, have passed local legislation that prohibit fin possession and fin retention even if the shark was legally caught.⁵⁴ The problem with the 2010 Act is that it does not prohibit catching sharks, bringing them ashore and then harvesting their fins.

The current laws allow the shark fin practice to continue. To address these shortcomings, in November 2019, the U.S. House of Representatives passed the *Shark Fin Sales Elimination Act*. This is an important step, but it remains unclear whether the Act will become law as the Senate has not yet passed similar legislation. Further, the international community must be encouraged to take appropriate action, considering the final destination of most shark fin products are outside of the United States.⁵⁵

States have also taken initiatives to close the loopholes where possible to prevent further decimation of the shark species. The most recent example is in Florida, where the state legislature in March 2020 passed legislation responding to the growing threat of shark finning in Florida.⁵⁶

World Landscape on Fins

The United States is an “important transit hub for shark fin shipments, with fins passing through U.S. ports via air, sea, and land. Some nations in Central America ship as much as one – third to one-half of all their shark fin exports through U.S. ports.”⁵⁷ Researchers found that between 2010 and 2017, “a minimum of 591 to 701 metric tons” possibly as high as 859 metric tons of shark fins pass through the US from Latin America.⁵⁸ Simply put, one metric ton of dried shark fins are equivalent to 1,500 sharks. While the United States has been a leader within the international community with regards to shark fin

⁵⁴ There has been some question as to federal preemption with respect to shark finning laws. Under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) -- the primary law to which both the Shark Finning Prohibition Act (2000) and the Shark Conservation Act of 2010 were both amendments -- NOAA Fisheries is authorized to manage sharks in U.S. federal waters. In 2014, NOAA Fisheries challenged the states' local laws, claiming that federal regulations preempted them. After heavy public campaigning from advocacy groups, however, NOAA Fisheries agreed to review each of the laws individually and found that none of them conflicted with the MSA. See NOAA Fisheries, *Ongoing MSA Reauthorization Activities*, <https://www.fisheries.noaa.gov/national/laws-and-policies/ongoing-msa-reauthorization-activities> (accessed February 6, 2020).

⁵⁵ Jason Bittel, *The Surprise Middleman in the Illegal Shark Fin Trade: The United States*, NRDC (Nov. 20, 2019), <https://www.nrdc.org/onearth/surprise-middleman-illegal-shark-fin-trade-united-states>.

⁵⁶ See Danielle Ivanov, “Florida Moves to Ban Imports of Shark Fins; Bill Awaits Governor’s Signature” WUFT (March 13, 2020), <https://www.wuft.org/news/2020/03/13/florida-moves-to-ban-imports-of-shark-fins-bill-awaits-governors-signature/>

⁵⁷ Elizabeth Murdock and Vanessa Villanueva, *Unintentional Partner: How the United States Helps the Illegal Shark Fin Market*, NRDC REPORT 6 (Oct. 2019).

⁵⁸ *Id.* at 19.

legislation, laws which prohibit finning completely is the only way to protect remaining shark species and finally sanction those who are illegally harvesting fins.

Throughout the international community the response to bans on shark fins has been mixed. The first “G7” country to ban shark fins was Canada in the summer of 2019.⁵⁹ The inconsistent response by the international community has made it impossible for shark populations to rebound from human consumption, the main driver of extinction.

The European Union passed similar restrictions to that of the United States prohibiting shark finning since 2003. However, special permits were given to allow fisher people to remove fins at sea.⁶⁰ This created a loophole allowing fisher people to fin sharks unnoticed.⁶¹ In Europe, since the start of 2017, the United Kingdom has exported “more than 50 tonnes of shark fins” and the majority of the fins were exported to Spain.⁶² One expert states “when you consider that Spain, France, Portugal and Britain feature in the top 25 shark fishing nations in the world it’s clear that European fishing fleets are making the most of the fact that there is still no catch limits...”⁶³ Several organizations have launched an initiative in the European Union to stop the import, export, and transport of shark fins. The Commission has registered the “Stop finning – stop the trade” initiative as of January 2, 2020.⁶⁴

Finally, concerns have been raised that this EU resolution would result in World Trade Organization (WTO) violations. The WTO recently ruled on a case regarding dolphin free tuna. The WTO ruled in favor of the United States and this may give some guidance on what the response to a possible challenge regarding shark fins may be.⁶⁵ It can be argued that there is a precedent for WTO trade law to support a shark finning ban initiative. As one legal scholar notes, “the United States should adopt a nationwide ban on all sale and possession of shark fins...such a ban would quell the potential for WTO violations, set a positive example in the international community that could help to encourage other countries to take affirmative action to conserve sharks, and serve as a good domestic policy.”⁶⁶

⁵⁹ Leyland Cecco, *Canada becomes first G7 country to ban shark fin imports*, THE GUARDIAN (June 21, 2019), <https://www.theguardian.com/world/2019/jun/21/canada-bans-shark-fin-imports-sale>.

⁶⁰ Mark Kinver, *Shark finning continues despite EU ban, says report*, BBC (Dec. 9, 2010), <https://www.bbc.com/news/science-environment-11951562>.

⁶¹ *Id.*

⁶² Joe Sandler Clarke, *Britain has exported more than 50 tonnes of shark fins since 2017*, UNEARTHED (July 29, 2019), <https://unearthed.greenpeace.org/2019/07/29/shark-fin-soup-uk/>.

⁶³ *Id.*

⁶⁴ Government Europa, *Shark Fin trade initiative aims to end finning industry* (Dec. 18, 2019), <https://www.governmenteuropa.eu/shark-fin-trade-initiative/95893/>.

⁶⁵ *US – Tuna II (Mexico)*, United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products - Appellate Body Report and Panel Reports pursuant to Article 21.5 of the DSU - Action by the Dispute Settlement Body – Revision (Jan. 17, 2019), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm#bkmk381abrw2.

⁶⁶ Elizabeth Neville, *Shark Finning: A Ban to Change the Tide of Extinction*, 25 COLO. NAT. RESOURCES, ENERGY & ENVTL.L. REV. 387, 417 (2014).

The American Bar Association Resolution comes at a critical time. The American Bar Association should urge the enactment of legislation to help to ensure that sharks are protected from the threat of extinction. Jurisdictions should consider whether civil sanctions, criminal penalties or some combination of both would be most appropriate to ensure such protection. This resolution calls upon the ABA House of Delegates to emphasize the importance of sharks particularly in light of the United Nations Decade of Ocean Science for Sustainable Development 2021- 2030. As the United Nations has succinctly stated, “the marine realm is the largest component of the Earth’s ecosystem.” Sharks, a critical component of that ecosystem are in need of any and all support to continue to allow this ecosystem to flourish.

Respectfully submitted,

Lisa Ryan
Chair, International Law Section
August 2020

GENERAL INFORMATION FORM

Submitting Entity: International Law Section

Submitted By: Lisa Ryan, Chair, International Law Section

1. Summary of Resolution(s).

Sharks are threatened by extinction as a result of the shark fin trade. The ABA can assist to end the shark fin trade by advocating for a consistent and comprehensive legal regime in the US and throughout the world to stop illicit trade of shark fins in addition to preventing sharks from becoming extinct. The resolution specifically calls for penalties for the possession, sale, and trade of shark fins.

2. Approval by Submitting Entity.

The International Law Section Council voted to approve the resolution and report on February 14, 2020.

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

No

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

Not applicable.

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

N/A.

6. Status of Legislation. (If applicable)

Shark Fin Sales Elimination Act of 2019 has passed the House and is currently in the Senate, S. 877

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

Ensuring that there is continued education, working with US government, state governments, and international community to ensure protection of the shark species. Further, working with non-governmental groups to ensure that ABA policy is promoted and utilized.

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

None.

9. Disclosure of Interest. (If applicable)

Not applicable.

10. Referrals.

This Report and Recommendation is referred to the Chairs and Staff Directors of all ABA Sections and Divisions.

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

Regina Paulose
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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.

Penalizes the sale, trade, possession of shark fins

2. Summary of the issue that the resolution addresses.

Shark fin trade in all forms contributes to the decimation of the shark population worldwide. The sharks represent a critical resource to oceanic ecosystems and therefore the continued decimation of sharks could lead to severe consequences in the marine ecosystem and fishing industries. The laws which prohibit the sale, trade, and possession of shark fins are not uniform and have been adopted in only certain jurisdictions. The current federal law has a loophole that is constantly exploited by those interested in conducting illegal business trade of shark fins.

3. Please explain how the proposed policy position will address the issue.

This resolution advocates for consistent and comprehensive laws that penalize shark fin possession, sale, and trade in the US and abroad to protect sharks and stop organized crime from exploiting loopholes in the existing national, regional, and international laws.

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

Shark populations are not threatened.

AMERICAN BAR ASSOCIATION
INTERNATIONAL LAW SECTION
SECTION OF DISPUTE RESOLUTION
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

- 1 RESOLVED, That the American Bar Association urges all nations, including the United
- 2 States, to become a party to and implement the 2019 Convention on the Recognition and
- 3 Enforcement of Foreign Judgments in Civil or Commercial Matters.

REPORT

I. Introduction

On July 2, 2019, the 22nd Diplomatic Session of the Hague Conference on Private International Law adopted the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the “Convention”).¹ This follows almost fourteen years to the day that the 20th Diplomatic Session of the Hague Conference on Private International Law, on June 30, 2005, adopted the Convention on Choice of Court Agreements.² That followed almost thirteen years of negotiations on jurisdiction and judgments. The ABA House of Delegates adopted Resolution 123A supporting the Hague Convention on Choice of Court Agreements at its August 2006 annual meeting.³ However, the United States has not yet ratified that Convention. Work began on the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters in 2012.

The United States, not a party to any bilateral or multilateral convention on the recognition and enforcement of civil and commercial judgments, sought to find a means for private parties to enforce foreign judgments outside of the U.S. without relitigation and to “level the playing field” for litigants in the United States. Most U.S. states have implemented a form of the Uniform Law Commission’s Uniform Act Foreign Country Money Judgments Recognition Act that facilitates the recognition and enforcement of non-U.S. judgments based on identified criteria. The House of Delegates approved at its Mid-Year meeting in February 2020 the Uniform Law Commission’s Uniform Registration of Canadian Money Judgments Act which further recognizes the need for uniformity in facilitating cross-border enforcement of non-U.S. judgments. The Convention is consistent with that policy of providing cross border recognition and enforcement such that federal and state judgments issued in the United States will have analogous treatment by non-U.S. signatories to the Convention. Additionally, courts in the United States frequently recognize and enforce foreign judgments as a matter of comity. On the other hand, litigants trying to enforce U.S. judgments abroad have a more difficult time than those seeking to enforce foreign judgments in the United States.

¹ See <https://www.hcch.net/en/news-archive/details/?varevent=687>. The text of the Convention is available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>. Sixty-eight countries and one regional integration organization signed the final act adoption the convention. See <https://assets.hcch.net/docs/f55fc0a1-1a3c-4368-9199-48e8df11ff3e.pdf>. See also <https://www.hcch.net/en/news-archive/details/?varevent=687>. Members of the Hague Conference as well as observers from Indonesia, Iran, Republic of Uzbekistan, Thailand, United Arab Emirates and Zimbabwe participated in the Diplomatic Conference. The Hague Conference has 85 members. See <https://www.hcch.net/en/states/hcch-members>. See David P. Stewart, “The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters,” 113 *American Journal of International Law* 772 (2019).

² For background on the Convention, see Louise Ellen Teitz, “Another Hague Judgments Convention? Bucking the Past to Provide for the Future,” 29 *Duke Journal of Comparative & International Law* 491 (2019). Background about the judgments project is also at <https://www.hcch.net/en/projects/legislative-projects/judgments>.

³ Text available at https://www.americanbar.org/content/dam/aba/directories/policy/2006_am_123a.pdf.

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The Convention from a U.S. perspective is focused directly on the exporting of U.S. judgments, making them recognizable and enforceable cross-border under the same rationale as the New York Convention does with arbitral awards. The Convention has the potential to provide increased certainty for certain civil or commercial matters through a uniform framework. Lawyers and businesses involved in transnational disputes are disadvantaged under the current system which lacks a mechanism for similar recognition and enforcement.⁴ This is particularly the case for lawyers representing clients with judgments entered in the United States; “[e]nforcing U.S. court judgments abroad can prove especially difficult in light of divergent rules on jurisdiction, requirements for special service of process, reciprocity, and some foreign countries’ public policy concerns over enforcing American jury awards carrying hefty punitive damages.”⁵ At present, non-U.S. litigants can expect that the United States will likely recognize and enforce judgments from non-U.S. jurisdictions. Although there are certain significant exclusions from the scope of the Convention in terms of certain practice areas, signature and ratification of this Convention by the United States and other nations would still be a significant step toward achieving international parity in the business-to-business area for commercial matters. Currently, the United States, on a state-by-state basis, provides mechanisms for recognition and enforcement of non-U.S. judgments, but it is not a function of treaty, and U.S. judgments are not afforded the same type of treatment abroad. It would eliminate the one-way traffic that is the current framework. For a comprehensive analysis of advantages to U.S. litigants of the Convention, a recent commentary in the *NYU Law Review* has outlined them.⁶

II. The Structure of the Convention

The Convention is broken into four chapters: (1) scope, exclusions and definitions; (2) general provisions regarding recognition and enforcement; (3) general provisions, including relationship with other instruments, and (4) final clauses including those relating to regional integration organizations and logistical details.⁷ Within Chapter II

⁴ Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 *Berkeley J. Int’l L.* 150, 151 (2013) (“Transnational litigants are therefore more likely to encounter difficulties enforcing their foreign court awards than parties seeking to enforce their foreign arbitral awards.”)

⁵ *Id.*

⁶ Coco, Sarah E., “The Value of a New Judgments Convention for U.S. Litigants,” 94 *New York University Law Review* 1209 (2019). The author stresses the increased certainty that the Convention affords: “More importantly, under the Convention, litigants in both of these cases would be able to predict more easily whether their judgments would be recognized prior to bringing a case, even if they did not know the country in which they would seek to enforce their judgment. In the contract dispute, the litigants would know that a judgment rendered in the place of performance designated in the contract was likely to be enforceable, as long as the defendant had some connection to the place of performance. Similarly, in the torts case, litigants would know that any country that had signed on to the Convention could not deny recognition based on jurisdiction for a judgment from the country where the injury occurred.” *Id.* R 1239.

⁷ Publications addressing the Convention are collected at <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=1&cid=137>.

(Recognition and Enforcement) is the heart of the Convention, Article 5, specifically providing the bases for recognition and enforcement.

a. Chapter I – Scope and Definitions

Article 1 limits scope to recognition and enforcement of judgments of contracting States in civil or commercial matters. It does not extend to revenue, customs or administrative matters, and Article 2 excludes legal capacity issues, as well as judgments in family matters, such as maintenance obligations, wills and succession, insolvency, defamation, privacy, intellectual property and certain antitrust judgments, to name a few. Specifically, the Convention does not apply to arbitration and related proceedings. Article 3 broadly defines judgment regardless of its nomenclature, but excludes interim measures.

b. Chapter II – Recognition and Enforcement

Article 4 precludes review of the merits underlying the judgment, which is recognizable and enforceable only if it has effect in the State of origin.

Article 5 sets forth the bases for eligibility for recognition and enforcement, providing 13 categories of judgments that may be recognized or enforced, including both contractual and non-contractual claims.⁸ Article 6 carves out judgments ruling on rights in rem in immovable property unless the property is situated in the State of origin.

Article 7 sets forth certain discretionary bases for refusal of recognition or enforcement, addressing considerations of due process, fraud and public policy, among other identified circumstances, and separately provides for postponement in certain situations. Notably, a refusal under Article 7 does not preclude subsequent application for recognition or enforcement of the judgment.

Article 10 provides for refusal of recognition or enforcement of a judgment “if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.”

Article 11 addresses judicial settlements that a court of a contracting State approved, rendering them enforceable as a judgment in the State of origin.

Article 12 identifies the documents necessary for the recognition and enforcement that the requesting party must provide, and Article 13 leaves the procedure for enforcement or registration to the contracting State.

⁸ Of note, Article 5(1)(m) establishes as one category judgments “given by a court designated in an agreement ... other than an exclusive choice of court agreement.” Therefore, to be recognized or enforced pursuant to this Convention, a judgment issued by a court determined by an exclusive choice of court agreement must fall into one of the other categories identified in Article 5.

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Article 15 establishes that, except for those judgments addressed in Article 6, the Convention does not preclude recognition and enforcement pursuant to domestic law rather than pursuant to the Convention. In other words, the Convention establishes that a State may recognize or enforce a judgment pursuant to domestic law even where not required to do so by the Convention.

The balance of the Chapter addresses matters such as severability, rulings on preliminary questions, costs of proceedings, and procedures.

c. Chapter III – General Clauses

Chapter III addresses declarations and transitional issues, including in particular declarations that a State will not apply the Convention to require it to recognize or enforce to judgments in which at state, directly or through agents, is a party. It further provides for interpretation to be consistent with the international character of the Convention, and to be compatible with other treaties in force among the contracting states.

The Convention has the potential to offer increased certainty and subsequent enforceability and global circulation of foreign judgments. Factors supporting United States interest in a multilateral judgments convention include reciprocity of enforcement of American court judgments in countries that are party; at present, most American states have a version of the Uniform Foreign Country Money Judgments Recognition Act, and U.S. courts have a policy of recognition and enforcement based on comity principles (whether by statute or common law), and reciprocity, where it is part of a state statute, is a discretionary and not a mandatory factor in considering enforcement and recognition. without exclusive regard to reciprocity. The Convention addresses the issue globally. It should also be emphasized that the Convention is, in essence, about enforcing United States judgments abroad, and therefore serves to level the playing field for American litigation. Without such a mechanism, U.S. parties have to avail themselves of such local procedures in other countries, which may entail having to relitigate the entire case. Significantly, in today's world where assets may be transferred at the push of button, expeditious means of obtaining recognition and enforcement of judgments in non-U.S. jurisdictions has heightened importance.

III. Implementation in the United States

Currently, as noted above, the enforcement of foreign judgments in the U.S. is largely a matter of state law.⁹ There is no international mechanism applicable to the recognition and enforcement of civil and commercial judgments across the board.

⁹ See, e.g., *DeJoria v. Maghreb Petroleum Expl., S.A.*, 935 F.3d 381, 385 (5th Cir. 2019), *as revised* (Aug. 16, 2019), *cert. denied sub nom. Maghreb Petroleum v. DeJoria*, No. 19-789, 2020 WL 1978947 (U.S. Apr. 27, 2020) (“Recognition of foreign-country judgments is a matter of state law . . .”)

The 2019 Judgments Convention follows the approach of the New York Convention. If upon further study, implementing legislation is considered required, there will need to be an assessment whether this should be done by federal legislation, state legislation, or a combination of these. The New York Convention was implemented in the United States by the Federal Arbitration Act (chapters 1 and 2 of title 9 of the U.S. Code).¹⁰

The Hague Choice of Court Convention, which was signed by the United States on January 1, 2009, has not yet been ratified by the United States, despite support for ratification by the ABA¹¹ because of disagreements on whether it should be implemented by U.S. state or federal legislation, or a combination. Efforts to achieve a compromise approach have been unavailing. The United States practice is not to deposit an instrument of ratification until it is able to implement the obligations it will become bound to. Every effort should be made to avoid such a stalemate with respect to the 2019 Judgments Convention. Parties on both sides of this debate nonetheless are united in the belief of the overall benefit of cross-border recognition and enforcement of judgments.

IV. Conclusion

The 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters addresses a specific perceived need for facilitating global transactions and providing certainty for US parties and litigants. It should be part of cross-border planning starting today. The Convention is also a means of dispute resolution, providing a viable alternative to arbitration.

Given the ABA's support for private international law initiatives, it is appropriate for the ABA to give its strong support to the implementation of The Hague Convention.

Respectfully submitted,

Lisa Ryan
Chair, International Law Section
August 2020

¹⁰ See, e.g. *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998) *cert. denied*, 525 U.S. 1068 (1999) (“The New York Convention is incorporated into federal law by the FAA, which governs the enforcement of arbitration agreements, and of arbitral awards made pursuant to such agreements, in federal and state courts.”).

¹¹ See Resolution 123A (August 2006).

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GENERAL INFORMATION FORM

Submitting Entity: International Law Section

Submitted By: Lisa Ryan

1. Summary of the Resolution(s).

The Resolution supports the prompt signature, ratification, and implementation of the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters by the United States.

2. Approval of Submitting Entity.

The Council of the International Law Section approved the recommendation at its April 2020 meeting.

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

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

Yes. As noted, the ABA House of Delegates adopted 06A123A supporting the Hague Convention on Choice of Court Agreements. The ABA House of Delegates also supported the Uniform Law Commission's Resolution 109C (Uniform Registration of Canadian Money Judgments Act, which the International Law Section co-sponsored). The ABA House of Delegates also adopted Resolution 104A, co-sponsored by Dispute Resolution, which urges all nations, including the United States, to become party to and implement the United Nations Convention on International Settlement Agreements Resulting from Mediation (also known as the Singapore Mediation Convention).

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

N/A

6. Status of legislation. (If applicable). Not applicable.

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

The International Law Section will offer the State Department Office of the Legal Adviser views and assistance in working toward U.S. ratification of the Convention and

addressing methods of implementation in the United States. When the Convention is transmitted to the Senate for advice and consent to ratification, the Section will support ratification before the Senate Foreign Relations Committee. With respect to ratification by other nations, the Section will consult with the Office of Private International Law in the State Department Office of the Legal Adviser to determine the best way to bring the resolution to the attention of foreign governments.

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

9. Disclosure of interest. (If applicable). Not applicable.

10. Referrals.

Simultaneous with this submission, referral is being made to all other ABA Sections and Divisions.

11. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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

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EXECUTIVE SUMMARY1. Summary of the Resolution.

The Resolution urges all nations, including the United States, expeditiously to become party to and implement the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

2. Summary of the issue that the resolution addresses.

The Resolution addresses the current imbalance between the ability of United States judgments to obtain recognition and enforcement in other countries without having to commence a new action, whereas most states in the United States provide a mechanism for non-U.S. commercial money judgments to be recognized and enforced in the United States.

3. Please explain how the proposed policy position will address the issue.

The proposed policy position urges support for the Convention that facilitates recognition and enforcement of judgments in analogous fashion to the recognition and enforcement of arbitration awards under the New York Convention.

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

None identified.

AMERICAN BAR ASSOCIATION**INTERNATIONAL LAW SECTION
CENTER FOR HUMAN RIGHTS****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

1 RESOLVED, That the American Bar Association urges the United States, other nations,
2 and the United Nations to facilitate and promote neutral and inclusive dialogues between
3 the government of Cameroon and separatist leaders;

4 FURTHER RESOLVED, That the American Bar Association urges adequate funding by
5 the United States and other nations for the United Nations Office for the Coordination of
6 Humanitarian Affairs' Humanitarian Response Plan for Cameroon to overcome the
7 ongoing humanitarian crisis in Cameroon;

8 FURTHER RESOLVED, That the American Bar Association urges the United States,
9 other nations, and the United Nations to urge the government of Cameroon and separatist
10 groups, as applicable, to comply with their obligations under international human rights
11 and international humanitarian law;

12 FURTHER RESOLVED, That the American Bar Association urges the Commonwealth of
13 Nations, the International Organization of La Francophonie, and the African Union to
14 substantially support the above efforts and promote a peaceful resolution to the conflict;
15 and

16 FURTHER RESOLVED, That the American Bar Association urges the President of the
17 United States to continue to withhold beneficiary country status under the U.S. Trade and
18 Development Act of 2000 until the Cameroon government demonstrates measurable
19 progress in establishing the rule of law, including by providing fair trials for prisoners
20 detained in connection with protests against the government.

REPORT**I. INTRODUCTION**

A protracted armed conflict, reinforced by a broader political stalemate, has afflicted Cameroon's population for the past three years. Worsening humanitarian conditions and human rights violations associated with the conflict between the central government in Yaoundé and the people of the country's two Anglophone regions—the North West Region and the South West Region—have emphasized the need for coordinated and deliberate international action.¹ Recurrent military clashes have produced a burgeoning displacement crisis in the North West and South West Regions of Cameroon. As of February 2020, approximately 679,000 people from the Anglophone regions were internally displaced within Cameroon.² 60,000 more have fled to neighboring Nigeria.³

The ABA's action on this issue is consistent with its support for the rule of law and the Global Compact on Refugees (2018) in 2019 mid-year Resolution 116.⁴ The Compact calls for increased resources from the international community for—and the pursuit of durable solutions to—refugee and displacement crises. The Global Compact declares that “[a]ll states and relevant stakeholders are called on to tackle the root causes of large refugee situations, including through heightened international efforts to prevent and resolve conflict.”⁵ Any efforts in accordance with this resolution support the fourth pillar of the Global Compact on Refugees, which enlists international cooperation to create “conditions in countries of origin for return [of refugees] in safety and dignity.”⁶ Moreover, the ABA's support for strengthened humanitarian assistance, and respect for human rights and humanitarian law principles, is undergirded by the ABA's affirmation that human dignity is foundational to a just rule of law (19A113B).

¹ Cameroon is currently divided into ten political and administrative regions. Two of those regions (the North West Region and South West Region) are made up of the former UN Trust Territory of Southern Cameroons under British administration, which gained independence in 1961 by uniting with the then République du Cameroun to found the Federal Republic of Cameroon.

² *More Cameroonian refugees flee to Nigeria, bringing total arrivals close to 60,000 mark*, UNHCR.ORG (Feb. 13, 2020), <https://www.unhcr.org/en-us/news/press/2020/2/5e452d2b4/cameroonian-refugees-flee-nigeria-bringing-total-arrivals-close-60000-mark.html>.

³ *Id.*

⁴ The ABA urged “countries working to implement the Global Compact on Refugees (December 2018) and the Global Compact for Safe, Orderly and Regular Migration (December 2018) . . . to act to: Address the root causes of internal displacement and forced migration, including by providing support to transitional justice mechanisms and justice institutions that address widespread repression, persecution and violence in fragile communities . . .” (19M116). This Resolution addresses the root causes of the refugee and displacement crisis originating in the North West and South West Regions of Cameroon.

⁵ United Nations General Assembly, *Report of the United Nations High Commissioner for Refugees: Part II – Global Compact on Refugees*, A/73/12 (Part II) (Sept. 13, 2018), at 3, https://www.unhcr.org/gcr/GCR_English.pdf.

⁶ *Id.* at 2.

II. Background

a. Cameroon's colonial ties and disparate cultural composition

The history of Cameroon, bordered by Nigeria, Chad, the Central African Republic, the Republic of Congo, Equatorial Guinea, and Gabon, is steeped in colonial ties to Europe. In 1884, Germany founded the Kamerun Protectorate on the Cameroon River District, along the Gulf of Guinea. The Germans later undertook additional explorations and extended the colony to as far as Lake Chad.⁷ After Germany was defeated in World War I, the League of Nations officially transferred administration of the colony to France and Britain in 1922.⁸ Britain administered one-fifth of the erstwhile German colony and France took control of the other four-fifths.⁹ The territory under British control was further split into British Northern Cameroons and British Southern Cameroons, but the division was nominal and the territory was largely administered as a single entity.¹⁰ After the founding of the United Nations, the territories became UN Trust Territories under the administration of France and Britain.¹¹ Key differences materialized that later complicated the unification and coexistence of the French and British territories: British Northern and Southern Cameroons adopted the English language, the Common Law of England and Wales, and the system of indirect rule favored by Britain in its West African colonies.¹² French Cameroons adopted the French language, France's Civil Law system, and a more centralized, direct structure of governance.¹³

As conditions for their independence in 1961, the people of British Northern and Southern Cameroons were limited by the UN to only two options—union with the independent Federation of Nigeria or the newly independent République du Cameroun (that is, French Cameroons, which had gained independence on January 1, 1960).¹⁴ While the people of British Northern Cameroons chose union with Nigeria, British Southern Cameroonians elected to unite with the République du Cameroun.¹⁵ The union of Southern Cameroons and the République du Cameroun produced an ephemeral federal system, dubbed the République fédérale du Cameroun (Federal Republic of Cameroon), that was abolished in 1972 through a national referendum shrouded in state suppression.¹⁶ The name of the

⁷ *Id.* at 148.

⁸ *The Political History of Cameroon*, 18 WORLD TODAY 341, 341 (1962).

⁹ Cameroon profile - Timeline, BBC NEWS (Oct. 22, 2018), <https://www.bbc.com/news/world-africa-13148483>.

¹⁰ *Id.* at 341-42.

¹¹ *UN Documentation: Trusteeship Council*, DAG HAMMARSKJÖLD LIBRARY, <https://research.un.org/en/docs/tc/territories> (last accessed May 23, 2020).

¹² JOHN MUKUM MBAKU, CULTURE AND CUSTOMS OF CAMEROON (2005); FREDERICK JOHN D. LUGARD (LORD), THE DUAL MANDATE IN BRITISH TROPICAL AFRICA ([1922] 2018).

¹³ VICTOR T. LEVINE, THE CAMEROONS: FROM MANDATE TO INDEPENDENCE (1964); H.N.A. ENONCHONG, CONSTITUTIONAL LAW: FEDERALISM IN A MIXED COMMON LAW AND CIVIL LAW SYSTEM (1967); Mark Caldwell, *Cameroon: colonial past and present frictions*, DW (Jan. 31, 2017), <https://www.dw.com/en/cameroon-colonial-past-and-present-frictions/a-37344849>.

¹⁴ REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS, SUPPL. 3, VOL. 3, ART. 76, 129-131.

¹⁵ *Id.*

¹⁶ Bongfen Chem-Langhëë, *The Road to the Unitary State of Cameroon 1959-1972*, 41 PAIDEUMA: MITTEILUNGEN ZUR KULTURKUNDE 17, 22-24 (1995).

country changed to the United Republic of Cameroon.¹⁷ In 1984, the country's present president, Paul Biya, changed the name of the country to the Republic of Cameroon.¹⁸

Today, the country is divided into ten administrative regions, two of which, the North West Region and South West Region, were carved out of the former British Southern Cameroons.¹⁹ The capital of the country, Yaoundé, rests in former French Cameroons.²⁰

A governance structure that places much of the decision-making power with primarily Francophone leaders and legislators has produced persistent grievances for the minority Anglophone population. Directed by Francophone President Paul Biya (1982-present), the government is considered a unitary republic led by an executive president.²¹ President Biya has retained his position due to a constitutional amendment in 2008 that allowed him to serve more than two terms.²² The president directly appoints the Prime Minister and council of ministers and certain members of the country's bicameral legislature, which is composed of a National Assembly (180 members) and a Senate (100 members).²³ Since Anglophone citizens comprise just one-fifth of Cameroon's population, significant leverage within the Yaoundé-based national government is elusive.²⁴ Members of the national government have aggravated Anglophones' feelings of marginalization by giving most speeches and publishing important documents in French.²⁵

An acute cause of Anglophone Cameroon's conflict with the central government is the struggle for cultural autonomy within Cameroon's bipartite legal and educational systems. Each linguistic bloc has fought to maintain its legal and educational heritage—the Common Law system and Anglo-Saxon educational norms on the one hand and the Civil Law system and French educational norms on the other—yet to a large extent, Anglo-Saxon culture has been displaced.²⁶ The fight over Anglophone Cameroon's legal system in particular has ignited an already tense arrangement into an all-out military engagement.²⁷

¹⁷ *Id.* at 24.

¹⁸ POST-COLONIAL CAMEROON: POLITICS, ECONOMY, AND SOCIETY xvi (JOSEPH TAKOUGANG & JULIUS A. AMIN EDS., 2018).

¹⁹ *Cameroon Regions*, CAMEROON ASSOCIATION FOR RESPONSIBLE TOURISM (CAMAST), <https://sites.google.com/a/cameroontourist.com/www/cameroon-regions> (last accessed May 23, 2020).

²⁰ *Yaoundé: National Capital, Cameroon*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/place/Yaounde> (last accessed May 23, 2020).

²¹ *Cameroon: Constitution and Politics*, THE COMMONWEALTH, <https://thecommonwealth.org/our-member-countries/cameroon/constitution-politics> (last visited May 26, 2020).

²² *Id.*

²³ *Id.*

²⁴ Takougang, *supra* note 18, at 396-397.

²⁵ Mariama Sow, *Africa in the news: Protests continue in English-speaking parts of Cameroon...*, BROOKINGS (Feb. 3, 2017), <https://www.brookings.edu/blog/africa-in-focus/2017/02/03/africa-in-the-news-protests-continue-in-english-speaking-parts-of-cameroon-au-summit-concludes-and-liberian-businesses-strike/>; Moki Edwin Kindzeka, *Lawyers, Teachers in Cameroon Strike for More English*, Voice of America (Nov. 29, 2016), <https://www.voanews.com/africa/lawyers-teachers-cameroon-strike-more-english-anglophone-regions>

²⁶ *Id.*

²⁷ *Id.* at 397.

b. Cameroon's historical and social dissonance, humanitarian conditions, and severe human rights violations

Within the last four years, the divisions between the linguistic and cultural blocs have brought “Cameroon to the brink of civil war.”²⁸ Rooted in both the above historical context and more immediately in a series of protests in late 2016, Cameroon’s budding civil war is producing untenable humanitarian conditions. In November 2016, lawyers protested *en masse* in Bamenda, the capital of the North West Region, to express opposition to the encroachment of the French language and Francophone magistrates in the court systems of the Anglophone region.²⁹ Teachers, spurning the imposition of the French language for use in instruction in subjects in Anglophone schools, readily joined the protests.³⁰ Decades of unresolved tensions exploded with unprecedented force, as government efforts to disband the protests seemed to strengthen rather than weaken Anglophone resolve.³¹

Decried by the international community, President Biya’s response was characterized by “armored vehicles, tear gas, arrests, batons, and killings.”³² The harsh crackdown on the protests did more than spark immediate outrage; it granted ardor to a growing separatist movement within Cameroon that fights to define a new nation, the Republic of Ambazonia, out of Cameroon’s Anglophone region.³³ Separatist forces have sporadically engaged with government forces since 2017, the armed conflict converting the North West and South West Regions into war zones where approximately 3,000 people have perished and many Anglophone villages have been burned down. The UN estimates the fighting has displaced 679,000 people inside Cameroon, while approximately 60,000 more have fled to neighboring Nigeria.³⁴

III. International Involvement to Promote Neutral and Inclusive Dialogues Between the Government of Cameroon and Separatist Leaders is Imperative

On September 30, 2019, President Biya opened a “Grand National Dialogue” aimed at addressing the Anglophone crisis. Both Francophone and Anglophone leaders attended the Dialogue, set in Yaoundé. Crucially, however, no Anglophone separatist leaders attended. Instead, more moderate federalist Anglophones represented the Anglophone population. For the conflict to be truly resolved, negotiations involving

²⁸ Siobhán O’Grady (Videos by Joyce Lee), *Divided by Language*, THE WASHINGTON POST (Feb. 5, 2019), https://www.washingtonpost.com/graphics/2019/world/cameroon-anglophone-crisis/?utm_term=.57806c9d5020.

²⁹ Conor Gaffey, *Understanding Cameroon’s Anglophone Protests*, NEWSWEEK (Feb. 13, 2017), <https://www.newsweek.com/cameroon-anglophone-problem-paul-biya-556151>; Takougang, *supra* note 18, at 397.

³⁰ Gaffey, *supra* note 29.

³¹ Takougang, at 394.

³² *Id.*

³³ *Id.*

³⁴ *More Cameroon refugees flee to Nigeria, bringing total arrivals close to 60,000 mark*, *supra* note 2.

both sides of the conflict must take place. For this to occur, there is a strong need for international involvement to break the stalemate.

a. The National Dialogue

Separatists and federalists alike balked at the extent to which the content of the Dialogue was influenced by non-Anglophone voices.³⁵ Separatists spurned invitations due to a failure to include terms of secession as the focal point of the agenda and hold the talks on neutral territory.³⁶ Federalists faced the challenge of making their case in short time constraints and amidst other topics like the Boka Haram insurgency and violence following the October 2018 presidential election.³⁷

Upon its conclusion on October 4, 2019, the Dialogue had produced a number of proposals:

- Conferring a special status on the two Anglophone regions (North West and South West Regions);
- Reinstating the House of Traditional Chiefs to establish more local control;
- Electing local governors to tip the balance of power away from Yaoundé;
- Revitalizing key infrastructure projects in the Anglophone regions;
- Providing opportunities for reintegration of ex-combatants who surrender themselves;
- Reverting the country's name to "The United Republic of Cameroon"; and
- Inaugurating a law forcing government officials to declare their assets as a means of uprooting official corruption.³⁸

The level of hope in, or engagement with, these initiatives starkly varies among Cameroon's population. For separatists, the proposals fall far short of fulfilling their quest for a separate nation and are considered an insult amongst their more vocal leaders.³⁹ For federalist Anglophones, the proposals may represent a possibility for incremental change, albeit a more moderate one than hoped for. For the average observer, the Dialogue seems to be producing mixed results. Some have cited

³⁵ Mbulle-Nziege Leonard, *Cameroon's Anglophone Crisis' National Dialogue: A Glimmer of Hope?* DEMOCRACY IN AFRICA (Oct. 2, 2019), <http://democracyinafrica.org/cameroons-anglophone-crisis-national-dialogue-glimmer-hope/>.

³⁶ Leonard, *supra* note 35; *Cameroon Dialogue Starts as Anglophone Separatists Pull Out*, ALJAZEERA.COM (Sept. 30, 2019), <https://www.aljazeera.com/news/2019/09/cameroon-dialogue-starts-anglophone-separatists-pull-190930070354713.html>.

³⁷ *Cameroon's Anglophone Dialogue: A Work in Progress*, INTERNATIONAL CRISIS GROUP (Sept. 26, 2019), <https://www.crisisgroup.org/africa/central-africa/cameroon/cameroons-anglophone-dialogue-work-progress>; Andrew Green, *Is Biya's Offer of National Dialogue in Cameroon Really Sincere?* WORLD POLITICS REVIEW (Sept. 13, 2019), <https://www.worldpoliticsreview.com/trend-lines/28188/is-biya-s-offer-of-national-dialogue-in-cameroon-really-sincere>.

³⁸ Ngala Killian Chintom, *Cameroon's Conflict: Will the National Dialogue Make Any Difference?* BBC NEWS (Oct. 5, 2019), <https://www.bbc.com/news/world-africa-49931662>.

³⁹ *Cameroon Govt Declares Dialogue 'Success'; Anglophones Doubtful*, AFRICANEWS.COM (Oct. 5, 2019), <https://www.africanews.com/2019/10/05/cameroon-govt-declares-dialogue-success-anglophones-doubtful/>.

increased instances of violence since the Dialogue, as both the government's and the separatists' military tactics seemingly have morphed into more aggressive forms.⁴⁰

Legislatively if not militarily, one positive impact of the Dialogue has been a new law that defines the Anglophone region's "special status." Cameroon's parliament approved the law in the waning moments of 2019. Yet some fear the bill may "not change the underlying governance structure that has allowed Yaoundé to manage the affairs of local municipalities for decades."⁴¹ Administratively, the bill might also take an exorbitant amount of time to implement.⁴² Most importantly, separatists have flatly rejected the elements of the bill on their merits and refuse to recognize it as a legitimate concession.

Affirming the need for inclusive dialogues, the US, through its representative Tibor Nagy, stated that the Cameroon government will not win militarily, that sending more troops into the field is strengthening the separatists, and that the dialogue held was more symbolic than practical.⁴³

b. The role of the ABA and the international community

The ABA should encourage the United States, other countries, and the United Nations to commence efforts to negotiate mutually agreeable terms for inclusive talks. This could entail sending representatives to both the government and separatist groups to gather cogent summaries of the terms on both sides and mediate interactions among the parties in conflict.

A country-led initiative to foster inclusive dialogue between separatists and national government is neither a new idea nor one that is without international support. Switzerland's efforts in 2019 garnered the wholehearted approval of Secretary General Antonio Guterres, who expressed "the full backing of the United Nations," committed "to support [the effort] as necessary," and "reiterate[d] the need for all Cameroonian stakeholders to engage in an inclusive and genuine political dialogue."⁴⁴ While Switzerland's efforts were later abandoned due to concerns about neutrality and inclusiveness,⁴⁵ the attempt and the UN's backing demonstrate international support for efforts to effectuate dialogues. The ABA should encourage

⁴⁰ R. Maxwell Bone and Akem Kelvin Nkwain, *Why Has Violence Increased Since Cameroon's National Dialogue?* AFRICAN ARGUMENTS (Oct. 29, 2019), <https://africanarguments.org/2019/10/29/violence-increased-cameroon-conflict-national-dialogue-anglophone/>.

⁴¹ R. Maxwell Bone and Akem Kelvin Nkwain, *Cameroon Grants 'Special Status' its to [sic] Restive Regions. They Don't Feel Special.*, AFRICAN ARGUMENTS (Jan. 13, 2020), <https://africanarguments.org/2020/01/13/cameroon-grants-special-status-anglophone-conflict/>.

⁴² *Id.*

⁴³ *US Urges Devolution of Power in Cameroon*, YAHOO NEWS (Nov. 19, 2019), <https://news.yahoo.com/us-urges-devolution-power-cameroon-172456391.html>.

⁴⁴ *Secretary-General Welcomes Swiss Government's Commitment to Facilitate Resolution of Crisis in Cameroon Through Dialogue*, UN MEETINGS COVERAGE AND PRESS RELEASES (SG/SM/19648) (June 28, 2019), <https://www.un.org/press/en/2019/sgsm19648.doc.htm>.

⁴⁵ Franck Foute, *Cameroon: Anglophone secessionists split on Swiss mediation*, THEAFRICAREPORT (July 15, 2019), <https://www.theafricareport.com/15341/cameroon-english-secessionists-split-on-swiss-mediation/>.

the US, other countries, and the UN to act once more, and to emphasize neutrality, inclusiveness, and transparency to quell fears on both sides.⁴⁶ In urging these parties to facilitate dialogue, the ABA can provide input and expertise to highlight important aspects of successful third-party mediation.

The ABA should also urge the US and other countries with substantial economic ties to Cameroon to wield their influence to encourage Cameroon's government to engage in an inclusive dialogue. Since the US has already exerted economic pressure on Cameroon through withdrawal of aid and trade benefits (See Section V) based on its track record of human rights abuses related to the conflict, the ABA could encourage such methods of pressure be exerted by the US and other countries in tandem with a demand that the Cameroon government engage in dialogue with the separatists. A joint international effort could produce crucial concessions.

IV. The United Nations Office for the Coordination of Humanitarian Affairs' Humanitarian Response Plan for Cameroon Requires Additional International Funding

As the ABA's advocacy for dialogues addresses long-term factors undermining humanitarian conditions in Cameroon, the ABA also should encourage adequate funding for the United Nations Office for the Coordination of Humanitarian Affairs' (OCHA) Humanitarian Response Plan for Cameroon to address the immediate needs of those affected by violent conflict in Anglophone Cameroon. Many victims of the crisis endure life-threatening conditions without humanitarian assistance.

a. Cameroon's humanitarian crisis

The brutal conditions of fighting between government and separatist forces and the violent spillover into civilian life have driven tens of thousands of Anglophone Cameroonians from vital resources. Separatist and government forces alike have indiscriminately involved civilians in the conflict, producing an atmosphere of terror that has destabilized life in the region. See Section V(a).

According to the director of UN humanitarian operations, Reena Ghelani, Cameroon is home to "one of the fastest growing displacement crises in Africa."⁴⁷ Internally displaced Cameroonians lack adequate food, shelter, and water. According to the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), 4.3 million people currently need "lifesaving assistance."⁴⁸ This marks a 31 percent increase from 2018⁴⁹ and amounts to one in every five individuals in Cameroon.

⁴⁶ *Id.*

⁴⁷ John Campbell, *Dim Outlook for Peace Talks Between Separatist Rebels and Cameroon*, COUNCIL ON FOREIGN RELATIONS (Dec. 27, 2018), <https://www.cfr.org/blog/dim-outlook-peace-talks-between-separatist-rebels-and-cameroon>.

⁴⁸ *Cameroon: "Underfunding Means We Cannot Do All We Can to Make the Difference in People's Lives"*, UNOCHA.ORG (Jan. 25, 2019), <https://www.unocha.org/story/cameroon-%E2%80%99Cunderfunding-means-we-cannot-do-all-we-can-make-difference-people%E2%80%99s-lives%E2%80%99D>.

⁴⁹ *Id.*

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Cameroonians, particularly Anglophone Cameroonians, are in dire need of physical protection, food, health care, and education.⁵⁰

Of those internally displaced by the government-separatist conflict, the majority are women and children.⁵¹ These groups are particularly vulnerable, as displacement limits necessary access to nutrition for young children and nursing mothers.⁵²

Unfortunately, for those who have fled the Anglophone regions as a result of the violence, conditions are not significantly improved. Refugees in Nigeria still face acute resource shortages, including lack of proper shelter and virtually nonexistent access to schooling.⁵³ “It is not easy to leave your country and go and suffer in a different country,” mourned Rachel Agah, who led her family to Nigeria after her husband was murdered in Cameroon’s South West Region.⁵⁴

b. The UN OCHA’s Humanitarian Response Plan for Cameroon, a focused means by which international partners can contribute

The UN OCHA is responsible for disbursing funds received from international partners to various relief organizations for the purpose of accomplishing the UN’s humanitarian goals in Cameroon. In 2019, OCHA received donations or commitments based on the Humanitarian Response Plan’s appeal from at least 26 identified entities, including 15 national governments, 4 UN agencies, 3 private organizations/foundations/individuals, 2 NGOs, one intergovernmental organization, and a pooled fund.⁵⁵ OCHA disbursed or will disburse these funds to 19 identified organizations, including 11 UN agencies and 8 NGOs.⁵⁶ Filtering donations data to isolate funds earmarked for the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), and the Norwegian Refugee Council (NRC) shows that many of the organizations receiving OCHA funds are allocating resources and efforts to assisting affected populations in the North West Region and South West Region.⁵⁷ However, for 2019, the three organizations named above only received 42.9% of the funding required to conduct their work in Cameroon.⁵⁸

⁵⁰ UNOCHA, *2019 Humanitarian Response Plan: Summary*, p. 3 (Jan. 2019), https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/2019_cmr_hrp_20190219_summary_print.pdf.

⁵¹ UNOCHA, *Cameroon: North-West and South-West: Situation Report No. 2*, p. 2 (Dec. 31, 2018), https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/2019/01/OCHA-Cameroon_Situation_Report_no2_Final.pdf.

⁵² *Id.* at 4.

⁵³ Catherine Wachiaya, *Displaced Cameroonians struggle in Nigeria*, UNHCR.ORG (May 15, 2019), <https://www.unhcr.org/en-us/news/stories/2019/5/5cbbd9f74/displaced-cameroonians-struggle-nigeria.html>.

⁵⁴ *Id.*

⁵⁵ See Financial Tracking Service Data on Cameroon 2019 Humanitarian Response Plan, FTS.UNOCHA.ORG, <https://fts.unocha.org/appeals/718/flows> (last visited Apr. 3, 2020).

⁵⁶ See *id.*

⁵⁷ Financial Tracking Service Data on Cameroon 2019 Humanitarian Response Plan (filtered), FTS.UNOCHA.ORG, bit.ly/unochaappealsfiltered (last visited Apr. 3, 2020).

⁵⁸ *Id.*

The Humanitarian Response Plan for Cameroon has remained starkly underfunded, as funding for 2019 reached only 43.3% of the approximately \$299 million goal.⁵⁹ In order for UN agencies and NGOs to meet the needs of Cameroonians on the ground, the number of donors and size of their donations must rise substantially.

The ABA should urge that the United States and other UN member states increase levels of funding for the Humanitarian Response Plan for Cameroon in 2020 and 2021 to ensure it will be adequately funded to meet the humanitarian needs of displaced persons in Cameroon and refugees in Nigeria. The improved participation of the international community would have drastic impacts on the quality of life for thousands of Cameroonians. Furthermore, advocating for improved financial commitment to Cameroon's refugees and displaced persons provides an opportunity for the ABA to tangibly implement its previous commitment to the ideals of the Global Compact on Refugees, which calls on the international community to provide "timely, adequate, and needs-driven humanitarian assistance . . . including predictable, flexible, unearmarked, and multi-year funding whenever possible."⁶⁰

V. Cameroon Should Respect its International Obligations to Respect Human Rights and the Rights of Civilians in Situations of Armed Conflict

a. Human rights abuses and international humanitarian law violations in Cameroon

Prior to February 2020 municipal and parliamentary elections, the government expanded its military presence in the North West Region and South West Region, hoping to ensure voting could go on unhindered. According to Amnesty International, this increased military presence led to violent clashes with civilians.⁶¹ Eyewitnesses described a group of soldiers shooting indiscriminately in the village of Ndoh's market in retaliation to reports that a soldier had been killed in the area.⁶² 14 were confirmed dead.⁶³ Further attacks caused the destruction of several villages in January 2020.⁶⁴

Simultaneously, separatist forces intensified violent tactics against civilians. In preparation for the February municipal and parliamentary elections, separatist forces declared a lockdown to enforce a boycott against voting.⁶⁵ Some separatist forces vowed to enforce the boycott by killing anyone who participated in the elections.⁶⁶ Precedent confirmed the authenticity of these threats; separatist forces had abducted

⁵⁹ Financial Tracking Service Data on Cameroon 2019 Humanitarian Response Plan, *supra* note 55.

⁶⁰ United Nations General Assembly, *Report of the United Nations High Commissioner for Refugees: Part II – Global Compact on Refugees*, *supra* note 5, at 6.

⁶¹ *Cameroon: Rise in killings in Anglophone regions ahead of parliamentary elections*, AMNESTY INTERNATIONAL (Feb. 6, 2020), <https://www.amnesty.org/en/latest/news/2020/02/cameroon-rise-in-killings-in-anglophone-regions/>.

⁶² *Id.*.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Cameroon elections to take place amid fears of violence in Anglophone crisis*, RFI (Feb. 7, 2020), <http://www.rfi.fr/en/international/20200207-cameroon-elections-take-place-amid-fears-violence-anglophone-crisis>.

⁶⁶ *Id.*.

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three villagers near Bamenda in December of 2019, and killed another who attempted to avoid a separatist checkpoint in January 2020.⁶⁷

Illustrating most vividly the brutal effect of the conflict on civilians is the recent Ngarbuh Massacre. On February 14, 2020, soldiers entered the village of Ngarbuh in the North West Region and began looting homes and beating residents. The violence quickly escalated. The soldiers began to execute civilians, the majority of them women and children, thereafter burning down many of their homes.⁶⁸ Human Rights Watch reports that 21 civilians, 13 of them children, were killed in the attack, while the BBC reports that 22 civilians, 14 of them children, fell victim.⁶⁹ Some reports describe victims being burned alive.⁷⁰ Survivors of the attack identify the soldiers as a mixture of government forces, including the Rapid Intervention Battalion (BIR), and armed ethnic Fulani.⁷¹ While the government significantly downplays these reports, it recently admitted to the role Cameroon government forces played in the massacre.⁷²

Cameroon's human rights record with regard to arbitrary arrests and detentions, lack of due process, and dearth of impartial justice mechanisms is as grim as the above events. Unlawful arrests and detentions of Anglophone citizens connected in even tangential ways to the separatist movement have proliferated. In Cameroon, where there is a history of unjust military tribunals and torture,⁷³ the arrests of Anglophone citizens protesting the central government's rule constitutes a concerning threat to due process. Furthermore, the pattern of unjust arrests and detentions has not been limited to those connected with Anglophone-Francophone tensions, but has extended to anyone who critiques the government. Reports indicate that the government targeted journalists and jailed them for allegedly reporting false news and defamation. "Cameroon remains the second-leading jailer of journalists" in sub-Saharan Africa.⁷⁴

In early 2019, Cameroon's military court charged Maurice Kamto, the main opposition leader in the 2018 presidential election, with crimes carrying the death penalty. This

⁶⁷ *Cameroon: Rise in killings in Anglophone regions ahead of parliamentary elections*, *supra* note 61.

⁶⁸ *Cameroon: Civilians Massacred in Separatist Area*, HUMAN RIGHTS WATCH (Feb. 25, 2020), <https://www.hrw.org/news/2020/02/25/cameroon-civilians-massacred-separatist-area#> (last visited Apr. 1, 2020).

⁶⁹ *Cameroon: Civilians Massacred in Separatist Area*, *supra* note 68; *Children among 22 killed in attack on Cameroon village*, BBC NEWS (Feb. 17, 2020), <https://www.bbc.com/news/world-africa-51526358>.

⁷⁰ *Children among 22 killed in attack on Cameroon village*, *supra* note 69.

⁷¹ *Cameroon: Civilians Massacred in Separatist Area*, *supra* note 68.

⁷² Cameroon admits army's role in civilian killings, BBC NEWS (Apr. 21, 2020), <https://www.bbc.com/news/world-africa-52376916>.

⁷³ *Cameroon: Ten Arrested Anglophone Leaders at Risk of Unfair Trial and Torture if Deported from Nigeria*, AMNESTY INT'L (Jan. 12, 2018), <https://www.amnesty.org/en/latest/news/2018/01/cameroon-ten-arrested-anglophone-leaders-at-risk-of-unfair-trial-and-torture-if-deported-from-nigeria/>.

⁷⁴ Siobhán O'Grady, *In Cameroon, Journalists are Being Jailed on Charges of 'Fake News'*, THE WASHINGTON POST (Dec. 16, 2018), https://www.washingtonpost.com/world/africa/in-cameroon-journalists-are-being-jailed-on-charges-of-fake-news/2018/12/15/80bcb5c6-f9ad-11e8-8642-c9718a256cbd_story.html?utm_term=.20b883390307.

followed Kamto's participation in a peaceful protest in the wake of the 2018 election.⁷⁵ While the government of Cameroon has released Kamto and others, it is still estimated that hundreds of people are being detained in connection with the Anglophone crisis, some subject to torture and incommunicado detention.⁷⁶

b. Cameroon's human rights and IHL treaty obligations

A variety of international instruments to which Cameroon has acceded or has endorsed are applicable to current events in Cameroon. Without being exhaustive, Cameroon has ratified the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child. Cameroon is also a party to the African Charter on Human and Peoples' Rights, the Maputo Protocol, the African Charter on the Rights and Welfare of the Child, the Kampala Convention, and has endorsed the Global Compact on Refugees. The ABA should encourage the US, other nations, and the United Nations to urge Cameroon to comply with its obligations to adhere to the international human rights and humanitarian law treaties to which it is a party as well as any other relevant international agreement it has endorsed.⁷⁷

Two of Cameroon's commitments to comply with international human rights and humanitarian law are mentioned below as illustrative examples of agreements that the US and other nations, along with the United Nations, could raise with Cameroon and, as applicable, elements of the separatist movement.

- **The Geneva Conventions and Additional Protocol II's prohibition of violence against civilians in non-international armed conflicts**

Cameroon acceded to the Geneva Conventions in 1963 and Additional Protocol II in 1984. Common Article 3 of the Geneva Conventions addresses situations of "armed conflict not of an international character [i.e., not between recognized countries] occurring in the territory of one of the High Contracting Parties."⁷⁸

⁷⁵ *Cameroon: Opposition Leader and More Than a Hundred Supporters Face the Death Penalty*, AMNESTY INT'L (Feb. 21, 2019), <https://www.amnesty.org/en/latest/news/2019/02/cameroon-opposition-leader-and-more-than-a-hundred-supporters-face-the-death-penalty/>.

⁷⁶ *Cameroon: Detainees Tortured*, HUMAN RIGHTS WATCH (Aug. 20, 2019), <https://www.hrw.org/news/2019/08/20/cameroon-detainees-tortured>.

⁷⁷ Under Cameroon's legal system, both the Anglophone and Francophone regions recognize the authority of international treaties in Cameroon's general body of law. Feh Henry Baaboh, *Cameroon Legal System*, HG.ORG, <https://www.hg.org/legal-articles/cameroon-legal-system-7155> (last visited Apr. 3, 2020).

⁷⁸ Fourth Geneva Convention, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949. "Armed conflict not of an international character"—the field of application of Common Article 3—is not clearly defined within the Geneva Conventions. Any definitions established via historical practice, the norms of international judicial bodies, and legal literature should not contradict the intent that the article be applied "as widely as possible." Laurie R. Blank and Gregory P. Noone, *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War* 117-18 (Wolters Kluwer 2d ed. 2019).

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Common Article 3 defines the *minimum* level of protection civilians taking no direct part in hostilities are entitled to under law. Article 3 mandates that “persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely.”⁷⁹ Any “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . , taking of hostages . . . , humiliating and degrading treatment[, and] the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court” are strictly prohibited.⁸⁰ Additional Protocol II extends these protections and re-emphasizes that civilians shall in no case “be the object of attack.”⁸¹ The Protocol also requires proactive measures be taken for the protection of civilians, such as the temporary removal of children from areas of military hostilities.⁸²

The events described in Section V(a) above demonstrate that both separatist groups and Cameroon government forces have deviated from Common Article 3 and Additional Protocol II. Both separatist and government forces, then, should be addressed in reminders to conform to the terms of the articles. The US, other countries, and the UN should urge separatist leaders to comply with Common Article 3 principles, and in doing so note the gratuitousness and self-defeating nature of violence against Anglophone populations, which they claim to represent.

- **The African Charter on Human and People’s Rights protection of the rights to assembly, freedom from arbitrary arrests or detention, and impartial trial**

Cameroon ratified the African Charter on Human and Peoples’ Rights in 1989. The Charter declares that “[e]very individual shall have the right to freely assemble with others” (Article 11), that no one may “be arbitrarily arrested or detained” (Article 9), and that all shall have “the right to be tried within a reasonable time by an impartial court or tribunal” (Article 7). These selected principles are grounded in the principle that “human beings are inviolable” and “entitled to respect for [] life and integrity of [] person.”⁸³

The treatment of protestors in late 2016, the arrests of hundreds involved in peaceful protests following the controversial 2018 presidential election,⁸⁴ and trials like that of Maurice Kamto demonstrate Cameroon’s divergence from the ideals of the Charter. Gaps in the rule of law such as these only exacerbate displacement crises, as those affected by violent conflict have no stable legal system to look to for redress of grievances.⁸⁵

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Art. 13, Dec. 12, 1977.

⁸² *Id.*, Art. 4(3)(e).

⁸³ African Charter on Human and Peoples’ Rights, Art. 4, June 27, 1981.

⁸⁴ *Cameroon: Opposition Leaders Arrested*, HUMAN RIGHTS WATCH (Jan. 30, 2019), <https://www.hrw.org/news/2019/01/30/cameroon-opposition-leaders-arrested#>.

⁸⁵ ABA Mid-Year Resolution 19M116, 2-3.

c. The Global Compact's enjoiner to resolve conditions that lead to displacement crises

Cameroon voted in favor of the Global Compact on Refugees at its official adoption by the UN General Assembly in 2018. The Global Compact declares that “addressing root causes is the responsibility of countries at the origin of refugee movements”⁸⁶ and that “enabling voluntary repatriation is first and foremost the responsibility of the country of origin towards its own people.”⁸⁷ The ABA has linked rule of law issues such as those discussed with respect to the above treaties to displacement, encouraging “states and parties working to implement the global compacts to address the root causes of displacement, including gaps in the rule of law” (19M116). It now reinforces that link by advocating for compliance with relevant international instruments.

VI. The Conflict in Cameroon Necessitates Greater Involvement By Relevant Regional Organizations

a. The Commonwealth of Nations, the International Organization of La Francophonie, and the African Union

Cameroon is a member of the Commonwealth of Nations, the International Organization of La Francophonie and the African Union. According to the Commonwealth Charter, human rights, international peace and security, and the rule of law are among its core values.⁸⁸ The International Organization of La Francophonie is committed to promoting peace, democracy, and human rights,⁸⁹ and is an observer member of the UN. The African Union aims to promote “peace, security, and stability on the continent.”⁹⁰ The stated objectives of these organizations are in direct line with solving the problems that deny some groups within Cameroon the right to participate fully and effectively in economic and political institutions.

b. The crucial role of these organizations in promoting peace in Cameroon

In a joint official visit to Cameroon, Representatives of the Commonwealth of Nations, the International Organization of La Francophonie, and the African Union stated that dialogue remains the path for peace and that the Cameroon government should start by implementing the resolutions of the National Dialogue.⁹¹ The joint declaration released by the three leaders of these organizations illustrates the collaborative

⁸⁶ United Nations General Assembly, *Report of the United Nations High Commissioner for Refugees: Part II – Global Compact on Refugees*, *supra* note 5, at 2.

⁸⁷ *Id.* at 17.

⁸⁸ *Commonwealth Charter*, THE COMMONWEALTH, <https://thecommonwealth.org/about-us/charter> (last visited Apr. 6, 2020).

⁸⁹ *The International Organization of La Francophonie (Overview)*, <http://mediatheque.francophonie.org/L-Organisation-internationale-de.html> (last visited May 4, 2020).

⁹⁰ *About the African Union*, AFRICAN UNION, <https://au.int/en/overview> (last visited May 4, 2020).

⁹¹ *Joint declaration of the tripartite visit to Cameroon*, THE COMMONWEALTH (Nov. 28, 2019), <https://thecommonwealth.org/media/news/joint-declaration-tripartite-visit-cameroon>; Moki Edwin Kindzeka, *Commonwealth, AU, OIF Call for Peace and Unity in Cameroon*, VOICE OF AMERICA (Nov. 30, 2019), <https://www.voanews.com/africa/commonwealth-au-oif-call-peace-and-unity-cameroon>.

relationships they maintain with the Cameroon government;⁹² much of the content of the declaration reinforces the efforts of the national government, and the three representatives appear to have visited primarily with government representatives. Indeed, the AU has been criticized for being too lenient on Cameroon in violation of its founding charter.⁹³

The relationships these organizations maintain with the national government could aid the resolution of the conflict. The organizations have the means to pressure Cameroon to participate in an inclusive dialogue, e.g., by imposing sanctions such as suspension of membership. Yet it seems they prefer to influence the affairs of Yaoundé through continued engagement. The frequency of their contact (the joint declaration describes multiple visits over the last months⁹⁴) and their supportive stance on the National Dialogue implies a level of familiarity with and access to Biya's administration. The ABA should urge that these organizations use their influence to promote a peaceful resolution to the conflict through inclusive dialogues, while still affirming and advocating for the ideals outlined in their founding charters.

VII. Current US Policy Provides a Strategic Leverage Point for Furthering the Rule of Law in Cameroon

a. Withdrawal of AGOA Act beneficiary status

Although Cameroon had recently emerged as a key security ally for the United States in Africa, the United States recently acted under the Leahy Law to suspend “assistance to security force units or individuals” in Cameroon based on “credible information” of “gross violation[s] of human rights.”⁹⁵ Furthermore, on October 31, 2019, President Trump announced his intent to withdraw Cameroon's status as a beneficiary country under the African Growth and Opportunity Act (AGOA) (Title 1 of the Trade and Development Act of 2000). This status had allowed Cameroon to export certain products under highly preferential tariff rates.

Under Section 104 of the AGOA, Sub-Sahara African countries must either have “established” or must be “making continual progress toward establishing” the following requirements to be eligible for beneficiary country status: a market-based economy; the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law; the elimination of barriers to U.S. trade and investment; policies to reduce poverty; a system to combat corruption; and protection of internationally recognized

⁹² See, e.g., *International Organisation of La Francophonie to Contribute in Cameroon's Stability*, REPUBLIC OF CAMEROON, PRESIDENCY OF THE REPUBLIC, <https://www.prc.cm/en/news/audiences/3523-international-organisation-of-la-francophonie-to-contribute-in-cameroon-s-stability> (last visited May 4, 2020).

⁹³ Felix Agbor Nkongho and Rebecca Tinsley, *Opinion: Why the African Union must not ignore Cameroon*, DW (Feb. 7, 2020), <https://www.dw.com/en/opinion-why-the-african-union-must-not-ignore-cameroon/a-52265469>.

⁹⁴ *Joint declaration of the tripartite visit to Cameroon*, *supra* note 91.

⁹⁵ Siobhán O' Grady, *U.S. Cuts Some Military Assistance to Cameroon, Citing Allegations of Human Rights Violations*, THE WASHINGTON POST (Feb. 7, 2019), https://www.washingtonpost.com/world/africa/us-cuts-some-military-assistance-to-cameroon-citing-allegations-of-human-rights-violations/2019/02/06/aeb18052-2a4e-11e9-906e-9d55b6451eb4_story.html?noredirect=on&utm_term=.b20e4787895f.

workers' rights.⁹⁶ The country must also not "engage in gross violations of internationally recognized human rights."⁹⁷ Section 506A(a)(3)(A) of the Trade Act of 1974 enjoins the President to terminate beneficiary status if the President determines a country is not making continual progress toward the benchmarks enumerated in Section 104 of the AGOA or is committing gross violations of human rights.⁹⁸

b. Reinforcing the rule of law through AGOA Act benchmarks

As discussed above, unlawful arrests and detentions, unfair trials, and other threats to due process have constituted major grievances for Anglophones. The US can impact Cameroon's willingness to strengthen rule of law by leveraging beneficiary country status under the AGOA as an incentive.

In revoking Cameroon's beneficiary status, President Trump invoked 19 U.S.C Section 3703(3), determining that Cameroon is broadly engaging in gross violations of human rights and is therefore ineligible. However, as noted above, as a specific requirement of 19 U.S.C. Section 3703(1), Cameroon must have "established" or must be "making continual progress toward establishing . . . the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law."⁹⁹ The revocation of Cameroon's beneficiary country status under the AGOA provides a significant opportunity for the United States to exert pressure on Cameroon's government to reform and expand its judicial systems. The United States should alert Cameroon to the necessary progress it must demonstrate in establishing the rule of law for designation under Section 104 of the AGOA. In negotiations or discussions with Cameroon, the United States should emphasize the need for Cameroon to establish fair trials for those arrested in conjunction with the conflict and to discontinue arbitrary arrests and detentions. This is in addition to the baseline benchmark that Cameroon must not commit gross violations of human rights.

Furthermore, the ABA should urge the US to tie AGOA beneficiary status to Cameroon establishing stable, impartial judicial mechanisms which can protect and provide redress for civilians affected by violence. A judicial system capable of providing justice to those harmed by either separatist or government forces is critical to mitigating the root causes of displacement (19M116) and healing those affected by Cameroon's deadly schism.

Respectfully submitted,

Lisa Ryan
Chair, International Law Section
August 2020

⁹⁶ Trade and Development Act of 2000, 19 U.S.C. § 3703(1) (2012).

⁹⁷ 19 U.S.C. § 3703(3).

⁹⁸ Trade Act of 1974, 19 U.S.C. § 2466a(3)(A) (2012).

⁹⁹ 19 U.S.C 3703(1)(B).

GENERAL INFORMATION FORM

Submitting Entity: International Law Section

Submitted By: Lisa Ryan, Chair, International Law Section

1. Summary of the Resolution(s).

This resolution supports international efforts to resolve Cameroon's armed civil conflict and associated humanitarian and displacement crisis. Particularly, it supports promoting inclusive and neutral dialogue, international funding for humanitarian relief efforts, compliance with international human rights and humanitarian law, involvement by relevant regional organizations, and the implementation of strategic U.S. policy leverage points.

2. Approval by Submitting Entity.

The International Law Section Council approved the resolution on April 24, 2020.

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

No.

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

Resolution 19M116 encourages states working to implement the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration to address the root causes of displacement, i.e., those factors which give rise to the forced movement of people groups including conflict, violence, and in particular weak governance systems incapable of addressing violations of human rights. This resolution applies 19M116 by encouraging relevant international actors to address conditions in Cameroon, including violations of international human rights and humanitarian law, that have produced the country's burgeoning displacement crisis.

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)

S.Res. 292: “A resolution calling on the Government of Cameroon and armed separatist groups to respect the human rights of all Cameroonian citizens, to end all violence, and to pursue an inclusive dialogue to resolve the conflict in the Northwest and Southwest region.” This resolution was introduced and referred to the Committee on Foreign Relations on July 30, 2019.

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

The resolution would be drawn to the attention of the relevant U.S. and foreign government officials and to the attention of other relevant entities, urging them to implement the recommendations it contains.

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

This resolution will incur no additional direct or indirect costs to the Association.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

ABA Center for Human Rights
ABA Civil Rights and Social Justice Section
ABA Rule of Law Initiative
ABA International Law Section Africa Committee
ABA International Law Section International Human Rights Committee

11. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.)*

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12. Name and Contact 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*

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Delegates agenda online.

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EXECUTIVE SUMMARY1. Summary of the Resolution.

This resolution supports international efforts to resolve Cameroon's armed civil conflict and associated humanitarian and displacement crisis. Particularly, it supports promoting inclusive and neutral dialogue, international funding for humanitarian relief efforts, compliance with international human rights and humanitarian law, involvement by relevant regional organizations, and the implementation of strategic U.S. policy leverage points.

2. Summary of the issue that the resolution addresses.

This resolution addresses the ongoing armed conflict between Cameroon's national government and Anglophone separatist forces in North West and South West Regions of the country. The conflict and accompanying abuses of human rights have produced devastating humanitarian conditions and a growing displacement crisis in the Anglophone regions of Cameroon.

3. Please explain how the proposed policy position will address the issue.

The proposed policy will address the issue primarily by enlisting the assistance and advocacy of relevant actors within the international community, including the United States, other countries, the UN, and regional organizations in which Cameroon holds membership. The resolution seeks to spur greater international involvement, urging states and multi-state bodies to use their influence to promote a peaceful resolution to the conflict and mitigate existing conditions.

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

None.

AMERICAN BAR ASSOCIATION
COMMISSION ON DISABILITY RIGHTS
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and
2 tribal governments to adopt and enforce legislation, as well as educational policy, that:

3
4 (a) prohibits school personnel from using seclusion, mechanical, and chemical
5 restraints on preschool, elementary, and secondary students;
6

7 (b) prohibits school personnel from using physical restraint on preschool, elementary,
8 and secondary students unless the student's behavior poses an imminent danger
9 of serious physical injury to self or others, and only after all less intrusive, non-
10 physical interventions have been tried and failed or deemed inappropriate to
11 protect the student or others;
12

13 (c) prohibits, in situations where physical restraint is used because there is an
14 imminent danger of serious physical injury, the use of restraints in a face-down
15 position or any other position that is likely to impair a student's ability to breathe or
16 communicate distress, places pressure on a student's head, neck, or torso, or
17 obstructs a staff member's view of a student's face; and
18

19 (d) requires professional development and ongoing training in positive behavior
20 interventions and trauma-informed care, including crisis de-escalation, restorative
21 practices, and behavior management practices, for all school personnel.

REPORT

I. The Relationship to Existing ABA Policy

The ABA has, over the years, adopted resolutions encouraging changes in law and policy to address school discipline, keep students in school, and make schools safe, supportive, and caring places for students to learn. For example, in 2018 the ABA adopted policy urging federal, state, local, territorial, and tribal governments to enact laws and adopt policies that prohibit the use of out-of-school suspension and expulsion of pre-kindergarten through second grade students, except in cases where: (1) the student poses an imminent threat of serious physical harm to self or others that cannot be reduced or eliminated through the use of age-appropriate school-based behavior interventions and supports, and (2) the duration of the exclusion is limited to the shortest period practicable.¹

In 2016, the ABA “urged all federal, state, territorial and local legislative bodies and governmental agencies to adopt policies, legislation, and initiatives designed to eliminate the school to prison pipeline,” recognizing the disproportionate impact of over-discipline on students of color, students with disabilities, and LGBTQ students, resulting in disparate push-out rates and juvenile justice system or prison interactions.² Also, in 2009 the ABA passed a resolution urging federal and state legislatures to pass laws and national, state, and local education, child welfare, and juvenile justice agencies to implement and enforce policies that “[h]elp advance the right to remain in school, promote a safe and supportive school environment for all children, and enable them to complete school.”³

This resolution is consistent with these policies. It advocates for regulation of restraint and seclusion, aversive behavior interventions that transform school from the nurturing, safe place it should be to a punitive, traumatizing, and potentially dangerous, even lethal, environment. Specifically, the resolution urges the adoption and enforcement of legislation and policy that prohibits school personnel from using seclusion, mechanical restraint, and chemical restraint on preschool, elementary, and secondary students. The resolution also prohibits school personnel from using physical restraint unless the student’s behavior poses an imminent danger of serious physical injury to self or others, and only after all less intrusive, non-physical interventions have been tried and failed or have been deemed inappropriate to protect the student or others. In situations where physical restraint is used because there is an imminent danger of serious physical injury, a student cannot be restrained in a face-down position or any other position that is likely to impair the student’s ability to breathe or communicate distress, places pressure on a student’s head, neck, or torso, or obstructs a staff member’s view of the student’s face.

¹ ABA Resolution 18A116B,

<https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/116b.pdf>.

² ABA Resolution 16A115, https://www.americanbar.org/groups/child_law/resources/attorneys/school-to-prison-pipeline.html.

³ ABA Resolution 09A111B at 8,

https://www.americanbar.org/content/dam/aba/directories/policy/2009_am_118b.authcheckdam.pdf.

Accordingly, restraint should be implemented by trained personnel and cease immediately when the student no longer poses an imminent danger. The resolution also requires professional development and ongoing training in positive behavior interventions and trauma-informed care, including crisis de-escalation, restorative practices, and behavior management practices for all school personnel.

For purposes of the resolution, seclusion is the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. It does not include a timeout, a behavior management technique that is part of an approved program, involves the monitored separation of the student in an unlocked setting, and is implemented for the purpose of calming. Physical restraint is a personal restriction that immobilizes or reduces a student's ability to move their torso, arms, legs, or head freely. It does not include a physical escort, a temporary touching or holding of the hand, wrist, arm, shoulder, or back to induce a student to walk to a safe location. Mechanical restraint is the use of any device or equipment to restrict a student's freedom of movement. Chemical restraint is the administration of psychoactive medication for the purpose of convenience, sedation, discipline, or punishment rather than for treatment. In this report, "restraint and seclusion" includes all these forms of intervention.

II. Emergence of Restraint and Seclusion As a Public Issue and Policy Efforts to Address Their Use

Although courts have addressed the use of restraint and seclusion in institutional settings since the early 1970s,⁴ their use came to the public's attention in 1998 through a series of investigative articles published by the *Hartford Courant*.⁵ Based on a commissioned, first-of-its-kind national study, the reporters examined restraint deaths in facilities and group homes for children and adults with mental health and intellectual disabilities. The *Courant* confirmed 142 restraint or seclusion deaths over the previous decade but noted that, because many cases went unreported, the actual number of deaths could have been as high as 1,500, according to a statistical study. The authors of the series advocated oversight of and uniform standards for use of these practices.

By the early 2000s, several states, including Texas, Nevada and Maryland, enacted legislation to govern the use of restraint and seclusion in the school setting. Over the course of the decade, other states enacted laws, regulations, or policies. However, there was wide variance in how, or whether, states chose to address the use of restraint and seclusion in schools.⁶

⁴ *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972) (prohibiting the use of seclusion and barring the use of physical restraint unless (1) when absolutely necessary to protect residents from injury to self or to prevent injury to others, (2) if alternative techniques have failed, and (3) such restraint imposes the least possible restriction consistent with its purpose).

⁵ <https://www.courant.com/news/connecticut/hc-xpm-1998-10-11-9810090779-story.html>.

⁶ GOVERNMENT ACCOUNTABILITY OFFICE, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS, GAO-09-719T (MAY 19, 2009), <https://www.gao.gov/products/GAO-09-719T>.

In January 2009, the National Disability Rights Network (NDRN), the membership organization for the protection and advocacy (P&A) system,⁷ published *School Is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools*, which documented many instances of restraint and seclusion in school, some lasting for hours and resulting in death.⁸ In May 2009, the Council of Parent Attorneys and Advocates (COPAA), which had issued a declaration of principles opposing restraint, seclusion and aversive interventions in 2008,⁹ issued *Unsafe in the Schoolhouse: Abuse of Children with Disabilities*.¹⁰ The report summarized incidents of abusive use of restraint and seclusion nationwide and made policy recommendations, including a legislative ban on the use of prone, chemical, and mechanical restraints; restraints that interfere with breathing; restraint or seclusion that is medically and psychologically contraindicated for a child; any other restraint, except when a student poses a clear and imminent physical danger to self or others; and locked seclusion rooms or other rooms from which a child cannot leave unless there is an imminent threat of immediate bodily harm, in which case a child can be placed in a locked room while awaiting the arrival of law enforcement or crisis intervention team.¹¹

That same month, the U.S. Government Accountability Office (GAO) published a report on restraint and seclusion-related deaths and abuse at public and private schools and residential treatment centers, providing an in-depth examination of 10 case studies.¹² GAO found that there were no federal laws addressing the use of restraint or seclusion in the school setting and “widely divergent” laws at the state level.¹³

In 2011, Equip for Equality, the Illinois P&A System, with funding from Congress and in cooperation with the National Disability Rights Network and medical, nursing and forensic experts, conducted a study that examined and analyzed the deaths of 61 individuals with disabilities ranging in age from nine to 95 years in various settings across 12 states that occurred following the use of restraint.¹⁴ The study revealed alarming abuses of these dangerous interventions, including prone (face-down) physical restraint,

⁷ The protection and advocacy system, created by federal law, has the authority to investigate abuse and neglect of children and adults with disabilities and to seek redress for violations of their rights. See Developmental Disabilities Assistance and Bill of Rights (DD) Act of 2000, 42 U.S.C. § 15043; Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act of 1986, as amended, 42 U.S.C. § 10801 *et seq.*; and Protection and Advocacy for Individual Rights (PAIR) Program of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794(e), (f) (incorporating the general authorities, including access authorities as set forth in the DD Act.) Every state and territory has a protection and advocacy organization.

⁸ <https://www.ndrn.org/wp-content/uploads/2019/03/SR-Report2009.pdf>.

⁹ COPAA DECLARATION OF PRINCIPLES OPPOSING THE USE OF RESTRAINTS, SECLUSION, AND OTHER AVERSIVE INTERVENTIONS UPON CHILDREN WITH DISABILITIES (JUNE 2008), https://cdn.ymaws.com/copaa.site-ym.com/resource/resmgr/copaa_declaration_of_princip.pdf.

¹⁰ https://cdn.ymaws.com/www.copaa.org/resource/collection/662B1866-952D-41FA-B7F3-D3CF68639918/UnsafeCOPAAMay_27_2009.pdf.

¹¹ *Id.* at 11.

¹² GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 6.

¹³ *Id.* at i.

¹⁴ EQUIP FOR EQUALITY, NATIONAL REVIEW OF RESTRAINT RELATED DEATHS OF CHILDREN AND ADULTS WITH DISABILITIES: THE LETHAL CONSEQUENCES OF RESTRAINT (2011), <https://www.equipforequality.org/wp-content/uploads/2014/04/National-Review-of-Restraint-Related-Deaths-of-Adults-and-Children-with-Disabilities-The-Lethal-Consequences-of-Restraint.pdf>.

exacerbated by a critical lack of oversight and data collection. Consequently, Equip for Equality strongly recommended action to reduce and ultimately eliminate the use of restraint.

In 2012, the United States Department of Education (ED) issued *Restraint and Seclusion: Resource Document*, outlining 15 principles to guide the development or revision of policies and procedures regarding the use of restraint and seclusion in schools.¹⁵ Among other principles, the ED declared that: every effort should be made to prevent the need for the use of restraint and seclusion with any student, whether disabled or not; physical restraint and seclusion should never be used in a way that restricts breathing or harms the child; schools should never use mechanical restraints or drugs or medication to control behavior or restrict movement; physical restraint and seclusion should not be used unless the child's behavior poses imminent danger of serious harm to self or others and other interventions are ineffective; and restraint and seclusion should be discontinued as soon as there is no longer imminent danger of physical harm.¹⁶

The ED further outlined principles addressing training of school staff, documentation of the use of restraint and seclusion, notification of parents, monitoring of students subjected to restraint or seclusion, review of behavior plans if restraint or seclusion is used repeatedly, and development of policies.¹⁷ This was the first statement about restraint and seclusion by the ED. It remains an important document because of its emphasis on not using restraint and seclusion as routine school safety measures, but rather only in situations where a child's behavior poses imminent danger of serious physical harm to self or others.

III. The Problem of Seclusion and Restraints and Their Deleterious Impact on Students and Their Families

National research shows that students have been subjected to restraint and seclusion in schools as a means of discipline, to force compliance, for convenience of staff, as retaliation, or as a substitute for appropriate educational and behavioral support.¹⁸ The use of restraint and seclusion in schools has resulted in serious physical injury, psychological trauma, and death to students. Restraint and seclusion can be contraindicated based on a student's disability, healthcare needs, or medical or psychosocial history. Despite the widely recognized risks, the use of restraint and seclusion in schools continues.

¹⁵ UNITED STATES DEPARTMENT OF EDUCATION, RESTRAINT AND SECLUSION: RESOURCE DOCUMENT 12-23 (MAY 2012), <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Keeping Students Safe Act, HR 7124 and S 3626 (115th Cong., 2017-18), SEC. 2. FINDINGS (1), <https://www.congress.gov/bill/115th-congress/house-bill/7124/text?q=%7B%22search%22%3A%5B%22keeping+all+students%22%5D%7D&r=1>; <https://www.congress.gov/bill/115th-congress/senate-bill/3626/text>.

According to data from the Civil Rights Data Collection (CRDC), in the 2015–2016 school year 124,500 students across the country were restrained or secluded.¹⁹ Students with disabilities and African American students were restrained and placed in seclusion at disproportionate rates compared to other students.²⁰ Although students with disabilities make up 12 percent of total enrollment across the country, they make up 71 percent of students who were restrained and 66 percent of the students who were secluded.²¹ African American students make up 15 percent of total enrollment, and yet represent 27 percent of those students restrained and 23 percent secluded.²²

However, the numbers of students restrained or secluded may be higher because the CRDC data do not reflect all incidents of restraint and seclusion. According to GAO's analysis of federal restraint and seclusion data for the 2015-16 school year (the most recent available), ED's quality control processes for data it collects from public school districts on incidents of restraint and seclusion are largely ineffective or do not exist. Specifically, 70 percent of all districts reported zero incidents, but the CRDC rule requiring districts to verify zeros only applied to 30 of the nation's 17,000 districts. Absent more effective rules to improve data quality, determining the frequency and prevalence of restraint and seclusion will remain difficult.

Current laws and guidelines are not sufficient to protect students and keep them safe in schools. Congress has yet to pass federal legislation that comprehensively regulates the use of seclusion and restraint in schools. A decade ago, members of Congress introduced legislation to address this issue, which failed to become law. Over the past several years, members of Congress have introduced the Keeping All Students Safe Act aimed at prohibiting seclusion and tightly governing restraint and the circumstances under which it could be used.²³

Notwithstanding their incompleteness, the CRDC data reveal significant use of restraint and seclusion. For example, for the 2015-16 school year Clark County School district in Nevada, a district with 326,238 students at the time, reported 1,107 incidents of restraint. Gwinnet County, Georgia, with a student population of 175,958, reported 427 incidents of restraint. Baltimore County, Maryland, with 110,786 students, reported 388 incidents of restraint and 157 incidents of seclusion.

The regulation of restraint and seclusion in schools has been left to the states. Although the increase in state laws on seclusion and restraint since 2009 shows progress, the protections provided vary, ranging from comprehensive to inadequate to non-existent, despite the widely recognized risks of restraint and seclusion. Important safeguards

¹⁹ U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, 2015-16 CIVIL RIGHTS DATA COLLECTION, SCHOOL CLIMATE AND SAFETY 11 (APR. 2018, REVISED MAY 2019), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

²⁰ *Id.*

²¹ *Id.* at 12.

²² *Id.* at 11.

²³ See, e.g., HR 4247 and S 2860 (111th Cong., 2009-10); HR 1381 and S 2020 (112th Cong., 2011-12); HR 927 and S 2036 (114th Cong., 2015-16); HR 7124 and S 3626 (115th Cong., 2017-18).

present in some states are absent in others. Some states have only suggested guidelines, while others have nothing at all.

In July 2019, The Autism National Committee published an updated version of *How Safe is the Schoolhouse? An Analysis of State Seclusion and Restraint Laws and Policies*.²⁴ First published in 2012, this report represents the most current survey of state laws regarding restraint and seclusion. According to the report, 42 states and the District of Columbia have enacted some form of legislative or regulatory restriction on the use of restraint and seclusion, but these laws range from weak to meaningful.²⁵

Thirty states have laws providing meaningful protections against restraint and seclusion for all children, while 39 for children with disabilities.²⁶ Only 22 states by law require that an emergency situation of threatening physical danger exist before restraint can be used for all children; 26 states impose the threatening physical danger requirement for children with disabilities.²⁷ Restraints that impede breathing and threaten life are prohibited in 31 states for all children and in 35 states for children with disabilities.²⁸ Twenty-one states ban mechanical restraint for all children; 25 for students with disabilities.²⁹ Twenty-one states prohibit dangerous chemical and drug restraints for children with and without disabilities.³⁰ Twenty-five states either ban seclusion or require staff to continuously watch all students in seclusion; 35 states, for students with disabilities.

Further, there are wide variations in how school districts report restraint and seclusion, making it impossible to get a full picture of its use, and suggesting that these practices are more common than the data show.³¹ In January 2019 ED announced the Office for Civil Rights (OCR) and the Office of Special Education and Rehabilitative Services (OSERS) will work in partnership to protect students with disabilities by providing technical assistance and support to schools, districts, and state education agencies regarding restraint and seclusion and to strengthen oversight. Among other things, OCR will work with school districts to improve the quality of the data submitted in accord with

²⁴ Jessica Butler, *How Safe is the Schoolhouse? An Analysis of State Seclusion and Restraint Laws and Policies*, <http://autcom.org/pdf/HowSafeSchoolhouse.pdf>.

²⁵ *Id.* at 127-34 (AZ, AL, AK, AR, CA, CO, CT, DE, DC, FL, HI, IL, IN, IO, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, NE, NV, NH, NJ, NM, NY, NC, OH, OR, PA, RI, SD, TN, TX, UT, VT, WA, WVA).

²⁶ *Id.* at x.

²⁷ *Id.*

²⁸ *Id.* at xi.

²⁹ *Id.*

³⁰ *Id.*

³¹ See, e.g., Asmar, Melanie, "Behind closed doors: When it comes to seclusion and restraint, Colorado schools 'are investigating themselves,'" *Chalkbeat*, Feb. 20, 2020, <https://co.chalkbeat.org/2020/2/20/21178602/behind-closed-doors-when-it-comes-to-seclusion-and-restraint-colorado-schools-are-investigating-them>; Williams, Ed, "Restraint, Seclusion, Deception: Parents, regulators left in the dark over school behavior management techniques," *NM Political Report*, Nov. 10, 2019, <https://nmpoliticalreport.com/2019/10/11/restraint-seclusion-deception-parents-regulators-left-in-the-dark-over-school-behavior-management-techniques/>.

the requirements of the CRDC and to provide technical assistance to schools on data quality.³²

What these numbers do not explain is the impact that each restraint and seclusion incident has on the child or youth and their family, or who these children and youth are. Death in restraint or seclusion occurs, although it is a rare occurrence, but trauma and injuries are not.³³ Families must deal with the repercussions of the use of restraint and seclusion with their children; parents and guardians have reported regression, toileting accidents, children not wanting to sleep in their own beds, and school phobia, in addition to the physical injuries children and youth sustain, ranging from bruises and scratches to broken fingers and bones.³⁴

As previously noted, students with disabilities are restrained and placed in seclusion at disproportionate rates compared to students without disabilities. These students have a variety of disabilities ranging from autism to intellectual disability to emotional and behavioral disabilities or, often, a combination of disabilities. For many of these students, particularly those who are nonverbal or who have limited verbal skills or difficulty expressing themselves, their behavior is a form of communication.³⁵ When challenging behavior is not recognized as communication but is simply viewed as something to be eradicated, restraint and seclusion become punitive and even more traumatizing. One boy with autism and behavioral issues was reportedly restrained or secluded more than 400 times from 2013 to 2016. As a result, he hated school, was more violent, and distrusted authority figures.³⁶

All students deserve to be safe in schools. Restraint and seclusion have a profoundly traumatizing impact not just on students and their families, but also on the students who witness the use of these aversive interventions and on school staff³⁷ themselves. Given the widely recognized risks involved with the use of restraint and seclusion, it is incumbent upon policymakers to enact legislation to restrict, and eventually eliminate, these practices and promote practices that allow educators and other school personnel to support students with positive interventions that are evidence-based, trauma-informed, and tailored to meet their individual needs.

³² <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

³³ Williams, *supra* note 31.

³⁴ Examples from cases handled by Disability Rights Maryland, the protection and advocacy organization for Maryland.

³⁵ See, e.g., "Challenging Behavior as Communication," American Speech-Language-Hearing Association, <https://www.asha.org/NJC/Challenging-Behavior-as-Communication/>.

³⁶ Abamu, Jenny, "How Some Schools Restrain or Seclude Students: A Look at a Controversial Practice," NPR, June 15, 2019, <https://www.npr.org/2019/06/15/729955321/how-some-schools-restrain-or-seclude-students-a-look-at-a-controversial-practice>.

³⁷ Asmar, *supra* note 31.

IV. Alternatives to Restraint and Seclusion

School staff turn to restraint and seclusion when they do not know what else to do. Accordingly, they need to have an array of strategies in hand to prevent a crisis, defuse a crisis, and make sense of what has happened after a crisis has occurred. If services are scaffolded to support students and assist them to manage effectively in the school environment and the other places where they spend their time, crises can often be averted, and the need for restraint or seclusion can be reduced or eliminated.³⁸

School staff must have the necessary tools to meet their students' academic, social-emotional, and behavioral needs. Robust teacher, administrator, and service provider preparation programs, professional development, and ongoing technical assistance and support are all critical to increasing the likelihood that school staff will be able to establish and maintain safe, nurturing, and supportive learning environments for the children and youth who enter their buildings each day. Use of proactive strategies and supports provides needed structure and supports to children and youth, ensuring school system accountability.

The regulations implementing the Individuals with Disabilities Education Act (IDEA)³⁹ require that for students with behavior that impedes their learning or the learning of others, the team designing their individualized education programs must consider positive behavior supports, interventions, and strategies.⁴⁰ The use of physical restraint as a planned intervention shall not be written into a student's education plan, individual safety plan, behavioral plan, or individualized education program.⁴¹ At its core, positive behavior supports are ways of addressing behavior that do not rely on punishment or aversive interventions such as suspension, restraint or seclusion. Much has been written about positive behavior supports in general and the three-tier system of Positive Behavior Interventions and Supports (PBIS) developed by George Sugai and Robert Horner, a school-wide systems change model that focuses on progressively more intensive interventions beginning with the whole school and then intervening with smaller groups of students who do not respond to the previous level of intervention.⁴² The effective implementation of positive behavior supports is linked to greater academic achievement, significantly fewer disciplinary problems, increased instruction time, and staff perception

³⁸ See, e.g., DEPARTMENT OF EDUCATION, *supra* note 15, at 13-14 (when integrated with effective academic instruction, comprehensive, prevention-oriented, positive behavioral systems such as PBIS reinforces appropriate behaviors while reducing instances of dangerous behaviors that may lead to the need to use restraint or seclusion).

³⁹ 20 U.S.C. §§ 1400 *et. seq.*

⁴⁰ 34 C.F.R. § 300.324(a)(2)(i).

⁴¹ Keeping All Students Safe Act, *supra* note 18, at SEC. MINIMUM STANDARDS; RULES OF CONSTRUCTION 5(a)(5).

⁴² See, e.g., Office of Special Education Programs (OSEP) PBIS Technical Assistance Center at <https://www.pbis.org> (includes links to research articles); "Positive Behavior Support (PBS)—A Discussion," Safe & Civil Schools, www.safeandcivilschools.com/research/papers/pbs.php; Robert H. Horner, "Positive Behavior Supports" in *Mental Retardation in the 21st Century* (2000, M.L. Wehmeyer & J.R. Patton eds.), citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.910.4491&rep=rep1&type=pdf.

of a safer teaching environment.⁴³ Training for school personnel that is focused on the dangers of restraint and seclusion as well as training in positive behavior supports, de-escalation techniques, and physical restraint and seclusion prevention, can reduce the incidence of injury, trauma, and death.⁴⁴

Trauma-informed care in the school setting recognizes that children are affected by trauma they experience, such as abuse or neglect, loss of a loved one, or other negative event, or series of events, and that those experiences can have an impact on brain development and how a child behaves in and outside of school.⁴⁵ Increasingly, resources are becoming available to assist school staff in applying the principles of trauma-informed care to the classroom by engaging in practices such as setting up predictable classroom routines, creating a safe, uncluttered classroom, providing movement breaks for students, and having students repeat verbal instructions.⁴⁶

A number of states have adopted trauma-informed practices. For example, Massachusetts encourages schools to adopt a “Flexible Framework” for Trauma-Sensitive Practices in Schools; this framework includes strategies designed to address school culture and infrastructure, staff training, links to mental health professionals, academic instruction for students who have experienced trauma, nonacademic strategies, and school policies, procedures and protocols.⁴⁷ Washington State has a handbook entitled *The Heart of Learning and Teaching: Compassion. Resiliency, and Academic Success*, issued through its Superintendent’s Office, containing principles that should guide interactions with students who have experienced trauma.⁴⁸

V. Conclusion

Restraint and seclusion are not educational strategies, nor are they therapeutic. They are aversive interventions used by desperate school staff when they do not know how else to manage students in their classrooms and schools. Prohibiting seclusion and restricting restraint to situations posing only imminent serious physical injury while at the same time providing staff with the professional development and ongoing support and technical assistance necessary to provide appropriate educational instruction, positive behavior supports and trauma-informed care will go a long way toward making school a nurturing, safe, and supportive learning environment for children, especially those who need a refuge from an otherwise stormy world.

⁴³ Keeping All Students Safe Act, *supra* note 18, at SEC. 2. FINDINGS (6).

⁴⁴ *Id.* at SEC. 2. FINDINGS (3).

⁴⁵ See, e.g., Maura McInerney, J.D. & Amy McKlindon, M.S.W., “Unlocking the Door to Learning: Trauma-Informed Classrooms & Transformational Schools” (Education Law Center, 2014), <https://www.elc-pa.org/wp-content/uploads/2015/06/Trauma-Informed-in-Schools-Classrooms-FINAL-December2014-2.pdf>.

⁴⁶ “Creating a Trauma-Sensitive Classroom,” National Education Agency, <http://www.nea.org/tools/tips/creating-a-trauma-sensitive-classroom.html>.

⁴⁷ McInerney & McKlindon, *supra* note 45, at 8.

⁴⁸ *Id.* at 9.

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Respectfully submitted,

Denise Avant
Chair, Commission on Disability Rights
August 2020

GENERAL INFORMATION FORM

Submitting Entity: Commission on Disability Rights

Submitted By: Denise Avant, Chair

1. Summary of the Resolution(s). Urges the adoption and enforcement of legislation and policy that prohibits school personnel from using seclusion, mechanical restraint, and chemical restraint on preschool, elementary, and secondary students, and prohibits the use of physical restraint unless the student's behavior poses an imminent danger of serious physical injury to self or others, and only after all less intrusive, non-physical interventions have been tried and failed or have been deemed inappropriate to protect the student or others. In situations where physical restraint is used because there is an imminent danger of serious physical injury, a student cannot be restrained in a face-down position or any other position that is likely to impair the student's ability to breathe or communicate distress, places pressure on a student's head, neck, or torso, or obstructs a staff member's view of the student's face. The resolution also requires professional development and ongoing training in positive behavior interventions and trauma-informed care, including crisis de-escalation, restorative practices, and behavior management practices, for all school personnel.
2. Approval by Submitting Entity. August 10, 2019 at the Commission on Disability Right's Business Meeting. April 4, 2020 the Section of Civil Rights and Social Justice approved co-sponsorship of the resolution.
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? In 2009 the ABA passed a resolution urging federal and state legislatures to pass laws and national, state, and local education, child welfare, and juvenile justice agencies to implement and enforce policies that "[h]elp advance the right to remain in school, promote a safe and supportive school environment for all children, and enable them to complete school." ABA Resolution 09A111B at 8, https://www.americanbar.org/content/dam/aba/directories/policy/2009_am_118b.authcheckdam.pdf. This resolution expands the scope of the 2009 policy, promoting a safe and supportive school environment for all children by prohibiting or restricting the use of restraint and seclusion on preschool, elementary, and secondary students.
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). Keeping All Students Safe Act. HR 7124 (115th Congress, 2017-18) was introduced by Representative Donald Beyer Jr. (D-VA-8) and

was referred to the Subcommittee on Military Personnel on November 15, 2018. S 3626 (115th Congress, 2017-18) was introduced by Senator Murphy Christopher (D-CT) and referred to the Committee on Health, Education, Labor, and Pensions. Legislation has yet to be introduced in the 116th Congress.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. We would work with federal, state, local, territorial, and tribal governments to adopt or strengthen existing laws or policies on the use of restraint and seclusion in schools. We would also be able to support any pending legislation in Congress.

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

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

10. Referrals.

Litigation Section
State and Local Government Law Section
Center on Children and the Law
Commission on Youth at Risk

11. Contact Name and Information prior to the Meeting. Amy Allbright, 703.336.2501, amy.allbright@americanbar.org.

12. Contact Name and Information. (Who will present the Resolution with Report to the House?) Denise Avant, 773.991.8050, davant1958@gmail.com

EXECUTIVE SUMMARY

1. Summary of the Resolution

Urges the adoption and enforcement of legislation and policy that prohibits school personnel from using seclusion, mechanical restraint, and chemical restraint on preschool, elementary, and secondary students, and prohibits the use of physical restraint unless the student's behavior poses an imminent danger of serious physical injury to self or others, and only after all less intrusive, non-physical interventions have been tried and failed or have been deemed inappropriate to protect the student or others. In situations where physical restraint is used because there is an imminent danger of serious physical injury, a student cannot be restrained in a face-down position or any other position that is likely to impair the student's ability to breathe or communicate distress, places pressure on a student's head, neck, or torso, or obstructs a staff member's view of the student's face. The resolution also requires professional development and ongoing training in positive behavior interventions and trauma-informed care, including crisis de-escalation, restorative practices, and behavior management practices, for all school personnel.

2. Summary of the Issue that the Resolution Addresses

Seclusion and various forms of restraint (mechanical, chemical, and physical) are punitive measures used in schools from elementary through high school in lieu of therapeutic interventions with students. Notwithstanding the long-standing recognition that these forms of behavioral intervention cause significant harm to children, school officials continue to deploy them to an unacceptably high degree. The Resolution calls for an end of the use of seclusion, mechanical and chemical restraints and significant limitations on the use of physical restraints, and in their place urges the use of positive behavioral supports and trauma-informed care to help children to thrive.

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

The proposed policy position directly addresses this issue by calling for governments to adopt legislation and policies banning or limiting the above harmful practices.

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

None

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON SPECIALIZATION
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association reaccredits for an additional five-year
2 term the following designated specialty certification programs for lawyers:

3
4 Social Security Disability Law program of the National Board of Trial Advocacy of
5 Wrentham, Massachusetts;

6
7 Business Bankruptcy Law program of the American Board of Certification of Cedar
8 Rapids, Iowa;

9
10 Consumer Bankruptcy Law program of the American Board of Certification of Cedar
11 Rapids, Iowa; and

12
13 Creditors' Rights Law program of the American Board of Certification of Cedar Rapids,
14 Iowa.

REPORT

Background and Synopsis of the Resolutions

At the 1993 Midyear Meeting, the House adopted [Standards for Accreditation of Specialty Certification Programs For Lawyers](#) and delegated to the Standing Committee on Specialization the task of evaluating programs sponsored by organizations that apply to the ABA for accreditation, and making recommendations to the House of Delegates about the periodic renewal of accreditation.

The adoption of the Standards in February 1993 (93MY105), followed an August 1992 (92AM128), House resolution requesting that the Association develop standards for accrediting private organizations that certify lawyers as specialists, and that the Association establish and maintain a mechanism to accredit organizations that meet those standards. The 1992 resolution affirmed that a national accreditation mechanism administered by the Association according to uniform standards would be an efficient and effective means of dealing with a multiplicity of organizations that are offering, or planning to offer, certification programs. At the 1999 Annual Meeting (99AM107A), the House extended the initial period of accreditation approved in the Standards from three to five years. In addition, the House lengthened the period of reaccreditation from every third year to every fifth year.

The Standing Committee on Specialization currently has pending applications for reaccreditation under the Standards from four programs: (1) the Social Security Disability Law program of the National Board of Trial Advocacy (NBTA) and the (2) Business Bankruptcy Law, (3) Consumer Bankruptcy Law, and (4) Creditors' Rights Law programs of the American Board of Certification (ABC). In evaluating any programs for reaccreditation, the Standing Committee follows the procedures it adopted on March 2, 1993, as amended thereafter from time to time.

In order to ensure that each of the programs continues to comply with ABA Standards, the Standing Committee requires that the following documents accompany applications for reaccreditation:

- i. Current versions of the applicant's governing documents, including articles of incorporation, bylaws, and resolutions of the governing bodies of the applicant or any parent organization, which resolutions relate to the standards, procedures, guidelines or practices of the applicant's certification programs;
- ii. Biographical summaries of members of the governing board, senior staff and members of advisory panels, certification committees, examination boards and like entities involved with the certification process, including specific information concerning the degree of involvement in the specialty area of persons who review and pass upon applications for certification;

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- iii. All materials furnished to lawyers seeking certification, including application forms, booklets or pamphlets describing the certification program, peer reference forms, rules and procedures, evaluation guides and any other information furnished to the public or the media regarding the certification process;
- iv. A copy of the last examination given to applicants for specialty certification, along with a description of how the exam was developed, conducted and reviewed; a description of the grading standards; and the names of persons responsible for determining pass/fail standards. The examinations were made available, on a confidential basis, for review by a person appointed by the Standing Committee an examination reviewer.

Furthermore, as to the application of the NBTA program, in addition to passage of the examinations it administers itself, the NBTA accepts applicants' passage of examinations administered by the New Jersey Supreme Court's Board on Attorney Certification, the Texas Board of Legal Specialty Certification, and the Florida State Bar's Board of Legal Specialization and Education. Recent examinations from all of these programs were made available, on a confidential basis, for review by examination reviewers appointed by the Standing Committee to review the NBTA program.

After reviewing the application for the Social Security Disability law program, the Standing Committee requested additional materials from NBTA regarding Standards for Recertification (4.08), as well as the procedure for the revocation of certification process (4.09). The Committee reviewed the requested materials at its meeting on February 15, 2020 and unanimously voted to recommend that the ABA House of Delegates approve reaccreditation for the program for an additional five-year term with the friendly amendment that NBTA amend the revocation of certification process to include a description of the process by which a certification is revoked that would then lead to an appeal and the role of the lawyer in that process. Additionally, NBTA revised its Social Security Disability Law exam to meet the approval of the exam reviewer.

The Standing Committee is currently reviewing the application and materials for the three ABC programs. The Standing Committee anticipates approving the applications for reaccreditation prior to August 2020. The Standing Committee thus recommends that the ABA approve the three ABC programs, pending completion of the application and exam reviews and approval by the reviewers.

The Accreditation Review Panels were appointed by the Standing Committee for the Social Security Disability Law program of the National Board of Trial Advocacy and the Business Bankruptcy Law, Consumer Bankruptcy Law, and Creditors' Rights Law programs of the American Board of Certification (ABC), and consisted of a chair and one or two other members, as well as the appointed examination reviewer. Applicants were provided notice, in writing, of the names and affiliations of the members of the Accreditation Review Panel and the examination reviewer. The reaccreditation

procedures provide certifying organizations the opportunity to object for cause to the appointment of examination reviewer.

The Accreditation Review Panel members and examination reviewers for these applications were:

1. Applicant Organization: ***National Board of Trial Advocacy***

Specialty Area: ***Social Security Disability Law***

The NBTA was founded in 1977 to provide board certification for attorneys. It is dedicated to bettering the quality of trial advocacy in our nation's courtrooms and helping consumers find experienced and highly qualified trial lawyers. The NBTA was originally housed, and fully supported by the Association of Trial Lawyers of American (now American Association of Justice) until 1987 when it became an independent non-profit corporation.

The NBTA has programs accredited by the American Bar Association to certify lawyers in the specialty areas of civil practice advocacy law, criminal trial advocacy law, family law trial advocacy, social security disability law, civil trial law, and truck accident law.

Accreditation Review Panel

Shannon Hartsfield. Ms. Hartsfield is partner in the Tallahassee office of Holland & Knight. She is board certified in Health Law by The Florida Bar Board of Legal Specialization and Education. She is past Chair of the ABA Health Law Section's eHealth, Privacy & Security Interest Group, and is a member of the Standing Committee on Specialization.

Steven Rubin. Mr. Rubin is a solo practitioner who specializes in real estate transactions, real estate related litigation, and condominium and planned development law, and concentrates in other civil matters relating to real estate and commercial law. He is a Florida Bar Board Certified Attorney and is a member of the Standing Committee on Specialization.

Examination Reviewer

Timothy Vrana. Mr. Vrana is a solo practitioner with Timothy J. Vrana LLC in Columbus, Indiana. His practice focuses on Social Security Disability.

In addition to reviewing the applicant's reaccreditation application materials, members of the Accreditation Review Panel considered the information on the reaccreditation evaluation forms and comments provided by the examination reviewer who evaluated the written examinations on a confidential basis. Based upon that review, the Accreditation Review Panel concluded that the applicant's program did not comply

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with the ABA Standards and requested the ABA extend its accreditation to August 2020 to allow NBTA to provide the requested materials and revise its exam. The Standing Committee requested additional materials from NBTA regarding Standards for Recertification (4.08), as well as the procedure for the revocation of certification process (4.09). The Committee reviewed the requested materials at its meeting on February 15, 2020 and unanimously voted to recommend that the ABA House of Delegates approve reaccreditation for the program for an additional five-year term with the friendly amendment that NBTA amend the revocation of certification process to include a description of the process by which a certification is revoked that would then lead to an appeal and the role of the lawyer in that process. Additionally, NBTA revised its Social Security Disability Law based on the exam reviewers' comments and the exam now meets the approval of the exam reviewer.

By unanimous vote at its February 15, 2020 business meeting, the Standing Committee on Specialization accepted the Panel's recommendation to approve the NBTA Social Security Disability Law program reaccreditation application and recommends reaccreditation for a five year term.

2. *Applicant Organization:* *American Board of Certification*

Specialty Areas:* *Business Bankruptcy Law, Consumer Bankruptcy Law, and Creditors' Right Law

The American Board of Certification (ABC) is a non-profit organization dedicated to serving the public and improving the quality of the bankruptcy and creditors' rights law bars. ABC has certified nearly 1,000 attorneys in consumer and business bankruptcy and creditor's rights law nationwide. ABC certification serves the public by allowing potential clients to make an informed decision in choosing bankruptcy and creditors rights counsel. In addition, ABC certification encourages attorneys to strive toward excellence and recognizes those attorneys who have met the rigorous ABC standards.

ABC has three programs accredited by the American Bar Association to certify lawyers in the specialty area of business bankruptcy, consumer bankruptcy, and creditors' rights.

Business Bankruptcy, Consumer Bankruptcy, and Creditors' Rights Law Accreditation Review Panel

Barbara Howard, Chair. Ms. Howard is the Chair of the Standing Committee on Specialization. She is the principal of Barbara J. Howard Co., LPA in Cincinnati, Ohio and is a Certified Family Relations Law Specialist.

Samuel Edmunds. Mr. Edmunds is a member of the Standing Committee on Specialization. He is an experienced trial attorney and partner of Sieben

Edmunds Miller PLLC in Mendota Heights, Minnesota. Mr. Edmunds is a Board Certified Criminal Law Specialist.

Hon. Melissa May. Judge May was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in April of 1998. Prior to her appointment to the Court, Judge May practiced law for fourteen years in Evansville, Indiana, where she focused on insurance defense and personal injury litigation. From 1999 until December 2004, Judge May was a member of Indiana's Continuing Legal Education Commission, where she chaired the Specialization Committee. She is currently on an Advisory Panel to the Specialization Committee and is a member of the Standing Committee on Specialization.

Examination Reviewers

Not yet assigned.

While the applications for reaccreditation for all three ABC programs were received in August, and panelists were assigned to the Accreditation Review Panel, the Standing Committee experienced a staffing change and the Accreditation Review Panel did not receive the materials in a timely manner. Therefore, by unanimous vote at an October 31, 2019, business meeting in Chicago, the Standing Committee on Specialization voted to recommend to the House of Delegates that it extend the accreditation period of the ABC Business Bankruptcy, Consumer Bankruptcy and Creditors' Rights Law programs to the 2020 Annual Meeting. Approval was granted at the February 2020 ABA Midyear Meeting.

The review panel has now received the application, materials, and exams and expects to approve the programs prior to August 2020. The committee therefore recommends approval of all three programs for a five year period, pending the completed review and approval by the review panel.

Respectfully submitted,

Barbara J. Howard
Chair, Standing Committee on Specialization
August 2020

APPENDIX

**(Excerpted provisions of the Standards for Accreditation
of Specialty Certification Programs For Lawyers)**

AMERICAN BAR ASSOCIATION ACCREDITATION OF SPECIALTY CERTIFICATION PROGRAMS FOR LAWYERS

STANDARDS

* * *

SECTION 4: REQUIREMENTS FOR ACCREDITATION OF CERTIFYING ORGANIZATIONS

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

- 4.01 Purpose of Organization -- The Applicant shall demonstrate that the organization is dedicated to the identification of lawyers who possess an enhanced level of skill and expertise, and to the development and improvement of the professional competence of lawyers.
- 4.02 Organizational Capabilities -- The Applicant shall demonstrate that it possesses the organizational and financial resources to carry out its certification program on a continuing basis, and that key personnel have by experience, education and professional background the ability to direct and carry out such programs in a manner consistent with these Standards.
- 4.03 Decision Makers -- A majority of the body within an Applicant organization reviewing applications for certification of lawyers as specialists in a particular area of law shall consist of lawyers who have substantial involvement in the specialty area.
- 4.04 Uniform Applicability of Certification Requirements and Nondiscrimination
- (A) The Applicant's requirements for certifying lawyers shall not be arbitrary and shall be clearly understood and easily applied. The organization may only certify those lawyers who have demonstrably met each standard. The requirements shall be uniform in all jurisdictions in which the Applicant certifies lawyers, except to the extent state or local law or regulation imposes a higher requirement.
 - (B) Membership in any organization or completion of educational programs offered by any specific organization shall not be required for certification, except that this paragraph shall not apply to requirements relating to the practice of law which are set out in statutes, rules and regulations promulgated by the government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.
 - (C) Applicants shall not discriminate against any lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age. This

paragraph does not prohibit an Applicant from imposing reasonable experience requirements on lawyers seeking certification or re-certification.

4.05 Definition and Number of Specialties -- An Applicant shall specifically define the specialty area or areas in which it proposes to certify lawyers as specialists.

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

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

- (A) Substantial Involvement -- Substantial involvement in the specialty area throughout the three-year period immediately preceding application to the certifying organization. Substantial involvement is measured by the type and number of cases or matters handled and the amount of time spent practicing in the specialty area, and require that the time spent in practicing the specialty be no less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice.
- (B) Peer Review -- A minimum of five references, a majority of which are from attorneys or judges who are knowledgeable regarding the practice area and are familiar with the competence of the lawyer, and none of which are from persons related to or engaged in legal practice with the lawyer.
 - (1) Type of References -- The certification requirements shall allow lawyers seeking certification to list persons to whom reference forms could be sent, but shall also provide that the Applicant organization send out all reference forms. In addition, the organization may seek and consider reference forms from persons of the organization's own choosing.
 - (2) Content of Reference Forms -- The reference forms shall inquire into the respondent's areas of practice, the respondent's familiarity with both the specialty area and with the lawyer seeking certification, and the length of time that the respondent has been practicing law and has known the

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applicant. The form shall inquire about the qualifications of the lawyer seeking certification in various aspects of the practice and, as appropriate, the lawyer's dealings with judges and opposing counsel.

- (C) Written Examination -- An evaluation of the lawyer's knowledge of the substantive and procedural law in the specialty area, determined by written examination of suitable length and complexity. The examination shall include professional responsibility and ethics as it relates to the particular specialty.
- (D) Educational Experience -- A minimum of 36 hours of participation in continuing legal education in the specialty area in the three-year period preceding the lawyer's application for certification. This requirement may be met through any of the following means:
- (1) Attending programs of continuing legal education or courses offered by Association accredited law schools in the specialty area;
 - (2) Teaching courses or seminars in the specialty area;
 - (3) Participating as panelist, speaker or workshop leader at educational or professional conferences covering the specialty area; or
 - (4) Writing published books or articles concerning the specialty area.
- (E) Good Standing -- A lawyer seeking certification is admitted to practice and is a member in good standing in one or more states or territories of the United States or the District of Columbia.
- 4.07 Impartial Review -- The Applicant shall maintain a formal policy providing lawyers who are denied certification an opportunity for review by an impartial decision maker.
- 4.08 Requirements for Re-Certification -- The period of certification shall be set by the Applicant, but shall be no longer than five years, after which time lawyers who have been certified must apply for re-certification. Re-certification shall require similar evidence of competence as that required for initial certification in substantial involvement, peer review, educational experience and evidence of good standing.
- 4.09 Revocation of Certification -- The Applicant shall maintain a procedure for revocation of certification. The procedures shall require a certified lawyer to report his or her disbarment or suspension from the practice of law in any jurisdiction to the certifying organization.

SECTION 5: ACCREDITATION PERIOD AND RE-ACCREDITATION

- 5.01 Initial accreditation by the Association of any Applicant shall be granted for five years.

- 5.02 To retain Association accreditation, a certifying organization shall be required to apply for re-accreditation prior to the end of the fifth year of its initial accreditation period and every five years thereafter. The organization shall be granted re-accreditation upon a showing of continued compliance with these Standards.

SECTION 6: REVOCATION OF ACCREDITATION

- 6.01 A certifying organization's accreditation by the Association may be revoked upon a determination that the organization has ceased to exist, or has ceased to operate its certification program in compliance with these Standards.

SECTION 7: AUTHORITY TO IMPLEMENT STANDARDS

- 7.01 Consistent with these Standards, the Standing Committee shall have the authority to:

- (A) Interpret these Standards;
- (B) Adopt rules and procedures for implementing these Standards, and amend such rules and procedures as necessary;
- (C) Adopt an appropriate fee schedule to administer these Standards;
- (D) Consider applications by any certifying organization for accreditation or re-accreditation under these Standards, evaluate those requests in accordance with the Standards and recommend approval by the Association of such requests when it deems the organization has met the requirements as set forth in these Standards; and
- (E) Recommend the revocation of accreditation in accordance with the provisions of Section 6.01 of these Standards.

SECTION 8: ADOPTION AND AMENDMENT

- 8.01 These Standards become effective upon their adoption by the House of Delegates of the Association.
- 8.02 The power to approve an amendment to these Standards is vested in the House of Delegates; however, the House will not act on any amendment until it has first received and considered the advice and recommendations of the Standing Committee.

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GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Specialization

Submitted By: Barbara J. Howard, Chair

1. Summary of the Resolutions.

The resolution will grant reaccreditation to the Social Security Disability Law program of the National Board of Trial Advocacy and the Business Bankruptcy Law, Consumer Bankruptcy Law, and Creditors' Rights Law programs of the American Board of Certification.

2. Approval by Submitting Entity.

At its meeting on February 15, 2020, the Standing Committee on Specialization voted unanimously that it submit this resolution to the House of Delegates for consideration at the 2020 Annual Meeting.

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

Yes. NBTA's Social Security Disability Law program was last reaccredited in February 2015. The ABC programs were last reaccredited in August 2014.

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

The American Bar Association Standards for Accreditation of Specialty Certification Programs for Lawyers. They will not be affected by the adoption of this Resolution; rather, they are the policy under which any action to accredit or withhold accreditation are taken by the Association.

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

N/A

Prompt action is necessary in order to prevent ABA accreditation of the programs under consideration from lapsing and to continue to assist the states in regulating private certifying organizations.

6. Status of Legislation.

Not applicable

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

Implementation will be self-executing if the programs are reaccredited by the House of Delegates.

8. Cost to the Association.

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

9. Disclosure of Interest.

None.

10. Referrals.

None.

11. Contact Person (Prior to the Meeting)

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12. Contact Person (Who will present the Report to the House)

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on Specialization
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EXECUTIVE SUMMARY

1. Summary of the Resolution.

The resolution will grant reaccreditation to the Social Security Disability Law program of the National Board of Trial Advocacy and the Business Bankruptcy Law, Consumer Bankruptcy Law, and Creditors' Rights Law programs of the American Board of Certification.

2. Summary of the issue that the resolution addresses.

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

3. Please explain how the proposed policy position will address the issue.

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

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

None

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON SPECIALIZATION
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association adopts certain clarifying provisions to
- 2 Standard 4.06(C) Written Examination of the Standing Committee on Specialization's
- 3 Standards for the Accreditation of Specialty Certification Programs for Lawyers, dated
- 4 August 2020.

REPORT

Background and Synopsis of the Resolutions

At the 1993 Midyear Meeting, the House adopted [Standards for Accreditation of Specialty Certification Programs For Lawyers](#) and delegated to the Standing Committee on Specialization the task of evaluating programs sponsored by organizations that apply to the ABA for accreditation, and making recommendations to the House of Delegates about the periodic renewal of accreditation.

The adoption of the Standards in February 1993 (93MY105), followed an August 1992 (92AM128), House resolution requesting that the Association develop standards for accrediting private organizations that certify lawyers as specialists, and that the Association establish and maintain a mechanism to accredit organizations that meet those standards. The 1992 resolution affirmed that a national accreditation mechanism administered by the Association according to uniform standards would be an efficient and effective means of dealing with a multiplicity of organizations that are offering, or planning to offer, certification programs. At the 1999 Annual Meeting (99AM107A), the House extended the initial period of accreditation approved in the Standards from three to five years. In addition, the House lengthened the period of reaccreditation from every third year to every fifth year. The Standards were last revised and approved by the ABA in August 2014.

At its October 2019 committee meeting, the committee discussed the need for a revised exam standard in order to provide additional instructions for both the certifying organizations when creating certification exams that meet the standards, and the exam reviewers who review exams during the accreditation and reaccreditation application process. The revisions below were approved by the Committee in April 2020.

Current Standard 4.06(C) Written Examination

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

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Redlined Standard 4.06(C)

(C) Written Examination - An evaluation of the lawyer's knowledge of the substantive and procedural law in the specialty area, determined by written examination of suitable length and complexity.

(i) The examination shall include professional responsibility and ethics as it relates to the particular specialty. In addition, the written examination:

1. Shall be prepared reasonably consistent with testing industry recognized standards of examination preparation, administration, and testing;

2. Shall be designed to identify lawyers who have special experience, knowledge, and skills, and substantive expertise in the practice area tested;

3. Shall be prepared in accordance with written examination specifications developed and approved by the Certifying Organization. The examination specifications shall assist the drafters of the examination in the preparation of the examination and communicate to potential examinees the substantive scope of the examination. The examination specifications should also identify the number and type of questions, the point values for the questions and subparts of the examination, the total number of points needed to pass the examination, the grading scale that will be used to grade the exam, the scoring guide for grading essay question answers, the effective date of applicable law the questions will be based on, and the time limit for completing the examination. The examination specifications should also contain some sample questions and model answers;

4. Shall be edited and proofread to avoid typographical, grammatical, and clerical errors, and to avoid questions and model answers containing gender, religious, sexual orientation, national origin, or racially based discriminatory language;

5. Shall be administered in compliance with applicable law to reasonably accommodate any examinee who has a disability;

6. Shall not be arbitrary, ambiguous, or capricious in its design, format, instructions, or grading, and shall be accurate in its substance;

7. Shall be clear in terms of what the examinee has been asked to answer or discuss, and shall focus on matters experts in the area of law usually encounter; and

8. Shall be reviewed in advance of the examination administration, when reasonably practical, by at least one attorney whose practice focus is in the area of law tested, to further ensure compliance with the written examination standards set forth in this Section.

(ii) On written request from an Applicant, the Standing Committee may allow the Applicant to certify up to twelve lawyers who create and grade the initial version of the examination required under this paragraph without requiring those lawyers to take and pass the examination. Such written request to the Standing Committee shall include the names and addresses of the lawyers, and shall expressly state that they have created and graded, or will grade, the initial version of the examination required under this paragraph, and that they otherwise meet the certification requirements described in ¶¶4.06(A), (B), (D), (E), and (F).

Final Revised Standard 4.06(C) Written Examination

(C) Written Examination - An evaluation of the lawyer's knowledge of the substantive and procedural law in the specialty area, determined by written examination of suitable length and complexity.

(i) The examination shall include professional responsibility and ethics as it relates to the particular specialty. In addition, the written examination:

1. Shall be prepared reasonably consistent with testing industry recognized standards of examination preparation, administration, and testing;
2. Shall be designed to identify lawyers who have special experience, knowledge, and skills, and substantive expertise in the practice area tested;
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4. Shall be edited and proofread to avoid typographical, grammatical, and clerical errors, and to avoid questions and model answers containing gender, religious, sexual orientation, national origin, or racially based discriminatory language;
5. Shall be administered in compliance with applicable law to reasonably accommodate any examinee who has a disability;
6. Shall not be arbitrary, ambiguous, or capricious in its design, format, instructions, or grading, and shall be accurate in its substance;

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7. Shall be clear in terms of what the examinee has been asked to answer or discuss, and shall focus on matters experts in the area of law usually encounter; and

8. Shall be reviewed in advance of the examination administration, when reasonably practical, by at least one attorney whose practice focus is in the area of law tested, to further ensure compliance with the written examination standards set forth in this Section.

(ii) On written request from an Applicant, the Standing Committee may allow the Applicant to certify up to twelve lawyers who create and grade the initial version of the examination required under this paragraph without requiring those lawyers to take and pass the examination. Such written request to the Standing Committee shall include the names and addresses of the lawyers, and shall expressly state that they have created and graded, or will grade, the initial version of the examination required under this paragraph, and that they otherwise meet the certification requirements described in ¶¶4.06(A), (B), (D), (E), and (F).

To respond to a need to regulate certifying organizations, the House of Delegates adopted standards for accreditation of specialty certification programs for lawyers, and delegated to the Standing Committee the task of evaluating organizations that apply to the ABA for accreditation and reaccreditation. This Resolution, if approved, revises the exam standard to be applied during the review of an organization's certifying exam during the accreditation and reaccreditation process.

Respectfully submitted,

Barbara J. Howard
Chair, Standing Committee on Specialization
August 2020

APPENDIX

**(Excerpted provisions of the Standards for Accreditation
of Specialty Certification Programs For Lawyers)**

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AMERICAN BAR ASSOCIATION ACCREDITATION OF SPECIALTY CERTIFICATION PROGRAMS FOR LAWYERS

STANDARDS

* * *

SECTION 4: REQUIREMENTS FOR ACCREDITATION OF CERTIFYING ORGANIZATIONS

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

- 4.01 Purpose of Organization -- The Applicant shall demonstrate that the organization is dedicated to the identification of lawyers who possess an enhanced level of skill and expertise, and to the development and improvement of the professional competence of lawyers.
- 4.02 Organizational Capabilities -- The Applicant shall demonstrate that it possesses the organizational and financial resources to carry out its certification program on a continuing basis, and that key personnel have by experience, education and professional background the ability to direct and carry out such programs in a manner consistent with these Standards.
- 4.03 Decision Makers -- A majority of the body within an Applicant organization reviewing applications for certification of lawyers as specialists in a particular area of law shall consist of lawyers who have substantial involvement in the specialty area.
- 4.04 Uniform Applicability of Certification Requirements and Nondiscrimination
- (A) The Applicant's requirements for certifying lawyers shall not be arbitrary and shall be clearly understood and easily applied. The organization may only certify those lawyers who have demonstrably met each standard. The requirements shall be uniform in all jurisdictions in which the Applicant certifies lawyers, except to the extent state or local law or regulation imposes a higher requirement.
 - (B) Membership in any organization or completion of educational programs offered by any specific organization shall not be required for certification, except that this paragraph shall not apply to requirements relating to the practice of law which are set out in statutes, rules and regulations promulgated by the government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.
 - (C) Applicants shall not discriminate against any lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age. This

paragraph does not prohibit an Applicant from imposing reasonable experience requirements on lawyers seeking certification or re-certification.

4.05 Definition and Number of Specialties -- An Applicant shall specifically define the specialty area or areas in which it proposes to certify lawyers as specialists.

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

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

- (A) Substantial Involvement -- Substantial involvement in the specialty area throughout the three-year period immediately preceding application to the certifying organization. Substantial involvement is measured by the type and number of cases or matters handled and the amount of time spent practicing in the specialty area, and require that the time spent in practicing the specialty be no less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice.
- (B) Peer Review -- A minimum of five references, a majority of which are from attorneys or judges who are knowledgeable regarding the practice area and are familiar with the competence of the lawyer, and none of which are from persons related to or engaged in legal practice with the lawyer.
 - (1) Type of References -- The certification requirements shall allow lawyers seeking certification to list persons to whom reference forms could be sent, but shall also provide that the Applicant organization send out all reference forms. In addition, the organization may seek and consider reference forms from persons of the organization's own choosing.
 - (2) Content of Reference Forms -- The reference forms shall inquire into the respondent's areas of practice, the respondent's familiarity with both the specialty area and with the lawyer seeking certification, and the length of time that the respondent has been practicing law and has known the

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applicant. The form shall inquire about the qualifications of the lawyer seeking certification in various aspects of the practice and, as appropriate, the lawyer's dealings with judges and opposing counsel.

- (C) Written Examination -- An evaluation of the lawyer's knowledge of the substantive and procedural law in the specialty area, determined by written examination of suitable length and complexity. The examination shall include professional responsibility and ethics as it relates to the particular specialty.
- (D) Educational Experience -- A minimum of 36 hours of participation in continuing legal education in the specialty area in the three-year period preceding the lawyer's application for certification. This requirement may be met through any of the following means:
- (1) Attending programs of continuing legal education or courses offered by Association accredited law schools in the specialty area;
 - (2) Teaching courses or seminars in the specialty area;
 - (3) Participating as panelist, speaker or workshop leader at educational or professional conferences covering the specialty area; or
 - (4) Writing published books or articles concerning the specialty area.
- (E) Good Standing -- A lawyer seeking certification is admitted to practice and is a member in good standing in one or more states or territories of the United States or the District of Columbia.
- 4.07 Impartial Review -- The Applicant shall maintain a formal policy providing lawyers who are denied certification an opportunity for review by an impartial decision maker.
- 4.08 Requirements for Re-Certification -- The period of certification shall be set by the Applicant, but shall be no longer than five years, after which time lawyers who have been certified must apply for re-certification. Re-certification shall require similar evidence of competence as that required for initial certification in substantial involvement, peer review, educational experience and evidence of good standing.
- 4.09 Revocation of Certification -- The Applicant shall maintain a procedure for revocation of certification. The procedures shall require a certified lawyer to report his or her disbarment or suspension from the practice of law in any jurisdiction to the certifying organization.

SECTION 5: ACCREDITATION PERIOD AND RE-ACCREDITATION

- 5.01 Initial accreditation by the Association of any Applicant shall be granted for five years.

- 5.02 To retain Association accreditation, a certifying organization shall be required to apply for re-accreditation prior to the end of the fifth year of its initial accreditation period and every five years thereafter. The organization shall be granted re-accreditation upon a showing of continued compliance with these Standards.

SECTION 6: REVOCATION OF ACCREDITATION

- 6.01 A certifying organization's accreditation by the Association may be revoked upon a determination that the organization has ceased to exist, or has ceased to operate its certification program in compliance with these Standards.

SECTION 7: AUTHORITY TO IMPLEMENT STANDARDS

- 7.01 Consistent with these Standards, the Standing Committee shall have the authority to:

- (A) Interpret these Standards;
- (B) Adopt rules and procedures for implementing these Standards, and amend such rules and procedures as necessary;
- (C) Adopt an appropriate fee schedule to administer these Standards;
- (D) Consider applications by any certifying organization for accreditation or re-accreditation under these Standards, evaluate those requests in accordance with the Standards and recommend approval by the Association of such requests when it deems the organization has met the requirements as set forth in these Standards; and
- (E) Recommend the revocation of accreditation in accordance with the provisions of Section 6.01 of these Standards.

SECTION 8: ADOPTION AND AMENDMENT

- 8.01 These Standards become effective upon their adoption by the House of Delegates of the Association.
- 8.02 The power to approve an amendment to these Standards is vested in the House of Delegates; however, the House will not act on any amendment until it has first received and considered the advice and recommendations of the Standing Committee.

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GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Specialization

Submitted By: Barbara J. Howard, Chair

1. Summary of the Resolution.

The resolution will approve clarifying revisions to Standard 4.06(C), which addresses written examinations of certifying organizations.

2. Approval by Submitting Entity.

The Standing Committee on Specialization approved the Resolution in April 2020.

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

Yes, the Standards were last revised and approved in August 2014.

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

Standard 4.06(C) – Written Examination - the American Bar Association Standards for Accreditation of Specialty Certification Programs for Lawyers will be affected by the adoption of this Resolution as it provides a revision; they are the policy under which any action to accredit or withhold accreditation are taken by the Association.

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

N/A

Prompt action is necessary in order to allow the Standing Committee to begin applying this revised standard in future accreditation and reaccreditation application reviews.

6. Status of Legislation.

N/A

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

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

8. Cost to the Association

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

9. Disclosure of Interest

None.

10. Referrals

None.

11. Contact Person (Prior to the Meeting)

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12. Contact Person (Who will present the Report to the House)

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

The resolution will approve revisions to Standard 4.06(C), which addresses written examinations of certifying organizations.

2. Summary of the issue that the resolution addresses.

To respond to a need to regulate certifying organizations, the House of Delegates adopted standards for accreditation of specialty certification programs for lawyers and delegated to the Standing Committee the task of evaluating organizations that apply to the ABA for accreditation and reaccreditation. This Resolution, if approved, revises the exam standard to be applied during the review of an organization's certifying exam during the accreditation and reaccreditation process.

3. Please explain how the proposed policy position will address the issue.

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

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

None

AMERICAN BAR ASSOCIATION
COMMISSION ON LAW AND AGING
SENIOR LAWYERS DIVISION
SECTION OF REAL PROPERTY, TRUST, AND ESTATE LAW
COMMISSION ON DISABILITY RIGHTS
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges Congress to create and fund a
2 Guardianship Court Improvement Program for adult guardianship (following the model of
3 the State Court Improvement Program for child welfare agencies created in 1993) to
4 support state court efforts to improve the legal process in the adult guardianship system,
5 improve outcomes for adults subject to or potentially subject to guardianship, increase
6 the use of less restrictive options than guardianship, and enhance collaboration among
7 courts, the legal system, and the aging and disability networks.

REPORT

Introduction. The resolution urges Congress to support improvement of state guardianship systems by investing federal funds and resources in a Guardianship Court Improvement Program. Adult guardianship is a drastic state intervention, removing an adult's authority to make decisions and in some jurisdictions, such fundamental rights as the right to marry and vote, and delegating that authority to another decision-maker – a court appointed guardian. In the United States, an estimated one to three million people are subject to guardianship. .

Currently states bear the sole responsibility for judicial appointment, administrative cost, and monitoring of guardianships, yet they lack the resources to do so adequately. A Guardianship Court Improvement Program will provide states with the necessary federal funding and support to improve the lives of individuals with guardians, improve outcomes for adults in the system, increase the use of less restrictive options than guardianship, and enhance collaboration among courts, the legal system, and the aging and disability networks.

There is an analogous precedent for the concept of a Guardianship Court Improvement Program for adults - the State Court Improvement Program (CIP) for child welfare agencies. In 1993, at the urging of the ABA Center on Children and the Law and other child welfare advocates, Congress authorized funding for a State Court Improvement Program to provide grants to state courts to assess areas of need and improve child welfare outcomes with state specific programs. After early successes, Congress increased funding for the State Court Improvement Program to provide technical assistance to state courts. The history and successes of the State Court Improvement Program have much to offer as a model for an adult Guardianship Court Improvement Program. A Guardianship Court Improvement Program would not regulate state court practices, it would offer courts the opportunity to apply for grant funding to address self-identified issues. In addition, federally funded technical assistance, as described in more detail in this report, would provide state courts the opportunity to consult with nationally renowned experts and each other.

This resolution advances the American Bar Association's long-standing commitment to advancing guardianship reform, by ensuring guardians are appointed only when necessary, encouraging the collaboration of state courts and guardianship stakeholders, and recognizing the need for greater support and monitoring to protect the safety, well-being, and individual rights of millions of individuals in the United States who may be or have been appointed a guardian.

Section I of this report presents background information on adult guardianship and the need for reform, relevant demographic changes, and the State Court Improvement Program for child welfare agencies. Section II proposes a Guardianship Court Improvement Program for adults as a logical and effective next step in guardianship reform, Section III addresses the lack of relevant ABA policy. Section IV reviews the need for ABA policy.

Section I: Background Information

The following information about adult guardianship, guardian abuse and the role of courts, demographic changes, and the State Court Improvement Program for child welfare agencies is critical to understanding the need for a Guardianship Court Improvement Program.

Adult Guardianship. Adult guardianship is a relationship created by state/territorial law in which a court determines an individual lacks capacity to make his or her own decisions, and gives another person or agency (the guardian) the duty and power to make personal and/or property decisions on behalf of the individual.¹ Guardianship is in many ways a “civil death,” severely curtailing the due process rights of an individual, and should only be used as a last resort when there are no available less restrictive options to address the individual’s specific circumstances.²

Guardianship is entirely a matter of state law. A state court is responsible for oversight of the guardianship for its duration, typically the lifetime of the individual for whom the court appointed a guardian. Currently, there is no federal funding for state guardianship courts, public guardians, or other services related to guardianship.

Lack of Resources for Guardianships in State Courts Lead to Violation of Due Process and other Individual Rights, Abuse, Neglect, and Exploitation. Most state courts are not equipped with the necessary resources to protect the individual rights and safety of the individuals who come before them in guardianship cases. The court may not have funds to compensate a professional for an independent comprehensive evaluation, or to pay a court investigator to gather information about the person’s abilities, limitations, and circumstances. State statutes may not guarantee the right to an attorney, much less a state funded attorney, for respondents in guardianship proceedings.

Yet these individuals, who are elderly, have a disability, or due to other circumstances are alleged to lack the capacity to make their own decisions, may be among the least prepared litigants to navigate the judicial system and demand their right to due process. Ultimately, without adequate legal representation, investigative staff, and other resources, courts often lack sufficient evidence to make well informed determinations as to whether less restrictive options or a narrowly tailored guardianship would meet the needs of the individual.

¹ A note on terminology: Guardianship terminology varies by state. In this report, the generic term “guardianship” refers to guardian of the person as well as guardian of the property, frequently known as “conservator.” “Ward” is an outdated, although still frequently used statutory term, with a negative connotation. Other terms include “protected person,” and “respondent.”

² See Perlin, Michael, “Striking for Guardians and the Protectors of the Mind” The Convention on the Rights of People with Disabilities and the Future of Guardianship Law,” 117 Penn. St. L. Rev. 1159 (2013).

Most state guardianship statutes require consideration of less restrictive alternatives prior to appointment of a guardian.³ Less restrictive options include traditional legal options such as powers of attorney, trusts, and advance directives in which the individual may delegate decision-making authority to another party. More recently, advocates, interest groups, state and federal policy, ABA policy, and individuals who are the subject of guardianship proceedings, have recognized and explored supporting rather than supplanting the individual's decision-making with the concept of "supported decision-making." According to ABA policy, "Guardianship practice involves a third party, the guardian, making decisions *for* the individual subject to guardianship, using a variety of standards. By contrast, supported decision-making focuses on *supporting* the individual's own decisions."⁴

In instances when less restrictive options are not available, courts should strive to limit a guardian's authority to the areas in which an individual needs decision-making support. Although virtually all state statutes, and the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act, include a strong preference for limited guardianship, empirical data suggests that most guardians appointed are given total power to substitute their decisions for those of the persons under guardianship.⁵

Overly broad guardian powers are not only an infringement of an individual's fundamental rights; they provide opportunity for neglect, abuse, and exploitation. While most guardians are trustworthy fiduciaries, some use their authority to take advantage via financial exploitation, physical, emotional, or psychological abuse, and neglect of an adult. Most courts do not have the infrastructure and resources to facilitate an effective monitoring program that would prevent, detect, and address guardian abuse.⁶

Without federal funding and support, there is no mechanism for collecting national data on the extent of guardian abuse, but anecdotal evidence and media accounts indicate it occurs with some frequency and devastating consequences. In 2018, the U. S. Senate Special Committee on Aging found that while data is lacking, "unscrupulous guardians acting with little oversight have used guardianship proceedings to . . . obtain control of vulnerable individuals and . . . to liquidate assets and savings for their own

³ See ABA Commission on Law and Aging, "Least Restrictive Alternative References in State Guardianship Statutes" (June 2018), https://www.americanbar.org/content/dam/aba/administrative/law_aging/06-23-2018-lra-chart-final.pdf.

⁴ See ABA Policy 17A113 Report to House of Delegates at 5.

⁵ See ABA Commission on Law and Aging, "Limited Guardianship of the Person and Property" (2017), https://www.americanbar.org/content/dam/aba/administrative/law_aging/chart/limitedguardianshipofthepersonandproperty.pdf; ABA Policy 17A113 Report to House of Delegates at 2; Uniform Guardianship, Conservatorship, and other Protective Arrangements Act, §301(a)(1)(2017).

⁶ For more information about court monitoring practices, see National Center for State Courts et. al, "Background Brief - Detecting Exploitation by Conservators: Court Monitoring (2018), <http://www.eldersandcourts.org/~media/Microsites/Files/cec/OVC%20Briefs/OVC-Brief-3.ashx>.

personal benefit.”⁷ In 2016, the U.S. Government Accountability Office profiled eight cases in which guardians financially exploited or neglected older adults subject to guardianship.”⁸ Recent media accounts have revealed egregious cases of professional guardians exploiting hundreds of individuals in large scale operations, stealing millions of dollars in assets, overbilling, and public benefits.⁹ Some family guardians have also taken advantage of their position of trust to engage in exploitation.¹⁰

Lack of Data, Demographic Changes, and the Number of People with Guardians in the United States. While some states collect data, without federal funding or support there is no means for collecting national data on the total number of adults under guardianship. A 2011 study estimated approximately one to three million people in the United States have a guardian, and presumably that number has increased in the last decade.¹¹ As the National Council on Disability noted in a seminal report, “The lack of data on who is under guardianship or what happens to adults under guardians is a constant source of frustration for anyone attempting to understand guardianship, much less those urging policymakers that there is an immediate need for resources to address problems arising from it.”¹²

State courts may not be prepared to handle an increase in guardianship cases as the population of individuals ages 65 and over grows. Between 2007 and 2017 the population aged 65 and over increased 34%, from 37.8 to 50.9 million people, and is

⁷ U.S. Senate Special Committee on Aging, “Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans” at 5 (Nov. 2019), https://www.aging.senate.gov/imo/media/doc/SCA_Aging%20Report-%20Ensuring%20Trust%20Guardianship2018.pdf.

⁸ See U.S. Government Accountability Office, “Elder Abuse: The Extent of Abuse by Guardians is Unknown, but Some Measures Exist to Help Protect Older Adults,” GAO-17-33 (2016), <https://www.gao.gov/assets/690/681088.pdf>, acknowledging “the extent of elder abuse by guardians nationally is unknown due to limited data.”

⁹ Balch, Bridget, “Unguarded: A three-part series on how Richmond’s guardianship process leaves vulnerable people unprotected,” Richmond Times-Dispatch, Nov. 30, 2019, https://www.richmond.com/news/local/unguarded-a-three-part-series-on-how-richmond-s-guardianship/article_d39e242e-9213-5600-8150-da9566c143b7.html; Cordeiro, Monivette, “Rebecca Fierle, disgraced Orlando guardian at center of statewide scandal, arrested on abuse, neglect charges,” Orlando Sentinel, Feb. 10, 2020, <https://www.orlandosentinel.com/news/florida/guardians/os-ne-orlando-guardian-rebecca-fierle-arrest-20200211-awhldpb555he7dj2esgfcpemf4-story.html>; Aviv, Rachel, “How the Elderly Lose Their Rights,” The New Yorker, Oct. 9, 2017, <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights>; Heild, Colleen, “Who guards the guardians? Ayudando was a family affair,” Albuquerque Journal, Jul. 29, 2017, <https://www.abqjournal.com/1040519/ayudando-guardian-firm-was-a-family-affair.html>.

¹⁰ National Center for State Courts et. al, “Background Brief - Detecting Exploitation by Conservators: Court Monitoring (2018), <http://www.eldersandcourts.org/~media/Microsites/Files/cec/OVC%20Briefs/OVC-Brief-3.ashx>.

¹¹ Uekert, Brenda & Van Duizend, Richard, “Adult Guardianships: A ‘Best Guess’ National Estimate and the Momentum for Reform (2011), National Center for State Courts, <https://www.ncsc.org/~media/Microsites/Files/Future%20Trends/Author%20PDFs/Uekert%20and%20Van%20Duizend.ashx>.

¹² National Council on Disability, “Beyond Guardianship: Towards Alternatives that Promote Greater Self-Determination” at 65 (Mar. 22, 2018), https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf.

projected to reach 98 million by 2060.¹³ The 85 and older population is expected to more than double from 6.5 million in 2017 to 14.4 million in 2040.¹⁴ Currently, approximately 5.8 million Americans ages 65 and older are living with Alzheimer's disease and the annual number of new cases of Alzheimer's and other dementias is projected to double by 2050.¹⁵

The demand for guardianship for adults with intellectual/developmental disabilities and other cognitive impairments may also increase. Nearly 30 million families in the U.S. have a member with an intellectual disability.¹⁶ Adults of all ages may experience cognitive impairment due to brain injury, chronic illnesses, and substance abuse. As more individuals with disabilities live in the community instead of in institutions, there may be a rise in the appointment of guardians to manage support and services.¹⁷

State Court Improvement Program for Child Welfare Agencies. In 1993, Congress created the State Court Improvement Program, for the first time providing federal funds to state child welfare agencies and tribes for services to families at risk or in crisis with three primary goals: (1) support state courts to improve the legal process in the child welfare system; (2) improve outcomes for children and families; and (3) enhance collaboration among courts, child welfare agencies, and tribes. The State Court Improvement Program is administered by the U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau.¹⁸

For the last several years, Congress has funded a total of \$30 million annually for distribution among all state courts, Puerto Rico, and tribal courts. The highest state courts may apply for funding for three kinds of grants: (1) A basic grant that enables state courts to conduct assessments of the role, responsibilities, and effectiveness of courts in carrying out state child welfare laws, as well as allowing courts to make improvements for the safety, well-being, and permanence of children in foster care; (2) A data grant that supports court data collection and analysis, and promotes data sharing among state courts, child welfare agencies, and tribes;¹⁹ and (3) A training grant to increase child

¹³ U.S. Administration for Community Living, "A Profile of Older Americans: 2018," <https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2018OlderAmericansProfile.pdf>.

¹⁴ Id.

¹⁵ Alzheimer's Association, "2020 Alzheimer's Disease Fact and Figures: On the Front Lines: Primary Care Physicians and Alzheimer's Care in America," https://www.alz.org/media/Documents/alzheimers-facts-and-figures_1.pdf.

¹⁶ U.S. Administration for Children & Families, "Intellectual Disabilities Fact Sheet," http://www.acf.hhs.gov/programs/pcpid/pcpid_fact.html.

¹⁷ National Council on Disability, "Beyond Guardianship: Towards Alternatives that Promote Greater Self-Determination" at 66-67 (2018), https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf.

¹⁸ <https://www.acf.hhs.gov/sites/default/files/cb/pi1605.pdf>.

¹⁹ In 2012, the Children's Bureau initiated a new reporting requirement for state courts, initiating a major improvement in states' collection of data. The collection of data was critical to continuous quality improvement and demonstrating progress or areas in need of improvement. "Monitoring these data will provide courts a point to begin identifying strengths and areas in need of improvement." Child Welfare

welfare expertise within the legal community and facilitate cross-training opportunities among agencies, tribes, courts and other key stakeholders.²⁰

Since its inception, the State Court Improvement Program has achieved significant results, including: developing court projects that have improved court processes, playing a leadership role in broad child welfare system improvement efforts throughout the country, establishing close collaboration and data sharing between courts and child welfare agencies, and increasing collaboration with tribes.²¹ While every state program sets its own unique priorities, typical State Court Improvement Program activities include development of mediation programs, joint agency-court training, automated docketing and case tracking, linked agency-court data systems, one judge/one family models, time-specific docketing, formalized relationships with the child welfare agency, improvement of representation for children and families, and legislative changes.²²

Prior to and after the founding of the State Court Improvement Program, the American Bar Association Center on Children and the Law has played an instrumental role in its success.²³ As a partner in the Capacity Building Center for the Courts, the Center on Children and the Law engages State Court Improvement Programs in system improvement work, including developing continuous quality improvement processes, providing direct support to state programs, and creating learning opportunities and resources to elevate legal and judicial practices.²⁴

Section II: Guardianship Court Improvement Program for Adults-- The Next Step in Guardianship Reform

Relevant history of guardianship reform, including Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS). The ABA Commission on Law and Aging has been at the forefront of the guardianship reform movement since its inception in the 1980s. With partnering stakeholders, the Commission on Law and Aging has

Capacity Building Center for Courts, "Outcome Measures and Continuous Quality Improvement for Children in Foster Care: Analysis of 2014 CIP Timeliness Measure Submissions," citing program instruction, <https://www.acf.hhs.gov/sites/default/files/cb/pi1202.pdf>.

²⁰ Social Security Act, 42 U.S.C. §629h.

²¹ ABA Center on Children and the Law, "Fact Sheet for the State Court Improvement Program."

²² Children's Bureau, Administration for Children and Families, U.S. Dept. of Health and Human Services, "Court Improvement Program," <https://www.acf.hhs.gov/cb/resource/court-improvement-program>.

²³ The history of the State Court Improvement Program, is based on the report's authors' oral interviews with past and present Children and the Law staff and other stakeholders, and in particular, former Center staff Mark Hardin.

²⁴ For more information about the Capacity Building Center for the Courts and the work of the Center on Children and the Law, see Child Welfare Capacity Building Collaborative, <https://capacity.childwelfare.gov/courts/about-courts/>; Center on Children and the Law website, "National Court Projects," https://www.americanbar.org/groups/public_interest/child_law/project-areas/national-court-projects/.

facilitated three landmark multidisciplinary conferences on guardianship reform.²⁵ Commission staff served as observers to Uniform Law Commission guardianship model acts and provided feedback on standards established by the National College of Probate Judges and the National Guardianship Association. Finally, every year Commission staff publish a comprehensive analysis of new state guardianship legislation.²⁶

In 2011, the National Guardianship Network convened the Third National Guardianship Summit for 92 multidisciplinary participants. The Summit's delegates adopted a set of recommendations, including the recommendation that the highest court in each state create a Working Interdisciplinary Network of Guardianship Stakeholders (WINGS). While every state WINGS is different, generally a WINGS is a court-stakeholder partnership, working towards improvement in guardianship policy and practice through "collective impact." In 2016 the Administration for Community Living (ACL) of the U.S. Department of Health and Human Services funded the Commission on Law and Aging to establish, expand, and enhance WINGS, resulting in seven subgrants to state courts.²⁷ Currently approximately 25 state WINGS or similar groups exist, including those funded by ACL.

Under the ACL grant, in April 2019, the Commission on Law and Aging convened an "Exploratory Meeting on Applicability of the Court Improvement Model for Adult Guardianship" for WINGS coordinators from more than twenty states across the nation. The discussion covered striking parallels between adult guardianship reform and child welfare reform. Participants agreed WINGS could serve as a launching pad for a Guardianship Court Improvement Program.

While state WINGS have advanced adult guardianship reform, their modestly funded efforts are not enough to improve outcomes for adults subject to, or potentially subject to, guardianship throughout the country. Some state courts and legislatures have committed modest amounts of funding primarily for the role of a WINGS coordinator. Other WINGS function entirely on a volunteer basis, driven by the passion and commitment of court staff and guardianship stakeholders. The continuous, significant funding of a Guardianship Court Improvement Program could serve to build upon and expand current state WINGS' work or fill the void for states without a WINGS, providing every state with consistent, ongoing technical assistance and support.

A Vision of a Guardianship Court Improvement Program. A Guardianship Court Improvement Program would enable state courts, in collaboration with guardianship stakeholders, to conduct system assessments and make improvements that enhance the

²⁵ National Guardianship Network, "Guardianship Summits," https://www.naels.org/NGN_PUBLIC/Summits/NGN_PUBLIC/Summits.aspx?hkey=7570beee-1b84-4e09-90c7-7146dada6a9a.

²⁶ Annual legislation summary available at https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/.

²⁷ For more information about WINGS, see ABA Commission on Law and Aging website, "WINGS Court-Stakeholder Partnerships," https://www.americanbar.org/groups/law_aging/resources/wings-court-stakeholder-partnerships0/.

rights and well-being of adults subject to, or potentially subject to, guardianship. While such a program would have some parallels in objectives and processes with the current State Court Improvement Program for child welfare courts, the issues it faces are quite different. The court's role in removing an individual's rights and appointing a guardian to make decisions on his or her behalf differs from the role of child welfare courts intervening with respect to a parent's authority to raise his or her children. The Guardianship Court Improvement Program would have its own unique processes, appropriate for state courts handling adult guardianship cases.

A Guardianship Court Improvement Program could improve state guardianship systems in several ways, including:

- Directing courts to conduct a baseline self-assessment to determine priority guardianship reform areas for the state. As with the early years of the State Court Improvement Program for child welfare courts, courts would have wide discretion to select priorities.
- Providing funding and expertise to courts in data sharing, collection, and analysis. As discussed throughout this report, lack of data is a major barrier to guardianship reform. Federal funding would provide both the financial resources and uniform expectations for courts to collect data on a state level that would tell a crucial story about guardianship throughout the nation.
- Providing funding and technical assistance to support courts in strengthening the use of less restrictive options than guardianship, including supported decision-making. A Guardianship Court Improvement Program could offer grants encouraging courts to develop a plan for expanding the use of less restrictive options and supported decision-making. Through technical assistance, courts could consult among states. For example, there are a growing number of published court decisions denying a motion to appoint a guardian, or terminating a guardianship, because a supported decision-making arrangement is available. A court capacity-building center, as described below, could provide a platform for judges to share their experiences with each other.
- Supporting courts in developing a strategic plan and establish measures to evaluate the effect of their efforts, including a Continuous Quality Improvement (CQI) process to monitor and report progress. CQI is a major component of state court improvement programs for child welfare courts, providing courts with an opportunity to examine their projects and activities to ensure efficient and effective use of resources and successful interventions.
- Creating a national court capacity-building center. Following the model funded by the State Court Improvement Program for child welfare courts (of which the ABA Center on Children and the Law is a partner), a court capacity-building center would provide expertise in best practices for courts. The center would maintain

contact with all state program directors and provide guidance for each requirement and step in the program.²⁸

- Providing expert training for state guardianship stakeholders including judges, court staff, lawyers, adult protective services, and social services agencies. For example, child welfare State Court Improvement Program projects have focused on the quality of representation for parties in child welfare cases. There is a dire need for better training and resources for legal representation of individuals alleged to need a guardian, leaving the individual open to due process violations and in some cases unnecessary or overly broad guardianships. Attorneys who do represent respondents often lack training and resources to zealously represent their clients according to state statutory standards and possible less restrictive options. For one of the few examples of guidance for attorneys on guardianship related matters, see the Commission on Law and Aging's well-known PRACTICAL Tool, a guide for attorneys to explore other decision-making supports before seeking guardianship.²⁹
- Enhancing collaboration between courts and other stakeholder agencies and organizations. The success of WINGS is predicated upon the "collective impact" of "the commitment of a group of important actors from different sectors to a common agenda for solving a specific social problem."³⁰ Effective WINGS draw not only from the judicial but the legal, aging, disability, guardianship, and mental health communities, and more. Federal support for such collaboration would bring it to the next level, leading to greater statewide improvements.

Section III: Current ABA Policy and Involvement.

ABA Resolution 111A(09M111A) encourages the federal government to provide funding and support for training, research, exchange of information on practices, consistent collection of data, and development of state, local, territorial and tribal standards regarding adult guardianship. This general policy on improving adult guardianship has enabled the ABA Government Affairs Office to voice support for resources and improvement strategies under the Older Americans Act and in new legislation, but there is no policy specifically identifying and prioritizing a Guardianship Court Improvement Program.

²⁸ See Child Welfare Capacity Building Collaborative, "About the Center for Courts," <https://capacity.childwelfare.gov/courts/about-courts/>; Children and Family Futures: Strengthening Partnerships, Improving Family Outcomes, "National Quality Improvement Center for Collaborative Community Court Teams," https://www.cffutures.org/qic-ccct_partners/.

²⁹ ABA Commission on Law and Aging, PRACTICAL Tool, <http://supporteddecisionmaking.org/sites/default/files/PRACTICALGuide.pdf>.

³⁰ Kania, John and Kramer, Mark, "Collective Impact," Stanford Social Innovation Review (Winter 2011), <https://www.fsg.org/publications/collective-impact>.

ABA policy also supports the formation of Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS), indicating support for encouraging court/stakeholder collaboration to advance guardianship reform. Resolution 106B (12A106B) adopts the standards and recommendations of the 2011 National Guardianship Network's Third National Guardianship Summit, including recommendations that states develop Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) to advance adult guardianship reform and serve as an ongoing problem-solving forum.

Finally, Resolution 113 (17A113) urges state, territorial, and tribal legislatures, as well as courts, to recognize supported decision-making as an alternative to guardianship. As described in this report, increased use of alternatives to guardianship is fundamental to guardianship reform. A Guardianship Court Improvement Program would provide state courts with training and other resources to enhance consideration of less restrictive options, including supported decision-making.

Section IV. Need for ABA Policy for Funding of Guardianship Court Improvement Program

Now, more than ever, federal funding and support is urgently needed to ensure courts can continue to protect the rights, safety, and well-being of individuals in guardianship proceedings during the COVID-19 pandemic. Few courts will have the infrastructure, resources, and institutional knowledge to address pressing issues such as determining which hearings can be held remotely, how to effectively hold remote hearings, continuing existing monitoring of guardianship proceedings, and providing guidance to guardians on fulfilling their duties. A Guardianship Court Improvement Program would be enormously useful in providing funding and disseminating accurate and vital information to state courts and guardians.

The ABA Commission on Law and Aging has played a major role in the national discussion on guardianship reform, sponsoring and facilitating major guardianship conferences and authoring several relevant publications and educational materials for attorneys. Millions of individuals in the United States have guardians, but state courts simply lack the resources to safeguard their well-being and protect their individual rights. Governmental and media reports continually highlight instances in which guardians have breached their fiduciary duties to the individuals they were appointed to protect.

The ABA Commission on Law and Aging has played a central role in supporting state WINGS to create innovative approaches to state guardianship issues, but additional funding for state WINGS is uncertain. WINGS make a large difference with minimal funding, but more funding and support is necessary to truly impact guardianship systems.³¹ A federally funded Guardianship Court Improvement Program could provide

³¹ See Van Duizend, Richard, "Final WINGS Assessment Report" at 16, Commission on Law and Aging and National Center for State Courts (August 2019),

resources for current WINGS to expand or collaborate with or develop into state guardianship court improvement programs. A federally funded program would also motivate states that currently do not have a WINGS or similar group to initiate a local guardianship reform effort.

ABA policy in support of a Guardianship Court Improvement Program will demonstrate the ABA's commitment not only to guardianship reform, but to the dignity and self-determination of millions of Americans. n.

Respectfully submitted,

Honorable Louraine C. Arkfeld
Chair, Commission on Law and Aging
August 2020

GENERAL INFORMATION FORM

Submitting Entity: Commission on Law and Aging

Submitted By: The Honorable Louraine C. Arkfeld, Chair

1. Summary of Resolution.

The proposed resolution urges Congress to create and fund a Guardianship Court Improvement Program for state guardianship courts (following the model of the State Court Improvement Program for child welfare agencies created in 1993).

2. Approval by Submitting Entity.

The Commission on Law and Aging approved the proposed policy recommendation on April 17, 2020.

The Senior Lawyers Division approved the proposed policy recommendation on April 23, 2020.

The Commission on Disability Rights approved the proposed policy recommendation on April 27, 2020.

The Section on Real Property, Trust, and Estate Law approved the proposed policy on May 6, 2020.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

No.

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

This resolution would demonstrate the ABA's continued and evolving commitment to guardian reform by building on previous resolution in support of federal funding for state adult guardianship systems and WINGS. ABA Resolution 111A (09M111A) encourages the federal government to provide funding and support for training, research, exchange of information on practices, consistent collection of data, and development of state, local, territorial and tribal standards regarding adult guardianship. This general policy on improving adult guardianship has enabled the ABA Government Affairs Office to voice support for resources and improvement strategies under the Older Americans Act and in new legislation, but

there is no ABA policy that specifically supports a Guardianship Court Improvement Project for adult guardianship.

ABA policy also supports the formation of Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS), indicating support for encouraging court stakeholder collaboration to advance guardianship reform. Resolution 106B (12A106B) adopts the standards and recommendations of the 2011 National Guardianship Network's Third National Guardianship Summit, including recommendations that states develop Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) to advance adult guardianship reform and serve as an ongoing problem-solving forum.

Finally, the proposed resolution notes federal support for state courts would increase use of less restrictive options than guardianship, including supported decision-making. ABA Resolution 113 (17A113) urges state, local, territorial, and tribal legislatures, as well as courts, to recognize supported decision-making as an alternative to guardianship.

5. If this a late Report, what urgency exists which requires action at this meeting of the House? If your Report is not late, then the answer to this question is "N/A."

N/A.

6. Status of Legislation.

No current legislation.

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

Advocacy and support of any proposed legislation in Congress and in state legislatures consistent with the policy; promote exploration of pilot programs through "Working Interdisciplinary Networks of Guardianship Stakeholders" (WINGS); submission of law review article on a Guardianship Court Improvement Program at the Fourth National Guardianship Network Summit planned for May 2021.

8. Cost to the Association.

None.

9. Disclosure of Interest. (If applicable.)

N/A

10. Referrals.

The recommendation has been or is being referred to the following ABA entities:

- Civil Rights and Social Justice
- Commission on Disability Rights
- Commission on Domestic and Sexual Violence
- Commission on Hispanic Legal Rights and Responsibilities
- Commission on Homelessness and Poverty
- Government and Public Sector Lawyers Division
- National Legal Aid & Defender Association
- Section of Administrative Law and Regulatory Practice
- Section of Dispute Resolution
- Section of Family Law
- Section of Real Property, Probate and Trust law
- Section of State and Local Government Law
- Senior Lawyers Division
- Standing Committee on Legal Aid and Indigent Defendants
- Standing Committee on Pro Bono and Public Service
- Standing Committee on the Delivery of Legal Services
- The Judicial Division
- Young Lawyers Division
- Solo, Small Firm and General Practice Division

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

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 ABA Commission on Law and Aging
 1050 Connecticut Ave, NW Fourth Floor
 Washington DC 20036
 (202) 390-8447
charles.sabatino@americanbar.org

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

The Honorable Louraine C. Arkfeld, Chair
 Commission on Law and Aging
 480-250-5044
louraine.arkfeld@gmail.com

EXECUTIVE SUMMARY

1. Summary of the Resolution. The proposed resolution from the Commission on Law and Aging and others urges Congress to create and fund a Guardianship Court Improvement Program for adult guardianship systems (following the model of the State Court Improvement Program for child welfare agencies created in 1993).
2. Summary of the Issue that the Resolution Addresses. The proposed resolution requests the ABA urge Congress to support improvement of state guardianship systems by investing federal funds and resources in a Guardianship Court Improvement Program. Adult guardianship is a drastic state intervention: a court removes the authority of an adult to make most decisions and delegates that authority to a guardian. An estimated one to three million people living in the United States have a guardian.

Currently states bear the sole responsibility for judicial appointment, administrative cost, and monitoring of guardianships. A federally funded Guardianship Court Improvement Program could drastically improve the lives of individuals with guardians by supporting state courts, improving outcomes for adults in the system, increasing the use of less restrictive options than guardianship, and enhancing collaboration among courts, the legal system, and the aging and disability networks.

This resolution advances the American Bar Association's long-standing commitment to advancing guardianship reform, by ensuring guardianships are appointed only when necessary, encouraging the collaboration of state courts and guardianship stakeholders, and recognizing the need for federal support of state courts to protect the safety, well-being, and individual rights of millions of individuals in the United States who may be or have been appointed a guardian.

3. How the Proposed Policy Position Will Address the Issue.
The proposed policy position will bring attention to the argument for funding for a pilot Guardianship Court Improvement Program. The ABA's support of such a program will lend credence to the concept as an innovative, viable, and much needed step in guardianship reform.
4. Summary of Minority Views
None identified.

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES

1 RESOLVED, that the American Bar Association urges prosecutors, defense attorneys,
2 judges, probation officers, parole authorities, legislators, policymakers, and community
3 partner organizations to consider using a restorative justice response to crime as one
4 effective alternative, or adjunct to, a criminal adjudicatory process in appropriate cases,
5 which contains the following elements:

6
7 1. Has a victim-centered approach;

8
9 2. Requires the informed consent of the victim or victim surrogate and the offender,
10 that either party may withdraw;

11
12 3. Is facilitated by a trained specialist who can determine if the victim and the
13 offender can be safely brought together and who can protect the interests of both;

14
15 4. Seeks to produce, if feasible, a voluntary agreement between the victim and the
16 offender designed to acknowledge and repair the harm caused by the offender; and

17
18 5. Maintains data on the effectiveness of restorative justice practices to ensure that
19 they are evidence-based and effective;

20
21 FURTHER RESOLVED that the American Bar Association urges federal, state, local,
22 territorial and tribal governments to develop grant and funding streams to enable
23 prosecutors, defense attorneys, judges, probation officers, parole authorities, legislators,
24 policymakers, and community partner organizations to develop, maintain, and assess the
25 effectiveness of restorative justice programs in a data-driven manner; and

26
27 FURTHER RESOLVED that the American Bar Association urges the National Institute of
28 Justice to prioritize and make publicly available an evaluation of restorative justice
29 practices nationwide that includes data on the underlying crime and eligibility criteria, the
30 percentage of cases in which restorative justice was chosen by victims, victims'
31 satisfaction rates, recidivism rates, collection of restitution, evidence of racial or other bias,
32 and effect on post-traumatic stress symptoms in victims.

REPORT

This resolution urges criminal justice stakeholders to develop restorative justice processes and make them available, where appropriate, to crime victims interested in participating in them. It does not argue that restorative justice should supplant the existing criminal justice process. It does not argue that restorative justice processes should relieve the prosecutor or court from the duties, obligations and authority to manage, process and marshal criminal cases within the criminal justice system. It argues that, in some cases, restorative justice processes may provide the best path forward for healing victims' pain, repairing harm caused by the offending behavior, and preventing its recurrence.

Native American and indigenous communities have long used restorative justice practices to resolve harms.¹ Currently, there is a nascent but growing movement to use restorative justice in pockets of the United States within the traditional criminal justice system or as an adjunct to it. Often these programs are an alternative to sending juveniles through a delinquency process.² A few states offer restorative justice as an alternative in misdemeanor cases.³ A program run by a federal district court in Boston since 2015 has offered a diversion program for serious, non-violent felonies in which restorative justice is a key component.⁴ And a program run by the Office of the Attorney General (OAG) in Washington, D.C., "is now referring some of the most serious cases on [the] docket into [a restorative justice] program."⁵ Robert "Roman" Haferd, who is the restorative justice

¹ Leena Kurki, National Institute of Justice, Office of Justice Programs, U.S. Dept. of Justice, *Incorporating Restorative and Community Justice into American Sentencing and Corrections, Sentencing and Corrections Issues for the 21st Century*, 4 (Sept. 1999), <https://www.ncjrs.gov/pdffiles1/nij/175723.pdf>; Amy B. Cyphert, *The Devil is in the Details: Exploring Restorative Justice as an Option for Campus Sexual Assault Responses under Title IX*, 96 Denver L. Rev. 51, 67 (2018).

² The Oakland, California-based Restorative Justice Project, directed by 2019 MacArthur "Genius" Grant Fellow Sujatha Baliga, partners with prosecutor offices to provide restorative justice alternatives to the school-to-prison pipeline. See <https://impactjustice.org/impact/restorative-justice/> (visited March 20, 2020); Rebecca Beitsch "States Consider Restorative Justice as an Alternative to Mass Incarceration," PBS NEWS, July 20, 2016 (describing restorative justice programs as alternatives to delinquency proceedings in Colorado, Vermont, and West Virginia). In Florida, there is a statute authorizing restorative justice for first-time, nonviolent juvenile offenders. Fl. Code Crim. Pro. Section 985.155, http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0900-0999/0985/Sections/0985.155.html. Florida prosecutors have also used the "pre-plea conference" as a way of using restorative justice. See, e.g., Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?* NYT Magazine, Jan. 4, 2013, <https://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html>. In the case profiled in the *New York Times Magazine*, a young man killed his girlfriend. He was charged with first-degree murder. The victim's family sought the use of restorative justice practices through a pre-plea conference. During the facilitated conversation, the victim's family recommended 10-15 years. The assistant state attorney attended the pre-plea conference and, after speaking to other stakeholders, he offered two options: (1) 20 years plus 5 years probation or (2) 25 years.

³ See, e.g., Restorative Justice Alternative, City of Montpelier (describing the Restorative Justice Alternative Program (RDAP) for "[p]eople who commit certain lower level offenses." <https://www.montpelier-vt.org/797/Restorative-Justice-Alternative>

⁴ Lara Bazelon, "Redemption for Offenders and Victims," AMERICAN PROSPECT, Jan. 18, 2018.

⁵ Carrie Johnson, *D.C. Prosecutors, Once Dubious, are Becoming Believers in Restorative Justice*, NPR NEWS, July 2, 2019, <https://www.npr.org/2019/07/02/735506637/d-c-prosecutors-once-dubious-are-becoming-believers-in-restorative-justice>.

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coordinator in the OAG, stated that: “We are embarking on phase of our program in which victims and respondents of virtually all violent crime, including gun crime, are offered restorative justice in conjunction with trauma-informed cognitive behavioral therapy for involved youth. This program is being evaluated by outside researchers to measure improvements in public safety, victim satisfaction and procedural justice.” Haferd noted that, “the program is mostly limited to juveniles, although we do accept a handful of adult cases (including with serious injuries) through the US Attorney’s Office and our adult criminal section.”⁶

Mr. Haferd stated that, as of October 3, 2019:

- The Restorative Justice Program [in the OAG] has received 259 referrals from prosecutors for restorative justice as an alternative to prosecution.
- 110 restorative justice conferences ended successfully.
- Of over 200 surveyed victims, charged youth, and their respective parents and supporters that participated in a restorative justice conference facilitated by the AG’s office, 94% reported that they would recommend the restorative justice process to others, and 89% reported that they would use the restorative justice process again.
- 7 cases were returned to the prosecutor as not successful. Of those, in three cases the group did not come to agreement at the conclusion of the restorative justice conference, in two cases the critical parties did not attend the restorative justice conference and it was abandoned, and in two cases the respondent did not complete all the terms of the Agreement post-conference.
- In 53 cases the victim declined to participate in restorative justice.
- 53 cases did not go to Conference for “Other” reason, including that the respondent chose to go to trial, respondent was arrested on a new charge and the RJ offer was withdrawn, respondent absconded, or the facilitator determined that restorative justice was not appropriate for the case.
- 25 cases are currently pending conference
- The remaining cases represent matters with more than one co-respondent.⁷

Chesa Boudin, the newly elected District Attorney of San Francisco, ran and won on a platform that included a promise that “[e]very victim who wants to participate in restorative justice will have the right to do so.”⁸ During the campaign, he spoke about the role that

⁶ Email correspondence between Robert Roman Haferd and Lara Bazelon dated April 22, 2020.

⁷ Email correspondence between Robert Roman Haferd and Lara Bazelon dated November 7, 2020. OAG’s statistics are mainly limited to juvenile cases. Email correspondence between Robert Roman Haferd and Lara Bazelon dated February 24, 2020.

⁸ See Chesa Boudin’s Plan for a Survivor-Centered Approach to Harm, Using a Restorative Justice Program to End the Cycle of Incarceration through Healing and Accountability, at: https://www.chesaboudin.com/restorative_justice (visited on Dec. 8, 2019).

restorative justice had played in his own life.⁹ Noting that his parents' crimes claimed many victims—two police officers and an armored guard were killed¹⁰—he also pointed out that as their 18-month-old son, he too, suffered from their sudden, prolonged absence from his life.¹¹ His mother was not released until 2003, when Boudin was finishing college; his father remains in prison. “But restorative justice saved me,” he wrote, “and did more to rehabilitate my parents than any number of years in prison ever could.”¹²

Restorative justice is also gaining traction in rural jurisdictions that are less racially and ethnically diverse. In 2019, Natasha Irving, a criminal defense lawyer, was elected to serve as district attorney in Maine's District 6. As DA, she oversees four counties with a combined population of less than 150,000 people, and she won after pledging to broaden the use of restorative justice. Prior to Irving's election, restorative practices were employed in District 6 principally in cases involving juveniles and young adults. Promising to “implement a system of community-based restorative justice for [adults'] nonviolent misdemeanor offenses,” she explained: “Community-based restorative justice, it holds the offender accountable, makes the victim whole, keeps our community safe, and it costs less in taxpayer dollars than the system we are using now, which is ‘lock em’ up.’ Lock them up for any nonviolent offense that we can get jail time for.”¹³ In the past few two years, other candidates who are part of the progressive prosecution movement¹⁴ have taken a page from a guidebook for 21st century prosecutors, which lists restorative justice among its 21 principles.¹⁵

While existing programs that use restorative justice in cases of interpersonal violence in the United States are limited, the few that exist show promise. Danielle Sered's organization, Common Justice, was created in 2008 by the Vera Institute in partnership with the Kings County District Attorney's Office in Brooklyn.¹⁶ As Sered explains, Common Justice, “[g]uided by restorative justice principles [offers] a survivor-centered accountability process that gives those directly impacted by acts of violence the

⁹ John Nichols, *Chesa Boudin Wants to Bring Restorative Justice to San Francisco*, THE NATION, Oct. 22, 2019.

¹⁰ In 1981, Boudin's parents, Kathy Boudin and David Gilbert, drove the getaway car in a robbery planned by members of the Black Liberation Army—a black power organization. A guard was killed in the course of the robbery. When the vehicle Gilbert was driving was subsequently stopped by police, BLA members shot and killed two police officers. Both Boudin and Gilbert were convicted under New York State's felony murder rule. Boudin received a sentence of 20 years to life and was paroled in 2003. Gilbert, who received a sentence of 75 years to life, is still in prison. Dana Goodyear, *How Far Will California Take Criminal Justice Reform*, NEW YORKER, Oct. 5, 2019.

¹¹ Chesa Boudin, *San Francisco Deserves Restorative Justice*, THE APPEAL, Aug. 30, 2019.

¹² *Id.*

¹³ Jessica Picard, *DA Candidate Focuses on Restorative Justice*, THE LINCOLN COUNTY NEWS, Sept. 10, 2018, at: <https://lcnme.com/currentnews/da-candidate-focuses-on-restorative-justice/> (quoting Natasha Irving).

¹⁴ See generally Jeffrey Bellin, *Defending Progressive Prosecution*, at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479165; Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, at: <https://escholarship.org/uc/item/2rq8t137>.

¹⁵ Fair and Just Prosecution et al., 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 12-13 (2018).

¹⁶ DANIELLE SERED, UNTIL WE RECKON 133 (2018).

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opportunity to shape what that repair will look like, and in the case of the responsible party, to carry out that repair instead of going to prison.”¹⁷

Many of the participants have committed serious crimes including shootings, stabbings, and other violent assaults. Common Justice does not, however, accept cases involving sexual assault, domestic violence, or intimate partner violence. The program is limited to young adults ages 16-26. If, and only if, the victims agree to participate, they will come together—or use a surrogate to represent them—with the perpetrator “and family and community members with a stake in the outcome.”¹⁸ The victims are free to reject the Common Justice alternative, in which case the offenders will go through the court process, and if convicted, serve prison sentences.¹⁹

One might expect that most victims would reject what Common Justice offers them.²⁰ But the statistics provided by Haferd from the OAG’s office mirror those of Common Justice: ninety percent of victims choose the program over the traditional criminal justice process. They make this choice knowing that the people who hurt them will not be sent to prison and will have their felony conviction removed following successful completion of the program. By 2018, Sered wrote, the number of offenders who engaged in her program had a recidivism rate of only six percent. From 2012-2018, Common Justice expelled only one person from the program for committing a new crime.²¹

To offer another example: RESTORE, a federally-funded program that operated in Pima County, Arizona from 2004-2007,²² worked collaboratively with local prosecutors to offer victims of felony and misdemeanor sexual assaults the opportunity to choose a restorative justice alternative over the traditional criminal process.²³ RESTORE “excluded repeat sexual offenders, persons with police reports for domestic violence, or individuals with arrests for any crimes involving non-sexual forms of physical assault.”²⁴ Sexual offenses within accepted categories ranged from rape to indecent exposure.²⁵ The majority of victims offered this choice accepted the opportunity to participate in RESTORE. Participation in RESTORE required victims and offenders to participate in a restorative justice conferencing process overseen by program personnel and a facilitator, together

¹⁷ *Id.*

¹⁸ Danielle Sered, *A New Approach to Victim Services: The Common Justice Demonstration Project*, 24 FEDERAL SENTENCING REPORTER 50, 50 (2011)

¹⁹ *Id.*

²⁰ SERED, UNTIL WE RECKON 42.

²¹ SERED, UNTIL WE RECKON 134.

²² “The program operated from March, 2003, to August, 2007, and closed at the end of federal funding.” Mary P. Koss, *The Restore Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcome*, Journal of Interpersonal Violence (2013) at 10, <https://publichealth.arizona.edu/sites/publichealth.arizona.edu/files/14%2004%2024%20RESTORE%200n-line%20published.pdf>.

²³ Quince et al., *Applying Restorative Justice Practices*, at 301–02 (explaining that RESTORE was “funded by a \$1.5 million grant from the Centers for Disease Control”).

Certain offenders were excluded, including juveniles, those accused of domestic violence, those with arrests for violent crimes excluding sexual assault, and those with repeated histories of sexual assault.

²⁴ Koss, *The Restore Program* at 10.

²⁵ Koss, *The Restore Program* at 4.

with family and supporters.²⁶ Victims described how the assault had impacted their lives and the lives of their friends and family.²⁷ Offenders took responsibility for committing the assault and also participated in active listening by putting the victims' story into their own words, with the victims correcting them when necessary.²⁸ Offenders were held to account through mandatory participation in sex offender therapy, substance abuse treatment where warranted, regular meetings and check-ins with case managers, community service, and restitution.²⁹

A study of the program found that of the 22 cases accepted over a three-year period, "[t]wo thirds of felony and 91% of misdemeanor" offenders successfully completed the program. Two offenders were terminated from the program because homelessness, substance abuse or financial problems prevented them from complying with the requirements; one offender withdrew after reversing himself and denying responsibility.³⁰ More than 90 percent of the victims who participated stated that they "were satisfied that justice was done."³¹ The percentage of victims suffering from PTSD dropped from 82% to 66% after completing the program.³² The percentage of participants who "felt safe, listened to, supported, treated fairly, treated with respect, and not expected to do more than they anticipated" exceeded ninety percent.³³

RESTORE and Common Justice are just two programs in two counties, but their results teach important lessons. First, the under-utilization, selective application, and limited funding of restorative justice practices should be re-examined. Traditionally, restorative justice has been reserved as an alternative only in cases involving juveniles or only for low-level non-violent offenses.³⁴ Studies and successful programs such as Common Justice and RESTORE have demonstrated that restorative justice programs—when founded on principles of victim-centeredness and offender accountability with a focus on accountability, repair, and community involvement—can be used in a range of felony cases, including cases involving violence.

Moreover, it is possible to implement a restorative justice alternative with the cooperation and support of prosecutors who recognize that restorative outcomes promote public safety and serve victims. RESTORE's partnership with a willing Pima County District Attorney's Office, and Common Justice's partnership with the King's County District Attorney's Office, which is now more than a decade-old, demonstrates that such partnerships are not only possible but successful and durable.

This resolution purposefully does not define when a restorative justice response is appropriate and the types of offenses and eligibility criteria to use when developing

²⁶ *Id.* at 8

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 9

³⁰ *Id.* at 25

³¹ *Id.* at 32

³² *Id.* at 19.

³³ *Id.* at 22.

³⁴ Quince et al., *supra* note 22, at 300–01.

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restorative justice programs. These decisions should be made by the stakeholders in each jurisdiction so long as the restorative justice program is geared toward public safety, victims' healing, and offenders' accountability.

The consent of the participants throughout the restorative justice process should be informed and voluntary. The victim and the offender should provide written consent after reviewing the procedures and practices of the program and having the opportunity to ask any questions. Before any in-person meeting, victims and offenders should have an opportunity to meet with the restorative justice facilitator and counsel to review safety concerns, go over the rules and the process so that they know what to expect, go over what they would like to say during the in person meeting and what they hope to achieve at the end of the process regarding in terms of repair of harm, redress, and restitution. Any agreement reached between the victim and the offender at the conclusion of the restorative justice process should be in writing and should be informed and voluntary. Before signing any such agreement, both parties should have the opportunity to consult with the restorative justice facilitator and counsel to go over any questions or concerns. If there is a deadline, the deadline should be extended if either side needs additional time.

Lastly, data is key to evaluating the use of restorative justice programs. For that reason, the resolution "urges the National Institute of Justice to prioritize and make publicly available an evaluation of restorative justice practices nationwide." The resolution singled out the NIJ because of its unique role, as an arm of the U.S. Department of Justice, in collecting, evaluating, and disseminating empirical data on effectiveness of criminal justice initiatives to reduce recidivism, rates of incarceration, and promote the cause of justice.³⁵

As seen by the various programs used around the nation, tracking when the programs are offered to victims, when victims choose to participate, recidivism rates, collection of restitution, and reduction of post-traumatic stress symptoms on victims may help criminal justice stakeholders provide victims the justice they require. Collecting data may also help identify ways to address implicit bias in program eligibility.

Respectfully submitted,

Kim T. Parker
Chair, Criminal Justice Section
August 2020

³⁵ National Institute of Justice, About NIJ, <https://nij.ojp.gov/about-nij> (last visited May 23, 2020).

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Kim T. Parker, Chair, Criminal Justice Section

1. Summary of the Resolution(s). This resolution urges criminal justice stakeholders to consider the development and use of restorative justice processes where appropriate, to crime victims interested in participating in them. It does not mandate the use of restorative justice, but encourages all parts of the criminal justice system, from pre-arrest to parole, to consider whether restorative justice procedures can be appropriate and helpful to crime victims seeking justice and accountability by an offender.
2. Approval by Submitting Entity. The resolution was approved by the CJS Council on May 1, 2020.
3. Has this or a similar resolution been submitted to the House or Board previously?
Not to our knowledge.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

In 1994, the ABA enacted a resolution supporting victim-offender mediation/dialogue programs, and this resolution on restorative justice improves upon that effort. (94A101B)

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 resolution will be used to advocate for the use of restorative justice programs as one alternative to the criminal adjudicatory process in local jurisdictions, and to collect and report data from these programs so that they can be improved and initiated more broadly.

8. Cost to the Association. (Both direct and indirect costs)
None.
9. Disclosure of Interest. (If applicable) n/a

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10. Referrals. The section will contact the following entities for support:

Coalition on Racial and Ethnic Justice
Commission on Disability Rights
Commission on Domestic and Sexual Violence
Commission on Homelessness and Poverty
Commission on Sexual Orientation and Gender Identity
Commission on Youth at Risk
Division for Public Education
Government and Public Sector Lawyers Division
Hispanic Legal Rights and Responsibilities
Judicial Division
Section of Civil Rights and Social Justice
Section of Dispute Resolution
Section on Family Law
Section on Health Law
Section on International Law
Section on Labor and Employment Law
Section on Litigation
Section on Science and Technology Law
Section on State and Local Government Law
Section on Torts Trial and Insurance Practice
Senior Lawyers Division
Solo, Small Firm and General Practice Division
Standing Committee on Legal Aid and Indigent Defense
Standing Committee on Pro Bono and Public Service
Young Lawyers Division

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

This resolution urges criminal justice stakeholders to consider the development and use of restorative justice processes where appropriate, to crime victims interested in participating in them. It does not mandate the use of restorative justice, but encourages all parts of the criminal justice system, from pre-arrest to parole, to consider whether restorative justice procedures can be appropriate and helpful to crime victims seeking justice and accountability by an offender.

2. Summary of the issue that the resolution addresses.

Restorative justice has been successfully used in juvenile justice systems and in schools as an alternative to criminalizing behavior and zero tolerance disciplinary programs. Reform efforts in the criminal justice system presently focus on programs that similarly reduce incarceration and provide more meaningful responses to victims of crime and better accountability on the part of those who have broken the law, and restorative justice is one alternative.

3. Please explain how the proposed policy position will address the issue.

This resolution urges jurisdictions to initiate and improve use of restorative justice practices and emphasizes the necessary elements of a program, whether used as a way to divert defendants from traditional prosecution and sentencing, or as a way to allow those who are incarcerated to be held accountable and become more successful on parole.

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

Restorative justice programs are widely supported when used in appropriate cases, and when care is taken to ensure that the parties are on equal footing and that their participation is voluntary.

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES

- 1 RESOLVED, That the American Bar Association adopts the black letter of the *ABA*
- 2 *Standards for Criminal Justice: Discovery, Fourth Edition*, dated August 2020, to supplant
- 3 the Third Edition (August 1994) of the *ABA Standards for Criminal Justice: Discovery*.

**American Bar Association
Criminal Justice Standards on Discovery
Fourth Edition**

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DISCOVERY

PART I. GENERAL PRINCIPLES

Standard 11-1.1 Definitions

For purposes of these Standards:

(a) **Case.** “Case” means the prosecution of the crimes charged, including sentencing, and the investigation leading to those charges.

(b) **Defense.** “Defense” includes every defense attorney who has participated in defending the case, members of their legal or investigative staff in the case, and the defendant.

(c) **Electronically Stored Information (“ESI”).** “Electronically stored information” (“ESI”) means any information created, recorded, stored, or utilized with digital technology.

(d) **Formal charging document.** “Formal charging document” means an information, indictment, or other document on the basis of which a defendant may be tried.

(e) **Oral Statement.** An “oral statement” of a person means the substance of any statement of any kind by that person, not reflected in a recorded statement.

(f) **Party.** “Party” means the prosecutor, the defense attorney, and the defendant.

(g) **Possession or control of the defense.** Something is in the “possession or control of the defense” when it is in the possession of the defense or any other individual or entity that is under the defense attorney’s direction or control.

(h) **Possession or control of the prosecution.** Something is in the “possession or control of the prosecution” when it is in the possession of the prosecution, any law enforcement agency that has participated in investigating or prosecuting the case, any other individual or entity that has participated in investigating or prosecuting the case at the direction or request of or by agreement with the prosecution or any law enforcement agency in the case.

(i) **Prosecution.** “Prosecution” includes any prosecutors in the case and other members of their legal or investigative staff.

(j) **Prosecutor.** “Prosecutor” includes every attorney who has participated in prosecuting the case.

(k) **Recorded Statement.** A “recorded statement” of a person includes:

(i) any statement in writing that is made, signed or adopted by that person;

(ii) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by that person; and

(iii) the substance of a statement of any kind made by that person that is embodied or summarized in any writing or recording, whether or not specifically signed or

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adopted by that person. The term includes statements contained in police or investigative reports, but does not include attorney work product.

(l) **The Defense Attorney.** “The defense attorney” includes any defense attorney representing the defendant, and includes the defendant if the defendant is proceeding pro se.

Standard 11-1.2 Objectives of these Standards

Objectives of these Standards include:

(a) to promote a fair, accurate, and expeditious disposition of the charges;

(b) to provide the defendant with sufficient information to make an informed plea;

(c) to permit thorough preparation for and minimize unfair surprise at hearings and trial;

(d) to facilitate early identification and resolution prior to trial of any procedural, collateral, or constitutional issues;

(e) to effect economies in time, money, judicial resources, and professional skills by minimizing paperwork, avoiding repetitious assertions of issues, avoiding unnecessary motion practice, and reducing the number of separate hearings;

(f) to reduce interruptions and complications during trial and avoid unnecessary and repetitious trials;

(g) to protect the security of confidential, privileged, or personal information;

(h) to minimize the burden upon and protect the interests of victims, witnesses, and other third parties;

(i) to protect the safety of the community;

(j) to specify remedies for non-compliance that mitigate prejudice while minimizing disruption to the criminal proceeding, and provide that sanctions for non-compliance should be reserved for blameworthy behavior; and

(k) to protect the rights of the defendant.

Standard 11-1.3 Applicability

These Standards should be applied in all criminal cases. Discovery procedures may be more limited in cases involving minor offenses, provided the procedures are sufficient to permit the parties adequately to investigate and prepare the case, and to satisfy constitutional requirements.

PART II. DISCOVERY OBLIGATIONS OF THE PROSECUTION AND DEFENSE

Standard 11-2.1 Prosecutorial disclosure

(a) **Obligation of the prosecutor to identify and gather information and material.** As soon as practicable, the prosecutor should with reasonable diligence seek to identify and

gather all information and material relevant to the case, including information and material described in subsection (c) of this Standard in the possession or control of the prosecution.

(b) Advise on continuing obligation. The prosecutor should with reasonable diligence advise individuals and entities who may have information and material in the possession or control of the prosecution of their continuing duty to identify, preserve, and disclose to the prosecutor information and material relevant to the case.

(c) The prosecutor's general obligation to disclose to the defense. Subject to the limitations in Standard 6.1(a) and any protective orders, and in compliance with the timeframes provided in Standard 11-2.3, the prosecutor should disclose to the defense the following information and material it has identified and gathered pursuant to subsection (a) of this Standard, and permit inspection, copying, testing, and photographing of disclosed documents or tangible objects:

(i) The date, time, and place of the offense(s) with which the defendant is charged.

(ii) All law enforcement records created in the case.

(iii) All recorded and oral statements of the defendant that relate to the case, and all recorded and oral statements of any codefendant that the government intends to introduce at trial or that contain information that is described in subsection xiii of this section, and any documents relating to the acquisition of such statements.

(iv) The names and, if known, information sufficient to contact, all persons having information relating to the case, together with all recorded statements of any such person that relate to the subject matter of the case.

(v) Any tangible objects, including books, papers, documents, photographs, electronically stored information, buildings, or places that were obtained from or belong to the defendant.

(vi) Any additional tangible objects, including books, papers, documents, photographs, electronically stored information, buildings, or places that pertain to the case.

(vii) Any results or reports of tests or examinations of persons or physical evidence made in the case, and all related data, calculations, and documentation created in the case, including chain of custody documents, preliminary test or screening results, bench notes, and underlying raw data produced during testing. Additionally, where results or reports of tests or examinations of persons or physical evidence are disclosed, the prosecutor should disclose to the defense related documents such as laboratory protocols and manuals, if the defense requests the documents and if the documents are not publicly available.

(viii) Criminal records, pending charges, or probationary status of the defendant or of any codefendant.

(ix) Any material, documents, or information relating to lineups, showups, picture, voice, or other identification procedures that pertain to the case.

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(x) Any information, documents, or other materials relating to any governmental electronic surveillance of the defendant's person, communications, possessions, activities, or premises, or to legal authorization of the surveillance, that pertains to the case.

(xi) Any information, documents, or other material relating to the acquisition of any tangible object the prosecutor intends to offer at trial that was obtained through a search or seizure.

(xii) Any material, documents, or information relating to

(1) any relationship between the prosecution or law enforcement agents who have participated in the case and any witness the prosecution intends to call that does or reasonably might create bias or the appearance of bias, or

(2) any benefit received by or promised to the witness.

(xiii) Any material or information that tends to negate the guilt of the accused, mitigate the offense charged or sentence, or impeach the prosecution's witnesses or evidence. Where the prosecution provides the defense with voluminous discovery material and the prosecutor is aware that it contains such material or information, the prosecutor should identify that material or information.

(xiv) Where the prosecutor provides the defense with voluminous discovery material, as the prosecutor determines that specific material will be used in the prosecution's case-in-chief the prosecutor should identify that material to the defense.

(d) The prosecutor's obligation to make pre-hearing disclosures to the defense.

Unless previously disclosed, the prosecutor should disclose to the defense the following information and material for a pre-trial hearing at which evidence or witnesses will be presented:

(i) Any record of convictions, pending charges, or probationary status known to the prosecution of any witness to be called by the prosecution.

(ii) All recorded statements of any witness to be called by the prosecution at the hearing that relate to the subject matter of the hearing.

(iii) Any tangible objects, including books, papers, documents, photographs, electronically stored information, buildings, or places that the prosecution intends to introduce as evidence at the hearing.

(iv) Any material or information known to the prosecutor to be inconsistent with or impeaching the prosecution's representations or evidence in the hearing.

(v) With respect to each person from whom the prosecution intends to elicit expert testimony at the hearing, a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the basis of that opinion. If the substance of the proposed testimony, the expert's opinion, and the basis of that opinion are contained

344 in a disclosed expert report, the prosecutor is not required to create a written
345 description.

346 (vi) Any results or reports of tests or examinations of persons or physical
347 evidence that the prosecution intends to introduce as evidence at the
348 hearing, and all related data, calculations, and documentation created in the
349 case, including chain of custody documents, preliminary test or screening
350 results, bench notes, and underlying raw data produced during testing.
351 Additionally, where results or reports of tests or examinations of persons or
352 physical evidence are disclosed, the prosecutor should disclose to the
353 defense related documents such as laboratory protocols and manuals, if the
354 defense requests the documents and if the documents are not publicly
355 available.

356 **(e) The prosecutor's obligation to make pre-trial disclosures to the defense.** Unless
357 previously disclosed, the prosecutor should disclose to the defense the following
358 additional information and material prior to trial:

359 (i) A list of persons the prosecution intends to call as witnesses at trial.

360 (ii) All recorded and oral statements of any jointly tried co-defendant.

361 (iii) Any record of convictions, pending charges, or probationary status known to
362 the prosecution of any witness to be called by either party at trial, to the extent not
363 previously disclosed.

364 (iv) With respect to each person from whom the prosecution intends to elicit expert
365 testimony at trial, a curriculum vitae and a written description of the substance of the
366 proposed testimony of the expert, the expert's opinion, and the basis of that opinion, to
367 the extent not previously disclosed under subsections (c) or (d) of this Standard. If the
368 substance of the proposed testimony, the expert's opinion, and the basis of that opinion
369 are contained in a disclosed expert report, the prosecutor is not required to create a
370 written description.

371 (v) A list of exhibits the prosecution intends to offer as evidence or use at trial.

372 (vi) Notification of the intent to use, and the substance of, any character, reputation,
373 or other-act evidence the prosecution intends to use at trial.

374 **(f) Specification of basis for charges.** If, following completion of disclosures under
375 subsections (c), (d), and (e) of this Standard, the defense is reasonably unable to
376 determine the factual or legal basis for the charges sufficiently to prepare a defense at
377 trial, the court should, upon a showing by the defense, order the prosecutor to specify
378 further the factual or legal basis for the charges.

379 **(g) The prosecutor's obligation to make pre-sentencing disclosures to the defense.**
380 The prosecutor should disclose to the defense the following additional information and
381 material prior to sentencing:

382 (i) A list of persons it intends to call as witnesses at sentencing and, to the extent
383 not previously disclosed, information sufficient to contact the witnesses together with all

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384 recorded statements of the witnesses that are within the possession or control of the
385 prosecution and that relate to the subject matter of the testimony of the witness.

386 (ii) Any record of convictions, pending charges, or probationary status known to
387 the prosecution of any witness to be called by either party at sentencing, to the extent not
388 previously disclosed.

389 (iii) Any results or reports of tests or examinations of persons or physical evidence
390 made in the case that the prosecution intends to introduce as evidence at sentencing to
391 the extent not previously disclosed, and all related data, calculations, and documentation
392 created in the case, including chain of custody documents, preliminary test or screening
393 results, bench notes, and underlying raw data produced during testing. Additionally,
394 where results or reports of tests or examinations of persons or physical evidence are
395 disclosed, the prosecution should disclose to the defense related documents such as
396 laboratory protocols and manuals, if the defense requests the documents and the
397 documents are not publicly available.

398 (iv) With respect to any person from whom the prosecution intends to elicit expert
399 testimony at sentencing, a curriculum vitae and a written description of the substance of
400 the proposed testimony of the expert, the expert's opinion, and the basis of that opinion,
401 to the extent not previously disclosed under subsections (c), (d), or (e) of this Standard.
402 If the substance of the proposed testimony, the expert's opinion, and the basis of that
403 opinion are contained in a disclosed expert report, the prosecutor is not required to create
404 a written description.

405 (v) A list of exhibits the prosecution intends to offer as evidence or use at
406 sentencing, and any tangible objects, including books, papers, documents, photographs,
407 electronically stored information, buildings, or places that the prosecution intends to
408 introduce as evidence at sentencing, to the extent not previously disclosed.

409 (vi) Notification of the intent to use, and the substance of, any character, reputation,
410 or other-act evidence the prosecution intends to use at sentencing.

411 (vii) Any material or information provided by the prosecution to an individual
412 responsible for conducting a pre-sentence investigation or preparing a pre-sentence
413 report, in connection with that pre-sentence investigation or pre-sentence report.

414
415 **(h) The prosecutor's obligation to disclose discoverable third party information and**
416 **material.** If the prosecutor knows that information or material described in subsection (c)
417 of this Standard exists and is in the possession or control of a known third party, and not
418 in the possession or control of the prosecution, the prosecutor should disclose to the
419 defense the existence and location of that information and material.
420

421 **Standard 11-2.2 Defense disclosure**

422 **(a) The defense attorney's obligation to make pre-hearing disclosures to the**
423 **prosecution.** The defense attorney should disclose to the prosecution the following

424 additional information and material for a pre-trial hearing in which evidence or witnesses
425 will be presented:

426 (i) All recorded statements of any witness to be called by the defense at the hearing
427 that relate to the subject matter of the testimony of the witness.

428 (ii) Any tangible objects, including books, papers, documents, photographs,
429 electronically stored information, buildings, or places that the defense intends to
430 introduce as evidence at the hearing.

431 (iii) Any results or reports of tests or examinations of persons or physical evidence
432 made in the case, and all related data, calculations, and documentation created in
433 the case, including chain of custody documents, preliminary test or screening
434 results, bench notes, and underlying raw data produced during testing, that the
435 defense intends to introduce as evidence at the hearing. Additionally, where
436 results or reports of tests or examinations of persons or physical evidence are
437 disclosed, the defense should disclose to the prosecution related documents such
438 as laboratory protocols and manuals, if the prosecution requests the documents
439 and the documents are not publicly available.

440 (iv) With respect to each expert whom the defense intends to call as a witness at
441 the hearing, the defense should also furnish to the prosecution a curriculum vitae
442 and a written description of the substance of the proposed testimony of the expert,
443 the expert's opinion, and the underlying basis of that opinion. If the substance of
444 the proposed testimony, the expert's opinion, and the basis of that opinion are
445 contained in a disclosed expert report, the defense attorney is not required to
446 create a written description.

447 **(b) The defense attorney's obligation to disclose defenses.** The defense attorney
448 should disclose to the prosecution the following information:

449 (i) When the defense intends to offer at trial any defense of justification or excuse
450 recognized in the jurisdiction, or any defense recognized in the jurisdiction
451 premised on the mental or physical capacity of the defendant, including:

452 (a) Duress;

453 (b) Necessity;

454 (c) Entrapment;

455 (d) Involuntary or voluntary intoxication;

456 (e) Insanity;

457 (f) Diminished mental capacity;

458 (g) Public authority; and

459 (h) Defense of self, others, or property

460 the defense attorney shall provide written notification of that intent, the names of
461 and, if known, information sufficient to contact, witnesses other than the defendant

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whom the defense intends to call in support of the defenses, and all recorded statements of the witnesses.

(ii) If the defense intends to introduce evidence to prove an alibi, written notification of that intent should include, in addition to the disclosure required by (b)(i), the specific place or places at which the defendant claims to have been at the time of the alleged offense.

(c) The defense attorney's obligation to make pre-trial disclosures to the prosecution. The defense attorney should disclose to the prosecutor the following additional information and material and permit inspection, copying, testing, and photographing of disclosed documents and tangible objects prior to trial:

(i) The names and, if known, information sufficient to contact all witnesses (other than the defendant) whom the defense intends to call at trial and which have not previously been disclosed, together with all recorded statements of any such witness that are within the possession or control of the defense and that relate to the subject matter of the testimony of the witness. Disclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a prosecution witness should not be required until after the prosecution witness has testified at trial.

(ii) Any tangible objects, including books, papers, documents, photographs, electronically stored information, buildings, or places that the defense intends to introduce as evidence at trial. Disclosure of tangible objects that will be used for the sole purpose of impeaching a prosecution witness should not be required until after the prosecution witness's direct testimony has concluded.

(iii) Any results or reports of tests or examinations of persons or physical evidence made in the case that the defense intends to introduce as evidence at trial, and all related data, calculations, and documentation created in the case, including chain of custody documents, preliminary test or screening results, bench notes, and underlying raw data produced during testing. Additionally, where results or reports of tests or examinations of persons or physical evidence are disclosed, the defense should disclose to the prosecution related documents such as laboratory protocols and manuals, if the prosecution requests the documents and the documents are not publicly available.

(iv) With respect to each expert whom the defense intends to call as a witness at trial, the defense should also furnish to the prosecution a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion, to the extent not previously disclosed pursuant to Standard 11-2.2(a)(ii). If the substance of the proposed testimony, the expert's opinion, and the basis of that opinion are contained in a disclosed expert report, the defense attorney is not required to create a written description.

(v) Notification of the intent to use, and the substance of, any character, reputation, or other-act evidence the defense intends to use at trial, unless the evidence would reveal testimony of the defendant. Disclosure of character, reputation, or other-act evidence that will be used for the sole purpose of impeaching a prosecution witness should not be required until after the prosecution witness's direct testimony has concluded.

(vi) A list of exhibits the defense intends to offer as evidence or use at trial. Disclosure of exhibits that will be used for the sole purpose of impeaching a prosecution witness should not be required until after the prosecution witness has testified at trial.

(d) The defense attorney's obligation to make pre-sentencing disclosures to the prosecution. The defense attorney should disclose to the prosecution the following additional information and material prior to sentencing:

(i) A list of any persons the defense intends to call as witnesses at sentencing and, to the extent not previously disclosed, information sufficient to contact the witnesses together with all recorded statements of the witnesses that are within the possession or control of the defense and that relate to the subject matter of the testimony of the witness.

(ii) Any results or reports of tests or examinations of persons or physical evidence made in the case that the defense intends to introduce as evidence at sentencing to the extent not previously disclosed, and all related data, calculations, and documentation created in the case, including chain of custody documents, preliminary test or screening results, bench notes, and underlying raw data produced during testing. Additionally, where results or reports of tests or examinations of persons or physical evidence are disclosed, the defense should disclose to the prosecution related documents such as laboratory protocols and manuals, if the prosecution requests the documents and the documents are not publicly available.

(iii) With respect to each person from whom the defense intends to elicit expert testimony at sentencing, a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the basis of that opinion, to the extent not previously disclosed. If the substance of the proposed testimony, the expert's opinion, and the basis of that opinion are contained in a disclosed expert report, the defense attorney is not required to create a written description.

(iv) A list of any exhibits the defense intends to offer as evidence or use at sentencing, and any tangible objects, including books, papers, documents, photographs, electronically stored information, buildings, or places that the defense intends to introduce as evidence at sentencing, to the extent not previously disclosed.

(v) Notification of the intent to use, and the substance of, any character, reputation, or other-act evidence the defense intends to use at sentencing.

(vi) Any material or information provided by the defense to an individual responsible for conducting a pre-sentence investigation or preparing a pre-sentence report, in connection with that pre-sentence investigation or pre-sentence report.

Standard 11-2.3 Timing of discovery

(a) Discovery initiation and time limits. Discovery should be initiated as early as practicable. Each jurisdiction should adopt time limits within which discovery should be performed at each stage of a criminal case.

(b) Motion to change timing of disclosure. Upon motion by either party, if the court finds that there is good cause to extend or shorten any specified time limits, the court should enter an order doing so. The court's order should consider any agreements made

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as described in Standard 3.1. However, in all cases, disclosures should be made in sufficient time for each party to use the disclosed information to adequately prepare for hearings, the entry of a plea, trial, or sentencing.

(c) Disclosure in stages for pre-trial, trial, and post-trial use. Unless the court otherwise orders, disclosure should occur within the following time frames.

(i) **Disclosure of information to the defense.** Notwithstanding other timing provisions, the prosecutor should disclose to the defense information that tends to negate the guilt of the accused, mitigate the offense charged or sentence as soon as practicable after the items have been identified and gathered.

(ii) **Disclosure at first appearance.** At the first appearance before a judicial officer where a prosecutor is present, the prosecutor should disclose information and material relating to the release determination that are in the prosecutor's possession. If a plea occurs at first appearance the prosecutor should make the disclosures described in subsection (ix) of this Standard.

(iii) **Prosecution general disclosure.** Within [14 days] of the filing of the formal charging document, the prosecutor should disclose to the defense all items listed in Standard 11-2.1(c). However, if the defendant is in custody, such disclosure should occur within [28 days] of the custody determination or [14] days of filing of the formal charging document, whichever is sooner.

(iv) **Defense disclosure of defenses.** Within [21 days] of the prosecutor's disclosure under subsection (c)(iii), the defense attorney should disclose to the prosecutor all items listed in Standard 11-2.2(b).

(v) **Prosecution responsive disclosure.** Within [14 days] of the defense's disclosure under subsection (iv) of this Standard, the prosecutor should disclose any previously undisclosed information or material the prosecution intends to use, or witnesses it intends to call, all recorded statements of the witnesses, and, if known, information sufficient to contact those witnesses, to respond to defenses disclosed.

(vi) **Prosecution and defense pre-hearing disclosure.** As soon as practicable after a pre-trial hearing is ordered, the party bearing the initial burden at the hearing should disclose to the opposing party all items listed in Standard 11-2.1(d) or 11-2.2(d) to the extent not previously disclosed. As soon as practicable but in all cases prior to the hearing, the opposing party should disclose all items listed in Standard 11-2.1(d) or 11-2.2(a) to the extent not previously disclosed.

(vii) **Prosecution pre-trial disclosure.** No later than [21 days] prior to trial, the prosecutor should disclose to the defense all items listed in Standard 11-2.1(e).

(viii) **Defense pre-trial disclosure.** Within [7 days] of the prosecution's disclosure under Standard 11-2.3(c)(vii), the defense attorney should disclose to the prosecutor all items listed in Standard 11-2.2(c).

(ix) **Prosecution disclosure before plea.** Prior to the entry of a guilty plea, the prosecutor should disclose to the defense information or material sufficient to support the charges in the proposed agreement, and information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense charged or sentence.

(x) **Sentencing disclosure.** Prior to sentencing, the prosecutor should disclose to the defense all previously undisclosed items listed in Standard 11-2.2(g). Following the prosecutor's disclosure and prior to sentencing, the defense attorney should disclose to the prosecutor all previously undisclosed items listed in Standard 11-2.3(d) that are relevant to sentencing.

Standard 11-2.4 The person of the defendant

(a) After first appearance and upon motion by the prosecutor, with reasonable notice and opportunity to be heard to the defense, the court should, upon an appropriate showing, order the defendant to appear for the following purposes:

(i) to permit the taking of fingerprints, photographs, handwriting exemplars, or voice exemplars from the defendant;

(ii) to permit the taking of specimens of blood, urine, saliva, breath, hair, nails, or other materials of the body of the defendant;

(iii) for the purpose of having the defendant appear, move, or speak for identification in a lineup or try on clothing or other articles;

(iv) to submit to a reasonable physical or medical inspection of the body;

(v) to submit to a reasonable mental health examination; or

(vi) to participate in other reasonable and appropriate procedures.

(b) The motion and order pursuant to subsection (a) should specify the following information where appropriate: the authorized procedure, the scope of the defendant's participation, and the scope, if any, of defense counsel's participation, the name or job title of the person who is to conduct the procedure, and the time, duration, place, and other conditions under which the procedure is to be conducted.

(c) The court should issue the order sought pursuant to subsection (a) above if it finds that:

(i) the procedure specified may produce evidence that is material to the determination of the issues in the case;

(ii) the procedure is reasonable and will be conducted in a manner which does not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the defendant; and

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(iii) the request is reasonable and comports with applicable law.

Standard 11-2.5. Additional disclosure upon motion

The court in its discretion may, upon motion, require disclosure to the prosecution or defense of information or material related to the case but not specified in Standard 11-2.1 or 11-2.2, on a showing by the requesting party that the request is reasonable.

Standard 11-2.6 Continuing obligation to disclose

Each party has a continuing obligation to produce discoverable material to the other side.

(a) If counsel discovers additional information or material that is subject to disclosure subsequent to the date when that disclosure was due, it should promptly notify opposing counsel of the existence of, and should promptly disclose, the additional information or material.

(b) If counsel discovers that information or material that is subject to disclosure has been destroyed, lost, or otherwise have become unavailable before disclosure was made, it should promptly notify opposing counsel of the destruction, loss, or unavailability. Nothing in this Standard requires disclosure that would violate state or federal constitutions or ethical rules.

Standard 11-2.7. Disclosure of intended use inadmissible

The fact that a party has disclosed an intention to offer a specified defense or evidence or to call a specified witness should not be admissible against that party in any civil or criminal case.

PART III. SPECIAL DISCOVERY PROCEDURES

Standard 11-3.1 Counsel should confer regarding substantial, complex, or non-routine discovery

In cases involving substantial, complex, or non-routine discovery, counsel should meet and confer about the nature, volume, and procedures for producing discovery. After conferring, counsel should notify the court of discovery production issues or problems that they reasonably anticipate will significantly affect the case.

Standard 11-3.2 Procedures for Electronically Stored Information

(a) **Definitions.** For purposes of this Standard:

(i) “ESI discovery” is Electronically Stored Information (“ESI”) that is discoverable.

(ii) “Format” is the structure of a file that defines the manner in which data is created, used or saved within a digital file.

(iii) “Media” are devices used to store and transmit electronically stored information, including CDs, DVDs, USB storage devices, and hard drives.

(iv) “Process” or “processing” is any action taken to convert the format of, or otherwise alter a native file. For purposes of this definition, “native file” is a digital file in its native format, including metadata, “native format” is the original format in which a digital file is created by a software application, and “metadata” is structured, system-generated data that provides information about the digital file.

(b) **Objectives of procedures for ESI discovery.** In addition to the objectives listed in Standard 11-1.2, objectives of procedures for ESI discovery include:

(i) To realize the benefits of ESI in discovery;

(ii) To reduce unnecessary conflict and litigation over ESI;

(iii) To avoid unnecessary duplication of time and expense for the parties in the handling and using of ESI;

(iv) To protect a producing party from an unreasonable expenditure of resources, beyond expenditure for its own case preparation, in processing ESI;

(v) To ensure the reasonable usability of ESI;

(vi) To ensure the reasonable integrity of ESI;

(vii) To prevent unauthorized or unlawful dissemination of ESI that is confidential, private, privileged, or sensitive;

(viii) To avoid unnecessary burdens on third parties.

(c) **Format of discovery.**

(i) A party should, where practicable, and subject to subsections (c)(ii), (iii), and (iv), and subsection (e) of this Standard, select a reasonably usable format for production.

(ii) ESI received from third parties should ordinarily be produced in the format in which it was received.

(iii) ESI from the prosecution's or defense's records should ordinarily be produced in the format in which it was maintained.

(iv) Where a producing party elects to process ESI, including processing to create a more usable format, the results of that processing should, unless it constitutes information or material that may be withheld under Standard 11-6.1, be produced in discovery along with the underlying ESI.

(d) **Transmitting discovery.** The party producing ESI discovery should provide the receiving party with a general description of what is being transmitted, and should maintain a record of what was transmitted. Any media should be labeled to identify, at least, the case name and number, the producing party, a general description of what the media contain, and a production date.

(e) **No unreasonable extra cost, time, or burden.** When producing ESI discovery, a party should not be required to take on unreasonable additional processing costs, time, or burden beyond what the party has already incurred or will incur for its own case preparation or discovery production.

(f) **Informal resolution of ESI discovery issues.** Before filing any motion addressing an ESI discovery issue, the moving party should confer with opposing counsel as described in Standard 11-4.3. If resolution of the dispute requires technical knowledge beyond what the parties possess, the parties should involve individuals with sufficient knowledge to understand the technical issues.

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(g) **Security.** The parties should be mindful that ESI raises special security concerns because of its volume and ease of dissemination. Dissemination of ESI discovery should be limited to the parties and individuals necessary to the case. The parties should take reasonable measures to secure ESI against unauthorized access or disclosure. If ESI potentially includes confidential, private, or sensitive information, the parties should enter into an agreement to protect the ESI. Absent agreement, the producing party should seek a protective order from the court before producing the ESI. Any agreement or protective order should specify steps for handling confidential, private, or sensitive ESI materials after the matter has concluded.

(h) **Substantial or complex ESI discovery.**

(i) As soon as practicable after the start of discovery in a case involving substantial or complex ESI, the parties should confer about the nature, volume, and procedures for producing ESI. The parties should discuss the following matters:

(1) What types of ESI exist;

(2) Formats of production and the need, if any, for preservation of data and formats;

(3) Transmission methods;

(4) Confidentiality and security of ESI; and

(5) Any other issues identified by the parties.

(ii) After they confer, the parties should notify the court of unresolved issues concerning ESI.

(iii) The parties should involve individuals with sufficient technical knowledge regarding ESI as needed in the discovery process

(iv) If a party disclosing substantial ESI has created an organizing tool such as a table of contents or index for the ESI, the party should disclose the organizing tool unless it constitutes information or material that may be withheld under Standard 11-6.1.

Standard 11-3.3 Obtaining nontestimonial information from a third party

(a) A party seeking information or material in the possession or control of a third party should, when practicable, make a good faith effort to obtain the information or material from the third party voluntarily.

(b) If information or material in control of a third party cannot be obtained voluntarily, either party may move the court for compulsory process. Upon motion by either party, if the court finds that there is good cause to believe that the information or material sought may be material to the determination of the issues in the case, the court should, in advance of trial, issue compulsory process for the following purposes:

(i) To obtain documents and other tangible objects in the possession of a third party.

(ii) To allow the entry upon property owned or controlled by a third party. Such process should be issued if the court finds that the party requesting entry has met the applicable legal standard.

(iii) To obtain from a third party fingerprints, photographs, handwriting exemplars, or voice exemplars, or to compel a third party to appear, move or speak for identification in a lineup, to try on clothing or other articles, to permit the taking of specimens of blood, urine, saliva, breath, hair, nails, or other materials of the body, to submit to a reasonable physical or medical inspection of the body, or to participate in other reasonable and appropriate procedures. Such process should be issued if the court finds that:

(1) the procedure is reasonable and will be conducted in a manner which does not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual; and

(2) the request is reasonable and comports with applicable law.

(c) The motion and the order should specify the following information where appropriate: the authorized procedure; the scope of participation of the third party; the name or job title of the person who is to conduct the procedure; and the time, duration, place and other conditions under which the procedure is to be conducted.

(d) The court should be sensitive to the interests of third parties in issuing compulsory process. A person whose interests would be affected by the compulsory process sought should have the right and a reasonable opportunity to move to quash or modify the order on the ground that compliance would subject the person to an undue burden, or would require that disclosure of material that is privileged, personal, confidential, otherwise protected from disclosure, or would otherwise be unreasonable.

Standard 11-3.4 Testing or evaluation by experts and preservation of evidence

(a) Upon motion, either party should be permitted to conduct evaluations or tests of physical evidence in the possession or control of the other party which is subject to disclosure. The motion should specify the nature of the test or evaluation to be conducted, the names and qualifications of the experts designated to conduct evaluations or tests, and the material upon which such tests will be conducted. The court may make such orders as are necessary to make the material to be tested or examined available to the designated expert.

(b) Where feasible, the court should condition an order under subpart (a) so as to preserve the integrity of the material to be tested or evaluated.

(c) If the material on which evaluations or tests is requested is contraband material or a controlled substance, the entity having custody of the material may elect to have a representative present during the testing of the material.

(d) If either party intends to destroy or transfer out of its possession any objects or information otherwise discoverable under these standards, the party should give notice to the other party sufficiently in advance to afford that party an opportunity to object or take other appropriate action.

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PART IV. MANNER OF CONDUCTING DISCOVERY

Standard 11-4.1 Manner of performing disclosure

Disclosure may be accomplished in any manner mutually agreeable to the parties. Absent agreement, counsel for the party having the burden of production should:

(a) notify opposing counsel that material and information, described in general terms, may be disclosed, received, inspected, obtained, tested, copied, or photographed during specified reasonable times; and

(b) make available to opposing counsel at the time specified such material and information and suitable facilities or other arrangements for disclosure, receipt, inspection, testing, copying, and photographing of such material and information.

Standard 11-4.2 Motion concerning the manner or place of production.

When, after conferring with opposing as described in Standard 11-4.3, a dispute concerning the manner of place of production, or any other arrangements for disclosing, receiving, inspecting, testing, copying, or photographing material and information has not been resolved between the parties, either party may make a motion seeking an order determining those discovery arrangements.

Standard 11-4.3 Informal resolution of discovery requests or disputes

Before filing any motion addressing a request or dispute, the moving party should confer with opposing counsel in a good-faith effort to resolve the request or dispute. Any motion addressing a discovery request or dispute should include a statement of counsel for the moving party relating that after consultation with the attorney for the opposing party the parties have been unable to resolve the request or dispute without court action.

Standard 11-4.4 Investigations not to be impeded

Attorneys for the parties and their staff should not advise persons (other than the defendant) who have relevant information or material to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor should they otherwise impede opposing counsel's investigation of the case.

PART V. DEPOSITIONS

Standard 11-5.1 Depositions necessary to preserve testimony

(a) Witnesses should testify in person at a hearing or trial whenever possible. After an indictment or information is filed, upon motion of either party, the court should order a deposition taken to preserve the testimony of a prospective witness other than the defendant, if the court finds that there is a substantial likelihood that the witness will be unavailable to testify and that it is necessary in the interest of justice to take the witness's deposition.

(b) In the order for the deposition, the court may also require that any tangible objects, including books, papers, documents, photographs, or electronically stored information, not privileged, be produced by the deponent at the time and place of the deposition.

(c) The court should make provision for the defendant to be present at the taking of the deposition and should make such other provisions as are necessary to preserve the rights of the defendant, including the defendant's right to confront witnesses and right to counsel.

(d) A deposition so taken and any evidentiary material produced at such deposition may later be introduced in evidence, subject to applicable rules of evidence. However, no deposition taken under this section should be used or read in evidence when the attendance of the deposed witness can be procured, except for the purpose of impeaching the testimony of the deponent.

(e) Depositions under this Standard should be taken before a judicial officer under oath, transcribed, preserved by video recording or if that is impracticable by audio recording, and conducted in accordance with such other rules for criminal depositions as a jurisdiction or the judge in the case may impose.

Standard 11-5.2 Depositions necessary to prevent unjust surprise at trial

(a) After an indictment or information is filed, upon motion of either party, the court should order the taking of a deposition upon oral examination of any person other than the defendant, concerning information relevant to the offense charged, but only on a substantial showing that:

(i) the name of the person sought to be deposed has been disclosed to the movant by the opposing party through the exchange of names of witnesses or has been discovered during the movant's investigation of the case;

(ii) other information or materials disclosed to the movant in discovery do not summarize the relevant knowledge of the person to an extent adequate to prevent surprise at trial;

(iii) the person proposed to be deposed has refused to cooperate in giving a voluntary statement, despite reasonable efforts by the moving party; and

(iv) the taking of a deposition is necessary in the interest of justice.

(b) In determining whether to order the taking of a deposition under this Standard, the court should be sensitive to the interests of the person sought to be deposed.

(c) The order issued pursuant to subsection (a) should limit the scope of the deposition to information necessary to avoid unjust surprise at trial.

(d) The defendant may be present at the deposition unless the court orders otherwise for good cause shown.

(e) A deposition under this Standard should be admissible at a trial or hearing only for the purpose of contradicting or impeaching the testimony of the deponent as a witness, unless otherwise stipulated by the parties, ordered by the court, or admissible under governing rules of evidence.

(f) Depositions under this Standard should be taken before a judicial officer under oath, transcribed, and conducted in accordance with such other rules for criminal depositions as a jurisdiction or the judge in the case may impose.

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Standard 11-5.3 Deponent opportunity to quash

A person whose deposition is sought under this Part should have the right to move to quash on the ground that compliance would subject the person to an undue burden, would require the disclosure of material that is privileged, confidential, personal, or otherwise protected from disclosure, or would otherwise be unreasonable.

Standard 11-5.4 Deposition procedures

Depositions under this Part should be taken before a judicial officer under oath, transcribed, and conducted in accordance with such other rules for criminal depositions as a jurisdiction or the judge in the case may impose. Depositions taken under Standard 11-5.2 should also be preserved by video and audio recording unless impracticable.

PART VI. LIMITATIONS ON DISCLOSURE

Standard 11-6.1 Automatic limitations

(a) A party may withhold the following information and material from disclosure under these Standards, unless the party whose obligation it is to disclose intends to offer the information and material at a hearing or trial:

i. Legal research, records, correspondence, reports, or memoranda made by the prosecutor or any defense attorney in the case, or members of their legal or investigative staff, to the extent that they contain the opinions, theories, or conclusions of the prosecutor, the defense attorney, or members of those attorneys' legal or investigative staff;

ii. Personal identifying information of witnesses or victims except information sufficient to contact a witness as required by Standards 11-2.1(c) and 11-2.2(b), (c), and (d);

iii. Any information or material that is protected from disclosure by the state or federal constitutions, statutes, or other law; and

iv. The identity of a witness who provided information to the government in the case under a promise of confidentiality, and whose identity has been kept confidential.

(b) If a party withholds information or material from disclosure on the basis of 11-6.1(a)(iii) or (iv), counsel for the party should disclose to opposing counsel the category of information or material that is withheld, and the basis for the withholding.

(c) Nothing in this Standard permits the withholding of information or material required to be disclosed under other laws or where withholding will infringe the rights of the defendant.

(d) Nothing in this Standard prohibits a party from voluntarily disclosing information or material that is not subject to disclosure under these Standards, if such disclosure is otherwise permitted by law.

Standard 11-6.2 Protective orders.

(a) Upon motion of a party, or of any affected person, or on its own motion, and, except as provided below in subsection (d), after the opportunity for any non-moving party or affected person to be heard, the court may order that information or material otherwise subject to disclosure under these Standards be deferred, conditioned upon compliance with protective measures, or withheld, or make such other protective order as is appropriate.

(b) Before issuing a protective order under subsection (a), the court should balance the potential harm of disclosure to any person or entity against the potential prejudice that the proposed protective order would cause to a party or affected person. The court should issue a protective order only if the potential harm of disclosure is greater than the prejudice caused by the proposed protection, and should impose only those restrictions that are reasonable and necessary in relation to an articulated harm.

(c) Any showing under subsection (b) should, where feasible, be preserved in the record. The court may permit any evidentiary showing for a protective order, or any portion of such showing, to be made in camera (i.e., not in open court) or under seal.

(d) Upon request of a party, the court may permit any showing for a protective order to be made ex parte (i.e., without the other party present or served with the material supporting the showing in whole or in part), but only on a showing that such a procedure is necessary to fulfill the purpose of the requested limitation on discovery. A record should be made of an ex parte proceeding, and upon the entry of an order granting relief following an ex parte showing, all confidential portions of the record should be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

Standard 11-6.3 Redaction

Even if parts of material or information are not subject to disclosure under these Standards, the parts subject to disclosure should be disclosed. The disclosing party should notify the opposing party that parts have been redacted, and those parts should be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal. A redacting party should redact parts not subject to disclosure in a way that does not cause confusion to the opposing party, and if the basis for the redaction is not clear the redacting party should communicate the basis to the opposing party.

Standard 11-6.4 Use of materials

Any materials furnished to an attorney pursuant to these Standards, unless publicly disclosed at a hearing or trial, should be used only for the purposes of performing the attorney's professional obligations or for such other purposes as the parties agree or the court orders, and should be subject to such other terms and conditions as the court may provide.

PART VII. NON-COMPLIANCE AND REMEDIES

Standard 11-7.1 Objectives of discovery remedies

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Objectives of remedies for failure to comply with an applicable discovery obligation include:

- (a) Ensuring prompt and full compliance with discovery obligations;
- (b) Mitigating prejudice to a party, victim, witnesses, or the administration of justice;
- (c) Minimizing disruption to the case and criminal proceeding; and
- (d) Avoiding or remedying infringement of the rights of the defendant.

Standard 11-7.2 Motion to determine compliance

After conferring with opposing counsel as described in Standard 11-4.3, either party may move for a determination from the court that the opposing party's withholding, redaction, or other limitation on disclosure is in violation of an applicable discovery obligation.

Standard 11-7.3 Available remedies

If a party fails to comply with a discovery obligation, the court should take such action as the interest of justice in the case requires. Any action taken should be preserved in the record of the proceedings. Remedies may include:

- (a) cautioning the party that failed to comply;
- (b) ordering compliance with the rule or order;
- (c) ordering additional discovery;
- (d) granting a continuance;
- (e) reconsidering a pretrial detention decision;
- (f) permitting a party to call or recall a witness;
- (g) providing a curative instruction to the jury;
- (h) prohibiting the party from calling a witness or introducing evidence;
- (i) declaring a mistrial; or
- (j) dismissing the charge with or without prejudice.

Standard 11-7.4 Considerations in selecting remedies

(a) Prior to ordering a remedy for failure to comply with an applicable discovery obligation, the court should consider:

- i. the effect of the failure to comply on the opposing party or the administration of justice;
- ii. the reason(s) for the failure to comply;
- iii. the potential for additional failures to comply by the same party in the case;
- iv. the feasibility of mitigating prejudice caused by the failure to comply;

v. prejudice to the interests of the parties, victims, witnesses, or others from a particular remedy; and

vi. any other relevant circumstances.

(b) The court should select the least severe remedy sufficient to accomplish the objectives of this Part.

PART VIII SANCTIONS FOR NON-COMPLIANCE

Standard 11-8.1 Objectives of discovery sanctions

Objectives of sanctions for failure to comply with applicable discovery obligations are:

(a) Punishing blameworthy disregard of discovery obligations; and

(b) Deterring disregard of discovery obligations.

Standard 11-8.2 Imposing sanctions on individuals

After notice and an opportunity for any non-moving party or affected person to be heard, the court may, consistent with its jurisdiction and authority under law, subject an individual responsible for a violation of a discovery obligation in the case to appropriate sanctions upon a finding on the record that the violation was intentional, knowing, or reckless. No sanction should be imposed for an attorney's failure to disclose information or material in the custody of another individual or entity if the attorney has diligently sought to identify and gather the information or material, and has diligently advised the individual or entity of the continuing duty to identify, preserve, and disclose discoverable information and material.

Standard 11-8.3 Imposing sanctions on entities

After notice and an opportunity for any non-moving party or affected person to be heard, the court may, consistent with its jurisdiction and authority under law, subject an office or other entity to appropriate sanctions upon a finding on the record that an entity's policy, custom, or pattern of practice, including the entity's failure to supervise or train, caused a failure to comply with a discovery obligation in the case.

Standard 11-8.4 Sanctions Not to Disrupt Criminal Proceeding

(a) The court should avoid disruption of the case in considering or imposing sanctions.

(b) The court should ordinarily delay considering and imposing sanctions until the conclusion of the case.

Standard 11-8.5 Considerations in Selecting Sanctions

(a) In addition to the requirements of Standard 11-8.2 and 11-8.3, in deciding whether to order a sanction and selecting a sanction for failure to comply with an applicable discovery obligation, the court should consider:

(i) the reason(s) for the failure to comply;

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- 1025 (ii) the effect of the failure to comply on the opposing party or the administration of
1026 justice;
- 1027 (iii) other incidents of failure to comply by the same individual or entity in the case
1028 or in other cases;
- 1029 (iv) the rights of the individual or entity; and
- 1030 (v) any other relevant circumstances.
- 1031 (b) The court should select the least severe sanction sufficient to accomplish the
1032 objectives of this Part.

REPORT

This resolution calls for the enactment of the Fourth Edition of the ABA Criminal Justice Section Standards on Discovery, as a revision to the Third Edition of the black letter standards which were approved in 1994.¹

Overarching Approach of the Proposed Fourth Edition

It will be helpful for the House of Delegates to be aware of the overarching approach to disclosure that is reflected in the proposed Fourth Edition of the Discovery Standards, particularly in Parts I, II, and VI. The aim was to provide a set of Standards that, working together, would facilitate gathering and disclosure of information by both the prosecution and the defense as early as feasible in the life of a case, subject to exceptions through limited automatic exceptions and court-ordered restrictions in appropriate circumstances. To that end, the proposed Fourth Edition differs from the Third Edition by addressing discovery at multiple non-trial stages of a case – including pleas, pretrial hearings, and sentencing – as well as by addressing the timing of discovery in significant detail. At the same time, the Fourth Edition attends more carefully to the ability of the parties – either automatically or by court order – to withhold, delay, or otherwise limit disclosure. The proposed Fourth Edition also aimed to offer greater conceptual and procedural clarity about the role that court-ordered remedies and sanctions should play in the event of discovery violations.

Additionally, the aim was to write Standards that provided clear direction to actors in how to execute their discovery obligations. Hence, to the extent feasible, the proposed Fourth Edition is drafted with an eye to ensuring that a new lawyer picking it up and reading it from beginning to end would understand *what to do* in discovery. These twin goals animated many of the drafting decisions discussed below.

I. Part I – General Principles: Overview of Change from the Third Edition

Part I to the Third Edition is titled “General Principles,” and contains a standard on “objectives,” one on “applicability” of the Standards, and a single definition of the term “statement.” The proposed Fourth Edition moves to the front and substantially expands the “definitions” standard to define many terms used but not defined in the Third Edition. Note in particular that the new definitions of “case,” “defense,” “party,” “possession or control of the defense,” “possession or control of the prosecution,” “prosecution,” “prosecutor,” and “the defense attorney” become important in defining the scope of

¹ Judge Martin Marcus chaired the task force that developed the fourth edition black letter standards, and Jennifer Laurin, law professor at the University of Texas Law School, served as the reporter for the task force. Bruce Green served as chair of the CJS Standards Committee, which began review of the black letter in 2018. CJS Chairs Lucian Dervan and Kim T. Parker oversaw the Council review of the black letter beginning in August 2019 and completed in May 2020. The Criminal Justice Section approved the final revisions to the black letter on May 1, 2020.

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disclosure obligations described in Part II. Proposed Part I also adds several objectives and retains an “applicability” provision in 11-1.3 that is unchanged from the Third Edition.

I. Part II – Discovery Obligations of the Prosecution and Defense

Overview of Change from the Third Edition

Part II of the Third Edition contains three standards: 11-2.1, “Prosecutorial disclosure,” itemizes what the prosecution must disclose to the defense “within a specified and reasonable time prior to trial.” 11-2.2, “Defense disclosure,” itemizes the corollary list for the defense. 11-2.3 outlines procedures for the prosecution to obtain items from “the person of the defendant.”

Proposed Part II reorients the Standards to (1) address the initial task of identifying and gathering discoverable information as a critical part of the “discovery obligations of the prosecution and the defense,” (2) broaden both prosecution and (to a more significant degree) defense disclosure obligations, and (3) attend more thoroughly to timing of disclosure, pegging the discovery clock to the start of criminal proceedings rather than to the time of trial to accelerate the exchange of information, but providing for phased disclosure in stages, all subject to the ability of parties to obtain timing modifications or protective orders. It is worth emphasizing again that the various provisions of Part II are interlocking – and, indeed, work in tandem with other sections of the Standards, including in particular 11-1.1 (definitions) and Part VI (limitations on disclosure).

Point by Point Explanation

- 11-2.1, “Prosecutorial disclosure,” outlines the prosecution’s obligations in identifying, gathering, and disclosing information and material to the defense. Note that throughout, the proposed Standards are deliberate in using the terms “prosecutor” or “prosecution,” as defined in 11-1.1.
 - o Proposed 11-2.1(a) requires “the prosecutor,” as defined in 11-1.1, to begin the process of seeking to identify and gather material that will be discoverable “as soon as practicable” in the case. The most similar analogous provision in the Third Edition appears in 11-4.3, which states that “the obligations of the prosecuting attorney . . . under these standards extend to material and information in the possession or control” of specified individuals, but does not include an express direction to gather. With this different approach, the aim is for the Standards to provide concrete direction that the discovery process includes gathering and should begin as early as possible in the case – even if disclosure will come much later. The obligation to gather extends to everything listed in 11-2.1(c) that is “in the possession or control of the prosecution,” as defined in 11-1.1 (discussed *supra*, at page 2).

- Proposed 11-2.1(b) aims to ensure that the prosecutor make those with discoverable information and material aware of the continuing duty to preserve and disclose it. The provision is similar in sentiment to Third Edition 11-4.3(b), but takes its language from the newly adopted ABA Standard 3-5.4 for the Prosecution Function.
- Proposed 11-2.1(c) sets forth what must be gathered and then disclosed, all subject to the timeframes in 11-2.3. Note that all items have been gathered pursuant to subsection (a), meaning that all are subject to the caveat that they are “in the possession or control of the prosecution.” Note as well that in all cases the obligation to disclose all or any portion of the items listed is subject to the “limitations” on discovery in Part VI, including some automatic limitations and provisions to obtain protective orders. Finally, a consistent change from the Third Edition is that the Task Force chose to treat all disclosures that relate to trial (such as, for example, notification of intent to use prior-act evidence) in a separate standard – proposed 11-2.1(e).
 - 11-2.1(c)(i) is a new category, requiring that the prosecution disclose the date, time, and place of any offense charged.
 - 11-2.1(c)(ii) is a new category, requiring the disclosure of “[a]ll law enforcement records created in the case.” The obligation to disclose documentation of the police investigation in a case is arguably covered by Third Edition 11-2.1(a)(v), requiring disclosure of any “documents . . . which pertain to the case.”
 - 11-2.1(c)(iii) is a category contained in the Third Edition, but it eliminates the requirement that all codefendant statements be disclosed to the defense. Instead, with respect to codefendant statements it creates a more limited obligation: “recorded and oral statements of any codefendant that the government intends to introduce at trial or that contain” exculpatory or impeachment information. Note that a later standard also requires that prior to trial, any statements of jointly tried codefendants must be disclosed.
 - 11-2.1(c)(iv) tracks Third Edition 11-2.1(a)(ii) with the following changes. First, the proposed Fourth Edition aims to separate out distinct items to be disclosed that the Third Edition had combined into a single subsection. Hence, this provision deals with names of all witnesses in the case, and a *later* provision deals with individuals the prosecution intends to call as witnesses. Second, the proposed Fourth Edition eliminated the requirement that addresses be provided, and instead required “information sufficient to contact” a witness, in an effort to accommodate both the need for defense

access to witnesses with the privacy and security interests of witnesses and third parties who might live with them.

- 11-2.1(c)(v) and (c)(vi) are substantively identical to Third Edition 11-2.1(a)(v), but breaks the separate categories of “objects” from the defendant and “objects” from any other source into two provisions. Separately treated in a later provision are “objects” the prosecution intends to use at trial. Both provisions also add “electronically stored information” to the category of “objects.”
- 11-2.1(c)(vii) covers the topic addressed in the first sentence of Third Edition 11-2.1(a)(iv). Disclosure of experts who will testify at trial is separately treated in a later provision. The proposed standard requires disclosure of not just final “reports” but also of all underlying documentation of work done by the expert. Additionally, it requires disclosure upon request of laboratory protocols and manuals, and other documentation related to testing in the case, unless those materials are (as they increasingly are) publicly available.
- 11-2.1(c)(viii) covers the topic addressed in the first clause of Third Edition 11-2.1(a)(vi). Disclosure of criminal records of witnesses who will be called at trial is treated in a separate, later provision. Proposed 11-2.1(c)(viii) is slightly broader than the Third Edition, in that it requires disclosure of any criminal “records,” rather than “convictions,” which would include the possibility of, for example, disclosure of (unsealed) arrest records. Recall that this is subject to the caveat that these records were within the possession or control of the prosecution, as defined in Part I and 11-2.1(a).
- 11-2.1(c)(ix) is substantively identical to Third Edition 11-2.1(a)(vii). (It uses the phrase “pertain to the case” rather than “in relation to the case,” in order to match the phrasing of 11-2.1(c)(vi).)
- 11-2.1(c)(x) addresses the topic of electronic surveillance covered in Third Edition 11-2.1(c). The proposed Fourth Edition revises the standard, in part to bring it within the phrasing style of other proposed standards, in part to enhance the utility of the standard, and in part to address a challenge of scope that is created by the pervasiveness of “electronic surveillance” in contemporary society. The obligation to disclose is limited to information relating to “governmental electronic surveillance” of the defendant “in the case” – again, subject to the caveat that it be in the possession or control of the prosecution.

The proposed standard requires the prosecution to disclose not only the “fact” of surveillance (as in the Third Edition), but also its fruits, including

information concerning any legal authorization of it. Note that this likely does not expand the scope of what the prosecution must disclose, since arguably these items would be covered by the Third Edition's requirement that "objects" concerning the investigation be disclosed. This approach has the advantage, however, of itemization and clarity.

- 11-2.1(c)(xi) is substantively identical to Third Edition 11-2.1(d), rephrased for stylistic consistency with other proposed standards.
- 11-2.1(c)(xii) is a revised version of Third Edition 11-2.1(a)(iii) aiming to make clearer what sorts of relationships it was concerned with, as well as potentially under-inclusive. The proposed standard takes the approach of delineating two separate categories of interest – (1) the existence of any relationship between a witness and the prosecution or participating law enforcement that might create bias or an appearance of bias, and (2) any benefit received by a witness.
- 11-2.1(c)(xiii) is a revised version of Third Edition 11-2.1(a)(viii), which addresses the obligation to disclose favorable evidence. Since publication of the Third Edition in 1996, the ABA has adopted a resolution describing the obligation to disclose favorable evidence to the defense in the following terms:

RESOLVED, That the American Bar Association urges federal, state, territorial and tribal governments to adopt disclosure rules requiring the prosecution to seek from its agents and to timely disclose to the defense before the commencement of trial all information known to the prosecution *that tends to negate the guilt of the accused, mitigate the offense charged or sentence, or impeach the prosecution's witnesses or evidence*, except when relieved of this responsibility by a protective order.²

Proposed 11-2.1(c)(xiii) tracks the italicized portion of Resolution 105D.

- Proposed 11-2.1(d) is a new provision enumerating disclosures that should be made before a "pre-trial hearing at which evidence or witnesses will be presented."
- Proposed 11-2.1(e) is a new provision enumerating disclosures that should be made before trial, in addition to what was already gathered and disclosed

² American Bar Association Resolution 105D (Aug. 8—9, 2011), https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_105d.authcheckdam.pdf.

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pursuant to 11-2.1(c). It largely tracks (and relocates) the requirements of the Third Edition.

- 11-2.1(e)(i) requires, as the Third Edition does in 11-2.1(a)(ii), that a witness list be disclosed.
 - 11-2.1(e)(ii) creates a new category of disclosure – statements of jointly tried codefendants – due to the decision to eliminate across-the-board disclosure of all codefendant statements.
 - 11-2.1(e)(iii) requires, as the Third Edition does in 11-2.1(vi), that criminal convictions of trial witnesses be disclosed.
 - 11-2.1(e)(iv) requires, as the Third Edition does in 11-2.1(iv), that additional material be disclosed concerning an expert who will testify at trial. The last sentence of the proposed standard reflects a change from the Third Edition’s requirement that the prosecution prepare a “written description of the substance of the proposed testimony of the expert.” Proposed 11-2.1(e)(iii) requires a written description only if the substance of the proposed testimony, the opinion, and the basis for it are not contained in a report prepared by the expert.
 - 11-2.1(e)(v) is, to the mind of the Task Force, a more straightforward phrasing of the last sentence of Third Edition 11-2.1(a)(v).
 - 11-2.1(e)(vi) is substantively identical to Third Edition 11-2.1(b).
- Proposed 11-2.1(f) is a new provision permitting the defense to move to require the prosecution to specify “the factual or legal basis for the charges” if such basis is not clear from disclosures provided in discovery.
 - Proposed 11-2.1(g) is a new provision specifying disclosures that should be made prior to sentencing. Note that the provisions essentially track what is required to be disclosed prior to trial.
 - Proposed 11-2.1(h) largely tracks Third Edition 11-4.3(c), rephrased to fit within the framework of proposed 11-2.1. The idea remains the same that if a prosecutor knows that discoverable items exist outside its possession or control, it should tell the defense about those items. Proposed 11-2.1(h) expands the obligation to include items in the possession or control of *any* “third party,” and not just “a government agency not reporting directly to the prosecution.”
- The Department of Justice objected to this Standard as lacking support in case law, and as requiring undue speculation on the part

of the Government.³ Because the obligation is limited to information actually “know[n]” to the prosecutor, the Task Force did not believe that it requires prosecutors to speculate.

- 11-2.2, “Defense disclosure,” outlines the defense obligations in identifying, gathering, and disclosing information and material to the prosecution. Note that throughout, the Task Force was deliberate in using the terms “defense attorney” or “defense,” as defined in 11-1.1.
 - o Proposed 11-2.2(a) is a new standard that outlines discovery that must be provided by the defense to the prosecution before a hearing. It tracks, subsection by subsection, the prosecution’s parallel pre-hearing disclosure obligations – except that it does *not* have a provision parallel to the prosecution’s (constitutionally and ethically rooted) obligation to disclose favorable information.
 - o Proposed 11-2.2(e) deals with the primary disclosure obligation of the defense attorney: the obligation to disclose defenses. The Third Edition requires in 11-2.2(c) only that defenses of alibi and insanity be disclosed, along with witnesses who will be called in support. Just as the proposed Fourth Edition reflects the belief that accelerated prosecution disclosure would enhance adversarial parity and adjudication accuracy as well as encourage appropriate negotiated dispositions of cases, so too does enhanced disclosure from the defense to the prosecution facilitate those goals. Ultimately, the approach taken in the Fourth Edition draft takes its cues from jurisdictions that have fairly substantially broadened defense disclosure obligations, but did not adopt the farthest-reaching approach of jurisdictions like Arizona, Arkansas, Colorado, Hawaii, Illinois, and Minnesota, which require disclosure of *all* defenses to be advanced at trial. Proposed 11-2.2(e) requires disclosure of “any defense of justification or excuse recognized in the jurisdiction, or any defense . . . premised on the mental or physical capacity of the defendant.” The logic of this formulation is that it requires the defense to give notice of defenses with respect to which the defendant is likely to be best-positioned to obtain relevant evidence (defenses as to which the defendant bears the burden or production or that go to mental or physical capacity), but protects the defendant in most instances (other than those involving capacity) from having to disclose information or material concerning elements on which the state bears the burden of production (as well as proof). Proposed 11-2.2(e) retains the constitutionally significant constraint that only defenses to be used at trial must be disclosed. (See *Taylor v. Illinois*, 484 U.S. 400 (1988).)

³ From the Department of Justice representative to the Standards Committee: “We are not aware of any case authority for this requirement, and it is not clear when this requirement would be triggered. The standard would require the government to speculate. Moreover, the government should not be put in a position where we inform a defense attorney that some third-party “might” have material information.”

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Additionally, note that the requirement to disclose witnesses to be called at trial and recorded statements thereof is consistent with Third Edition 11-2.2(a)(i).

- Proposed 11-2.2(f) deals with the defense's pre-trial disclosure obligations. These proposed provisions largely track Third Edition 11-2.2 with the following exceptions.
 - Proposed 11-2.2(f)(iii) and (iv) breaks into two separate standards what is combined in Third Edition 11-2.2(a)(ii) – test results to be introduced at trial, and expert witnesses to be called at trial. The two provisions contain the same revisions already discussed in regard to the parallel provisions under prosecution disclosure: the requirement to disclose underlying data and, if requested and not publicly available, laboratory protocols and related documents, and modification to the requirement of a “written description” of expert testimony.
 - Proposed 11-2.2(f)(v) addresses the subject matter of Third Edition 11-2.2(b) but is revised in two respects. First, the proposed provision would require disclosure of other-act evidence “related” to the defendant so long as it does not reveal the defendant’s testimony (which would raise Fifth Amendment concerns). Second, the proposed provision adds a sentence clarifying that the exception in 11-2.2(f)(i) that permits the defense to withhold witnesses that will be called “for the sole purpose of impeaching a prosecution witness” does not permit the defense to withhold character, reputation, or other-act evidence “intended to be used for the sole purpose” of impeachment.
- Proposed 11-2.2(g) is a new provision, parallel to the prosecution’s pre-sentencing disclosure obligations.
- 11-2.3, “Timing of discovery,” is essentially a new standard in its entirety. The Third Edition addresses timing in standard 11-4.1, which simply calls on jurisdictions to develop time limits under which “discovery is initiated as early as practicable in the process” and completed sufficiently early so that “each party has sufficient time to use the disclosed information adequately to prepare for trial.” The Task Force has proposed a reorientation of timing, (1) away from viewing preparation for trial as the sole benchmark for timely completion, and (2) toward a regime of early, phased, reciprocal disclosures.
 - Proposed 11-2.3(c) provides steps and timeframes for disclosure. The proposed Fourth Edition takes the approach of supplying bracketed numerical timeframes, with the brackets signifying that while individual jurisdictions will need to tailor the recommendations to their particular

procedural framework; the number is an approximate expression of how soon each disclosure should occur. In selecting a ballpark number, the drafter took note of the fact that several jurisdictions have enacted shorter timeframes than the proposed suggested figures, and others have enacted slightly longer timeframes. Compare, e.g., Alabama R. Crim. P. 16.1 (prosecution disclosure within fourteen days of request); Ariz. R. Crim. P. 15.1 (initial disclosures at arraignment and complete disclosure within thirty days of arraignment); Colorado R. Crim. P. 16(b)(1) (as soon as is practicable but not later than 21 days after the defendant's first appearance at the time of or following the filing of charges"); Fla. R. Crim. P. Rule 3.220(b)(1) (within fifteen days of request); Hawaii R. Penal P. 1(e)(1) (within fifteen days of arraignment); Kansas Statute Annotated § 22-3212(f) (twenty-one days after arraignment); New Jersey Ct. R. 3:13-3 (at the time of a pre-indictment plea offer or within seven days of return of indictment); New Mexico Rule 5-501 (within ten days of arraignment). Note that in all events, pursuant to proposed 11-2.3(c)(ix), prior to a guilty plea there must be disclosure of information sufficient to support the charges, and known exculpatory information. The language tracks that which the ABA adopted in the Prosecution Function Standards, Standard 3-5.6(f). Note as well that irrespective of time limits, 11-2.3(c)(i) requires any *exculpatory* information to be given to the defense as soon as practicable after it is gathered.

- Proposed 11-2.4, "The person of the defendant," addresses what is treated in the Third Edition at 11-2.3. The only change of substance appears in subsection (a). While the Third Edition permits some types of examinations of the defendant to be done without a motion, the Task Force was of the view that defense counsel should have an opportunity to be heard whenever the state aims to obtain evidence from or examine the defendant. Therefore, proposed 11-2.3(a) subjects all procedures concerning the person of the defendant to a requirement of a motion, with notice and opportunity to be heard, and a determination by the court.
- Proposed 11-2.5 expresses the sentiment contained in Third Edition 11-4.3(d): the court may, on request, order additional discovery. It adds a standard of "reasonableness" against which to measure such a request.
- Proposed 11-2.6 addresses the continuing obligation to disclose treated in Third Edition 11-4.1(c). It largely tracks the substance of that provision, but rephrases and reorganizes its content in order to clarify the steps that a party should undertake if new discoverable evidence arises. It also creates a new obligation to promptly inform if discoverable information or material has been destroyed, lost, or has become unavailable. Proposed 11-2.6 eliminates reference to a party's obligations after trial. The nature and scope of discovery obligations after the conclusion of criminal proceedings is a matter of increasing legal, ethical, and institutional complexity, and the Task Force viewed the subject as beyond the scope of these Standards.

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- Proposed 11-2.7 is a modified version of Third Edition standard 11-6.2, to clarify that “intention to offer” evidence is not admissible against a party in any legal proceeding.

II. Part III – Special Discovery Procedures

Overview of Change from the Third Edition

Part III to the Third Edition has two provisions for “Special Discovery Procedures.” 11-3.1 addresses obtaining nontestimonial information from third parties, and 11-3.2 addresses “Preservation of evidence and testing or evaluation by experts.” The proposed Fourth Edition largely retains those provisions and adds two additional “special procedures.”

Point by Point Explanation

- Proposed 11-3.1 is a new provision directing parties to meet and confer regarding “substantial, complex, or non-routine discovery,” and to notify the court if the conferral leads them to anticipate issues or problems concerning discovery.
- Proposed 11-3.2 is a new standard drafted to address discovery procedures for Electronically Stored Information (“ESI”). It relies substantially on the Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases, developed by a joint working group of prosecutors, defense lawyers, and court personnel in 2012. The content of 11-3.2 is a distillation of the recommendations and strategies contained in that document.
- Proposed 11-3.3 is substantially identical to Standard 11-3.1 in the Third Edition, with the following changes.
 - Subpart (a) is a new provision that is adapted from Third Edition Standard 11-4.3(d), and which aims to capture the common sense essence of the provision: When third parties have information, everyone should try to get it themselves rather than first seeking court assistance; and at the same time if an opposing party can help, they should.
 - Subpart (b)(iii)(2) is identical to (a)(iii)(2) in the Third Edition *except for* the addition of the language “and comports with applicable law.”
 - Subpart (d) is identical to Third Edition 11-3.1(c) with two exceptions. First, it has the following sentence at the start: “The court should be sensitive to the interests of third parties in issuing compulsory process.” In addition, (d) adds “personal” and “confidential” to the list of attributes that would provide grounds for shielding information from disclosure.

- Proposed 11-3.4 is a reordered version of the Third Edition's 11-3.2, reflecting what the Task Force thought was a more intuitive sequence of ideas.
 - o Proposed (a) is identical to Third Edition (b).
 - o Proposed (b) and (c) are identical to Third Edition (b)(i) & (ii).
 - o Proposed (d) is identical to Third Edition (a).

III. Part IV – Manner of Conducting Discovery

Overview of Change from the Third Edition

Part IV of the Third Edition, titled “Timing and Manner of Disclosure,” contains three standards: 11-4.1 governs “Timely performance of disclosure”; 11-4.2 governs the “Manner of performing disclosure”; and 11-4.3 sets forth the “Obligation to obtain discoverable material.” The proposed Fourth Edition reflects the view that several provisions contained in Part IV were inappropriately located given the aim to write Standards that could more easily be read as “instructions” by a lawyer trying to fulfill discovery obligations led us to group matters of timing and the obligation to gather discoverable material within Part II rather than Part IV.

Point by Point Explanation

- The title of the Part is changed to, “Manner of Conducting Discovery.”
- Proposed 11-4.1, “Manner of performing disclosure,” is identical to 11-4.2 in the Third Edition.
- Proposed 11-4.2, “Motion concerning the manner or place of production,” is a new provision.
- Proposed 11-4.3, “Informal resolution of discovery requests or disputes,” is a new standard, which directs parties to confer before filing discovery motions, and to certify in any discovery motion filed that such conferral has occurred.
- Proposed 11-4.4, “Investigations not to be impeded,” is identical to Third Edition Standard 11-6.3.

IV. Part V – Depositions

Overview of Change from the Third Edition

Part V of the Third Edition contains two Standards, which govern the taking and use of depositions in criminal proceedings. The revisions aim primarily to clarify the existing provisions’ description of the purposes, scope, and limitations on depositions. Nothing

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about the revisions proposed aim to expand the use of depositions in criminal proceedings; if anything, the revised provisions aim to express that depositions (particularly for discovery purposes) are to be quite rare.

Point by Point Explanation

- Proposed 11-5.1, “Depositions necessary to preserve testimony,” tracks (with tweaks) the Third Edition’s 11-5.1. It is renamed to clarify and to express in its title the limited nature of the device (only when “necessary”).
 - 5.1(a) provides the basic standard by which a court should measure a request to take a deposition to preserve testimony. The Third Edition requires a showing that the deposition is necessary to prevent a failure of justice and that a witness is “unable to be present and to testify at trial because of serious illness or other comparably serious reason.” The Third Edition also requires that the witness be “material,” a term that the proposed Fourth Edition avoids throughout because its meaning is so contestable as to be unhelpful, as well as freighted with the baggage of *Brady* doctrine.

The proposed Fourth Edition requires a showing of “unavailability” and that the deposition is “necessary in the interest of justice.” It also eliminates the independent requirement that the witness be “material,” on the logic that a showing that “the interest of justice” requires the deposition should be sufficient. (Compare Fed. R. Cr. P. 15(a) (permitting depositions of any witness under “exceptional circumstances” and in the “interest of justice” without an additional “materiality” showing).

- 5.1(b) is identical to Third Edition 5.1(b).
 - 5.1(c) is nearly identical to Third Edition 5.1(c) but broadens the constitutional rights that might be implicated by the deposition.
 - 5.1(d) is nearly identical to Third Edition 5.1(d), but the final clause excepts only the purpose of “impeaching the testimony of the deponent” rather than excepting “contradicting or impeaching,” in order to eliminate unhelpful redundancy.
- Proposed 11-5.2, “Depositions necessary to prevent unjust surprise at trial,” tracks (with tweaks) the Third Editions’ 11-5.2. It is renamed to clarify and express in its title the limited nature of the device.
 - 5.2(a) tracks Third Edition 5.2(a) with the following changes:
 - It requires a “substantial” showing be made.

- (a)(ii) is rephrased to clarify that if *any* materials disclosed to the movant (not just “writings”) adequately summarize the witness’s knowledge then a deposition should not occur.
- (a)(iii) is rephrased to clarify (but not change meaning).
- Proposed 5.2(b) is a new provision directing the court to be “sensitive to the interests of the person sought to be deposed.” A similar provision is proposed in the context of subpoenas (see below, Part VI).
- Proposed (c) is a new provision further directing the court to limit the scope of inquiry in a deposition to its purpose.
- Proposed (d) reverses the presumption against a defendant’s presence contained in Third Edition 5.2(b).
- Proposed (e) broadens the purpose for which a deposition under this standard may be used, keeping in mind the limitations imposed by the Confrontation Clause. The Third Edition permitted use only for impeachment or as stipulated by the parties, which the Task Force noted was seemingly inadvertently *more* restrictive than the Sixth Amendment and evidence law: The doctrine of forfeiture by wrongdoing, for example, might make a pre-trial statement admissible against a party responsible for the unavailability of the witness. See *Crawford v. Washington*, 541 U.S. 36, 62, 124 S. Ct. 1354, 1370, 158 L. Ed. 2d 177 (2004) (accepting rule of forfeiture by wrongdoing). Proposed (e) adds additionally that it might be used if “ordered by the court” or if it is “admissible under governing rules of evidence.”
- Note that proposed 11-5.2 does not have a subsection that is equivalent to Third Edition 11-5.2(c). This reflects the view that it is anomalous to address the issue of procedure only in regard to discovery depositions. Instead, the proposed Fourth Edition includes a standard to specify minimum procedural safeguards for all depositions (see below). Additionally, note that the right of a proposed deponent to move to quash a deposition order, addressed in Third Edition 11-5.2, receives its own standard in the proposed Fourth Edition, discussed next.
- Proposed 11-5.3 pulls out into its own standard the right of a proposed deponent to quash, reflective of the Task Force’s view that this procedural protection was important enough to merit separate treatment, and that it should extend to both types of depositions. The substance of the standard is nearly identical to Third Edition 11-5.2(e), but it adds “confidential” and “personal” as categories of material that might be shielded.

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- Proposed 11-5.4 specifies minimum procedures for depositions under this Part. It distinguishes between the two types of depositions only in that depositions to preserve testimony should (unless impracticable) be video or audio recorded.

V. Part VI – Limitations on Disclosure

Overview of Change from the Third Edition

Part VI in the Third Edition is titled “General Provisions Governing Discovery.” Three of the standards that it contains deal with restrictions on disclosure in the form of protective orders or other mechanisms: 11-6.1 lists categories of “Restrictions on disclosure” and authorizes a court to further restrict disclosure; 11-6.5 deals separation with “Protective orders,” 11-6.6 governs “Excision,” and 11-6.7 addresses when proceedings concerning restriction on disclosure may occur “in camera.” Other standards in Part VI concern conceptually separate matters: whether non-use of a disclosed item is admissible in evidence (11-6.2), a prohibition on impeding an opposing party’s investigations (11-6.3), and a provision on custody of materials (11-6.4).

The proposed Fourth Edition reflects the view that it is important that Part VI concern only the important topic of what information can, though otherwise discoverable, be shielded from disclosure, and what procedures should govern such a determination. Therefore, the proposed draft relocated all unrelated provisions to other parts of the Standards. Additionally, because of the importance of proposed Part VI as a corollary to the acceleration of disclosure reflected in Part II, it is drafted to give parties and courts as predictable and useful a tool as possible for making determinations about restrictions on discovery. In particular, substantive provisions on disclosure limitations were redrafted with an eye for maximizing clarity and precision.

Point by Point Explanation

- Proposed 11-6.1 spells out “Automatic limitations” on disclosure – categories of information that may be withheld by parties without seeking leave of the court. Subdivision (a)(i) is identical to Third Edition 11-6.1(a). Subdivision (a)(ii), excluding personal identifying information, is a new provision. Subdivision (a)(iii) is identical to the second clause of Third Edition 11-6.1(d). Subdivision (iv) is intended to be substantively the same as Third Edition 11-6.1(b). Subdivision (b) adds a new provision requiring that a withholding party disclose the category of any information withheld and the basis for the withholding. Providing this information enables the opposing party to determine whether to lodge objections to the withholding. The statement of “basis” is intended to be brief and categorical rather than substantively justificatory; simply providing the category of information should be sufficient - for example, “prosecutor’s notes withheld under (a)(i).”

Note that all restrictions are subject to the caveat that information in these categories must be disclosed if “the party whose obligation it is to disclose intends to offer the information and material at a hearing or trial.” Additionally, all are subject to the caveat

that withholding is not permitted if doing so would infringe the defendant's constitutional rights.

- Proposed 11-6.2 addresses "Protective Orders," and aims to spell out in a clearer order and in more detail what procedures govern these devices.
 - o Proposed 11-6.2(a) first specifies that a party, any "affected person," or the court on its own motion may request that disclosure be restricted in any "appropriate" manner, reflecting the view that the Standards should clarify that individuals other than "a party" may request the order, and that it is helpful to enumerate a range of options for restriction in order to encourage courts and parties to use the most limited mechanism of protection that will accomplish the protective goal.
 - o Proposed 11-6.2(b) supplies the standard that the court should utilize to decide a protective order motion, rejecting the existing formulation in 11-6.5 that an order issue "for cause," and instead directing the court to balance the harms from unlimited disclosure against the harms from the requested restriction, and to "impose only those restrictions that are reasonable and necessary in relation to an articulated harm." This formulation is consistent with many decisions interpreting the "good cause" standard contained in Federal Rule 16(d). Significantly (and as Commentary can discuss), the Standard as drafted does not require a threshold showing of a "specific" or "particularized" harm, but rather contemplates that the level and specificity of "potential harm" required to be shown will vary with the level of "potential prejudice" generated by the precise manner of restriction proposed; lighter restrictions (e.g., deferred discovery or conditions on use) could be justified by lower or less specific harm potential than, say, outright withholding. See, e.g., *United States v. Dixon*, 355 F. Supp. 3d 1, 4 (D.D.C. 2019) ("[T]he level of particularity required depends on the nature and type of protective order at issue.").
 - o Proposed 11-6.3(c) specifies that determination of a protective order should be on the record when feasible, but may be made "in camera," which the standard defines as "not in open court." Proposed 11-6.3(d) outlines narrow circumstances when a protective order proceeding may be made ex parte (defined as "without the other party present").
- Proposed 11-6.3 addresses "Redaction," renamed from the Third Edition's "Excision" standard (11-6.6). The proposed standard aims to clarify the language of the Third Edition, and also adds a statement that a redacting party should avoid confusion in redaction and should communicate the basis for redaction if such basis is not otherwise clear.
- Proposed 11-6.4 addresses the topic of Third Edition 11-6.4, "Custody." The proposed standard is renamed, reflecting the actual import of its substance: the

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use of materials disclosed. The proposal also expands the legitimate uses of discovery. Whereas the Third Edition limits an attorney's use of disclosed materials to only "preparation and trial of the case," the proposed standard arguably better reflects the realities of practice and appropriate professional norms. Proposed 11-6.4 limits use to "performing the attorney's professional obligations or for such other purposes as the parties agree or the court orders."

VI. Parts VII and VIII

Overview of Change from the Third Edition

The Third Edition of the Standards deals with the consequences for violation of a discovery rule or order in Part VII, which contains a single provision titled, "Sanctions." The proposed Fourth Edition aims both to reconceive and to strengthen the Fourth Edition's approach to discovery violations. In reconceiving, the primary goal was to introduce a terminological and conceptual distinction between a "remedy" – which should respond to and repair harm done in a criminal proceeding by a discovery violation – and a "sanction" – which should be visited only on a blameworthy actor and aim at prospective consequences. The drafters were particularly concerned with the disruption that can occur in a criminal proceeding – including consumption of time and damage to professional relationships – when questions of blame and responsibility for discovery errors are litigated in the course of the case. In separating remedies from sanctions, and in specifying that sanctions should ordinarily be considered, if at all, only at the conclusion of the case (proposed 11-8.3), the proposed Fourth Edition seeks to avoid that disruption. Finally, the proposed Fourth Edition aims to strengthen judges' power to respond to discovery violations by providing clearer guidance about what a response should aim to achieve and the considerations that should go into the determination of an appropriate remedy or sanction. The proposed Fourth Edition also takes the step of explicitly authorizing the procedure of sanctioning an entity, separate and apart from an individual.

Conclusion

The updated Standards represents thoughtful and well-crafted work of the Discovery Task Force. The Standards have gone through a rigorous review by the ABA CJS Standards Committee, and two readings by the CJS Council. The Fourth Edition of the ABA Criminal Justice Standards on Discovery should be enacted by the House of Delegates.

Respectfully submitted,

Kim T. Parker
Chair, Criminal Justice Section
August 2020

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Kim T. Parker, Chair, Criminal Justice Section

1. Summary of the Resolution(s). The Resolution adopts the fourth edition black letter standards of the ABA Standard for Criminal Justice: Discovery.
2. Approval by Submitting Entity. The Criminal Justice Section Council approved the standards on May 1, 2020.
3. Has this or a similar resolution been submitted to the House or Board previously? The fourth edition supplants the third edition of the Discovery Standards that were approved by the House of Delegates in August 1994.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? n/a
5. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a
6. Status of Legislation. (If applicable) n/a
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, commentary to the standards will be drafted by the Discovery Task Force reporter, Jennifer Laurin, and reviewed by the CJS Standards Committee. Both the black letter standards and commentary will be published in soft cover and e-book formats as part of the multi-volume ABA Standards for Criminal Justice.
8. Cost to the Association. (Both direct and indirect costs) None. Costs are borne by the Criminal Justice Section.
9. Disclosure of Interest. (If applicable) n/a
10. Referrals.
 Judicial Division
 Section of Business Law
 Section of Litigation
 Solo, Small Firm and General Practice Division
11. Name and Contact Information.)

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EXECUTIVE SUMMARY1. Summary of the Resolution.

The resolution urges the adoption of the fourth edition black letter standards of the ABA Standards on Criminal Justice: Discovery.

2. Summary of the issue that the resolution addresses.

The third edition of the Discovery Standards was adopted by the ABA in August 1994. These standards update the work of the third edition.

3. Please explain how the proposed policy position will address the issue.

The updated black letter standards on discovery will assist criminal law practitioners and courts as part of the overall ABA Standards on Criminal Justice. The Standards are a 60-year project of the Section to provide aspirational standards to the legal profession.

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

None have been identified except as indicated in the Report so that there is an understanding of the discussion of particular issues and resulting position.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association amends Rule 1.8(e) and related
 2 commentary of the ABA Model Rules of Professional Conduct as follows (insertions
 3 underlined, deletions ~~struck through~~):

4 **Model Rule 1.8: Current Clients: Specific Rules**

5 ***

6 (e) A lawyer shall not provide financial assistance to a client in connection with pending
 7 or contemplated litigation, except that:

8
 9 (1) a lawyer may advance court costs and expenses of litigation, the repayment of
 10 which may be contingent on the outcome of the matter; ~~and~~

11
 12 (2) a lawyer representing an indigent client may pay court costs and expenses of
 13 litigation on behalf of the client; and

14
 15 (3) a lawyer representing an indigent client pro bono, a lawyer representing an
 16 indigent client through a nonprofit legal services or public interest organization and
 17 a lawyer representing an indigent client through a law school clinical or pro bono
 18 program may provide modest gifts to the client for food, rent, transportation,
 19 medicine and other basic living expenses if financial hardship would otherwise
 20 prevent the client from instituting or maintaining the proceedings or from
 21 withstanding delays that put substantial pressure on the client to settle. The legal
 22 services must be delivered at no fee to the indigent client and the lawyer:

23
 24 (i) may not promise, assure or imply the availability of such gifts prior to
 25 retention or as an inducement to continue the client-lawyer relationship after
 26 retention;

27
 28 (ii) may not seek or accept reimbursement from the client, a relative of the
 29 client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such financial assistance to clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

Comment

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client through a nonprofit legal services or public interest organization and a lawyer representing an indigent client through a law school clinical or pro bono program may give the client modest gifts if financial hardship would otherwise prevent the client from instituting or maintaining pending or contemplated litigation or administrative proceedings or from withstanding delays that would put substantial pressure on the client to settle. Gifts permitted under paragraph (e)(3) include modest contributions as are reasonably necessary for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. A gift is allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to

70 provide financial assistance to clients beyond court costs and expenses of litigation in
71 connection with contemplated or pending litigation or administrative proceedings.
72

73 [13] Financial assistance may be provided pursuant to paragraph (e)(3) even if the
74 representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3)
75 does not permit lawyers to provide assistance in other contemplated or pending litigation
76 in which the lawyer may eventually recover a fee, such as contingent-fee personal injury
77 cases or cases in which fees may be available under a contractual fee-shifting provision,
78 even if the lawyer does not eventually receive a fee.

79 [No other changes proposed in the commentary to this Rule except renumbering
80 succeeding paragraphs.]

REPORT

I. Introduction

The Standing Committee on Ethics and Professional Responsibility (SCEPR) and the Standing Committee on Legal Aid and Indigent Defendants (SCLAID) propose adding a narrow exception to Model Rule 1.8(e) that will increase access to justice for our most vulnerable citizens. Rule 1.8(e) forbids financial assistance for living expenses to clients who are represented in pending or contemplated litigation or administrative proceedings. The proposed rule would *permit* financial assistance for living expenses *only* to indigent clients, *only* in the form of gifts not loans, *only* when the lawyer is working pro bono without fee to the client, and *only* where there is a need for help to pay for life's necessities. Permitted gifts are modest contributions to the client for food, rent, transportation, medicine, and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. Similar exceptions, variously worded, appear in the rules of eleven U.S. jurisdictions.

The proposed rule addresses a gap in the current rule. Currently, lawyers

- may provide financial assistance to any transactional client;
- may invest in a transactional client, subject to Rule 1.8(a);
- may offer social hospitality to any litigation or transactional client as part of business development; and
- may advance the costs of litigation with repayment contingent on the outcome or no repayment if the client is indigent.

The only clients to whom a lawyer may not give money or things of value are those litigation clients who need help with the basic necessities of life. Discretion to give indigent clients such aid is often referred to as “a humanitarian exception” to Rule 1.8(e).¹

Supporting a humanitarian exception to Rule 1.8(e), one pro bono lawyer wrote: “There are plenty of situations in which a small amount of money can make a huge difference for a client, whether for food, transportation, or clothes.”² Another wrote: “I

¹ See, e.g., Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 GEO. J. LEGAL ETHICS 39, 40 (2015) (discussing the desirability of a humanitarian exception to Model Rule 1.8(e)); Model Rule 1.8(e) “is at odds with the legal profession’s goal of facilitating access to justice. [It] bars lawyers from assisting their low-income litigation clients with living expenses, such as food, shelter and medicine, though such clients may suffer or even die while waiting for a favorable litigation result.” The rule should be changed “[b]ecause of its indifference to the humanitarian or charitable impulses of lawyers and its harsh effect on indigent clients”); Cristina D. Lockwood, *Adhering to Professional Obligations: Amending ABA Model Rule of Professional Conduct 1.8(e) to Allow for Humanitarian Loans to Existing Clients*, 48 U.S.F. L. REV. 457 (2014). See also Florida Bar v. Taylor, 648 So. 2d 1190, 1192 (Fla. 1994) (giving an indigent client a used coat and \$200 is an “act of humanitarianism”).

² Statement of Legal Services Corporation (“LSC”) Program Executive Director in connection with a broad but anecdotal survey conducted by the National Legal Aid and Defender Association (NLADA) for the

hate that helping a client . . . is against the rules.”³ And another: “Legal aid attorneys grapple with enough heartache and burdens that they should not also have to worry about whether a minor gift—an expression of care and support for a client in need—could violate the rule.”⁴

Model Rule 1.8 cmt. [10] gives two reasons for the prohibition against lawyers financially assisting litigation clients. First, it prevents lawyers from having “too great a financial stake in the litigation.” Second, allowing assistance would “encourage clients to pursue lawsuits that would not otherwise be brought.”

Regarding the first reason, because the assistance permitted by the proposed rule must be in the form of a gift, not a loan, there is no interest in recoupment that could affect the lawyer’s advice. Further, the amounts will often be small compared to the sums lawyers may now advance for litigation costs, which are repayable from a client’s recovery and therefore could affect the lawyer’s judgment.

Regarding the second reason—that financial assistance will “encourage... lawsuits that might not otherwise be brought”—in the limited circumstances the amendment describes, that outcome, if it occurs, furthers ABA Policy. By enabling the most financially vulnerable clients to vindicate their rights in court within the proposed rule’s restrictions, the amendment ensures equal justice under law, a core ABA mission.⁵

Additional support for this conclusion is found in legislation—for example, in civil rights and anti-discrimination statutes that empower courts to award counsel fees to the prevailing plaintiff. The policy behind this legislation is to facilitate access to courts, not discourage it.⁶ Lawyers in turn advance the legislative purpose if they can financially help their indigent clients with living expenses while a case is pending.

Support is also found in two Supreme Court opinions recognizing the social value of court access. In another context, Justice Hugo Black wrote “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”⁷ Nor can there be equal justice when the ability to bring and prosecute a case—to get a trial at all—is lost because of extreme poverty.

ABA Standing Committee on Legal Aid and Indigent Defendants (“SCLAID”), on file with SCLAID (hereinafter, “SCLAID Survey”). See also Schrag, *supra* note 1 at 40.

³ SCLAID Survey, *supra* note 2, at 3.

⁴ *Id.* at 1.

⁵ See ABA MISSION STATEMENT, https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited May 4, 2020). Many ABA policies support equal justice. See, e.g., ABA CONSTITUTION Art. 10, sec. 10.1 (creation of the Civil Rights and Social Justice Section and Criminal Justice Section); ABA CONSTITUTION Art. 15 (creation of the ABA Fund for Justice and Education); ABA BY-LAWS sec. 31.7 (creation of SCLAID).

⁶ See *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (“The purpose of § 1988 is to ensure ‘effective access to the judicial process’ for persons with civil rights grievances.” H.R. REP. NO. 94-1558, p. 1 (1976)).

⁷ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

Nearly thirty years later, Justice Byron White rejected the argument that restrictions on lawyer advertising were justified by the goal of not “stirring up litigation.” Justice White wrote:

But we cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy: ‘we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action’. . . . That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride.⁸

The amendment SCEPR and SCLAID propose is client-centric, focused on the most vulnerable populations, and protects the ability of indigent persons to gain access to justice where they might otherwise be foreclosed as a practical matter because of their poverty.

II. Support for the Proposed Rule in the Nonprofit Community

SCEPR and SCLAID have received support from the Society of American Law Teachers (SALT), the National Legal Aid and Defender Association (NLADA), approximately sixty lawyers in nonprofit organizations and legal services and legal aid offices, including the Legal Aid Society in NYC—an office of more than 1200 lawyers, and clinical faculty at law schools nationwide.⁹ Further, in a letter to the ABA Board of Governors, the Association of Pro Bono Counsel (“APBCo”), a membership organization of nearly 250 partners, counsel, and practice group managers who run pro bono practices on primarily a full-time basis at more than 100 of the country’s largest law firms wrote:

APBCo supports the effort to modify the Model Rules and permit pro bono lawyers to help their indigent clients meet basic human necessities, such as food, rent, transportation and medicine during the course of the representation. In the context of pro bono representation, none of these kinds of charitable gifts present any concerns raised by the Model Rule, which is designed to prevent lawyers from providing financial assistance to clients in order to subsidize lawsuits or administrative proceedings in a way

⁸ *Zauderer v. Disciplinary Counsel*, 471 U.S. 626, 643 (1985) (*citing* *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 (1977)).

⁹ See (i) SALT email of April 24, 2020, (ii) NLADA Memo of April 23, 2020, and (iii) emails dated April 10 and April 11, 2020 from Daniel L. Greenberg, Special Counsel for Pro Bono Initiatives at Schulte, Roth, & Zabel and former member of SCLAID, and Barbara S. Gillers, SCEPR Chair, to public interest lawyers and law school clinicians, and responses, on file with SCEPR. SALT is one of the largest associations of law professors in the United States.

that encourages clients to pursue lawsuits that might not otherwise be brought and gives lawyers a specific financial stake in the litigation. Neither pro bono lawyers nor their firms profit from public interest representation; the kinds of limited financial assistance contemplated by the proposed amendment will in no way violate the intended policy behind the Rule.¹⁰

III. Background

Model Rule of Professional Conduct 1.8(e) was adopted in 1983.¹¹ Its prohibition against financial assistance in connection with litigation is derived from the common law prohibitions against champerty and maintenance.¹² As originally defined, maintenance is “improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse.”¹³ Champerty is “a specialized form of maintenance in which the person assisting another’s litigation becomes an interested investor because of a promise by the assisted person to repay the investor with a share of any recovery.”¹⁴

Payments or loans for litigation costs and expenses are allowed under the rule “because [they] are virtually indistinguishable from contingent fees and help ensure access to the courts.”¹⁵ Comment [10], which was added in 2001 on the recommendation of the Ethics 2000 Commission,¹⁶ makes clear that “court costs and litigation expenses [include] the expenses of medical examination and the costs of obtaining and presenting evidence”.¹⁷ Litigation expenses also typically include payments for experts, translators, court reporters, medical examinations connected to the merits or remedies, mailing, and photocopying.¹⁸ However, living expenses in connection with pending or contemplated litigation, e.g. for food, rent, and other basic necessities, were never permitted by the rule

¹⁰ See Letter, April 14, 2020, APBCo to the ABA Board of Governors, on file with SCEPR.

¹¹ ART GARWIN, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 at 193 (2013).

¹² See MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. [16] (2019) (paragraph (e) “has its basis in common law champerty and maintenance”); Cristina D. Lockwood, *supra* note 1 at 466 (“the restrictions in Rule 1.8(e) were adopted to protect the poor by incorporating rules against champerty and maintenance”); Utah State Bar, Advisory Op. 11-02 (2011) (Rule 1.8(e) is “derived from the common law prohibition of champerty and maintenance”) (cite omitted); Mich. State Bar Advisory Opinion RI-14 (1989) (Rule 1.8(e) “is the result of the common law rules against champerty and maintenance”). See also John Sahl, *Helping Clients With Living Expenses; “No Good Deed Goes Unpunished”*, 13 No. 2 PROF. LAW. 1 (Winter 2002) (common law doctrines of champerty and maintenance influenced the ABA Rules against financial assistance to clients).

¹³ STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 30 (11th ed. 2018) (quoting *In re Trepca Mines, Ltd.*, [1963] 3 All E.R. 351 (C.A.)).

¹⁴ CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.13 at 940 (1986) (cites omitted); GILLERS, *supra* note 13 at 630 (“[c]hamperty [is] the unlawful maintenance of a suit, where a person without an interest in it agrees to finance the suit, in whole or in part, in consideration for receiving a portion of the proceeds of the litigation” (quoting *Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997)); *In re Primus*, 436 U.S. 412, 424 n. 15 (1978) (champerty is “maintaining a suit in return for a financial interest in the outcome”; maintenance is “helping another prosecute a lawsuit”).

¹⁵ MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. [10] (2019).

¹⁶ See GARWIN, *supra* note 11 at 207.

¹⁷ MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. [10] (2019).

¹⁸ N.Y. City Bar, Formal Op. 2019-6 at 3 (2019).

because of concerns rooted in traditional common law prohibitions on champerty and maintenance.

Modern American applications of the doctrines of champerty and maintenance are varied and in some jurisdictions are quite limited.¹⁹ Moreover, courts and commentators have recognized that these doctrines “can be used abusively—to deny unpopular litigants access to the courts to vindicate constitutional rights. They can also make it harder for persons with even mundane claims to go to court”²⁰ Some bar committees have rejected the essential justification for the doctrines.²¹ The SCLAID Survey demonstrated that the prohibition on living expenses is especially harsh on indigent clients for whom even small financial burdens can pose significant barriers to initiating, participating in, and completing litigation.²² For all of these reasons, and those explained below, the prohibition on financial assistance should no longer apply in the limited circumstances and the types of representations covered by the proposed rule.

IV. Analysis

A. The Current Rule

Model Rule of Professional Conduct 1.8(e)(1) and (2) strictly limit financial assistance to clients in pending or contemplated litigation. Only court costs and litigation expenses are permitted. The Rule reads: “A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.”²³

Comment [10] explains why Rule 1.8(e) permits financial assistance for litigation expenses and court costs only: “Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, *because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.*”²⁴ The Comment continues: “[L]ending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence” is permitted “because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.

¹⁹ REPORT TO THE PRESIDENT BY THE NEW YORK CITY BAR ASSOCIATION WORKING GROUP ON LITIGATION FUNDING 5-8 (Feb. 28, 2020) (“[t]he extent to which the United States has adopted and has continued to enforce prohibitions [based on champerty and maintenance] varies by jurisdiction”) (cites omitted).

²⁰ GILLERS, *supra* note 13 at 631 (cites omitted).

²¹ See, e.g., Utah State Bar, Advisory Op. 11-02, *supra* note 12 at 4 (permitting “small charitable gifts” under Utah RPC 1.8(e), which is “more permissive” than M.R. 1.8(e); observing that “[t]he original goal of not stirring up litigation is no longer a justification for [the rule]”) (cites omitted)).

²² See Memo from SCLAID to the SCEPR dated June 14, 2016, on file with SCEPR [hereinafter, “SCLAID Memo”].

²³ MODEL RULES OF PROF’L CONDUCT R. 1.8(e) (2019).

²⁴ MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. [10] (2019) (emphasis added).

Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.”²⁵

B. The Proposed Rule

The proposed rule adds a new exception, 1.8(e)(3). The new exception permits lawyers representing poor people pro bono or through certain organizations or programs to contribute to the living expenses of their indigent clients. As further explained below, the contributions must be gifts not loans for basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the litigation or administrative proceedings or from withstanding the delays that put substantial pressure on the client to settle. The assistance is permitted even if the representation is eligible for an award of attorney’s fees under a fee-shifting statute, for example, the Civil Rights Attorney’s Fees Award Act.²⁶ The lawyer may not promise the assistance in advance, seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client, or advertise its availability. The new provision reads:

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client through a nonprofit legal services or public interest organization and a lawyer representing an indigent client through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. The legal services must be delivered at no fee to the indigent client and the lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide financial assistance to clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

²⁵ *Id.*

²⁶ 42 U.S.C.A. § 1988 (“[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 12361 of Title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs [with exceptions]”).

SCEPR and SCLAID propose new Comments [11], [12], and [13] to explain key elements of the new exception.

Comment [11]

New Comment [11] offers guidance on covered expenses and permitted amounts. Below, this Report first sets out the text of new Comment [11] and then discusses its key elements. The text reads:

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client through a nonprofit legal services or public interest organization and a lawyer representing an indigent client through a law school clinical or pro bono program may give the client modest gifts if financial hardship would otherwise prevent the client from instituting or maintaining pending or contemplated litigation or administrative proceedings or from withstanding delays that would put substantial pressure on the client to settle. Gifts permitted under paragraph (e)(3) include modest contributions as are reasonably necessary for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4

Living Expenses

Comment [11] gives examples of permitted assistance: “Gifts permitted under paragraph (e)(3) include modest contributions as are reasonably necessary for food, rent, transportation, medicine and similar basic necessities of life.” This would include reasonable contributions for meals, clothing, transportation, housing and similar basic necessities. Examples from SCLAID include small amounts for moving to avoid eviction, bus fare, meals, clothes to go to court, and groceries, including cleaning supplies and toilet paper.²⁷

Amounts

The Rule and the Comments permit contributions of modest and reasonable amounts. This follows seven of the eleven jurisdictions that have already adopted a humanitarian exception.²⁸ The flexibility gives lawyers room to decide amounts based on

²⁷ See SCLAID Survey, *supra* note 2.

²⁸ See D.C. Rule of Prof'l Conduct 1.8(d) (a lawyer may “pay or otherwise provide . . . financial assistance which is *reasonably necessary* to permit the client to institute or maintain the litigation or administrative proceedings”) (emphasis added); Minn. Rule of Prof'l Conduct 1.8(e)(3) (a lawyer may guarantee a loan “*reasonably needed* to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship”; prohibits promises of assistance prior to retention and requires that client remain liable for repayment without regard to the

the cost of living in their jurisdictions and other factors. Rent assistance and food costs in New York City, for example, would differ from that in a rural area. Lawyers routinely make judgments about reasonableness. See, e.g., Model Rule 1.4(a)(2) (lawyers must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished”); Model Rule 1.4(a)(3) (lawyers must “keep the client reasonably informed about the status of the matter”); Model Rule 1.4(a)(4) (lawyers must “promptly comply with reasonable requests for information”); Model Rule 1.5 (lawyers must “not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses”); and Model Rule 1.6 (limiting the disclosure of confidential information “to the extent the lawyer reasonably believes necessary”); see also, Model Rule 1.0(h), (i) and (j) (defining “reasonable,” “reasonably,” “reasonable belief” and “reasonably should know”).

No Definition of “Indigent”

The new Rule and Comments do not add a definition of “indigent.” None is needed. The word “indigent” has been in Rule 1.8(e) since 1983. It was also in the predecessor rule, DR 5-103(B). SCEPR is aware of no problems in applying this term. Further, the Model Rules already address obligations toward the indigent, the poor, and “persons of limited means.”²⁹ Additionally, SCEPR opinions address lawyers’ obligations toward the “indigent.”³⁰ Webster’s Dictionary defines (1) “indigent” as “suffering from indigence” and “impoverished” and (2) “indigence” as (3) “a level of poverty in which real hardship and deprivation are suffered and comforts of life are wholly lacking” and (4) “impoverished.”

outcome of the litigation) (emphasis added); Miss. Rule of Prof’l Conduct 1.8(2)(2) (permits a lawyer to advance (i) “*reasonable* and necessary” (a) “medical expenses associated with treatment for the injury giving rise to the litigation” and (b) “living expenses incurred”; client must be in “dire and necessitous circumstances”; other limitations and conditions apply) (emphasis added). Mont. Rule 1.8(e)(3) (a lawyer may guarantee a loan from certain financial institutions “for the sole purpose of providing basic living expenses;” the loan must be “*reasonably needed* to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship;” client must remain liable for repayment without regard to the outcome; prohibits promises or advertisements before retention) (emphasis added); N.D. Rule of Prof’l Conduct 1.8(e)(3) (a lawyer may guarantee a loan “*reasonably needed* to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship;” client must remain liable for repayment without regard to the outcome; no promise of assistance before retention) (emphasis added); Tex. Rule of Prof’l Conduct 1.08(d)(1) (a lawyer may “advance or guarantee . . . *reasonably necessary* medical and living expenses, the repayment of which may be contingent on the outcome of the matter”) (emphasis added); Utah Rule of Prof’l Conduct 1.8(e)(2) (a lawyer representing an indigent client may “pay . . . minor expenses *reasonably connected* to the litigation”) (emphasis added). Only *one* of the eleven jurisdictions incorporates a dollar amount: Mississippi. See Miss. Rule of Prof’l Conduct 1.8(e)(2) (Permitted expenses “shall be limited to \$1,500 to any one party by any lawyer or group or succession of lawyers during the continuation of any litigation unless [the Standing Committee on Ethics of the Mississippi Bar approves a greater amount.]”).

²⁹ MODEL RULES OF PROF’L CONDUCT R. 6.1 cmt. [3] provides: “Persons eligible for legal service [that meet Rule 6.1] are those who qualify for participation in programs funded by the [LSC] and those whose incomes and financial resources are slightly above guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women’s centers and food pantries that serve those of limited means.”)

³⁰ See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-441 (2006) (discussing the ethical obligations of lawyers “who represent *indigent* persons”) (emphasis added).

Synonyms include “needy, necessitous, and impoverished.”³¹ Finally, lawyers covered by the exception generally serve only the poor and the most economically disadvantaged.³²

Comment [12]

Comment [12] contains safeguards against conflicts and abuse by prohibiting lawyers from (i) using assistance to lure clients, (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client, and (iii) advertising the availability of assistance. It provides:

[12] The paragraph (e)(3) exception is narrow. A gift is allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide financial assistance to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

New Comment [13]

New Comment [13] underscores that contributions may be made even if the representation is eligible for fees under a fee-shifting statute but not in connection with contingent-fee personal injury cases or other specified matters. It reads:

[13] Financial assistance may be provided pursuant to paragraph (e)(3) even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

³¹ See ROGET’S INTERNATIONAL THESAURUS § 836.8 (3rd ed.). See also THE COMPACT OXFORD ENGLISH DICTIONARY, NEW EDITION, SECOND EDITION (1994) (“indigent” means “destitute,” “lacking in the necessities of life,” “in needy circumstances,” “characterized by poverty,” “poor,” “needy”).

³² See, e.g., Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* n.4 (Sept. 2009), <https://mlac.org/wp-content/uploads/2015/08/Documenting-the-Justice-Gap.pdf> (“LSC establishes maximum income levels for persons eligible for civil legal assistance . . . the maximum level is equivalent to 125 percent of the federal poverty guidelines”). For poverty guidelines, see U.S. Department of Health & Human Services, *Poverty Guidelines 2020* (2020), <https://aspe.hhs.gov/poverty-guidelines>. See also ABA FINDLEGALHELP.ORG FREQUENTLY ASKED QUESTIONS, https://www.americanbar.org/groups/legal_services/flh-home/flh-faq/ (last visited May 4, 2020) (clients of public defenders are “indigent”).

C. Proposed 1.8(e)(3) Does Not Present the Ethical Risks that 1.8(e)(1) and (2) Address

Policy Against “Encouraging Litigation”

As noted earlier, Model Rule 1.8(e) prohibits living expenses “*because [permitting them] would encourage clients to pursue lawsuits that might not otherwise be brought. . .*”³³

The proposed amendment could result in a poor client being able to bring and maintain a lawsuit that would not otherwise be brought or that would be settled quickly if brought because of the client’s adverse financial circumstances. SCEPR and SCLAID deem this a worthy objective. It reflects the view that legal ethics rules should not impede a poor client’s access to the courts, as the current rule does, where the conditions described in the proposed rule are present. Furthermore, as noted earlier, in public interest fee-shifting cases the proposed rule will reinforce the legislative goal of facilitating rather than impeding court access. It would frustrate that goal and achieve no benefit if the amendment allowed financial assistance to indigent clients only if a lawyer were willing to forego a court-ordered fee under a fee-shifting statute.

Comment [10] is *not* addressed to the problem of frivolous litigation, as some analysts seem to suggest.³⁴ Other rules do that. Model Rule 3.1 makes clear that a lawyer “shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is basis in law and fact for doing so *that is not frivolous*. . . .”³⁵ Rule 11 of the Federal Rules of Civil Procedure requires lawyers to certify, *inter alia*, that court filings are not “presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation . . . [and that] claims, defenses, and other legal contentions are warranted by existing law or by a *nonfrivolous* argument for extending, modifying, or reversing existing law or for establishing new law.”³⁶ Many jurisdictions have similar court rules and other mechanisms to prevent frivolous litigation.³⁷

Whatever the relationship between financial assistance and frivolous litigation in other contexts, however, it is not credible that a lawyer working *without fee* would assist

³³ MODEL RULES OF PROF’L CONDUCT R.1.8(e) cmt. [10] (2019).

³⁴ See Lockwood, *supra* note 1 at 472-474 (“the assertion [in Cmt. [10] is that] unlike the financing of litigation expenses, financing living expenses is somehow distinguishable from contingency fee financing and leads to frivolous litigation”); N.Y. CITY BAR REPORT BY THE PROF’L RESPONSIBILITY COMM. PROPOSED AMENDMENT TO RULE 1.8(E), NY RULES OF PROFESSIONAL CONDUCT 8 (Mar. 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/proposed-amendment-to-rule-18e-ny-rules-of-professional-conduct> [hereinafter “CITY BAR RPT.”] (NYRPC 1.8 cmt. [10], which is identical to Model Rule 1.8 cmt. [10], is aimed, in part, to curb frivolous litigation). Lawyers will “support” plaintiffs, it is suggested, in order to get retained to bring cases that turn out to be frivolous. As shown in the text by reference to Model Rule 1.8 cmt. [10] this is *not* the purpose of the prohibition in 1.8(e). It is not in the text. It is not in the Comment. Other Rules perform that function.

³⁵ MODEL RULES OF PROF’L CONDUCT R. 3.1 (2019) (emphasis added).

³⁶ FED. R. CIV. P. 11(b)(1) and (b)(2) (emphasis added).

³⁷ See, e.g., N.Y. Rules of the Chief Administrator of the Courts Part 130, *Awards of Costs and Imposition of Financial Sanctions For Frivolous Conduct In Civil Litigation*, 22 NYCRR 130-1.1.

a poor client with living expenses, which could not be recouped, so that the lawyer could file a frivolous lawsuit.

No Compromise of the Lawyer's Independent Judgment

Rule 1.8(e) forbids financial assistance for living expenses also to avoid conflicts between the interests of the lawyer and the interests of the client and to protect the lawyer's independence. Living expenses are not allowed "*because such assistance gives lawyers too great a financial stake in the litigation.*"³⁸

Rule 1.8(e)(1), however, allows the lawyer to advance the costs of litigation with repayment contingent on the outcome of the matter. There is no cap on the amount of these expenses, which can amount to tens of thousands of dollars. Lawyers also may invest thousands of hours on a contingency matter which will be compensated only if there is a recovery. The profession tolerates these outlays of time and money, trusting that lawyers will honor their obligations to exercise independent professional judgment in the advice they give clients and not be influenced by their own financial concerns.

The proposed rule presents no such risks simply because loans to assist indigent clients are prohibited. Unlike in the exception for advancing the costs of litigation, lawyers have no interest in repayment of the financial help.

No Competition for Clients

Some opponents of expanding a lawyer's discretion to provide financial assistance under Rule 1.8(e) expressed concern that lawyers will use this discretion to improperly compete for clients.³⁹ The proposed rule avoids this problem because it prohibits advertising or publicizing the availability of financial assistance for living expenses. More importantly, however, pro bono lawyers don't compete for business. As stated by SCLAID: "Poverty lawyers and lawyers who provide *pro bono* service to clients in poverty are simply not competing for the business of their clients."⁴⁰

Other Impediments to Financial Assistance

There may be other laws or rules in American jurisdictions that will operate if financial assistance is allowed and provided. Some commenters seemed to suggest that the proposed rule might affect a client's tax status or the ability to qualify for public assistance or social services or, potentially, a financial disclosure requirement. SCEPR and SCLAID have seen no evidence that the type of modest assistance to indigent clients

³⁸ MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. [10] (2019) (emphasis added).

³⁹ See, e.g., Sahl, *supra* note 12 at 5 ("[s]ome practitioners fear a competitive disadvantage in the marketplace for legal services if the profession permits lawyers to advance living expenses because only more established or affluent lawyers will offer such assistance") (cite omitted); Schrag, *supra* note 1 at 54 (a "thread that runs through the history of Rule 1.8(e) is the concern that lawyers might compete with each other for business through the generosity of the gifts or loan terms that they might offer their clients").

⁴⁰ SCLAID Memo, *supra* note 22.

for basic necessities of life permitted by the proposed rule will have such consequences.⁴¹ However, Model Rule of Professional Conduct 1.4 requires lawyers to consult with clients about the representation and a reference is made to that obligation in the proposed new Comments.

Financial assistance to transactional clients, social hospitality toward all clients as part of business development, and payment of litigation expenses that may or may not be recovered may all have collateral consequences under tax or other law. But in allowing each, the only question is whether the activity creates the kind of dangers that should concern the Model Rules of Professional Conduct. The limited exception in the proposed amendment does not create those dangers.

V. The Need for ABA Leadership

In all but eleven U.S. jurisdictions Rule 1.8(e) is identical or substantially similar to Model Rule 1.8(e).⁴² Ethics Committees generally interpret the prohibition strictly.⁴³ Courts generally discipline lawyers for providing clients with non-litigation expenses.⁴⁴ Only a handful of courts and ethics committees have approved financial assistance in small amounts beyond litigation expenses, even where the text of the rule would forbid it.⁴⁵

⁴¹ SCEPR asked Tom Callahan, Chair of the ABA Tax Section, about the tax consequences of the proposed rule. He told the Committee that the proposed rule appears to be a gift with true donative intent; that the gift should be neither income to the donee nor deductible by the donor for federal income tax purposes; and that there is an exclusion from gift taxes of up to \$15,000 per donee for 2020. Tom Callahan also indicated that the tax impact, if any, of state and local taxes has not been considered. Email exchange between Tom Callahan and SCEPR Chair Barbara S. Gillers, on file with SCEPR.

⁴² See ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 173 (9th ed. 2019) (“[m]ost jurisdictions do not allow an exception for assisting indigent clients”).

⁴³ See N.Y. City Bar, Formal Op. 2019-6, *supra* note 18 at 2 (“routine medical care and living expenses do *not* qualify as expenses of litigation even if, in the absence of assistance, the client may be pressured to accept an unfavorable settlement”) (emphasis in original) (cites omitted); Conn. Bar Ass’n, Informal Op. 2011-10 (2011) (water bills; \$300 in advance rent to avoid eviction); Pa. Bar Ass’n, Informal Op. 94-12 (1994) (bond for preliminary injunction); Ariz. State Bar, Formal Op. 95-01 (1995) (transportation costs); Ill. State Bar Ass’n, Advisory Op. on Prof’l Conduct 95-6 (1995) (medical care); S.C. Bar Ethics Advisory Comm., Advisory Op. 89-12 (1989) (medical treatment). *But see* N.C. State Bar, Formal Op. 7 (occasional cab or bus fare or other transportation cost may be permitted as a litigation cost “when reasonable in light of the distance to be traveled”).

⁴⁴ See Schrag, *supra* note 1 at 59-61 (discussing “unforgiving” application of Rule 1.8(e)); Lawyer Disciplinary Bd. v. Nessel, 769 S.E.2d 484, 493 (W. Va. 2015) (prohibition on living expenses is absolute; no exception for “altruistic intent”); Matter of Cellino, 798 N.Y.S.2d 600 (4th Dept. 2005) (suspension for, among other violations, loaning a client money for the client’s son’s nursing and care and rehabilitation); State ex rel. Oklahoma Bar Ass’n v. Smolen, 17 P.3d 456 (2000) (suspending a lawyer for, among other violations, loaning a client \$1200 for living expenses); Maryland Attorney Grievance Comm’n v. Kandel, 563 A.2d 387 (Md. App. 1989) (discipline for advancing the cost of medical treatment and transportation to obtain the treatment).

⁴⁵ See, e.g., Florida Bar v. Taylor, 648 So.2d 1190, 1192 (Fla. 1994) (used clothing for child and \$200 for necessities approved as “act of humanitarianism”); Okla. Bar Ass’n, Op. 326 (2009) (“[n]ominal monetary gifts by a public defender to a death row inmate for prison system expenses”); Va. State Bar Legal Ethics Op. 1830 (2006) (“nominal amounts” to an incarcerated client to buy personal items or food at the jail

Of the jurisdictions that have adopted an exception to Rule 1.8(e)'s prohibition on providing assistance for living expenses, some go beyond the modest amendment SCEPR and SCLAID propose.⁴⁶ They permit, for example, advances and loans for basic needs and other living expenses. Reimbursement by the client is sometimes required. By contrast, the proposed rule permits gifts only. No loans. No advances. No reimbursements. New Jersey has a specific provision for pro bono legal services.⁴⁷

The proposed rule draws on the rules of the eleven jurisdictions, expert commentary, and comments provided in response to earlier drafts. In addition, SCEPR and SCLAID notes that recently, the New York State Bar Association (NYSBA) House of Delegates unanimously approved a recommendation by the NYSBA Committee on Standards of Attorney Conduct (COSAC) and the City Bar Professional Responsibility Committee to adopt a humanitarian exception to NYRPC 1.8(e) that is similar in some respects to the one SCEPR and SCLAID propose for the Model Rules.⁴⁸

The ABA has been a leader in access to justice for decades. It should lead here, too, by changing an out-of-date rule that interferes with access to justice by the most vulnerable population and encouraging all American jurisdictions to adopt the new rule.

VI. Support Based on Bar Counsel Experience

SCEPR asked bar counsel for the eleven jurisdictions with some form of humanitarian exception about their experience implementing the provision. Two jurisdictions, D.C. and Louisiana, responded. Both jurisdictions permit loans for living expenses and apply in contingency matters. Chief Disciplinary Counsel in Louisiana wrote that Louisiana's version of Rule 1.8(e), which has been in effect since 1976,

commissary); Md. State Bar Ass'n Comm. on Ethics, Op. 2000-42 (2000) (a "de minimus gift" does not violate 1.8(e)); Ariz. State Bar, Formal Op. 91-14 (1991) (loan for client's daughter's medical care prohibited but a gift for that purpose is permitted if the lawyer has a "charitable motivation").

⁴⁶ In addition to the rules cited in footnote 28, see Ala. Rule of Prof'l Conduct 1.8(e) (lawyer may advance or guarantee emergency assistance; prohibits (i) making repayment contingent on the outcome and (ii) promises or assurance of assistance before retention); Cal. Rule of Prof'l Conduct 1.8.5 (permits a lawyer to pay a client's personal or business expenses to third person, "from funds collected or to be collected for the client as a result of the representation" with the consent of the client; and "to pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interest of an indigent person in a matter in which the lawyer represents the client"); La. Rule of Prof'l Conduct 1.8(e) (permits financial assistance in addition to court costs and litigation expenses to clients in "necessitous circumstances"; conditions and limitations apply).

⁴⁷ N.J. Rule of Prof'l Conduct 1.8(e) provides: "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that . . . (e)(3) a legal services or public interest organization, a law school clinical or pro bono program, or an attorney providing qualifying pro bono service as defined in R. 1:21-11(a), may provide financial assistance to an indigent client whom the organization, program or attorney is representing without fee." N.J. Rules of Court, R. 1:21-11(a) defines "qualifying pro bono service" to include legal assistance through a legal services or public interest organization and legal assistance through a law school clinical or pro bono program.

⁴⁸ NYSBA COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT MEMORANDUM 3-6 (Jan. 15, 2020), <https://nysba.org/app/uploads/2020/03/12-14-cosac-AGENDA-ITEM-8.pdf>. CITY BAR RPT., *supra* note 34.

permits lawyers to advance monies to clients in necessitous circumstances. The Louisiana rule is not limited to non-profits and does not prohibit a lawyer from obtaining reimbursement, although it does not permit a lawyer to obtain reimbursement of interest for funds the lawyer advances directly . . . The Louisiana Office of Disciplinary Counsel has received very few complaints against lawyers concerning Rule 1.8(e) and (f). The complaints that have been lodged primarily involve how the lawyer calculated disbursement of funds from monetary recoveries resulting from a suit or settlement. Because you have informed me that the proposed ABA Rule prohibits any reimbursement of any necessitous circumstances advances, I do not anticipate that such a rule would lead to any complaints (such as the ones we have received) to a state's disciplinary counsel. Based upon my experience as the Chief Disciplinary Counsel in Louisiana, it is my belief that the rule discussed would not lead to an increase in disciplinary enforcement action nor increase the potential for harm to the public or to the legal profession.⁴⁹

Disciplinary Counsel for D.C. wrote:

We have had few if any complaints about lawyers violating Rule 1.8(d) [the D.C. analogue to M.R. 1.8(e)]. I can't represent that no one has ever complained because I don't have a way of checking every one of the approximately 1000 complaints we receive each year. Certainly, we have never brought a case based on a violation of that rule, and it has been mentioned in only three reported opinions, two of which are reciprocal matters from other states whose parallel rule is not as liberal as our Rule 1.8(d).⁵⁰

VII. Support from the Pro Bono Community

Commenters have questioned whether the pro bono community supports adding a humanitarian exception to Rule 1.8(e). SCEPR's work in connection with the proposed rule shows that there is broad support for this in the pro bono and law school clinician

⁴⁹ Letter from Chief Disciplinary Counsel in Louisiana, Charles B. Plattsmier to SCEPR Member Michael H. Rubin (Apr. 8, 2020) (on file with SCEPR).

⁵⁰ E-mail from Hamilton P. Fox, Disciplinary Counsel in D.C. to SCEPR Member Thomas H. Mason (Apr. 8, 2020) (on file with SCEPR) (citing the following reciprocal cases: *In re Schurtz*, 25 A.3d 905, 906-907 (D.C. 2011); *In re Edelstein*, 892 A.2d 1153, 1159 n.3 (D.C. 2006); *In re Wallace*, Board Docket No. 17-BD-001 at 10 n.6 (BPR HCR, Mar. 16, 2018)). See also Sahl, *supra* note 12 at 8 (DC's "permissive approach concerning lawyer advances for living expenses has existed for a 'long time and has not produced any official complaints.' Nor has the approach caused the bar any 'reason to be concerned.'" (citing the author's conversations with D.C. Bar Counsel); CITY BAR RPT., *supra* note 34 at 10 ("the committee informally consulted bar regulators and academic ethicists in the jurisdictions which currently have a version of a 'humanitarian exception,' in order to assess whether those rules have led to any notable abuses or problems. Without exception, no one reported problems with a humanitarian exception in pro bono cases.")).

communities.⁵¹ SCLAID is a cosponsor. ABA supporters include the Diversity and Inclusion Center and its constituent Goal III entities—the Coalition on Racial and Ethnic Justice; Commission on Disability Rights; Commission on Hispanic Legal Rights and Responsibilities; Commission on Racial and Ethnic Diversity in the Profession; Commission on Sexual Orientation and Gender Identity; Council for Diversity in the Educational Pipeline; and Commission on Women in the Profession; the Standing Committee on Pro Bono and Public Service, the Section of Civil Rights and Social Justice, the Commission on Homelessness and Poverty, the Law Students Division, the Commission on Domestic and Sexual Violence, the Standing Committee on Disaster Response & Preparedness, and the Standing Committee on Legal Assistance for Military Personnel. In addition, the Society of American Law Teachers (SALT), the National Legal Aid and Defender Association (NLADA), approximately sixty pro bono lawyers and law school clinicians nationwide, the Legal Aid Society of New York (an organization of more than 1200 lawyers), and APBCo support it.⁵² Just recently—on Easter weekend and in response to SCEPR’s Survey—one lawyer wrote:

Ethics rule 1.8, and its correlating rule under New York rules, has substantially hindered our ability to support clients: rather than supporting those in the most desperate of circumstances, we can only help clients with no pending or contemplated litigation. We urge the rule be amended to allow our ability to respond to our client’s financial needs during this crisis.⁵³

Some lawyers outside the pro bono community have suggested that giving pro bono lawyers discretion to help their needy clients would create stress that might impair the client-lawyer relationship. SCEPR has seen no evidence from the pro bono community that this is true, and there are several approaches short of denying the discretion to the many pro bono lawyers who seek it. Lawyers and legal services organizations can adopt a policy against providing assistance with living expenses to any client. Alternatively, decisions can be made not by individual attorneys but by a central-decision maker according to rules and standards adopted by the organization.

VIII. Conclusion

For the foregoing reasons, the ABA should adopt the proposed amendments to Rule 1.8(e).

Respectfully submitted,

Barbara S. Gillers
Chair, Standing Committee on Ethics
and Professional Responsibility
August 2020

⁵¹ See Section II of this Report.

⁵² *Id.*

⁵³ E-mail from Michael Pope, Executive Director of Youth Represent, to Daniel L. Greenberg and Barbara S. Gillers (Apr. 10, 2020) (on file with SCEPR).

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Ethics and Professional Responsibility

Submitted By: Barbara S. Gillers, Chair, Standing Committee on Ethics and Professional Responsibility

1. Summary of the Resolution(s). The proposed rule amends Model Rule 1.8(e) by adding a narrow exception that will increase access to justice for the most vulnerable clients. Rule 1.8(e) forbids financial assistance for living expenses to clients who are represented in pending or contemplated litigation or administrative proceedings. The proposed rule would *permit* financial assistance for living expenses *only* to indigent clients, *only* in the form of gifts not loans, *only* when the lawyer is working pro bono and without fee or through a nonprofit legal services or public interest organization or a law school clinical or pro bono program, and *only* where there is a need for help to pay for life's necessities. Permitted gifts are modest contributions to the client for food, rent, transportation, medicine, and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle.

The proposed rule closes a gap in the current rule. Currently, lawyers may provide financial assistance to transactional clients, may offer social hospitality to any litigation or transactional client and may advance or pay the costs of litigation with repayment contingent on the outcome or no repayment if the client is indigent. The only clients to whom lawyers may not give money or things of value are litigation clients who need help with basic necessities of life. By allowing lawyers to give such gifts, the proposed rule will increase access to justice and permit lawyers to follow their humanitarian instincts.

2. Approval by Submitting Entity. The Resolution was approved in May 2020 by both the Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Legal Aid and Indigent Defendants.
3. Has this or a similar resolution been submitted to the House or Board previously? The ABA Model Rules of Professional Conduct were adopted by the House of Delegates in 1983. Model Rule 1.8(e) was a part of that submission. It has not been amended since its adoption in 1983.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The ABA Model Rules of Professional Conduct, as adopted by the House of Delegates, are ABA policy. This would amend that policy. The SCEPR knows of no other ABA policy that would be affected by this change. As noted in the report, "By enabling the most financially vulnerable clients to vindicate their rights in court within the proposed rule's restrictions, the amendment ensures equal justice under law, a core ABA mission." ABA Goal IV is to "Advance the Rule of Law." To meet this goal, one of the ABA's objectives is to "[a]ssure meaningful access

to justice for all persons.” SCEPR and SCLAID believe this resolution advances that objective.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. (If applicable) N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments. Information about the amendment will be provided to the Chief Justice of every state. Developments in the states will be tracked and published on the Center’s website.
8. Cost to the Association. (Both direct and indirect costs) None
9. Disclosure of Interest. (If applicable) N/A
10. Referrals.

Standing Committee on Legal Aid and Indigent Defendants
 Center for Diversity and Inclusion
 Business Law Section
 Civil Rights & Social Justice Section
 Criminal Justice Section
 Health Law Section
 Law Student Division
 Litigation Section
 Young Lawyers Division
 Commission on Disability Rights
 Commission on Immigration
 Commission on Homelessness & Poverty
 Center on Children & the Law
 Commission on Domestic and Sexual Violence
 Commission on Law & Aging
 Standing Committee on Professionalism
 Standing Committee on Pro Bono & Public Service
 Standing Committee on Legal Assistance for Military Personnel
 Standing Committee on Professional Regulation
 Standing Committee on Lawyers’ Professional Liability
 Standing Committee on Public Protection in the Provision of Legal Services
 Commission on Lawyers’ Assistance Programs
 Commission on Interest on Lawyers’ Trust Accounts
 Standing Committee on Delivery of Legal Services
 Standing Committee on Disaster Response & Preparedness
 Standing Committee on Group & Prepaid Legal Services

Standing Committee on Lawyer Referral & Information Services

11. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

Barbara S. Gillers, Chair of the Standing Committee on Ethics and Professional Responsibility, 917.679.5757, barbara.gillers@nyu.edu

12. Name and Contact 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.*

Barbara S. Gillers, Chair of the Standing Committee on Ethics and Professional Responsibility, 917.679.5757, barbara.gillers@nyu.edu

EXECUTIVE SUMMARY

1. Summary of the Resolution.

The resolution asks the House of Delegates to add a narrow exception to Model Rule 1.8(e) that will increase access to justice for our most vulnerable citizens. Rule 1.8(e) forbids financial assistance for living expenses to clients who are represented without fee to the client in a pending or contemplated litigation or administrative proceeding. The proposed rule will permit modest financial assistance to indigent clients by lawyers representing those clients in litigation or administrative proceedings pro bono or through a nonprofit legal services or public interest organization or a law school clinical or pro bono program.

The proposed rule would *permit* financial assistance for living expenses *only* to indigent clients, *only* in the form of gifts not loans, *only* when the lawyer is working pro bono without fee to the client, and *only* where there is a need for help to pay for life's necessities. Permitted gifts are modest contributions for food, rent, transportation, medicine, and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. Similar exceptions, variously worded, appear in the rules of eleven U.S. jurisdictions.

A lawyer may not: (1) promise, assure or imply the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (2) seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; or (3) publicize or advertise a willingness to provide financial assistance to clients.

2. Summary of the issue that the resolution addresses.

ABA Model Rule of Professional Conduct 1.8(e) is at odds with the ABA's goal of increasing access to justice. It prohibits lawyers from helping indigent clients with basic and essential living expenses such as food, clothing, shelter and medicine while a litigation or administrative proceeding is pending even where financial hardship prevents the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle.

The history, development, and commentary on the prohibition against financial assistance to litigation clients establishes two reasons for the prohibition, which are succinctly stated in Comment [10] to Rule 1.8. First, the prohibition prevents lawyers from having "too great a financial stake in the litigation." Second, allowing assistance would "encourage clients to pursue lawsuits that would not otherwise be brought."

Because the assistance permitted by the proposed rule must be in the form of a gift, not a loan, there is no interest in recoupment that could affect the lawyer's advice. Further, by enabling the most financially vulnerable clients to vindicate their rights in court within

the proposed rule's restrictions, the amendment ensures equal justice under law, a core ABA mission. An exception for assistance permitted by the proposed rule is commonly referred to as a "humanitarian exception" to the prohibitions in Model Rule 1.8(e).

The proposed rule to add a humanitarian exception to Rule 1.8(e) has received support from a wide variety of pro bono, legal services and legal aid lawyers and from law school clinicians. This group includes approximately sixty lawyers in nonprofit organizations and legal services and legal aid offices, the Legal Aid Society in NYC—an office of more than 1200 lawyers, and clinical faculty at law schools nationwide. SCEPR and SCLAID have received support from the Society of American Law Teachers (SALT) and the National Legal Aid and Defender Association (NLADA). Further, in a letter to the ABA Board of Governors, the Association of Pro Bono Counsel ("APBCo"), a membership organization of nearly 250 partners, counsel, and practice group managers who run pro bono practices on primarily a full-time basis at more than 100 of the country's largest law firms wrote, "APBCo supports the effort to modify the Model Rules and permit pro bono lawyers to help their indigent clients meet basic human necessities, such as food, rent, transportation and medicine during the course of the representation. In the context of pro bono representation, none of these kinds of charitable gifts present any concerns raised by the Model Rule, which is designed to prevent lawyers from providing financial assistance to clients in order to subsidize lawsuits or administrative proceedings in a way that encourages clients to pursue lawsuits that might not otherwise be brought and gives lawyers a specific financial stake in the litigation. Neither pro bono lawyers nor their firms profit from public interest representation; the kinds of limited financial assistance contemplated by the proposed amendment will in no way violate the intended policy."

In addition, many ABA committees and entities involved in access to justice initiatives support the proposed rule. These include the cosponsor, the Standing Committee on Legal Aid and Indigent Defendants, the Diversity and Inclusion Center and its constituent Goal III entities, the Standing Committee on Pro Bono and Public Service, the Section of Civil Rights and Social Justice, the Commission on Homelessness and Poverty, the Commission on Domestic and Sexual Violence, the Law Students Division, the Standing Committee on Disaster Response & Preparedness, and the Standing Committee on Legal Assistance for Military Personnel.

While support for the proposed rule is deep and wide within the public interest community, the proposed rule *does not require* any lawyer to provide financial assistance for living expenses to indigent clients.

3. Please explain how the proposed policy position will address the issue.

The amendment to Model Rule 1.8(e) would eliminate the prohibition on providing indigent clients represented pro bono in litigation or administrative proceedings with modest financial assistance for basic necessities of life, e.g. food, clothing, shelter, and medicine, when financial hardship would otherwise prevent these clients from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on these clients to settle.

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

During our pre-filing circulations of a draft resolution and report (on March 12 and 13, on April 20, and again in May 2020) the following committees noted their support for permitting modest financial assistance for basic living expenses to indigent clients represented pro bono in litigation and administrative proceeding but also offered general comments and specific amendments: the Steering Committee of the ABA's Death Penalty Representation Project, the Committee on Business and Corporate Litigation of the Business Law Section, and the Standing Committees on (i) Professionalism, (ii) Interest on Lawyers' Trust Accounts, (iii) Lawyers' Professional Liability, (iv) Professional Regulation, and (v) Public Protection in the Provision of Legal Services.

SCEPR and SCLAID made amendments to the report and resolution as a result. We believe these changes address most of the concerns raised.

As is customary for both SCLAID and SCEPR, we will continue to work with all entities presenting concerns to ensure that all are heard and that every reasonable attempt at consensus is made.

AMERICAN BAR ASSOCIATION
SECTION OF INTELLECTUAL PROPERTY LAW
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges Congress to enact legislation
2 authorizing one or more principal officers, who are appointed by the President and
3 confirmed by the Senate, to review decisions of the Patent Trial and Appeal Board (PTAB)
4 determining the patentability of any claim reviewed by the PTAB before such decisions
5 become final decisions of the U.S. Patent and Trademark Office (USPTO), and that the
6 legislation should also restore Title 5 removal protections for Administrative Patent
7 Judges (APJs) of the PTAB.

REPORT

I. Introduction

The America Invents Act (“AIA”)¹ brought about significant changes to U.S. patent law. For example, the AIA harmonized U.S. patent law with the rest of the world by transitioning the U.S. from a first-to-invent system to a first-inventor-to-file system.² The AIA also created the Patent Trial and Appeal Board (PTAB) to serve as an appellate and adjudicative body within the U.S. Patent and Trademark Office (USPTO) to review adverse examination decisions (*ex parte* appeals), and to conduct trials for contested disputes between two parties involving an issued patent or pending application (*inter partes* proceedings).³

This Report proposes a legislative fix to an issue with the appointment of Administrative Patent Judges (APJs) of the PTAB arising from the U.S. Court of Appeals for the Federal Circuit’s *Arthrex* decision in October 2019, that the appointment of APJs under the AIA violates the Appointments Clause of the U.S. Constitution.⁴ The proposed change would provide for review of PTAB decisions by one or more properly appointed principal officers, which would make APJs inferior officers under the Appointments Clause, and allow for the restoration of APJs’ Title 5 removal protections. It is important to restore APJs’ removal protections to help insulate them from political influences and thereby ensure that APJs have the decisional independence required to adjudicate their cases based on applicable legal and regulatory standards.

II. The Appointments Clause and Congressional Design of the PTAB

Under the Appointments Clause,⁵ the President may appoint principal officers of the United States only with Senate confirmation. The heads of departments, however, can appoint inferior officers. Congress intended for the Director of the USPTO (“Director”) to be a principal officer,⁶ and for APJs of the PTAB to be inferior officers.⁷

The USPTO is part of the Department of Commerce.⁸ Like the Secretary of Commerce, the Director is appointed by the President and confirmed by the Senate.⁹ The phrase “appointed by the President and confirmed by the Senate” is intended to

¹ 125 Stat. 284 (2011).

² See 35 U.S.C. § 102.

³ See *id.* § 6(a)-(b).

⁴ *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1325, 1335 (Fed. Cir. 2019), *en banc rehearing denied*, 953 F.3d 760 (2020).

⁵ U.S. Const. art. II, § 2, cl. 2.

⁶ See 35 U.S.C. § 3(a)(1) (“The powers and duties of the [USPTO] shall be vested in an Under Secretary of Commerce for Intellectual Property and Director of the [USPTO]...who shall be appointed by the President, by and with the advice and consent of the Senate.”).

⁷ See *id.* § 6(a) (designating that APJs of the PTAB are to be “appointed by the Secretary [of Commerce], in consultation with the Director [of the USPTO].”).

⁸ See *id.* § 1(a).

⁹ See *id.* § 3(a)(1).

correspond to the Constitutional process of nomination by the President, confirmation by the Senate, and then appointment of the principal officer to the position.

The AIA created *inter partes* review (“IPR”) and post-grant review (“PGR”) trial proceedings¹⁰ to provide an opportunity to contest the validity of claims in issued patents,¹¹ and derivation proceedings to determine whether an inventor of an earlier-filed patent application derived that invention from an applicant of a later-filed application.¹² Congress also created the PTAB as a part of the USPTO to conduct IPR, PGR, and derivation proceedings and to review appeals of adverse examiner decisions in original patent applications or ex parte reexamination proceedings.¹³ Each appeal, IPR, PGR, and derivation proceeding is heard by at least three members of the PTAB, and the panel is designated by the Director.¹⁴ A three-member panel of APJs issues a final written decision at the conclusion of an instituted IPR, PGR or derivation proceeding, if the proceeding is instituted and not dismissed.¹⁵ Likewise, a three-member panel of APJs issues a decision on appeal at the conclusion of each appeal.¹⁶

The PTAB is composed of the Director, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and APJs.¹⁷ APJs are appointed by the Secretary of Commerce in consultation with the Director.¹⁸ By designating that the Director be appointed by the President and confirmed by the Senate, Congress intended for the Director to be a principal officer under the Appointments Clause.¹⁹ Conversely, by requiring the appointment of APJs by the Secretary of Commerce, in consultation with the Director, Congress intended for the APJs to be (at most) inferior officers under the Appointments Clause.²⁰ Congress expressly provided APJs with Title 5 employment protections,²¹ including for-cause removal protections.²²

III. The Federal Circuit’s *Arthrex* Decision

On October 31, 2019, a panel of the Federal Circuit held in *Arthrex* that APJs are principal officers based on the AIA “as currently constructed” and thus held that the

¹⁰ IPR proceedings have been widely used since they first became available on September 16, 2012, often by defendants in patent infringement cases in federal district courts. As of March 31, 2020, over 10,500 IPR petitions have been filed with the PTAB seeking to contest the validity of at least one claim in an issued patent. See https://www.uspto.gov/sites/default/files/documents/trial_statistics_20200331.pdf.

¹¹ See 35 U.S.C. §§ 311-318 (IPR) and 321-328 (PGR).

¹² See *id.* § 135(a). The AIA transformed the U.S. patent system to a first-inventor-to-file system, instead of the predecessor “first-to-invent” system that it replaced. Derivation proceedings seek to ensure that the first person to file an application for an invention is the inventor of the claimed subject matter.

¹³ See *id.* § 6(a)-(b).

¹⁴ See *id.* § 6(c).

¹⁵ See *id.* §§ 318(a), 328(a), 135(b), 135(d).

¹⁶ See 37 C.F.R. 41.50.

¹⁷ See *id.* § 6(a).

¹⁸ *Id.*

¹⁹ See *id.* § 3(a)(1).

²⁰ See *id.* § 6(a).

²¹ See *id.* § 3(c).

²² See 5 U.S.C. § 7513(a).

appointment of APJs violates the Appointments Clause.²³ The *Arthrex* panel concluded that the Director has insufficient review and control authority over APJs to render them inferior officers under the Appointments Clause.²⁴ The *Arthrex* panel reasoned that APJs are principal officers, rather than inferior officers, because the Director lacks sufficient authority to review and reverse the decisions of APJs.²⁵ In particular, the *Arthrex* panel explained that the Director, though a presidentially appointed officer, does not have “the power to single-handedly review, nullify, or reverse a final written decision issued by a panel of APJs.”²⁶ The *Arthrex* panel noted that “[n]o presidentially-appointed officer has independent authority to review a final written decision by the APJs before the decision issues on the behalf of the United States.”²⁷

To remedy the determined constitutional defect with the appointment of APJs, the *Arthrex* panel severed the part of 35 U.S.C. § 3(c) designating APJs as “officers and employees” subject to Title 5’s “for cause” removal restrictions.²⁸ According to the *Arthrex* panel, severing the Title 5 restrictions that prevent removal of APJs without cause makes removal of APJs easier and thus reduces APJs to inferior officers.²⁹ The *Arthrex* panel explained that severing the APJs’ removal restrictions was “the narrowest viable approach to remedying the violation of the Appointments Clause.”³⁰

On March 23, 2020, the Federal Circuit denied *en banc* rehearing requests from all parties, including the U.S. Government, which intervened in the case.³¹ Judge Moore—the author of the *Arthrex* panel opinion—provided a concurrence defending the original panel decision, arguing that “[t]he severance applied in *Arthrex* resulted in minimal disruption to the inter partes review system and no uncertainty presently remains as to the constitutionality of APJ appointments.”³² However, the decision removes the Title 5 removal protections that Congress provided to APJs, making APJs subject to at-will dismissal. The parties in *Arthrex*, including the U.S. government, have not yet filed a petition for certiorari with the Supreme Court. That petition is due by June 22, 2020.³³

On May 1, 2020, the Chief Judge of the PTAB issued a “General Order” indicating that the Federal Circuit has responded to *Arthrex* by issuing numerous Orders vacating “more than 100 decisions by the Patent Trial and Appeal Board...and more such Orders are expected.”³⁴ The Order also indicates that the PTAB will hold in administrative

²³ *Arthrex*, 941 F.3d at 1325, 1335 (Fed. Cir. 2019).

²⁴ *Id.* at 1335, 1329-31.

²⁵ *Arthrex*, 941 F.3d at 1329-31.

²⁶ *Id.* at 1329.

²⁷ *Id.*

²⁸ *Id.* at 1325, 1337-38; *see also* 5 U.S.C. § 7513(a) (Title 5 removal protections).

²⁹ *Arthrex*, 941 F.3d at 1337-38.

³⁰ *Id.* at 1337.

³¹ *Arthrex*, 953 F.3d 760 (Fed. Cir. 2020).

³² *Id.* at 764.

³³ *See* Sup. Ct. R. 13 (a petition for certiorari is due 90 days after the date of entry of judgment, i.e., the date of rehearing denial in *Arthrex*).

³⁴ *See* <https://secureservercdn.net/184.168.47.225/9ac.02d.myftpupload.com/wp-content/uploads/2020/05/Order.pdf>.

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abeyance all PTAB decisions that have been vacated under *Arthrex* “until the Supreme Court acts on a petition for certiorari or the time for filing such petitions expires.”

IV. Proposed Legislative Fixes to Appointment of APJs

A. Overview

After the *Arthrex* panel decision, the House Subcommittee on Intellectual Property³⁵ held a hearing on November 19, 2019, titled “The Patent Trial and Appeal Board and the Appointments Clause: Implications of Recent Court Decisions.” The panel of witnesses included Professor John F. Duffy, Professor Ari K. Rai, Professor John M. Whealan, and Mr. Robert A. Armitage.³⁶

During the hearing, Professor Duffy proposed three potential legislative solutions:

- (1) make APJs appointed by the President with the consent of the Senate;
- (2) make PTAB decisions reviewable by the Director of the USPTO; or
- (3) make PTAB decisions reviewable by a Special PTAB Panel composed of officers appointed by the President with the consent of the Senate.³⁷

In addition to Professor Duffy’s proposals (1)-(3), the ABA-IPL Section understands that the Chair of the Courts, Intellectual Property, and the Internet Subcommittee of the House Judiciary Committee, Representative Henry (“Hank”) Johnson, may also be contemplating proposing a fix along the following lines:

- (4) implement a commission-review similar to the commission-review process of the International Trade Commission (ITC), where such a commission is separate from the administrative law judges (ALJs) who conduct investigations, and the commission reviews the initial determinations by ALJs.

B. Discussion of Proposed Legislative Fixes

Professor Duffy’s first proposal (1) would solve the Appointments Clause issue for APJs; however, this option is impractical. At present, the PTAB contains approximately

³⁵ The House Subcommittee on Courts, Intellectual Property and the Internet, is a subcommittee of the House Committee on the Judiciary.

³⁶ John F. Duffy is the Samuel H. McCoy II Professor of Law at the University of Virginia School of Law. Arti K. Rai is the Elvin R. Latty Professor of Law and Faculty Director, the Center for Innovation Policy at the Duke University School of Law. John M. Whealan is the Intellectual Property Advisory Board Associate Dena for Intellectual Property Law Studies at the George Washington University Law School. Robert A. Armitage is a consultant on IP strategy and policy, and the former Senior Vice President and General Counsel for Eli Lilly and Co. The statements of the witnesses can be accessed at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2249>.

³⁷ Professor Duffy’s statement is available at <http://docs.house.gov/meetings/JU/JU03/20191119/110260/HHRG-116-JU03-Wstate-DuffyJ-20191119.pdf>.

260 APJs. Professor Duffy's first proposal (1) would require Presidential appointment and Senate confirmation of each APJ of the PTAB.

Proposal (2) recognizes Congress' intent for the Director to have broad powers to direct the policy of the agency. Congress intended for the "powers and duties of the [USPTO]" to "be vested in" the Director, and for the Director to "provid[e] policy direction and management supervision for the Office and for the issuance of patents and the registration of trademarks."³⁸ Giving the Director the authority to review PTAB decisions would help to promote uniform policy positions within the USPTO. However, proposal (2) may subject the review of PTAB decisions to politically motivated interventions, since the Director is a political appointee. Some have suggested that proposal (2) would concentrate too much power in the hands of one individual, and may subject the patent system as a whole to different results at the PTAB depending on which Director is leading the USPTO at any point in time.

Proposals (3) and (4) may provide for more insulation from politics, since more than one principal officer would have the authority to review PTAB decisions, thereby preventing any one individual from dictating policy decisions at the PTAB. To be sure, these principal officers would still be nominated by the President and confirmed by the Senate, but proposals (3) and (4) would arguably better protect against political interventions because a majority of a review body of principal officers would need to vote in favor of adopting, modifying, or reversing the PTAB's determination on the patentability of a claim reviewed by the PTAB. Proposals (3) and (4) could therefore provide greater long-term stability for the patent system by minimizing the impact of different policy positions of different Directors on decisions of the PTAB. However, proposals (3) and (4) may lead to policy incoherence, in that the Director's policy initiatives for the agency overall may conflict with the policy decisions of the principal officers authorized to review PTAB decisions under proposals (3) and (4).

Proposal (4) has an additional complication relating to the structural composition of the USPTO. Implementing a Commission-style review structure according to proposal (4) would require a significant restructuring of the USPTO. As an administrative agency, the USPTO is structured quite differently from the ITC, FTC, and FCC, which are independent federal agencies each governed by a Commission structure consisting of several presidentially-appointed Commissioners.³⁹ On the other hand, as part of the Department of Commerce, the USPTO is an Executive Branch agency that is led by one political appointee, the Director, who is "responsible for providing policy direction and management supervision for the Office."⁴⁰ For the USPTO, Congress vested authority in the Director⁴¹ and created the PTAB to serve as the adjudicative arm of the USPTO.⁴² Conversely, the ITC is governed by a Commission whose six members are appointed by the President and approved by the Senate.⁴³ The ITC has a Chairman and Vice

³⁸ See 35 U.S.C. § 3(a)(1)-(2).

³⁹ See 19 U.S.C. § 1330(a) (ITC); 15 U.S.C. § 41 (FTC); 47 U.S.C. § 154 (FCC).

⁴⁰ 35 U.S.C. §§ 3(a)(1), 3(a)(2)(A).

⁴¹ See *id.* § 3(a).

⁴² See *id.* § 6(c).

⁴³ See 19 U.S.C. § 1330(a).

Chairman, but they are members of the Commission.⁴⁴ No more than three Commissioners may be members of the same political party.⁴⁵ Likewise, the FTC and FCC are each governed by a five-member Commission,⁴⁶ the members of which are each appointed by the President and approved by the Senate. Like the ITC, the respective Chairman of the FTC and FCC are each chosen from that agency's Commission, and the number of Commissioners belonging to the same political party is limited by statute.⁴⁷

C. Recommendation

The co-sponsors recommend that Congress enact legislation authorizing one or more principal officers, who are appointed by the President and confirmed by the Senate, to review decisions of the PTAB determining the patentability of any claim reviewed by the PTAB before such decisions become final decisions of the USPTO. By recommending that Congress authorize "one or more principal officers" to review PTAB decisions, the co-sponsors take no position on whether Congress should embrace proposal (2) of a Director-led review of the PTAB or proposal (3) of a multi-member review panel consisting of principal officers. Instead, the co-sponsors defer to Congress to decide which proposal best serves the patent system as a whole. As discussed below, the post-*Arthrex* status quo of no job protections for APJs is untenable as a matter of policy and should be legislatively remedied as soon as possible.

This review structure would directly address *Arthrex*'s concern that under the current statutory scheme, "[n]o presidentially-appointed officer has independent authority to review a final written decision by the APJs before the decision issues on behalf of the United States."⁴⁸ The proposed legislative fix incorporates aspects of proposals (2)-(4) discussed above, in that the review structure would comprise one or more principal officers. As noted above, the co-sponsors prefer to leave to Congress the specific principal officer(s) that should be included in the new review structure.

The recommended legislative fix is a *prospective* one responding to the issues identified in *Arthrex*. The creation of a new review function by one or more principal officers would resolve the issues identified in *Arthrex* prospectively, as of the date the review is established. Thus, the recommended legislative fix is not intended to be a retroactive fix to the issues identified in *Arthrex*. *Arthrex*'s severance of APJs' Title 5 removal protections rendered APJs as inferior officers and thus fixed the perceived constitutional infirmity with the appointment of APJs under the AIA, but in doing so, the Federal Circuit removed the Title 5 removal protections that Congress afforded to APJs.⁴⁹ These employment protections are critical for maintaining APJs' decisional independence. The proposed legislative fix will render APJs inferior officers due to the

⁴⁴ See *id.* § 1330(c).

⁴⁵ *Id.* § 1330(a).

⁴⁶ See 15 U.S.C. § 41 (FTC); 47 U.S.C. § 154 (FCC).

⁴⁷ *Id.*

⁴⁸ *Arthrex*, 941 F.3d at 1329.

⁴⁹ *Id.* at 1338; see also *Arthrex*, 953 F.3d at 764 ("Because the APJs were constitutionally appointed as of the implementation of the severance, *inter partes* review decisions going forward were no longer rendered by unconstitutional panels."); 35 U.S.C. § 3(c) (Title 5 protections afforded to "officers and employees" of the USPTO).

creation of the new review function, without requiring APJs to lack Title 5 removal protections.

The proposed legislative fix is preferable to waiting for the Supreme Court to rule on this issue, for several reasons. The Supreme Court does not have the power to legislate. Therefore, if the Supreme Court denies any petition for certiorari or affirms the Federal Circuit's decision in *Arthrex*, APJs would be left without Title 5 removal protections that are required to ensure judicial independence. Alternatively, if the Supreme Court agrees with the Federal Circuit that APJs were principal officers before the severance of their Title 5 removal protections but that the issue cannot be resolved by the courts, a legislative fix is needed to ensure that APJs may perform the reviews they were intended to do under the AIA. On the other hand, if the Supreme Court reverses the Federal Circuit's decision in *Arthrex* based on a finding that APJs are inferior officers under the current statutory scheme, the Supreme Court's holding may be limited to APJs' review functions for IPRs and PGRs, but not impact the function of APJs in reviewing examiner decisions.⁵⁰

If Congress does cure the purported constitutional infirmities noted in *Arthrex* by providing that decisions by APJs may be reviewed by one or more principal officers, as the resolution recommends, it should use the same legislation to restore the Title 5 removal protections that Congress afforded to APJs but that were severed by *Arthrex*. The co-sponsors believe it is important for APJs to have removal protections to provide APJs with the decisional independence required to adjudicate their cases with due process for all involved parties. Congress showed a clear intent to afford Title 5 employment protections to APJs, by expressly requiring Title 5 protections for officers and employees of the Office.⁵¹ Restoring APJs' Title 5 removal protections, which were severed in *Arthrex*, will provide APJs with the decisional independence required to adjudicate their cases.

V. Conclusion

The co-sponsors recommend solving the Appointments Clause infirmity identified in *Arthrex* through legislation to provide appropriate decision-making by one or more properly appointed principal officers. This legislative solution should also restore the Title 5 removal protections for APJs at the PTAB, which will provide APJs with the decisional independence required to adjudicate their cases.

Respectfully submitted,

George W. Jordan, III, Chair
Section of Intellectual Property Law
August 2020

⁵⁰ The proposed legislative fix could be applied in the future to Administrative Trademark Judges performing review functions for the Trademark Trial and Appeal Board (TTAB) of the USPTO.

⁵¹ See 35 U.S.C. § 3(c).

GENERAL INFORMATION FORM

Submitting Entity: Section of Intellectual Property Law, and Section of Administrative Law and Regulatory Practice

Submitted by: George W. Jordan, III, Chair of Section of Intellectual Property Law

1. Summary of Resolution

The Resolution calls for the Association to adopt policy urging Congress to pass legislation authorizing review of decisions of the U.S. Patent and Trademark Office's Patent Trial and Appeal Board (PTAB) before such decisions become the final decisions of the agency, and restoring the statutorily afforded Title 5 removal protections that were severed from Administrative Patent Judges (APJs) of the (PTAB). The proposed legislative fix would ensure that APJs are rendered inferior officers, rather than principal officers, under the Appointments Clause of the U.S. Constitution. U.S. Const. art. II, § 2, cl. 2. Congress intended for APJs to be inferior officers. 35 U.S.C. § 6(a). However, in *Arthrex*, the Federal Circuit held that APJs are principal officers because the Director of the USPTO does not have sufficient authority to review and possibly reverse decisions of the PTAB before they become the final decisions of the agency, and the Director has insufficient power to remove APJs from office. *Arthrex Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1329-31, 1332-34 (Fed. Cir. 2019), *en banc rehearing denied*, 953 F.3d 760 (2020). To remedy the determined constitutional defect with the appointment of APJs while preserving the adjudicative and appellate functions of the PTAB under the AIA, the Federal Circuit severed APJs' statutory removal protections under Title 5, making APJs removable at will. *Id.* at 1338. But Congress expressly intended for APJs to have Title 5 employment protections afforded to federal employees. See 35 U.S.C. § 3(c). The proposed legislative fix would restore Title 5 removal protections and therefore afford APJs with the judicial independence to adjudicate their cases.

2. Approval by Submitting Entity

The Section of Intellectual Property Law Council approved the Resolution on April 7, 2020. The Section of Administrative Law and Regulatory Practice approved the Resolution on May 9, 2020.

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

No.

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

None.

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

N/A

6. Status of Legislation

A bill has not yet been proposed by either the House or Senate. The House Judiciary Committee's Subcommittee on the Courts, Intellectual Property and the Internet held a hearing in November 2019, and it is anticipated that the Subcommittee will introduce a bill after the return to regular order after the current Coronavirus/COVID-19 public emergency has passed.

7. Plans for implementation of the policy if adopted by the House of Delegates

The policy will provide Association support for legislation addressing the issue.

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

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

9. Disclosure of Interest

There are no known conflicts of interest regarding this recommendation.

10. Referrals

The Resolution and Report have been 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 Person (prior to meeting)

Mark K. Dickson, Ph.D.
Immediate Past Chair, Section of Intellectual Property Law
Phase M, LLP
San Mateo, CA 94402
mdickson@phaseM.com

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

Mark K. Dickson, Ph.D.
Immediate Past Chair, Section of Intellectual Property Law
Phase M, LLP
San Mateo, CA 94402
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EXECUTIVE SUMMARY1. Summary of the Resolution

The Resolution calls for the Association to adopt policy urging Congress to pass legislation that authorizes one or more principal officers, who are appointed by the President and confirmed by the Senate in accordance with the Appointments Clause of the U.S. Constitution, to review decisions of the Patent Trial and Appeal Board (PTAB) of the U.S. Patent and Trademark Office (USPTO) before such decisions become the final decisions of the USPTO, and that restores Title 5 employment protections for the PTAB's Administrative Patent Judges (APJs), in response to the severance of those protections in the Federal Circuit's *Arthrex* decision.

2. Summary of the Issue that the Resolution Addresses

This report addresses the issue of creating a legislative solution to ensure that APJs of the PTAB are rendered inferior officers, rather than principal officers, under the Appointments Clause of the U.S. Constitution. U.S. Const. art. II, § 2, cl. 2. A principal officer is appointed by the President and confirmed by the Senate. *Id.* An inferior officer may be appointed by a principal officer who is the head of an agency. *Id.* The Director of the USPTO is a principal officer. 35 U.S.C. § 3(a)(1). Congress intended for APJs to be inferior officers. *Id.* § 6(a). However, in *Arthrex*, the Federal Circuit held that APJs are principal officers because the Director of the USPTO does not have sufficient authority to review and possibly reverse decisions of the PTAB before they become the final decisions of the agency, and the Director has insufficient power to remove APJs from office. *Arthrex Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1329-31, 1332-1334 (Fed. Cir. 2019), *en banc rehearing denied*, 953 F.3d 760 (2020). To remedy the determined constitutional defect with the appointment of APJs while preserving the adjudicative and appellate functions of the PTAB under the AIA, the Federal Circuit severed APJs' statutory removal protections under Title 5, making APJs removable at will. *Id.* at 1338. Congress expressly intended for APJs to have Title 5 employment protections afforded to federal employees. See 35 U.S.C. § 3(c).

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

The proposed legislative solution directly addresses the Federal Circuit's concern that "[n]o presidentially-appointed officer has independent authority to review a final written decision by the APJs before the decision issues on the behalf of the United States." *Arthrex*, 941 F.3d at 1329. Authorizing one or more principal officers to review the PTAB's decisions before they become the final decisions of the agency is sufficient to render APJs inferior officers, *Arthrex*, 941 F.3d at 1329, and would thus allow for the restorations of APJs' Title 5 removal protections that

were severed in *Arthrex*, thereby providing APJs the decisional independence to adjudicate their cases.

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

None known.

AMERICAN BAR ASSOCIATION
SECTION OF INTELLECTUAL PROPERTY LAW
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association supports, in principle, a transparent
2 administrative process or processes to remove trademark registrations from the U.S.
3 Patent and Trademark Office's Principal or Supplemental Register, provided that:

4 (a) invalidation of a targeted registration is conditioned on proof that the registered
5 mark was not used in commerce by any of the following relevant dates: (1) the claimed
6 date of first use; (2) the filing date of an amendment to allege use; or (3) date of
7 registration;

8 (b) the USPTO independently verifies the evidence of such non-use;

9 (c) there is a clear definition of what qualifies as sufficient evidence to prove such non-
10 use as of the relevant date;

11 (d) registrants domiciled in the United States are not disadvantaged vis-à-vis
12 registrants domiciled outside the United States, including with regard to the timing of
13 the process(es) and any mechanisms by which registrations are invalidated;

14 (e) such process(es) before the USPTO should be stayed in the event of an adversarial
15 proceeding before a tribunal with competent jurisdiction in which there is a claim or
16 defense that the registration should be cancelled on the ground of such non-use on or
17 before the relevant date; and

18 (f) registrants receive the right to appeal adverse determinations by civil action or by
19 appeal to the U.S. Court of Appeals for Federal Circuit, as set forth in 15 U.S.C. § 1071.

REPORT

I. Introduction

Consumer protection is the cornerstone of the Lanham Act, 15 U.S.C. § 1051 et seq., and the accuracy and validity of the records of federally registered marks maintained by the U.S. Patent and Trademark Office (USPTO) is critical to furthering this purpose. In recent years, the USPTO has seen a massive influx of trademark applications (primarily by foreign applicants) based on false (and often fraudulent) sworn averments by applicants. This flood of bogus filings has affected the integrity of the trademark registers and affected the ability of legitimate mark owners to register their trademarks.

Currently, the only viable methods for clearing the trademark registers of these problematic filings are: (1) an adversarial proceeding before the Trademark Trial and Appeal Board (TTAB) of the USPTO challenging the pending application or registration; or (2) a counterclaim for cancellation in a civil action in which the claim at issue has been asserted against the counterclaimant. TTAB proceedings, held before a panel of non-Article III administrative law judges, can be quite costly and burdensome to litigate and often take many months or years to receive a final determination on the merits; litigation before federal and state courts has the same disadvantages.

To combat these suspect filings, Congress has proposed amendments to the Lanham Act¹ to create new, abbreviated proceedings that would be adjudicated by the Director of the USPTO. The Resolution proposes certain conditions that should be present in any such legislation to preserve the integrity of the trademark registers and prevent abuse of any new proceedings. While an expedited and abbreviated proceeding before the Director may present the opportunity to clear the register of deadwood registrations more efficiently than currently possible, at the same time it may allow nefarious actors to abuse the process by harassing and/or otherwise unscrupulously attacking otherwise valid registrations for business and/or legal gain. Safeguards therefore should accompany any such legislative amendment to prevent abuse of the new proceedings.

II. The Significance of Use in Commerce to the Trademark Registration Process

When filing a federal trademark application under Section 1(a) of the Lanham Act, 15 U.S.C. § 1051(a), an applicant domiciled in the United States must aver, under oath, that it has used its mark in interstate commerce and must submit a specimen demonstrating use on or in connection with the goods or services being offered. If the applicant is domiciled outside of the United States, the applicant may follow the same procedure, or it may avail itself of the Paris Convention or Madrid Protocol and rely upon a registration issued by its own national trademark office. If it takes the latter approach, it must aver a bona fide intent to use its mark in commerce.²

¹ See Trademark Modernization Act of 2020, H.R. 6196 and S. 3449, introduced on March 11, 2020.

² See Section 44(e) and 66 of the Lanham Act, 15 U.S.C. §§ 1126(e), 1141.

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The USPTO has seen an increase in the number of (somewhat recently issued) registrations apparently arising from false averments that the applied-for marks are used in interstate commerce. Thus, the problem is that in certain situations, applicants are declaring, under oath and penalty of perjury, that their marks are used in interstate commerce when, in fact, they are not.

Within the first five years after a trademark registration is issued by the USPTO under Section 1(a), the registration may be challenged as void *ab initio* for want of use in interstate commerce as of the date of an averment of use in commerce during the registration process. 15 U.S.C. § 1064. Although the Lanham Act authorizes federal and state courts of competent jurisdiction to order the cancellation of registrations, this type of challenge most often takes the form of an *inter partes* cancellation proceeding before the TTAB and, as mentioned previously, may take months or years to receive a final determination on the merits.

With respect to applications based upon a foreign (non-U.S.) registration, the subsequent U.S. registration may not be challenged until three years after issuance for abandonment based upon certain treaty obligations. However, abandonment requires showings of both nonuse and an intent not to begin or resume use, 15 U.S.C. § 1127. These same registrations also may be challenged up until five years after their issuance because the applicant did not have the required bona fide intent to use its mark in interstate commerce as of the filing date of the application that matured into registration. Both showings may be difficult because they require inquiries into scienter.

In the context of national trademark registration systems, “‘deadwood’ generally means registered marks that are not in use in the country for which the registration has been issued, or registered marks that are in use but only for some of the goods and services covered by the registrations.” Daniel R. Bereskin & Aaron Sawchuk, Crocker Revisited: The Protection of Trademarks of Foreign Nationals in the United States, 93 TRADEMARK REP. 1199, 1218 n.9 (2003). Regardless of intent, deadwood registrations present several obstacles to the owners or potential owners of similar or identical marks.³ These obstacles often become present at the early stages of mark consideration or adoption if they are identified either by trademark counsel during the clearance process and/or by a USPTO Examining Attorney who refuses registration to an applied-for mark by citing the mark underlying the deadwood registration as likely to cause consumer confusion. Removing the deadwood from the register to pave the way for the new mark (and

³ One type of “deadwood” registration which is problematic but is not currently addressed by the proposed legislation involves a mark that was in use in commerce when the registration issued but later fell out of use. This non-use may not be the result of mischief but may simply be the result of such things as a bankruptcy or a conscious decision to re-brand a product or service. In these situations, the mark was legitimately in use at the time that the registration issued but such use in commerce ceased at some point within the first five years following issuance. Currently, this particular type of “deadwood” registration may only be removed via an *inter partes* cancellation proceeding before the TTAB or via a counterclaim for cancellation in an infringement action. Often, these deadwood registrations remain on the trademark register until the next date for a maintenance filing and can be an obstacle to owners or potential owners of similar or identical marks.

subsequent registration) can be both costly and time consuming and can drain the resources of the TTAB.

III. Requirements To Be Included In Legislation That Preserve The Integrity Of The Trademark Registers And Prevent Abuse Of Any New Proceedings

The Trademark Modernization Act of 2020, introduced in both the House of Representatives and Senate on March 11, 2020, H.R. 6196 and S. 3449, would create two new administrative mechanisms for addressing the deadwood issues, namely:

- 1) an expungement proceeding targeting registrations of marks that never have been used in commerce; and
- 2) an ex parte reexamination proceeding targeting registrations of marks not used in commerce before the relevant date required for registration.

While these bills have merit, important safeguards are needed for the administrative mechanisms proposed by the bills.

A. Ensuring That The Proceedings Apply Equally To Domestic And Non-U.S. Registrants

Currently, a party seeking to challenge an existing registration because the registered mark was not in use at the time of filing the application or Statement of Use⁴ has no recourse short of initiating a formal TTAB proceeding or asserting a counterclaim to cancel the registration. If Congress amends the Lanham Act to permit an expedited (and abbreviated) proceeding before the Director to remove such registrations from a trademark register, invalidating a registration should be limited to those situations in which the mark can be proven to lack legitimate use in commerce by any of the following relevant dates: (1) date of first use; (2) date of filing an amendment to allege use; or (3) date of registration. Further, the rules underlying any such proceedings should apply equally to both U.S. and non-U.S. registrants (and registrations) to avoid conflict with various trademark-related treaty obligations.⁵

B. Mirroring The Lanham Act's Current Provision Permitting Appeals To Either The Federal Circuit Or A U.S. District Court

The Lanham Act currently allows an appeal from a TTAB decision either to a United States District Court or to the United States Court of Appeals for the Federal Circuit. See 15 U.S.C. § 1071. Similarly, a party seeking to appeal an adverse decision by the Director should be permitted such recourse to either a district court or the Federal Circuit on all

⁴ Under Sections 14(3), 15 U.S.C. §1064, and 1(a), 1(c) and 1(d), *id.* § 1051, there are numerous grounds for opposing the registration of an application and/or seeking to cancel a registration, including if the registered marks have been abandoned or were not in use at the time of filing the application or Statement of Use, or if the application had been fraudulently filed.

⁵ Treaty examples include the Paris Convention and Madrid Protocol.

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appeals of re-examination and expungement proceedings because the contrary presupposes that the various federal district courts are not equally capable of adjudicating such proceedings. For decades, trademark litigants have relied on federal district courts to adjudicate complex trademark issues, and case law proves that the courts are quite adept at rendering well-reasoned decisions in trademark law. Moreover, forcing a registrant or petitioner to incur travel expenses to appeal an adverse decision by the Director when a local (federal) district court would be the more convenient venue for one or both parties seems heavy handed and unnecessary, under the circumstances. Additionally, permitting an appeal to be brought before a federal district court would allow the registrant and petitioner the opportunity to present new and/or more detailed evidence⁶ than might not have been presented earlier due to the limited nature of the proceeding before the Director. If appellate jurisdiction were restricted to only the Federal Circuit, the parties would be limited to only the evidence put forth on the record before the Director. Further, if a party appeals a decision from a re-examination or expungement proceeding, thereby being willing to invest tens or hundreds of thousands of dollars in pursuing the matter, it is likely important enough to deserve the full life cycle of a district court case rather than being decided based on the limited information allowed for submission during a re-examination or expungement proceeding.

C. Safeguards Necessary To Prevent Abuse Of The New Proceedings

i. Transparency Of The Proceeding

While the Lanham Act contains a standing requirement⁷ for initiating a cancellation proceeding before the TTAB, the new proposed proceedings before the Director may be filed by anyone who presents a petition alleging a prima facie case of non-use. This lack of a standing requirement opens the door for someone with malicious intentions to file a petition that meets the minimum standard for a prima facie case and effectively hide behind the anonymity of a filing that remains hidden away from public view. Thus, it is imperative that any petitions, including the identity of the petitioner, filed under the proposed new proceedings should be made part of the public record, fully accessible by the registrant and anyone else in the public, via the USPTO's online filing systems.

ii. Setting Forth A Clear Standard For What Constitutes Sufficient Proof Necessary To Cancel A Registration For Non-Use

One such area for abuse is the potential ability of a party to weaponize the proceeding against a competitor by filing a meritless petition to the Director simply to cast doubt and uncertainty upon the validity of the competitor's registration. Thus, whether the proceeding before the USPTO is requested by the USPTO or by another party, the evidence of such non-use can and must be verified independently by the USPTO prior

⁶ See Sec. 21(b) of the Lanham Act, 15 U.S.C. §1071(b).

⁷ "A petition to cancel a registration of a mark, stating the grounds relied upon, may, upon payment of the prescribed fee, be filed as follows by any person who believes that he is or will be damaged, including as a result of a likelihood of dilution by blurring or dilution by tarnishment under section 1125(c) of this title, by the registration of a mark on the principal register established by this chapter, or under the Act of March 3, 1881, or the Act of February 20, 1905..." 15 U.S.C. § 1064.

to instituting the proceeding. Moreover, any such legislation (and corresponding rules) should clearly define what constitutes sufficient proof of such non-use by the relevant date to avoid a scenario where there is an inconsistent and unclear standard by which a registration is cancelled for non-use under the proceeding.

iii. Staying A Proceeding Where A Corresponding Federal Court Action Has Been Instituted

Another scenario in which the new proceeding could be weaponized by a competitor against an otherwise legitimate and unsuspecting brand owner is in the context of a federal court action for trademark infringement or counterfeiting.⁸ Suppose, for example, that a plaintiff files a complaint and motion for preliminary injunction in court based upon a claim of infringement of a registered trademark under Section 32 of the Lanham Act, 15 U.S.C. §1114, and a re-examination proceeding is initiated against the plaintiff's trademark registration shortly after the filing of the complaint. The re-examination of plaintiff's presumptively valid and subsisting registration would cast a dark cloud over plaintiff's rights. Therefore, the court may be less inclined to grant the plaintiff's preliminary injunction in light of the pending re-examination proceeding. The court also might defer a decision on the motion for preliminary injunction pending the outcome of the re-examination proceeding. The extensive delay caused by the re-examination proceeding alone could reduce the likelihood that the court would grant preliminary injunctive relief. This delay could be felt even more profoundly in a case of counterfeiting of a registered mark where the counterfeit goods are being advertised and sold on the open market and, in some cases, may involve counterfeit products that pose a significant risk to public health or safety (e.g., counterfeit pharmaceuticals, sub-standard electronics, medical devices or diagnostic equipment.)⁹

Accordingly, these new proceedings before the Director should be automatically stayed if an adverse proceeding is brought before a tribunal with competent jurisdiction in which a claim or defense that the registration should be cancelled on the ground of non-use as of the relevant date could have been brought. As a result, the ultimate question of validity of the registration will be or could have been before the court, which has the inherent power to cancel the registration if the mark was never in use at the time of filing (i.e., the same standard under the proposed re-examination and expungement proceedings). This is consistent with the current TTAB practice that when "a party or parties to a case pending before it are involved in a civil action that may have a bearing on the Board case, proceedings before the Board may be suspended until final determination of the civil action."¹⁰

⁸ Section 32 of the Lanham Act, 15 U.S.C. § 1114, specifically provides remedies for infringement or counterfeiting of registered trademarks. The unauthorized use of unregistered marks and other false designations of origin (i.e., those at common law) is generally only actionable under Section 43(a) of the Lanham Act. Thus, certain remedies, including *ex parte* seizure of counterfeit goods, are only available to marks which are registered.

⁹ Ownership of a federal trademark registration is a prerequisite to successfully asserting a claim of counterfeiting under the Lanham Act. See 15 U.S.C. § 1127.

¹⁰ 37 C.F.R. § 2.117(a).

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IV. Conclusion

The Section of Intellectual Property Law urges the House of Delegates to adopt the proposed resolution to: (1) support, in principle, a transparent process by which the Director of the USPTO may invalidate a federal trademark registration either because the mark covered by it was not used in commerce at the time the registrant represented the mark was so used or because the registered mark has not been so used; but (2) condition that support on the conditions set forth above, which will prevent abuse and further the goal of maintaining the accuracy and validity of the trademark registers.

Respectfully submitted,

George W. Jordan, III
Chair, Section of Intellectual Property Law
August 2020

GENERAL INFORMATION FORM

Submitting Entity: Section of Intellectual Property Law

Submitted by: George W. Jordan, III, Section Chair

1. Summary of Resolution

The proposed policy enumerates conditions necessary to ensure that possible expedited proceedings for the invalidation of federal trademark registrations are not abused. In particular, the conditions would ensure that (1) these proceedings apply equally to domestic and non-U.S. registrants, (2) the proceedings are transparent in identifying the petitioner, (3) there is a clear standard for the proof required to cancel a registration, (4) stays are provided in these proceedings when a corresponding federal court action is pending, and (5) these proceedings permit appeals to either the Court of Appeals for the Federal Circuit or a U.S. District Court.

2. Approval by Submitting Entity

The Section of Intellectual Property Law Council approved the Resolution on April 24, 2020.

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

No.

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

None.

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

N/A

6. Status of Legislation

The Courts, Intellectual Property and the Internet Committee of the House Judiciary Committee held a series of roundtables with stakeholders in the fall - winter of 2019, to develop this legislation. The resulting Trademark Modernization Act of 2020, H.R. 6196 and S. 3449, was introduced March 11, 2020. Neither the House nor the Senate companion bill has been voted out of committee due to the

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current COVID-19 public emergency, but at a minimum the House Judiciary Committee is expected to mark this bill up in the fall of 2020. At this point in time, certain safeguards that the Resolution proposes are not included in the legislation.

7. Plans for implementation of the policy if adopted by the House of Delegates

The policy will provide Association support for legislation addressing the issue.

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

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

9. Disclosure of Interest

There are no known conflicts of interest regarding this recommendation.

10. Referrals

The Resolution and Report have been 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 Person (prior to meeting)

Lisa A. Dunner
Dunner Law PLLC
3243 P Street, N.W.
Washington, DC 20007
202.298.6002
ldunner@dunnerlaw.com

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

Lisa A. Dunner
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Washington, DC 20007
202.298.6002
ldunner@dunnerlaw.com

EXECUTIVE SUMMARY

1. Summary of the Resolution

The proposed policy enumerates conditions necessary to ensure that possible expedited proceedings for the invalidation of federal trademark registrations are not abused. In particular, the conditions would ensure that (1) these proceedings apply equally to domestic and non-U.S. registrants, (2) the proceedings are transparent in identifying the petitioner, (3) there is a clear standard for the proof required to cancel a registration, (4) stays are provided in these proceedings when a corresponding federal court action is pending, and (5) these proceedings permit appeals to either the Court of Appeals for the Federal Circuit or a U.S. District Court.

2. Summary of the Issue that the Resolution Addresses

Congress is proposing the creation of two new expedited proceedings to cancel a federal trademark registration. Absent certain safeguards, these proceedings being created to stem trademark registrations acquired through false statements may open up new avenues for malicious actors to frivolously challenge legitimately acquired trademarks registrations.

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

The proposed policy would allow the ABA to support federal legislation authorizing the expedited invalidation of deadwood trademark registrations while also conditioning that support on the codification of certain safeguards to prevent abuse of the resulting proceedings.

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

None known at this time.

AMERICAN BAR ASSOCIATION
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association House of Delegates concurs in the
2 action of the Council of the Section of Legal Education and Admissions to the Bar in
3 making amendments dated August 2020 to Definitions, Standards, and Rules of the *ABA*
4 *Standards and Rules of Procedure for Approval of Law Schools*, that change the approval
5 process for distance education programs to a substantive change process (Standard 105
6 and Rule 24) as required by the U.S. Department of Education, rather than the current
7 variance process (Standard 107).

8
9
10 Definitions

11 Standard 105. Acquiescence for Substantive Change in Program or Structure

12 Standard 306. Distance Education

13 Standard 311. Academic Program and Academic Calendar

14 Standard 511. Verification of Student Identity

15 Rule 24. Application for Acquiescence in Substantive Change

**American Bar Association
Section of Legal Education and Admissions to the Bar
Revised Standards for Approval of Law Schools
August 2020**

(Insertions underlined; deletions ~~struck through~~.)

DEFINITIONS:

As used in the Standards, Interpretations, and Rules of Procedure:

...

(6) “Distance education course” means one in which students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously.

(7) “Distance Education J.D. Program” means a program where a law school grants a student more than one third of the credit hours required for the J.D. degree for distance education courses.

~~(6)~~(8) “Full-time faculty member” means an individual whose primary professional employment is with the law school, who is designated by the law school as a full-time faculty member, who devotes substantially all working time during the academic year to responsibilities described in Standard 404(a), and whose outside professional activities, other than those described in Standard 404(a), if any, do not unduly interfere with his or her responsibilities as a full-time faculty member.

~~(7)~~(9) “Governing board” means a board of trustees, board of regents, or comparable body that has ultimate policy making authority for a law school or the university of which the law school is a part.

~~(8)~~(10) “House” means the House of Delegates of the American Bar Association.

~~(9)~~(11) “Interpretations” mean the Interpretations of the Standards for Approval of Law Schools.

~~(10)~~(12) “J.D. degree” means the professional degree in law granted upon completion of a program of legal education that is governed by the Standards.

~~(11)~~(13) “Managing Director” means the Managing Director of the Section of Legal Education and Admissions to the Bar of the American Bar Association.

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- 37 ~~(12)~~(14) "President" means the chief executive officer of a university or, if the
38 university has more than one administratively independent unit, of the
39 independent unit. If a law school is not part of a university, "president" refers
40 to the chief executive officer of any entity that owns the law school, if there
41 is such a person, or else the Chair of the Board of Directors of the law school.
42 "Probation" is a public status indicating that a law school is not being
43 operated in compliance with the Standards and is at risk of having its
44 approval withdrawn.
- 45 ~~(13)~~(15) "Rules" mean the Rules of Procedure for Approval of Law Schools.
- 46 ~~(14)~~(16) "Section" means the Section of Legal Education and Admissions to the Bar
47 of the American Bar Association.
- 48 ~~(15)~~(17) "Separate location" means a physical location within the United States: (1) at
49 which the law school offers J.D. degree courses, (2) where a student may
50 earn more than sixteen credit hours of the school's program of legal
51 education, and (3) that is not in reasonable proximity to the law school's main
52 location.
- 53 ~~(16)~~(18) "Standards" mean the Standards for Approval of Law Schools.
- 54 ~~(17)~~(19) "University" means a post-secondary educational institution, whether
55 referred to as a university, college, or by any other name, that confers a
56 baccalaureate degree (and may grant other degrees).

57

58 **STANDARD 105. ACQUIESCENCE FOR SUBSTANTIVE CHANGE IN PROGRAM OR** 59 **STRUCTURE**

- 60 (a) Before a law school makes a substantive change in its program of legal education
61 or organizational structure, it shall obtain the acquiescence of the Council for the
62 change. A substantive change in program or structure that requires application for
63 acquiescence includes:
- 64 ...
- 65 (12) The addition of courses or programs that represent a significant departure
66 from existing offerings or method of delivery since the latest site evaluation
67 including instituting a new full-time or part-time division, instituting a
68 Distance Education J.D. Program, or establishing a new or different
69 program leading to a certificate or degree other than a J.D. degree.

...

STANDARD 306. DISTANCE EDUCATION

(a) A distance education course is one in which students are separated from the faculty member or each other for more than one third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously.

(b) Credit for a distance education course shall be awarded only if the academic content, the method of course delivery, and the method of evaluating student performance are approved as part of the school's regular curriculum approval process.

(c) A law school shall have the technological capacity, staff, information resources, and facilities necessary to assure the educational quality of distance education.

(d) A law school may award credit for distance education and may count that credit toward the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction required by Standard 311(a) if:

- (1) there is opportunity for regular and substantive interaction between faculty member and student and among students;
- (2) there is regular monitoring of student effort by the faculty member and opportunity for communication about that effort; and
- (3) the learning outcomes for the course are consistent with Standard 302.

(e) A law school may grant a student up to one-third of the credit hours required for the J.D. degree for distance education courses qualifying under this Standard. A law school may grant up to 10 of those credits during the first one-third of a student's program of legal education.

(f) A law school shall establish an effective process for verifying the identity of students taking distance education courses and that also protects student privacy. If any additional student charges are associated with verification of student identity, students must be notified at the time of registration or enrollment.

Interpretation 306-1

Methods to verify student identity as required by Standard 306(f) include, but are not limited to (i) a secure login and pass code, (ii) proctored examinations, and (iii) other technologies and practices that are effective in verifying student identity. As part of the verification process, a law school shall verify that the student who registers for a class is the same student that participates and takes any examinations for the class.

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STANDARD 311. ACADEMIC PROGRAM AND ACADEMIC CALENDAR

- (a) A law school shall require, as a condition for graduation, successful completion of a course of study of not fewer than 83 credit hours. At least 64 of these credit hours shall be in courses that require attendance in regularly scheduled classroom sessions or direct faculty instruction.
- (b) A law school shall require that the course of study for the J.D. degree be completed no earlier than 24 months and, except in extraordinary circumstances, no later than 84 months after a student has commenced law study at the law school or a law school from which the school has accepted transfer credit.
- (c) A law school shall not permit a student to be enrolled at any time in coursework that exceeds 20 percent of the total credit hours required by that school for graduation.
- (d) Credit for a J.D. degree shall only be given for course work taken after the student has matriculated in a law school's J.D. program of study, except for credit that may be granted pursuant to Standard 505. A law school may not grant credit toward the J.D. degree for work taken in a pre-admission program.
- (e) A law school may grant up to 10 credit hours required for the J.D. degree for distance education courses during the first one-third of a student's program of legal education.

Interpretation 311-1

- (a) In calculating the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction for the purpose of Standard 311(a), the credit hours may include:
 - (1) Credit hours earned by attendance in regularly scheduled classroom sessions or direct faculty instruction;
 - (2) Credit hours earned by participation in a simulation course or law clinic in compliance with Standard 304;
 - (3) Credit hours earned through distance education ~~in compliance with Standard 306~~; and
 - (4) Credit hours earned by participation in law-related studies or activities in a country outside the United States in compliance with Standard 307.

...

STANDARD 511. VERIFICATION OF STUDENT IDENTITY

A Law School shall verify that a student who registers for any distance education course is the same student that academically engages in the course.

143

144 **RULE 24: APPLICATION FOR ACQUIESCENCE IN SUBSTANTIVE CHANGE**

145 (a) Substantive changes requiring application for acquiescence include:

146 ...

147 (12) The addition of courses or programs that represent a significant departure
 148 from existing offerings or method of delivery since the latest site evaluation
 149 including instituting a new full-time or part-time division, instituting a
 150 Distance Education J.D. Program, or establishing a new or different
 151 program leading to a certificate or degree other than a J.D. degree.

152 (13) The addition of a permanent location at which the law school is conducting
 153 a teach-out for students at another law school that has ceased operating
 154 before all students have completed their program of study;

155 (14) Contracting with an educational entity that is not certified to participate in
 156 Title IV, HEA programs, that would permit a student to earn 25 percent or
 157 more of the course credits required for graduation from the approved law
 158 school;

159 (15) Establishing a new or different program leading to a certificate or degree
 160 other than the J.D. degree;

161 (16) A change in program length measurement from clock hours to credit hours;
 162 and

163 (17) A substantial increase in the number of clock or credit hours required for
 164 graduation.

165 ...

166 (h) A Law School shall not receive acquiescence in a substantive change if the law
 167 school is on probation or receives a finding of significant non-compliance with one
 168 or more Standards under Rule 11(a)(4), has been subject to such action by the
 169 Council over the prior three academic years, or is under a provisional certification
 170 under Title IV of the Higher Education Act of 1965, as amended, unless the law
 171 school can show the substantive change will assist the law school in making
 172 progress toward achieving full compliance.

173

174 (i) The decision of the Council granting acquiescence in a substantive change to
 175 institute a Distance Education J.D. Program under Rule 24(a)(12) may be for a
 176 term certain and can be extended once, with the extension being for either a
 177 further term certain or indefinite, but subject to revocation.

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178 (j) The decision granting acquiescence in a substantive change to institute a
179 Distance Education J.D. Program may require the law school to report to the
180 Managing Director or the Council regularly as specified in the decision.

REPORT

The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence the attached changes to the Definitions, Standards, and Rules of the *ABA Standards and Rules of Procedure for Approval of Law Schools*¹.

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

The amendments were approved by the Council for Notice and Comment during its meetings held on February 20-22, 2020. The Council received ten written comments on the proposed changes. The Council approved the amendments at its meeting on May 14-15, 2020.

Definitions

Standard 105. Acquiescence for Substantive Change in Program or Structure

Standard 306. Distance Education

Standard 311. Academic Program and Academic Calendar

Standard 511. Verification of Student Identity

Rule 24. Application for Acquiescence in Substantive Change

Currently, if a law school wants to start a distance education program, the law school must request a variance under Standard 107 (the process used to implement a change that is beyond what is permitted by the current Standards). The Department of Education recently communicated to the Section that starting a distance education program is considered a substantive change by the Department of Education, thus the approval of a distance education program must be handled as a substantive change under Standard 105 and Rule 24. The first step to make these changes is to add distance education as a substantive change under Standard 105 and Rule 24.

The second step in making these changes is to delete Standard 306, Distance Education. The language currently in Standard 306(a), providing the definition of "distance education" would be moved under Definitions, adding a definition for "Distance Education Course" and "Distance Education J.D."

The language currently in Standard 306(b) addresses approving distance education courses as part of a law school's regular curriculum approval process. Because all

¹ "2019-2020 ABA Standards and Rules of Procedure for Approval of Law Schools," http://www.americanbar.org/groups/legal_education/resources/standards.html.

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courses (distance or not) are approved as part of a law school's regular curriculum approval process, the language in Standard 306(b) is unnecessary.

The language currently in Standard 306(c) requires a law school to have the technological capacity, staff, information resources, and facilities necessary to assure the quality of distance education. Because the Standards have requirements for technology, staffing, information resources, and facilities, this language is already covered by other Standards.

The language currently in Standard 306(d) addresses when distance education may count toward the 64 credit hours of regularly scheduled classroom sessions under Standard 311, including that learning outcomes are consistent with Standard 302. Proposed language has been added to Standard 311, noting that credit hours earned through distance education may count toward the 64 credits. The requirements of Standard 302 on learning outcomes applies to the entire law school and does not exclude distance education, thus, Standard 306(d) is unnecessary.

The language currently in Standard 306(e) regarding the amount of credit that can be granted for distance education has been included in the new definitions for distance education. The limitation of 10 distance education credits in the first year has been moved to a new Standard 311(e).

The language currently in Standard 306(f) regarding the verification of student identity has been moved to a new Standard 511 under Student Services.

The Council also wanted to maintain some of the requirements that have been imposed when granting a variance for distance education like reporting and time limits. This language has been added to the proposed changes in Rule 24.

Respectfully submitted,

Diane F. Bosse

Chair, Council of the Section of Legal Education and Admissions to the Bar
August 2020

GENERAL INFORMATION FORM

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

Submitted By: Diane F. Bosse, Chair

1. Summary of Resolution.

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Definitions, Standards, and Rules of the *ABA Standards and Rules of Procedure for Approval of Law Schools*, that change the approval process for distance education programs to a substantive change process (Standard 105 and Rule 24) as required by the U.S. Department of Education, rather than the current variance process (Standard 107).

2. Approval by Submitting Entity.

The amendments were approved by the Council for Notice and Comment during its meetings held on February 20-22, 2020. The Council received ten written comments on the proposed changes. The Council approved the amendments at its meeting on May 14-15, 2020.

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

No.

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

The amendments modify the existing *ABA Standards and Rules of Procedure for Approval of Law Schools*.

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

N/A.

6. Status of Legislation. (If applicable).

N/A.

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

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

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

Not applicable.

9. Disclosure of Interest.

Not applicable.

10. Referrals.

ABA Entities

ABA Diversity and Inclusion Center (and related groups)

ABA Law Student Division

ABA Section Directors and Delegates

ABA Standing and Special Committees, Task Forces, and Commission Chairs

ABA Young Lawyers Division

Conference of State Delegates

Minority Caucus

National Caucus of State Bar Associations

Non-ABA Entities

AccessLex Institute

American Association of Law Libraries

Association of American Law Schools

Association of Legal Writing Directors

Clinical Legal Education Association

Conference of Chief Justices

Deans and Associate Deans of Law Schools

Law School Admission Council

National Association for Law Placement

National Association of Bar Executives

National Conference of Bar Examiners

National Conference of Bar Presidents

SBA Presidents

Society of American Law Teachers

University Presidents

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

William Adams
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Section of Legal Education and Admissions to the Bar
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Stephanie Giggetts
American Bar Association
Section of Legal Education and Admissions to the Bar
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12. Name and Contact Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting)

Joan S. Howland
Associate Dean and Professor
University of Minnesota Law School
Ph: (612) 625-9036
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The Honorable Solomon Oliver, Jr.
Judge
U.S. District Court for the Northern District of Ohio
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EXECUTIVE SUMMARY

1. Summary of the Resolution

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Definitions, Standards, and Rules of the *ABA Standards and Rules of Procedure for Approval of Law Schools*, that change the approval process for distance education programs to a substantive change process (Standard 105 and Rule 24) as required by the Department of Education, rather than the current variance process (Standard 107).

2. Summary of the Issue that the Resolution Addresses

The resolution addresses Definitions, Standards, and Rules of the *ABA Standards and Rules of Procedure for Approval of Law Schools*, that change the approval process for distance education programs to a substantive change process (Standard 105 and Rule 24) as required by the U.S. Department of Education, rather than the current variance process (Standard 107).

move the approval of distance education programs under substantive change. (Standard 105 and Rule 24) as required by the U.S. Department of Education, and remove it from the variance process (Standard 107).

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

The proposal moves the approval process for distance education programs to the substantive change process under Standard 105 and Rule 24 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*, thus responding to the Department of Education's communication to the Section that starting a distance education program is considered a substantive change and approval of a distance education program must be handled as a substantive change.

4. Summary of Minority Views

None.

AMERICAN BAR ASSOCIATION
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association House of Delegates concurs in the
2 action of the Council of the Section of Legal Education and Admissions to the Bar in
3 making amendments dated August 2020 to Rule 2 of the *ABA Standards and Rules of*
4 *Procedure for Approval of Law Schools*:
5
6 Rule 2. Council Responsibility and Authority with Regard to Accreditation Status

American Bar Association
Section of Legal Education and Admissions to the Bar
Revised Standards for Approval of Law Schools
August 2020

(Insertions underlined; deletions ~~struck through~~.)

**RULE 2: COUNCIL RESPONSIBILITY AND AUTHORITY ~~WITH REGARD TO~~
ACCREDITATION STATUS**

(a) The Council has authority to determine compliance with the Standards. The Council has authority to:

- (1) ~~(a)~~ grant or deny an application of a law school for provisional approval or full approval;
- (2) ~~(b)~~ withdraw provisional or full approval;
- (3) ~~(c)~~ grant or deny applications for acquiescence in a substantive change, as provided in the Standards;
- (4) ~~(d)~~ grant or deny applications for variances;
- (5) ~~(e)~~ grant or deny an application for approval of a foreign program, and the continuance of a foreign program as set forth in the Criteria for Foreign Summer and Intersession Programs offered by ABA Approved Law Schools in a Location Outside the United States; the Criteria for Approval of Foreign Semester and Year-Long Programs; and the Criteria for Accepting Credit for Student Study at a Foreign Institution;
- (6) ~~(f)~~ approve or deny approval of a teach-out plan;
- (7) ~~(g)~~ impose sanctions and/or direct specific remedial action; and
- (8) ~~(h)~~ set fees for services and activities related to accreditation.

(b) A determination by the Council shall be effective upon issuance and is not retroactive.

(c) The Council is authorized to adopt emergency policies and procedures in response to extraordinary circumstances in which compliance with the Standards would create or constitute extreme hardship for multiple law schools. These policies and procedures will be effective upon adoption by the Council for a term certain and limited to the duration of the extraordinary circumstance.

REPORT

The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence the attached changes to the Rule 2 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*¹.

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

The Council approve the amendments for Notice and Comment during its meetings on May 14-15, 2020. The Council is expected to approve the amendments at its meeting in July 2020.

Rule 2: Council Responsibility and Authority with Regard to Accreditation Status.

This proposed amendment will authorize the Council to act quickly to address an emergency impacting multiple law schools—either regionally or nationally. Examples of emergencies include, but are not limited to, weather disasters and pandemics. In such emergency situations, law schools may need to respond in ways that could violate a standard. An example was when many law schools needed to abruptly shift from routine in-class scheduling of courses to distance learning due to the COVID-19 pandemic of 2020. This proposed amendment would permit the Council to provide temporary relief from a rule or the requirements of a standard to allow law schools to respond to the emergency. Such relief would be effective only for the duration of the extraordinary circumstance and only to the extent specifically provided.

Respectfully submitted,

Diane F. Bosse

Chair, Council of the Section of Legal Education and Admissions to the Bar
August 2020

¹ "2019-2020 ABA Standards and Rules of Procedure for Approval of Law Schools," http://www.americanbar.org/groups/legal_education/resources/standards.html.

GENERAL INFORMATION FORM

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

Submitted By: Diane F. Bosse, Chair

1. Summary of Resolution.

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Rule 2 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*, authorizing the Council to act quickly to address an emergency impacting multiple law schools—either regionally or nationally, by providing temporary relief from a rule or the requirements of a standard to allow law schools to respond to the emergency. Such relief would be effective only for the duration of the extraordinary circumstance and only to the extent specifically provided.

2. Approval by Submitting Entity.

The Council approved the amendments for Notice and Comment during its meetings on May 14-15, 2020. The Council is expected to approve the amendments at its meeting in July 2020.

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

No.

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

The amendments modify the existing *ABA Standards and Rules of Procedure for Approval of Law Schools*.

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

Not applicable.

6. Status of Legislation. (If applicable).

Not applicable.

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

The Council will notify ABA-approved law schools and other interested entities of the approved changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

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

Not applicable.

9. Disclosure of Interest.

Not applicable.

10. Referrals.

ABA Entities

ABA Diversity and Inclusion Center (and related groups)

ABA Law Student Division

ABA Section Directors and Delegates

ABA Standing and Special Committees, Task Forces, and Commission Chairs

ABA Young Lawyers Division

Conference of State Delegates

Minority Caucus

National Caucus of State Bar Associations

Non-ABA Entities

AccessLex Institute

American Association of Law Libraries

Association of American Law Schools

Association of Legal Writing Directors

Clinical Legal Education Association

Conference of Chief Justices

Deans and Associate Deans of Law Schools

Law School Admission Council

National Association for Law Placement

National Association of Bar Executives

National Conference of Bar Examiners

National Conference of Bar Presidents

SBA Presidents

Society of American Law Teachers

University Presidents

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

William Adams
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12. Name and Contact Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting)

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

1. Summary of the Resolution

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Rule 2 of the *ABA Standards and Rules of Procedure for Approval of Law Schools* authorizing the Council to act quickly to address an emergency impacting multiple law schools—either regionally or nationally, by providing temporary relief from a rule or the requirements of a standard to allow law schools to respond to the emergency.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses Rule 2 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*, authorizing the Council to act quickly to address an emergency impacting multiple law schools—either regionally or nationally. This proposed amendment would permit the Council to provide temporary relief from a rule or the requirements of a standard to allow law schools to respond to an emergency. Such relief would be effective only for the duration of the extraordinary circumstance and only to the extent specifically provided.

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

The proposals amend the 2019-2020 *ABA Standards and Rules of Procedure for Approval of Law Schools*.

4. Summary of Minority Views

None.

AMERICAN BAR ASSOCIATION
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association House of Delegates concurs in the
2 action of the Council of the Section of Legal Education and Admissions to the Bar in
3 making amendments dated August 2020 to Rules 2, 22, 24, 27, 29 and 39 of the *ABA*
4 *Standards and Rules of Procedure for Approval of Law Schools*:

5
6 Rule 2. Council Responsibility and Authority with Regard to Accreditation Status

7 Rule 22. Application for Provisional or Full Approval

8 Rule 24. Application for Acquiescence in Substantive Change

9 Rule 27. Application for Approval of Foreign Program

10 Rule 29. Teach-Out Plan

11 Rule 39. Decision of the Proceeding Panel

American Bar Association
Section of Legal Education and Admissions to the Bar
Revised Standards for Approval of Law Schools
August 2020

(Insertions underlined; deletions ~~struck through~~.)

**RULE 2: COUNCIL RESPONSIBILITY AND AUTHORITY WITH REGARD TO
ACCREDITATION STATUS**

(a) The Council has authority to determine compliance with the Standards. The Council has authority to:

- (1) grant or deny an application of a law school for provisional approval or full approval; withdraw provisional or full approval;
- (2) grant or deny applications for acquiescence in a substantive change, as provided in the Standards;
- (3) grant or deny applications for variances;
- (4) grant or deny an application for approval of a foreign program, and the continuance of a foreign program as set forth in the Criteria for Foreign Summer and Intersession Programs offered by ABA-Approved Law Schools in a Location Outside the United States; the Criteria for Approval of Foreign Semester and Year-Long Programs; and the Criteria for Accepting Credit for Student Study at a Foreign Institution;
- (5) approve or deny approval of a teach-out plan;
- (6) impose sanctions and/or direct specific remedial action; and set fees for services and activities related to accreditation; and
- (7) set fees for services and activities related to accreditation.

(b) A determination by the Council shall be effective upon issuance and is not retroactive.

RULE 22: APPLICATION FOR PROVISIONAL OR FULL APPROVAL

(a) A law school seeking provisional or full approval shall file with the Managing Director a written notice of intent to seek approval.

- (1) The notice shall be filed no later than March 15 in the academic year prior to the academic year in which the law school will apply for approval and shall indicate the law school's preference for a fall or spring site evaluation visit.

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- 38 (2) Upon receipt of written notice of a law school's intent to seek provisional or
39 full approval, the Managing Director shall arrange for a site evaluation as
40 provided under Rule 4.
- 41 (3) A law school may not apply for provisional approval until it has completed the
42 first full academic year of operating a full-time program of legal education.
- 43 (4) A provisionally approved law school may apply for full approval no earlier than
44 two years after the date that provisional approval was granted.
- 45 (5) Upon notice to the Managing Director of its intent to seek provisional approval,
46 a law school seeking provisional approval shall comply with Standard 102(f)
47 regarding communication of its status.
- 48 (b) The application for provisional or full approval is due at least eight weeks prior to the
49 scheduled site evaluation visit and must contain:
- 50 (1) A letter from the dean certifying that the law school has completed all of the
51 requirements for seeking provisional or full approval or that the law school
52 seeks a variance from specific requirements of the Standards and that the
53 law school has obtained the concurrence of the president in the application;
- 54 (2) All completed forms and questionnaires, as adopted by the Council;
- 55 (3) In the case of a law school seeking provisional approval, a copy of a feasibility
56 study that evaluates the nature of the educational program and goals of the
57 law school, the profile of the students who are likely to apply, and the
58 resources necessary to create and sustain the law school, including relation
59 to the resources of a parent institution, if any;
- 60 (4) In the case of a law school applying for provisional approval, the law school
61 must submit a teach-out plan in accordance with Rule 29, that includes the
62 names of other law schools that could enter into a teach-out agreement with
63 the law school.
- 64 (45) A copy of the self study;
- 65 (56) Financial operating statements and balance sheets for the last three fiscal
66 years, or such lesser time as the institution has been in existence. If the
67 applicant is not a publicly owned institution, the statements and balance
68 sheets must be certified;
- 69 (67) Appropriate documents detailing the law school and parent institution's
70 ownership interest in any land or physical facilities used by the law school;

71 (~~78~~) A request that the Managing Director schedule a site evaluation at the law
72 school's expense; and

73 (~~89~~) Payment to the Section of any required fee.

74 (c) A law school must demonstrate that it or the university of which it is a part is legally
75 authorized under applicable state law to provide a program of education beyond the
76 secondary level.

77 (d) A law school shall disclose whether an accrediting agency recognized by the United
78 States Secretary of Education has denied an application for accreditation filed by the
79 law school, revoked the accreditation of the law school, or placed the law school on
80 probation. If the law school is part of a university, then the law school shall further
81 disclose whether an accrediting agency recognized by the United States Secretary
82 of Education has taken any of the actions enumerated above with respect to the
83 university or any program offered by the university. As part of such disclosure, the
84 law school shall provide the Managing Director with information concerning the basis
85 for the action of the accrediting agency.

86

87 **RULE 24: APPLICATION FOR ACQUIESCENCE IN SUBSTANTIVE CHANGE**

88 (a) Substantive changes requiring application for acquiescence include:

89

90 (1) Acquiring another law school, program, or educational institution;

91

92 (2) Acquiring or merging with another university by the parent university where it
93 appears that there may be substantial impact on the operation of the law school;

94

95 (3) Transferring all, or substantially all, of the program of legal education or assets of
96 the approved law school to another law school or university;

97

98 (4) Merging or affiliating with one or more approved or unapproved law schools;

99

100 (5) Merging or affiliating with one or more universities;

101

102 (6) Materially modifying the law school's legal status or institutional relationship with
103 a parent institution;

104

105 (7) A change in control of the law school resulting from a change in ownership of the
106 law school or a contractual arrangement;

107

108 (8) A change in the location of the law school that could result in substantial changes
109 in the faculty, administration, student body, or management of the law school;

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- 111 (9) Establishing a branch campus;
112
113 (10) Establishing a separate location other than a branch campus;
114
115 (11) A significant change in the mission or objectives of the law school;
116
117 (12) The addition of courses or programs that represent a significant departure
118 from existing offerings or method of delivery since the latest site evaluation
119 including instituting a new fulltime or part-time division, or establishing a
120 new or different program leading to a degree other than a J.D. degree;
121
122 (13) The addition of a permanent location at which the law school is conducting
123 a teach-out for students at another law school that has ceased operating
124 before all students have completed their program of study;
125
126 (14) Contracting with an educational entity that is not certified to participate in
127 Title IV, HEA programs, that would permit a student to earn 25 percent or
128 more of the course credits required for graduation from the approved law
129 school;
130
131 (15) The addition of graduate programs of study by an institution that previously
132 offered only undergraduate degrees or certificate programs. ~~Establishing a~~
133 ~~new or different program leading to a certificate or degree other than the~~
134 ~~J.D. degree;~~
135
136 (16) A change in program length measurement from clock hours to credit hours;
137 ~~and~~
138
139 (17) A substantial increase in the number of clock or credit hours required for
140 graduation-; and
141
142 (18) The addition of each direct assessment program.
143
144 (b) An application for acquiescence in a substantive change shall consist of the
145 following:
146
147 (1) All completed forms and questionnaires, as adopted by the Council;
148
149 (2) A letter from the dean certifying that the law school has completed all of the
150 requirements for requesting acquiescence in a substantive change and that the
151 law school has obtained the concurrence of the president in the application;
152
153 (3) A copy of the law school's most recent self study or an updated self study if the
154 most recent self study is more than three years old where the application is for

acquiescence in a substantive change described in Rule 24(a)(1) through 24(a)(13);

(4) A description of the proposed change and a detailed analysis of the effect of the proposed change on the law school's compliance with the Standards;

(5) Payment to the Section of the application fee.

(c) The Managing Director shall appoint a fact finder in connection with an application for acquiescence in a substantive change, except that no fact finder is required if the Managing Director and the Chair of the Council determine that the application does not require additional information to assist Council determination of the question of acquiescence.

(d) When the Council grants acquiescence in a substantive change under Rules 24(a)(1) through 24(a)(9), the Managing Director shall appoint a fact finder subsequent to the effective date of acquiescence as provided in Rule 25(e). The Council also may direct appointment of a fact finder subsequent to the effective date of acquiescence in a substantive change under Rules 24(a)(10) through 24(a)(17) for purposes of determining whether the law school remains in compliance with the Standards. When the Council grants acquiescence under Rule 24(a)(10) in a separate location at which the law school offers more than 50% of the law school's program of legal education, the Managing Director shall appoint a fact finder to conduct a visit within six months of the effective date of acquiescence or in the first academic term subsequent to acquiescence in which students are enrolled at the separate location.

(e) In addition to satisfying the requirements of Rule 24(b), an application for acquiescence shall contain information sufficient to allow the Council to determine whether the substantive change is so significant as to constitute the creation of a new or different law school. If the Council that the substantive change constitutes the creation of a new or different law school, then it shall require that the school apply for provisional approval under the provisions of Standard 102 and Rule 22. Factors that shall be considered in making the determination of whether the substantive change is so significant as to constitute the creation of a new or different law school include, without limitation:

(1) the financial resources available to the law school;

(2) a significant change, present or planned, in the governance of the law school;

(3) the overall composition of the faculty and staff at the law school;

(4) the educational program offered by the law school; and

(5) the location or physical facilities of the law school.

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- (f) A law school's approval status remains unchanged following acquiescence in any substantive change.
- (g) A law school's request for acquiescence in the proposed substantive change in organizational structure shall be considered under the provisions of Rule 25, and will become effective upon the decision of the Council. The decision of the Council may not be retroactive.
- (h) A Law School shall not receive acquiescence in a substantive change if the law school is on probation or receives a finding of significant non-compliance with one or more Standards under Rule 11(a)(4), has been subject to such action by the Council over the prior three academic years, or is under a provisional certification under Title IV of the Higher Education Act of 1965, as amended, unless the law school can show the substantive change will assist the law school in making progress toward achieving full compliance.

RULE 27: APPLICATION FOR APPROVAL OF FOREIGN PROGRAM

- (a) A law school may apply for approval of programs in accordance with the procedures set forth in the following Criteria:
- (1) ~~Criteria for Foreign Summer and Intersession Programs Offered by ABA-Approved Law Schools in a Location Outside the United States; or~~
- (2) ~~Criteria for Approval of Semester and year Long Study Abroad Programs Established by ABA Approved Law Schools; or~~
- (3) Criteria for Accepting Credit for Student Study at a Foreign Institution.

RULE 29. TEACH-OUT PLAN

- (a) If a provisional or fully approved law school decides to cease operations or close a branch campus, the law school shall promptly make a public announcement of the decision and shall notify the Managing Director, the appropriate state licensing authority, and the United States Department of Education of the decision.
- (b) A provisional or fully approved law school must submit a teach-out plan for approval upon occurrence of any of the following events:
- (1) The law school notifies the Managing Director's Office that it intends to cease operations or close a branch campus;
- (2) The Council acts to withdraw, terminate, or suspend, the accreditation of the law school;

- 236 (3)The United States Secretary of Education notifies the Managing Director's
 237 Office that the Secretary has initiated an emergency action against an
 238 institution, in accordance with section 487(c)(1)(G) of the HEA, or an action to
 239 limit, suspend, or terminate an institution participating in any Title IV, HEA
 240 program, in accordance with Section 487(c)(1)(F) of the HEA, and that a teach-
 241 out plan is required;
- 242 (4)A state licensing or authorizing agency notifies the Managing Director's Office
 243 that an institution's license or legal authorization to provide an educational
 244 program has been or will be revoked.
- 245 (c) A law school applying for provisional approval under Rule 22 must submit a teach-
 246 out plan for approval with its application, that includes the names of other law schools
 247 that could enter into a teach-out agreement with the law school.
- 248 (~~d~~e) The law school shall submit the teach-out plan for the law school or branch being
 249 closed as required by paragraph (b) to the Managing Director's Office within the time
 250 specified by the Managing Director. The Managing Director's Office, in consultation
 251 with the Chair of the Council, may require a law school to enter into a teach-out
 252 agreement as part of its teach-out plan.
- 253 (~~e~~d) A law school must submit the "Teach-Out Plan Approval Form," as adopted by the
 254 Council, and address each item in the form.
- 255 (~~f~~e) If a law school voluntarily enters into a teach-out agreement or if the Managing
 256 Director requires a law school to submit a teach-out agreement as part of a teach-out
 257 plan, the law school must submit the "Teach-Out Agreement Approval Form," as
 258 adopted by the Council, and address each criterion in the form.
- 259 (~~g~~f) The Council shall either approve or deny the teach-out plan submitted in accordance
 260 with (b) and
- 261 (c).
- 262 (1) Approval of the teach-out plan may be conditioned on specified changes to the
 263 plan.
- 264 (2) If the teach-out plan is denied, the law school must revise the plan to meet the
 265 deficiencies identified and resubmit the plan no later than 30 days after receiving
 266 notice of the decision.
- 267 (~~h~~g) Upon approval of a teach-out plan of a law school or branch that is also accredited
 268 by another recognized accrediting agency, the Managing Director's Office shall notify
 269 that accrediting agency within 30 days of its approval.
- 270 (~~i~~h) Upon approval of a teach-out plan, the Managing Director shall within 30 days notify
 271 all recognized agencies that accredit other programs offered by the institution of which
 272 the law school is a part.

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- (i) In the event a law school closes without an approved teach-out plan or agreement, the Managing Director's office will work with the United States Department of Education and the appropriate State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.

RULE 39: DECISION OF THE PROCEEDING PANEL

- (a) The Proceeding Panel shall issue a written decision no later than 30 days following the hearing. The decision shall state specifically the grounds upon which it is based.
- (b) The Proceeding Panel, following a hearing, has the authority to:
- (1) Affirm the decision of the Council;
 - ~~(2) Reverse the decision of the Council and enter a new decision;~~
 - (2) Amend the decision of the Council; or
 - ~~(3)~~ Remand the decision of the Council for further consideration.
- (c) The decision of the Proceeding Panel shall be effective upon issuance. If the Proceeding Panel remands a decision for further consideration or action by the Council, the Proceeding Panel shall identify specific issues that the Council must address.
- (d) Decisions by the Proceeding Panel under (b)(1) , ~~(2) and (3)~~ are final and not appealable.
- (e) When the only remaining deficiency cited by the Council in support of an adverse decision is a law school's failure to meet the Standards dealing with financial resources for a law school, the law school may request a review of new financial information that was not part of the record before the Council at the time of the adverse decision if all of the following conditions are met:
- (1) A written request for review is filed with the Office of the Managing Director within 30 days after the date of the letter reporting the adverse decision of the Council to the law school;

(2) The financial information was unavailable to the law school until after the adverse decision subject to the appeal was made; and

(3) The financial information is significant and bears materially on the financial deficiencies that were the basis of the adverse decision by the Council.

(f) The request to review new financial information will be considered by the Council at its next meeting occurring at least 30 days after receipt of the request.

(g) A law school may request review of new financial information only once and a decision made by the Council with respect to that review does not provide a basis for appeal.

REPORT

The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence the attached changes to the Rules of the *ABA Standards and Rules of Procedure for Approval of Law Schools*¹.

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

The amendments were approved by the Council for Notice and Comment during its meetings held on November 21-23, 2019. A public hearing was held on February 19, 2020. The Council received one written comment on the proposed changes and no one testified at the public hearing on the proposed changes. The Council approved the amendments at its meeting on February 20-22, 2020.

Rule 2: Council Responsibility and Authority with Regard to Accreditation Status.

The Department of Education wants all accreditors to publish any policies for retroactive application of an accrediting decision. Since the Council does not have retroactive application, the proposed change clarifies that decisions of the Council are not retroactive.

Rule 22: Application for Provisional or Full Approval. In the past, the Council has taken the position that it does not preaccredit law schools. The new Department of Education regulations include the following revised definition:

Preaccreditation means the status of accreditation and public recognition that a nationally recognized accrediting agency grants to an institution or program for a limited period of time that signifies the agency has determined that the institution or program is progressing toward full accreditation and is likely to attain full accreditation before the expiration of that limited period of time.

Given the revised definition, the Council believes that provisional approval is preaccreditation, and the proposed changes allow the Council to meet additional requirements under the Department of Education regulations for preaccreditation, including requiring all provisionally approved schools to submit a teach-out plan.

Rule 24: Application for Acquiescence in Substantive Change. The Department of Education has added two items (the addition of graduate programs of study by at an

¹ "2019-2020 ABA Standards and Rules of Procedure for Approval of Law Schools," http://www.americanbar.org/groups/legal_education/resources/standards.html.

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institution that previously offered only undergraduate programs or certificates, and the addition of each direct assessment program) that must be included in the definition of substantive change. The Department of Education also added additional items of substantive change that a school on probation or equivalent status must seek prior approval. The proposed language prevents a school on probation or a school that has received a finding of significant non-compliance with one or more standards under Rule 11(a)(4), from applying for a substantive change, unless the law school can show that the substantive change will assist the law school in making progress toward achieving full compliance.

Rule 27: Application for Approval of Foreign Program. At its August 2019 meeting, the Council approved changes to merge *the Criteria for Foreign Summer and Intersession Programs Offered by ABA-Approved Law Schools in a Location Outside the United States* and the *Criteria for Approval of Foreign Semester and Year-Long Study Abroad Programs Established by ABA Approved Law Schools* into one set of criteria called *Criteria for Programs Offered by ABA-Approved Law Schools in a Location Outside the United States*. The proposed change to Rule 27 reflects this change.

Rule 29. Teach-Out Plan. In the past, the Council has taken the position that it does not preaccredit law schools. The new Department of Education regulations include the following revised definition:

Preaccreditation means the status of accreditation and public recognition that a nationally recognized accrediting agency grants to an institution or program for a limited period of time that signifies the agency has determined that the institution or program is progressing toward full accreditation and is likely to attain full accreditation before the expiration of that limited period of time.

Given the revised definition, the Council believes that provisional approval is preaccreditation, and the proposed changes allow the Council to meet additional requirements under the Department of Education regulations for preaccreditation, including requiring all provisionally approved schools to submit a teach-out plan.

Rule 39: Decision of the Proceeding Panel. The Department of Education has removed reversal as an option available to the appeals panel to ensure that an accreditator's board is able to fully re-evaluate its original decision upon remand, whereas a reversal prohibits that re-evaluation. The proposed change removes reversal as an option for the appeals panel.

Respectfully submitted,

Diane F. Bosse
Chair, Council of the Section of Legal Education and Admissions to the Bar
August 2020

GENERAL INFORMATION FORM

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

Submitted By: Diane F. Bosse, Chair

1. Summary of Resolution.

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Rules 2, 22, 24, 27, 29, and 39 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. The resolution addresses changes to the Rules required by new Department of Education regulations.

2. Approval by Submitting Entity.

The amendments were approved by the Council for Notice and Comment during its meetings held on November 21-23, 2019. A public hearing was held on February 19, 2020. The Council approved the amendments at its meeting on February 20-22, 2020.

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

No.

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

The amendments modify the existing *ABA Standards and Rules of Procedure for Approval of Law Schools*.

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

Not applicable.

6. Status of Legislation. (If applicable).

Not applicable.

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

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

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

Not applicable.

9. Disclosure of Interest.

Not applicable.

10. Referrals.

ABA Entities

ABA Diversity and Inclusion Center (and related groups)

ABA Law Student Division

ABA Section Directors and Delegates

ABA Standing and Special Committees, Task Forces, and Commission Chairs

ABA Young Lawyers Division

Conference of State Delegates

Minority Caucus

National Caucus of State Bar Associations

Non-ABA Entities

AccessLex Institute

American Association of Law Libraries

Association of American Law Schools

Association of Legal Writing Directors

Clinical Legal Education Association

Conference of Chief Justices

Deans and Associate Deans of Law Schools

Law School Admission Council

National Association for Law Placement

National Association of Bar Executives

National Conference of Bar Examiners

National Conference of Bar Presidents

SBA Presidents

Society of American Law Teachers

University Presidents

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

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12. Name and Contact Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting)

Joan S. Howland
 Associate Dean and Professor
 University of Minnesota Law School
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The Honorable Solomon Oliver, Jr.
 Judge
 U.S. District Court for the Northern District of Ohio
 Ph: (216) 357-7171 / Cell: (216) 973-6496
 Email: solomon_oliver@ohnd.uscourts.gov

EXECUTIVE SUMMARY

1. Summary of the Resolution

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Rules 2, 22, 24, 27, 29, and 39 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses Rules 2, 22, 24, 27, 29, and 39 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. The resolution addresses changes to the Rules required by new Department of Education regulations.

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

The proposals amend the 2019-2020 *ABA Standards and Rules of Procedure for Approval of Law Schools*.

4. Summary of Minority Views

None.

AMERICAN BAR ASSOCIATION
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association House of Delegates concurs in the
2 action of the Council of the Section of Legal Education and Admissions to the Bar in
3 making amendments dated August 2020 to Standards 102, 103, and 105 of the *ABA*
4 *Standards and Rules of Procedure for Approval of Law Schools*:
5
6 Standard 102. Provisional Approval
7 Standard 103. Full Approval
8 Standard 105. Acquiescence for Substantive Change in Program or Structure

American Bar Association
Section of Legal Education and Admissions to the Bar
Revised Standards for Approval of Law Schools
August 2020

(Insertions underlined; deletions ~~struck through~~.)

STANDARD 102. PROVISIONAL APPROVAL

- (a) The Council shall grant provisional approval to a law school if at the time the school seeks such approval it demonstrates that it has achieved substantial compliance with the Standards and presents a reliable plan for bringing the law school into full compliance with each of the Standards within three years after receiving provisional approval. In order to demonstrate that it has a reliable plan to come into full compliance with the Standards within three years after receiving provisional approval, a law school must clearly state the specific actions that it plans to take to bring the school into full compliance and demonstrate that there is a reasonable probability that such actions will be successful. A provisionally approved law school may apply for full approval no earlier than two years after receiving provisional approval and must obtain full approval within five years after receiving provisional approval.
- (b) The Council may withdraw provisional approval if the Council determines that the law school is no longer in substantial compliance with the Standards, is not making adequate progress toward achieving full compliance with each of the Standards, or is no longer able to demonstrate that there is a reasonable probability that the school will achieve full compliance with each of the Standards within the allotted time frame.
- (c) If five years have elapsed since the law school was provisionally approved and the Council has not granted full approval, provisional approval shall terminate, except that the Council may extend provisional approval to allow the law school to complete a teach-out plan. Before the end of the five-year period in an extraordinary case and for good cause shown, the Council may extend the time within which the law school must obtain full approval.
- (d) A provisionally approved law school shall not offer a post-J.D. degree program or other non-J.D. degree program, offer a program in a country outside the United States, or seek to establish a separate location.
- (e) A provisionally approved law school shall state that it is provisionally approved in all of its printed and electronic materials describing the law school and its program and in any other publication that references the law school's approval by the Council.

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- (f) A law school seeking provisional approval shall make its status clear in any printed and electronic materials describing the law school and its program and in any other publication that references the law school's approval status. At a minimum, the law school shall state the following in all such communications:

The law school is not currently approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association and makes no representation to any applicant that it will receive approval from the Council before the graduation of any matriculating student.

- (g) A law school seeking provisional approval shall not delay conferring a J.D. upon a student in anticipation of obtaining approval. An approved law school may not retroactively grant a J.D. degree as an approved school to a student who graduated from the law school before its approval.

STANDARD 103. FULL APPROVAL

- (a) The Council shall grant full approval to a provisionally approved law school if at the time the school seeks such approval it demonstrates that it is in full compliance with each of the Standards. Plans to achieve full compliance with any Standard are not sufficient to demonstrate full compliance.

- (b) A law school granted approval under this Standard remains approved unless the Council withdraws that approval.

- (c) Once a law school is granted full approval, the Council shall not reclassify the law school as a provisionally approved law school unless, following the loss of approval, the law school reapplies for provisional approval.

STANDARD 105. ACQUIESCENCE FOR SUBSTANTIVE CHANGE IN PROGRAM OR STRUCTURE

- (a) Before a law school makes a substantive change in its program of legal education or organizational structure, it shall obtain the acquiescence of the Council for the change. A substantive change in program or structure that requires application for acquiescence includes:

- (1) Acquiring another law school, program, or educational institution;
- (2) Acquiring or merging with another university by the parent university where it appears that there may be substantial impact on the operation of the law school;

- (3) Transferring all, or substantially all, of the program of legal education or assets of the approved law school to another law school or university;
- (4) Merging or affiliating with one or more approved or unapproved law schools;
- (5) Merging or affiliating with one or more universities;
- (6) Materially modifying the law school's legal status or institutional relationship with a parent institution;
- (7) A change in control of the school resulting from a change in ownership of the school or a contractual arrangement;
- (8) A change in the location of the school that could result in substantial changes in the faculty, administration, student body, or management of the school;
- (9) Establishing a branch campus;
- (10) Establishing a separate location;
- (11) A significant change in the mission or objectives of the law school;
- (12) The addition of courses or programs that represent a significant departure from existing offerings or method of delivery since the latest site evaluation including instituting a new full-time or part-time division; or establishing a new or different program leading to a degree other than a J.D. degree;
- (13) The addition of a permanent location at which the law school is conducting a teach-out for students at another law school that has ceased operating before all students have completed their program of study;
- (14) Contracting with an educational entity that is not certified to participate in Title IV, HEA programs, that would permit a student to earn 25 percent or more of the course credits required for graduation from the approved law school;
- (15) The addition of graduate programs of study by an institution that previously offered only undergraduate degrees or certificate programs. ~~Establishing a new or different program leading to a degree other than the J.D. degree;~~
- (16) A change in program length measurement from clock hours to credit hours; and
- (17) A substantial increase in the number of clock or credit hours required for graduation; and
- (18) The addition of each direct assessment program.

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111 (b) The Council shall grant acquiescence only if the law school demonstrates that
112 the change will not detract from the law school's ability to remain in compliance with
113 the Standards.

114 (c) A law school may not apply for acquiescence in a substantive change if the law school
115 is on probation or receives a finding of significant non-compliance with one or more
116 Standards under Rule 11(a)(4), has been subject to such action by the Council over
117 the prior three academic years, or is under a provisional certification under Title IV of
118 the Higher Education Act of 1965, as amended, unless the law school can show the
119 substantive change will assist the law school in making progress toward achieving full
120 compliance.

REPORT

The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence the attached changes to the Standards of the *ABA Standards and Rules of Procedure for Approval of Law Schools*¹.

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

The amendments were approved by the Council for Notice and Comment during its meetings held on November 21-23, 2019. A public hearing was held on February 19, 2020. The Council received one written comment on the proposed changes and no one testified at the public hearing on the proposed changes. The Council approved the amendments at its meeting on February 20-22, 2020.

Standard 102. Provisional Approval Standard 103. Full Approval

In the past, the Council has taken the position that it does not preaccredit law schools. The new Department of Education regulations include the following revised definition:

Preaccreditation means the status of accreditation and public recognition that a nationally recognized accrediting agency grants to an institution or program for a limited period of time that signifies the agency has determined that the institution or program is progressing toward full accreditation and is likely to attain full accreditation before the expiration of that limited period of time.

Given the revised definition, the Council believes that provisional approval is preaccreditation, and the proposed changes allow the Council to meet additional requirements under the Department of Education regulations for preaccreditation, including allowing schools that are denied provisional approval to maintain accreditation in order to teach out students, and preventing schools from moving from accredited status to preaccredited status.

Standard 105. Acquiescence for Substantive Change in Program or Structure

The Department of Education has added two items (the addition of graduate programs of study by an institution that previously offered only undergraduate programs or certificates, and the addition of each direct assessment program) that must be included in the

¹ "2019-2020 ABA Standards and Rules of Procedure for Approval of Law Schools," http://www.americanbar.org/groups/legal_education/resources/standards.html.

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definition of substantive change. The Department of Education also added additional items of substantive change that a school on probation or equivalent status must seek prior approval. The proposed language prevents a school on probation or a school that has received a finding of significant non-compliance with one or more standards under Rule 11(a)(4), from applying for a substantive change, unless the law school can show that the substantive change will assist the law school in making progress toward achieving full compliance.

Respectfully submitted,

Diane F. Bosse
Chair, Council of the Section of Legal Education and Admissions to the Bar
August 2020

GENERAL INFORMATION FORM

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

Submitted By: Diane F. Bosse, Chair

1. Summary of Resolution.

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Standards 102, 103, and 105 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

2. Approval by Submitting Entity.

The amendments were approved by the Council for Notice and Comment during its meetings held on November 21-23, 2019. A public hearing was held on February 19, 2020. The Council approved the amendments at its meeting on February 20-22, 2020.

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

No.

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

The amendments modify the existing *ABA Standards and Rules of Procedure for Approval of Law Schools*.

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

N/A.

6. Status of Legislation. (If applicable).

N/A

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

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

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

Not applicable.

9. Disclosure of Interest.

Not applicable.

10. Referrals.

ABA Entities

ABA Diversity and Inclusion Center (and related groups)

ABA Law Student Division

ABA Section Directors and Delegates

ABA Standing and Special Committees, Task Forces, and Commission Chairs

ABA Young Lawyers Division

Conference of State Delegates

Minority Caucus

National Caucus of State Bar Associations

Non-ABA Entities

AccessLex Institute

American Association of Law Libraries

Association of American Law Schools

Association of Legal Writing Directors

Clinical Legal Education Association

Conference of Chief Justices

Deans and Associate Deans of Law Schools

Law School Admission Council

National Association for Law Placement

National Association of Bar Executives

National Conference of Bar Examiners

National Conference of Bar Presidents

SBA Presidents

Society of American Law Teachers

University Presidents

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

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12. Name and Contact Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting)

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

1. Summary of the Resolution

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Standards 102, 103, and 105 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses Standards 102, 103, and 105 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*, and addresses changes necessary due to new Department of Education regulations.

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

The proposals amend the 2019-2020 *ABA Standards and Rules of Procedure for Approval of Law Schools*.

4. Summary of Minority Views

None.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON LEGAL ASSISTANCE FOR MILITARY PERSONNEL
COMMISSION ON HOMELESSNESS AND POVERTY
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
SECTION OF STATE AND LOCAL GOVERNMENT LAW
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges Congress and the Administration
2 to require the Department of Veterans Affairs to remove regulatory barriers to full
3 accreditation of Tribal Veterans Service Officers ("TVSOs") under 38 C.F.R. 14.627 and
4 38 C.F.R. 14.628, and, consistent with the federal trust responsibility for Indian tribes,
5 provide sufficient federal funding for establishing and operating TVSOs in those instances
6 where a tribal community is economically disadvantaged; and
7

8 FURTHER RESOLVED, That the American Bar Association urges that when the
9 Department of Veterans Affairs promulgates rules and regulations governing agent
10 accreditation or the administration of programs, benefits, treatment, and services for
11 veterans on Tribal land, the proposals be culturally competent, acknowledge the status
12 of federally-recognized tribes as domestic dependent sovereigns, and be consistent with
13 prevailing laws of sovereignty.

REPORT

The American Bar Association urges Congress to adopt legislation that would require the Department of Veterans Affairs (the “VA” or the “Agency”) to remove existing regulatory barriers to full accreditation of Tribal Veterans Service Officers (“TVSOs”) such as those within 38 C.F.R. § 14.627 and 38 C.F.R. § 14.628, and, consistent with the federal trust responsibility for Indian tribes,¹ provide sufficient federal funding for establishing and operating TVSOs in those instances where a tribal community is economically disadvantaged. Further, the American Bar Association urges the VA to promulgate regulations that allow full accreditation of TVSOs employed by individual tribal communities that are consistent with existing laws of sovereignty and cultural competence. In so recommending, it is acknowledged that such TVSOs would be required to meet training, continuing education and background requirements of the Agency.

Recognizing the barriers faced by Native American veterans to utilize assistance to apply for and obtain earned VA benefits, in 2017, new rules were created under 38 C.F.R. §§ 14.627–14.628 to allow tribal organizations to be VA-recognized for the purpose of providing assistance to VA benefits claimants. Despite these regulations, to date, the VA has failed to approve any tribal applications for accreditation, demonstrating that the rules are too onerous, resulting in continued barriers for native veterans to seek and obtain their benefits.

The Post-Separation Process

After military members separate or retire from the service, they are entitled to file a claim for benefits with the VA. The claims procedure is complex, time consuming, and rule-oriented. In order to help navigate the VA process, many veterans enlist the help of accredited representatives who work for Veteran Service Organizations (“VSOs”), which are private non-profit groups recognized under the VA’s rules. They assist veterans in

¹ “The trust doctrine is a source of federal responsibility to Indians requiring the federal government to support tribal self-government and economic prosperity, duties that stem from the government’s treaty guarantees to protect Indian tribes and respect their sovereignty. In 1977, the Senate report of the American Indian Policy Review Commission expressed the trust obligation as follows:

The purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance tribal lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.”

See <https://www.acf.hhs.gov/ana/resource/american-indians-and-alaska-natives-the-trust-responsibility> (last accessed May 3, 2020). “A second aspect of the trust responsibility arises from the fact that Congress, primarily through legislation, has placed most tribal land and other property under the control of federal agencies to the extent that virtually everything a tribe may wish to do with its land must be approved by the federal government. Courts have recognized that, when Congress delegates to federal officials the power to control or manage tribal land, their actions with respect to those resources must be ‘judged by the most exacting fiduciary standards.’ *Seminole Nation v. U.S.* (1942)” *Id.*

applying for claims for benefits, which can include compensation, education, vocational rehabilitation and employment, home loans, life insurance, pension, health care, and burial benefits.² Because VSOs are familiar with the complex VA process, they provide veterans with valuable assistance in obtaining the benefits they have earned as a result of their service. VSOs also have access to the Veterans Benefits Management System, which is a VA database that includes information that is essential to the claims process.

Native American Veterans

Indigenous people, which include American Indians, Alaska Natives, Native Hawaiians and Pacific Islanders, serve in the armed forces at a higher percentage than any other ethnic group.³ They form a portion of active duty forces that is twice that of their proportion of the U.S. population.⁴ A reported 25% of all able-bodied Native Americans enlist in the military, and a majority of these Native American service members return to the reservation after they have completed their service. Accordingly, it is not unheard of for half the population of a given Native American community to be military veterans; such military service has been culturally important for many tribes going back centuries.

Visits with tribes across the country and discussions with tribal leaders indicate that a disproportionate number of native veterans fail to apply for the benefits they have earned.⁵ There is likely a confluence of factors that accounts for this disparity. Tribes generally distrust the federal government, which to-date has violated more than 400 treaties.⁶ This distrust, in turn, makes it less likely that a native veteran will participate in the VA process. Many native veterans also live in rural, isolated communities with only general mail delivery and without internet access; sheer geographic remoteness makes the VA process significantly more challenging. Native veterans and their tribes are not educated about their available VA benefits and how to apply for them. National VSOs that require membership dues do not do outreach to or even serve Indian country. Each of these factors is in addition to the general reluctance to seek help common to many veterans.

TVSOs working within tribes would function as an important asset to native veterans. A TVSO is a culturally competent and integral part of the tribal community who is almost always a veteran. TVSOs who are part of the community understand the needs of the veterans, are acquainted with the veterans' extended families, and are able to incorporate into claims the accurate specifics of each individual veteran's situation, including trying to ensure cultural competence in mental health assessment and

² <https://www.benefits.va.gov/vso/> (last accessed May 3, 2020).

³ See <https://www.militarytimes.com/off-duty/military-culture/2019/11/15/a-warrior-tradition-why-native-americans-continue-fighting-for-the-same-government-that-tried-to-wipe-them-out/> (last accessed February 17, 2020).

⁴ See <https://www.theguardian.com/world/2011/sep/06/native-americans-fighting-us-military> (last accessed February 17, 2020).

⁵ See generally <https://www.stripes.com/news/us/va-policy-restricts-meaningful-access-to-benefits-for-native-americans-1.587710> (last accessed February 17, 2020).

⁶ See <https://www.americanindianmagazine.org/story/nation-nation-treaties-between-united-states-and-american-indian-nations> (last accessed February 18, 2020).

treatment. This is important because native people do not process wounds of war like post-traumatic stress in the same way as others; concepts like “family” and “wellness” do not resemble what those terms mean in a society focused around the nuclear family. To a far greater extent than with national VSOs, TVSOs are the gateway to VA benefits to which tribal veterans are entitled, such as health care, housing loans, educational programs, adaptive housing and special needs—virtually every program made available to all other veterans everywhere.

TVSOs would not only ensure culturally-competent assistance, but they are necessary to meet the urgent need for delivery of benefits and services to veterans on tribal lands. The sheer size of some reservations necessitates the presence of a local TVSO.⁷ This is especially true because no national VSO serves Indian country. VA accreditation is necessary for these TVSOs to assist native veterans in submitting claims and claims appeals to the VA. With significant poverty and unemployment rates as high as 90% on some reservations,⁸ infusion of earned benefits into these communities is especially important.

The Rule: 38 C.F.R. § 14.628(b)(2) & (d)

It was in this context that the Department of Veterans Affairs promulgated new rules in 2017 that included the process of accreditation for TVSOs. These new rules were enacted “to address the needs of Native American populations who are geographically isolated from existing recognized Veterans Service Organizations (VSOs) or who may not be utilizing other recognized VSOs due to cultural barriers or lack of familiarity with those organizations.”⁹

The 2017 rule provides that a tribal organization established and funded by one or more tribal governments may be recognized for the purpose of providing assistance on VA benefit claims. Additionally, the rule allows an employee of a tribal government to become accredited through a recognized state organization in a similar manner as a County Veterans’ Service Officer¹⁰ may become accredited through a recognized State organization.¹¹

⁷ The Navajo Nation encompasses more than 17 million acres. See <https://www.fs.fed.us/people/tribal/tribexd.pdf> (last accessed March 3, 2020).

⁸ Sokaogon Chippewa Community (93% unemployment), Pechanga Band of Luiseno Indians (91% unemployment), Oglala Sioux Tribe of Pine Ridge (89% unemployment), Cheyenne River Sioux Tribe (88% unemployment), The Apache Tribe of Oklahoma (87% unemployment), Standing Rock Sioux Tribe (86% unemployment), Little Traverse Bay Band (86% unemployment), Round Valley Indian Tribes (86% unemployment), Shoshone Tribe of the Wind River Reservation (86% unemployment); https://newsmaven.io/indiancountrytoday/archive/terrible-statistics-15-native-tribes-with-unemployment-rates-over-80-percent-iAV-3u_770-C6fEcCc3lfA (last accessed February 17, 2020).

⁹ <https://www.federalregister.gov/documents/2017/01/19/2017-00947/recognition-of-tribal-organizations-for-representation-of-va-claimants> (last accessed February 17, 2020).

¹⁰ “VSO” is often used interchangeably to refer to Veterans Service Organizations, which include national, state, regional, and local organizations with VA-recognition, and Veteran Service Officers, who are accredited representatives of VA-recognized Veteran Service Organizations.

¹¹ While the rule provides that accreditation could be made through a state, only 38 states have offices of veterans’ affairs that prosecute claims before the VA.

The applicable portions of the 2017 rule¹² provide as follows:

(b) (2) Tribal organization. For the purposes of 38 CFR 14.626 through 14.637, an organization that is a legally established organization that is primarily funded and controlled, sanctioned, or chartered by one or more tribal governments and that has a primary purpose of serving the needs of Native American veterans.

(d) Requirements for recognition.

(1) In order to be recognized under this section, an organization shall meet the following requirements:

(i) Have as a primary purpose serving veterans.

(ii) Demonstrate a substantial service commitment to veterans either by showing a sizable organizational membership or by showing performance of veterans' services to a sizable number of veterans.

(iii) Commit a significant portion of its assets to veterans' services and have adequate funding to properly perform those services.

(iv) Maintain a policy and capability of providing complete claims service to each claimant requesting representation or give written notice of any limitation in its claims service with advice concerning the availability of alternative sources of claims service.

During the public comment period prior to enactment, the Veterans and Military Law Section of the Federal Bar Association (the "FBA") sent a letter alerting the VA to problems with the then-proposed regulation. The VA summarized the FBA's concerns as follows:

Many tribal organizations may not be able to satisfy the requirement of having a primary purpose of serving veterans, the requirement of a substantial service commitment to veterans as shown either by a sizable organizational membership or by performance of veterans' services to a sizable number of veterans, or requirements concerning funding and training, to include providing the required supporting documentation.¹³

In response to this concern, the VA stated that they have

¹² 38 CFR § 14.628 - Recognition of organizations.

¹³ <https://www.federalregister.gov/documents/2017/01/19/2017-00947/recognition-of-tribal-organizations-for-representation-of-va-claimants> (last accessed February 17, 2020).

provided additional means to achieve VA recognition or accreditation for those tribal governments that may have difficulty establishing a tribal organization capable of meeting the § 14.628(d) requirements, to include the ability for one or more tribal governments to establish and fund a tribal organization and the ability of an employee of a tribal government to become accredited as a tribal veterans' service officer through a recognized State organization. Therefore, VA makes no changes based on these comments.¹⁴

The VA contends that the regulations were not intended to hurt a TVSO's ability to become accredited, but that there are standards established to help ensure that veterans on tribal lands receive competent, sustained support from qualified and trained representatives.

The Impact

At the outset, it is important to note that the VA did not expect a robust response in the form of tribes applying for TVSO recognition. At the time the rule was adopted, the VA estimated it would receive five applications per year.¹⁵ One reason for this may be how large or well-resourced a tribe would need to be for its veterans organization to meet the requirements. This is consistent with an observation made during a meeting at the VA that smaller tribes may have difficulty meeting the requirements, and examples of tribes that conceivably could meet the requirements included some of the largest, for example, Choctaw or Chippewa. There are more than 500 federally-recognized tribes in the United States. A rule aimed at addressing the needs of 1% of the native veteran community is not and cannot be sufficient.

To date three Tribal Communities have applied for VA accreditation. None has been approved. In fact, the Confederated Tribes of the Umatilla Reservation in Oregon have submitted two requests, to no avail.¹⁶ The VA's rationale in not approving the most recent request focused on the scope of the Umatilla representative's responsibilities and the VA's concern that the Umatilla may not be able to accommodate increased growth in the veteran population. Ultimately, and regardless of the rationale, it is clear that the provisions in the final rule have proved to be insurmountable for TVSO accreditation. A rule whose purpose, as articulated by its drafters, was to "provide veterans with better, more culturally competent services"¹⁷ must be re-evaluated when not a single tribe has succeeded in obtaining this recognition.

¹⁴ *Id.*

¹⁵ Federal Register/Vol. 81, No. 139/Wednesday, July 20, 2016/Proposed Rules at 47091, <https://www.federalregister.gov/documents/2016/07/20/2016-17052/recognition-of-tribal-organizations-for-representation-of-va-claimants> (last accessed February 18, 2020).

¹⁶ One application was submitted before the 2017 rule change, and two were submitted afterwards.

¹⁷ *VA to recognize tribal organizations as Veteran representatives*, Vantage Point, Official Blog of the U.S. Department of Veterans Affairs, <https://www.blogs.va.gov/VAntage/34839/va-to-recognize-tribal-organizations-as-veteran-representatives/> (last accessed March 3, 2020).

Conclusion

The first peoples of this country have served in the armed forces since before the Revolutionary War and continue to do so in far greater proportion than any other ethnic group. Each tribe and their veteran citizens are entitled to culturally-competent VSO representation and meaningful access to VA benefits and services.

Respectfully submitted,

Katherine Ellsworth Oler
Chair, ABA Standing Committee on Legal Assistance for Military Personnel
August 2020

GENERAL INFORMATION FORM

Submitting Entity: ABA Standing Committee on Legal Assistance for Military Personnel

Submitted By: Katherine Ellsworth Oler, Chair, ABA Standing Committee on Legal Assistance for Military Personnel

1. Summary of the Resolution(s). This Resolution calls for the ABA to urge Congress to adopt legislation that would require the Department of Veterans Affairs (the "VA") to remove existing regulatory barriers to full accreditation of Tribal Veterans Service Officers ("TVSOs") and provide sufficient federal funding for establishing and operating TVSOs where a tribal community is economically disadvantaged. This Resolution further urges the VA to promulgate regulations that allow full accreditation of TVSOs employed by individual tribal communities that are consistent with existing laws of sovereignty and cultural competence.
2. Approval by Submitting Entity. The ABA Standing Committee on Legal Assistance for Military Personnel approved this Resolution on March 12, 2020.
3. Has this or a similar resolution been submitted to the House or Board previously? No proposal has been submitted on this specific subject matter.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This Resolution reinforces, and is fully consistent with existing ABA policies related to access to justice for low-income and/or military-connected individuals and families, including the following policies that support veterans' legal rights and administration of supportive services:
 - 08M108, to urge lawmakers to support legislation that increases the availability of, and access to, legal services for veterans to assist them in seeking their due federal benefits.
 - 17M118, to urge lawmakers at all levels to work with the legal profession to collaborate in the identification and removal of legal barriers to veterans' access to due and necessary assistance, including housing, education, employment, treatment, benefits, and services, particularly those provided by the Department of Veterans Affairs.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. (If applicable) While no legislation is pending, this Resolution relates to 38 C.F.R. §§ 14.627–14.628, signed into law and effective February 21, 2017.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Implementation will be undertaken by the ABA Governmental

Affairs Office working with the ABA Standing Committee on Legal Assistance for Military Personnel, as well as other military- and veteran-focused ABA entities. Congress and the Administration will be urged to require the VA to promulgate regulations that will remove regulatory barriers for TVSOs to obtain VA accreditation.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this Resolution implicates no cost to the ABA.

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

10. Referrals. Input and support are being sought from relevant ABA entities involved with related legal issues, including the following:

Center for Human Rights
Coalition on Racial and Ethnic Justice
Commission on Disability Rights
Commission on Homelessness and Poverty
Government and Public Sector Lawyers Division
Health Law Section
Section of Administrative Law and Regulatory Practice
Section of Civil Rights and Social Justice
Section of State and Local Government Law
Solo, Small Firm and General Practice Division
Standing Committee on Armed Forces Law

This Resolution will also be broadcasted and circulated broadly to additional ABA policy-making entities.

11. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

Katherine Ellsworth Oler
United States Court of Federal Claims
1401 H Street NW
Washington, DC 20005
Ph: 703-201-6858
Email: katherine.oler@gmail.com

12. Name and Contact 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.*

Katherine Ellsworth Oler
United States Court of Federal Claims

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Email: katherine.oler@gmail.com

EXECUTIVE SUMMARY

1. Summary of the Resolution.

This Resolution calls for the ABA to urge Congress to adopt legislation that would require the Department of Veterans Affairs (the “VA”) to remove existing regulatory barriers to full accreditation of Tribal Veterans Service Officers (“TVSOs”) and provide sufficient federal funding for establishing and operating TVSOs where a tribal community is economically disadvantaged. This Resolution further urges the VA to promulgate regulations that allow full accreditation of TVSOs employed by individual tribal communities that are consistent with existing laws of sovereignty and cultural competence.

2. Summary of the issue that the resolution addresses.

After military members separate or retire from the service, they are entitled to file claims with the VA to obtain the benefits they have earned. To navigate the VA process, many veterans enlist the help of an accredited representative who works for a Veterans Service Organization (“VSO”). A VSO is a private non-profit group recognized by the VA that advocates on behalf of veterans and provides veteran-specific resources. Each tribe and their veteran citizens are entitled to culturally-competent representation and meaningful access to VA benefits and services. However, current VA regulations provide obstacles preventing TVSOs from receiving VA accreditation, as tribal organizations are unable to meet the existing requirements, resulting in difficulty for native veterans to seek and obtain their benefits. This also fails to consider cultural competence, understanding that accredited TVSOs would be a beneficial and integral part of a tribal community.

3. Please explain how the proposed policy position will address the issue.

Native veterans need the help of accredited TVSOs. VA regulations establish uniform standards for private and governmental organizations for VA-recognition, but when applied to sovereigns such as Native tribes, the standards present unnecessary and insurmountable barriers. This prevents tribal entities from being recognized by the VA, leaving TVSOs with few if any reliable alternative routes for accreditation. This Resolution, if adopted, will permit the ABA to advocate for removing any regulations that unfairly impede tribal organization recognition by the VA for TVSO accreditation. Further, this Resolution will allow the ABA to advocate for the proper recognition of tribal authorities under the relevant VA regulations as sovereigns, consistent with the federal government’s trust obligation to recognized tribes, to be distinguished from other types of “organizations” that seek recognition from the VA.

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

There is no known opposition. The only external minority view to-date is from the VA, as VA regulations require that all entities seeking recognition by the VA must abide by the same set of standards.

AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION
SECTION OF INTERNATIONAL LAW
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

- 1 RESOLVED, That the American Bar Association adopts the *American Bar Association*
- 2 *Best Practices for Third-Party Litigation Funding* dated August 2020.

**AMERICAN BAR ASSOCIATION
BEST PRACTICES FOR
THIRD-PARTY LITIGATION FUNDING
AUGUST 2020**

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**AMERICAN BAR ASSOCIATION
BEST PRACTICES FOR
THIRD-PARTY LITIGATION FUNDING
AUGUST 2020**

I. INTRODUCTION

The *American Bar Association Best Practices for Third-Party Litigation Funding* (“Best Practices”) are written to assist lawyers considering litigation funding – whether to provide legal fees for sophisticated, cross-border arbitration and litigation, to assist an individual plaintiff or claimant in a personal injury lawsuit or worker’s compensation claim, or any other litigation or arbitration context.

The American Bar Association first addressed third-party litigation funding in 2012 when the House of Delegates adopted the *Commission on Ethics 20/20 White Paper on Alternative Litigation Finance Informational Report to the House of Delegates* (hereinafter “20/20 Report”). This work predates the exponential growth in third-party litigation funding, but still provides an important foundation for Best Practices.

The term “litigation funding” covers a broad range. Sections II and III set forth the basics and then describe various types of funding. Suggested Best Practices applicable to all types of litigation funding follow in Section IV, and Section V provides additional considerations for particular types of funding. They range from cases where clients obtain the funds – perhaps with assistance from their lawyer – to situations where the lawyer initiates and negotiates the funding arrangement.

In this evolving area, these Best Practices should not be read as recommended standards of professional conduct or as a basis for attorney discipline. The phrase “Best Practices” is used as a shorthand for issues that should be considered before entering into a litigation funding arrangement. Jurisdictions where the attorney practices may have standards that differ (perhaps materially) from these Best Practices, and those standards may establish standards of care or grounds for discipline.

The Best Practices do not take a position on a number of litigation funding issues – for example, whether litigation funding should be permitted, as a matter of law or legal ethics, in any particular jurisdiction or in any particular context; or whether, when and in how much detail a funding arrangement need be disclosed.¹ On the issue of disclosure,

¹ For a quick comparison of some varying results regarding court-required disclosure, compare *Charge Injection Technologies, Inc. v. E.I. DuPont de Nemours & Co.*, 2015 Del. Super. LEXIS 166 at *12-13 (Del. Super. Ct. March 31, 2015) (protecting “finance agreement” as work product) and *Xerox Corp. v. Google, Inc.*, 801 F. Supp. 2d 293, 303-04 (D. Del. 2011) (applying common interest coverage of attorney-client privilege to find no waiver when documents shared with funder), with *Acceleration Bay LLC v. Activision Blizzard, Inc.*, 2018 WL 798731 (D. Del. Feb. 9, 2018) (documents “prepared with a ‘primary’ purpose of obtaining a loan, as opposed to aiding in possible future litigation,” not protected as work product; also finding no common interest exception to waiver of attorney-client privilege, and noting as significant that communications and documents at issue were exchanged before written agreement was entered into for litigation funding) and *Miller UK v. Caterpillar*, 17 F. Supp. 3d 711, 732-33 (N.D. Ill. 2014) (finding lack of “common legal interest” between funder and party; shared financial interest was inadequate, so attorney-client privilege was deemed waived).

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the Best Practices suggest that the practitioner should assume that some level of disclosure may be required at some point – whether by court rules or standing orders, arbitral rules, discovery rulings, or events and proceedings extraneous to the “main event” litigation. This assumption is not meant to indicate a preference, let alone a conclusion, regarding if, when, how, or in how much detail any disclosure should take place. Rather, the goal of these Best Practices is to alert the practitioner to the questions and decisions that should be addressed when considering funding arrangements.

Similarly, the Best Practices do not focus upon the underwriting practices of the funder, as the focus here is on the lawyer and client. Underwriting is mentioned only in connection with pressures that may be exerted on the lawyer to generate additional documentation and the need for the lawyer to exercise caution in the event that disclosure is ultimately ordered in jurisdictions where work product and attorney-client privilege protections are not afforded (or are deemed waived) as to such analyses.

With these disclaimers, some suggested Best Practices are common to all types of funding. *First*, any litigation funding arrangement should be in writing. *Second*, the litigation funding arrangement should assure that the client remains in control of the case. *Third*, the written document should address what happens to the funding arrangement if, down the road, the client and the funder disagree on litigation strategy or goals. *Finally*, because the propriety and the discoverability of litigation funding arrangements are unsettled questions in many jurisdictions (and may differ across contexts within those jurisdictions), the Best Practices advise that attorneys negotiating funding agreements do so with an eye to the likelihood that the “deal documents” for the funding arrangement will be examined by readers whose interests are not fully congruent with those of the lawyer and client.

II. BASICS – WHAT IS THIRD-PARTY LITIGATION FUNDING?

“Third-party litigation finance is contracting, as a litigant, to obtain financial assistance from third-party funders in exchange for an interest in the potential recovery. Put simply, a third-party investor helps to finance a lawsuit. The agreement is usually non-recourse, so if the plaintiff loses the case, the funder receives nothing.” Jayme Herschkopf, *Third Party Litigation Finance* (Federal Judicial Center 2017) (hereinafter “*FJC Pocket Guide*”) at 1. A single narrow definition, however, cannot encompass the range of funding activities that may arise.

For a collection of cases across jurisdictions addressing these matters as of early 2019, see the cases cited at pages 23-39 of Charles Agee, III, Lucian Pera, Steven Vickery, *Litigation Funding and Confidentiality: A Compromise Analysis of Current Caselaw* (Westfleet Advisors, revised June 10, 2019) (hereinafter “*Compromise Analysis*”). Similar analyses are likely available from other sources, but the cases listed by Agee, Pera, and Vickery provide a solid start. See also, e.g., *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods Liab. Litig.*, 2019 U.S. Dist. LEXIS 160051, 2019 WL 4485702, Civ. No. 19-2875 (RBK/JS) (D.N.J. Sept. 19, 2019) (rejecting early disclosure of litigation funding of plaintiffs in M.D.L. based on relevancy and proportionality considerations, but noting split in courts and indicating disclosure would be required if there were a showing that non-party was controlling litigation or settlement discussions).

“Third-party litigation funding refers to funding methods that employ resources from insurance markets, capital markets, or a private fund in lieu of a litigant’s own funds.” Nicole K. Chipi, *Eat Your Vitamins and Say Your Prayers: Bollea v. Gawker, Revenge Litigation Funding, and the Fate of the Fourth Estate*, 72 U. Miami L. Rev. 269 (2017) (hereinafter “*Eat Your Vitamins*”). Funding may also be supplied by foundations, non-profit organizations or others having a non-financial interest in the outcome.

“Litigation funding” typically is structured as an investment by a funder on a non-recourse basis in a lawsuit or arbitration in exchange for an agreed return from the proceeds, or, in the case of funding of defendants, some other way of compensating the funder based upon the results of the lawsuit. The funds may be provided to a lawyer – including for a single case, a class action, or a portfolio of cases – or to the litigant. Direct funding to a litigant for living expenses may be structured as a loan or as an investment, which can make a difference as to its legality under local law. See, e.g., *Ruth v. Cherokee Funding*, 304 Ga. 574, 820 S.E.2d 704 (2018) (money advanced to litigant for living expenses as a non-recourse investment held not subject to state law usury cap, while characterization as “loan” would likely have rendered terms usurious).

Funding is a form of distributing risk. Contingent fee arrangements distribute risk between the lawyer and client. In some jurisdictions, lawyers are allowed to advance sums to the client that may be unrelated to the lawsuit (living expense loans) and that may be non-recourse. Lawsuits have been funded by family members and businesses unrelated to the lawsuit as well. Outside funding is not new but does have different funders.

Third-party funding is one of many alternative sources of funding for disputes. Other models include: insurance (one of the oldest models), traditional loans, corporate financing, equity-based and inter-corporate funding, and attorneys as funders (when engaged to act on a full or partial contingency fee basis, or in other alternative fee arrangements, reduced hourly rates, capped fees, or pro bono lawyering). See Int’l Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (April, 2018) (hereinafter “*ICCA Report*”), at 35-37, 46.

The frequency of funding, the diversity of types of funding, and the number of funders have increased. “The funding market has expanded in several respects. The number of funded cases has increased significantly. The number and geographic diversity of third-party funders has also increased, with new entities continuing to enter the market and consequently increase the aggregate amounts available for funding. . . . Perhaps most importantly, the forms of dispute financing have expanded significantly, raising challenging questions about how ‘third-party funder’ or ‘third-party funding’ should be defined.” *Id.*

III. TYPES

In general, plaintiff-side litigation funding consists of a non-recourse investment or loan to either the lawyer (a “Lawyer-Funder” arrangement) or the client (a “Client-Funder” arrangement), with the repayment coming from the litigation recovery. In defendant-side funding, repayment typically depends on the defendant achieving some agreed-upon benchmark in the adjudication or settlement of the case.

“The [Alternative Legal Finance] market (‘ALF’) is apparently fairly strongly differentiated.” *20/20 Report*. The years since 2012 (when the 20/20 Report was adopted by the ABA House of Delegates) have seen increased differentiation.

“A large number of ALF suppliers serve the consumer sector, marketing to personal-injury plaintiffs, and to other individual clients with relatively small legal claims. Consumer ALF suppliers are distinguishable from settlement factoring companies; the former take a partial assignment in a claim that has not yet been settled or reduced to judgment, while the latter purchases a claim that has been reduced to judgment, typically as a result of a judicially approved settlement. A considerably smaller number of entities fund large, complex commercial litigation. These companies conduct extensive due diligence on individual cases and make sizeable financial investments. Finally, commercial lenders and some specialized ALF companies make loans directly to lawyers, as opposed to purchasing claims or parts of claims from clients.” *Id.*

A. Direct Lawyer-Funder Arrangements and Considerations

Some litigation funding arrangements involve only the lawyer/law firm and the funder. In effect, the funder invests directly with the lawyer. This type of funding can involve arrangements across a portfolio of cases handled by the law firm (portfolio funding),² a large single case, or a class action. The following issues may arise in direct lawyer-funder arrangements.

1. Fee Splitting

If payment is expected to come from the lawyer’s share of the recovery (via contingency or from an express fee award), then local law and ethics rules regarding “fee splitting” with a non-lawyer (the funder) should carefully be examined. A New York City Bar Opinion has found this type of arrangement to constitute impermissible fee splitting. New York City Bar Op 2018-5, *Litigation Funders’ Contingent Interest in Legal Fees* (hereinafter “*NYC Bar Op. 2018-5*”). “[T]he fee-sharing rule forbids two alternative arrangements – first, where an entity’s funding is not secured other than by the lawyer’s fee in one or more lawsuits, so that it is implicit that the lawyer will pay the funder only if the lawyer receives legal fees in the matter or matters; and second, where a lawyer and funder agree, whether in a recourse or non-recourse arrangement, that instead of a fixed amount or fixed rate of interest, the amount of the funder’s payment will depend on the amount of the lawyer’s fees – for example, where the agreement sets a payment rate on

² See p. 12 *infra* for a more detailed discussion of portfolio funding.

a sliding scale based on the total legal fees or total recovery in the case or portfolio of cases.” *Id.*

Positions on fee splitting, however, are far from unanimous; the New York City Bar Opinion is not the “law of the land” outside of its reach, nor are opinions or approaches that contradict the New York City Bar Opinion. This is a developing area.

Opponents of the New York City Bar view have generally taken two approaches. The first is to amend the jurisdiction’s version of Model Rule of Professional Conduct 5.4(a), upon which New York City Bar Opinion 2018-5 is based, to provide that sharing fees with a funder is not covered by the Rule so long as the lawyer remains independent and the client remains in charge of the lawsuit. This approach is being examined in New York and other jurisdictions. The second, in jurisdictions not covered by the New York City Bar Opinion, posits that the source of the payment should not be the key factor, but must focus upon “independence,” and not the flow of funds. David Gallagher, an investment manager for a litigation funder, who was quoted in a 2017 article for the ABA Section of Litigation Solo and Small Practice Committee, provides an example of this type of approach: “[I]tigation funding arrangements with law firms do not violate the rule against fee-splitting, provided that the arrangements do not compromise the attorneys’ exercise of independent professional judgment, the protection of which is the underlying purpose of the rule. . . . Two key features of ethically permissible law firm funding arrangements that help to protect the attorneys’ exercise of independent professional judgment are the following: 1) an express provision that the funder has no right to control litigation strategy or settlement decisions, and 2) the inclusion of multiple matters in the funded portfolio—typically three or more—to ensure that the funder’s investment return will not be tied to any particular client matter.” D. Gallagher, *Litigation Funding: What Are the Benefits for Solo Practitioners and Small Firms*, American Bar Association (January 25, 2017) (“*Small Firm/Solo Benefits*”). The jury is still out over which type of analysis will become, or even is, the majority rule.

2. Referral Fees

Irrespective of the analytical approaches to fee splitting, referral fees should not be paid by attorneys to funders. “Attorneys should not offer, and funders should not accept, referral fees from attorneys.” *Id.* Likewise, attorneys should not accept referral fees from funders.

3. Disclosure of Client’s Confidential Information to Funder

Typically, funders will want access to case information to evaluate whether to make in investment. “No attorney should disclose confidential client information to a litigation funder without client consent. In order for that consent to be informed, the attorney should advise the client of the risk that a disclosure to a funder might be deemed a waiver of the attorney-client privilege.” *Id.* As discussed below, while the current trend in the case law favors continuing to protect material disclosed to funders (generally as work product), the cases are not uniform. For a sampling of cases, see *Compromise Analysis*, pages 23-39.

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4. Potential Conflicts

When portfolio financing is involved, the possibility of tensions, and even concrete conflicts of interest, may arise if the lawyer or a single client begins to have difficulties with the funder involving one of a group of matters. “It may even be that the law firm relies upon the funder for financing across a portfolio of matters, which can make it more difficult to avoid or manage perceived conflicts of interest where a disagreement arises between the funder and one of the funded clients in the portfolio.” *ICCA Report*.

5. Loans

“Commercial lenders and some specialized ALF suppliers provide loans or lines of credit directly to law firms. These loans are typically secured by assets of the firm, such as furniture and fixtures, the firm’s accounts receivable, or the firm’s contingent interests in ongoing cases.” *20/20 Report*. “[T]he fee-sharing rule does not forbid a traditional recourse loan requiring the lawyer to repay the loan at a fixed rate of interest without regard to the outcome of, or the lawyer’s receipt of a fee in, any particular lawsuit or lawsuits. That is the case regardless of whether the loan is secured by some kind of collateral.” *NYC Bar Op. 2018-5*.

6. Class Actions

Because of the special role of the court in a class action, these types of cases are unique. In the class action context, while the lead class lawyer is expected to be experienced and sophisticated, the client may or may not be sophisticated. Interviews with funders have indicated that their primary focus is on the lawyer and his or her ability and willingness to move the case forward, as opposed to an analysis of the putative representative’s “staying power” or even a detailed assessment of the facts underlying the claim. The willingness of an attorney respected by the funder to invest substantial time and attention to the case, especially if combined with a track record from past class actions backed by the funder, may serve as a rough proxy for what would otherwise be ordinary due diligence for a financing arrangement.

In class actions governed by the Private Securities Litigation Reform Act, or other situations in which a court will ultimately pick a “lead plaintiff”/“lead counsel,” aspiring lead counsel may, as part of the lead-counsel application process, want to reveal the availability of litigation funding as a benefit that will assure that there is sufficient financial backing to see the case through to its conclusion. *See FJC Pocket Guide*, at 9, n.16.

There will be situations, particularly in securities or consumer class actions, where a sophisticated lawyer will work with a funder. The existence of these relationships is required to be disclosed in some jurisdictions and would likely need to be disclosed in others in order for the funder to be paid by a Settlement Administrator. For example, class action funding arrangements are required to be disclosed by Standing Order of all judges in the United States District Court for the Northern District of California. *See* Standing Order, ¶ 19 (“In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any

claim or counterclaim.”). Other jurisdictions may follow with similar requirements.³ Additionally, at a later point in the class action context – settlement approval and implementation – the most likely source for payments to the funder will be first, a repayment of expenses, and second, from the sums awarded the lawyer. Awarding sums from the recovery earmarked for the class, particularly in a common fund situation, may require greater disclosure and review by the court and perhaps notice to absent class members.

There is at least one international case of a court-approved arrangement for payment to a funder from funds that would otherwise be available to the class, rather than from attorneys’ fees. The Federal Court of Australia has certified a shareholder class and approved the litigation funder being paid on a percentage basis from a common fund, subject to court oversight. *Money Max Int Pty Ltd (Trustee) v. QBE Ins. Group*, FCAFC 148 (October 26, 2016).

B. Client-Funder Arrangements

Under a typical client-funder arrangement as described by the New York City Bar Association, “the funder agrees directly with the lawyer’s client to provide funding for a specific matter and the client agrees to make future payments if the client prevails.” *NYC Bar Op 2018-5*. In effect, the client rather than the lawyer is the party agreeing to make the payment, and the payment does not affect the amount of the lawyer’s fee.

Consistent with the concept of an “investment” (as opposed to a loan), the arrangement provides funding on a non-recourse basis. The funder provides money for prosecuting the lawsuit. The client agrees to compensate the funder from the recovery in the lawsuit, but only from the recovery: no recovery, no return for the funder. Typically, the return to the funder will be a stated percentage of what the client recovers, and is *not* calculated based on the amount advanced.

1. Living Support for Unsophisticated Litigants

Early client litigation funding often involved amounts paid to fund the living expenses of a personal injury plaintiff. Some arrangements were structured as loans while others were structured as investments. The expectation was that the money would be used to provide support for the plaintiff’s living and other expenses, and not necessarily to support the funding of the lawsuit itself. *See 20/20 Report*. Early ABA Formal Opinions addressed this situation, such as ABA Formal Opinion 484 (focusing upon advances from lawyer to or on behalf of client).

2. Investing in Commercial Litigation: Sophisticated Client, Single Big Case

³ Because the disclosure requirement in the Northern District of California Standing Order excited considerable legal press and commentary when announced on January 22, 2017, experience with the disclosure requirement of the Standing Order may result in consideration of similar local practices or eventually changes to mandatory disclosure requirements.

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The more recent emphasis on litigation funding, however, has involved funders investing in expensive lawsuits that have a possibility of large awards. These single big lawsuits with a sophisticated client implicate different concerns from the early “living expense” model of litigation funding. The party negotiating with both the lawyer and the funder may very well be a well-funded, sophisticated, repeat litigant. In these circumstances, the litigation funding is being designated to fund the lawsuit directly as opposed to providing ongoing living expenses for the client.

3. Portfolio Funding

A recent development is portfolio funding. This funding can be provided to a client involved in multiple actions, either as a plaintiff or defendant, or to lawyers handling multiple actions involving different clients. The portfolio funding can be structured either as a direct lawyer-funder arrangement, or as a client-funder arrangement. When the funding is to the law firm for multiple cases, the firm may need to disclose the funding to the different clients. Related but slightly different disclosure issues may be required when more than one type of case is covered by the portfolio funding.

“Portfolio funding is gaining prominence as an alternative to financing on a case-by-case basis and is an approach that many funders now actively promote. A portfolio arrangement can be structured in many ways; [one major type is] finance structured around a law firm, or department within a law firm, where the claim holders may be various clients of the firm” *ICCA Report*.

“Structuring finance around multiple claims . . . usually involves some form of cross-collateralization, meaning that the funder’s return is dependent upon the overall net financial performance of the portfolio as opposed to the outcome of each particular claim. This type of structure may enable the entity (e.g., the law firm . . .) to secure third-party funding more quickly, on pre-arranged terms, and, depending on the structure, the ability to benefit from the overall success of the portfolio. Additionally, there may also be economic benefits to this approach – if the funder’s risk is spread across multiple claims, this should in turn dictate a lower cost of capital for the funded party (although this does not always materialize in practice).” *Id.*

“A law firm portfolio may be structurally similar [to a corporate claim holder’s portfolio], where the finance is provided to support a law firm’s contingency fee portfolio, with the funder’s return pegged to the law firm’s success. Again, such a model potentially allows for the law firm to draw and deploy capital more flexibly than a single case funding scenario, as well as enabling, for example, fee overruns on one case to be offset by another case that is operating below budget. In this model, the funder may have no direct contractual relationship with the law firm’s clients, as the portfolio funding agreement is only between the law firm and the funder.” *Id.*

4. Not Motivated by Profit: Cause-Based Funding

Some litigation funding is based upon interests of the funder other than profit. For example, a funder may wish to advance social, political, or other policy interests and seek

to fund litigation brought by others to do so. The Times Up Legal Defense Fund is a recent example. This funding can take the form of grants or donations with no expectation of recovery or recoverable grants where repayment occurs only when fees and costs are recovered. Whether the goals of the litigation align with the funder's charitable purposes will be of greater significance than the prospect of repayment.

5. Revenge Funding

A funder may also be motivated by purely personal grudges or other idiosyncratic motives. This “revenge funding” occurs when the funder advances sums to a litigant to sue someone to further the personal (sometimes undisclosed) objectives of the funder. The subject matter of the dispute is less important than the ability to extract revenge or punishment upon the defendant.

As one commentator noted, “[r]evenge litigation funding utilizes third-party litigation funding to weaponize torts against a specific target; using the legal system to carry out a vendetta versus an interest in the return on investment.” *Eat Your Vitamins*. While the recent litigation against Gawker received attention for this particular form of funding by one wealthy donor, there is little reason to believe that this will be a growing practice.

“In *In re Gilman’s Administratrix*, 167 N.E. 437 (N.Y. 1929), Judge Cardozo said that ‘maintenance inspired by charity or benevolence’ could be legal but not ‘maintenance for spite or envy or the promise or hope of gain.’” *20/20 Report*. In these circumstances, the lawyer should examine whether the motives of the funder will affect the legality and enforceability of the arrangement.

6. Respondent-/Defendant-Side Funding

In some situations, a party defending against litigation may receive outside funding as well. Putting aside the instance of counterclaims, the reasons for defendant-side funding will generally involve situations in which a realistic economic exit point, as well as pricing based upon that exit point, can be determined. These arrangements are individually negotiated and can vary widely.

While defendant-side funding does not seem to be garnering the same attention as other forms of litigation funding, the concept has existed for over a decade and major funders have stated that they engage in it. In broad strokes, “the two parties (the defendant and the financier) agree on a definition of a ‘successful’ outcome, often settlement below a certain dollar threshold. The financier then commits a set amount of money toward the cost of defense, to indemnify the counterparty for a settlement or judgment above a set threshold, or both. The parties also agree on an investment return that the financier will receive in the event of a successful outcome. The contract may also specify exactly how the defendant will pay the investment return to the financier—such as through a lump sum after resolution of the litigation or via periodic payments.” Emily Samra, “*The Business of Defense: Defense-Side Litigation Financing*,” 83 University of Chicago L. Rev. 2299, at 2305 (2016), see also pp. 2328-40. As recently as 2016, the

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“most fertile segment of the defense-side litigation-financing market [was identified as] noninsured business disputes.” *Id.* at 2313. The market remains relatively untapped. It has grown as a concept since 2011.⁴

7. Third-Party Funding in International Arbitration

Many of the suggested best practices for litigation funding have been developed in the context of international arbitration. In 2018, the International Council for Commercial Arbitration issued an important report on Third-Party Funding in International Arbitration (the “ICCA Report”), which serves as a primary document, arising out of many years of experience with funding arrangements for arbitration.

Some aspects of international arbitration will not be present in United States-based court proceedings. For example, not unusual in international arbitration for a party seeking expensive discovery to be required to demonstrate an ability to pay the other side’s costs, including a portion of its legal fees, in the event the claim is unsuccessful. Here, the presence of a funder can be particularly meaningful. Under the United States-based “American rule,” in which each party pays its own fees regardless of who prevails, however, these factors are less significant.

IV. BEST PRACTICES

Even though there are multiple forms of third-party litigation funding and meaningful distinctions among them, some best practices will apply across the board. Here are a few of those common elements:

The arrangement should be spelled out in writing.

The writing should make clear the non-recourse nature of the investment the funder is making in the claim; how the funder will be compensated; and

⁴ “Information obtained by the [ABA] Commission Working Group shows that, [in 2011], investors in ALF are primarily financing the claimant, though defense side financing is also possible. Funding on the defense side obviously does not involve taking a percentage interest in the claim, but often does involve the ALF supplier taking all or a percentage interest in the liability facing the defendant. . . . ALF transactions between large law firms and defendants are generally negotiated individually between the parties, with the method of calculating the supplier’s payment being one of the most important terms in the contract.” Ralph Lindeman, “Third-Party Investors Offer New Funding Source for Major Commercial Lawsuits,” (BNA: Daily Report for Executives, Vol. 0, No. 42 March 5, 2010) (posted March 10, 2010) (“Although most investments of third-party funders to date have been on the plaintiff’s side, company executives do not rule out targeted investments on the defense side. ‘It’s not a matter of favoring plaintiffs over defendants,’ said [Selvyn] Seidel [then-chairman of Burford Capital Ltd.] ‘It’s a matter of favoring good claims and good defenses over bad claims and bad defenses.’ [Richard] Fields at Juridica [Capital Management Limited] agreed, saying, ‘Although we haven’t closed a deal on the defense side yet, we are going to be playing in that arena as well.’”); *20/20 Report* (citing Comments of Burford Group to the Am. Bar Ass’n Working Group on Alternative Litig. Fin. 4 (Feb. 15, 2011) (“Burford is willing to finance plaintiffs and defendants with equanimity.”); Comments of Juridica Capital Mgmt. Ltd. to the Am. Bar Ass’n Working Group on Alternative Litig. Fin. 2 (Feb. 17, 2011) (“To date we have been involved mainly in claims by plaintiffs in major commercial litigation but we – and we understand at least one of our peers – are working on products for defendants as well.”)).

who is responsible for paying the funder, from what source (e.g., the recovery after trial or settlement) and when (e.g., time period after receipt of judgment or settlement funds).

The arrangement should be structured so that the client retains control of the litigation, and not the funder (or lawyer, if the lawyer is receiving the funding).

Lawyers should be cautious in making case-related reports or predictions.

These Best Practices, as well as others that are common across all types of litigation funding, are set out below. They are supplemented in sections that follow with additional comments when appropriate, for particular types of litigation funding that require special considerations.

A. Disclosure

The careful lawyer should assume that the litigation funding arrangement may well be examined by a court or the other party at some point in litigation.⁵ Disclosure may be required in many contexts. It could be required (1) in jurisdictions that do not find such arrangements protected by work product or attorney-client privilege or those that require disclosure by court rule or discovery order, (2) in a subsequent dispute regarding payment, or (3) in a jurisdiction in which loans to clients are prohibited.

Disclosure is addressed by ABA Formal Opinion 484, which advises that a lawyer who is willing to allow a client to finance the lawyer's fee must explain the arrangement to the client to the extent reasonably necessary to permit the client to make informed decisions about the funding. Depending on the facts, this may include explaining:

- (1) the lawyer's relationship with the finance company or broker, including any fees paid by the lawyer to the company or broker, the payments received by the lawyer, and whether the company or broker is also a client of the lawyer;
- (2) how the lawyer's fee will be paid by the finance company or bank where the finance company or bank disburses funds directly to the lawyer, or how the client is expected to pay the lawyer's fee where the finance company or bank disburses the loan funds to the client;

⁵ As noted above, these Best Practices do not take a position on whether disclosure to a court or adversary will or should take place. A careful lawyer will assure that the written undertakings accurately reflect that the client retains control of the litigation, that disclosures to the funder are limited so as not to create risks of waiver of attorney-client privilege or work product, and that the attorney retains and protects his or her ability to exercise independent professional judgment. Lawyers should examine relevant ethics and court rules or precedents in their jurisdiction – and, if different, where the case is pending – regarding the need for and the contents of disclosure.

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- (3) that the finance company will inform the lawyer when it makes a loan to the client and disburses funds to the client;
- (4) the costs and benefits of the transaction to the client;
- (5) the terms of the arrangement between the finance company or broker and the client as known or understood by the lawyer;
- (6) alternative payment options for the client and other funding sources or arrangements that may be of equal or superior value/risk profile to the client;
- (7) any payment terms that the lawyer intends to impose if the finance company disburses the loan proceeds to the client rather than to the lawyer;
- (8) whether the lawyer will charge a higher fee than he or she would charge otherwise because of the financing arrangement, for example to recoup any financing or other fee the lawyer must pay to the finance company or broker;
- (9) the lawyer's obligation to maintain the confidentiality of client information with respect to the finance company, broker, or bank;
- (10) that paying the lawyer through fee financing may affect the rights and remedies the client might have to obtain the repayment or return of those funds or the forgiveness or reduction of the client's debt in a dispute arising out of the lawyer's performance; and
- (11) any other factors that the lawyer knows or reasonably should know to be material to the financing of the representation.

The lawyer should advise the client that the client is to remain in charge of the lawsuit, as well as explain and take steps to assure that the financing entity will not direct or regulate the lawyer's professional judgment. *See ABA Formal Opinion 484.*

If the lawyer has or acquires any direct or indirect ownership or other profit interest in the financing company, the lawyer would be entering into a business relationship with the client by providing funding; this requires the lawyer to (1) make appropriate disclosure, (2) provide fair and reasonable terms, fully disclosed and explained; (3) advise the client about seeking independent legal advice as to whether to enter into the proposed funding; and (4) obtain informed written consent. *Id.*

B. Documentation and Structure

General: The funding agreement should be drafted to assure that (a) the client retains control of the litigation (including, for example, decisions as to whether to settle or discontinue the litigation as opposed to proceeding to trial or verdict), and (b) that the

lawyer retains independent professional judgment. Lawyers advising clients on litigation funding should be careful about arrangements that appear to give a majority interest in lawsuit to the funder because this may give rise to an argument that the funder has assumed control of the lawsuit, a role that belongs to the client. While there may be cases in which more than a majority of the recovery goes to the funder for a variety of reasons, control of key litigation decisions, including with respect to settlement, should remain with the client in all circumstances.

The non-recourse nature of the agreement should be clearly set forth. Recourse can take many forms, including liability for a variety of wrongs caused the funder. Merger and integration clauses as well as robust waiver provisions are a must.

Basic Funding Agreement Terms: Funding agreements should be in writing, and their terms should be clear, unequivocal, and reflect the intentions of the parties (*i.e.*, the client, funder, lawyer, and any other relevant persons). Funding agreements also should state the amount of funding to be provided, the amount or method of calculating the return to the third-party funder, and how and when the proceeds of the party's recovery are to be distributed among the parties. Funding agreements should provide a fair, transparent, and independent dispute resolution process. Funding agreements also should include a recommendation that a party obtain independent legal advice as to whether to enter into the proposed funding. There should also be a confidentiality obligation of the funder that survives termination of the agreement.

Parties to the Agreement: In client-funder financing, the third-party funder and the party should be the sole parties to the funding agreement in order to avoid any potential attorney conflicts of interest, should the party and the funder disagree on a material issue during the course of the litigation. Many non-recourse finance agreements ask the attorney to promise the funder that the attorney will notify the funder when the case is resolved. This duty can be established either by the lawyer making a side agreement with the funder or the funder conditioning the funding on the client issuing irrevocable instructions to the lawyer.

No Representations: Lawyers should obtain written affirmation from the funder that no advice, opinions or representations have been made by the client or lawyer and that the funder disclaims the existence or materiality of, or any reliance by it upon, any such advice, opinions, or representations. Providing advice to the funder about the merits of the lawsuit may not only raise questions about waiver of attorney-client privilege, but could also expose the lawyer to claims that the lawyer will need to supplement or alter that advice as the litigation proceeds and the facts develop.

The goal of this provision is to negate any fraud or fraud like claims, as well as any reliance. In particular:

- (1) the funding agreement should state that no advice as to the underlying claims has been or will be provided to the funder and no one at the law firm or client has any authority to offer such advice; and

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- (2) the lawyer should obtain acknowledgement from the funder that no opinions have been offered and none were sought on the underlying lawsuit, and none will be required by the funder during the case.

Termination of Agreement or Withdrawal: Provisions for termination and withdrawal are some of the most important issues to consider in any funding agreement. In considering such terms, the parties should clearly address:

- (1) when either or both parties can terminate the agreement and on what bases, including with respect to (i) funding already provided, (ii) any future funding, and (iii) returns due to the third-party funder;
- (2) if there is a termination, what is the impact of that termination on (i) funding already provided, (ii) any future funding, and (iii) returns due to the third-party funder;
- (3) whether and when notice of intent to terminate or withdraw must be provided and whether it must be in writing;
- (4) whether there is a point in the proceedings after which termination of the agreement is precluded;
- (5) how any amendments or modification of the terms of the agreement will be handled;
- (6) what funding limits are set in advance and how and when those limits may be re-examined (particularly as to additional expenses); and
- (7) what continuing or further obligation of confidentiality is owed by the third-party funder to a party should the agreement be terminated.

Transparency: A lawyer contemplating a funding arrangement should consider:

- (1) whether the third-party funder is or will be audited annually by a reputable firm;
- (2) whether the third-party funder will periodically provide a statement of the capital invested during the pendency of the case, the percentage of the budget consumed, and the risk, if any, that the budget may be exhausted;
- (3) a clear expression in the funding agreement that only the client (and not the funder) can terminate counsel;
- (4) including a provision providing that the third-party funder should provide accurate and non-misleading information, particularly regarding its financial conditions, and its intended funding commitment; and

- (5) whether and in what circumstances the third-party funder will manage a party's litigation itself or the litigation expenses of the case.⁶ This is a major red flag and should rarely, if ever, be allowed.

Day-to-Day Case Management and Strategic Decisions (Party Control): The litigation should be managed and controlled by the party and the party's counsel. Limitations on a third-party funder's involvement in, or direct or indirect control of or input into (or receipt of notice of), either day-to-day or broader litigation management and on all key issues (such as strategy and settlement) should be addressed in the funding agreement. The funding agreement also should address the procedures, rights, and duties that apply if an unresolved dispute over management and strategy arises. In all cases, the client and lawyer should have final say.

Similarly, lawyers may want to obtain written acknowledgement that the funder will not seek to control the litigation or the expense (other than the "reasonable and necessary" language normally attached to the expenditure of fees and expenses – and even this oversight can be problematic).

Lawyers should establish a schedule of dates or milestones when the payments will be made: e.g., one lump sum payable to an account to be drawn on as opposed to repeated requests for payment, with the requirement that payment of uncontested fees be made within a specified period of time). (As a general matter, whatever the funder does not pay, the client must pay when due.)

The agreement should establish what notice and involvement the funder is to receive of settlement-related proposals, negotiations, and agreements. This notice may range from no notice, to transparency on all settlement negotiations (*i.e.*, a seat at the table in mediation), to not having the funder involved in the settlement discussions in any respect.

C. Professional Responsibility

The lawyer should examine the rules of professional responsibility in any relevant jurisdiction (e.g., if the action is pending elsewhere other than in the State in which the lawyer is admitted), particularly as they apply to the following:⁷

- Independent Professional Judgment and Conflict of Interest.
 - o Conflict of Interest.
 - i. Material Limitation Conflicts (Model Rule 1.7(a)(2)).

⁶ As discussed above, as a general principle, the greater the control the funder has over the litigation, the weaker the argument becomes that disclosures to the funder are privileged or otherwise protected and, in some jurisdictions, if too much control is granted to the funder, the arrangement itself may be subject to heightened scrutiny under what remains of champerty or maintenance concerns.

⁷ This list is adapted from the 20/20 Report.

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- ii. Business transactions with Clients (Model Rule 1.8(a)).
 - iii. Financial Assistance to Clients (Model Rule 1.8(e)).
 - iv. Acquisition of an Interest in the Client's Cause of Action (Model Rule 1.8(i)).
 - v. Withdrawal and substitution of counsel (Model Rule 1.16).
- o Interference.
 - i. Referring clients to funders.
 - ii. Effect on settlement (express contract provisions addressing who approves settlements and awareness of effect of incentives in funding arrangements upon decisions of plaintiffs, either over- or under-incentivizing settlements at particular points in the litigation in light of the fee structure).
 - iii. Fee Sharing (Model Rule 5.4(a)).
 - iv. Third Party Payment of Fees (Model Rule 1.8(f) and 5.4(c)).
- Confidentiality, Privilege and Work Product.
 - o Duty of Confidentiality (Model Rule 1.6)⁸.
 - o Attorney-Client Privilege, Waiver, Common Interest exception.
 - o Work Product Doctrine.
 - o Third-Party Evaluations.
- Fees.
 - o Reasonableness (Model Rule 1.5).
 - o Passing Borrowing Costs to Clients (Model Rule 1.5).
- Competence & Communication: advising in connection with ALF transactions.

⁸ It is important for attorneys to “balance the disclosure of information required for assessment/due diligence and minimizing the risk of waiving privilege,” keeping in mind that funders have been the target of fraudulent schemes. *ICCA Report*; see also Indictment in *United States v. Hammatt*, case no. 1:19-cr-00067 (S.D.N.Y. 2019) (describing attorney who “borrowed” money from a funder based upon a falsified settlement agreement).

The lawyer must charge a reasonable fee, even if it is increased because of finance or subscription fees. *See ABA Formal Opinion 484.*

If the lawyer accepts a flat fee, he or she must deposit the funds in an account and treat them as unearned or earned in the same way as the jurisdiction provides for the payment of flat fees generally. The lawyer must refund any unearned fees.

The lawyer should beware of conflicts of interest (e.g., is a particular financing company in the client's best interest, or just the lawyer's?). Similarly, has the lawyer represented the finance company previously, such that it is a former client and the lawyer would need informed consent from that client? Also, how many times has the lawyer used the particular funder or any other funders? What is the relationship between the lawyer and the funder?

D. Privilege and Work Product

Lawyers should explain the doctrines of attorney-client privilege and work product to the client.

In general, the lawyer may not reveal confidential information about the representation to the financing entity, without the client's informed consent. *ABA Formal Opinion 484.*

Financing entities that are new to the industry, in particular, may need to be educated about how the attorney-client privilege works, as well as regarding issues of waiver. The lawyer should also explain the limitations that must be imposed on the financing entity's involvement in the litigation. For example, financing companies should not ask for any non-public documents, so that privilege is not an issue.⁹

Best Practices Regarding Privilege:¹⁰ A party should seek – and, if not specifically requested by the client, the lawyer should provide – legal advice regarding the doctrines of attorney-client privilege (and any other privileges that may inure), professional secrecy, work product and waiver, under the law(s) potentially applicable to funding arrangements. ABA Model Rule 8.5 addresses choice of law issues regarding the relevant rules of professional conduct. Given the variance of treatment of attorney-client privilege in the international context, choice of law issues should be reviewed.¹¹

⁹ “Perhaps aware of the risks in having to produce the funding application, most funding companies are moving to a more bare-bones application, so if the application has to be produced, it won't be the treasure trove of information that defendants would hope for.” S. Gupta, *Litigation Funding and Product Liability Lawsuits*, submitted for Georgia's 26th Annual Products Liability Seminar, p. 4 (2018).

¹⁰ This section is adapted from the *ICCA Report*. While the same “disclosure” concerns may not all be present in US-centric litigation, the *ICCA Report* remains a logical starting point.

¹¹ Though privilege is generally “procedural,” in which a court applies the rules of privilege in its own jurisdiction, Rule 44.1 allows proof of foreign law, including privilege, in federal proceedings; *see, e.g., In re Air Crash at Belle Harbor*, 241 F.R.D. 202, 204 (S.D.N.Y. 2007); *In re Rivastigmine Patent Litig.* (MDL No. 1661), 237 F.R.D. 69, 74 (S.D.N.Y. 2006).

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The strength and applicability of the attorney-client privilege and work product doctrine vary by jurisdiction (not only from state-to-state, but depending on whether the case is in federal or state court).¹² The availability of either protection may be evidenced by, but is not necessarily dependent on, an agreement between the party and the funder that contains provisions addressing confidentiality and/or non-disclosure.¹³

The lawyer should not provide to a potential or agreed-upon funder any attorney-client or otherwise privileged materials that would risk waiver of any privilege.¹⁴ Some prudent steps for the lawyer would include one or more of the following:

- (1) obtain written acknowledgment from the funder that no attorney-client or otherwise privileged materials have been supplied;
- (2) only supply the funder with public documents and access to the public file (keeping detailed communications records of bates-labeled communications);
- (3) for non-public documents, examine local rules and practices regarding waiver and ensure compliance; and
- (4) offer no opinion about the underlying claims, which are often included in responses to seemingly innocuous questions, such as:
 - i. What do you think are the chances that the Judge will do x or y?
 - ii. Are you satisfied with the Court's rulings or do you have any problems with them?
 - iii. What are weaknesses in the other side's case? In your case?
 - iv. Are there documents withheld from us?

Moreover, the lawyer may not reveal confidential information about the representation to the financing entity. *ABA Formal Opinion 484*.

¹² See generally Fed. R. Evid. 501. Compare, e.g., *Schlaeffler v. United States*, 806 F.3d 34 (2d Cir. 2015) (upholding common interest privilege) with *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y. 3d 616 (2016) (rejecting *Schlaeffler* and denying privilege protection).

¹³ See, e.g., *United States v. Homeward Residential, Inc.*, 2016 WL 1031154, at *6 (E.D. Tex. 2016) (“[A]t least one court in [the Eastern District of Texas] has held that the presence of a written nondisclosure agreement preserves work product protection.”).

¹⁴ Work product may be provided without waiver under specific conditions, depending on the jurisdiction (including whether one is in federal or state court). See, e.g., *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 735-36 (N.D. Ill. 2014) (“While disclosure of a document to a third party waives attorney-client privilege unless the disclosure is necessary to further the goal of enabling the client to seek informed legal assistance, the same is not necessarily true of documents protected by the work product doctrine.”); *United States v. Homeward Residential, Inc.*, 2016 WL 1031154, at *5 (E.D. Tex. 2016) (“Disclosure of work product waives protection ‘only if work-product is given to adversaries or treated in a manner that substantially increases the likelihood that an adversary will come into possession of the material.’”).

V. ADDITIONAL CONSIDERATIONS FOR SPECIAL TYPES OF FUNDING

A. Funding for Unsophisticated Litigants

Choice of law considerations, with or without a choice of law provision in the agreement, may determine whether the type of financing is permitted at all. For example, in *Maslowski v. Prospect Funding Partners LLC, et al.*, 2019 Minn. App. Unpub. LEXIS 644, 2019 WL 3000747, No. A18-1906 (Minn. Ct. App. July 8, 2019), the court determined that an agreement to fund a personal injury lawsuit violated Minnesota law against champerty, even though the agreement provided for the application of New York law, which has a more narrow definition of champerty. The court found Minnesota law to be applicable since all relevant parties and events were based in Minnesota, and concluded that the New York forum selection clause was an attempt to evade Minnesota's prohibition on champerty. The important point is to check all potentially applicable state laws before entering into any litigation funding arrangement.

B. Class Actions

As with other types of litigation funding, disclosure, documentation, and privilege should be closely examined here. An awareness that the litigation funding agreement may be disclosed at some point, assuring client control (rather than funder control) throughout, and guaranteeing lawyer independence will be paramount. In the class action context, the funding agreement may have to be disclosed at the outset under a local court rule or standing order,¹⁵ in connection with approving payment in the context of a class settlement or recovery, or simply by a court ruling on discovery requests.

It would be prudent for the lawyers to disclose certain basics even to supposedly sophisticated clients or in the context of class counsel appointment. The lawyer would do well to assume that the litigation funding arrangement will, at some point in the litigation, be examined by a court or an opposing party.¹⁶ And in the event of a class action reaching a settlement, unless the entirety of the funds going to the litigation funder are to be taken from the attorney's fees, court disclosure and approval of the payment to the funder may be required in the class settlement approval process. In addition, where a court will ultimately pick a lead plaintiff or lead counsel, lead counsel may wish to reveal

¹⁵ *E.g.*, Standing Order for all Judges of the Northern District of California, Contents of the Joint Case Management Statement (adopted January 23, 2017), paragraph 19.

¹⁶ *See, e.g.*, *Gbarabe v. Chevron Corp.*, 2016 WL 4154849 (N.D. Cal. 2016) (finding that "the litigation funding agreement is relevant to the adequacy determination [of Rule 23 of the Federal Rules of Civil Procedure] and should be produced to defendant"). *But see Kaplan v. S.A.C. Capital Advisors, L.P.*, 2015 WL 5730101 (S.D.N.Y. 2015) (finding that "the defendants did not show that the requested [litigation funding-related] documents are relevant to any party's claim or defense"). These Best Practices do not take a position on whether disclosure should be required. But, a careful lawyer will assure that the written agreement reflects that the client retains control, disclosures to the funder are limited so as not to waive attorney-client privilege or work product, and the attorney protects his or her ability to exercise independent professional judgment. Lawyers should examine relevant ethics and court rules or precedents regarding the need for and the contents of disclosure.

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the presence of litigation funding as a benefit to the class by assuring sufficient financial backing.

ABA Formal Opinion 484, while developed in a different context, provides guidance here as well. Clients, even clients who seek to be class representatives, may well benefit from receiving explanations that address the possible availability, terms, and costs/benefits of litigation funding.

Particularly in the class action context, a lawyer responsible to putative class members must assure that the financing entity will not direct or regulate the lawyer's professional judgment. *ABA Formal Opinion 484*.

The lawyer should consider whether a third-party funder and a party (whether the putative class representative or the class itself following court approval) should be the sole parties to the funding agreement to mitigate against the likelihood of potential attorney conflicts of interest should the party and the funder disagree on a material issue. Many non-recourse finance agreements ask the attorney to notify the funder when the case is resolved.

While the funder should not have a majority interest in the lawsuit, in a class action context the funder may receive more than the class representative or any class member if the case is successful. To anticipate an attack based upon the identity of the real party in interest, care should be taken to assure that the funder does not have the ability to exercise influence over decisions of the putative representative and that, as with any class action, the attorney keeps the interests of the putative class paramount.

C. Portfolio Funding

Where the lawyer has a number of cases funded by the same funder, the fee-splitting concerns raised by New York City Bar Opinion 2018-5 (or other relevant ethics authorities) should be examined and addressed.

D. Funding Not Motivated by Profit

Although the main goal in this type of litigation funding is not a financial recovery, many of the same topics should be addressed in the written funding agreement. As with other types of litigation funding, lawyers should disclose certain basics to both individual and organizational clients. The lawyer would do well to assume that the litigation funding arrangement may be examined by a court or the other party in litigation. In addition to the regular arguments for and against disclosure, there may be unique First Amendment protections that could come into play in determining the need for and scope of disclosure.¹⁷

¹⁷ *National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 428–29 (1963) (holding that the litigation-funding activities of the NAACP “are modes of expression and association protected by the First and Fourteenth Amendments, because “[i]n the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives

E. Revenge Litigation Funding

This category is set out separately to acknowledge that this type of funding exists. This does not seem to be a statistically significant practice, but it did receive much early interest due to the anecdotal argument that the plaintiff in this type of arrangement may well abandon decision-making to the funder (who generally has a personal or institutional interest, rather than an “investment” or “profit” motive, for providing the funding to support the litigation). In any event, the same type of disclosure, documentation, and privilege concerns are present.

F. Respondent/Defendant Side Funding

The same disclosure, documentation, and privilege considerations are relevant in respondent/defendant-side funding as in plaintiff-side funding. The documentation should also set forth the amount of funding to be supplied, when it will be supplied, and how and when the funder may receive a recovery. The main issue for defendant-side funding is establishing the metrics that will trigger the payment to the funder. In a typical defendant-side funding scenario, a case will be valued (e.g., at \$10 million) and the funder will receive a portion of all “savings” realized if the case settles or resolves for less than that (e.g., if the case resolved at \$4 million, the funder might receive 50% of the “savings,” or \$3 million). In these scenarios, defense lawyers with alternative fee arrangements may also receive less of a “cut” of the “savings,” which drives home the need for transparency. Other models exist.¹⁸ Evaluation of both the “value” of the case as well as analysis of the likelihood of recovery below that estimate are critical to the inquiry. Because good analytical models are still being developed, defendant-side funding depends instead on less scientific anecdotal evaluations and judgments on cases, which may have inhibited its widespread use. However, there are litigation funders focused on this segment of the market¹⁹ and defense-side funding has received scholarly support.²⁰

G. Third-Party Funding in International Arbitration

“The arbitration community should strive to find a way to balance the increasing business need for innovative approaches to the financing of legal matters while protecting

of equality of treatment by all government”). See also, e.g., *United States v. Homeward Residential Inc.*, 2016 WL 1031154 (E.D. Tex. Mar. 15, 2016); *Matthews v. City of Maitland*, 923 So. 2d 591 (Fla. Dist. Ct. App. 2006) (“The compelled disclosure of the names of citizens exercising their right to participate in the democratic process would create a chilling effect on their rights to organize and associate. . . . [D]isclosure of contributors’ identity would subject them to possible intimidation and coercion.”); *Estate of McPherson ex rel. Liebreich v. Church of Scientology Flag Service Organization, Inc.*, 815 So.2d 678 (Fla. 2d DCA 2002) (finding that the identity of financial contributors was not information necessary or relevant to the plaintiffs’ claims; rather, it was sought to chill future funding).

¹⁸ See, e.g., <http://disputeresolutionblog.practicallaw.com/litigation-funding-and-insurance-for-defendants-a-lesser-trodden-path/>.

¹⁹ See, e.g., <https://abovethelaw.com/2017/03/litigation-finance-for-defendants/>; <https://www.law360.com/articles/429993/litigation-finance-co-launches-with-defense-side-focus>.

²⁰ Samra, *The Business of Defense: Defense-Side Litigation Financing*, 83 Univ. Chicago L. Rev. 2299 (2016) (available at: <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5980&context=uclrev>).

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the integrity of the arbitral process and the ultimate enforceability of awards.” *ICCA Report*, at 17.

Particularly in international arbitration, due to a “loser pays” history and tradition, litigation funding may need to be disclosed to assure that litigation expenses can, in fact, be covered. Counsel for a party seeking funding should ensure that a robust non-disclosure agreement (“NDA”) is entered into with a funder before any substantive discussions to protect against the disclosure of confidential communications.

Best Practices Regarding Privilege: A party should seek legal advice regarding the doctrines of privilege, professional secrecy, work product, and waiver, under the law applicable to funding arrangements. While research regarding specific tribunals is warranted, international arbitral tribunals can be expected to treat as privileged and not order production of any information that (1) is determined to be subject to a privilege under either national law or international arbitration standards, and (2) has been provided by a party or its counsel to a funder for the purpose of obtaining funding or supporting the funding relationship during the pendency of arbitral proceedings unless the material is otherwise relevant (including, for example, illustrating the ability and circumstances under which a funder may have guaranteed expenses in the event of an award against the claimant).

The strength and applicability of the privilege may be evidenced or increased by, but does not depend on, an existing agreement between the party and the funder that contains provisions addressing confidentiality and/or non-disclosure.

In instances when documents provided to a funder by a party or its counsel may be relevant and the presumptive privilege applicable to such documents may be deemed to have been waived, international tribunals have generally exercised caution in ordering their production, including limiting the purposes for which such documents or the information contained in such documents may be used.

VI. CONCLUSION

These Best Practices were developed to educate and guide lawyers as they navigate the complex and evolving area of litigation financing. By following these Best Practices, lawyers should be better positioned to represent their clients and protect against problems that may arise in these arrangements and relationships.

REPORT

The *American Bar Association Best Practices for Third-Party Litigation Funding* (“Best Practices”) is written to assist lawyers considering litigation funding – whether to provide legal fees for sophisticated, cross-border arbitration and litigation, to assist an individual plaintiff or claimant in a personal injury lawsuit or worker’s compensation claim, or any other litigation or arbitration context.

In 2010, the ABA House of Delegates adopted the *Commission on Ethics 20/20 White Paper on Alternative Litigation Finance Informational Report to the House of Delegates* (the “20/20 Report”). That work predates the exponential growth in third-party litigation funding but provides an important foundation for Best Practices.

As the frequency of third-party litigation funding increased over the following ten years, the Section of Litigation Federal Practice Task Force has monitored the developments in terms of the types and variety of financing situations occurring, case law developments involving issues of disclosure of the arrangements in litigation, ethical issues, and the legality of the financing arrangements themselves. In view of these developments, the Task Force determined it was now time to expand upon the fine work set forth in the 20/20 Report.

The accompanying Best Practices, incorporated herein by reference, are intended to be a guide for lawyers who have no prior experience with third-party funding as well as for experienced practitioners who have utilized the services of funders on many occasions. The Best Practices include making sure the arrangement is set forth in detail in writing, includes the non-recourse nature of the financing, insures that the client retains control of the case and protects the attorney-client relationship. They explain the many different circumstances in which funding has now occurred, and cover such issues as properly documenting the arrangements, regardless of whether the funding is to the client or to counsel, properly disclosing the arrangements to the client, and ensuring that the client continues to be the master of the litigation without improper intrusion by the third-party funder.

Courts currently are of differing views on whether the fact of third-party funding and the details need to be disclosed to the other side or are proper issues for discovery. Best Practices identifies these issues but does not take a position on whether such disclosure should occur. Instead, Best Practices advises the careful lawyer to approach third-party funding on the assumption that there is a possibility that the arrangement will at some point be subject to scrutiny by the courts, and to be guided accordingly in negotiating the arrangement and conducting the litigation or arbitration.

Respectfully submitted,

Barbara J. Dawson
Chair, Section of Litigation
August 2020

GENERAL INFORMATION FORM

Submitting Entity: Section of Litigation.

Submitted By: Barbara J. Dawson, Section of Litigation Chair.

1. Summary of the Resolution(s). The Resolution adopts the *American Bar Association Best Practices for Third-Party Litigation Funding*. The Best Practices include making sure the arrangement is set forth in detail in writing, includes the non-recourse nature of the financing, insures that the client retains control of the case and protects the attorney-client relationship.
2. Approval by Submitting Entity. On January 18, 2020, the Section of Litigation Council voted to submit the Resolution to the ABA House of Delegates.
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? In connection with the work of the Ethics 20/20 Commission in 2012 the Association adopted a White Paper on Alternative Litigation Finance presented as an "Informational Report to the House of Delegates" authored by the Association's Commission on Ethics 20/20. The present Resolution and accompanying Best Practices paper update and expand upon the work of the Commission on Ethics 20/20 in light of ongoing developments.
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. Publication of the Best Practices by the Section of Litigation and other co-sponsoring organizations.
8. Cost to the Association. (Both direct and indirect costs) None.
9. Disclosure of Interest. (If applicable) None.
10. Referrals.

International Law Section (Co-sponsor)
Business Law Section
Dispute Resolution Section
Judicial Division
Tort Trial and Insurance Practice Section
Standing Committee on Ethics and Professional Responsibility

Standing Committee on Lawyers' Professional Liability
Young Lawyers Division

11. Name and Contact Information. (Prior to the Meeting.) Please include name, telephone number and e-mail address. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

Delegate Dennis J. Drasco, 973-228-6770, ddrasco@lumlaw.com
Delegate Judith Miller, 301-656-4157, judith.miller3@gmail.com

12. Name and Contact 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.*

Delegate Dennis J. Drasco, 973-228-6770, ddrasco@lumlaw.com
Delegate Judith Miller, 301-656-4157, judith.miller3@gmail.com

EXECUTIVE SUMMARY

1. Summary of the Resolution.

The *American Bar Association Best Practices for Third-Party Litigation Funding* surveys the types of alternative litigation funding and proposes best practices to be consulted and factors to be considered by attorneys seeking to explore or utilize litigation funding in dynamic regulatory, judicial, and arbitral environments.

2. Summary of the issue that the resolution addresses.

Rules applicable to alternative methods of litigation financing are rapidly changing across multiple jurisdictions and in arbitral forums. The Resolution notes areas to be considered by attorneys considering litigation funding, including best practices to avoid ethical pitfalls, protect information otherwise covered by the attorney-client privilege and work product doctrine, and otherwise maintain client confidences.

3. Please explain how the proposed policy position will address the issue.

The proposed Best Practices summary surveys multiple jurisdictions and secondary materials and provides approaches to aid lawyers who have not yet participated in litigation funding.

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

None known at present.

AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE
COMMISSION ON YOUTH AT RISK
COMMISSION ON HOMELESSNESS AND POVERTY
COALITION ON RACIAL AND ETHNIC JUSTICE

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges all federal, state, local,
2 territorial, and tribal governments to adopt policies and contractual provisions that
3 prohibit conducting strip searches of children and youth, except in exceptional
4 circumstances, where the searches are permitted only:

- 5
6 (1) when the child or youth is in custody;
7 (2) when there is probable cause to believe that the child or youth possesses
8 an implement that poses a threat of imminent bodily harm to themselves or
9 others;
10 (3) after all other less intrusive methods of discovering and removing the
11 implement have been exhausted, including the use of alternative search
12 techniques that can be performed while the child or youth is fully clothed;
13 and
14 (4) after the child or youth has been given notice, in a manner that is consistent
15 with the child's or youth's primary language and developmental stage, and
16 that takes into account accommodations for disability, that they will be
17 searched and that they have the opportunity to reveal any implement they
18 are carrying instead of being searched; and
19
20

21 FURTHER RESOLVED, That the American Bar Association urges all federal,
22 state, local, territorial, and tribal governments to adopt policies and contractual
23 provisions that require that, if the child or youth must be strip-searched, the search
24 is conducted in a manner that respects the sexual orientation and gender identity
25 of the child or youth and is the least intrusive manner possible; and
26

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27 FURTHER RESOLVED, That the American Bar Association urges all federal,
28 state, local, territorial, and tribal governments to adopt policies and contractual
29 provisions prohibiting body cavity searches of children and youth; and
30

31 FURTHER RESOLVED, That the American Bar Association encourages court
32 systems, lawyers, law schools, and bar associations to promote awareness of the
33 harmful effects of strip searches and body cavity searches of children and youth,
34 including trauma and re-victimization.

REPORT

Summary of the Resolution

This Resolution urges all federal, state, local, territorial, and tribal governments to adopt policies and contractual provisions that prohibit strip searches of children and youth, except in exceptional circumstances. The policy is based on evidence that strip searches are harmful and cause trauma to children and youth, and especially to those who have previously been victimized.

For this reason, the Resolution urges prohibiting strip searches except when all of the following conditions are met: (1) the child or youth is in custody; (2) there is probable cause to believe that the child or youth possesses an implement that poses a threat of imminent bodily harm to themselves or others; (3) all other less intrusive methods of discovering and removing the implement have been exhausted, including the use of alternative search techniques that can be performed while the child or youth is fully clothed; and (4) the child or youth has been given notice, in a manner that is consistent with the child's or youth's primary language and developmental stage, and that takes into account accommodations for disability, that they will be searched and that they have an opportunity to reveal any implement they are carrying instead of being searched. The Resolution urges absolutely prohibiting body cavity searches of children and youth. In addition, if a child or youth must be strip-searched, the search shall be conducted in a manner that respects the sexual orientation and gender identity of the child or youth and in the least intrusive manner possible. Finally, the Resolution urges the bar to promote awareness of the harmful and traumatizing effects of strip searches on children and youth.

Definition of Strip Searches

A strip search is a “search that requires a person to remove or arrange some clothing so as to permit a visual inspection of the person’s breasts, buttocks, or genitalia.”¹ Strip searches may also involve “inspections of the scalp, ears, hands, feet, mouth, and nose.”² Depending on state law, a strip search can be visual, physical, or a combination of both

¹ Prison Rape Elimination Act, Juvenile Facility Standards, 28 C.F.R. § 115.6 (2012). *See also Body Searches: Addressing Risk Factors to Prevent Torture and Ill-Treatment*, PENAL REFORM INT’L 1, 1 (2015), [hereinafter *Body Searches*], <https://www.penalreform.org/resource/detention-monitoring-tool-factsheet-body-searches/> at 1.

² KATHERINE HUNT FEDERLE, *CHILDREN & THE LAW: AN INTERDISCIPLINARY APPROACH* (2012). *See also* Michael Umpierre, *Rights & Responsibilities of Youth, Families, and Staff*, in NAT’L INST. CORRECTIONS, *DESKTOP GUIDE TO QUALITY PRACTICE FOR WORKING WITH YOUTH IN CONFINEMENT* (2017); Anne M. Nelsen, *Management & Facility Administration*, in NAT’L INST. CORRECTIONS, *DESKTOP GUIDE TO QUALITY PRACTICE FOR WORKING WITH YOUTH IN CONFINEMENT* (2017); Anne M. Nelsen, *Admission and Intake*, in NAT’L INST. CORRECTIONS, *DESKTOP GUIDE TO QUALITY PRACTICE FOR WORKING WITH YOUTH IN CONFINEMENT* (2017); *Body Searches*, *supra* note 1, at 1.

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and may also involve a body cavity search.³ In addition, the child or youth may be required to bend over and cough in the presence of a staff member.⁴

Definition of Children and Youth

For purposes of this Resolution, children and youth are defined as an individual who is (1) under the age of 18; or (2) under the age of 22 who remains under the jurisdiction of the juvenile court.⁵

Harm and Trauma Caused By Strip Searches of Children and Youth

Strip searches are “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.”⁶ Strip searches are perceived as particularly intrusive by children and teenagers.⁷ A child or youth does not have to be completely naked to be negatively affected by a strip search, as underwear searches are also “embarrassing, frightening, and humiliating.”⁸ “Scientific and psychological research indicates that a traumatic strip search can have a lifelong impact on an adolescent’s developing mind.”⁹ Because “youth . . . is a . . . condition of life when a person may be most susceptible . . . to psychological damage,”¹⁰ “[c]hildren are especially susceptible to possible traumas from strip searches.”¹¹ As noted by the United States Supreme Court, “adolescent vulnerability intensifies the patent intrusiveness of the exposure” and can “result in serious emotional damage.”¹²

³ See WIS. STAT. § 968.255 (2015); CAL. PENAL CODE § 4031 (2017). See also William Simonitsch, *Visual Body Cavity Searches Incident to Arrest: Validity under the Fourth Amendment*, 54 U. MIAMI L. REV. 665 (2000); *Body Searches*, *supra* note 1, at 1.

⁴ See JUVENILE LAW CENTER, *Addressing Trauma: Eliminating Strip Searches* (2017) [hereinafter *Addressing Trauma*], <https://jlc.org/resources/addressing-trauma-eliminating-strip-searches>.

⁵ See A.B.A., MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT AND DEPENDENCY CASES 1, 2 (2011), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/model-act-final-adopted-by-aba-8-11.pdf.

⁶ *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (citation and internal quotation marks omitted). See also *Body Searches*, *supra* note 1, at 1 (“All types of body search can be intimidating and degrading, and the more intrusive the method, the stronger the feeling of invasion will be.”).

⁷ See, e.g., *Cornfield by Lewis v. Consolidated School District No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993) (strip search was particularly intrusive for a sixteen-year-old, because that is the “age at which children are extremely self-conscious about their bodies”); *Doe v. Renfrow*, 631 F.2d 91, 93 (7th Cir. 1980) (strip search of a thirteen-year-old was a “violation of any known principle of human decency”). See also *Thomas ex. rel. Thomas v. Roberts*, 261 F.3d 1160, 1168 (11th Cir. 2001) (strip searches represented a serious intrusion on the rights of the children), *vacated on other grounds*, 536 U.S. 953 (2002). See *Body Searches*, *supra* note 1, at 6 (noting that children are particularly vulnerable to the humiliating and degrading effects of strip searches).

⁸ *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364, 374-75 (2009).

⁹ Emily J. Nelson, *Custodial Strip Searches of Juveniles: How Safford Informs a New Two-Tiered Standard of Review*, 52 B.C.L. REV. 339, 361 (2011) (citing Erica J. Adams, *Healing Invisible Wounds: Why Investing in Trauma-Informed Care for Children Makes Sense*, JUST. POL’Y INST. 1, 2 (2010), www.justicepolicy.org/images/upload/10-07_REP_HealingInvisibleWounds_JJ-PS.pdf).

¹⁰ *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

¹¹ *Flores v. Meese*, 681 F. Supp. 665, 667 (C.D. Cal. 1988), *rev’d on other grounds*, 507 U.S. 292 (1993).

¹² *Safford*, 557 U.S. at 366, 375 (citations omitted).

Strip searches can seriously traumatize children, leading them to experience negative consequences for years, including anxiety, depression, loss of concentration, sleep disturbances, difficulty performing in school, phobic reactions, and lasting emotional scars.¹³ Consequently, any strip search, no matter the underlying justification, has a debilitating impact that clearly does not account for the child's best interests. Trauma during adolescence may have a particularly significant effect on the development of the frontal lobe, the area in the brain that is responsible for thoughtful decision-making and measured responses. Trauma to the frontal lobe during a youth's development can result in lasting consequences into adulthood.¹⁴

Research in adolescent development also supports the legal conclusion that strip searches impact young people even more severely than adults. With the onset of puberty, teenagers begin to view their bodies critically and compare them to those of their peers and their ideals, making adolescents particularly vulnerable to embarrassment.¹⁵ Surveys confirm a high degree of anxious body preoccupation and dissatisfaction among adolescents.¹⁶ Accordingly, teenagers have a heightened need for personal privacy.¹⁷ For an adolescent, privacy is a "marker of independence and self-differentiation."¹⁸ If the child's privacy is threatened, the resulting stress can seriously undermine the child's self-esteem.¹⁹ Moreover, "a child may well experience a strip search as a form of sexual abuse."²⁰ Children, even at very early ages, understand the concept that certain parts of their body are 'private.' Child-abuse education programs underscore this understanding, telling children that nobody should look at or touch their private parts. Thus, a strip search—being compelled to expose one's private parts to an adult stranger who is not a medical practitioner—is offensive to the child's natural instincts and training.²¹

¹³ See Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. Cal. L. Rev. 921, 929 (1997) (describing lasting and debilitating psychological effects of school's strip search of a student).

¹⁴ See *Addressing Trauma*, *supra* note 4.

¹⁵ See F. PHILLIP RICE & KIM GALE DOLGIN, *THE ADOLESCENT: DEVELOPMENT, RELATIONSHIPS AND CULTURE* 173 (10th ed. 2002).

¹⁶ See Anne C. Peterson & Brandon Taylor, *The Biological Approach to Adolescence: Biological Change and Psychological Adaptation*, in *HANDBOOK OF ADOLESCENT PSYCHOLOGY* 144-45 (Joseph Adelson ed., 1980).

¹⁷ See Gary B. Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?*, 62 NEB. L. REV. 455, 488 (1983). See generally Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509 (1998).

¹⁸ See Melton, *supra* note 17, at 488.

¹⁹ See William A. Rae, *Common Adolescent-Parent Problems*, in *HANDBOOK OF CLINICAL CHILD PSYCHOLOGY* 561 (C. Eugene Walker & Michael C. Roberts eds., 2d ed. 1992) (noting the importance of confidentiality when working with adolescents); RICE & DOLGIN, *supra* note 15, at 180 (noting the negative impact of stress upon self-esteem and adolescent development).

²⁰ Steven F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 12 (1991).

²¹ *Id.* at 12-13.

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Strip searches can also re-traumatize youth who may be victims of abuse or neglect.²² Children and youth in the juvenile or adult criminal legal systems and the child welfare system are particularly vulnerable to lasting harm when strip-searched. National studies show that nearly all of the youth in the juvenile system have experienced trauma, and that nearly two-thirds of young men in the system and three-quarters of young women meet the criteria for one or more psychiatric disorders.²³

Scope and Prevalence of the Problem

Strip searches have customarily been used to discover contraband while individuals are incarcerated, but have become increasingly common in juvenile detention facilities as well as in other spaces and circumstances, including in schools, in immigration detention centers, during child welfare investigations, and prior to children and youth visiting incarcerated family members. While some state laws provide guidance on when and how strip searches can be performed on children and youth,²⁴ individual agencies and facilities have discretion to create their own policies and contractual provisions, particularly when in the interest of furthering public safety. These searches have a harmful impact on children and youth regardless of the circumstances and reasons for the search:

- Juvenile detention centers rely on state and facility policy authorizing strip searches at various times throughout the period of incarceration. Several facilities require searches as part of the intake procedure as well as after any face-to-face visits with family, attorneys, or counselors.²⁵
 - Before a court ruled the practice unconstitutional,²⁶ a county youth jail in Oregon adhered to a policy that required a multi-step search where youth stripped and were made to stand naked while a staff member examined

²² See *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 239 (2d. Cir. 2004) (Sotomayor, J., dissenting) (“We should be especially wary of strip searches of children, since youth ‘is a time and condition of life when a person may be most susceptible to influence and to psychological damage. . . . [W]ith children who may be victims of sexual abuse, the concerns are even greater.’”). See also *Body Searches*, *supra* note 1, at 4 (“For female detainees, the experience of a body search may be re-traumatizing due to sexual abuse in the past.”)

²³ See *Addressing Trauma*, *supra* note 4.

²⁴ Thirteen states, including Texas and Florida, prohibit strip searches of juveniles unless officers have a reasonable suspicion that a youth has concealed a prohibited item. See Alan Judd, *Georgia’s Juvenile Prisons: Assaults by Guards, Strip Searches, Chaos*, ATLANTA JOURNAL-CONSTITUTION, Nov. 17, 2019, <https://www.ajc.com/news/crime-law/violence-permeates-youth-prisons/7YRQTDEnIT20hGVEnjqybP/>.

²⁵ See *Body Searches*, *supra* note 1, at 2 (“Usually, a systematic search takes place upon admission to a place of detention to ensure that the detainee does not carry dangerous objects (such as weapons) or prohibited items (such as drugs, objects that could be used for escape attempts, or cell phones in some contexts). Searches are subsequently applied when detainees may have had access to such items, for example before and following personal contact with visitors (relatives, friends, lawyers), exercise or activity in workshops, after transfers, including for example for specialized treatment to a hospital, or following home visits or temporary release.”).

²⁶ See *Mashburn v. Yamhill County*, 698 F. Supp. 2d 1233, 1235, 1240-41 (D. Or. 2010).

them from head to toe. They were also asked to manipulate their breasts and genitals in front of the examiner.²⁷

- In Georgia, a facility requires strip searches when a youth enters a facility for the first time, after being escorted by officers to a medical appointment or court appearance, and after any visit. The Georgia Department of Juvenile Justice policy requires examination of a youth's hair, ears, mouth, armpits, hands, feet, inner thighs, pubic area and outer rectum.²⁸
- When children are placed in immigration detention, they also risk being strip-searched.
 - Fifteen- and sixteen-year-old girls were regularly strip-searched and subject to vaginal searches at Texas and California detention facilities.²⁹
- Some prisons also permit correctional staff to strip search children who are visiting their incarcerated family members.
 - In December 2019, the governor of Virginia suspended a policy allowing strip searches of all visitors after an eight-year-old girl was strip-searched before visiting her father, who was incarcerated.³⁰
- Strip searches have also been used as a tool to discover signs of child abuse.
 - A four-year-old girl in Colorado was strip-searched in her school by a Child Protective Services caseworker.³¹
 - A family of four children, ages 10 months to 5 years old, was strip-searched by a Child Protective Services Worker after their mother left them alone in the car for ten minutes when she ran into a store to get them a snack.³²
- School personnel also conduct strip searches of children and youth.
 - In 2003, two female school officials in Arizona asked a 13-year-old girl to undress to her undergarments after she was suspected of distributing prescription and over-the-counter ibuprofen to students. She was asked to

²⁷ See *Judge: Youth strip searches at Oregon jail unconstitutional*, ASSOCIATED PRESS, Mar. 27, 2010, https://tdn.com/news/judge-youth-strip-searches-at-oregon-jail-unconstitutional/article_8b212556-3a03-11df-b391-001cc4c03286.html.

²⁸ See Judd, *supra* note 24.

²⁹ See *When Migrant Children Were Detained Among Adults, Strip Searched*, NBC NEWS, July 24, 2014, <https://www.nbcnews.com/storyline/immigration-border-crisis/when-migrant-children-were-detained-among-adults-strip-searched-n161956>.

³⁰ See Gary A. Harki, *An 8-Year-Old Girl Was Strip Searched at a Virginia Prison. She Was Told It Was the Only Way to See Her Dad*, VIRGINIAN-PILOT, Dec. 5, 2019, <https://www.pilotonline.com/government/virginia/vp-nw-strip-search-20191206-wd2ejtrtqfqbvkbi7xzh7btenu-story.html>. See also *Body Searches*, *supra* note 1, at 7 (“Intrusive search procedures are likely to discourage visitors, and consequently have a negative impact on the maintenance of family and social links which are essential for reintegration following release.”); *id.* at 8 (“[T]he Committee on the Rights of the Child recommend[s] measures to ensure that the visit context is respectful to the child’s dignity and right to privacy and urged states to ensure that security matters and policies on incarcerated parents take into account the rights of affected children.”) (citations and internal quotations omitted).

³¹ See Daniel Leddy, *High Court Passes on Case of School Kid Being Strip-Searched*, *Staten Island Advance*, May 31, 2019, <https://www.silive.com/news/2019/05/high-court-passes-on-case-of-school-kid-being-strip-searched-commentary.html>.

³² See Lenore Skenazy & Diane Redleaf, *How Dare She Dash in for Muffins?*, WASH. POST, May 29, 2019, <https://www.washingtonpost.com/outlook/2019/05/22/how-dare-she-dash-muffins/>.

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pull her bra out and to the side to expose her breasts, to shake, and to pull out the elastic in her underpants, which exposed her pelvic area.³³

- An assistant principal in a Houston school “ordered a mass, suspicionless strip search of the underwear of twenty-two preteen girls” in a sixth-grade choir class after \$50 went missing.³⁴ A school nurse “strip searched them, taking them one at a time into a bathroom, where she ‘check[ed] around the waistband of [their] panties,’ loosened their bras, and checked under their shirts. The girls were made to lift their shirts so they were exposed from the shoulder to the waist.”³⁵
- An assistant principal in Clayton County, Georgia instructed a 12-year-old boy to pull his underpants down to his ankles, exposing his genitals to other school personnel and classmates, because a classmate claimed the boy had marijuana.³⁶

Court Rulings on Strip Searches of Children and Youth

Schools

Courts have made clear that strip searches in schools are such a significant intrusion into personal privacy that they should only occur when the government need is substantial.³⁷ The United States Supreme Court has held that searches in schools must be “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”³⁸ In the case of Savana Redding, the 13-year-old strip searched for ibuprofen, the Supreme Court held that the intrusiveness of the search outweighed the degree of suspicion about drug possession and thus violated her constitutional rights.³⁹ Similarly, federal courts found that the mass strip search of a 6th grade choir class was impermissibly intrusive,⁴⁰ as was requiring a 7th grade boy to stand naked in front of his classmates.⁴¹

Juvenile detention facilities

Juvenile detention centers most commonly house children and youth when they have been charged with a criminal offense. However, they also house children and youth who have run away from home or violated curfew, are beyond the control of their parents or

³³ See *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364, 368-69 (2009).

³⁴ *Littell v. Houston Independent School District*, 894 F.3d 616, 619 (5th Cir. 2018).

³⁵ *Id.* at 620.

³⁶ See *D.H. by Dawson v. Clayton County School District*, 830 F.3d 1306, 1308, 1311-1312 (11th Cir. 2016).

³⁷ See *Safford*, 557 U.S. at 375-77 (holding that a 13-year-old student's constitutional rights were violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school, because there was no reason to suspect the drugs presented a danger or were concealed in her underwear).

³⁸ *New Jersey v. T.L.O.*, 469 U.S. 325, 349 (1985).

³⁹ See *Safford*, 557 U.S. at 375-77.

⁴⁰ See *Littell v. Houston Independent School District*, 894 F.3d 616, 623-34 (5th Cir. 2018).

⁴¹ See *D.H.*, 830 F.3d at 1317-18. The court, however, did find that the assistant principal did not violate the 12-year-old D.H.'s constitutional rights when, prior to instructing the child to remove his underpants, the principal asked the boy to pull the waistband of his underpants away from his body, thus exposing his genitals; three other students had marijuana, and one of them had produced the marijuana from his underpants. *Id.*

truant, or have mental health issues.⁴² The United States Supreme Court has never considered the constitutionality of strip searches of children and youth in detention centers.⁴³ The lower courts that have addressed challenges to these practices have been largely deferential to personnel in juvenile detention.

The cases examining strip searches of children and youth in detention facilities distinguish between searches done when the child first arrives at the facility, and searches conducted at other times during the child's detention. Prior to 2012, federal courts of appeal upheld the constitutionality of strip searches upon admission to detention facilities on the grounds that the detention of youth was a "special needs" situation; the government's need to protect the youth in their custody outweighed the intrusion on the youth's privacy and, therefore, the individualized suspicion requirement was waived.⁴⁴ For example, the Eighth Circuit found that a juvenile detention center did not violate the constitutional rights of children and youth who were required to strip down to their undergarments for an intake search when they first arrived at the facility.⁴⁵ The Second Circuit similarly upheld initial admission searches.⁴⁶ Notably, during this same time period, some federal courts of appeals prohibited the strip search of adults charged with minor offenses.⁴⁷

In 2012, the United States Supreme Court overturned the circuit court opinions, holding in *Florence v. Board of Chosen Freeholders of County of Burlington* that intake strip and cavity searches of adults detained after arrest, even for minor offenses, did not violate the Constitution even though correctional officials lacked individualized suspicion.⁴⁸ The *Florence* court held that a regulation or policy "impinging on an inmate's constitutional rights must be upheld if it is reasonably related to legitimate penological interests,"⁴⁹ and that search policies aimed at maintaining security in correctional facilities are owed deference "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response ... courts should ordinarily defer to their expert judgment in such matters."⁵⁰

⁴² See *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 227 (2d Cir. 2004).

⁴³ See Nelson, *supra* note 9, at 341.

⁴⁴ See, e.g., *Smook v. Minnehaha County*, 457 F.3d 806, 809, 811-812 (8th Cir. 2006) (strip search of 16-year-old girl admitted to detention center for curfew violation did not violate Constitution where youth was allowed to remain in her undergarments in a private room with a female staff member, who touched the girl to look under her arms, between her toes, and through her hair and scalp).

⁴⁵ *Id.*

⁴⁶ See *N.G.*, 382 F.3d at 239 (Sotomayor, J., dissenting).

⁴⁷ See Nelson, *supra* note 9, at 342 n.21 (citing *Miller v. Kennebec County*, 219 F.3d 8, 12-13 (1st Cir. 2000) that required reasonable suspicion for a search after the defendant failed to pay a fine. *Masters v. Crouch*, 872 F.2d 1248, 1249-50, 1253-55 (6th Cir. 1989) required reasonable suspicion for a strip search after the defendant failed to appear in court for motor vehicle violations. See *also N.G.*, 382 F.3d at 232 (noting that the federal courts of appeal have uniformly held that strip searches may not be performed on adults confined after arrests for misdemeanors in the absence of reasonable suspicion that they possess contraband) (collecting cases).

⁴⁸ 566 U.S. 318 (2012).

⁴⁹ *Id.* at 326 (internal quotations and citations omitted).

⁵⁰ *Id.* at 328 (internal quotations and citations omitted).

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Consequently, federal courts of appeals have relied on *Florence* to rule constitutional the practice of detention centers conducting full strip searches of children and youth upon admission. For example, the Fifth Circuit held constitutional the intake strip and body cavity search of a 12-year-old girl who was arrested for a fight at school.⁵¹ The detention center officer found no contraband after using a metal wand and patting down the girl. Nevertheless, the girl was “made to strip naked, bend over, spread her buttocks, display the anal cavity, and cough”.⁵²

In pre-*Florence* cases where courts upheld the strip search of youth in detention, the decisions cited to the state’s responsibility to act in the place of the parents (in loco parentis) when the children are in government custody, therefore holding that the searches were needed to protect them from harm, either self-inflicted or by others, as the government interest that outweighed the harm to the children.⁵³ But suspicionless admissions searches generally yield little in the way of contraband.⁵⁴ Often, “the detention centers’ own documentation of contraband discoveries provides absolutely no evidence that suspicionless strip searches were necessary, or even helpful, in any case.”⁵⁵ Testimony by detention center staff—who have conducted strip searches on thousands of youth without yielding contraband—further establishes that suspicionless strip searches are unnecessary to ensure child safety.⁵⁶ Post-*Florence* courts now put the burden on the child or youth to introduce evidence to show that the blanket policy of admission strip searches is an unreasonable, exaggerated or irrational response to security needs.⁵⁷ Detention centers better fulfill their duty to protect the well-being of children and youth in their custody by limiting highly-intrusive, harmful strip searches to those situations in which officials have probable cause to believe they are in possession of items that could cause injury.

⁵¹ See *Mabry v. Lee County*, 849 F.3d 232, 238-39 (5th Cir. 2017).

⁵² *Id.* at 234. See also *J.B. ex rel. Benjamin v. Fassnacht*, 801 F.3d 336, 338 (3d Cir. 2015) (finding lawful suspicionless strip and body cavity searches as part of routine admission to juvenile detention center).

⁵³ *Smook v. Minnehaha County*, 457 F.3d 806, 811 (8th Cir. 2006) (citing *N.G.*, 382 F.3d at 232).

⁵⁴ See *N.G.*, 382 F.3d at 242 (Sotomayor, J., dissenting) (noting that the detention center produced thirty-four “event reports” for the years 1995 through 2000 where contraband was discovered in the possession of the detainees; thirty-two reports described contraband that either “(1) was discovered through a search that was less intrusive than a full strip search; (2) could have been discovered through a search that was less intrusive than a full strip search; or (3) could have been discovered through a policy that allowed strip searches only in cases of individualized suspicion. With regard to the remaining two reports, it is unclear whether a strip search was necessary for discovery of the contraband; it is also unclear if individualized suspicion existed.”).

⁵⁵ *Id.* (Sotomayor, J., dissenting). See also *Mabry v. Lee County*, 849 F.3d 232, 238-39 (5th Cir. 2017) (“[A]t oral argument, counsel for the County could not point to even one instance in which contraband was found via the strip and cavity search that could not have been found through use of the metal detecting wand and pat-down. . . . Indeed, at no point in its brief does the County point to *any evidence whatsoever* legitimating any components of the Center’s intake procedures, including the search policy.”).

⁵⁶ See *N.G.*, 382 F.3d at 242-43 (Sotomayor, J., dissenting) (“One supervisor testified that of the one hundred strip searches she personally conducted, not one yielded evidence of contraband. A director of one of the facilities testified that out of 2,500 strip searches performed since that facility was built, only two strip searches revealed contraband that otherwise would not have been found. Those two recovered items of contraband were a piece of jewelry attached to a child’s belly button and cocaine that was discovered in a child’s clothing. Full nudity would not have been necessary to uncover these items.”).

⁵⁷ See *Mabry*, 849 F.3d at 238-39 (citing *Florence v. Bd. of Chosen Freeholders*, 132 S.Ct.1510, 1517 (2012)).

Courts have been less deferential to juvenile detention centers conducting strip searches outside the initial admission/intake context absent individualized suspicion that the child or youth possessed an implement that could cause harm. Courts have struck down policies that required children and youth to be strip-searched multiple times while in detention. For example, the Second Circuit invalidated suspicionless strip-searches of youth transferred from one facility to another, and when pencils went missing.⁵⁸ A federal district court in Oregon held that it was unconstitutional to strip search youth after visits with their attorneys or other visitors; the center's policy subjected youth to as many as eight strip-searches over five days.⁵⁹

Child welfare system

Courts have considered the lawfulness of strip searches by child protective services caseworkers who are investigating allegations of abuse. There is a split among the federal courts of appeals as to whether such strip searches are constitutional absent a warrant or judicial order. The Fourth and Seventh circuits have held that such searches can proceed without a warrant if the search passes the “special needs” balancing test.⁶⁰ By contrast, four other circuits have held that strip searches of children based on suspicions of abuse are not amenable to the “special needs” test and are only valid subject to a court order or search warrant, or exigent circumstances.⁶¹ The United State Supreme Court recently denied certiorari on a case out of the Tenth Circuit that highlighted the split authority; thus, the conflicting approaches will not be resolved soon.⁶²

International Law⁶³

Under basic principles of human rights, children have the fundamental right to be treated with dignity and humanity. This is especially important when children are confined or in

⁵⁸ See N.G., 382 F.3d at 233-34, 237-38.

⁵⁹ See *Mashburn v. Yamhill County*, 698 F. Supp. 2d 1233, 1235, 1240-41 (D. Or. 2010).

⁶⁰ See *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986); *Wildauer v. Frederick Cty.*, 993 F.2d 369 (4th Cir. 1993).

⁶¹ See *Good v. Dauphin Cty. Soc. Servs. Children & Youth*, 891 F.2d 1087 (3d Cir. 1989) (holding that social workers' search of a child in his home required either a search warrant, consent, or exigent circumstances); *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999) (holding that a social worker performing a search on a child to investigate possible abuse must have a warrant, consent, or exigent circumstances, and may not rely on the special needs doctrine); *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999) (judicial authorization was required for social workers to examine a student upon suspicion of abuse); *Roe v. Texas Dep't Protective & Regulatory Servs.*, 299 F.3d 395 (5th Cir. 2002) (social workers performing a visual body cavity search for suspected abuse needed a court order based on probable cause or exigent circumstances, and that they could not rely on the special needs doctrine).

⁶² See *Doe v. Woodard*, 912 F.3d 1278 (10th Cir. 2019), *cert. denied*, 139 S.Ct. 2616 (2019).

⁶³ International law has played a larger role in constitutional analysis in the last two decades and is particularly persuasive when considering the “evolving standards of decency” in the world community. Diane Marie Amann, *“Raise the Flag and Let It Talk”: On the Use of External Norms in Constitutional Decision Making*, 2 INT'L J. CONST. L. 597, 602 (2004) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). “The incorporation of a right to human dignity into the Fourth Amendment’s ‘privacy’ provisions is consistent not only with U.S. constitutional law, but also with the international law obligations of the U.S., which require it to respect and ensure the rights of prisoners (and others) to human dignity.” Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 797 (2005).

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conflict with the law. The U.N. Convention on the Rights of the Child mandates treatment of children

consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.⁶⁴

The Convention also requires treatment with humanity and "respect for the inherent dignity" of the child, taking into account the particular needs of the child.⁶⁵ Similarly, the United Nations rules for the protection of children who are deprived of their liberty establishes children's right to facilities and services that meet all the requirements of health and human dignity.⁶⁶ The institution is required to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.⁶⁷

Consistent with these principles, the Unaccompanied Alien Child Protection Act prohibits the "unreasonable use" of shackling, handcuffing, solitary confinement, and pat or strip searches, which may violate a child's sense of dignity and respect.⁶⁸ More broadly, the International Convention on Civil and Political Rights⁶⁹ states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."⁷⁰

⁶⁴ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989) at art. 40 para. 1. The United States has not yet ratified the Convention on the Rights of the Child, but is a signatory. Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, 778 (2001). The United States, South Sudan, and Somalia are the only countries in the world that have not ratified the Convention. *Id.*

⁶⁵ Convention on the Rights of the Child, *supra* note 64, art. 37(c).

⁶⁶ U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990) at Part IV.D para. 31. See also U.N. Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/ 611, Annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

⁶⁷ See U.N. Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/ 611, Annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977), which became applicable to juveniles in 1985. U.N. Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, U.N. Doc. A/RES/40/33 (Nov. 29, 1985).

⁶⁸ See Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131 (2006). See also Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. (2005).

⁶⁹ International Covenant on Civil and Political Rights ("ICCPR"), opened for signature Dec. 16, 1966, 999 U.N.T.S. 171, available at www.unhchr.ch/html/menu3/b/a_ccpr.htm.

⁷⁰ *Id.* art. 17. The United States has been a party to the ICCPR since 1992. See Office of the U.N. High Comm'r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* 1, 11 (June 9, 2004), available at <http://www.unhchr.ch/pdf/report.pdf>.

Individual courts around the globe have also addressed this issue. In one case, the European Court of Human Rights held that strip searches without medical necessity were unlawful and inhumane. See *Y.F. v. Turkey*, No. 24209/94, 2003-IX Eur. Ct. H.R. para. 43, available at

Scope and Application of Resolution

This Resolution applies to professionals and agencies who come into contact with children and youth including, but not limited to: schools and educational institutions, and their personnel; child welfare agencies and facilities and their personnel, including foster parents; mental health treatment agencies and facilities, and their personnel; programs and facilities for children and youth with developmental disabilities, and their personnel; law enforcement; juvenile justice agencies and facilities, and their personnel; and criminal justice agencies and facilities, and their personnel.

The Resolution prohibits strip searches except when all of the following conditions are met.

- (1) the child or youth is in the physical and legal custody of the entity conducting the search; and
- (2) there is probable cause to believe that the child or youth possesses an implement that poses a threat of imminent bodily harm to themselves or others;⁷¹ and
- (3) all other less intrusive methods of discovering and removing the implement have been exhausted, including the use of alternative search techniques that can be performed while the child or youth is fully clothed; and
- (4) the child or youth has been given notice, in a manner that is consistent with the child's or youth's primary language and developmental stage, and that takes into account accommodations for disability, that they will be searched and an opportunity to reveal any implement they are carrying instead of being searched.

Strip searches are intended to locate contraband, but less intrusive approaches can accomplish the same goal. For example, the facility may use a handheld metal detector wand or body scanner that can be utilized while the youth is fully clothed.⁷² Additionally,

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=9&portal=hbkm&action=html&highlight=Y.F.&sessionid=3321244&skin=hudoc-en>. In this case, a young woman was forced to submit to a gynecological exam upon detention to prove that she was not sexually assaulted by her guards. *Id.* para. 12. The court, citing the country's constitution, accordingly held that the physical interference with a person's body is only permitted in the case of medical necessity or if allowed by law. *Id.* para. 23. The court reasoned that a person's body concerns the most intimate aspect of one's private life and thus, medical intervention, even if of minor importance, constitutes an interference with the right to privacy. *Id.* para. 33. For similar reasons – and recognizing the unique dangers to children when their privacy is breached by a strip search – the British government passed protective legislation to decrease the use of strip-searches on juveniles. As a result, youth in Britain are strip searched at much lower rates than adults. See Tim Newburn et al., *Race, Crime and Injustice: Strip Search and the Treatment of Suspects in Custody*, 44 BRIT. J. CRIMINOLOGY 677, 683-84 (2004).

⁷¹ See *Body Searches*, *supra* note 1, at 3 (“Body searches are only permissible when strictly necessary, based on a case-by-case assessment and if there is a specific suspicion. Where they are conducted on a routine basis, too frequently, in a systematic or collective way to all detainees, body searches become arbitrary measures and may in themselves constitute humiliating or degrading treatment.”).

⁷² See *id.* at 1 (“Alternatives, such as electronic scanning devices, should be developed and used wherever possible and when body searches are unavoidable, the least invasive method should be applied.”).

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children and youth should be permitted to remain dressed in a layer of undergarments during the search.⁷³

The Resolution also contemplates a graduated response scheme before a child or youth is subjected to a strip search.

- First, the child or youth should be notified, in a manner that is consistent with the child's or youth's primary language and developmental stage, and that takes into account accommodations for disability, of the reported suspicion that they are in possession of contraband, including what specific contraband it is and the process by which the adult will attempt to locate and retrieve the contraband.
- Second, the adult must exhaust all communicative intervention techniques to persuade the child or youth to voluntarily surrender any possible contraband. To the extent possible, the child or youth should be permitted to have the assistance of a mental health professional—such as a child/youth psychologist or therapist—or a trusted adult designated by the child or youth, to facilitate this verbal intervention.
- Third, if all communicative intervention techniques fail to result in the retrieval of the contraband, the adult must permit the child or youth to ask questions before any search is conducted.
- Fourth, the adult must first attempt least intrusive methods to discover contraband, such as use of a hand-held metal detector wand or body scanner while the child or youth remains fully clothed. The adult should instruct the child or youth to remove an item on their person if the detector's alarm sounds.
- Fifth, where both a discussion and the use of a detection device fail in the retrieval of contraband, the adult must inform the child or youth that the next step in the search will involve a visual, manual, or physical search of the youth's body, including the area of the body the staff will inspect. If a child or youth expresses concerns about being touched before or during a search, staff must be sensitive and accommodate such requests to prevent trauma and/or re-victimization.

Special Considerations for Gender and Gender Identity

If a child or youth must be strip-searched, the search should be conducted by an adult of the same gender of the child or youth. Most states require strip searches to be performed by members of the same gender as the individual being searched. Transgender and intersex children and youth must be given an opportunity to request the gender of the individual conducting their search. Strip searches should never be conducted to determine the biological gender of the child or youth.⁷⁴ Per current policy, a number of

⁷³ See, e.g., KY. DEP'T JUV. JUST., POLICY & PROCEDURE: SEARCHES (2018), <https://djj.ky.gov/Policy%20Manual1/DJJ%20714%20Searches.pdf>.

⁷⁴ For transgender or intersex individuals, the Prison Rape Elimination Act (PREA) prohibits searches or physical examinations "for the sole purpose of determining...genital status." Prison Rape Elimination Act, Juvenile Facility Standards, 28 C.F.R. § 115.315 (2012).

states allow transgender or intersex youth an opportunity to request whom they would prefer to conduct the search.⁷⁵

Prohibition on Body Cavity Searches

Body cavity searches “are a physical examination of body orifices (such as vagina or anus). This type of search includes rectal and pelvic examination, and is physically and psychologically the most intrusive method” of body searches.⁷⁶ Body cavity searches “constitute the most intrusive search method.”⁷⁷ While “all types of body search can be intimidating and degrading, and the more intrusive the method, the stronger the feeling of invasion will be.”⁷⁸ Indeed, “the interests in human dignity and privacy which the Fourth Amendment protects forbid [searches involving intrusions beyond the body’s surface] on the mere chance that desired evidence might be obtained.”⁷⁹

This Resolution absolutely prohibits body cavity searches of children and youth because they carry a high risk of causing physical and psychological injury.⁸⁰ Alternatives to conducting a body cavity search include using modern scanning technology, or keeping the child or youth under close supervision until such time as any item is naturally expelled from the body, as recommended by the World Health Organization.⁸¹ Body cavity searches are unreasonable given that less invasive search methods are available.⁸²

Conclusion

Strip searches are harmful and cause trauma to children and youth, particularly those who have previously been victimized. Therefore, strip searches should only be performed in exceptional circumstances and body cavity searches must be prohibited.

⁷⁵ See, e.g., WASH. ST. DEP’T SOC. & HEALTH SERVS., JUVENILE REHABILITATION ADMINISTRATION POLICY, POLICY 5.70 CONDUCTING SEARCHES (2015), <https://www.dcyf.wa.gov/sites/default/files/pdf/jr-policies/Policy5.70.pdf>. See also *Body Searches*, *supra* note 1, at 5 (noting that Lesbian, Gay, Bisexual, Transgender and Intersex individuals should be allowed to request a gender preference regarding the staff member who will conduct the search).

⁷⁶ *Body Searches*, *supra* note 1, at 1.

⁷⁷ See *id.* at 3.

⁷⁸ See *id.* at 1.

⁷⁹ See *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826 (1966).

⁸⁰ *Body Searches*, *supra* note 1, at 3.

⁸¹ See *id.* at n.17 (citing WORLD HEALTH ORG. EUR., HEALTH, HEALTH IN PRISONS: A WHO GUIDE TO THE ESSENTIALS IN PRISON HEALTH 36 (Møller et al. eds. 2007); PENAL REFORM INT’L & THAILAND INST. JUST., GUIDANCE ON THE UNITED NATIONS RULES ON THE TREATMENT OF WOMEN PRISONERS AND NON-CUSTODIAL MEASURES FOR WOMEN OFFENDERS (THE BANGKOK RULES) 63 (2013)). Further, the Inter-American Commission on Human Rights prohibits body cavity searches, as does France and five states in Brazil. See *id.* at 3 (citations omitted).

⁸² See *U.S. v. Gray*, 669 F.3d 556, 564-65 (5th Cir.), *rev’d on other grounds*, 133 S.Ct. 151 (2012).

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Respectfully submitted,

Barbara J. Dawson
Chair, Section of Litigation
August 2020

GENERAL INFORMATION FORM

Submitting Entity: Section of Litigation

Submitted By: Barbara J. Dawson

1. Summary of the Resolution(s). This Resolution urges all federal, state, local, territorial, and tribal governments to adopt policies and contractual provisions that prohibit conducting strip searches of children and youth, except in exceptional circumstances. The Resolution is based on evidence that strip searches are harmful and cause trauma to children and youth, and especially to those children and youth who have previously been victimized. For this reason, the Resolution prohibits strip searches except when all of the following conditions are met: (1) the child or youth is in custody; (2) there is probable cause to believe that the child or youth possesses an implement that poses a threat of imminent bodily harm to themselves or others; (3) all other less intrusive methods of discovering and removing the implement have been exhausted, including the use of alternative search techniques that can be performed while the child or youth is fully clothed; and (4) the child or youth has been given notice, in a manner that is consistent with the child's or youth's primary language and developmental stage, and that takes into account accommodations for disability, that they will be searched and that they have an opportunity to reveal any implement they are carrying instead of being searched. The Resolution absolutely prohibits body cavity searches of children and youth. In addition, if a child or youth must be strip-searched, the search shall be conducted in a manner that respects the sexual orientation and gender identity of the child or youth and in the least intrusive manner possible. Finally, the Resolution urges the bar to promote awareness of the harmful and traumatizing effects of strip searches and body cavity searches on children and youth.

2. Approval by Submitting Entity.

The Section of Litigation Council approved this resolution April 24, 2020.

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

No.

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

The ABA has Juvenile Justice Standards that do not specifically mention strip searches of juveniles, though they do touch on general searches of juveniles (IJA/ABA Juvenile Justice Standards, Annotated, 1996). This Resolution is consistent with the Juvenile Justice Standard's overall approach to a juvenile's rights and privacy, while balancing a need for safety.

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The ABA has a policy on Trauma-Informed Advocacy for Children and Youth and this Resolution is consistent with its recommendation for the “the development of trauma-informed, evidence-based approaches and practices on behalf of justice system-involved children and youth who have been exposed to violence, including victims of child abuse and neglect or other crimes and those subject to delinquency or status offense proceedings” (American Bar Association Trauma-Informed Advocacy for Children and Youth February 2014).

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 Children’s Rights Litigation Committee of the Section of Litigation will develop and implement a public education program to inform lawmakers and policymakers across the country about the trauma and harm caused by strip searches, and the need to enact laws and policies and promulgate contractual provisions in alignment with the resolution.

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

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

10. Referrals.

Center for Human Rights
Commission on Domestic and Sexual Violence
Commission on Homelessness and Poverty
Commission on Racial and Ethnic Justice
Commission on Sexual Orientation and Gender Identity
Commission on Youth at Risk
Juvenile Justice Committee, Criminal Justice Section
Section of Civil Rights and Social Justice

11. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.)*

Delegate Eileen Letts, 312-346-1100, eletts@zublerlawler.com

12. Name and Contact 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.*

Delegate Eileen Letts, 312-346-1100, eletts@zublerlawler.com

EXECUTIVE SUMMARY

1. Summary of the Resolution.

This Resolution urges all federal, state, local, territorial, and tribal governments to adopt policies and contractual provisions that prohibit conducting strip searches of children and youth, except in exceptional circumstances. The Resolution is based on evidence that strip searches are harmful and cause trauma to children and youth, and especially to those children and youth who have previously been victimized. For this reason, the Resolution prohibits strip searches except when all of the following conditions are met: (1) the child or youth is in custody; (2) there is probable cause to believe that the child or youth possesses an implement that poses a threat of imminent bodily harm to themselves or others; (3) all other less intrusive methods of discovering and removing the implement have been exhausted, including the use of alternative search techniques that can be performed while the child or youth is fully clothed; and (4) the child or youth has been given notice, in a manner that is consistent with the child's or youth's primary language and developmental stage, and that takes into account accommodations for disability, that they will be searched and that they have an opportunity to reveal any implement they are carrying instead of being searched. The Resolution absolutely prohibits body cavity searches of children and youth. In addition, if a child or youth must be strip-searched, the search shall be conducted in a manner that respects the sexual orientation and gender identity of the child or youth and in the least intrusive manner possible. Finally, the Resolution urges the bar to promote awareness of the harmful and traumatizing effects of strip searches and body cavity searches on children and youth.

2. Summary of the issue that the resolution addresses.

Strip searches are demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, and repulsive, signifying degradation and submission. Strip searches are perceived as particularly intrusive by children and youth. And a child or youth does not have to be completely naked to be negatively affected by a strip search, as underwear searches are embarrassing, frightening, and humiliating. Scientific and psychological research indicates that a traumatic strip search can have a lifelong impact on an adolescent's developing mind. Indeed, because youth is a condition of life when a person may be most susceptible to psychological damage, children are especially susceptible to possible traumas from strip searches. As noted by the U.S. Supreme Court, adolescent vulnerability intensifies the patent intrusiveness of the exposure and can result in serious emotional damage. Research in adolescent development supports the legal conclusion that strip searches impact children and youth even more severely than adults.

Strip searches have customarily been used to discover contraband while individuals are incarcerated, but have become increasingly common in juvenile detention facilities as well as in other spaces and circumstances, including in schools, in immigration detention centers, during child welfare investigations, and prior to children and youth visiting incarcerated family members. While some state laws provide guidance on when and how strip searches can be performed on children and youth, individual agencies and facilities are often left to their own discretion to create policies.

3. Please explain how the proposed policy position will address the issue.

This Resolution addresses the issue by urging all federal, state, local, territorial, and tribal governments to adopt laws, regulations, policies, and contractual provisions that would: prohibit adults who interact with children and youth from conducting strip searches of children and youth, except in exceptional circumstances; stipulate that when strip searches are necessary that they be conducted in the least intrusive manner possible and with respect to the sexual orientation and gender identity of the child or youth; and prohibit body cavity searches. In addition, the Resolution urges the bar to promote awareness of the harmful and traumatizing effects of strip searches on children and youth.

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

None identified.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON PARALEGALS
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association approves the following paralegal
2 education program: Calhoun Community College, Paralegal Studies Program, Huntsville,
3 AL; and
4

5 FURTHER RESOLVED, That the American Bar Association reapproves the following
6 paralegal education programs: University of California, Paralegal Certificate Program,
7 Riverside, CA; University of Hartford, Paralegal Studies Program, West Hartford, CT; South
8 Suburban College, Paralegal/Legal Assistant Program, South Holland, IL; Bay Path
9 University, Legal Studies Program, Longmeadow, MA; Meredith College, Paralegal
10 Program, Raleigh, NC; Truckee Meadows Community College, Paralegal/Law Program,
11 Reno, NV; Trident Technical College, Paralegal Program, Charleston, SC; San Jacinto
12 College, Paralegal Program, Houston, TX; Texas A&M University, Commerce, Paralegal
13 Studies Program, Commerce, TX; Milwaukee Area Technical College, Paralegal Program,
14 Milwaukee, WI; and
15

16 FURTHER RESOLVED, That the American Bar Association withdraws the approval of the
17 following paralegal education programs: Samford University, Paralegal Studies Program,
18 Birmingham, AL; Edison State Community College, Paralegal Studies Program, Piqua,
19 OH; Vincennes University, Legal Studies Program, Vincennes, IN; and Robert Morris
20 University, Paralegal Program, Chicago, IL; and
21

22 FURTHER RESOLVED, That the American Bar Association extends the terms of approval
23 until the February 2021 Midyear Meeting of the House of Delegates for the following
24 paralegal education programs: Community College of the Air Force, Air Force JAG
25 School, Maxwell AFB, AL; Gadsden State Community College, Paralegal Program,
26 Gadsden, AL; Phoenix College, Paralegal Studies Program, Phoenix, AZ; California State
27 University, East Bay, Paralegal Studies Program, East Bay, CA; De Anza College,
28 Paralegal Studies Program, Cupertino, CA; Fullerton College, Paralegal Studies
29 Program, Fullerton, CA; University of California, Santa Barbara, Paralegal Studies
30 Program, Santa Barbara, CA; West Los Angeles College, Paralegal Studies Program,
31 Culver City, CA; Manchester Community College, Paralegal Studies Program,
32 Manchester, CT; Wesley College, Legal Studies Program, Dover, DE; Nova Southeastern
33 University, Paralegal Studies, Fort Lauderdale Davie, FL; Valencia College, Paralegal

34 Studies Program, Valencia, FL; University of North Georgia; Paralegal Program,
 35 Gainesville, GA; Elgin Community College, Paralegal Program, Elgin, IL; Illinois Central
 36 College, Paralegal Program, Peoria, IL; MacCormac College, Paralegal Studies Program,
 37 Chicago, IL; Harford Community College, Paralegal Program, Bel Air, MD; North Shore
 38 Community College, Paralegal Program, Danvers, MA; Suffolk University, Paralegal
 39 Studies Program, Boston, MA; Davenport University, Paralegal Program, Grand Rapids,
 40 MI; Henry Ford College, Paralegal Studies Program, Dearborn, MI; Madonna University,
 41 Paralegal Studies Program, Livonia, MI; North Hennepin Community College, Paralegal
 42 Program, Brooklyn Park, MN; Webster University, Legal Studies Program, St. Louis, MO;
 43 University of Providence, Paralegal and Legal Studies Program, Great Falls, MT; Atlantic
 44 Cape Community College, Paralegal Studies Program, Mays Landing, NJ; Mercer County
 45 Community College, Paralegal Studies Program, West Windsor, NJ; Bronx Community
 46 College, Paralegal Studies Program, Bronx, NY; Marist College, Paralegal Program,
 47 Poughkeepsie, NY; Westchester Community College (SUNY), Paralegal Studies
 48 Program, Valhalla, NY; Kent State University, Paralegal Studies Program, Kent, OH;
 49 Rhodes State College, Paralegal/Legal Assisting Program, Lima, OH; Clarion University,
 50 Paralegal Studies Program, Clarion, PA; Delaware County Community College, Paralegal
 51 Studies Program, Media, PA; Duquesne University, Paralegal Institute, Pittsburgh, PA;
 52 Manor College, Paralegal Program, Jenkintown, PA; Villanova University, Paralegal
 53 Program, Villanova, PA; Roger Williams University, Paralegal Studies Program,
 54 Providence, RI; Florence-Darlington Technical College, Paralegal Program, Florence,
 55 SC; National American University, Paralegal Studies Program, Rapid City, SD; Roane
 56 State Community College, Paralegal Studies Program, Harriman, TN; Amarillo College,
 57 Legal Studies Program, Amarillo, TX; El Centro College, Paralegal Studies Program,
 58 Dallas, TX; Lone Star College, Paralegal Studies Program, Houston, TX; American
 59 National University, Paralegal Program, Salem, VA; Northern Virginia Community
 60 College, Paralegal Studies Program, Alexandria, VA; Tacoma Community College,
 61 Paralegal Program, Tacoma, WA, and Mountwest Community and Technical College,
 62 Paralegal Studies Program, Huntington, WV.

REPORT

In August 1973, the House of Delegates of the American Bar Association adopted the Guidelines for the Approval of Legal Assistant Education Programs as recommended by the Special Committee on Legal Assistants, now known as the Standing Committee on Paralegals (https://www.americanbar.org/content/dam/aba/administrative/paralegals/lis_prllgs_2018_paralegal_guidelines.pdf). The Committee subsequently developed supporting evaluative criteria and procedures for seeking American Bar Association approval. Applications for approval were accepted formally beginning in the fall of 1974.

Programs applying for approval are required to submit a self-evaluation report which provides a comprehensive description of the program, including but not limited to the following areas: organization and administration, financial support, curriculum, faculty, admissions, student services, advisory committee, library, and physical plant. An on-site visit to the program is conducted by representatives of the Association if the contents of the self-evaluation report indicate compliance with the ABA Guidelines.

For an initial approval, the inspection team is chaired by a member of the Approval Commission of the Standing Committee on Paralegals, or a specially designated past commissioner, and consists of a lawyer, an experienced paralegal or a director of another institution's program. On a reapproval visit, the team, which is again chaired by a member of the Approval Commission, or a specially designated past commissioner, includes two of the previously mentioned groups. The purpose of the on-site visit is to verify the information provided in the self-evaluation report and to acquire supplementary information helpful to making an evaluation and which can only be obtained through the person-to-person contact and the observation the visit affords. The visit is conducted over a one and one-half day period and consists of a series of meetings with the advisory committee, students, faculty and other individuals involved to a lesser extent and in some aspect of the program, such as the registrar, financial officer, placement coordinator and admissions and counseling staff. The team also observes legal specialty classes in session and may inspect various program data, such as detailed curriculum materials, admission and placement records, student evaluations of faculty members, and courses.

Following the on-site visit a written report is prepared by team members. The Approval Commission reviews the evaluation report and makes its recommendations to the Standing Committee on Paralegals, which in turn, submits its recommendation to the American Bar Association House of Delegates for final action.

Approval

The Standing Committee on Paralegals has completed review of the programs identified below and found them to be operating in compliance with the Guidelines for the Approval of Paralegal Education Programs and is, therefore, recommending approval be granted.

Calhoun Community College, Paralegal Studies Program, Huntsville, AL

Calhoun Community College is a community college accredited by the Southern Association of Colleges and Schools. The College offers an Associate of Applied Science Degree in Business Administration, Paralegal.

Reapproval

The following schools were recently evaluated for reapproval. Having demonstrated compliance with the Guidelines for the Approval of Paralegal Education Programs, the Standing Committee on Paralegals recommends that reapproval be granted to the following paralegal education programs:

University of California, Paralegal Certificate Program, Riverside, CA

University of California, Riverside is a four-year university accredited by the Western Association of Schools and Colleges. The University offers a Professional Certificate in Paralegal Studies.

University of Hartford, Paralegal Studies Program, West Hartford, CT

University of Hartford is a four-year university accredited by the New England Commission of Higher Education. The University offers an Associate of Science Degree in Paralegal Studies, a Bachelor of Arts Degree in Paralegal Studies and a Paralegal Studies Certificate.

South Suburban College, Paralegal/Legal Assistant Program, South Holland, IL

South Suburban College is a community college accredited by the Higher Learning Commission. The College offers a Paralegal/Legal Assistant Associate of Applied Science Degree and a Paralegal/Legal Assistant Certificate.

Bay Path University, Legal Studies Program, Longmeadow, MA

Bay Path University is a four-year university accredited by the New England Commission of Higher Education. The University offers a Bachelor of Arts Degree in Legal Studies, a Bachelor of Science Degree in Legal Studies, a Bachelor of Arts Degree in Legal Studies with a major in Forensic Studies, a Bachelor of Arts Degree in Paralegal Studies, an Associate of Science Degree in Paralegal Studies and a Paralegal Studies Certificate.

Meredith College, Paralegal Program, Raleigh, NC

Meredith College is a four-year college accredited by the Southern Association of Colleges and Schools. The College offers a Paralegal Post-Baccalaureate Certificate.

Truckee Meadows Community College, Paralegal/Law Program, Reno, NV

Truckee Meadows Community College is a community college accredited by the Northwest Commission on Colleges and Universities. The College offers an Associate of Applied Science Degree in Paralegal/Law.

Trident Technical College, Paralegal Program, Charleston, SC

Trident Technical College is a community college accredited by the Southern Association of Colleges and Schools. The College offers a Paralegal Associate of Applied Science

Degree and a Paralegal Certificate.

San Jacinto College, Paralegal Program, Houston, TX

San Jacinto College is a community college accredited by the Southern Association of Colleges and Schools. The College offers a Paralegal Associate of Applied Science Degree.

Texas A&M University, Commerce, Paralegal Studies Program, Commerce, TX

Texas A7M University, Commerce is a university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor of Arts Degree in Paralegal Studies and a Bachelor of Science Degree in Paralegal Studies.

Milwaukee Area Technical College, Paralegal Program, Milwaukee, WI

Milwaukee Area Technical College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Paralegal Degree and a Post-Baccalaureate Certificate Paralegal Diploma.

Withdrawal of Approval

The following paralegal education programs are recommended for withdrawal of ABA approval, at the request of the institutions:

Samford University, Paralegal Studies Program, Birmingham, AL

Samford University is a university accredited by the Southern Association of Colleges and Schools. The College offers a Bachelor of Arts Degree in Paralegal Studies, a Paralegal Studies Certificate and a Paralegal Studies Minor.

Edison State Community College, Paralegal Studies Program Piqua, OH

Edison State Community College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Business Degree in Paralegal Studies and a Baccalaureate Certificate in Paralegal Studies.

Vincennes University, Legal Studies Program, Vincennes, IN

Vincennes University is a four-year university accredited by the Higher Learning Commission. The University offers an Associate of Science Degree in Paralegal Studies or Legal Studies.

Robert Morris University, Paralegal Studies Program, Chicago, IL

Robert Morris University was a four-year university accredited by the Higher Learning Commission. The University offered a Paralegal Associate of Applied Science Degree.

Term of Approval Extended

Applications for reapproval have been filed by the following schools and are currently being evaluated. Until the evaluation process has been completed, the Committee recommends that the term of approval for each program be extended until the 2021 Midyear Meeting of the American Bar Association House of Delegates.

Community College of the Air Force, Air Force JAG School, Maxwell AFB, AL;
 Gadsden State Community College, Paralegal Program, Gadsden, AL;
 Phoenix College, Paralegal Studies Program, Phoenix, AZ;
 California State University, East Bay, Paralegal Studies Program, East Bay, CA;
 De Anza College, Paralegal Studies Program, Cupertino, CA;
 Fullerton College, Paralegal Studies Program, Fullerton, CA;
 University of California, Santa Barbara, Paralegal Studies Program, Santa Barbara, CA;
 West Los Angeles College, Paralegal Studies Program, Culver City, CA;
 Manchester Community College, Paralegal Studies Program, Manchester, CT;
 Wesley College, Legal Studies Program, Dover, DE;
 Nova Southeastern University, Paralegal Studies, Fort Lauderdale Davie, FL;
 Valencia College, Paralegal Studies Program, Valencia, FL;
 University of North Georgia, Paralegal Program, Gainesville, GA;
 Elgin Community College, Paralegal Program, Elgin, IL;
 Illinois Central College, Paralegal Program, Peoria, IL;
 McCormack College, Paralegal Studies Program, Chicago, IL;
 Harford Community College, Paralegal Program, Bel Air, MD;
 North Shore Community College, Paralegal Program, Danvers, MA;
 Suffolk University, Paralegal Studies Program, Boston, MA;
 Davenport University, Paralegal Program, Grand Rapids, MI;
 Henry Ford College, Paralegal Studies Program, Dearborn, MI;
 Madonna University, Paralegal Studies Program, Livonia, MI;
 North Hennepin Community College, Paralegal Program, Brooklyn Park, MN;
 Webster University, Legal Studies Program, St. Louis, MO;
 University of Providence, Paralegal and Legal Studies Program, Great Falls, MT;
 Atlantic Cape Community College, Paralegal Studies Program, Mays Landing, NJ;
 Mercer County Community College, Paralegal Studies Program, West Windsor, NJ;
 Bronx Community College, Paralegal Studies Program, Bronx, NY;
 Marist College, Paralegal Program, Poughkeepsie, NY;
 Westchester Community College (SUNY), Paralegal Studies Program, Valhalla, NY;
 Kent State University, Paralegal Studies Program, Kent, OH;
 Rhodes State College, Paralegal/Legal Assisting Program, Lima, OH;
 Clarion University, Paralegal Studies Program, Clarion, PA;
 Delaware County Community College, Paralegal Studies Program, Media, PA;
 Duquesne University, Paralegal Institute, Pittsburgh, PA;
 Manor College, Paralegal Program, Jenkintown, PA;
 Villanova University, Paralegal Program, Villanova, PA;

Roger Williams University, Paralegal Studies Program, Providence, RI;
Florence-Darlington Technical College, Paralegal Program, Florence, SC;
National American University, Paralegal Studies Program, Rapid City, SD;
Roane State Community College, Paralegal Studies Program, Harriman, TN;
Amarillo College, Legal Studies Program, Amarillo, TX;
El Centro College, Paralegal Studies Program, Dallas, TX;
Lone Star College, Paralegal Studies Program, Houston, TX;
American National University, Paralegal Program, Salem, VA;
Northern Virginia Community College, Paralegal Studies Program,
Alexandria, VA;
Tacoma Community College, Paralegal Program, Tacoma, WA and
Mountwest Community and Technical College, Paralegal Studies Program,
Huntington, WV.

Respectfully submitted,

Chris S. Jennison
Chair, Standing Committee on Paralegals
August 2020

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Paralegals

Submitted By: Chris S. Jennison, Chair

1. Summary of Resolution(s).

This Resolution recommends that the House of Delegates grants approval to 1 paralegal education program, grants reapproval to 10 programs, withdraws the approval of 4 programs at the requests of the institutions, and extends the term of approval to 48 programs.

2. Approval by Submitting Entity.

This resolution was approved by the Standing Committee on Paralegals in April 2020.

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

This resolution has not been previously submitted.

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

This resolution supports the Guidelines for the Approval of Paralegal Education Programs, as adopted by the House of Delegates.

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.

Approved programs are notified of the action of the House of Delegates by the Standing Committee on Paralegals. The programs are monitored for compliance during the approval term by the Standing Committee.

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

None

9. Disclosure of Interest. (If applicable.)

N/A

10. Referrals.

None

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

Jessica Watson
 Manager, Paralegal Programs
 Standing Committee on Paralegals
 American Bar Association
 321 North Clark Street Chicago, IL 60654
 (312) 988-5757
 E-Mail: Jessica.Watson@americanbar.org

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

Chris S. Jennison
 Silver Spring, MD 20906
 (301) 538-5705
 E-Mail: chris.s.jennison@gmail.com

EXECUTIVE SUMMARY

Submitting Entity: Standing Committee on Paralegals

Submitted By: Chris S. Jennison, Chair

1. Summary of the Resolution

This Resolution recommends that the House of Delegates grants approval to 1 paralegal education program, grants reapproval to 10 programs, withdraws the approval of 4 programs at the requests of the institutions, and extends the term of approval to 48 programs.

2. Summary of the issue which the Resolution Addresses

The programs recommended for approval and reapproval in the enclosed report meet the Guidelines for the Approval of Paralegal Education Programs. The programs recommended for withdrawal of approval in the enclosed report have requested that approval be withdrawn.

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

The programs recommended for approval, reapproval, and withdrawal of approval in this report have followed the procedures required by the Association and are in compliance with the Guidelines for the Approval of Paralegal Education Programs.

4. Summary of Minority Views

No other positions on this resolution have been taken by other Association entities, affiliated organizations or other interested groups.

AMERICAN BAR ASSOCIATION
COMMISSION ON DOMESTIC & SEXUAL VIOLENCE
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS
CENTER FOR HUMAN RIGHTS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges Congress to re-authorize and fully
2 fund the Violence Against Women Act ("VAWA") and similar legislation that:

- 3
- 4 1. Preserves the protections approved in the 2013 reauthorization of VAWA, and
5 continues to respond to emerging challenges and to the concerns from the field of
6 expert professionals;
- 7
- 8 2. Improves services, minimizes bias, and prioritizes safety, autonomy, and support
9 for all victims of gender-based violence, with a particular emphasis on the self-
10 defined needs of marginalized and underserved groups, including victims who:
- 11 a. are LGBTQ;
- 12 b. are immigrants, without regard for their legal status;
- 13 c. are Indigenous;
- 14 d. are persons of color;
- 15 e. live with a disability, including mental/behavioral health disabilities and/or
16 substance use disorders;
- 17 f. are youth or elders;
- 18 g. primarily speak a language other than English;
- 19 h. are members of a religious minority;
- 20 i. live in rural or frontier areas; or
- 21 j. are or were incarcerated;
- 22
- 23 3. Enhances judicial, legal, and law enforcement tools that respond to domestic
24 violence, dating violence, sexual assault, and stalking in a trauma-informed way,
25 including by:
- 26 a. recognizing tribal courts' inherent jurisdiction over gender-based and
27 related violence committed on tribal lands;
- 28 b. restricting adjudicated abusers' access to firearms; and

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- 29 c. allowing for innovation in developing victim-defined alternatives to
30 traditional justice responses;
31
- 32 4. Strengthens the healthcare system's comprehensive and trauma-informed
33 response to domestic violence, dating violence, sexual assault, and stalking;
34
- 35 5. Provides economic and housing opportunities and protections for victims of
36 domestic violence, dating violence, sexual assault, and stalking, including non-
37 discrimination protections; and
38
- 39 6. Implements evidence-based prevention and educational programs that encourage
40 healthy relationships and teach how to respond to attitudes and behaviors
41 contributing to sexual and domestic violence.

REPORT

This Resolution urges Congress to re-authorize and fully fund the Violence Against Women Act (“VAWA”) and similar legislation that seeks to support the existing law, while continuing to be responsive to the needs of all survivors of gender-based violence. This is an update to existing American Bar Association policy supporting VAWA reauthorization, 10M115. In the more than ten years since that resolution’s adoption, shifting dynamics in Congress have made it increasingly challenging to move any piece of legislation. In the past, a single VAWA reauthorization bill was introduced, negotiated and passed relatively quickly with bipartisan support; however, the last two VAWA reauthorizations have been much more contentious, involving multiple competing bills, draft bills, and marker bills, resulting in significant delays.

In the current reauthorization process, H.R.1585 was voted out of the U.S. House of Representatives on April 4, 2019 with bipartisan support. On November 13, 2019, a companion to H.R.1585 was introduced in the Senate as S.2843. A week later, S.2920 was introduced, an alternative VAWA reauthorization bill that includes rollbacks to the existing law. At the time of this writing, both Senate bills remain pending.

While the ABA has supported VAWA since its first passage in 1994, it is now necessary to refine the Association’s position of general support to allow the Association to distinguish between competing bills in Congress. This Resolution aims to do that.

First, any reauthorization of VAWA must be forward-looking, preserving the hard-fought gains of previous reauthorizations while evolving to respond to emerging and unmet challenges. Rollbacks in existing protections—for example, to remove or undermine non-discrimination mandates, or to weaken outreach and services to underserved communities—are unacceptable.

A key strategy to maintaining the balance between defending the existing statute and being responsive to unmet needs, is to attend to the experts who work every day to identify and meet the needs of survivors, and specifically, to “center the margins” by focusing on safety, autonomy, and support for the most underserved populations of victims. Removing barriers for these victims will mean VAWA programs are truly available to anyone who needs them.

VAWA currently funds programming in legal, healthcare, housing, economic, victim advocacy, and prevention responses. Years of experience have demonstrated that all are most successfully implemented with a trauma-informed approach, recognizing that it is extremely common for victims of domestic violence, sexual assault, and stalking to experience symptoms of post-traumatic stress.

Particular legal system goals identified for the current reauthorization include: maintaining and extending the unmitigated success of the 2013 pilot program to recognize the

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inherent jurisdiction of tribal courts over gender-based violence on tribal lands;¹ restricting *adjudicated* abusers' access to firearms by enforcing existing federal law, and by closing the "boyfriend loophole" which allows abusers not married to their victims a functional free pass from surrender provisions; and, acknowledging that survivors have been asking for meaningful alternatives to a criminal justice response for decades, and finding ways through VAWA pilot programs and other mechanisms to allow for responsibly-crafted, victim-defined innovations in this area.

Further discussion of the reasons behind all of these the points are captured effectively in the Department of Justice report, [*Twenty Years of the Violence Against Women Act: Dispatches from the Field*](#).² *Twenty Years* provides a review of the successes and remaining gaps for VAWA, as described by VAWA grantees from around the country.

VAWA has become integral to our nation's response to gender-based violence, both as a key funding source for critical infrastructure, and as a response to the evolving needs of survivors. The ABA should continue its tradition of pursuing justice for the most marginalized and underserved victims by adopting this updated resolution.

Respectfully submitted,

Andrew King-Ries
Chair, Commission on Domestic & Sexual Violence
August 2020

¹ The ABA has already adopted policy on this point, most recently at the 2020 Midyear meeting (20M116).

² U.S. Department of Justice, Office on Violence Against Women, *Twenty Years of the Violence Against Women Act: Dispatches from the Field*, June 2016, available at <https://www.justice.gov/ovw/file/866576/download>, last visited 4/6/2020.

GENERAL INFORMATION FORM

Submitting Entity: Commission on Domestic & Sexual Violence

Submitted By: Andrew King-Ries, Chair, CDSV

1. Summary of the Resolution(s). This Resolution urges Congress to re-authorize and fully fund the Violence Against Women Act and similar legislation that seeks to support the existing law while continuing to be responsive to the needs of all survivors of gender-based violence.
2. Approval by Submitting Entity. The CDSV voted to approve this proposal on 3/25/2020.
3. Has this or a similar resolution been submitted to the House or Board previously? This is an update to existing ABA policy supporting VAWA reauthorization, *10M115*. Many other existing ABA policies intersect with or are relevant to this policy proposal
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? There are many ABA policies relevant to VAWA reauthorization (96A100; 10M115; 18M106), including (but not limited to) policies urging civil rights protection (89M8; 95A123; 04A301; 13A113A; 15A109A; 19M114), immigration relief (01M110; 06M107F; 19M106B; 20M117;), gun violence prevention (94A10E; 04A115; 11A10A; 20M107B; 20M107C), acknowledgement of Tribal authority (12A301; 20M116; 20M10A), criminal justice reform (94A101B; 07M102A; 11A105C; 11A109), access to civil justice (02M112; 06A 112A; 06A112B; 10A105), language access (97A106A; 97A109; 12M113), housing (03M106B; 13A117; 15M109B), or economic supports (14A112A; 18A104E). We are not aware of any that would be adversely affected by this 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. H.R. 1585 was voted out of the U.S. House of Representatives on April 4, 2019 with bipartisan support. On November 13, 2019, a companion to H.R. 1585 was introduced in the Senate as S. 2843. A week later, S. 2920 was introduced, an alternative VAWA reauthorization bill that includes rollbacks to the existing law. At the time of this writing, both Senate bills remain pending.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, supporting entities, together with GAO, can advocate for legislative change as described.
8. Cost to the Association. (Both direct and indirect costs) None.
9. Disclosure of Interest. CDSV has received funding pursuant to VAWA since 1998.

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10. Referrals.

Criminal Justice Section
Section of Civil Rights and Social Justice
Section of Family Law
Health Law Section
Litigation Section
Science & Technology Law Section
Tort Trial & Insurance Practice Section
Government and Public Sector Lawyers Division
Solo, Small Firm and General Practice Division
Judicial Division
Law Student Division
Young Lawyers Division
Standing Committee on Legal Aid and Indigent Defense
Standing Committee on Gun Violence
Commission on Homelessness & Poverty
Commission on Immigration
Commission on Law & Aging
Commission on Sexual Orientation and Gender Identity
Commission on Women
Commission on Youth at Risk
Center for Pro Bono
Center for Human Rights
National LGBT Bar Association
National Native American Bar Association
National Association of Women Judges
National Association of Women Lawyers
National Conference of Women's Bar Associations

11. Contact Name and Information prior to the Meeting. Please include name, telephone number and e-mail address.

Rebecca Henry, 202-662-1737, rebecca.henry@americanbar.org

12. Contact Name and Information of who will present the Resolution with Report to the House Please include best contact information to use when on-site at the meeting.

Mark Schickman, 415-541-0200, schickman@freelandlaw.com

EXECUTIVE SUMMARY1. Summary of the Resolution

This Resolution urges Congress to re-authorize and fully fund the Violence Against Women Act and similar legislation that seeks to support the existing law while continuing to be responsive to the needs of all survivors of gender-based violence.

2. Summary of the Issue that the Resolution Addresses

Reauthorization of VAWA has become more and more contentious over the years, resulting in the introduction of multiple competing reauthorization bills and marker bills in the House and Senate. Existing ABA policy supporting VAWA is not fine-tuned enough to allow the Association to take a position in support of one bill over another, forestalling its ability to weigh in on the national debate at the time when it is most necessary.

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

This policy provides more detailed guidance than the existing VAWA policy (which is 10 years old) does about the preferred content of any VAWA reauthorization bill or marker bill.

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

No internal opposition has been identified. External opposition would exclude immigrant and/or LGBTQ survivors from receiving federally funded services, would emphasize a criminal legal response to gender-based violence to the exclusion of other services and remedies, would refuse to acknowledge Tribal sovereignty, and would decline to enforce or expand existing federal gun restrictions for abusers.

AMERICAN BAR ASSOCIATION
COMMISSION ON DOMESTIC & SEXUAL VIOLENCE
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS
CENTER FOR HUMAN RIGHTS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and
2 tribal governments to enact legislation and policies to require all health care providers—
3 including facilities, physicians, physician assistants, residents, nurses, radiologists and
4 sonographers, therapists, laboratory technicians, midwives, and health care students—
5 to obtain specific informed patient consent in advance for all medically unnecessary pelvic
6 examinations.

REPORT

Trust between a doctor and a patient is of primary importance in the medical field, and therefore informed consent is a cornerstone of medical ethics, codified, in many cases, by state laws.¹ Failing to get it can be grounds for a personal injury lawsuit, not to mention professional discipline from state medical regulators. In extreme cases, it can even be the basis of criminal battery charges. Despite this fact, doctor-patient trust is being eroded by the current practice of medical students and residents performing medically unnecessary pelvic examinations on unconscious patients without clear and specific informed consent from the patient.²

This resolution urges federal, state, local, territorial, and tribal governments to enact legislation and policies to require all health care professionals and allied professionals to obtain specific informed consent for all pelvic examinations performed with or without anesthesia, whether or not for an educational purpose. Requiring that health professionals obtain specific informed consent before performing medically unnecessary pelvic examinations on unconscious patients protects patient autonomy and maintain trust between doctors and patients. It also reduces risk of personal injury litigation, ethics violations, or even criminal charges.

I. Medical Professionals Are Performing Pelvic Examinations on Unconsenting Patients

Currently in the United States, some health care providers are conducting medically unnecessary pelvic examinations on unconscious patients without specific informed consent. These unconsented pelvic examinations on unconscious patients are typically being done within obstetrics or gynecological surgeries; however, there are some scenarios where these examinations are completed on patients during a non-gynecological surgery, like stomach surgery.³

During these pelvic exams the provider places two fingers into the vagina, then places another hand on the abdomen, “feeling for abnormalities in [the] uterus and ovaries.”⁴ When unconscious, the patient could potentially have multiple medical providers practicing with their body.⁵

¹ See, e.g., [Cal. Bus. & Prof. Code § 2281](#); [Haw. Rev. Stat. § 453-18](#); [410 Ill. Comp. Stat. 50/7](#); [Iowa Code § 147.114](#); [Or. Rev. Stat. § 676.360](#); [Va. Code. § 54.1-2959](#); [Utah Code § 58-1-509](#).

² Phoebe Friesen, Educational pelvic exam on anesthetized women: Why consent matters, *Bioethics*. 2018; 32:298-307(1 Feb 2018). <http://doi.org/10.1111/bioe.12441>; Hannah Green, Med Students Are Doing Vaginal Exams on Unconscious, Non-Consenting Patients, *VICE*. 2019 (June 26, 2019) https://www.vice.com/en_us/article/43j59n/medical-students-allowed-to-do-pelvic-exams-on-unconscious-patients-without-consent; Lorelei Laird, Pelvic examinations performed without patients' permission spur new legislation, *ABA Journal*, (September 1, 2019) <https://www.abajournal.com/magazine/article/examined-while-unconscious>.

³ Laird, *Supra* Note 2; Green, *Supra* Note 2.

⁴ Friesen, *Supra* Note 2.

⁵ Green, *Supra* Note 2.

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These exams are most often being done in teaching hospitals for educational purposes, and have no benefit to the individual patient.⁶ Medical students are told by their supervisors to conduct the pelvic exams because it is a way for the students to feel the pelvic region in a relaxed state. Unconscious women are preferred because conscious women may tense up during the examination, making it harder to feel.⁷ The practice of pelvic examinations without patient consent “also disproportionately affects the poor and people of color...because they are more likely to use teaching hospitals.”⁸

In 2003, a study published in the *American Journal of Obstetrics and Gynecology* found that, of the medical students studied at five Pennsylvania medical schools, more than 90 percent had done a pelvic examination on an unconscious patient.⁹ The students said that, at first, they were “uncomfortable with it, [but] eventually became used to the idea.”¹⁰ Some medical students agreed that pelvic examinations should be completed with the patients’ consent; however, the medical students did not “feel comfortable raising their concerns with their instructors, given the rigid hierarchy that structures medical education as well as the intimate connection between those instructors and their chances at being placed for their residencies the next year.”¹¹ One medical student even admitted he showed up late to the OB/GYN rotation so he would not be forced into doing the examination as he felt it was “morally compromising.”¹² Some other medical students, however, did not see this practice as being a “big ethical issue.”¹³

As of June 26, 2019, forty-two states have not banned pelvic exams on unconscious, non-consenting patients.¹⁴ These numbers are high despite overwhelming public opinion in favor of such bans. This practice is still used in the medical field, despite the shift from the historical norm of paternalism to a more modern, partnership-type relationship between a patient and their physician.¹⁵

II. Defining Specific Informed Consent

In the United States, failure to obtain informed consent can lead to lawsuits and professional discipline from state medical regulators.¹⁶ The legal and ethical requirement for informed consent is in place to ensure patient autonomy as a basic human right.¹⁷ According to the American Medical Association, specific informed consent “occurs when communication between a patient and physician results in the patient’s authorization or

⁶ Laird, *Supra* Note 2.

⁷ *Id.*

⁸ *Id.*

⁹ Green, *Supra* Note 2.

¹⁰ *Id.*

¹¹ Friesen, *Supra* Note 2.

¹² Green, *Supra* Note 2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Friesen, *Supra* Note 2; Jennifer Geodken, Pelvic Examination Under Anesthesia: An Important Teaching Tool, 8 J. Health Care L. & Policy 232, 239 (2005).

¹⁶ *Id.*

¹⁷ K H Satyanarayana Rao, Informed Consent: An Ethical Obligation or Legal Compulsion, *Journal of Cutaneous and Aesthetic Surgery*, 2008 Ja. 1(1): 33-35 DOI: 10.4103/0974-2077.41159.

agreement to undergo a specific medical intervention.”¹⁸ This includes everything that happens while undergoing that specific medical intervention.

The American Medical Association recommends that health care providers seek informed consent by completing the following steps:

1. Assessing the patient’s ability to understand relevant medical information and the implications of treatment alternatives and to make the independent, voluntary decision.
2. Presenting relevant information accurately and sensitively, in keeping with the patient’s preferences for receiving medical information. The physician should include information about:
 - a. The diagnosis (when known);
 - b. The nature and purpose of recommended interventions; and
 - c. The burdens, risks, and expected benefits of all options, including forgoing treatment.
3. Documenting the informed consent conversation and the patient’s (or surrogate’s) decision in the medical record in some manner. When the patient/surrogate has provided specific written consent, the consent form should be included in the record. In emergencies, when a decision must be made urgently, the patient is not able to participate in decision-making, and the patient’s surrogate is unavailable, physicians may initiate treatment without prior informed consent. In such situations, the physician should inform the patient/surrogate at the earliest opportunity and obtain consent to ongoing treatment in keeping with these guidelines.¹⁹

An important aspect of informed consent is the patient’s involvement with the process. For informed consent to be valid a patient should be:

1. Told or given information about the possible risks and benefits of the treatment;
2. Told about the risks and benefits of other options;
3. Given the chance to ask questions and get them answered to their satisfaction;
4. Given the chance to discuss the plan with family, friends, or someone who can advise them about the treatment;
5. Able to use the information to make a decision that they think is in their own best interest; and]
6. Able to share their decision with their doctor or treatment team.²⁰

¹⁸ American Medical Association, Code of Medical Ethics Opinion 2.1.1, <http://www.ama-assn.org/delivering-care/ethics/informed-consent>. (Last visited 11/16/19)

¹⁹ American Medical Association, *Supra* Note 18.

²⁰ Understanding Informed Consent, HG <http://hg.org/legal-articles/understanding-informed-consent-31173>. (Last Visited Nov. 16, 2019).

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Unless all the above steps are followed by the medical professionals and available for patients, no informed consent has been given. By giving informed consent, the patient is accepting any possible risks.²¹

In addition to the American Medical Association, several other institutions have issued statements about the importance of informed consent for pelvic examinations.²² According to the Association of American Medical Colleges, it has “denounced pelvic exams without specific consent as ‘unethical and unacceptable,’ and many medical schools and teaching hospitals say they have revised their policies to require [informed consent].”²³ Whenever a patient “will be temporarily incapacitated and where student involvement is anticipated, involvement [of the student] should be discussed before the procedure is undertaken whenever possible.”²⁴ However, despite some schools and teaching hospitals having these policies, several medical students have reported performing medically unnecessary pelvic exams on unconscious women without knowing if the patient consented.²⁵

The American College of Obstetricians and Gynecologists (“ACOG”) also released a statement in 2009 regarding informed consent in the field.²⁶ The statement informs that obtaining informed consent whenever the procedure involves participation from students and residents for educational and teaching purposes is an ethical issue.²⁷ The statement goes on to say that informed consent exists to respect the patient as a person to ensure their “moral right to bodily integrity” through a process beyond getting a signature on a form.²⁸ According to the ACOG, informed consent means that information is being shared between the medical staff and patient to ensure that patients are making decisions while knowing their choices for ongoing care; therefore, ensuring patient autonomy.²⁹

III. Performing Medically Unnecessary Pelvic Examinations Without Consent on Unconscious Patients Is A Violation, Without Exception

By conducting these medically unnecessary pelvic exams on unconscious, unconsenting patients, doctors and medical students are violating patients’ autonomy and trust. In this context, autonomy is the “self-governance of one’s own body, especially the most intimate parts of one’s body.”³⁰ Pelvic exams involve one of the most private parts of a person’s body. It is not uncommon for women to feel “nervous before pelvic exams, [to report] feeling vulnerable, embarrassed, and subordinate.”³¹ Unsurprisingly, when

²¹ *Id.*

²² Jennifer McDermott and Carla Johnson, States Seek Explicit Patient Consent for Pelvic Examinations, U.S. News, May 12, 2019 (Last Visited Dec. 7, 2019) <https://www.usnews.com/news/health-news/articles/2019-05-12/bills-seek-special-consent-for-pelvic-examinations-under-anesthesia>

²³ *Id.*

²⁴ Friesen, *Supra* Note 2.

²⁵ McDermott, *Supra* Note 22.

²⁶ Informed Consent, ACOG Committee Opinion No. 439, 9 Aug. 2019.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Friesen, *Supra* Note 2.

³¹ *Id.*

asked “72-100% of women said that they would want to be consulted before an educational pelvic examination was performed on them while they were under anesthesia.”³² This level of discomfort shows how “pelvic exams are sensitive experiences and should be treated as such.”³³ Women who are survivors of sexual assault can also find this practice particularly distressing.³⁴

Autonomy is thought to provide the ethical foundation for informed consent.³⁵ The fact that a large majority of women want to be explicitly informed in advance about medically unnecessary pelvic exams reflects the high importance of this aspect of patient autonomy. By not seeking informed consent, doctors are denying their patients the right to autonomy.

Patients have a right to bodily integrity and trust. Having the ability to consent to a procedure allows patients the power to choose whether to waive their basic right to bodily integrity for the benefit of health care students.³⁶ Additionally, physicians hold a level of power in their positions because patients trust their doctors when vulnerable.³⁷ The loss of that trust is extremely destructive. If a patient feels “this space of vulnerability becomes corrupted by distrust, the [medical] profession cannot maintain itself, for only patients who trust their physicians will seek treatment, especially with regard to sexual health care or mental health care....”³⁸ These pelvic exams do not have any medical benefit for the patients, and if done without patients’ knowledge and consent, the practice disregards patients’ rights to bodily integrity and destroys patients’ trust for their doctors.³⁹

Some doctors argue that “concerns are exaggerated, and the proposed laws would regulate doctor-patient relationships so closely that they could inadvertently stop doctors from providing necessary care.”⁴⁰ In justifying the status quo, these doctors rely on certain exceptions and objections to the need for patient consent as recognized in the field of medical ethics.

A Utilitarian line of argument posits that pelvic exams on unconscious patients benefit society too much to require doctors to stop performing them. The exception is built on the idea that any harm caused by involuntary pelvic exams on unconscious women is so minor that it is outweighed by the educational benefit of those exams. This is closely linked to the Teaching Objection, which argues that the practice of unconsented pelvic exams on unconscious patients should continue because it is part of the overall teaching experience to have students feel a relaxed uterus. Those who subscribe to this objection

³² Friesen, *Supra* Note 2, (quoting Bibby, J., Boyd, N. Redman, C. & Leusley, D. (1988). Consent for vaginal examination by students on anaesthetized patients. *Lancet*, 2, 1150; Wainberg, S., Wrigley, H., Fair, J., & Ross, S. (2010). Teaching pelvic examination under anesthesia. What do women think? *Journal of Obstetrics and gynecology Canada*, *Journal d'Obstetrique et Gynecologie du Canada*, 32(1), 49-53)).

³³ Friesen, *Supra* Note 2.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Friesen, *Supra* Note 2.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Laird, *Supra* Note 2.

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believe that students performing these pelvic exams “directly relate[s] to the safe achievement of the therapeutic goals of the operation.”⁴¹ The argument is that these exams “allow the student to understand the pathological condition of the patient and therefore fulfill [their] role as a surgical assistant.”⁴²

However, when 72-100% of women believe they should be consulted about such a practice before it is performed on them, it is clear that patient autonomy and bodily rights cannot be ignored in favor of a benefit for society—particularly when that benefit can be obtained by simply seeking proper patient consent before the educational exams. The harm versus benefit analysis should be performed from the perspective of the patient receiving the pelvic examination, not from the medical staff or clinics.⁴³

A different line of argument, the Presumed Consent Objection, tries to suggest that patients implicitly agree to the procedure by going to a teaching hospital.⁴⁴ The argument is that such procedures are a normal and expected part of being treated at a teaching hospital. However, 59% of patients, when asked, were not aware that they were at a hospital that did clinical teaching.⁴⁵ In addition, there is a fundamental injustice in allocating the harm associated with this practice to those patients who have no other option besides a teaching hospital. As mentioned above, this practice “disproportionately affect the poor and people of color... because they are more likely to use teaching hospitals.”⁴⁶ Even if patients are aware that they are at a teaching hospital for surgeries, even gynecological surgeries, they are still not consenting to “medical students practicing pelvic examinations on one’s body for education purposes.”⁴⁷

Although some professionals argue in favor of exceptions or objections for doctors to seek informed consent by patients regarding these pelvic exams, some “[p]rofessional groups agree that its ethically wrong to use unconsenting patients to practice procedures that don’t benefit them.”⁴⁸ It is not uncommon for first-year medical students to find the idea of practicing pelvic exams on women under anesthesia to be morally problematic, [however,] the longer they spend in medical school, the less they see it as an issue. Some have labeled this process, which shows up in many aspects of medical education, “ethical erosion.”⁴⁹

IV. Medical Students Can Still Get the Experience They Need Using a Specific Informed Consent Rule

Allowing medical students to do a pelvic examination on unconscious women with informed consent, could be a medical benefit for students. Studies have shown that “when

⁴¹ *Id.*

⁴² *Id.*

⁴³ Friesen, *Supra* Note 2.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Laird, *Supra* Note 2.

⁴⁷ Friesen, *Supra* Note 2.

⁴⁸ Green, *Supra* Note 2.

⁴⁹ Friesen, *Supra* Note 2.

consent for pelvic exams under anesthesia has been made routine, most women agree to take part.”⁵⁰ In Ireland, when asked if medical students can perform a medically unnecessary pelvic examination when the patient was unconscious, 74% consented to the examination and only 26% refused.⁵¹ In Canada, 62% of women agreed to a medically unnecessary pelvic examination when asked, and only 5% would only allow it if the medical student was a woman.⁵² In that same study, 18% were unsure and only 14% would refuse.⁵³ Since studies show that many women are open to the idea of medical students performing practice pelvic exams while under anesthesia, saying these unconsented pelvic examinations are vital for teaching purposes is a not a valid excuse.

There are alternatives that allow the same teaching opportunity for students. Some teaching hospitals have outright banned performing medically unnecessary pelvic exams on women without consent.⁵⁴ Instead, these teaching hospitals will “often hire professional patients to guide students through the process of giving a pelvic exam, or they use electronic teaching mannequins.”⁵⁵ Others teaching hospitals “have just incorporated specific consent for pelvic exams into medical education.”⁵⁶ These processes show that there are substitutes to performing educational pelvic exams on patients who are unconscious and do not consent. The educational benefit can be obtained without harming the patient’s trust or bodily autonomy, or putting the provider or institution at legal risk.

V. Proposed Changes

For change to happen there needs to be a shift in legislation, medical ethics codes, and medical board policies to ensure that pelvic examination on patients without consent while unconscious is unacceptable. Legislation is needed prohibiting health care providers from giving pelvic examinations on unconscious, unconsenting women for medically unnecessary purposes. States such as Utah, Maryland, California, Hawaii, Illinois, Iowa, Oregon, and Virginia already have bills that focuses on this issue.⁵⁷ One of most recent states to enact such a law and policy change is Utah in 2019. Utah’s statute states in relevant part:

[...]

(2) a health care provider may not perform a patient examination of an anesthetized or unconscious patient unless:

(a) the health care provider obtains consent from the patient or the patient’s representative in accordance with subsection (3);

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Laird, *supra* Note 2.

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(b) a court orders performance of the patient examination for the collection of evidence;

(c) the performance of the patient examination is within the scope of care for a procedure or diagnostic examination scheduled to be performed on the patients; or

(d) the patient examination is immediately necessary for diagnosis or treatment of the patient.⁵⁸

This section requires consent before pelvic exams can be performed on patients under anesthesia or while unconscious, unless there is a scenario that falls within subsection b-d. However, it is important to note that subsection 2(b-d) does not include situations where pelvic examinations for education purposes are appropriate. This statute protects patients from being used for educational purposes when there is no benefit to the patient derived from the examination.

A policy requiring doctors to obtain specific informed consent before medically unnecessary pelvic examinations helps protect the trust and autonomy of patients. Patients should have the opportunity to give informed consent to this procedure at the beginning of their stay at the hospital. In Utah, this includes separate paperwork with a consent form requiring explicit consent from the patient.⁵⁹ Outside of Utah's new statute, informed consent can include paperwork and introductions by all staff who will be participating in the patient's procedures. If a patient does consent to a pelvic examination under anesthesia for educational purposes, then the students and residents should introduce themselves to the patient to ensure trust. By requiring explicit consent from patients about medical procedures, medical care providers will ensure patient autonomy, build trust between patients and doctors, and mitigate legal risk.

Respectfully submitted,

Andrew King-Ries
Chair, Commission on Domestic & Sexual Violence
August 2020

⁵⁸ Utah [S.B. 188](#), 2019 General Session (2019) (enacted).

⁵⁹ *Id.*

GENERAL INFORMATION FORM

Submitting Entity: Commission on Domestic & Sexual Violence

Submitted By: Andrew King-Ries, Chair CDSV

1. Summary of the Resolution(s). This resolution urges legislative and policy changes to prevent the performance of pelvic exams without specific and advance informed consent.
2. Approval by Submitting Entity. The Commission voted to approve the resolution and report on 3/25/2020.
3. Has this or a similar resolution been submitted to the House or Board previously? No.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? There are no known affected policies.
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) Utah, Maryland, California, Hawaii, Illinois, Iowa, Oregon, and Virginia already have bills focusing on this issue. The resolution urges all jurisdictions to pursue such legislation.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, supporting entities, together with GAO, can advocate for legislative change as described.
8. Cost to the Association. (Both direct and indirect costs) None.
9. Disclosure of Interest. (If applicable) None.
10. Referrals.
 Criminal Justice Section
 Section of Civil Rights and Social Justice
 Section of Family Law
 Health Law Section
 Litigation Section
 Science & Technology Law Section
 Tort Trial & Insurance Practice Section
 Government and Public Sector Lawyers Division
 Solo, Small Firm and General Practice Division
 Judicial Division
 Law Student Division
 Young Lawyers Division
 Standing Committee on Legal Aid and Indigent Defense

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Standing Committee on Gun Violence
Commission on Homelessness & Poverty
Commission on Immigration
Commission on Law & Aging
Commission on Sexual Orientation and Gender Identity
Commission on Women
Commission on Youth at Risk
Center for Pro Bono
Center for Human Rights
National LGBT Bar Association
National Native American Bar Association
National Association of Women Judges
National Association of Women Lawyers
National Conference of Women's Bar Associations

11. Contact Name and Information prior to the Meeting. Please include name, telephone number and e-mail address.
Vivian Huelgo, 202-662-8637, vivian.huelgo@americanbar.org
12. Contact Name and Information. Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting.
Andrew King-Ries, 406-214-5445, Andrew.KingRies@mso.umt.edu

EXECUTIVE SUMMARY1. Summary of the Resolution

This resolution urges legislative and policy changes to prevent the performance of pelvic exams without specific and advance informed consent.

2. Summary of the Issue that the Resolution Addresses

Recent reporting has revealed a wide-spread practice of performing medically unnecessary pelvic examinations on unconscious patients without the patients' knowledge or consent, often for the stated purpose of providing opportunities for health care professionals to "practice" their skills.

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

Requiring that health professionals obtain specific informed consent before performing medically unnecessary pelvic examinations on unconscious patients protects patient autonomy and maintain trust between doctors and patients. It also reduces risk of personal injury litigation, ethics violations, or even criminal charges.

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

None.

AMERICAN BAR ASSOCIATION
COMMISSION ON DOMESTIC & SEXUAL VIOLENCE
CRIMINAL JUSTICE SECTION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS
CENTER FOR HUMAN RIGHTS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association adopts the eight principles and
2 accompanying commentary set forth in the U.S. Department of Justice December 15,
3 2015 guidance titled *Identifying and Preventing Gender Bias in Law Enforcement*
4 *Response to Sexual Assault and Domestic Violence*; and
5

6 FURTHER RESOLVED, That the American Bar Association urges all federal, state,
7 territorial, local and tribal law enforcement agencies in the United States to:
8

9 (1) adopt those same principles;
10

11 (2) provide periodic training to all law enforcement agency personnel to promote
12 compliance with those principles; and
13

14 (3) engage in regular review of compliance efforts and make any necessary
15 adjustments to improve compliance.

**U.S. Department of Justice
Principles to Prevent Gender Bias
in Law Enforcement Response
to Sexual Assault and Domestic Violence**

1. Recognize and address biases, assumptions and stereotypes about victims.
2. Treat all victims with respect and employ interviewing tactics that encourage a victim to participate and provide facts about the incident.
3. Investigate sexual assault or domestic violence complaints thoroughly and effectively.
4. Appropriately classify reports of sexual assault or domestic violence.
5. Refer victims to appropriate services.
6. Properly identify the assailant in domestic violence incidents.
7. Hold officers who commit sexual assault or domestic violence accountable.
8. Maintain, review and act upon data regarding sexual assault and domestic violence.

REPORT

Gender bias in policing practices is a form of discrimination that may result in law enforcement agencies providing less protection to certain victims on the basis of gender, failing to respond to crimes that disproportionately harm people of a particular gender, or offering reduced or less robust services due to a reliance on gender stereotypes. Gender bias, whether explicit or implicit, conscious or unconscious, may include:

- police officers misclassifying or underreporting sexual assault or domestic violence cases;
- inappropriately concluding that sexual assault cases are unfounded;
- failing to test sexual assault kits;
- interrogating rather than interviewing victims and witnesses;
- treating domestic violence as a family matter rather than a crime;
- failing to enforce protection orders; or
- failing to treat same-sex domestic violence as a crime.

In the sexual assault and domestic violence context, if gender bias influences the initial response to or investigation of the alleged crime, it may compromise law enforcement's ability to ascertain the facts, determine whether the incident is a crime, and develop a case that supports effective prosecution and holds the perpetrator accountable.

Recognizing that “one critical part of improving LEAs’ [law enforcement agencies’] response to allegations of sexual assault and domestic violence is identifying and preventing gender bias in policing practices,”¹ the U.S. Department of Justice issued a guidance in December 2015 entitled *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*. In its statement of purpose, the Department noted:

The focus of this document is reducing gender bias in *policing*. Addressing gender bias in policing is critical because police officers frequently have the initial contact with victims of sexual assault and domestic violence and LEAs generally conduct the investigations of sexual assault and domestic violence incidents. It is important to note, however, that gender bias—both explicit and implicit—exists throughout society, and as a result, it can arise in various aspects of the criminal justice system. Explicit and implicit gender bias can undermine the effective handling of sexual assault and domestic violence cases at any point from report to adjudication or closure. While not the subject of this document, addressing gender bias on the part of prosecutors, judges and juries in their consideration of sexual assault and domestic violence cases is critical to ensuring that justice is served. In

¹ U.S. Department of Justice, Civil Rights Division, Office on Violence Against Women (OVW), and Office of Community Oriented Policing Services (COPS Office), *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*, December 15, 2015, available at <https://www.justice.gov/opa/file/799366/download> (last visited May 20, 2020).

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addition, it is important for LEAs to be mindful that gender bias can occur alongside other types of unlawful discrimination, including racial bias, exacerbating any deficiencies in the criminal justice system's response to reports of sexual assault and domestic violence and further undermining access to safety for those victims.²

The guidance goes on to identify eight principles to aid in identifying and preventing gender bias in policing, accompanied by a series of detailed case examples. These principles are intuitively appealing and consistent with the ABA's long-held concern about bias in our justice system generally, and with gender bias specifically. Adopting them, and urging all law enforcement agencies to adopt them, train on them, and monitor and improve compliance,³ is one way the ABA can demonstrate its continued support for elimination of bias in the justice system and improved response to incidents of domestic and sexual violence.

I. Background

Sexual assault and domestic violence are crimes that disproportionately impact women, girls, and lesbian, gay, bisexual, and transgender (LGBT) individuals in the United States. According to surveys conducted by the Bureau of Justice Statistics and the Centers for Disease Control and Prevention (CDC):

- 90 percent of all cases of rape involve female victims.⁴
- Nearly one in five women in the United States (18.3 percent) have been raped.⁵
- About one in four women (24.3 percent) and one in seven men (13.8 percent) in the United States have experienced severe physical violence at the hands of an intimate partner.⁶
- 44 percent of lesbian women and 61 percent of bisexual women have experienced rape, physical violence, and/or stalking by an intimate partner.⁷
- 26 percent of gay men and 37 percent of bisexual men have experienced rape,

² *Id.* at 3.

³ The guidance also urges training and oversight: "The department encourages LEAs to consider these principles and integrate them into: (1) clear, unequivocal policies about the proper handling of sexual assault and domestic violence crimes; (2) training for officers about these policies and about effective responses to sexual assault and domestic violence crimes more generally; and (3) supervision protocols and systems of accountability to ensure that officers responding to sexual assault and domestic violence crimes act in accordance with these policies and trainings." *Id.*, p. 10.

⁴ U.S. Dep't of Justice, Bureau of Justice Statistics, *Female Victims of Sexual Violence, 1994-2010*, at 3 (2013), available at <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>.

⁵ Ctrs. for Disease Control and Prevention, Nat'l Ctr. for Injury Prevention and Control, *National Intimate Partner and Sexual Violence Survey 1* (2010), available at http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Executive_Summary-a.pdf.

⁶ *Id.* at 2.

⁷ Ctrs. for Disease Control and Prevention, Nat'l Ctr. for Injury Prevention and Control, *National Intimate Partner and Sexual Violence Survey: 2010 Findings on Victimization by Sexual Orientation 2* (2013), available at http://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf.

physical violence, and/or stalking by an intimate partner.⁸

- While there is a lack of data on the violence experienced by transgender individuals, community-based studies indicate high levels of victimization.⁹

Since the passage of the Violence Against Women Act in 1994 (VAWA),¹⁰ annual rates of domestic violence reports have dropped by 64 percent.¹¹ This progress is significant and due in no small part to the work that Law enforcement agencies have done, in partnership with the department, to improve their response to allegations of domestic violence. Yet, despite this progress, domestic violence still occurs at alarming rates and too often becomes lethal. On average, three women die per day as a result of domestic violence in the United States and, for every woman killed in a domestic violence homicide, nine more are critically injured.¹²

The persistence of these high rates of crimes involving sexual assault and domestic violence underscores the critical importance of the role of law enforcement agencies in investigating these crimes thoroughly and with the same vigor and skill as they do other crimes of a similar significance that occur in their jurisdictions. By using thorough and effective investigative techniques, law enforcement agencies will continue to improve their efforts to ensure that the perpetrators of these crimes are held accountable and that the victims receive meaningful access to justice.

Over the past 20 years, VAWA funding has transformed how criminal justice systems in many communities respond to sexual assault and domestic violence. Some of the innovations funded through VAWA include law enforcement collaboration with victim service providers; use of evidence-based lethality assessments to curb domestic violence-related homicides; improved forensic medical examinations for sexual assault victims; investigation and prosecution policies and practices that focus on the offender and account for the effects of trauma on victims; specialized law enforcement and prosecution units; enhanced offender monitoring; and improved training for law enforcement, prosecutors and judges. Law enforcement agencies are a critical component of a coordinated community response to sexual assault and domestic violence. By dedicating additional attention and resources to improving law enforcement's response to such crimes—including making efforts to eliminate gender

⁸ *Id.*

⁹ See, e.g., Nat'l Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence in 2013*, at 10 (2014 release edition), available at http://www.avp.org/storage/documents/ncavp2013ipvreport_webfinal.pdf; see also Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 *Aggression and Violent Behavior* 170, 171-172 (May-June 2009).

¹⁰ Although VAWA refers to women in its title, the statute makes clear that the protections are for all victims of domestic violence, dating violence, sexual assault, and stalking, regardless of sex, gender identity, or sexual orientation. 42 U.S.C. § 13925(b)(13).

¹¹ U.S. Dep't of Justice, Bureau of Justice Statistics, *Intimate Partner Violence, 1993-2010*, at 1 (rev. 2015), available at <http://www.bjs.gov/content/pub/pdf/ipv9310.pdf>.

¹² U.S. Dep't of Justice, Bureau of Justice Statistics, *Intimate Partner Violence: Attributes of Victimization, 1993-2011*, (2013), available at <http://www.bjs.gov/content/pub/pdf/ipvav9311.pdf>; Jacquelyn C. Campbell et al., *Intimate Partner Homicide: Review and implications of research and policy*, 8 *Trauma, Violence, & Abuse* 246 (July 2007).

bias—agencies will be better able to meet the needs of victims and the communities they serve.

II. The Impact of Gender Bias on Policing

Explicit and implicit biases, including stereotypes about gender roles, sexual assault, and domestic violence, are embedded in our culture and can affect people in all different professions.¹³ With respect to policing, these biases may affect law enforcement officers' perceptions of sexual assault and domestic violence incidents and prevent them from effectively handling allegations of these crimes.¹⁴ The intersection of racial and gender stereotypes and biases can also pose unique difficulties for women and LGBT individuals of color seeking police services to address sexual assault and domestic violence incidents.¹⁵

In some cases, a police officer may discriminate against victims of sexual assault or domestic violence because of a general bias against women or LGBT individuals. More commonly, discrimination may be based on explicit stereotypes about women or LGBT individuals. Acting on stereotypes about why women or LGBT individuals are sexually assaulted, or about how a victim of domestic violence or sexual assault should look or behave, can constitute unlawful discrimination and profoundly undermine an effective response to these crimes. For example, if an officer believes a sexual assault to be less severe because the victim was assaulted by an acquaintance or was intoxicated when the assault occurred, or based on stereotypical assumptions about a victim who is a gay man or lesbian woman assaulted by his or her partner, that is gender bias and may constitute unlawful discrimination.

Even where law enforcement officers harbor no explicit biases or stereotypes about women or LGBT individuals, an officer's unconscious bias towards these groups can undermine an effective response to sexual assault and domestic violence incidents. In recent years, the criminal justice community has begun to examine compelling social science research that suggests "implicit biases are predilections held by all [people] that operate largely outside of one's awareness."¹⁶ A collaboration of researchers at several

¹³ See e.g., *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary* 111th Cong. 6-7 (Sept. 14, 2010) (statement of Carol E. Tracy, Executive Director, Women's Law Project) [hereinafter *2010 Senate Committee Testimony*], available at <http://www.judiciary.senate.gov/imo/media/doc/09-14-10%20Tracy%20Testimony.pdf> (citing research); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 Colum. J. Gender & L. 1, 27 (1998).

¹⁴ See *2010 Senate Committee Testimony*, *supra* note 12, at 6-7.

¹⁵ See generally, Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 Wis. L. Rev. 1003, 1069-74 (1995). See also Fenton, *supra* note 12, at 53-54 (discussing how stereotypes can lead police to take the claims of African-American victims less seriously than others); *Domestic Violence at the Margins: Readings on Race, Class, Gender, and Culture* (Natalie J. Sokoloff and Christina Pratt, eds., 2005); Natalie J. Sokoloff and Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities*, 11 *Violence Against Women* 38, 43 (Jan. 2005).

¹⁶ Tracey G. Gove, *Implicit Bias and Law Enforcement*, 78 *The Police Chief* 44, 44 (Oct. 2011), available at

major universities has found that implicit biases are pervasive, people are often unaware of their implicit biases and implicit biases can predict behavior.¹⁷ Scholars have examined the implications of this research for law enforcement agencies.¹⁸ It is important for law enforcement to recognize the prevalence of implicit bias and to consider how both explicit and implicit bias might impact the law enforcement response to crimes involving sexual assault and domestic violence.

Eliminating gender bias in policing practices is an integral component of combating sexual assault and domestic violence, and can have a real and immediate effect on the safety of individual victims. A swift and meaningful criminal justice response to violence against women and LGBT individuals is critical for preventing future victimization¹⁹ and arresting offenders can deter repeat abuses.²⁰ Further, an appropriate law enforcement response not only fosters victim confidence, it also makes victims more likely to report future incidents. By²¹ contrast, if law enforcement agencies do not respond effectively to an incident of sexual assault or domestic violence, victims are less likely to participate in the investigation and prosecution of their case or seek police assistance in the future.²²

Moreover, an effective police response to domestic violence and sexual assault can improve the safety of our communities as a whole. Reducing female intimate partner homicides also reduces collateral homicides of children, other family members, and responding law enforcement officers, while also reducing abuser suicides.²³ Because some individuals suffer multiple victimizations before reporting to police, a full investigation of a particular domestic violence incident may reveal additional, even more serious incidents of abuse.²⁴ Studies also indicate that many abusers are likely to commit

<https://www.policiechiefmagazine.org/implicit-bias-and-law-enforcement/> (last visited May 20, 2020); see also Tami Abdollah, *Police Agencies Line Up to Learn About Unconscious Bias*, Associated Press, Mar. 9, 2015, available at <http://www.dailynews.com/government-and-politics/20150315/police-agencies-line-up-to-learn-about-unconscious-bias>.

¹⁷ Gove, supra note 15.

¹⁸ See e.g., L. Song Richardson and Phillip Atiba Goff, *Interrogating Racial Violence*, 12 Ohio St. J. Crim. L. 115, 120-24 (2014) (discussing studies regarding the impact of implicit bias on police use of force).

¹⁹ See André Rosey et al., *Investigation and Prosecution of Sexual Assault, Domestic Violence, and Stalking* 17-18 (2011), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/236429.pdf>; Jill Messing et al., *Police Departments' Use of the Lethality Assessment Program: A Quasi-Experimental Evaluation* 86-87 (2014), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/247456.pdf>.

²⁰ Christopher D. Maxwell et al., U.S. Dep't of Justice, Nat'l Institute of Justice, *The Effects of Arrest on Intimate Partner Violence: New Evidence From the Spouse Assault Replication Program* 1 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188199.pdf>; Laura Dugan et al., *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate-Partner Homicide*, 37 Law & Society Review 169, 178 (2003) available at http://www.ccjs.umd.edu/sites/ccjs.umd.edu/files/pubs/lasr_03701005.pdf.

²¹ Robert C. Davis & Christopher Maxwell, Vera Institute of Justice, *Preventing Repeat Incidents of Family Violence: A Reanalysis of Data from Three Field Tests* 5-6 (2002), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/200608.pdf>; Paul C. Friday, *Evaluating the Impact of a Specialized Domestic Violence Police Unit* 5-8 (2006), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/215916.pdf>.

²² Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response* 127 (2003).

²³ Andrew R. Klein, U.S. Dep't of Justice, Nat'l Institute of Justice, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges* 4 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/225722.pdf> (citing Federal Bureau of Investigations data and multiple state and local fatality reviews).

²⁴ *Id.* at 4, 6.

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new domestic and nondomestic violence crimes; thus, vigilant police investigation of sexual assault and domestic violence may help prevent other violent crimes.²⁵

The experience of Detroit illustrates the vital importance of fully investigating every reported sexual assault, regardless of an individual officer's assessment of a particular victim's credibility.²⁶ In 2009, the City of Detroit discovered over 11,000 untested sexual assault kits. When just 1,595 of those kits were tested, they yielded 785 Combined DNA Index System (CODIS) eligible profiles. And, in turn, over half of those profiles belonged to individuals already in CODIS and 28 percent yielded serial sexual assault hits (i.e., a DNA match across two or more sexual assault kits).²⁷ In short, the DNA from these untested kits belonged to offenders who had committed other crimes, including multiple other sexual assaults.²⁸

III. The Principles

As a prelude to describing the Principles of the guidance, the Department notes that the Principles should be used to develop “(1) clear, unequivocal policies about the proper handling of sexual assault and domestic violence crimes; (2) training for officers about these policies and about effective responses to sexual assault and domestic violence crimes more generally; and (3) supervision protocols and systems of accountability to ensure that officers responding to sexual assault and domestic violence crimes act in accordance with these policies and trainings.” This Resolution urges the same approach.

Principle 1. Recognize and Address Biases, Assumptions, and Stereotypes about Victims²⁹

In responding to a report of sexual assault or domestic violence, law enforcement officers should not base their judgments as to the credibility of a victim's account on assumptions or stereotypes about the “types” of people that can be victims of sexual

²⁵ *Id.* at 19-21.

²⁶ “An analysis of 1,268 sexual assault police reports associated with [sexual assault kits] that had not been submitted for testing revealed that most cases were closed after minimal investigational effort. In both the stakeholder interviews and in the actual police reports, law enforcement personnel expressed negative, victim-blaming beliefs about sexual assault victims.” Rebecca Campbell et al., *The Detroit Sexual Assault Kit (SAK) Action Research Project (ARP), Final Report* iv (2015) (emphasis in original), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf>.

²⁷ *Id.* at iii-vi.

²⁸ As of August 2015, Detroit has tested approximately 10,000 kits, resulting in 2,478 DNA matches and the identification of 469 potential serial rapists. The Wayne County Prosecutor's Office has obtained 21 convictions, and the DNA from the tested kits has been linked to crimes committed in 39 states. *Detroit, EndtheBacklog*, <http://www.endthebacklog.org/detroit> (last visited May 20, 2020).

²⁹ Letter from Thomas Perez, Ass't Att'y Gen. of the United States, to Hon. John Engen, Mayor of Missoula, Montana, 8, 13 (May 15, 2013) [hereinafter *Missoula FL*], available at http://www.justice.gov/sites/default/files/crt/legacy/2013/05/22/missoulapdfind_5-15-13.pdf; Investigation of the New Orleans Police Dep't, U.S. Dep't of Justice, Civil Rights Division 43, 46 (Mar. 16, 2011) [hereinafter *NOPD FL*], available at http://www.justice.gov/crt/about/spl/nopd_report.pdf; Int'l Ass'n of Chiefs of Police, Nat'l Law Enforcement Policy Ctr., *Investigating Sexual Assaults: Concepts and Issues Paper* 4 (2005) [hereinafter *IACP Investigating Sexual Assaults Issues Paper*], available at http://www.ncdsv.org/images/IACP_InvestigatingSAConceptsIs-suesPaper_7-2005.pdf

assault, or about how victims of sexual assault and domestic violence “should” respond or behave. The following examples illustrate the application of assumptions or stereotypes to victims to gauge a victim’s credibility, which undermines an effective investigation:

Example: A young woman enters a police station and reports that, two weeks earlier, she was raped at a house party by a colleague from work. The woman reports that she had been drinking that evening. The police officer on duty asks how often the woman drinks excessively at house parties and asks her what she was wearing that night. The officer then tells her that she should really watch how much she consumes when she goes out at night, especially if she is getting dressed up.

Example: A tall man, in good physical condition and with no visible injuries, goes to the local police precinct and reports that his boyfriend, with whom he lives, has been sending him threatening text and voice messages over the past several weeks, and that, the night before, his boyfriend had assaulted him. The responding officer looks at the man skeptically and tells him that he’s not sure that he can take a report based on this situation. The officer tells the man to think carefully about whether he has a crime to report and to come back another day if he still believes he needs assistance.

Example: A woman who has been known to engage in prostitution flags down a police officer who frequently patrols her neighborhood. She reports to the officer that she was just raped. The police officer on duty writes down her statement, but, when he returns to the police station, he immediately classifies the complaint as “unfounded,” and takes no further action, because of the woman’s sexual and criminal history.

Principle 1 in Practice

Law enforcement agencies should review and revise their policies and procedures as necessary and provide training to officers to ensure that responding officers and investigators gather all pertinent evidence in an unbiased manner. A victim’s nonconformance with behavioral stereotypes should not impact the way law enforcement officers evaluate the complaint.³⁰ Biases should also not prevent officers from taking a report or detectives from conducting a full investigation of all complaints received.³¹ Thus,

³⁰ See Memorandum of Understanding between the U.S. Dep’t of Justice and City of Missoula Regarding the Missoula Police Department’s Response to Sexual Assault 5 (May 15, 2013) [hereinafter *Missoula MOU*], available at http://www.justice.gov/sites/default/files/crt/legacy/2013/05/15/missoulapdsettle_5-15-13.pdf; Int’l Ass’n of Chiefs of Police, *Sexual Assault Incident Reports Investigative Strategies* 5 (2005) [hereinafter *IACP Sexual Assault Incident Reports*], available at <http://www.theiacp.org/portals/0/pdfs/SexualAssaultGuidelines.pdf>; Int’l Ass’n of Chiefs of Police, *Model Policy on Investigating Sexual Assaults* 1, 4 (2005) [hereinafter *IACP Model Policy on Investigating Sexual Assaults*], available at <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=93>; *IACP Investigating Sexual Assaults Issues Paper*, *supra* note 29, at 4; End Violence Against Women Int’l, *Training Bulletin: When to Conduct an Exam or Interview* 3 (2013) [hereinafter *EVAWI Training Bulletin*], available at http://www.ncdsv.org/images/EVAWI_When-to-conduct-an-exam-or-interview_6-2013.pdf.

³¹ Before making final credibility determinations, investigators should gather and assess objective evidence (statements; medical evidence; camera footage) as available and appropriate. See *infra*, Principle 3, notes 42-45 for guidelines on conducting a full investigation.

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the following factors, standing alone, are not dispositive in determining a victim's credibility: delayed reporting; the victim's history of making similar reports; the victim's sexual history; the victim's emotional state (e.g., whether a victim appears calm versus emotional or visibly upset); the victim's lack of resistance; the victim's criminal history or history of prostitution; evidence that the victim has a mental illness; evidence that the victim has a history of abusing alcohol or drugs; what the victim was wearing at the time the victimization occurred; whether the victim is of comparable size/strength to the assailant; the lack of any obvious signs of physical harm to the victim; the victim's sexual orientation or gender identity; and whether the victim was attacked by a person of the same sex.³²

Principle 2. Treat All Victims with Respect and Employ Interviewing Tactics That Encourage a Victim to Participate and Provide Facts About the Incident³³

A victim who is treated with respect is more likely to continue participating in an investigation and prosecution than one who feels judged or blamed for a sexual assault or domestic violence incident. Law enforcement agencies should take affirmative steps to ensure that, throughout their investigations, officers treat victims with respect and dignity, and use appropriate trauma-informed interviewing techniques to establish a rapport with the victim. The following example illustrates the use of inappropriate interviewing tactics that may cause a victim to be less willing to participate in an investigation or proffer facts about the incident:

Example: A woman reports to the police that she was raped several months ago while attending a party. The law enforcement officer on duty takes a cursory report and gives the file to an investigator, who says to the woman:

- “I’m sorry but you are reporting an incident that occurred several months ago. There is nothing we can do at this point.”
- “Is the reason you waited so long to report this rape because you now regret having sex?”
- “How can you remember any details given how much you had to drink?”
- “What did you think was going to happen after you went to his room alone?”
- “Why didn’t you push him off you and leave?”

Principle 2 in Practice

³² See generally *IACP Sexual Assault Incident Reports*, *supra* note 29, at 5; *IACP Model Policy on Investigating Sexual Assaults*, *supra* note 29, at 4.

³³ *Missoula FL*, *supra* note 28, at 8-9, 13; *NOPD FL*, *supra* note 28, at 43-44, 46-48.

Although law enforcement agencies will often need to ask difficult questions on the above topics to get information necessary to fully investigate a complaint or prepare a case for successful prosecution, *how* and *when* difficult questions are asked is an important consideration. By taking affirmative steps to respect the dignity of all complainants, law enforcement officers may be able to increase the quality and quantity of the information they receive. In addition, there are also some questions that are inappropriate to ask at any point during the investigation, no matter how they are phrased. These types of questions ignore the trauma that victims experience and, whether intentionally or not, suggest that blame should be placed on the victim or that the victim should not have reported the incident to the police at all. Examples of these questions include:

- “Have you considered talking to the man and letting him know that you are upset?”
- “Have you thought about how this is going to affect the alleged assailant's scholarship/career/ reputation/etc.?”
- “Wasn't this just a trick gone bad?”

Understanding the impact of trauma on the victim may help to explain many of the challenges that officers face in interviewing victims (e.g., memory gaps, inconsistent accounts, or delayed reporting) and prevent inappropriate questioning. Law enforcement agencies should review and revise their policies and procedures, as necessary, and provide training to assist officers in being cognizant of the emotional impact that participating in interviews and evidence-gathering may have on a victim who has undergone a traumatic event, such as a rape or sexual assault.³⁴ For example, a victim may experience flashbacks or intense psychological distress when asked to recall details about the incident or event. It is important that officers convey to a victim that the purpose of the interview is to understand and determine the facts, not to blame the victim.³⁵ Accordingly, officers should be trained to ask neutral, open-ended questions that elicit a narrative of the events from the victim, rather than leading questions or questions that may be perceived as assigning blame.³⁶ Examples of neutral and open-ended questions include:

³⁴ Consent Decree Regarding the New Orleans Police Department, *U.S. v. City of New Orleans*, No. 2:12-cv-01924-SM-JCW, at 54 (Jan. 11, 2013) [hereinafter *NOPD CD*], available at http://www.justice.gov/sites/default/files/crt/legacy/2013/01/11/nopd_agreement_1-11-13.pdf; *IACP Sexual Assault Incident Reports*, *supra* note 29, at 4-5; *IACP Model Policy on Investigating Sexual Assaults*, *supra* note 29, at 4; *EVAWI Training Bulletin*, *supra* note 29, at 3-4.

³⁵ *Missoula MOU*, *supra* note 29, at 5, 7; *IACP Sexual Assault Incident Reports*, *supra* note 29, at 4; *IACP Model Policy on Investigating Sexual Assaults*, *supra* note 29, at 1.

³⁶ *Missoula MOU*, *supra* note 29, at 5, 7; *IACP Sexual Assault Incident Reports*, *supra* note 29, at 3; *IACP Model Policy on Investigating Sexual Assaults*, *supra* note 29, at 4. See also The Nat'l Ctr. for Women and Policing, *Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement, Drug-Facilitated Sexual Assault Module 9-10* (2001) [hereinafter *Nat'l Ctr. For Women and Policing Training Manual*], available at <http://www.mincava.umn.edu/documents/acquaintsa/participant/drugfacilitated.pdf>.

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- “Can you tell me what happened?”
- “What can you tell me about the person who did this to you?”
- “What can you tell me about anything the person said before, during, or after the incident?”
- “Can you tell me about any witnesses or people who might have seen the incident?”
- “Did anything in particular cause you to come tell us about this incident today?”
- “Have you received medical treatment? Would you like to go to the hospital?”

A trauma-informed approach to asking questions during a victim interview also can help the investigator establish trust, which in turn can help the victim feel more comfortable disclosing aspects of the assault that could be difficult or embarrassing to talk about, or which the victim might worry will damage her/his credibility. For example, a victim might be more willing to disclose any voluntary or involuntary alcohol or drug use around the time of the assault if the officer has established a non-judgmental environment and demonstrated genuine empathy for the victim. Although an investigator has to ask questions necessary to corroborate the victim's account, many victims may become upset and frustrated by questions regarding their actions or behavior around the time of the incident, including alcohol or drug use. These questions, depending on how they are phrased, can come across as victim-blaming and can dissuade a victim from assisting with the investigation.³⁷ An example of how an officer could converse with a victim who might have been drinking or using drugs before s/he was assaulted might be:

“I know that this question is difficult to answer and I want you to know I am only asking you this question to get a clear picture of what you’ve experienced. I am very sorry about what has happened to you and I do not think that you are responsible for what happened. Any questions I may ask about alcohol or drug use by you or the offender I’m only asking to understand what happened.”

Similarly, officers should not make statements or engage in acts that indicate to the victim that they doubt the victim’s credibility, or that otherwise exhibit any bias towards the victim based on gender.³⁸ Such statements and judgments could include: stereotyped assumptions about the truth of a reported assault (e.g., that women are likely to report “regretted sex” as rape, that transgender women and men are unlikely to be raped, that people engaged in prostitution cannot be raped, or that certain ethnicities or races are more “promiscuous”); automatically believing the alleged assailant’s claim that the sex was consensual; or subtly, or even blatantly, coercing the victim to recant the allegation

³⁷ See *Nat’l Ctr. For Women and Policing Training Manual*, *supra* 35, at 9-10.

³⁸ *Missoula MOU*, *supra* note 29, at 5; *IACP Sexual Assault Incident Reports*, *supra* note 29, at 3, 7.

of sexual assault by blaming the victim for being assaulted or for making unwise or dangerous choices.

Further, law enforcement agencies should train officers to write reports of interviews or statements incorporating the victim's words, spontaneous statements, and narrative as much as possible, as opposed to providing the officer's summary. Such an approach will further the goal of presenting the victim's version of the events from the victim's perspective.³⁹ To ensure privacy and encourage candor, investigations of domestic violence or sexual assault complaints should not be conducted in public waiting areas.

Additionally, allowing the victim, if he or she so desires, to have the support of a victim advocate during a criminal investigation has been shown to have a positive impact on the victim's experience with law enforcement.⁴⁰ A victim advocate can provide support in several ways, including preparing a victim for law enforcement interviews by helping the victim understand what to expect. This preparation may help the victim to feel at ease during the interview, as well as promote the development of a relationship of trust between the victim and the law enforcement officer. This simple step of encouraging victims to seek support during the criminal investigation process may be critical to an effective victim interview, which in turn could prove important to the investigation, to the prosecution of any crime, and to the victim's continued cooperation with law enforcement.

Finally, to ensure that all individuals are able to communicate the relevant facts clearly, it is important to ensure meaningful language access for individuals with limited English proficiency.⁴¹ Absent exigent circumstances, law enforcement agencies should always use an independent interpreter for interviews, such as someone who works for the agency or a language services interpreter.⁴² To ensure independence and accuracy in law enforcement investigations, law enforcement agencies should not use victims' family members and friends as interpreters. Moreover, it is critical that children never be used as interpreters: this undermines effective language access for victims, can traumatize children exposed to these situations and may inhibit a victim from fully revealing important details about the assault.

³⁹ *Missoula MOU*, *supra* note 29, at 7; *IACP Sexual Assault Incident Reports*, *supra* note 29, at 3; Int'l Ass'n of Chiefs of Police, Nat'l Law Enforcement Policy Ctr., *Domestic Violence Concepts and Issues Paper 3* (2006) [hereinafter *IACP Domestic Violence Issues Paper*], available at http://www.ncdsv.org/images/IACP_DVConceptsIssuesPaper_rev6-2006.pdf; Joanne Archambault et al., *End Violence Against Women Int'l, Effective Report Writing: Using the Language of Non-Consensual Sex* 5-13 (2012) [hereinafter *EVAWI Effective Report Writing*], available at <http://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=43>.

⁴⁰ Rebecca Campbell, *Rape Survivors' Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference*, 12 *Violence Against Women* 30, 30 (2006); *Missoula MOU*, *supra* note 29, at 7; *IACP Sexual Assault Incident Reports*, *supra* note 29, at 4.

⁴¹ See Title VI of the Civil Rights Act of 1964, 42 U.S.C §§ 2000d et seq.; Exec. Order No. 13166, 65 Fed. Reg. 50,121 (Aug. 16, 2000).

⁴² See *Common Language Access Questions, Technical Assistance, and Guidance for Federally Conducted and Federally Assisted Programs* 8 & n.1 (August 2011), available at http://www.lep.gov/resources/081511_Language_Access_CAQ_TA_Guidance.pdf (citing Dep't of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,461 (June 18, 2002)).

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Principle 3. Investigate Sexual Assault or Domestic Violence Complaints Thoroughly and Effectively⁴³

Unlike many other crimes, incidents of sexual assault and domestic violence frequently occur in more private settings, with few, if any, witnesses present. As a result, it is crucial that LEAs undertake a thorough investigation of these crimes by gathering, preserving and analyzing as much evidence, particularly corroborative evidence, as quickly as they can. The following examples illustrate failures to thoroughly and effectively investigate complaints involving sexual assault and domestic violence:

Example: A 25-year-old woman reports to the police that the previous day, her ex-boyfriend physically and sexually assaulted her. After disclosing to her roommate what had happened, the woman goes to the hospital for a forensic exam and the patrol officer who interviews her takes the kit to an evidence storage facility. A detective calls her a few days later, but, when he does not immediately hear back, he closes the case, noting that the victim cannot be located, is not cooperating and there were no witnesses. The kit is never submitted to the lab for testing and an arrest is never made.

Example: Officers respond to a call for service based on a domestic dispute. When they arrive, they find a man and a woman at the scene. The man is clearly distressed and angry. The woman says the man hit her several times, but says she was not seriously injured. The man says that he and the woman had been on several dates, and he learned tonight that the woman is transgender. The man says that the woman is “crazy” and deceived him by “pretending” to be a woman. The officers leave the apartment without taking a report from the woman because there were no serious injuries; they have some sympathy for the man who feels deceived; and they believe their efforts are better spent on more serious crimes.

Principle 3 in Practice

To ensure that investigations are thorough, law enforcement agencies should implement clear policies and training about how to conduct domestic and sexual violence investigations that are complete and bias-free.⁴⁴ At a minimum, law enforcement agencies should have guidelines that address the following for possible crimes involving sexual or domestic violence:⁴⁵ collecting and preserving all relevant and corroborative

⁴³ *Missoula FL*, *supra* note 28, at 7; *NOPD FL*, *supra* note 28, at 47-50; *IACP Model Policy on Investigating Sexual Assaults*, *supra* note 29, at 2-3.

⁴⁴ *Missoula MOU*, *supra* note 29, at 4; *NOPD CD*, *supra* note 33, at 54; *IACP Sexual Assault Incident Reports*, *supra* note 29, at 7; *see generally* *IACP Model Policy on Investigating Sexual Assaults*, *supra* note 29; Police Executive Research Forum, *Improving the Police Response to Sexual Assault 1-2* (2012) [hereinafter *PERF Improving the Police Response*], available at http://www.policeforum.org/assets/docs/Critical_Issues_Series/improving%20the%20police%20response%20to%20sexual%20assault%202012.pdf.

⁴⁵ *Missoula MOU*, *supra* note 29, at 5; *NOPD CD*, *supra* note 33, at 54-55; Int'l Ass'n of Chiefs of Police, *Model Policy on Domestic Violence 4* (2006) [hereinafter *IACP Model Policy on Domestic Violence*],

evidence; ensuring that forensic medical exams, including “rape kits,” are completed and analyzed in a timely manner; identifying and documenting victim injuries, both at the time of the incident and during subsequent interactions; identifying and documenting all psychological and sensory evidence; and interviewing all possible witnesses and suspects and conducting each interview separately.⁴⁶

Principle 4. Appropriately Classify Reports of Sexual Assault or Domestic Violence⁴⁷

Complaints of sexual assault and domestic violence should be classified in a manner that will allow them to be fully investigated. If a sexual assault or domestic violence complaint is given an improper or non-criminal classification, the case may be closed before an investigation has been conducted. Like any other allegation of a crime, the determination that a sexual assault or domestic violence complaint is unsubstantiated should be made only after a thorough and full investigation, as discussed in Principle 3, and not presumptively at the classification stage. In order to encourage accurate classification of reports of sexual offenses, officers must be knowledgeable not only about their agency’s procedures for documenting such reports, but also about the elements of sexual assault and domestic violence offenses, so that they can better identify incidents that meet those criteria. The following example illustrates how a misclassification of a sexual assault complaint can lead to the failure to properly investigate (and secure a successful prosecution of) the complaint:

Example: A friend brings a woman to a police station and tells the police that her friend was raped while on a date the night before. While still sitting in the public waiting area, an officer asks the woman what happened, and the woman says she does not remember and does not know if she was raped. The law enforcement officer on duty fills out a report, but immediately classifies the incident as “unfounded.”

Principle 4 in Practice

Law enforcement agencies should review and revise their policies and procedures as necessary, and provide training to officers to ensure that sexual assault and domestic violence complaints are properly documented and only classified as non-criminal or unfounded after a thorough, full investigation is conducted.⁴⁸ All sexual assault or domestic violence complaints should be investigated, regardless of any of the following circumstances: the victim has gaps in memory; there are potential conflicts in the victim’s statements; the victim is reluctant to share his or her story; the victim expresses concern over having the alleged assailant charged with a crime; the victim expresses self-blame

available at <http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/DomesticViolencePolicy.pdf>.

⁴⁶ NOPD CD, *supra* note 33, at 54; IACP Sexual Assault Incident Reports, *supra* note 29, at 7; IACP Model Policy on Investigating Sexual Assaults, *supra* note 29, at 3.

⁴⁷ Missoula FL, *supra* note 28, at 8; NOPD FL, *supra* note 28, at 45-47.

⁴⁸ NOPD CD, *supra* note 33, at 54-56; End Violence Against Women Int’l, *Reporting Methods for Sexual Assault Cases* 8, 18 (2007) [hereinafter *EVAWI Sexual Assault Cases*], available at <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=35>; EVAWI Training Bulletin, *supra* note 29, at 4-5.

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(e.g., suggests that she/he didn't fight hard enough to stop the assault); the victim is emotionally distraught and unable to discuss the incident; or the victim was under the influence of alcohol or drugs at the time of the incident.^{49 50}

Additionally, law enforcement should be aware that victims of domestic violence and sexual assault may also be victims of sex trafficking, and officers should receive training on identifying and responding to victims of trafficking. The department offers training and grants to assist law enforcement and community partners in detecting trafficking and providing services to trafficking victims.⁵¹ Law enforcement agencies should also develop policies and procedures regarding U visas, which are available for immigrant victims of certain crimes—including sexual assault and domestic violence—if they assist law enforcement in the investigation or prosecution of criminal activity and meet other eligibility criteria.⁵²

Principle 5. Refer Victims to Appropriate Services⁵³

Officers should take steps to address the medical, emotional, safety and other needs of victims of sexual assault and domestic violence at the time they report an incident or make a complaint.

⁴⁹Missoula MOU, *supra* note 29, at 7; IACP Sexual Assault Incident Reports, *supra* note 29, at 2, 5; IACP Model Policy on Investigating Sexual Assaults, *supra* note 29, at 2, 4; EVAWI Sexual Assault Cases, *supra* note 47, at 7; EVAWI Training Bulletin, *supra* note 29, at 3.

⁵⁰ In conducting a full and thorough investigation, law enforcement officers should engage victims in a trauma-informed manner: officers should be careful to avoid pursuing victims (some of whom may be reluctant to speak to law enforcement) in a way that might “re-traumatize” them. See *supra* note 33.

⁵¹ For example, the Department's Bureau of Justice Assistance works collaboratively with the Department's Office for Victims of Crime (“OVC”) to develop training for law enforcement and communities to identify trafficking victims and to support anti-trafficking task forces involving collaboration among state and local law enforcement, trafficking victim services providers, federal law enforcement, and U.S. Attorneys' Offices. More information about OVC anti-human trafficking efforts is available here: <http://ovc.ncjrs.gov/humantrafficking/lawenforcement.html>. Information about OVC training and grant opportunities is available at: https://www.ovcttac.gov/views/Resources/dspResources_Org.cfm. The Department's Civil Rights Division Human Trafficking Prosecution Unit (HTPU) also provides advanced capacity-building and training programs on trauma-informed, victim-centered best practices in the investigation and prosecution of human trafficking cases and the stabilization of human trafficking victims. These programs include intensive, week-long, interdisciplinary trainings for law enforcement agents, prosecutors, law enforcement victim-witness coordinators, and non-governmental victim advocates on stabilizing traumatized victims, earning the trust of traumatized victims of labor trafficking and sex trafficking, and overcoming challenges to securing the cooperation of reluctant victims and empowering them to become active participants in the criminal justice process. These programs continue to enhance law enforcement capacity to empower victims of human trafficking—many of whom are women and girls with histories of poverty, dislocation, physical and sexual abuse, and cultural isolation—to report their victimization and play an active role in bringing human traffickers to justice. More information about HTPU is available at: <http://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu>.

⁵² Additional information about the U non-immigrant status (also known as the “U visa”) is available at: <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>. Victims of human trafficking also may be eligible for T non-immigrant status. See <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status>.

⁵³ Missoula FL, *supra* note 28, at 10-11; NOPD FL, *supra* note 28, at 43, 50-51.

Principle 5 in Practice

Law enforcement officials should make timely and appropriate referrals to medical professionals for victims of sexual assault or domestic violence.⁵⁴ Law enforcement policies and trainings should direct officers to, at the earliest point possible, offer to contact a victim advocate and refer victims of sexual assault or domestic violence to resources, such as rape crisis centers, domestic violence shelters or legal services organizations. At a minimum, officers should ensure that victims are aware of these services.⁵⁵ It is important for law enforcement to know and have relationships with community-based victim advocacy organizations, including any local culturally-specific organizations or other organizations that focus on underserved or marginalized populations. Law enforcement agencies seeking to identify victim service providers in their jurisdictions should contact their state domestic violence and sexual assault coalitions. Contact information for these organizations is available on the website of the department's Office on Violence Against Women at <http://www.Justice.Gov/ovw/local-resources>.

Principle 6. Properly Identify the Assailant in Domestic Violence Incidents⁵⁶

It is essential that officers are trained to identify the predominant aggressor when responding to domestic violence incidents, and make arrests accordingly. Law enforcement officials should be aware of the potential for abusers to report domestic violence complaints preemptively, claiming that they themselves are the victims of domestic violence. The following example illustrates a failure to pursue information that would help identify the predominant aggressor.

Example: An adult male calls 911 to report that his girlfriend assaulted him. When a police officer arrives, he sees the male caller with a deep scratch on his face. The female, while visibly shaken, appears to be physically unharmed, although she claims that her boyfriend tried to strangle her. Without further inquiry, the police officer files a report, citing the female as the predominant aggressor, and arrests her.

Principle 6 in Practice

Law enforcement agencies should review and revise their policies and procedures as necessary, and provide specialized training to ensure that officers are capable of properly identifying the predominant aggressor.⁵⁷ Specifically, officers should be trained to consider and balance the following factors, among others, to determine whose account is corroborated by the evidence, but without relying on any one of these factors alone as determinative.⁵⁸

⁵⁴ *IACP Sexual Assault Incident Reports*, *supra* note 29, at 4-5; *IACP Model Policy on Investigating Sexual Assaults*, *supra* note 29, at 2-3.

⁵⁵ *NOPD CD*, *supra* note 33, at 55.

⁵⁶ *NOPD FL*, *supra* note 28, at 48.

⁵⁷ *NOPD CD*, *supra* note 33, at 58.

⁵⁸ *IACP Domestic Violence Issues Paper*, *supra* note 38, at 4-5.

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- A documented or undocumented history of domestic violence;
- Whether a party to the incident may have a motivation to be untruthful;
- Whether someone may have been injured as a result of the other person engaging in self-defense;
- The existence of past or present protective orders; and
- Criminal histories involving violence to others.

There may be instances where law enforcement officers respond to reports of sexual assault or domestic violence and find that they are unable to communicate with both parties. This may be because one party does not speak or understand English proficiently, or because one party has a hearing or speech disability. In these circumstances, officers should ensure that they are able to adequately communicate with both parties before determining the predominant aggressor.

Law enforcement agencies also should discourage dual arrests in domestic violence cases, wherever feasible as well as issue policies that delineate the limited circumstances under which dual arrests are permissible.⁵⁹ Arresting the wrong party or both parties increases the likelihood that the offender will act again, and discourages the victim from reporting future incidents. Further, dual arrests often result in children being taken into the custody of child protective services and may diminish children's trust in law enforcement.

Principle 7. Hold Officers Who Commit Sexual Assault or Domestic Violence Accountable⁶⁰

Law enforcement agencies strive to be seen by their communities as credible and legitimate authorities in enforcing the law and protecting public safety. If a law enforcement agency does not fully investigate reports of sexual assault, sexual misconduct and domestic violence perpetrated by its own officers, or fails to appropriately discipline officers when those allegations are substantiated, the legitimacy of that law enforcement agency may be called into question. This, in turn, may make victims more reluctant to report crimes of sexual assault and domestic violence, which undermines public safety by increasing the risk of future harm from offenders who are not held accountable by the criminal justice system.

⁵⁹ NOPD CD, *supra* note 33, at 58; IACP Domestic Violence Issues Paper, *supra* note 38, at 4; IACP Model Policy on Domestic Violence, *supra* note 29 at 5; Barbara J. Hart, *Arrest: What's the Big Deal*, 3 Wm. & Mary J. Women & L. 207, 207-210 (1997) (noting the importance of first responders being cognizant of the goals of domestic violence intervention because their perspective will influence all major decisions, including whether to arrest one or both parties).

⁶⁰ NOPD FL, *supra* note 28, at 92; Int'l Ass'n of Chiefs of Police, *Model Policy on Domestic Violence by Police Officers* 1 (2003) [hereinafter *IACP Model Policy on Domestic Violence by Police Officers*], available at <http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/DomesticViolencebyPolicePolicy.pdf>.

Principle 7 in Practice

To maintain public confidence, law enforcement agencies should develop policies and practices aimed at preventing and addressing on-duty sexual harassment and assault of members of the public by law enforcement officers. These policies should provide that, at a minimum, the agency will open an internal investigation whenever an allegation is made that an officer has engaged in sexual abuse, sexual misconduct or domestic violence, irrespective of whether the officer was acting in his or her official capacity at the time.⁶¹ In addition to opening an internal investigation, law enforcement agencies should refer allegations of officer misconduct involving potential criminal activity to the local prosecutor's office.⁶²

Principle 8. Maintain, Review and Act Upon Data Regarding Sexual Assault and Domestic Violence

Some law enforcement agencies may be under-investigating sexual assault or domestic violence reports without being aware of the pattern. For instance, in most jurisdictions, the reported rate of sexual assaults typically exceeds the homicide rate.⁶³ If homicides exceed sexual assaults in a particular jurisdiction, this may be an indication that the agency is misclassifying or under-investigating incidents of sexual assault. Similarly, studies indicate that almost two-thirds to three-quarters of domestic violence incidents would be properly classified as "assaults" in law enforcement incident reports.⁶⁴ Therefore, if the ratio of arrest reports for lesser offenses (e.g., disorderly conduct) is significantly greater than that for assaults, this may indicate that law enforcement officers are not correctly identifying the underlying behavior – i.e., they are classifying serious domestic violence incidents as less serious infractions, such as disorderly conduct.⁶⁵

Principle 8 in Practice

Law enforcement agencies should assess whether their jurisdictions are under-investigating sexual assault and domestic violence reports by examining their own jurisdiction's crime statistics, including statistics on other violent crimes in that

⁶¹ *IACP Model Policy on Domestic Violence by Police Officers*, *supra* note 59, at 2-3; Int'l Ass'n of Chiefs of Police, Nat'l Law Enforcement Policy Ctr., *Domestic Violence by Police Officers Concepts and Issues Paper 2*, 6-7 (2003) [hereinafter *IACP Domestic Violence by Police Officers Issues Paper*], available at <http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/DomesticViolencebyPolicePaper.pdf>.

⁶² *NOPD CD*, *supra* note 33, at 101-102; *IACP Model Policy on Domestic Violence by Police Officers*, *supra* note 59, at 3, 7; *IACP Domestic Violence by Police Officers Issues Paper*, *supra* note 60, at 5, 9.

⁶³ FBI Crime in the United States 2018, Uniform Crime Reports online Table 7, available at <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-7> (last visited May 20, 2020) (showing that for 2018, there were 16,214 murders nationwide; by comparison, there were 139,380 rapes); FBI, Crime in the United States 2018, Uniform Crime Reports online Table 16, available at <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-16> (showing that in 2018, the rate of murder and nonnegligent manslaughter per 100,000 inhabitants was 5.0, while the rate of rape per 100,000 inhabitants was 44.4).

⁶⁴ Klein, *supra* note 22, at 9 (citing multiple studies).

⁶⁵ *Id.*

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jurisdiction.⁶⁶ Law enforcement agencies should gather and maintain accurate data on sexual assault and domestic violence reports in order to conduct such diagnostic reviews.⁶⁷ Law enforcement agencies also should analyze such data in order to identify trends in the rates of sexual assault and domestic violence in their communities, to assess the effectiveness of their response to these crimes, and to make decisions about their response to and investigation of these crimes. For example, a law enforcement agency might rely on data on sexual assault and domestic violence reports to determine whether it has an appropriate number of officers assigned to handle crimes of sexual assault and domestic violence and to determine the appropriate level of specialized training about sexual assault and domestic violence for its officers. Collecting, analyzing and acting upon data is key to ensuring that law enforcement agencies are operating lawfully and effectively.

Eliminating gender bias in policing practices is an integral component of combating sexual assault and domestic violence, and can have a real and immediate effect on the safety of individual victims. A swift and meaningful criminal justice response to violence against women and LGBTQ individuals is critical for preventing future victimization and arresting offenders to prevent repeat abuses. Further, an appropriate law enforcement response not only fosters victim confidence, it also makes victims more likely to report future incidents.

This guidance is entirely consistent with ABA positions on gender and LGBTQ civil rights and equality, and prosecutorial and law enforcement standards. The ABA should embrace this guidance as a well-informed and responsible statement of best practices.

Respectfully submitted,

Andrew King-Ries
Chair, Commission on Domestic & Sexual Violence

Kim T. Parker
Chair, Criminal Justice Section

Wendy Mariner
Chair, Section of Civil Rights and Social Justice

August 2020

⁶⁶ *NOPD CD*, *supra* note 33, at 54-60.

⁶⁷ *Missoula MOU*, *supra* note 29, at 10-11; *NOPD CD*, *supra* note 33, at 57; *IACP Model Policy on Domestic Violence*, *supra* note 44, at 2-3.

GENERAL INFORMATION FORM

Submitting Entities: Criminal Justice Section
 Section of Civil Rights and Social Justice
 Commission on Domestic & Sexual Violence

Submitted By: Kim Parker, Chair, Criminal Justice Section
 Wendy Mariner, Chair, Section of Civil Rights and Social Justice
 Andrew King-Ries, Chair, Commission on Domestic & Sexual Violence

1. Summary of the Resolution(s). This resolution adopts the eight principles and accompanying commentary set forth in U.S. DOJ guidance regarding gender bias in policing, and urges law enforcement agency to adopt, provide training on, and monitor compliance with the principles.
2. Approval by Submitting Entity. CRSJ council approved this resolution on 4/10/2020. CDSV approved this resolution on 3/25/2020. CJS council approved this resolution on 4/10/2020.
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 Association has many policies addressing gender bias in law and related professions (*see, e.g.,* 91A10D; 95M116C; 95A127; 96M107C; 02A104B; 16M107; 16A115; 18A105; 19A115E); none would be adversely affected by adoption of this resolution.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a
6. Status of Legislation. (If applicable) n/a
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, supporting entities, together with GAO, can advocate for law enforcement agency change as described.
8. Cost to the Association. (Both direct and indirect costs) None.
9. Disclosure of Interest. (If applicable) None.
10. Referrals.
 Criminal Justice Section
 Section of Civil Rights and Social Justice
 Section of Family Law
 Health Law Section
 Litigation Section

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Science & Technology Law Section
Tort Trial & Insurance Practice Section
Government and Public Sector Lawyers Division
Solo, Small Firm and General Practice Division
Judicial Division
Law Student Division
Young Lawyers Division
Standing Committee on Legal Aid and Indigent Defense
Standing Committee on Gun Violence
Commission on Homelessness & Poverty
Commission on Immigration
Commission on Law & Aging
Commission on Sexual Orientation and Gender Identity
Commission on Women
Commission on Youth at Risk
Center for Pro Bono
Center for Human Rights
National LGBT Bar Association
National Native American Bar Association
National Association of Women Judges
National Association of Women Lawyers
National Conference of Women's Bar Associations

11. Contact Name and Information prior to the Meeting. *Please include name, telephone number and e-mail address.*

Vivian Huelgo, 202-662-8637, vivian.huelgo@americanbar.org

12. Contact Name and Information. *Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting.*

Andrew King-Ries, 406-214-5445, Andrew.KingRies@mso.umt.edu

EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution adopts the eight principles and accompanying commentary set forth in U.S. DOJ guidance regarding gender bias in policing, and urges law enforcement agency to adopt, provide training on, and monitor compliance with the principles.

2. Summary of the Issue that the Resolution Addresses

Gender bias in policing practices is a form of discrimination that may result in law enforcement agencies providing less protection to certain victims on the basis of gender, failing to respond to crimes that disproportionately harm people of a particular gender or offering reduced or less robust services due to a reliance on gender stereotypes. Gender bias, whether explicit or implicit, conscious or unconscious, may include police officers misclassifying or underreporting sexual assault or domestic violence cases, or inappropriately concluding that sexual assault cases are unfounded; failing to test sexual assault kits; interrogating rather than interviewing victims and witnesses; treating domestic violence as a family matter rather than a crime; failing to enforce protection orders; or failing to treat same-sex domestic violence as a crime. In the sexual assault and domestic violence context, if gender bias influences the initial response to or investigation of the alleged crime, it may compromise law enforcement's ability to ascertain the facts, determine whether the incident is a crime, and develop a case that supports effective prosecution and holds the perpetrator accountable.

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

Promoting well-informed and responsible guidance such as this will help to change the culture that prevents so many cases from being reported, properly investigated, or zealously prosecuted. Eliminating gender bias in policing practices is an integral component of combating sexual assault and domestic violence, and can have a real and immediate effect on the safety of individual victims. A swift and meaningful criminal justice response to violence against women and LGBTQ individuals is critical for preventing future victimization and arresting offenders can deter repeat abuses. Further, an appropriate law enforcement response not only fosters victim confidence, it also makes victims more likely to report future incidents.

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

None.

**AMERICAN BAR ASSOCIATION
CENTER FOR HUMAN RIGHTS
REPORT TO THE HOUSE OF DELEGATES**

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges all national governments to
2 observe, respect, and protect the independence of the International Criminal Court;
3
4 FURTHER RESOLVED, That the American Bar Association condemns threats by
5 governments to the International Criminal Court and its officers and personnel in the
6 performance of their duties.

REPORT

“There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance.”

--*Benjamin B. Ferencz, Former Nuremberg War Crimes Prosecutor*

Since 1978, the American Bar Association has supported the establishment of a permanent international criminal tribunal to ensure accountability for mass atrocities.¹ Pursuant to that longstanding commitment, a delegation led by the ABA President participated in the 1998 Rome Conference that resulted in such a tribunal, the International Criminal Court (the “ICC” or the “Court”). Since the ICC’s formal creation under the Rome Statute of 1998 (which is also a multi-lateral treaty among 123 nations, including many U.S. allies), and the latter’s entry into force, in 2002,² the ABA has supported worldwide ratification of (or accession to) the treaty, including by the United States (which remains a non-party).

Subsequent ABA policies variously have urged greater U.S. engagement and cooperation with the ICC (even in the absence of ratification or accession).³ And, in 2012, with seed funding from The Planethood Foundation, founded by former Nuremberg War Prosecutor Benjamin B. Ferencz, the ABA Center for Human Rights established an “ICC Project” (now a joint project with the Criminal Justice Section under a broader “Atrocity Crimes Initiative”) to effectuate this strong body of ABA policy supporting the ICC in service of ABA Goal IV: Advance the Rule of Law, and its objective of “hold[ing] governments accountable under law.”

Given the ICC’s unique status as the only permanent judicial institution with a mandate to investigate and prosecute individuals for genocide, crimes against humanity, war crimes, and aggression, its initial growth and success as a new court since 2002 understandably have been uneven. While there have been numerous important successes,⁴ there have also been challenges: severely limited funding has led to

¹ Resolution 102C, *adopted* Aug. 1978. For a compendium of ABA policies on the ICC, see “ABA Policy on the ICC” (hereafter “ABA compendium”), available at <https://www.aba-icc.org/the-aba-icc-project/aba-policy-on-the-icc/>. Policies have, for example, urged the United States to support referrals of Sudan and Myanmar (177A (Midyear Meeting 2005) and 120 (Annual Meeting 2019) respectively), encouraged greater US cooperation with the Court’s investigations and participation in the Assembly of States Parties (108A (Annual meeting 2008)), and urged Congress to pass domestic crimes against humanity legislation (300 (Annual Meeting 2013)).

² The Rome Statute was adopted in 1998 by 120 states (the United States was one of seven states that voted in opposition despite playing an extensive role in negotiating the treaty). As of May 2020, there are 123 States Parties to the Rome Statute. The vast majority of ratifications happened within the first five years of the treaty’s existence, allow the Court to become operational in 2002 and reflecting an intense global desire to ensure accountability and prevent impunity for atrocity crimes.] Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, ASIL Insights 3:10 (Aug. 11, 1998); *States Parties: Chronological List*, Int’l Criminal Ct. Assemb. of States Parties, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20%20chronological%20list.aspx.

³ ABA compendium, *supra* n.1.

⁴ See Jane Stromseth, *Is the ICC Making a Difference?*, JUST SECURITY (Dec. 6, 2017), <https://www.justsecurity.org/47717/icc-making-difference/> (arguing the ICC has built a track record of

administrative inefficiencies and delays in completing trials and announcing verdicts, and inconsistent cooperation from States has limited the execution of arrest warrants and apprehension of suspects, for example. This year the ICC, in anticipation of its 20th anniversary in 2022, has undertaken a thorough institutional review, inviting all stakeholders, including civil society entities in the United States, to weigh in regarding how the Court can be improved across a broad range of topics. The ABA is participating in that review through the ICC Project and, in April 2020, submitted formal Comments to the Group of Independent Experts, which has been tasked with conducting and making recommendations for a large portion of the review.

The federal government, meanwhile, despite having been a leading force in the ICC's creation and playing an important role in the 1998 drafting of the Rome Statute/Treaty and subsequent legal framework, to date has resisted ratification due largely to concern about a potential for politically motivated prosecutions of U.S. personnel. While noting such concerns, President Clinton signed the Rome Statute on the last day it was open for signature, he chose not to send the treaty to the Senate for ratification at the time.⁵ The Bush administration initially disavowed Clinton's signature but later came to cooperate effectively (albeit indirectly) with the Court in response to the genocide in Darfur, and softened its policies towards the Court over time.⁶ The Obama administration cooperated with the Court, including by facilitating the transfer of two suspects to the ICC, supporting Security Council referral of the situation in Libya to the Court (the United States supported a referral of the situation in Syria as well but it was ultimately vetoed), participating in the ICC Assembly of States Parties as an observer, and expanding the U.S. War Crimes Rewards Program to allow rewards regarding ICC fugitives (among others).⁷ In no case, however, did the Clinton, Bush, or Obama administrations challenge the ICC's independence as an international judicial body by seeking to impede the Court's operations, or threaten Court personnel, or impair the ICC's ability to carry out its global mission *per se*.⁸

justice for atrocity crimes, catalyzed domestic accountability processes, empowered civil society advocacy, and strengthened prospects for deterrence and prevention); James A. Goldston, *Argument: Don't Give Up on the ICC*, FOREIGN POLICY (Aug. 8, 2019), <https://foreignpolicy.com/2019/08/08/dont-give-up-on-the-icc-hague-war-crimes/>; HUMAN RIGHTS WATCH, PRESSURE POINT: THE ICC'S IMPACT ON NATIONAL JUSTICE LESSONS FROM COLOMBIA, GEORGIA, GUINEA, AND THE UNITED KINGDOM (2018); Rosemary Gray, *Gender-Based Crimes: A Monumental Day for the ICC*, INTLAWGRRLS (July 8, 2019), <https://ilq2.org/2019/07/08/gender-based-crimes-a-monumental-day-for-the-icc/>.

⁵ See, e.g., "Excerpt: Position on International Criminal Court Clarified," Press Briefing by Richard Boucher, U.S. Dep't of State Spokesman (Jan. 2, 2001), https://b14399d4-3c15-4ce4-8e6c-3f7884fb2110.filesusr.com/ugd/e13974_97394e86d5634f55806d7f3905ccfe85.pdf.

⁶ See e.g., Amb. Clint Williamson, *A New War With the International Criminal Court*, THE HILL (Sept. 18, 2018), <https://thehill.com/opinion/criminal-justice/406722-a-new-war-with-the-international-criminal-court> (describing actions taken later in the Bush administration to reverse earlier policies and pursue a working relationship with the Court).

⁷ *Obama Administration*, AM. COALITION FOR THE INT'L CRIMINAL CT., <https://www.amicc.org/obama-administration>.

⁸ The American Servicemembers Protection Act, enacted during the Bush administration, contemplates various actions and penalties against other countries that cooperate with the ICC where U.S. personnel are involved. None, however, addresses the Court's functioning as an independent judicial institution. American Servicemembers' Protection Act, 22 U.S.C. §§ 7421–7433 (2002). For more on the American Servicemembers' Protection Act, including changes to its restrictions over time, see Julian Bava and Kiel

The Trump administration, by contrast, has been hostile to the ICC, and has sought through official policy to hamstring the Court's independence. On September 11, 2018, then-National Security Advisor John Bolton threatened immigration, financial, and criminal sanctions against the ICC were it to proceed with an investigation of alleged war crimes by American armed forces and the CIA in Afghanistan,⁹ declaring further that ICC judges and prosecutors would henceforth be barred from entering the US, and that their funds in the US would be targeted. "We will prosecute them in the US criminal system. We will do the same for any company or state that assists an ICC investigation of Americans," Bolton said.¹⁰ The following spring, the administration made good on Bolton's threat by revoking the travel visa of ICC Prosecutor Fatou Bensouda.¹¹

In response to this action, ABA President Bob Carlson issued this statement:

The American Bar Association is concerned over the policy announced last month by the United States government to restrict visas for certain officials of the International Criminal Court, a policy implemented last week by revoking the ICC Prosecutor's visa.

In the United States, the independence and impartiality of our justice system is foundational to our democracy and commitment to the rule of law. Although the United States is not a member of the ICC, barring the travel of legal professionals because of their work on behalf of this international tribunal sends the wrong message about the United States' commitment to those same principles in the pursuit of international justice and accountability.

The ABA urges the State Department to immediately reverse this policy decision and to refrain from taking actions against legal professionals based solely on their work on behalf of the ICC.¹²

On March 5, 2020, the ICC Appeals Chamber reversed a lower chamber decision and authorized a formal investigation of alleged war crimes in Afghanistan, potentially to

Ireland, *The American Servicemembers' Protection Act: Pathways to and Constraints on U.S. Cooperation with the International Criminal Court*, 12 EYES ON THE ICC 1 (2016), https://www-cdn.law.stanford.edu/wp-content/uploads/2016/07/Bava_Ireland_Article_FINAL.pdf.

⁹ "John Bolton threatens ICC with US sanctions," BBC, Sept. 11, 2018, *available at* <https://www.bbc.com/news/world-us-canada-45474864>. The Afghanistan investigation also encompasses alleged crimes committed by Afghan National Security Forces and the Taliban and affiliated groups. For more information, see *Afghanistan*, INT'L CRIMINAL CT., <https://www.icc-cpi.int/afghanistan>.

¹⁰ "John Bolton threatens ICC with US sanctions," BBC, Sept. 11, 2018, *available at* <https://www.bbc.com/news/world-us-canada-45474864>.

¹¹ "US revokes visa of International Criminal Court prosecutor," BBC, Apr. 5, 2019, *available at* <https://www.bbc.com/news/world-us-canada-47822839>.

¹² "Statement of ABA President Bob Carlson Re: Restricting International Criminal Court officials' visas," April 9, 2019, *available at* <https://www.americanbar.org/news/abanews/aba-news-archives/2019/04/statement-of-aba-president-bob-carlson-re--restricting-internati/>.

encompass actions by American personnel.¹³ Secretary of State Mike Pompeo, on March 17, 2020, responded to the decision with a direct attack upon the ICC itself, while extending it to named staff persons of the Court. In his media remarks announcing these measures, Mr. Pompeo stated:

Turning to the ICC, a so-called court which is revealing itself to be a nakedly political body:

As I said the last time I stood before you, we oppose any effort by the ICC to exercise jurisdiction over U.S. personnel. We will not tolerate its inappropriate and unjust attempts to investigate or prosecute Americans. When our personnel are accused of a crime, they face justice in our country.

It has recently come to my attention that the chef de cabinet to the prosecutor, Sam Shoamanesh, and the head of jurisdiction, complementarity, and cooperation division, Phakiso Mochochoko, are helping drive ICC prosecutor Fatou Bensouda's effort to use this court to investigate Americans. I'm examining this information now and considering what the United States' next steps ought to be with respect to these individuals and all those who are putting Americans at risk.

We want to identify those responsible for this partisan investigation and their family members who may want to travel to the United States or engage in activity that's inconsistent with making sure we protect Americans.

This court, the ICC, is an embarrassment. It's exposing and – we are exposing and confronting its abuses, and this is a true example of American leadership to ensure that multilateral institutions actually perform the missions for which they were designed.¹⁴

Setting aside the fact that, when U.S. personnel accused of a crime “face justice in our country,” the ICC has no jurisdiction over the U.S. and therefore poses no “threat” to U.S. personnel,¹⁵ Sec. Pompeo's statement nonetheless arguably represents an attack on international and national judicial independence writ large, thus setting a negative

¹³ ‘Unanimous’ ICC gives go-ahead to probe Afghanistan alleged war crimes,” UN News, Mar. 5, 2020, available at <https://news.un.org/en/story/2020/03/1058741> (emphasis added); *Afghanistan: ICC Appeals Chamber Authorises the Opening of an Investigation*, INT'L CRIMINAL CT. (Mar. 5, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1516>

¹⁴ “Secretary Michael R. Pompeo's Remarks to the Press,” U.S. Department of State transcript, Mar. 17, 2020 (emphasis added), available at <https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-6/>.

¹⁵ Under the Rome Statute's principle of “complementarity,” the ICC has jurisdiction to investigate and prosecute atrocity crimes only where the accused is otherwise subject to the Court's jurisdiction and the national government of the accused is unable or unwilling to investigate and prosecute the allegations itself. See Rome Statute of the International Criminal Court arts. 1, 17, July 17, 1998, 2187 U.N.T.S. 90.

example for the rest of the world.¹⁶ In a time when democracy is in retreat globally,¹⁷ such an attack against the ICC and its professional staff by the United States — historically the leading exemplar of democracy and a just rule of law, of which an independent judiciary is an indispensable part — gives fodder to those who cite such attacks as a legitimate basis to undermine judicial independence in their countries. Instead, America's core values of liberty, justice, and the rule of law are better served by adhering to the procedures set forth in the Rome Statute, which delineate clearly the ICC's actual jurisdiction and firmly provide ample safeguards against any concern about politically motivated prosecutions.¹⁸

In response to these recurrent assaults on the ICC, the ABA reaffirms its support of the independence of the ICC, consistent with the ABA's commitment to judicial independence, both domestically and internationally, and condemns attacks by governments on the ICC, its officers, and personnel.

Respectfully submitted,

Hon. James A. Wynn, Jr.
Chair, Center for Human Rights

August 2020

¹⁶ Matt Apuzzo & Marlise Simons, *U.S. Attack on I.C.C. Is Seen as Bolstering World's Despots*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/world/europe/icc-burundi-bolton.html>.

¹⁷ With regard to Poland, for example, the ABA has been resolute in condemning recent and recurring legislative attacks upon judicial independence, issuing statements by Presidents Perry Martinez, Carlson, Bass, and Klein, and undertaking presidential visits to Poland to support resistance to such laws by the Warsaw Bar and other advocates. See, e.g., "Poland: Erosion of Judicial Independence Continues," ABA Center for Human Rights, available at https://www.americanbar.org/groups/human_rights/reports/poland--erosion-of-judicial-independence-continues/.

¹⁸ See ABA Policy 105C (Annual Meeting 2001) for the ABA's original analysis of the Rome Statute's protections (and recommendation that the United States therefore accede to the Rome Statute). See also, Monroe Leigh, *Comparison: The U.S. Constitution vs. The International Criminal Court's Rome Statute*, AM. COALITION FOR THE INT'L CRIMINAL Ct., https://b14399d4-3c15-4ce4-8e6c-3f7884fb2110.filesusr.com/ugd/e13974_1ac1df43c05c435e904ce556bb351eb8.pdf.

GENERAL INFORMATION FORM

Submitting Entity: Center for Human Rights (CHR)

Submitted By: Hon. James A. Wynn, Jr., Chair

1. Summary of Resolution(s).

The resolution reaffirms the Association's commitment to the independence of the International Criminal Court ("ICC"), urges all national governments to observe, respect, and protect the independence of the ICC, and condemns governmental attacks on the ICC and its personnel.

2. Approval by Submitting Entity.

The resolution was approved by the CHR Board on May 4, 2020.

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?

As explained in the report, the ABA has numerous policies supporting the ICC since 1978. This resolution is distinct from yet consistent with and advances those prior policies (which are available here: <https://www.aba-icc.org/the-aba-icc-project/aba-policy-on-the-icc/>). Relevant policies include:

- 01M103C
- 01A105C
- 05M177A
- 06A120B
- 08A108A
- 19A120

The ABA also has policies reaffirming its commitment to protect and defend the independence of judicial and legal professionals, the latest of which is 106A (Annual Meeting 2018).

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

N/A

6. Status of Legislation. (If applicable)

N/A

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

If adopted as policy, the resolution will enhance ABA advocacy of the ICC's judicial independence and of the ability of its officers and personnel to perform their professional duties without undue interference.

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

If adopted, the resolution will incur no additional costs to the Association.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals. The Resolution with Report has been referred to the:

Section of Civil Rights and Social Justice
 Section of International Law
 Criminal Justice Section
 Judicial Division
 Center for Public Interest Law

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

Michael Pates, CHR Director
 American Bar Association
 1050 Connecticut Ave, NW, Fourth Floor
 Washington, DC 20036
 202/662-1025 / michael.pates@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.*)

Hon. James A. Wynn, Jr., CHR Chair
 American Bar Association
 1050 Connecticut Ave, NW, Fourth Floor
 Washington, DC 20036

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240/476-1870 (CHR Director)

jim_wynn@ca4.uscourts.gov; Crystal_Wright@ca4.uscourts.gov (Assistant)

EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution reaffirms the Association's commitment to the independence of the International Criminal Court ("ICC"), and urges all national governments to observe, respect, and protect the independence of the ICC, and condemns governmental attacks on the ICC and its personnel.

2. Summary of the Issue that the Resolution Addresses

As illustrated in the report, the U.S. Secretary of State recently imposed visa restrictions against ICC officials and threatened financial and criminal sanctions against them and members of the Court's professional staff, which threatens the ICC's independence as a duly established international tribunal.

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

While taking no position on the merits of any case, the resolution will reaffirm the Association's commitment to the ICC's independence by urging all governments to observe, respect, and protect the ICC's independence and refrain from attacks on its officers and personnel.

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

None received thus far.

**AMERICAN BAR ASSOCIATION
COMMISSION ON YOUTH AT RISK
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON IMMIGRATION**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association recognizes that effective reforms
2 of legal systems that affect the fundamental rights of children and youth –
3 including, but not limited to the child welfare, immigration, and juvenile justice legal
4 systems – cannot be accomplished without active participation by individuals who
5 experienced those systems as children and youth;

6
7 FURTHER RESOLVED, That the American Bar Association encourages
8 attorneys, judges, advocates, legislators, bar associations, and law schools to
9 promote effective, ongoing, and authentic engagement in legal system reform and
10 advocacy efforts by individuals who have experienced those systems as children
11 and youth;

12
13 FURTHER RESOLVED, That the American Bar Association encourages
14 attorneys, judges, advocates, legislators, bar associations, and law schools to
15 remove barriers to that engagement;

16
17 FURTHER RESOLVED, That the American Bar Association urges law schools,
18 bar associations, law firms, and other professional organizations to create
19 pathways for individuals with lived experience in legal systems that affect children
20 and youth to pursue and succeed in legal and advocacy careers, both within youth-
21 serving systems and more broadly in the legal profession; and

22
23 FURTHER RESOLVED, That the American Bar Association calls on organizations
24 focused on improving legal systems that affect children and youth to incorporate
25 individuals who experienced those systems as children into leadership positions,
26 including recruiting them as staff members, managers, partners, or board
27 members.

REPORT

Introduction

Effective reform of legal systems that affect children and youth cannot be accomplished without equal partnership by the very individuals whose lives have been shaped in those systems. The concept of engaging those most directly affected by a system in the process of reforming it is referred to as “human centered design”¹ and has been used widely in other public and private sector industries.² As applied to the children’s law field, this approach is both critical and challenging. This Resolution is designed to call on different members of the legal community—attorneys, judges, advocates, legislators, law schools and bar associations—to engage in this human centered design approach and to meet the challenges inherent in that process in the context of reforming legal systems that affect children and youth.

Specifically, this Resolution encourages members of the legal community to partner with organizations that have active youth engagement programs to ensure individuals with lived experiences in child and youth oriented legal systems have a supportive environment when working to effectuate system reform. The Resolution also encourages all members of the legal community to create pathways for individuals with lived experience to pursue and succeed in legal and advocacy careers in the legal profession. Finally, the Resolution encourages organizations focused on child welfare, juvenile justice and immigration reform to incorporate individuals who experienced those systems as children as part of their staff and board leadership.

Background

To inform this policy, the Commission on Youth at Risk sought input from organizations across the country who have successful youth engagement programs. Although these programs vary in substance and structure, several themes emerged as consistent components:

- a recognition that youth voice is expert voice;
- equal partnerships between youth and adults in shaping system reform;
- ongoing access to supportive services, including peer-to-peer support, for youth engaged in the process;
- trauma informed training for adults to work effectively with young people;
- education on the implications of sharing personal experiences publicly;
- regular reflection and program improvement informed by youth and adults;
- an understanding that youth engagement programs require risk-taking and open-minded leadership.

¹ Georgetown University Beeck Center, *Helping Policy Makers Put People First*, published May 11 by Alberty Rodriguez Alvarez, Dana Chisnell and Vivian Graubard available at <https://beeckcenter.georgetown.edu/helping-policy-makers-put-people-first-a-step-by-step-tool-for-user-centered-policy-making/>.

² See Code for America at <https://www.codeforamerica.org/practices/user-centered-design>.

This policy and report are not intended to create a roadmap for developing new youth engagement programs. Rather, this policy and report are designed to help the legal community – including attorneys, judges, legislators, bar associations, and law schools – understand the importance of working thoughtfully with organizations that have youth engagement expertise. When youth engagement is conducted informally without the support of experienced organizations, the risks of unintended consequences, such as misappropriation of story and tokenism, are high. These outcomes both harm the individuals involved and do not lead to effective system reform.

By way of example, during the research component of developing this policy, the Commission learned of a story where a young person who had been involved in the foster care system as a child was asked to share her personal story to help an organization fundraise after she interned there for the summer in a professional capacity. The individual had never authorized her story to be used in the organization's advocacy or other materials and was surprised and hurt by the experience. This is a prime example of *misappropriation of story*. The Commission also learned about a young person who was asked to testify before a legislative body to “share his story” but then felt used when that story seemed to be only for the purpose of producing an emotional reaction but no legislative efforts toward system change resulted. This is a prime example of *tokenism*.

Programs that specialize in youth engagement understand how to prepare for and address risks of harm like tokenism and misappropriation of story. These organizations put “youth at the center of articulating policies and determining the best ways to get those priorities addressed” they do not simply “invit[e] a young person to speak to a group of practitioners or policy makers, or giv[e] youth a role in a pre-determined agenda.”³ Working with organizations that specialize in youth engagement also provides benefits for all participants who may need to trouble-shoot challenges in the process. For example, this expertise is valuable for youth if and when they have negative experiences and need outlets to reflect on the impact. This expertise is also valuable for adults who may need help understanding how to navigate boundaries in professional relationships with youth, how to have patience to do this work well, and how to ask for help and reassurance when they themselves feel like they need additional support.

This policy also provides guidance on how the legal community can improve its own efforts to support pathways for youth with legal system experience to pursue careers in the legal field. This requires commitment to addressing challenges in both the law school and bar admissions processes. Finally, the policy addresses longer-term engagement opportunities by encouraging organizations that focus on youth legal system reform to incorporate individuals who have experience in those systems as part of their staff, board, or other leadership teams.

³ Korwin Consulting. (2011, December). *Youth Voice as a Strategy for Systems Change: An Evaluation of the Zellerbach Family Foundation Youth Voice Initiative*. <https://zff.org/wp-content/uploads/2019/05/youth-voice.pdf>

I. Dual Benefits of Applying Human Centered Design

Minors and some young adults under legal system custody – including, but not limited to the child welfare, immigration, and juvenile justice systems – are required by law to rely on these systems to make major life decisions on their behalf related to place of residence, education, and health and mental health care. As youth approach adulthood, various state and federal laws require these systems to provide youth with opportunities to voice their own preferences in decision-making processes. However, it is the systems themselves that hold ultimate decision-making power, exerting tremendous control over the lives of children and youth. This dynamic often leads youth to feel powerless over their life trajectories. That sense of powerlessness only compounds when youth exit a legal system and find they are unable to share their viewpoints about how the system affected their lives. This lack of agency in effectuating system reform is harmful for the individuals involved. A lack of youth voice in legal system reform is also detrimental to the effectiveness of any reform efforts. As the National League of Cities has explained “[e]ven well-intentioned efforts to work for youth – by ‘protecting’ them from perceived threats of by ‘rescuing’ those who are already in jeopardy – can prevent us from recognizing the importance of working with youth to identify positive solutions and build stronger communities.”⁴

a. Youth Empowerment Benefits

In contrast to the disempowerment that young people often experience as a part of juvenile justice, immigration, or child welfare systems, “involving young people in the policy-making process can empower youth and build their strengths, help policymakers view youth as a resource to inform their decisions, and result in policies and priorities that are more relevant to the youths’ lives.”⁵ Youth engagement in system reform is good practice for the young people involved because it helps them process their own experiences and effectuate change for others.⁶ The process also helps young people learn skills to better advocate for themselves and their legal rights in these systems.⁷

b. System Reform Benefits

⁴ National League of Cities & Institute for Youth, Education, and Families. (2002). *Action Kit for Municipal Leaders: Promoting Youth Participation – Issue #3*. Washington, DC: National League of Cities. Retrieved online at <https://www.nlc.org/resource/promoting-youth-participation-action-kit>

⁵ Martin, S., Pittman, K., Ferber, T., McMahon, A. (2007, July). *Building Effective Youth Councils: A Practical Guide to Engaging Youth in Policy Making*. Washington, D.C.: The Forum for Youth Investment.

⁶ The U.S. Department of Health and Human Services (HHS) Administration for Children and Families (ACF) Information Memorandum [ACYF-CB-IM-19-03](#) (“Youth voice and engagement in planning and decision-making are widely regarded as best practices in meeting the developmental needs of young people in foster care.”)

⁷ Masseill, B., & Bergan, J. (2018). *The Role of Youth-Run Organizations in Improving Services and Systems for Youth and Young Adults: A Commentary on the State of the Science*. Portland, OR: Research and Training Center for Pathways to Positive Futures, Portland State University. (“Young people point to these roles and activities as a source of increased confidence and self-esteem, as well as an opportunity to learn new skills, including organizational skills, communication and group skills, and a variety of employment-related skills.”)

Similarly, youth engagement in system reform is good practice for policymakers, administrators, and systems themselves. Policymakers who have partnered with youth often express that they gained an expanded point of view on an issue by hearing youth input on how that system is perceived and understood from a young person's perspective. One organization that participated in the Commission's policy development process shared an example where youth were invited by a county to shape local foster care reform. Throughout the process, youth focused repeatedly on their concern about the community's "lack of a centralized, youth-orientated location," which made it difficult to access critical resources. In partnership with this group of youth advocates, the community secured a facility, crafted a unique name and mission statement, designed a program plan, and worked with county officials to identify funding for the site. Since its opening six years ago, this center has created community-wide change in the foster care system. As the organization that shared this story explained, the main concept in youth engagement is "do not assume to know what the young people in the community need in order to be successful; instead, ask them and then empower them to build a service delivery model that is tailored to their specific needs."

c. Model Human Centered Design Programs

System reform engagement can be conducted with youth who are currently involved in a legal system, youth with previous experience, or a combination of both. In California, state law mandates "the participation of current and former foster youth in the development of state foster care and child welfare policy" and directs the state to contract with California Youth Connection – a statewide nonprofit organization that trains and empowers youth and communities to "transform the foster care system." This public-private partnership model of youth engagement is effective and has been replicated and adapted in a number of other states, leading to the passage of dozens of state laws and practice reforms that improve outcomes for children in foster care.

Another example arose when Los Angeles County established its first Youth Commission, consisting of 15 participants aged 18 to 26 with lived experience in the child welfare and juvenile justice systems. The Commission will be responsible for overseeing county departments, providing policy and reform recommendations, producing an annual youth report card evaluating county performance, and having direct access to the Board of Supervisors. The Commission also has the power to audit county department budgets.

This Resolution encourages members of the legal community – including attorneys, judges, and legislators – who seek to advocate for legal system reform in areas that affect youth to consider incorporating similar legislative requirements for youth participation into their own state and local laws. While each jurisdiction may take different approaches to engaging individuals with lived experience in these systems, all will benefit from the value of doing so.

II. **Legal Community Roles Promoting Authentic Engagement**

The legal community can play an important role facilitating authentic youth engagement by ensuring individuals with experience in legal systems as youth are not asked to share their stories in a vacuum. Rather, when the legal community seeks to use personal stories to illustrate the importance of system reform it is critical to work with the owner of that story as a partner in the process. That partnership includes: preparation, training, and ongoing support.

a. Authentic Engagement Requires Preparation

The engagement process should allow individuals with lived experience to participate as equals, which requires all organizations seeking to engage youth in system change efforts to make an intentional commitment to that partnership before it begins. One organization describes this as “culture building” within an institution to create the necessary environment for genuine power-sharing in decision-making and agenda setting. The culture building approach requires commitment from staff and board members. As another contributing organization explained, that means preparing for conflict resolution between advocates and staff or board members who may not be trained on including youth in leadership roles.

When planning for meetings or presentations youth must be engaged in developing the program agenda and plans for structuring the event. When setting substantive goals for the agenda, members of the legal community should not reach out to youth engagement organizations asking for a young person who fits that pre-written script. That is not how genuine engagement works. Rather, the process of engagement requires partnership with the young person to shape an event's substance and plan for how to deliver key messages.

This issue came up in our own organization at the ABA recently when we were asked to help identify a young person who could speak about the experience of reunifying with her parent in the foster care system. We struggled with this request. Although there are many wonderful stories of reunification, we wanted to be sure to engage with a person who could help shape the intended message and who had the support that he or she needed to understand what was being asked and to make decisions as an agent of change not an anecdote. Ultimately, we learned of a young woman who had already been working on cultivating a message about her reunification experience to shape system reform in partnership with a legal services organization in New Jersey. Because of the trust she had in that organization to help her prepare, she was able to join a panel of judges in the Senate. She and the attorney worked with the judicial panelists in advance planning calls to set the agenda and presentation goals collectively.

Logistics are also important, including scheduling meetings at times that are flexible for youth and do not conflict with school or work. To facilitate a young person's ability to participate in a meeting or convening, an organization should anticipate paying for travel-related costs directly or in advance. Many young people with legal system experience are supporting themselves and therefore cannot be asked to pay their own way to attend a professional meeting. Facilitating access to childcare can also be important for some

youth and adults who are young parents and may have additional challenges participating in events but also additional perspectives to share about system impact.

When members of the legal community partner with organizations to engage youth voice in system reform efforts they should make a commitment to compensate youth as the subject matter experts they are. This kind of compensation needs to reflect the value of the individual's professional expertise. It is not correct, for example, to pay honorarium to some speakers while providing a small stipend like a gift card to youth speakers.

b. Authentic Engagement Requires Training

It is also critical to adequately train all participants for the experience of engaging youth in system reform efforts. For example, youth must be provided with background information to understand all the elements of the issue before deciding how they may want to use their personal experience to contextualize it for an audience of policymakers. One of our contributing organizations addresses this training need by providing “one-on-one research support” through weekly meetings so participating youth are sufficiently briefed on the policy issues they are being asked to weigh in on during their professional child welfare internships.

In addition to content preparation, it is important to train youth for how to share, or not share, their deeply personal stories. One contributing organization trains Youth Advocates how to “strategically and safely share their experiences” so that they know how to contribute their personal experiences to a conversation while also safeguarding their right to privacy. For another organization, this includes training youth on when to say they do not want to share their story.

It is equally important for adults involved in system reform efforts to receive training on how to engage youth authentically as professional partners. Youth should not be expected to do all the “heavy lifting” for engagement to be successful. Adults must make efforts to meet youth where they are and to understand how to help youth achieve their own advocacy goals. Adults also have a responsibility to focus on helping youth understand their own strengths and leadership potential through system reform efforts.

c. Authentic Engagement Requires Ongoing Support to Participants

Particularly when engagement is ongoing – for example through participation in an advisory body, commission, or internship – an ongoing support system must be established to help youth navigate the process. One organization schedules regular check-ins for participants with staff to assess progress in the program and to meet participants' needs during the course of the program. Another organization has established an “emergency fund” available for youth partners so that staff can help meet a young person's needs without significant delays when necessary. Example uses include purchasing birth certificates and state identification cards that youth needed to access public benefits and employment opportunities. An approach to youth engagement that incorporates ongoing support ensures youth feel supported and respected throughout the

process of engaging in system reform. Ongoing support is not limited only to youth participants. Organizations regularly facilitating authentic youth engagement note that some of the most difficult challenges in the process – which can be easily overlooked – often occur in supporting adult participants.

Finally, programs can continually enhance their effectiveness by providing youth and adult participants the opportunity to evaluate their experience and the program and to provide recommendations for how to improve the engagement process. It is important for staff running engagement programs to conduct self-assessments as well, including participant feedback and reflection to ensure they are fulfilling their own obligations in the partnership role.

III. Legal Community Roles Removing Barriers to Engagement in Legal System Reform

The legal community can also advocate to remove barriers to that engagement by: building trust with young people; and establishing accountability and legal standards that protect against misappropriation and tokenism.

a. Trust is A Barrier to Authentic Engagement

Prior experience and power differentials can create significant challenges in a young person's sense of trust working with lawyers to effectuate legal system reform. For example, young people express frustration that their attorneys were focused only on telling them how to maintain “compliance” with requirements in the system and did not serve as true advocates. The same arises in the context of youth who believed their public defenders may have pushed them into taking a deal they didn't understand or didn't want. In other instances, some child welfare attorneys are tasked with representing a youth's best interest which may be in conflict with the youth's express interest creating another tension. Moreover, due to the existing lack of diversity in the legal profession and the over-representation of Black, Latino, and Indigenous youth in child welfare, immigration and juvenile justice legal systems – youth are often represented by attorneys who do not look like them and do not come from their backgrounds.⁸ This tension in both over and under representation adds to the complexity of building a trusting relationship with shared goals of system reform.⁹

It is important to ground any engagement in an understanding that the individual experience of being represented by counsel may not have been a positive one. Similarly, it is important to ground the engagement in a recognition that an attorney's perspective about a young person's experience in a legal system is not comprehensive. To address

⁸The Children's Bureau, Racial Disproportionality and Disparity in Child Welfare
https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf

⁹ American Bar Association, Diversity and Inclusion in the Law: Challenges and Initiatives
<https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/>

this trust barrier in the context of system reform work, members of the legal community must be prepared to begin the process of youth engagement by rebuilding relationships of trust. This includes listening carefully to youth perspectives on how to improve legal representation.

b. Lack of Accountability Is A Barrier to Authentic Engagement

Several youth engagement programs across the country address risks of misappropriation of story or tokenism through legal means like contracts. For example, one contributing organization creates group agreements at the beginning of convenings to ensure youth participants have complete control and autonomy over how and whether to share their own stories. Another organization's confidentiality policies were developed by youth themselves. Yet another organization ensures youth who participate in its advocacy program are fully briefed on image release policies and are not required to sign release forms to participate in the program.

A positive example of how these legal policies can protect against misappropriation comes from the Family Finding Project, which produced a video of a young man's experience searching for the relatives from whom he was separated while in the foster care system in Hawaii. The video of his experience is publicly available on YouTube but includes an important disclaimer that others are not allowed to use the video, including for training purposes, without the express consent of the individual. Contact information for the Family Finding organization (not the individual) is included to facilitate that process.

In addition to preventing misappropriation of stories, several organizations have specific policies and standards for helping youth engage with media in ways they control. For example, one contributing organization prepares youth by practicing saying "I'd rather not answer that" to ensure they feel empowered to say no when asked something they do not want to discuss. Meanwhile, another organization has developed a set of policies and standards around media engagement for youth which can include vetting reporter questions in advance, debriefing with the young person after an engagement, following up with a reporter if necessary and serving as an intermediary so that the young person does not need to share her own contact information.

Tackling these barriers also requires a concerted effort by adults to question before, during and after a youth engagement experience whether they have upheld the standards to which they seek to be accountable. This can include such questions as "Did I misuse the person's story?" or "Did I have permission to share those details?" This kind of self reflection can help help minimize the risk of inadvertent errors in the process.

III. Legal Community Efforts to Build Career Pathways for Individuals Who Experienced Legal Systems as Children or Youth

Individuals with lived experience in legal systems that affect children and youth—child welfare, juvenile delinquency, and immigration—are uniquely qualified to bring a realistic and humanized perspective to the law school classroom and legal profession. On the one

hand, these individuals understand on a personal level the massive responsibility and power the legal system can have on people's lives. On the other hand, racial and ethnic bias that result in disparate outcomes in these systems – including familial separation, entry into foster care, and harsher punishments in the juvenile delinquency system than similarly situated white youth and families – can all dissuade individuals from wanting to pursue a career in the legal field.¹⁰ For example, the legal professional may appear scary intimidating, and unappealing to those whose experiences have been traumatic. It is also challenging for youth who do not see themselves reflected in the attorney or judicial faces they encounter to visualize careers in the legal field.¹¹ Additionally, undocumented students, foster youth, and formerly incarcerated youth face additional barriers in their educational journeys, making high school and college graduation more difficult to attain and professional degrees like a J.D. especially challenging to attain.¹² These educational barriers can significantly impact accessibility to legal advocacy careers.

There are numerous steps that can effectuate the policies in this Resolution. The steps suggested below should be read, however, with an understanding that pipeline challenges present enormous hurdles and even after surpassing these hurdles individuals with legal system experience often face additional structural barriers to pursuing legal careers. It is incumbent on the legal profession to seek to address those structural barriers within our control.¹³

¹⁰ <https://www.burnsinstitute.org/what-is-red/>

¹¹For examples of recommendations to support for supporting system-involved youth and educations see John Burton Advocates for Youth's report, *Pipelines for Success: Supporting California Foster Youth from High School to Community College*, https://www.jbaforyouth.org/wp-content/uploads/2019/10/2019_ERP_Foster_Youth_Report-1.pdf; American Bar Association, Legal Center for Youth Justice and Education, Blueprint for Change, <https://jjeducationblueprint.org/>

¹² Courtney, M.E., Dworsky, A., Ruth, G., Havlicek, J., Perez, A., & Keller, T. (2007). Midwest evaluation of the adult functioning of former foster youth: outcomes at age 21. Chicago: Chapin Hall Center for Children (Children and youth in the foster care system face lower rates of high school graduation, college attendance and college graduation than the general population).

¹³For examples of recommendations to support for supporting system-involved youth and educations see John Burton Advocates for Youth's report, *Pipelines for Success: Supporting California Foster Youth from High School to Community College*, https://www.jbaforyouth.org/wp-content/uploads/2019/10/2019_ERP_Foster_Youth_Report-1.pdf; American Bar Association, Legal Center for Youth Justice and Education, Blueprint for Change, <https://jjeducationblueprint.org/>

a. Include “Lived Experience” in Diversity Statements

Law schools,¹⁴ the American Bar Association,¹⁵ State Bar Associations,¹⁶ and Law Firms make public commitments to diversity and inclusion. These commitments should extend to students and attorneys with lived experience. This is not only important in recruiting attorneys and advocates with lived experience, but also in retention. A study published in October 2016 by the American Psychological Association indicated that the manner in which a law firm communicated about its approach to diversity corresponded with attrition for attorneys in already underrepresented groups.¹⁷ Law schools, bar associations, and law firms should make the effort to have a much deeper understanding of diversity and inclusion issues and act to fulfill those public commitments.

b. Consider Changes to Law School Recruitment Applications

In order to implement diversity statements with fidelity, law schools should remove questions about prior system involvement from applications or provide much greater information and resources to help applicants with lived experience answer these questions and know that law school is still a viable option.

For example, the ABA’s admonition to law schools regarding standard 504(b),¹⁸ governing moral fitness to practice law, fosters a perception that allowing formerly juvenile justice system involved youth into law school may be a gamble because they may not pass moral character requirements when seeking to enter the profession.¹⁹ The way law schools inquire about system-involvement in their applications can also make it confusing as to whether individuals are required to disclose their history with the juvenile justice system, which can have a chilling effect on an individual’s decision to apply to law school.

¹⁴ See e.g. University of California Berkeley School of Law, *Faculty Admissions Policy*, <https://www.law.berkeley.edu/admissions/jd/applying-for-jd-degree/faculty-policy-regarding-admissions/>.

¹⁵ American Bar Association, *Commission on Racial and Ethnic Diversity in the Profession*, <https://www.americanbar.org/groups/diversity/DiversityCommission/>

¹⁶ See e.g., State Bar of California, *Promoting Inclusion and Diversity*, <https://www.calbar.ca.gov/About-Us/Our-Mission/Promoting-Diversity>

¹⁷ Kathleen Natly, *Do Law Firm Communications about Diversity and Inclusion Efforts Affect Retention of Attorneys in Underrepresented Groups?* <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2017/spring2017-0517-do-law-firm-communications-about-diversity-efforts-affect-retention-of-attorneys-in-underrepresented-groups/>

¹⁸ American Bar Association, Section of Legal Education and Admission to the Bar, *Managing Director’s Guidance Memo Standard 504*, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_guidance_s504_bar_admissions_qualifications.pdf

¹⁹ Stanford Law School, *Unlocking The Bar: Expanding Access to the Legal Profession for People with Criminal Records in California*, <https://www-cdn.law.stanford.edu/wp-content/uploads/2019/07/Unlocking-the-Bar-July-2019.pdf> (“[O]ne of the chief reasons law schools include moral character questions on their applications is that they are hoping to mirror state bars’ moral character requirements, and they are anticipating the particular information requests that state bar officials will make[...] In addition to anticipating state bars’ moral character requirements, admissions officers cited safety, liability concerns, and a desire to assess applicants’ judgment as reasons for asking about applicants’ criminal records”).

This can produce a significant barrier for youth interested pursuing system reform as lawyers.

Additionally, many law schools could improve pathways to legal careers by encouraging individuals who experienced legal systems as youth to apply to law school. For example, many schools ask applicants for admission if they would like to include an optional additional essay sometimes called a “Diversity Statement.” Schools often list characteristics should consider adding to the diversity of the class. Schools can consider adding “systems involvement,” or “legal status,” to the list of characteristics that might diversify their classes. Stanford Law asks applicants, if they would like the committee to consider how their “background, life and work experiences, advanced studies, extracurricular or community activities, culture, socio-economic status, sex, race, ethnicity, religion, sexual orientation, gender identity or expression, or other factors would contribute to the diversity of the entering class” they are invited to do so.²⁰

c. Adjust Bar Rules

Moral Character Determinations in of themselves create a barrier for some individuals with juvenile justice or immigration system involvement. For example, the California State Bar’s Moral Character application specifically requires disclosure of all convictions, including those that occurred in juvenile court.²¹ This is despite the fact that juveniles are adjudicated, not convicted. Law schools and bar associations can help address these barriers directly either through reforming character and fitness criteria or through providing greater clarity on the relevance of criminal history or the boundaries of what they do and do not need to share to diminish the chilling effect.

Lawyers can advocate for changes in their own State Bar, as has already happened in California, Florida, New York and New Jersey, to open their bars to DACA students.²² In the same vein, lawyers can also can also advocate that all questions on the Moral Character Determination Application asking about prior system juvenile legal system involvement or contact with law enforcement under the age of 18 be removed.

²⁰ Stanford Optional Diversity Statement: <https://law.stanford.edu/apply/how-to-apply/jd-application-process/>; Columbia Law, provides “socioeconomic status, ethnic, religious, sexual orientation” as examples.

²¹ For a full analysis of the exclusionary impacts of the Moral Character Determination, see Stanford Law School, *Unlocking The Bar: Expanding Access to the Legal Profession for People with Criminal Records in California*, <https://www-cdn.law.stanford.edu/wp-content/uploads/2019/07/Unlocking-the-Bar-July-2019.pdf>

²² Pat Eaton-Robb, *AP News*, “Taking on the system: ‘Dreamers’ are getting law degrees,” <https://apnews.com/2e2c786b76b14ddab6d9a516b33654bf/Taking-on-the-system-:‘Dreamers’-are-getting-law-degrees>

d. Volunteer with Organizations that Serve Youth with Lived Experience

Offering opportunities for job shadowing, mentoring, connections to potential employers, field experience, and professional development are all crucial in creating pathways to legal and advocacy careers for youth with lived experience. Many attorneys were able to get exposure to the legal profession before they began attending law school through their own personal network. For example, children of lawyers are 17 times more likely to become lawyers themselves.²³ Often, individuals with lived experience do not have access to these networks, and the only attorneys they have interacted with are the ones that have represented them in court. In this respect, attorneys who represent youth and judges who interact with youth could help identify broader legal community networks for mentorship.

The earlier that this mentorship can happen in these individual's lives, the more likely they can identify the legal and/or advocacy field as an area of interest and start trying to set themselves up for success. Some law schools already have programs to connect law students with high school students that might not otherwise have the exposure to the legal profession. For example, Loyola Law School of Los Angeles Young Lawyers provides mentoring that exposes youth to the benefits of continuing their education beyond high school. Law students are paired with high school students to provide one-on-one help with trial preparation and weekly homework, and to share their own experiences as undergraduate students and reasons for pursuing a legal career.²⁴

e. Establish Scholarships and Fellowships Dedicated to Individuals with Legal System Experience

Existing programs that assist individuals who are traditionally underrepresented at law schools can be used as a template for creating programs to support individuals with lived experience. For example, the Training and Recruitment Initiative for Admission to Leading Law Schools “Trails,” is a residential scholarship program that helps talented students of underrepresented backgrounds gain admission to the nation’s leading law schools.²⁵ Students receive support preparing for the LSAT as well as attending lectures at both NYU and Harvard Law School.²⁶

The Prison Reform and Education Project “PREP” Scholarship Fund at NYU Law that provides scholarships to students who have been directly impacted by their involvement with the criminal legal system, either through their own experience or that of a parent. It aims to encourage formerly incarcerated individuals—or those with a formerly or currently

²³Staci Zaretsky, Children Of Lawyers 17 Times More Likely To Become Lawyers, <https://abovethelaw.com/2019/04/children-of-lawyers-17-times-more-likely-to-become-lawyers/>

²⁴ Loyola Law School of Los Angeles, *Young Lawyers program*, <https://www.lls.edu/academics/experientiallearning/publicinterestprobonoservices/younglawyersprogram/>

²⁵Training and Recruitment Initiative for Admission to Leading Law Schools, <https://trials.atfoundation.org/>

²⁶ Training and Recruitment Initiative for Admission to Leading Law Schools <https://trials.atfoundation.org/program>

incarcerated parent—to apply to the Law School by making their attendance more financially feasible.²⁷

Additionally, scholarships and fellowships that specifically name lived experience as a factor in their eligibility criteria can help foster opportunities for individuals to enter the legal profession. For example, Soros Fellowships specifically state in their eligibility criteria they “especially welcome applications from individuals directly affected by, or with significant direct personal experience with, the policies, practices, and systems their projects seek to address.”²⁸ Equal Justice Works allows applicants to propose a fellowship project and as part of the application, asks applicants to write a personal statement detailing their “connection to the community” to which they will work.²⁹

f. Increase Peer Support and Supporting Establishment of Affinity Groups

A critical first step in addressing the obstacles that youth with lived experience face in becoming attorneys is to expand access to peer support. One example of this is the Underground Scholars Initiative. The Underground Scholars Initiative (USI) was created to support all prospective and current UC Berkeley students impacted by issues of mass incarceration, imprisonment, and detainment of any kind. “The goal of USI is to bridge the topic of mass incarceration that is highly popularized in academia with one that is grounded in the lived experiences of UC Berkeley students.”³⁰ There are three main components to the USI model: recruitment, retention, and policy advocacy. For example, USI utilizes the correspondence program with incarcerated students as part of its recruitment efforts and their retention program consists of hiring writing tutors to work specifically with USI’s student population. Additionally, USI’s policy work achievements included successfully getting the University of California to “Ban the Box” from the employment application.³¹

Another example of peer support, the recently formed California System Involved Bar Association, “CSBIA.” CSBIA aims to provide such support guidance and resources for prospective, current, and graduated law students from the perspective of individuals who are formerly incarcerated.³² CSBIA’s overarching mission is to diversify California’s legal profession by increasing access to legal education and California State Bar licensure for

²⁷ New York University Law School, PREP Scholarship,

<https://www.law.nyu.edu/NYULawPREPScholarship>

²⁸ Open Society Foundation, Soros Justice Fellowships,

<https://www.opensocietyfoundations.org/grants/soros-justice-fellowships>

²⁹ Equal Justice Works Fellowship Application Guide, <https://2cl03t2b1ka11nj21k1h04f3-wpengine.netdna-ssl.com/wp-content/uploads/2020/03/EJW-applicant-guide-2020-03.17.20-WEB.pdf>

³⁰ University of California at Berkeley, *Underground Scholars*, <https://callink.berkeley.edu/organization/usi>, American Bar Association, Legal Center for Youth Justice and Education, Blueprint for Change, <https://ijeducationblueprint.org/examples/underground-scholars-initiative>

³¹ Root and Rebound, *my education, my freedom: A Toolkit for Formerly Incarcerated and System-Impacted Students Pursuing Education in California*,

http://www.fullerton.edu/rebound/ resources/pdfs/Root%20and%20Rebound%20Higher%20Ed%20Toolkit_2018.pdf

³² For more information, please contact Frankie Guzman, Director of the Youth Justice Initiative at the National Center for Youth Law, at fguzman@youthlaw.org.

people who are formerly incarcerated or system involved. To deliver crucial supports in increasing representation of those with lived experience in the legal profession those organizations need support to operate. Funding such organizations would help create a more knowledgeable network for students with lived experience.

IV. Legal Community Roles in Hiring, Retaining and Promoting Individuals with Legal System Experience

This Resolution encourages legal organizations serving youth to hire, retain and promote individuals with lived experience. Of the organizations surveyed for this policy, most have staff, managers, directors and/or board members who have experienced the systems the organization seeks to improve. Given the complexities of the laws that affect those in the child welfare, juvenile justice and immigration systems, organizations can consider lived experience as enhancing an individual's academic or professional experience. As some advocates have suggested, skills can be learned on the job, but passion for the cause cannot be taught. That passion can come from serving those impacted by those systems, or it can come from being impacted by those systems themselves.

To enhance recruitment, job announcements must be posted where they will be seen by the target audience – foster youth newsletters, online communities, and advocacy organizations. Recruitment efforts can even encourage those with lived experience to apply.³³ Priority consideration could include allowing for some life experience in place of professional experience, accepting letters and character references from individuals other than supervisors, and assuring candidates that upon onboarding appropriate mentorship and other supports will be provided.

Once hired, staff with lived experience must be supported and retained with thoughtful attention to the additional challenges they may face in their roles. Professionals serving these populations have higher rates of secondary trauma, and those with lived experience are likely to at times face situations that may remind them of their own childhood experiences. Organizations are encouraged to support those with lived experience by having supportive medical/mental health services, supportive sick/paid time off policies, but also mentoring and quality trauma training. Organizations should provide training to staff, especially managers at identifying, and supporting those with secondary trauma. Organizations should also be mindful of ways to support those with lived experience in the workplace by valuing their personal expertise. Employers should also respect staff's comfort levels at sharing their story to avoid tokenizing staff or board members with lived experience. Finally, organizations should consider giving priority consideration for promotion to staff with lived experience when their expertise and skills are appropriate for the position. Having individuals with lived experience in leadership roles can help directly address pipeline challenges when youth do begin to see themselves reflected in the faces of those who are leading change in the fields that affect their own lives.

³³ See Employment Preference for Former Foster Youth https://www.dfps.state.tx.us/Child_Protection/Youth_and_Young_Adults/Transitional_Living/employment.asp.

For non-staff positions, many youth serving organizations have bylaws that require a certain number or percentage of their board to have personal experience in the legal system they work in. This Resolution encourages organizations to adopt and expand such policies. Organizations should also be careful to be deliberate about this process to ensure an individual with lived experience is not merely appointed in name but is able to actively engage in shaping the organization's direction. For example, if an individual with lived experience assumes a board or advisory role the organization should work to make sure meeting times and locations are accessible. Similarly, other board members and staff leadership should be trained on how to facilitate and support active engagement by all members to create space and access for new members to participate in ways that don't always conform with past practice.

Conclusion

As an association of legal professionals, the ABA has long-standing responsibilities to reform the many legal systems within which we work. This Resolution makes clear that effective reform of legal systems that affect children and youth cannot be accomplished without equal partnership in system reform by the very individuals whose lives have been shaped in those systems, including youth. The process of engaging youth in legal system reform requires expertise and careful efforts toward planning, training and ongoing reflection and support. Adoption of this Resolution will encourage members of the legal community to partner with organizations that have active youth engagement programs to ensure youth have this kind of supportive environment when working with the legal community to effectuate system reform. It will also encourage the legal system to create pathways for individuals with lived experience to pursue and succeed in legal and advocacy careers in the legal profession. Finally, it will encourage organizations focused on child welfare, juvenile justice and immigration reform to incorporate individuals who experienced those systems as children as part of their staff and board leadership.

Respectfully submitted,

Honorable Ernestine Gray
Chair, Commission on Youth at Risk
August 2020

GENERAL INFORMATION FORM

1. Submitting Entity: Commission on Youth
Section of Civil Rights and Social Justice
2. Submitted By: Hon. Ernestine Gray
3. Summary of the Resolution(s):

This Resolution recognizes that effective reforms of legal systems that affect the fundamental rights of children cannot be accomplished without active participation by individuals who experienced those systems as children and youth. It therefore encourages the legal community to promote effective, ongoing, and authentic engagement in legal system reform and advocacy efforts by individuals who have experienced those systems as children and youth and to address any barriers to that participation in reform and advocacy efforts. The Resolution also encourages legal organizations to incorporate authentic youth voice and lived experience in leadership positions, such as staff members, managers, partners, directors, and board members. And so that individuals with lived experience in legal systems that affect children and youth may pursue and succeed in legal and advocacy careers, the Resolution urges the legal community to create pathways for that to happen.

4. Approval by Submitting Entity:
Approved by Commission on Youth at Risk on May 25, 2020
Approved by Section of Civil Rights and Social Justice on May 25, 2020
5. Has this or a similar resolution been submitted to the House or Board previously? No
6. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This Resolution complements another Youth at Risk Resolution submitted for House consideration in August 2020.
7. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
8. Status of Legislation. (If applicable) N/A
9. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, this ABA Resolution with Report will be shared among networks of attorneys, judges, youth-serving organizations, and individuals with lived experience in legal matters as children and youth. We will encourage the legal and advocacy community to adopt policies recommended in the Report and follow guidance highlighted here.
10. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed Resolution would result in only minor indirect costs associated with Commission staff

time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

11. Disclosure of Interest. (If applicable) None

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

- Center for Human Rights
- Coalition on Racial and Ethnic Justice
- Commission on Disability Rights
- Commission on Domestic and Sexual Violence
- Commission on Homelessness and Poverty
- Commission on Immigration
- Commission on Sexual Orientation and Gender Identity
- Criminal Justice Section
- Family Law Section
- Judicial Division
- Legal Services Division
- Litigation Section
- Section of Science and Technology
- Solo, Small Firm and General Practice Division
- Young Lawyers Division

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

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14. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting.

Hon. Ernestine Gray

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Orleans Parish Juvenile Court
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EXECUTIVE SUMMARY

1. Summary of the Resolution.

This Resolution recognizes that effective reforms of legal systems that affect the fundamental rights of children cannot be accomplished without active participation by individuals who experienced those systems as children and youth. It therefore encourages the legal community—attorneys, judges, advocates, legislators, law schools and bar associations—to promote effective, ongoing, and authentic engagement in legal system reform and advocacy efforts by individuals who have experienced those systems as children and youth and to address any barriers to that participation in reform and advocacy efforts. The Resolution also encourages legal organizations to incorporate authentic youth voice and lived experience in leadership positions, such as staff members, managers, partners, directors, and board members. So that individuals with lived experience in legal systems that affect children and youth may pursue and succeed in legal and advocacy careers, the Resolution urges the legal community to create pathways for that to happen.

2. Summary of the issue that the resolution addresses.

This Resolution the all-too-common absence of meaningful participation in system reform efforts by individuals with lived experience as children and youth in those systems. When youth engagement is conducted informally without the support of experienced organizations, the risks of unintended consequences, such as misappropriation of story and tokenism, are high.

3. Please explain how the proposed policy position will address the issue.

This Resolution and Report is designed to help the legal community – including attorneys, judges, legislators, bar associations, and law schools – understand the importance of working thoughtfully with organizations that have youth engagement expertise. It reflects recommendations and extensive input from several organizations across the country who have developed authentic youth engagement programs.

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

None have been identified.

AMERICAN BAR ASSOCIATION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COALITION ON RACIAL AND ETHNIC JUSTICE

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, tribal, and
2 territorial governments to enact legislation that requires law enforcement agencies to
3 keep records of all instances in which lethal force is used, by maintaining the data on the
4 demographics of all persons against whom lethal force is used, including but not limited
5 to race, color, national origin, age, gender, apparent religion, the presence of mental or
6 physical disability, whether the person was fleeing at the time, whether the individual
7 possessed a weapon (including the type of weapon), and whether a body camera was
8 used;

9
10 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
11 tribal, and territorial governments to enact legislation requiring the appointment of a fully
12 independent special prosecutor whenever a person's death occurs in the custody of or
13 during an encounter with a police or other law enforcement officer acting in the officer's
14 official capacity; and

15
16 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
17 tribal, and territorial governments to enact legislation that requires a showing of objective
18 reasonable necessity to establish a defense in criminal cases involving lethal force use
19 by a police or other law enforcement officer.

REPORT

The American Bar Association (“ABA”) adopts this Resolution in furtherance of existing ABA policy that urges the implementation of policies and practices dealing with law enforcement’s use of lethal force and racial profiling.

At the 2020 Midyear meeting, the House of Delegates passed resolution 10B, which urges an examination of existing policies on the use of lethal force against individuals during law enforcement encounters.¹ More specifically, 10B calls for (1) the establishment of an investigative entity to examine whether use of lethal force was justified, (2) the publishing at regular intervals, at least annually, the number of times lethal force has been employed during the previous time period and whether or not the lethal force resulted in the death of an individual, (3) the publishing of conclusions of the investigative entity as to whether each use of lethal force was justified, and (4) continuing review of lethal force policies and training of law enforcement officers on the proper implementation of those policies.²

Over the last two decades, the ABA has supported policies that address the use of racial profiling by law enforcement through Resolutions 121B (2004) (Elimination of actual and perceived racial and ethnic bias in the criminal justice system) and 104C (2008) (Use of racial profiling by law enforcement). Resolution 121B highlights how African Americans constitute an overwhelmingly disproportionate number of arrests and convictions for drug possession and distribution despite not using or selling more drugs than white individuals. Racial profiling is one of the major factors in this issue and contributes directly to the racial disparity in the criminal justice system. In 121B, the ABA urges states, territories and the federal government to strive to eliminate actual and perceived racial and ethnic bias in the criminal justice system by establishing criminal justice racial and ethnic task forces, requiring law enforcement agencies to develop and implement policies and procedures to combat racial and ethnic profiling, and require legislatures to conduct racial and ethnic disparity impact analyses to evaluate the potential disparate effects on racial and ethnics groups.³

At the 2008 meeting of the House of Delegates, Resolution 104C was passed which urges federal, state, local and territorial governments to enact effective legislation, policies, and procedures to ban law enforcement’s use of racial or ethnic characteristics not justified by specific and articulable facts suggesting that an individual may be engaged in criminal behavior.⁴ Additionally, 104C urges legislation, policies and procedures, except when impractical due to the small size or other characteristics of a law enforcement agency, should require: (1) that law enforcement agencies have written policies, training, and supervision necessary to effectively implement the ban and funding necessary for these purposes; (2) data collection, on all police stops and searches, whether of drivers and their vehicles or pedestrians; (3) where feasible, independent analysis of data collected,

¹ 20M10B

² *Id.*

³ [04A121B](#)

⁴ 08A104C

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and publication of both the data and the analysis; and (4) funding for police agencies to be made contingent on compliance with these.

Furthermore, in 1979, the ABA adopted the Criminal Justice Standards on The Urban Police Function.⁵ Specifically, Standard 1-2.4(d) states:

In order to maximize the use of the special authority and ability of the police, it is appropriate for government, in developing objectives and priorities for police services, to give emphasis to those social and behavioral problems which may require the use of force or the use of special investigative abilities which the police possess. Given the awesome authority of the police to use force and the priority that must be given to preserving life, however, government should firmly establish the principle that the police should be restricted to using the amount of force reasonably necessary in responding to any situation.

Additionally, Criminal Justice Standard 1-5.3 Sanctions⁶ provides an overarching framework for this resolution when it states in pertinent part:

Legislatures should clarify the authority of police agencies to develop substantive and procedural rules controlling police authority – particularly regarding investigatory methods, the use of force, and enforcement policies – and creating methods for discovering and dealing with abuses of that authority. Where adequate administrative sanctions are in effect, evidence obtained in violation of administrative rules should not be excluded in criminal proceedings.

This resolution operates to further Resolution 10B, by calling for the investigative entity employed to investigate the use of lethal force be independent of the law enforcement agency involved and any other law enforcement agency. Additionally, this resolution urges that a special prosecutor be utilized. A special prosecutor is necessary to avoid any potential or real conflict of interest. In cases involving police violence, prosecutors cannot and should not rely on law enforcement to investigate themselves.

This resolution also furthers Resolutions 10B, 104C, and 121B by urging that law enforcement agencies to not only report the use of lethal force, but also report specific demographics of those such force is used against. These demographics include; race, gender, age, existence of an apparent disability, presence of mental illness, whether the person was fleeing, whether a body camera was worn by the officer, and whether said camera was in operation at the time of the incident.

This resolution furthers Criminal Justice Standard 1-2.4(d) and 1-5.3, by urging the enactment of legislation that requires a showing of reasonable necessity to establish a defense of immunity asserted by a law enforcement officer.

⁵ ABA Standards on Urban Police Function (1979). Retrieved from: <http://www.abanet.org>

⁶ ABA Criminal Justice Standards. Retrieved from: <http://www.abanet.org>

BACKGROUND AND DISCUSSION

Over 1,000 people were shot and killed by police in 2019.⁷ That year, there were only 27 days where someone was not killed by law enforcement. Police shootings have been a concern for many years. Although this resolution calls for a change in legal standard for prosecutions involving police involved shooting, it does not make assumptions regarding the extent to which lethal force is appropriate or inappropriate. The ABA recognizes that law enforcement officers face extraordinary threats to their safety or public safety that at times will require lethal force. The goal of this resolution is to urge jurisdictions and law enforcement agencies to recognize the existence of implicit biases in everyday life (that affect policing) and to act with a greater level of care for the preservation of human life and dignity.

I. Data Collection and Adequate Recordkeeping Should be Required

Governments should enact legislation that requires law enforcement agencies to collect and/or preserve information on the use of lethal force by police or other law enforcement officers. The data should be maintained by adequate recordkeeping and, at minimum, should consist of the following: the total number of instances in which lethal force was used; an accurate demographic description of the individuals against whom legal force is used, including race, color, national origin, age, gender, apparent religion, physical or mental disability (regardless of whether the disability was known at the time of the incident); and factors relevant to an investigation including whether the individual was fleeing at the time, whether the individual possessed a weapon and whether cameras were present during the incident (including officer body cameras, officer dash cameras and/or known witness cameras).

In general, there is a lack of accurate records of people killed by law enforcement. The opening paragraph of the introduction to this report could only accurately state that “over 1,000 people were shot and killed” because the number continues to grow even though this report was written well into the year 2020. Media outlets, like the Washington Post, that have committed to keeping these records must rely on news reports, the partial records from law enforcement, independent databases, and social media.⁸

The federal government does not require police departments to keep records of these killings. In 1994, Congress mandated that the Attorney General collect data on the use of excessive force by police and publish an annual report from the data.⁹ Despite this fact, in 2015, former Attorney General Loretta Lynch was quoted saying, “one of the things we are focusing on at the Department of Justice is not trying to reach down from Washington and dictate to every local department how they should handle the minutia of record keeping, but we are stressing to them that they must be kept.” When accurate record

⁷ Fatal Force: 2019 police shootings database. (2018, January 2). Retrieved from <https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/>

⁸ *Id.*

⁹ Violent Crime Control and Law Enforcement Act of 1994, Section 210402.

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keeping is lacking, it is more difficult to determine the root of the problem. These records would not only tell us who was killed, but it would give a clearer picture as to what led to the incident.

The ABA already urges data collection of the race of individuals stopped by law enforcement in order to ascertain whether racial bias and profiling played a role. This demographical data needs to be maintained by police departments when there is an officer involved shooting. Of the over 1,000 people shot and killed by police in 2019, the race of 187 of the victims is unknown. At least 40% of those killed by American law enforcement were minorities.¹⁰ According to the Washington Post, since 2015, there have been over 5,000 recorded deaths at the hands of law enforcement.¹¹ From their findings, Black Americans consist of thirteen percent of the population yet are killed by police at more than twice the rate of white Americans. Hispanic Americans are also killed by police in a similarly disproportionate rate.

A wealth of research on implicit social cognition has repeatedly demonstrated that even the most egalitarian-minded individuals are implicitly racially biased. Implicit racial bias can encourage police officers and others to perceive danger when dealing with a Black individual, even when that individual does not, in fact, pose a threat of violence. Latinos are also commonly stereotyped as criminal and dangerous. Muslim and Middle Eastern Americans are commonly stereotyped as terrorists.¹²

Additionally, available data confirms that 180 of the victims had a mental illness. One of the most important statistics is whether the officer involved was recording the incident with a body camera. In 836 (87%) of the aforementioned incidents, either there was no body camera or it could not be determined whether a body camera was worn.

II. An Independent Special Prosecutor Should Be Appointed When Lethal Force Is Used By Law Enforcement

Governments should enact legislation which will require the appointment of an independent special prosecutor to investigate and prosecute criminal cases involving the use of lethal force by a police or other law enforcement officer. Employing independent investigators in law-enforcement-involved shootings comports with prior ABA policy relating to racial disparity within the criminal justice system. Prosecutors often consider police officers to be their teammates¹³ and may fear that prosecuting an officer will result

¹⁰ *Id.*

¹¹ "Fatal Force: Police Shootings Database." The Washington Post, WP Company, 22 Jan. 2020, www.washingtonpost.com/graphics/investigations/police-shootings-database/.

¹² Cynthia Lee, REFORMING THE LAW ON POLICE USE OF DEADLY FORCE: DE-ESCALATION, PRESEIZURE CONDUCT, AND IMPERFECT SELF-DEFENSE, 2018 U. ILL. L. Rev. 629, 645-6 (2018).

¹³ Kate Levine, *Who Shouldn't Prosecute the Police*, 101 Iowa L. Rev. 1447, 1450 (2014); see also Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 Suffolk U. L. Rev. 1, 22 (2001) ("[P]rosecutors often enjoy too close of a relationship with local police and are therefore reluctant to turn against those with whom they have worked.").

in other officers refusing to testify in their other cases.¹⁴ This policy urges governments to ensure that law-enforcement-involved shootings are investigated by special prosecutors who are fully independent from the entity under investigation.

Campaign Zero was created in an attempt to push local and state governments to step up and protect the communities that are most affected by police violence and mass incarceration. It is a data-informed platform that “presents comprehensive solutions to end police violence in America.”¹⁵ Their solutions take into account community demands as well as policy recommendations from research organizations and former President Obama’s Task Force on 21st Century Policing.

The solutions, themselves, include lowering the standard of proof for Department of Justice civil rights investigations of police officers, using federal funds to encourage independent investigations and prosecutions, establishing a permanent Special Prosecutor’s Office at the State level for cases of police violence, and requiring independent investigations of all cases where police kill or seriously injure civilians.¹⁶

Not only are citizens campaigning for change, researchers have also been exploring how conflicts of interest in crimes of this manner require independent investigation. In 2018, Caleb J. Robertson wrote the article “Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police” for the Emory Law Journal. Robertson points out that conducting independent investigations is not necessarily meant to ensure police convictions. Instead, it creates a process that will increase the public’s acceptance of the substantive outcomes in these cases, whether the outcome is non-indictment or conviction.¹⁷

Some states across the U.S. are making efforts to incorporate the use of independent investigators in officer-involved shootings. For example, Governor Phil Murphy, of New Jersey, signed S1036¹⁸ into law in 2019. It stated that the Attorney General would be the one to investigate and prosecute crimes that relate to officer-involved deaths. Other legislative and local officials agreed that by providing an independent investigator in law enforcement-related deaths would remove the potential conflict of interest.¹⁹

¹⁴ As Kate Levine has noted: [Prosecutors] rely on the police for successful convictions, and therefore, must have a good working relationship with the police for professional advancement. A prosecutor who reports police crimes or advocates zealous prosecution of the police will necessarily run afoul of law enforcement’s good graces, which may impact conviction rates and therefore her career advancement. *Id.* at 1472.

¹⁵ Planning Team. (n.d.). Retrieved from <https://www.joincampaignzero.org/about>.

¹⁶ Independent Investigations and Prosecutions. (n.d.). Retrieved from <https://www.joincampaignzero.org/investigations>

¹⁷ Robertson, C. J. (2018). Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police. Emory Law Journal. Retrieved from <https://law.emory.edu/elj/content/volume-67/issue-4/comments/restoring-confidence-justice-prosecute-police.html>.

¹⁸ [New Jersey Senate Bill 1036](#)

¹⁹ Governor Murphy Signs Legislation Modifying Investigations of Law Enforcement-Related Deaths. (2019, January 30). State of New Jersey Governor Phil Murphy. Retrieved from <https://www.nj.gov/governor/news/news/562019/approved/20190130d.shtml>.

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Additionally, Congressional bills have addressed the lack of independent investigations of crimes where there was an officer-involved death. On May 13, 2015, Congressman Steve Cohen proposed bill H.R. 2302 (Police Training and Independent Review Act of 2015), which would require that States receiving Byrne JAG funds to provide sensitivity training for law enforcement officers of that State and to incentivize States to enact laws requiring the independent investigation and prosecution of the use of deadly force by law enforcement officers, and for other purposes.²⁰

III. An Objective Standard of Reasonable Necessity Should Be Applied When Lethal Force is Used By Law Enforcement

Governments should enact legislation that requires a showing of objective reasonable necessity to establish a defense in criminal cases involving lethal force use by a police or other law enforcement officer. This resolution urges that stricter standard of review. While many police departments already employ those stricter standards, departmental regulations do not have the force of law and do not act as an adequate deterrent against the use of deadly force..²¹

The United States Supreme Court, in *Tennessee v. Garner*, held that the use of deadly force is only constitutionally reasonable to effectuate the arrest of a fleeing felon when law enforcement has probable cause to believe the individual poses a threat of death or serious bodily injury.²² “The number of persons shot and killed by police decreased dramatically after the *Garner* decision.²³ The new legal standard announced in *Garner*, coupled with the net increase in the number of police departments with more restrictive shooting policies after *Garner*, resulted in a substantial reduction in both the number of police shootings and the number of persons shot and killed by police, proving how a change in the law can have a significant impact on the ground.”²⁴

Thereafter, the Court in *Graham v. Connor*, 490 U.S. 386 (1989) held that all excessive use of force claims must be examined by a balancing test, weighing the individual’s Fourth Amendment interests against the governmental interests. The Court indicated that an objective standard of reasonableness should be applied to use of force cases, stating that “‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the twenty-twenty vision of hindsight.”²⁵ This reasonableness should be based on the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he or she is actually resisting arrest or attempting to evade arrest by flight.²⁶ The *Graham* decision has two major concerns: (1) the Court ignored race and (2) it gave little

²⁰ Police Training and Independent Review Act of 2015, [H.R. 2302](#), 114th Cong. (2015).

²¹ *Id.*

²² *Tennessee v. Garner*, 471 U.S. 1 (1985).

²³ Cynthia Lee, REFORMING THE LAW ON POLICE USE OF DEADLY FORCE: DE-ESCALATION, PRESEIZURE CONDUCT, AND IMPERFECT SELF-DEFENSE, 2018 U. ILL. L. Rev. 629, 645 (2018).

²⁴ *Id.*

²⁵ *Id.* at 396.

²⁶ *Id.*

instruction on how to weigh the factors which determine reasonableness.²⁷ “Racial stereotypes about Blacks and other racial minorities can affect perceptions of whether an officer's use of force was reasonable. Blacks are often associated with aggression, violence, and criminality.”²⁸

On a departmental and State level, the currently required showing for officer immunity is too low, as there only needs to be a reasonable use of force. If the officer can prove his or her actions were “reasonable” under the circumstances, this is enough to avoid any consequences. Reasonableness in these cases is a low standard because it is generally based solely on the officer's perception of danger and not the officer's or victim's actions.²⁹ A showing of necessity would require the officer to show what actions were taken to de-escalate the situation, whether the victim had or appeared to have a deadly weapon, and whether a less deadly means of force was available.

Overall, the police officer will enjoy the benefit of the doubt not only by virtue of being a law enforcement official sworn to protect and serve, but because a jury will only be able to hear one side of the story and will be unlikely to convict a person that says he or she feared for their life.

In September 2018, Amber Guyger, an off-duty Dallas police officer shot and killed Botham Shem Jean, her neighbor, in his very own apartment, claiming she thought the unit was her own. “I feared for my life.” These five words are routinely asserted by police officers as justification for killing innocent Americans. Starkly, as of March 7, 2020, it has been found that 99% of cases between the years 2013 and 2019 have not resulted in any officer(s) involved being convicted of a crime.

CONCLUSION

According to the Washington Post, since 2015, there have been over 5,000 recorded deaths at the hands of law enforcement.³⁰ This resolution urges governments and law enforcement agencies to recognize the existence of implicit biases that adversely affect law enforcement actions, to take the necessary steps to gather information and to appoint a special prosecutor in criminal cases involving the use of lethal force by a police or other law enforcement officer.

Respectfully submitted,

Wendy K. Mariner
Chair, ABA Section of Civil Rights and Social Justice
August 2020

²⁷ Cynthia Lee, REFORMING THE LAW ON POLICE USE OF DEADLY FORCE: DE-ESCALATION, PRESEIZURE CONDUCT, AND IMPERFECT SELF-DEFENSE, 2018 U. ILL. L. Rev. 629, 645 (2018).

²⁸ *Id.*

²⁹ *Id.* at 637.

³⁰ *Id.*

GENERAL INFORMATION FORM

Submitting Entity: ABA Section of Civil Rights and Social Justice

Submitted By: Wendy K. Mariner, Chair

1. Summary of Resolution(s). The ABA urges federal, state, local, territorial, and tribal governments to enact legislation requiring the appointment of an independent special prosecutor that has no association with or dependence on police in any jurisdiction, enact legislation that requires law enforcement agencies to keep records of instances in which lethal force is used and enact legislation that establishes the burden of proof to establish a defense to a police-involved killing to objective reasonable necessity.

2. Approval by Submitting Entity.

The Section of Civil Rights and Social Justice approved the resolution on April 24, 2020.

The Coalition on Racial and Ethnic Justice approved cosponsorship of the resolution on May 26, 2020.

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

Over the last two decades, the ABA has supported policy that addresses officer-involved deaths. The previous resolutions include Resolution 04A121B (Elimination of actual and perceived racial and ethnic bias in the criminal justice system) and Resolution 08A104C (Use of racial profiling by law enforcement).

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

In 1979, the ABA adopted the Criminal Justice Standards on The Urban Police Function. Specifically, standard 1-2.4(d) states:

In order to maximize the use of the special authority and ability of the police, it is appropriate for government, in developing objectives and priorities for police services, to give emphasis to those social and behavioral problems which may require the use of force or the use of special investigative abilities which the police possess. Given the awesome authority of the police to use force and the priority that must be given to preserving life, however, government should firmly establish the principle that the police should be restricted to using the amount of force reasonably necessary in responding to any situation.³¹

Additionally, Criminal Justice Standard 1-5.3 Sanctions provides an overarching framework for this resolution when it states in pertinent part:

³¹ CJS 1-2.4(d).

Legislatures should clarify the authority of police agencies to develop substantive and procedural rules controlling police authority – particularly regarding investigatory methods, the use of force, and enforcement policies – and creating methods for discovering and dealing with abuses of that authority. Where adequate administrative sanctions are in effect, evidence obtained in violation of administrative rules should not be excluded in criminal proceedings.

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. Police Training and Independent Review Act of 2019, H.R. 125, 116th Cong. (2019-2020) was introduced on January 3, 2019, and is pending.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Section 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. The 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. N/A
10. Referrals.

Center for Human Rights
 Commission on Homelessness and Poverty
 Commission on Racial & Ethnic Diversity in the Profession
 Commission on Youth at Risk
 Government and Public Sector Lawyers Division
 Law Practice Division
 National Conference of Federal Trial Judges
 Section of Litigation
 Standing Committee on Legal Aid & Indigent Defense
 Criminal Justice Section
 Section of State & Local Government Law
 Diversity and Inclusion Center
 National Association of Criminal Defense Lawyers
 Coalition on Racial and Ethnic Justice

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EXECUTIVE SUMMARY1. Summary of the Resolution

The ABA urges federal, state, local, territorial, and tribal governments to enact legislation requiring the appointment of an independent special prosecutor that has no association with or dependence on police in any jurisdiction, enact legislation that requires law enforcement agencies to keep records of instances in which lethal force is used and enact legislation that increases the burden of proof for a defense to a police-involved killing to reasonable objective necessity.

2. Summary of the Issue that the Resolution Addresses

In cases involving police violence, prosecutors cannot and should not rely on the police to investigate themselves but should rely rather on an independent prosecutor.

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

The proposed policy position addresses the issue by calling for independent investigators in law-enforcement-involved shootings and establishing that a defense in an officer involved killing should be based on the standard of reasonable objective necessity.

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

None have been identified.

AMERICAN BAR ASSOCIATION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
SECTION OF STATE AND LOCAL GOVERNMENT LAW
COMMISSION ON HOMELESSNESS & POVERTY

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial and
2 tribal governments to:

3
4 a) adopt and enforce fair lending laws and other federal, state and local laws targeting
5 unfair or deceptive acts or practices to address discrimination in vehicle sales and
6 financing markets;

7 b) adopt laws and policies that promote the adoption of an enhanced
8 nondiscrimination compliance system for a vehicle loan or a flat percentage fee for
9 dealer compensation; and

10 c) adopt legislation requiring the timely notice and disclosure of pricing of add-on
11 products by dealers on each vehicle through reasonable means, such as a pricing
12 sheet and/or website prominently displayed and available at its location, before a
13 consumer negotiates to purchase a vehicle;

14
15 FURTHER RESOLVED, That the American Bar Association urges Congress to amend
16 the Equal Credit Opportunity Act, 15 U.S.C 1691, to require documentation and collection
17 of the applicant's race, gender and national origin for vehicle credit transactions, through
18 applicant voluntary self-identification using disaggregated racial and ethnic categories,
19 made available through a Demographic Information Addendum, or some equivalent
20 measurement;

21
22 FURTHER RESOLVED, That the American Bar Association encourages state, local,
23 territorial and tribal bar associations to offer educational programming and materials to
24 lawyers and consumers to help them understand and navigate purchases and financing
25 of vehicles and understand consumers' legal rights with respect to such purchases and
26 loans.

REPORT

OVERVIEW

This resolution addresses some highly discriminatory practices in auto lending and the sale of auto add-on products and their resulting impact on many consumers because of race, gender, national origin, or income. Consumers are burdened with interest-rate markups on loans that have no relation to their credit risk, but rather often relate to prejudice and discrimination. The resolution also addresses the issue of insufficient data available on credit applicants to identify and quantify potential discriminatory impact, and the lack of transparency in the auto lending market. Finally, the resolution identifies the need for enhancing the educational opportunities for consumers, guided by members of the Bar, in addressing issues in auto lending and sale practices.

BACKGROUND

More than 90% of American households own or lease a vehicle⁹⁴, with a vehicle being the lifeline to the American consumer in 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.⁹⁵ Auto loan debt represents the third largest type of consumer debt in America, trailing behind only mortgage and student debt.⁹⁶ For consumers who do not own a home, as is the case for many low-income consumers, auto loan debt can be the largest debt they carry.⁹⁷

The CFPB's Quarterly *Consumer Credit Trends Report*, "Growth in Longer-Term Auto Loans", issued in November 2017,⁹⁸ provides that 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.⁹⁹ 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.⁷

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.⁸ The report

⁹⁴ "CFPB Report Finds Sharp Increase In Riskier Longer-Term Auto Loans," Consumer Financial Protection Bureau (CFPB), November 1, 2017, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-sharp-increase-riskier-longer-term-auto-loans/>.

⁹⁵ *Id.* For consistency, we use the same definition of "auto loans" in this report as is used in the *Consumer Trends* dashboard. This definition includes closed-end loans or leases used by consumers to finance new or used automobile purchases.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ CFPB Quarterly *Consumer Credit Trends Report*, "Growth in Longer-Term Auto Loans", issued November 2017.

⁹⁹ *Id.* at 4.

⁷ *Id.* at 5.

⁸ "New Ways to Understand the Impact of Auto Finance on Low-Income Families," National Consumer Law Center, May 2016, page 4.

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data for 2014 (the most recent time for student debt data at the time of the report) shows that “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.”⁹

In analyzing the data, there is an indication 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 loans based on race or family income. However, consumer credit scores are available and earlier studies by the NCLC reflect a strong correlation between credit scores and applicant’s race, income, educational levels and other characteristics.¹⁰ By extrapolating the originations to the credit 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.”¹¹

The Washington Post, in a February 7, 2019, article, noted that the Federal Reserve Bank of New York reported that a record seven million Americans are 90 days or more behind on their auto loan payments, which is even more than during the financial crisis.¹² The New York Fed in its report said there were a million more “troubled borrowers, at the end of 2018 than there were in 2010, when unemployment hit 10% and the auto loan delinquency rate peaked.”¹³

ISSUES

1. ENFORCEMENT OF DISCRIMINATION LAWS

The American Bar Association (the “ABA”) 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.¹⁴ The ABA’s fundamental position condemning such

⁹ *Id.* at 5.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 8.

¹² The Washington Post, “A record 7 million Americans are 3 months behind on their car payments, a red flag for the economy,” by Heather Long, February 12, 2019, available at: https://www.washingtonpost.com/business/2019/02/12/record-million-americans-are-months-behind-their-car-payments-red-flag-economy/?utm_term=.a72dca7a3795

¹³ *Id.*

¹⁴ ABA House of Delegates, Resolution and Report, 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,

discrimination is based on its underlying commitment to the ideal of equal opportunity and advancement of human rights.¹⁵ 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.”¹⁶ 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.”¹⁷

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.¹⁸ 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.”¹⁹

Numerous research studies document 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.²⁰ The 1991 study documented that 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 because of race or gender.²¹ The study showed black male testers had to pay more than twice the markup price paid by white male testers. White women testers paid more than 40% over white men, and black women testers paid more than three times the markup paid by white male testers.²²

color, religion, national origin, sex or sexual orientation), *archived policies noted at https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/aba_archived_policies_through_2017_updated_sep_2018.pdf*; and addressing gender identity and expression, ABA House of Delegate Resolution and Report, 2015_at_112, available at https://www.americanbar.org/groups/leadership/house_of_delegates/policy-document-library

¹⁵ American Bar Association, ABA Mission and Goals, available at https://www.americanbar.org/about_the_aba/aba-mission-goals/

¹⁶ ABA House of Delegates, Resolution and Report, 2011_am_106c.pdf, available at https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_106c.pdf

¹⁷ ABA House of Delegates, Resolution and Report, 2017_AM_119A, available at https://www.americanbar.org/groups/leadership/house_of_delegates/policy-document-library

¹⁸ 15 U.S.C. § 1691(a).

¹⁹ S. Rep. No. 94-589, 94th Cong., 2d Sess. 3, reprinted in 1976 U.S. Code Cong. & Admin. News 403, 405.

²⁰ 104 Harv. L. Rev. 817 (February, 1991). Also available as Ayres, Ian, “Fair Driving: Gender and Race Discrimination in Retail Car Negotiations” (1991). Faculty Scholarship Series. 1540. Available Online at http://digitalcommons.law.yale.edu/iss_papers/1540. See also, Ayres, Ian, “Further Evidence of Discrimination New Car Negotiations and Estimates of its Cause (1995). Faculty Scholarship Series 1523, at http://digitalcommons.law.yale.edu/fss_papers/1523.

²¹ *Id.* at 818.

²² *Id.* at 819.

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A 2018 investigative report by the National Fair Housing Alliance (“NFHA”) describes the early history of discrimination in auto lending and documents continuing current discriminatory practices.²³ The report discusses 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, noting 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.”²⁴

A separate 2004 abridged report prepared by Dr. Cohen in the *Matter of Terry Willis, et al. v. American Honda Finance Corporation*, found that African-American borrowers paid more than two times the subjective markup that white borrowers paid. 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 industry-wide practice of subjective credit pricing results in a disparate impact on minorities.”²⁵

Another recent investigation conducted by the NFHA during the Fall of 2016 and Spring of 2017 utilized a widely accepted testing methodology that has been used in various contexts including enforcement, public policy, and compliance monitoring.²⁶ The use of fair housing testing evidence has been uniformly adopted by the courts, including the U.S. Supreme Court.²⁷ This testing was conducted at new and used car dealerships throughout Eastern Virginia. The findings of the 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.”²⁸

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

Under current law, Regulation B, implementing the ECOA, generally prohibits non-mortgage lenders from asking about or documenting characteristics such as a consumer’s race or national origin.²⁹ Mandatory data collection by lenders applies only to mortgage lenders under the Home Mortgage Disclosure Act (“HMDA”)³⁰ and certain

²³ Rice, Lisa, and Schwartz Jr., Erich, *Discrimination When Buying a Car, How the Color of Your Skin Can Affect the Car-Shopping Experience*, (Jan. 2018). Available online at <http://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf>.

²⁴ *Id.* at 7. See also Mark A. Cohen, *Report on the Racial Impact of GMAC’s Finance Charge Markup Policy*, 2003.

²⁵ Mark A. Cohen, *Report on the Racial Impact of AHFC’s Finance Charge Markup Policy*, 2004. Abridged summary of report available at <https://consumerfed.org/wp-content/uploads/2004/07/7-30-04-Racial-Impact-Finance-Charge-Markup-Report.pdf>.

²⁶ Rice and Schwartz, *id.* at 12.

²⁷ *Id.* at 12. See e.g. *Havens Realty Corp. v. Coleman*, 455 U.S.363, 373-374 (1982).

²⁸ *Id.* at 15.

²⁹ 12 C.F.R. Sec. 1002.5(b) 12 C.F.R. Sec. 12(a), (b).

³⁰ See generally Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1125 (1975) (codified at 12 U.S.C. Sections 2801-2810 (2006)).

business lenders under Section 1071 of the 2010 Dodd-Frank Reform Act, which covers applications for women-owned, minority-owned and small businesses.³¹

The National Consumer Law Center (“NCLC”), in the context of car loans, recently 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.³² And this is a long-standing problem. NCLC, in a 2008 letter to then-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 matter of law under the ECOA.”³³ 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.³⁴

Professor Winnie Taylor from Brooklyn Law School, in a Review of Banking and Finance Law journal article, addresses the question of whether the ECOA data collection should be expanded to cover non-mortgage lenders, and if so, should it cover all non-mortgage lenders or only a subset?³⁵ It answers the first question in the affirmative due to the heavy evidentiary burden of establishing a prima facie case of racial discrimination in lawsuits against non-mortgage lenders, as well as the difficulty in getting courts to accept proxies to such data, such as through general population statistics, census tract data, or zip codes.³⁶

Taylor’s article answers the second question by suggesting limiting the collection of data on non-mortgage lenders by exempting smaller lenders, as happens in other banking regulations, due to cost considerations. It also proposes to limit collection of data to certain types of loans, based on several factors, “particularly the extent to which there is evidence of potential discrimination in a particular market.”³⁷ However, Professor Taylor specifically includes automobile loans as needing the collection of data based on the car markets’ important structural aspects, public and private ECOA litigation, legal commentary and expert witnesses in ECOA cases regarding dealer mark-ups.³⁸ In contrast, she does not propose to expand data collection and reporting for race and gender data in the credit card industry.³⁹

³¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, Section 1071, 124 Stat. 1376, 2056 (2010).

³² *Auto Add-Ons Add Up, How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing*, National Consumer Law Center, October 2017, pgs. 27-28.

³³ National Consumer Law Center letter by Stuart T. Rossman to Congressman Mel Watt, dated July 16, 2008. Available online at https://www.nclc.org/images/pdf/car_sales/Watt_Regulation_Testimony.pdf

³⁴ U.S. Government Accountability Office, Fair Lending: Race and Gender Data Are Limited for Non-mortgage Lending, GAO-08-698 (June 2008).

³⁵ See Winnie Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance: The Missing Data Problem in Non-mortgage Credit*, 31 Rev. Banking & Fin. L. 199, 205 (2012).

³⁶ *Id.* at 244-245.

³⁷ *Id.* at 262.

³⁸ *Id.* at 262-263.

³⁹ *Id.* at 263.

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The article first sets forth the challenges both in litigation for ECOA plaintiffs and in enforcement for ECOA agencies due to the lack of collection of race data. As noted in the Policy Statement on Discrimination in Lending,⁴⁰ produced by a group of fair lending regulators, ECOA plaintiffs can prove lending discrimination in three ways: 1) overt discrimination; 2) disparate treatment; and 3) disparate impact.⁴¹

First, overt discrimination claims require an applicant and borrower to provide overt evidence, such as a written policy instructing loan officers to give minority borrowers lower credit limits than nonminority borrowers.⁴² Today, overt evidence of racial discrimination is rare; plaintiffs and enforcement agencies usually rely upon disparate treatment and disparate impact claims.⁴³ Second, when lenders intentionally treat some applicants or borrowers more favorably than others on an ECOA-prohibited basis, even though all are similarly creditworthy, disparate treatment occurs.⁴⁴ Third, “disparate impact occurs when a lender applies a neutral practice equally to all credit applicants, but the practice has a disproportionately adverse effect on applicants or borrowers from ECOA-protected groups.”⁴⁵ As distinguished from disparate treatment cases, the plaintiff does not have to prove the discriminatory practices are intentional or result from prohibited criteria; rather the focus is on the harm the victim experiences.⁴⁶

On May 4, 2017, the National Consumer Law Center (on behalf of its low-income clients), the National Association for the Advancement of Colored People (“NAACP”), the Leadership Conference on Civil and Human Rights, the Center for Responsible Lending, and a dozen other leading consumer advocacy groups, sent a comment letter in response to CFPB 2017-0009. The comment letter was in regard to proposed amendments to ECOA Regulation B on ethnicity and race information collection. It urged the Bureau to amend Regulation B to remove the prohibition on data collection for auto finance loans and require the collection, maintenance, reporting and public dissemination of such data, to “further the ECOA’s goal of promoting the availability of credit to all creditworthy applicants on a non-discriminatory basis.”⁴⁷

The comment letter stresses the need to collect such information for a number of reasons, in part based on the size of the auto loan market as the third largest consumer debt, and

⁴⁰ Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18, 266, 18,268 (Apr. 15, 1994).

⁴¹ Taylor, *supra* note 35, at 213.

⁴² Taylor, *supra*, note 35 at 208.

⁴³ Taylor, *supra*, note 35 at 209, and *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026, 1030 (N.D. Ga. 1980).

⁴⁴ Taylor, *supra*, note 35, at 210-211.

⁴⁵ Taylor, *supra*, note 35 at 212-213. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Ablemarle Paper Co. Moody*, 422 U.S. 405, 425 (1975).

⁴⁶ Taylor, *supra*, note 35 at 212.

⁴⁷ Letter to Ms. Jackson, Consumer Financial Protection Bureau, May 4, 2017, Re: Docket No. CFPB 2017-0009, 82 Fed. Reg. 16307 (Apr. 4, 2017), signed by (in alphabetical order) Americans for Financial Reform, Center for Responsible Lending, Consumer Action, Consumer Federation of America, Empire Justice Center, Jacksonville Area Legal Aid, Inc., The Leadership Conference on Civil and Human Rights, NAACP, National Association of Consumer Advocates, National Community Reinvestment Coalition, National Consumer Law Center (On behalf of its low-income clients), National Fair Housing Alliance, National Housing Law Project, National Urban League, New Economy Project, Woodstock Institute, available at https://www.nclc.org/images/pdf/credit_discrimination/cfpb-2017-ecoa-fnl3-cmmnts.pdf

the fact that there are almost three times as many auto borrowers as there are borrowers taking out student loans, and more than three times the number of auto finance originations as mortgage originations.⁴⁸ In addition, presently the data is basically unavailable, much of it is proprietary, and if available, it is prohibitively expensive or requires extensive analysis.⁴⁹ Further, the direct collection of data would answer the critics who question the use of proxy analysis in enforcement actions.⁵⁰

In Fall 2018, CFPB Rulemaking Agenda, the CFPB indicated, consistent with comments made earlier in May 2018, that it was reexamining the requirements of the ECOA concerning the disparate impact doctrine in light of recent Supreme Court cases, presumably the 2015 *Texas Department of Housing and Human Affairs v. the Inclusive Communities Project*⁵¹ as well as the passage of Public Law 115-172, wherein Congress invoked the Congressional Review Act to disapprove the CFPB Bulletin 2013-02 (March 21, 2013), relating to “Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act.”⁵² The response from U.S. Senators and State Attorneys General have been swift.

On September 5, 2018, fourteen State Attorneys General, in jurisdictions representing a total of 125 million Americans,⁵³ wrote to Acting CFPB Director Mick Mulvaney, in response to his statement that the CFPB “will be reexamining the requirements” of the ECOA.⁵⁴ They noted particular concern due to the State Attorneys General sharing authority with CFPB under 12 U.S.C. Section 5552, enacted under the Dodd-Frank Reform Act, and because many of their antidiscrimination statutes, such as the Maryland Equal Credit Opportunity Act,⁵⁵ are modeled on ECOA. The letter emphasizes the critical importance of disparate impact liability in antidiscrimination law and the reliance of State Attorneys General upon such theories to “combat lending discrimination and ensure greater equality of opportunity.”⁵⁶

⁴⁸ Americans for Financial Reform, *et al.*, *supra*, note 47 and note 8 at 5.

⁴⁹ Americans for Financial Reform, *et al.*, *supra*, note 47 at 4.

⁵⁰ Americans for Financial Reform, *et al.*, *supra*, note 47 at 4. See also note 60, *infra*. An example of proxy analysis is Bayesian Improved Surname Geocoding (BISG), which is appropriate, as noted below, yet objected to as it represents an indirect method.

⁵¹ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

⁵² 12 C.F.R. Sec. 1002.5(b) 12 C.F.R. Sec. 12(a), (b), and Public Law 115-172, May 21, 2018.

⁵³ Census Bureau, Annual Estimates of the Resident Populations for the United States, July 1, 2018, available at: <https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html>

⁵⁴ Letter dated September 5, 2018 to Acting Director Mick Mulvaney, Consumer Financial Protection Bureau, signed by Josh Stein, NC AG, Xavier Becerra, CA AG, Karl A. Racine, DC AG, Lisa Madigan, IL AG, Janet Mills, Maine AG, Brian E. Frosh, Maryland AG, Maura Healey, MA AG, Lori Swanson, MN AG, Gurbir Grewal, NJ AG, Barbara D. Underwood, NY AG, Ellen F. Rosenblum, OR AG, Peter F. Kilmartin, RI AG, Thomas J. Donovan, Jr., VT AG, and Mark R. Herring, VA AG., available at <https://www.ncdoj.gov/getattachment/36142f21-0b34-4955-8f8a-c5d92051662b/ECOA-disparate-impact-letter-to-CFPB-final.pdf.aspx>

⁵⁵ Md. Code Ann. Com. Law Section 12-701 *et seq.*

⁵⁶ Stein, *et al.*, *supra*, note 54 at 2, See Brief of Massachusetts *et al.* as Amici Curiae in Support of Respondent, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015) (No. 13-1371), at 24-26, available at https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/131371_amicus_resp_states.authcheckdam.pdf.

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Finally, the State Attorneys General expressed their trust that the CFPB reexamination would determine that ECOA provided for disparate impact liability, but in any event, they noted in closing that the “Attorneys General will not hesitate to uphold the law if CFPB acts in a manner contrary to law with respect to interpreting ECOA or to fulfilling its Congressional charge to ensure nondiscriminatory lending to the residents of our states.” Auto lending is one of the primary concerns of the State Attorneys General.

The critical importance of loan data reporting to combat discrimination and predatory lending is highlighted by the recent introduction in February 2019, of proposed legislation in the U.S. Senate and the House of Representatives. The Home Loan Quality Transparency Act, introduced in the Senate by Sen. Catherine Cortez Masto (NV), and its companion bill (H.R. 963) in the U.S. House of Representatives, introduced by Congresswoman Nydia M. Velazquez (NY), Chairwoman of the House Small Business Committee, reinstate Dodd-Frank reporting requirements that were repealed last year. At that time, Congress voted to roll back reform measures and exempted 85% of all banks and credit unions from reporting loan characteristics vital to ensuring lending fairness, and relied upon by consumers, advocates and regulators in addressing discriminatory and unfair lending practices. In addition to Senator Cortez Masto (NV), thirteen other U.S. Senators joined in introducing the legislation.⁵⁷

Absent timely action at the federal level for mortgage lending discrimination documentation, at least one state, Connecticut, has passed recent legislation to collect data from sales finance companies pertaining to the ethnicity, race and sex of applicants, effective October 1, 2018.⁵⁸

This resolution follows the notice published by the Consumer Financial Protection Bureau, pursuant to the ECOA, concerning the new Uniform Residential Loan Application and the collection of expanded HMDA Act Information about ethnicity and race in 2017.⁵⁹ It seeks to gather similar information in the vehicle sales market through voluntary self-identification, using disaggregated racial and ethnic categories, made available through a Demographic Information Addendum. The resolution further acknowledges that some other equivalent measurement of discrimination can also be adopted, such as the

⁵⁷ Van Hollen, Democratic Colleagues Introduce Legislation to Help Prevent Housing Discrimination, Press Release, Feb 5, 2019. Introduced in the Senate by U.S. Senators: Chris Van Hollen (Md), Catherine Cortez Masto (NV), Richard J. Durbin (IL), Cory Booker (NJ), Maria Cantwell (WA), Tammy Duckworth (IL), Diane Feinstein (CA), Kristen Gillibrand (NY), Kamala D. Harris (CA), Robert Menendez (NJ), Tina Smith (MN), Elizabeth Warren (MA), and Ron Wyden (OR), available at <https://www.vanhollen.senate.gov/news/press-releases/van-hollen-democratic-colleagues-introduce-legislation-to-help-prevent-housing-discrimination-h.r.963>. H.R. 963 was also cosponsored by Carolyn Maloney (NY), Al Green (TX), and Jackson Lee (TX). See also H.R. 963, available at <https://www.congress.gov/bill/116th-congress/house-bill/963/text?q=%7B%22search%22%3A%5B%22sickle+cell%22%5D%7D>.

⁵⁸ Section 36a-547 of the 2018 Supplement to the General Statutes, as Amended by Section 97 of Public Act 18-173, available at <https://www.cga.ct.gov/2018/act/pa/pdf/2018PA-00173-R00HB-05490-PA.pdf>.

⁵⁹ Bureau of Consumer Financial Protection Plan, Status of New Uniform Residential Loan Application and Collection of Expanded Home Mortgage Disclosure Act Information About Ethnicity and Race in 2017, Federal Register, Vol 81, No. 189/ Thursday, September 29, 2016, Notice.

Bayesian Improved Surname Geocoding (BISG) methodology,⁶⁰ or other generally agreed upon research-focused methodology pertaining to vehicle transactions. Geocoding refers to the process of taking input text, such as an address or a name of a place, and returning a latitude/longitude location on the earth's surface for that place.

3. ADDRESSING DISCRIMINATION: COMPLIANCE SYSTEMS AND DEALER MARKUPS

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, “[i]f 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.”⁶¹ Many studies 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.⁶²

The allegations of discrimination noted in the public settlements indicate a pattern or practice of conduct in violation of the Equal Credit Opportunity Act, 15 U.S.C. Sections 1691-1691(f), whereby dealers charge higher interest rates to consumer auto loan borrowers on the basis of race and national origin. Parties have challenged the CFPB Bulletin on the basis of whether the discrimination that may result from dealer markup is intentional by dealers or have challenged the bulletin on the basis that the CFPB exceeded its agency authority in issuing the bulletin. The General Accountability Office 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.⁶³ As noted earlier, Congress disapproved CFPB Bulletin 2013-02 (March 21, 2013), through passage of Public Law 115-17 (May 21, 2018).

On August 23, 2018, the New York State Department of Financial Services provided guidance to Indirect Automobile Lenders to ensure compliance with New York State's Fair Lending Law, Section 296-a of the Executive Law (“Fair Lending Law”), by supervised

⁶⁰ Consumer Financial Protection Bureau. (Summer 2014). “Using Publicly Available Information to Proxy for Unidentified Race and National Origin: A Methodology and Assessment.” [Hppt://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf](https://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf).

⁶¹ CFPB Bulletin 2013-02, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act, 15, dated March 21, 2013.

⁶² See Ayres and Cohen above. See also Ally Financial Inc. and Ally Bank (\$98 Million) U.S. Dept. of Justice Release 13-1349, dated Dec. 20, 2013; American Honda Corp (\$24 Million), U.S. Dept. of Justice Release 15-882, dated July 14, 2015; Fifth Third Bank (\$18 Million), U.S. Dept. of Justice Release 15-1185, dated Sept. 28, 2015; and Toyota (\$21 Million) U.S. Dept. of Justice Release 16-127, dated Feb. 2, 2016.

⁶³ U.S. Government Accountability Office, Letter B-329129, dated Dec. 5, 2017, addressed to U.S. Senator Patrick J. Toomey.

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institutions that engage in indirect automobile lending.⁶⁴ The guidance reiterates that New York's Fair Lending Law prohibits discrimination in, among other things, the granting, withholding, extending, or renewing, or in the fixing of the rates, terms, or conditions of any form of credit on the basis of race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, disability, or familial status. N.Y. Exec. Law Section 296-a(1)(b). The guidance sets forth a list of actions that lenders should take to develop a fair lending compliance program for indirect automobile lending.

Moreover, the guidance specifically addresses the liability of lenders for discrimination resulting from dealer markup and compensation policies. Since dealer markup is part of the credit transaction, it must be charged non-discriminatorily to comply with the Fair Lending Law. The guidance states that lenders that permit dealers to markup the buy rate are potentially liable for prohibited pricing disparities.⁶⁵ The guidance identifies specific compliance actions. Item 4 states "the lender should consider reducing dealer discretion by placing limits on dealer markup or eliminating dealer discretion to markup interest rates by using a different method for dealer compensation, such as a flat fee for each transaction, that does not potentially result in discrimination. Limits on markup do not, however, guarantee protection from fair lending liability."⁶⁶

U.S. Senator Kirsten Gillibrand (NY), and six other Senators, in a December 6, 2018, letter to Chairman Joseph Simons, Federal Trade Commission ("FTC"), expressed grave concerns about how minority car purchasers are harmed by discriminatory and predatory practices through dealer markups.⁶⁷ The letter acknowledged the FTC's authority over the business practices of automobile dealers, and requested a detailed explanation of how the FTC plans to uphold its responsibility and enforce ECOA in indirect automobile lending.⁶⁸ The letter specifically identified the issues of documented discrimination in studies alluded to elsewhere in this resolution⁶⁹ relating to dealer markups and the pricing and disparity of add-on products, as well as the prices of cars.

The fundamental issue this resolution addresses is the significant risk that currently exists in today's auto lending market: that pricing disparities may exist between auto lending customers with equal lending risk, on the basis of race, national origin, and potentially other prohibited bases. One remedy to this problem that was offered in CFPB 2013-02, now repealed, and in the September 2018 New York Guidance on Fair Lending Law, and supported by other commentators, is that of eliminating the discretion of dealers in dealer

⁶⁴ New York Department of Financial Services, Indirect Automobile Lending and Compliance with New York's Fair Lending Statute, Maria T. Vullo, Superintendent of Financial Services, August 23, 2018, available at <https://www.dfs.ny.gov/legal/industry/il180823.pdf>.

⁶⁵ *Id.* at 3.

⁶⁶ *Id.* at 3.

⁶⁷ Letter to Honorable Joseph Simons, Chairman, Federal Trade Commission, December 6, 2018, signed by: U.S. Senators: Kirsten Gillibrand (NY), Cory A. Booker (NJ), Elizabeth Warren (MA), Dianne Feinstein (CA), Richard Blumenthal (CT), Kamala Harris (CA), and Ron Wyden (OR), available at: <https://www.gillibrand.senate.gov/imo/media/doc/12.6.18%20Letter%20to%20FTC%20re%20auto%20lending%20guidance.pdf>.

⁶⁸ *Id.*

⁶⁹ Ayres, *supra*, note 20; Rice, *et al.*, *supra*, note 23; and Cohen, *supra*, note 24.

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 for all consumers.

The promotion of an enhanced nondiscrimination compliance system, as voluntarily promoted in the Fair Credit Compliance Policy & Program through the National Association of Minority Automobile Dealers (“NAMAD”), the National Automobile Dealers Association (“NADA”), and the American International Automobile Dealers,⁷⁰ can be an effective way to ensure a rigorous review of exceptions to a flat-percentage fee in order to provide robust processes for fair pricing of dealer markups to all consumers in a nondiscriminatory manner. The program is predicated on and incorporates the ECOA compliance framework spelled out by the Justice Department in a series of consent orders to resolve claims of disparate impact discrimination. One of the consent orders is publicly available.⁷¹ It is important to note that this consent order to a specific dealer was issued in 2007 and was effective for a limited five-year period.

4. TRANSPARENCY OF PRICING 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, exacerbated by the lack of transparency, result in excessive pricing for consumers and discriminatory markups 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.”⁷² This report is based on an analysis of almost three 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 car dealers.⁷³

Service contracts typically cover an item not covered under a typical manufacturer warranty, or they extend the warranty for 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 are where dealers will etch in the vehicle identification number (“VIN”) on one or multiple windows to deter theft or aid in finding a stolen car.⁷⁴

The insidious effects of the wide disparities in car loan pricing are evident when compared to insurance products, which have similar characteristics and are also not tangible in

⁷⁰ Fair Credit Compliance and Policy Program, <https://www.nada.org/faircreditprogram/>.

⁷¹ www.justice.gov/crt/about/hce/documents/pacifico_order.pdf (see, in particular, paragraph 7 entitled “Guidelines for Setting Dealer Reserves” and Appendix B).

⁷² *Auto Add-Ons Add Up, How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing*, National Consumer Law Center, October 2017.

⁷³ *Id.* at 9.

⁷⁴ *Auto Add-Ons Add Up*, at 7-8.

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nature. However, while 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 with dealers selling add-ons.⁷⁵

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 of markup was 170%."⁷⁶ To put it in perspective, 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.⁷⁷

It is also important to look at add-on pricing markups in comparison to commissions independent insurance agents receive when they sell insurance to consumers. The equivalent markup for insurance agents is 11% to 18%.⁷⁸ In 2012, the average dealer markup for Etch sales in the data set was 325%, the average for GAP was 151%, and the average dealer markup for service contracts was 83%.¹⁰⁰⁹

Vehicle Identification Number (Window) Etching pricing by dealers in theory should be consistent in price because 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.⁸⁰

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. These extreme pricing inconsistencies cannot be explained by different costs to the dealer, different products being sold, or different time periods."⁸¹

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.⁸²

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.⁸³ Additionally, New York City proposed in early 2018

⁷⁵ *Id.* at 11.

⁷⁶ *Auto Add-Ons*, NCLC report, *id.* at 10. Note this Report consistently uses markup as the ratio of gross profit to the wholesale price.

⁷⁷ *Id.* at 11.

⁷⁸ *Id.* at 12.

⁷⁹ *Id.* at 12-13.

⁸⁰ *Id.* at 19-20.

⁸¹ *Id.* at 19-20.

⁸² *Id.* at 22-26.

⁸³ NYC Admin. Code Section 20-271 (Local Laws of the City of New York for the Year 2015, No. 44).

new rules under Local Laws 197 and 198 in 2017 on second-hand car dealers that would benefit consumers by, among other provisions, providing for a Consumer Bill of Rights.⁸⁴ The Bill informs the consumer he or she has the right to receive an itemized price for each add-on product, has the right to refuse any add-on product by the dealer, and further that they have the right to be free from discrimination when applying for credit.⁸⁵

In December 2018, the National Consumer Law Center published the Model “Transparent and Consistent Pricing of Motor Vehicle Add-Ons Act.”⁸⁶ The Model looks to many current statutes or ordinances currently being used to achieve consistent and transparent pricing, such as Conn. Gen. Stat. Ann. Section 14-99h, ME. Rev. Stat. Ann. Tit. 10 Section 1174(3)(E) N.Y.C Admin Code Section 20-271, and others cited within the commentary to the Model Law.⁸⁷

The legislative intent of the statute is to make the pricing of add-on products transparent and consistent to protect consumers from paying arbitrary and discriminatory prices for add-on products.⁸⁸ The definition used in the Model Act, “seeks to cover any service or product sold either before or after the vehicle is sold, provided the product is sold in conjunction with the auto sale, which is similar to New York City’s requirement under N.Y.C. Admin. Code Section 20-264 that the product be “offered with” the vehicle.”⁸⁹

Requirements for posted pricing for many retail items already exist in many states.⁹⁰ For new cars, federal law requires that cars have a manufacturer suggested retail price (MSRP) sticker on each car. 15 U.S.C. Section 1232. It is not a posted price, “but it does give consumers some idea of where a reasonable price might start. New York City has extended this idea to pricing add-ons. N.Y.C. Admin. Code Section 20-271.”⁹¹

The Model Law Section 104(2), which prohibits charging different prices for different customers, is an extension of Maine’s protection to consumers. In Maine, a prohibition on charging some car buyers different prices from others exists for the protection of dealers buying cars from manufacturers, but not for consumers buying cars from dealers. ME Rev. Stat. Ann. Tit. 10 Section 1174(3)(E).⁹²

⁸⁴ Amendments to Subchapter K of Chapter 2 of Title 6 of the Rules of the City of New York.

⁸⁵ After completing the required public hearing, notice of adoption of the new rules to implement Local Laws 197 and 198 of 2017, was effective on June 24, 2018, and notice of adoption to amend the fixed penalties was effective on July 30, 2018. New York City Rules, Recently Adopted Rules, available at <http://rules.cityofnewyork.us/adopted-rules>.

⁸⁶ National Consumer Law Center, Model Transparent and Consistent Pricing of Motor Vehicle Add-Ons Act, December 2018, available at: https://www.nclc.org/images/pdf/legislation/model_laws/model-law-transparent-and-consistent-pricing.pdf.

⁸⁷ *Id.* at 2-7.

⁸⁸ *Id.* at Section 101, Short Title and Declaration of Purpose, 2.

⁸⁹ *Id.* at Section 102 Definitions, Comment.

⁹⁰ *Id.* at Section 104, Transparent and Consistent Pricing, Comment, and see, U.S Department of Commerce, National Institute of Standards and Technology, U.S. Pricing Laws and Regulations by listing state, available at <https://www.nist.gov/pml/weights-and-measures/laws-and-regulations/retail-and-unit-pricing-laws>.

⁹¹ *Id.* at Section 104, Transparent and Consistent Pricing, Comment.

⁹² *Id.* at Section 104, Transparent and Consistent Pricing, Comment.

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The mandate to provide a pricing schedule to the Attorney General in Model Law Section 104(1) and (2) is based in part on Connecticut's pricing requirements for vehicle identification number etching.⁹³ Connecticut Gen. Stat. Ann. Section 14-99h, requires dealers to submit prices for the add-on of etching and to submit an amended rate schedule for price changes. Further, the comment notes that regulators, researchers and consumer advocates will be able to see the prices from dealer to dealer for add-ons and will provide for healthy competition.⁹⁴

The Model Act requirement under Section 104(5) that vehicle add-ons be optional, and that that fact is disclosed, will aid in deterring discriminatory practices. Citing earlier research, the Comment notes that "African American and Latino consumers, for example, are about three times more likely to be told that add-ons are mandatory compared with white consumers."⁹⁵ Under the Model Law, Section 106(2), a violation of the Act is a violation of the state unfair and deceptive practices statute (UDAP).⁹⁶

Recent enforcement actions in add-on products further highlight the need for greater consumer protections. A recent important study by law professors Prentiss Cox, Amy Widman and Mark Totten, on UPAD enforcement, "Strategies of Public UDAP Enforcement," is helpful in understanding the varied operation of UDAP rules, which exist in every state⁹⁷ and at the federal level with the FTC and the CFPB.⁹⁸ The implications of the study by support the observation that robust enforcement of UDAP laws is lacking or insufficient in many jurisdictions, either due to lack of prioritization, funding, or effective enforcement strategy, among other reasons. Even in jurisdictions where large dollar amount settlements have been achieved, the authors question: "Should state enforcers focus on larger targets? If so, what happens to the fraud and deception furthered by individuals and small entities that states characterized as "street cops" target?"⁹⁹

5. EDUCATION OF LAWYERS AND CONSUMERS

Consumer protections would be strengthened by enhancing educational opportunities for consumers, guided by members of the Bar,¹⁰⁰ so they can identify and effectively address the issues they face in auto lending and sale practices. The magnitude of over 100 million

⁹³ *Id.* at Section 104, Transparent and Consistent Pricing, Comment.

⁹⁴ *Id.* at Section 104, Transparent and Consistent Pricing, Comment.

⁹⁵ *Id.* at Section 104, Transparent and Consistent Pricing, Comment.

⁹⁶ *Id.* at Section 106(2), Enforcement.

⁹⁷ Harvard Journal on Legislation, "Strategies of UDAP Enforcement," Posted March 29, 2017, last revised 4 Mar 2018, Prentiss Cox, Amy Widman, and Mark Totten, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2942406.

⁹⁸ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. No. 111-203, 124 Stat. 1376 (2010).

⁹⁹ Cox, et al., *supra* note 97 at 103.

¹⁰⁰ E.g., March 2019 webinar "Abusive Car Loan and Sale Practices: Scope and Potential Remedies to Strengthen Consumer Protections," sponsored by ABA Civil Rights and Social Justice Section, Economic Justice Comm., and State and Local Government Law Section, State Attorneys General and Department of Justice Attorneys Comm.

transactions and the substantial economic harm inflicted upon millions of low- and moderate-income consumers, many of whom count the automobile as their single largest debt, makes it imperative that the Association vigorously address the need to facilitate consumer protection. A recent Congressional Research Service In Focus Report, “The Automobile Lending Market and Policy Issues,” noted that CFPB research and others have identified the need for education programs to address the lack of awareness of consumers in their ability to negotiate the terms of an auto loan, and when combined with auto dealers’ discretion on markups, heightens consumers’ risk from bad actors.¹⁰¹

Finally, bar associations should help all citizens to understand their legal rights and address situations where those rights are violated. A starting point is communicating a model “Consumer Bill of Rights” so that all consumers are aware of their rights to receive an auto loan free of discrimination, based solely on their credit risk, and full pricing transparency prior to entering into negotiations for an auto purchase.

Conclusion

This resolution will affirm the ABA’s commitment to actively opposing discrimination on the basis of protected classifications as articulated in the ECOA, will strengthen consumer protections for all, and will promote economic justice. This resolution, if adopted, will advance the work of consumer advocates, legislators, and attorneys who seek justice and fairness for consumers, particularly low-income consumers and consumers who suffer discrimination on the basis of race, gender, national origin, or income.

Respectfully submitted,

Wendy K. Mariner
Chair, Section of Civil Rights and Social Justice
August 2020

¹⁰¹ Congressional Research Service, “The Automobile Lending Market and Policy Issues, Cheryl Cooper, April 25, 2019, IF11192, available at <https://fas.org/sgp/crs/misc/IF11192.pdf>.

GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Wendy K. Mariner, Chair

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, gender or national origin for non-mortgage credit transactions specifically for vehicle transactions; it urges Congress and all state, local, territorial, and tribal legislative bodies and governmental agencies to adopt and enforce laws and policies that require an enhanced nondiscrimination compliance system for a vehicle loan or consider reducing dealer discretion by placing limits on dealer markup and to adopt legislation requiring the timely notice and disclosure of pricing of add-on products by dealers on each vehicle through reasonable means before a consumer negotiates to purchase a vehicle; and encourages education of lawyers and consumers about purchases and financing of vehicles and consumers' legal rights in such purchases and loans.
2. Approval by Submitting Entity. The Council of the Section of Civil Rights and Social Justice approved sponsorship of the amended resolution during its Spring Meeting on Friday, April 24, 2020.

The Council of the Section of State and Local Government Law approved sponsorship of the amended resolution during its Spring Business Meeting on Tuesday, May 26, 2020.

The Commission on Homelessness and Poverty approved co-sponsorship of the amended resolution on May 1, 2020.

3. Has this or a similar resolution been submitted to the House or Board previously? Yes. A version was submitted for the 2018 Annual Meeting and 2019 Annual Meeting but withdrawn to collaborate with other entities.
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, which would be bolstered by this resolution.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

6. Status of Legislation. In February, 2019, fourteen U.S. Senators joined in introducing the Home Loan Quality Transparency Act, which calls for the reinstatement of reforms mandated by the Dodd-Frank Act for reporting of data collection requirements in the home mortgage market, which were relied upon by consumers, advocates and regulators in addressing discriminatory and unfair lending practices. Van Hollen, Democratic Colleagues Introduce Legislation to Help Prevent Housing Discrimination, Press Release, Feb 5, 2019. It was introduced in the Senate by U.S. Senator Catherine Cortez Masto (NV). The reinstatement was introduced because Congress voted to roll back the Dodd- Frank reform measures and exempted 85% of all banks and credit unions from reporting loan characteristics vital to ensuring lending fairness. A companion Bill, H.R. 963, February 2019, was introduced in the U.S. House of Representatives, by Congresswoman Nydia M. Velazquez, Chairwoman of the House Small Business Committee.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Section 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 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 Resolution and 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 Tort Trial and Insurance Practice Section
 Section of Litigation
 Section of Administrative Law and Regulatory Practice
 Government and Public-Sector Lawyers Division
 Commission of Racial and Ethnic Diversity in the Profession
 Commission of Hispanic Legal Rights and Responsibilities
 Coalition on Racial and Ethnic Justice
 Commission on Disability Rights
 Standing Committee on Public Education
 Law Student Division
 Young Lawyers Division
 Senior Lawyers Division
 Commission on Sexual Orientation and Gender Identity

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Solo, Small Firm and General Practice Division
Center for Public Interest entities.

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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, gender or national origin for non-mortgage credit transactions specifically for vehicle transactions; it urges Congress and all state, local, territorial, and tribal legislative bodies and governmental agencies to adopt and enforce laws and policies that require an enhanced nondiscrimination compliance system for a vehicle loan or consider reducing dealer discretion by placing limits on dealer markup and to adopt legislation requiring the timely notice and disclosure of pricing of add-on products by dealers on each vehicle through reasonable means before a consumer negotiates to purchase a vehicle; and encourages education of lawyers and consumers about purchases and financing of vehicles and consumers' legal rights to such purchases and loans.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the highly discriminatory practices and impacts to many consumers of color, gender, national origin, and low-income, that arise in 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 timely notice and transparency in the auto lending market, particularly in the pricing of add-on products, 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 public and private attorneys who diligently work to provide a fair and transparent economic market for all consumers, regardless of race, color, gender, 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, Congress approved Public Law 115-172, May 21, 2018, which invoked the Congressional Review Act to disapprove CFPB Bulletin 2013 -02 (March 21, 2013), which provided guidance on the use of discretion in dealer interest markup rates. The CFPB Rulemaking Agenda, Fall 2018, indicates that the CFPB is reexamining the requirements of the ECOA concerning the disparate impact doctrine in light of recent supreme court cases.

Internal to the ABA, the Business Law Section has not yet indicated it whether it will oppose or support the resolution, as of the time of filing.

AMERICAN BAR ASSOCIATION

**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
HIV/AIDS IMPACT PROJECT COMMITTEE
HEALTH LAW SECTION
CENTER FOR HUMAN RIGHTS**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association opposes all federal, state, local, territorial
- 2 and tribal legislation, regulation, and agency policy that discriminates against transgender
- 3 and non-binary people on the basis of gender identity and/or that imposes barriers to
- 4 obtaining or providing medically necessary care to affirm an individual's gender identity.

REPORT

INTRODUCTION

Transgender people are more visible in American society than ever before, but healthcare relevant to their needs is not uniformly accessible. Law-making bodies are proposing restrictions on the care available to transgender and non-binary¹ people. Currently, more than 30 such bills have been filed in half the states in the union, and this number is rapidly changing.² Many of these bills aim to prevent transgender and non-binary people from obtaining medically necessary, gender-affirming healthcare, albeit through different avenues; others propose to criminally punish medical providers, charge supportive parents with abuse and neglect, and end/or public funding of gender-affirming care.³ Regardless of how the laws execute their purpose, every one of them is inconsistent with medical consensus and would inflict harm by restricting access to medically necessary healthcare.⁴

According to the Williams Institute, 0.6% of U.S. adults (1.4 million) and an estimated 0.7% of youth ages 13 to 17, about 150,000 youth, are transgender.⁵ In “Injustice at Every Turn: A Report of the National Transgender Discrimination Survey,” 41% of respondents reported attempting suicide vs. the 1.6% of the general population.⁶ Nineteen percent of respondents were refused medical care because of their transgender or gender non-conforming status, and this rate was still higher for people of color.⁷ Sixteen percent of respondents in the 2018 National Center for Transgender Equality LGBTQ Behind Bars Report had been incarcerated at some point during their lives, with the number escalating to 47% for black transgender people.⁸ Transgender youth are over-represented in child welfare and juvenile justice systems and among youth experiencing homelessness compared to their cisgender peers.⁹ It is estimated that 152,000 transgender people are currently Medicaid recipients. They need increased access to healthcare, not more restrictions.

¹ The terms transgender and non-binary are being used as umbrella terms to refer to all people who do not identify with their sex assigned at birth.

² See Freedom For All Americans, <https://www.freedomforallamericans.org/2020-legislative-tracker/2020-anti-transgender-legislation/> (last visited April 11, 2020).

³ *Ibid.*

⁴ Human Rights Campaign Foundation, *Anti-Transgender Legislation Spreads Nationwide* (2016).

⁵ Jody L. Herman, Andrew R. Flores, Taylor M.T. Brown, Bianca D.M. Wilson and Kerith J. Conron, The Williams Institute, UCLA, *Age Of Individuals Who Identify As Transgender In The United States* (Jan. 2017) <http://thewilliamsins.wpengine.com/wp-content/uploads/Age-Trans-Individuals-Jan-2017.pdf>.

⁶ Jaime M. Grant, Lisa A. Mottet, Justin Tanis, National Center for Transgender Equality and National Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), https://www.thetaskforce.org/wp-content/uploads/2019/07/ntds_full.pdf.

⁷ *Supra* note 1.

⁸ National Center for Transgender Equality, *LGBTQ People Behind Bars* (Oct. 2018), available at <https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf>.

⁹ See LAMBDA LEGAL, CHILDREN'S RIGHTS, & CTR. FOR THE STUDY OF SOC. POLICY, *Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care*, at 7 (Apr. 2017), https://www.lambdalegal.org/sites/default/files/publications/downloads/tgnc-policyreport_2017_final-web_05-02-17.pdf

For some transgender and non-binary people, the disconnect between their sex assigned at birth and the gender with which they identify can lead to serious emotional distress that negatively affects their health and daily life. Pain and distress caused by this disconnect is called gender dysphoria, a serious medical condition. Gender-affirming care is proven, effective, medically necessary care provided to relieve dysphoria. Gender-affirming care can include puberty blockers, cross-sex hormone therapy, or surgical procedures, depending on the particular transgender person's needs. Transgender people have a right to gender-affirming care and a better quality of life.

The American Academy of Pediatrics (AAP) recommends that “youth who identify as TGD (trans and gender-diverse) have access to comprehensive, gender-affirming, and developmentally appropriate health care that is provided in a safe and inclusive clinical space”; and they find that any discrimination “based on gender identity or expression, real or perceived, is damaging to the socioemotional health of children, families, and society.”¹⁰ Providers are encouraged to ask youth how they self-identify and follow their lead. The AAP finds that pubertal suppression, used for precocious puberty for 40 years, reduces distress for transgender youth and reduces the need for certain surgeries later in life. They incorporate the same gender-affirming standards for adolescents used by the Endocrine Society and the World Professional Association for Transgender Health (WPATH).¹¹ Withholding puberty suppressants and subsequent hormone therapy is not a neutral option. Some treatments have a short window of time during which they may be effectively employed.¹² In addition to the AAP, the Endocrine Society and the WPATH, The American Psychological Association,¹³ the American College of Obstetricians and Gynecologists¹⁴ and the Society for Adolescent Health and Medicine¹⁵ concur that affirmative care is the standard that best serves transgender and non-binary youth. Still, numerous states are ignoring the evidence, proposing legislation that denies access to minors and thereby endangering their health.

This resolution is a logical next step to protect the LGBTQ community when transgender people are under legislative assault.

I. Restricting Access to Gender-Affirming Healthcare: Penalizing Providers and Parents

A-Penalizing Providers

¹⁰ Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 J. Pediatr. 1 (Oct. 2018).

¹¹ The World Professional Association for Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 7th Version, 2011.

¹² *Id.*

¹³ American Psychological Association, *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, 7 Am. Psychol. 832, (Dec. 2015).

¹⁴ American College of Obstetricians and Gynecologists, *Care for Transgender Adolescents*, Committee on Adolescent Care Opinion Number 685 (Jan. 2017).

¹⁵ Samantha J. Ridley, et. al., *Youth and Caregiver Perspectives on Barriers to Gender-Affirming Health Care for Transgender Youth*, 59 JADHE 254 (2016).

Alabama, Ohio, Colorado, Idaho and Oklahoma are among the states proposing consequences to providers for providing gender-affirming medical care to minors. In Alabama, the bill states, “no person shall engage in, counsel, or make a referral for any of the following practices upon a minor, and no person shall cause any of the practices in this subsection to be performed upon a minor if the practice is performed for the purpose of attempting to affirm the minor’s perception of his or her gender or sex, if that perception is inconsistent with the minor’s biological sex...” and it lists treatments including puberty blockers, cross-sex hormones, and myriad types of surgery.¹⁶ Violations are a Class C Felony.

In Oklahoma, “A health care professional who intentionally performs gender reassignment medical treatment on a person who is under the age of eighteen (18) years is subject to professional discipline by the State Board of Medical Licensure and Supervision, the State Board of Osteopathic Examiners or the applicable health care professional licensing board, up to and including suspension or revocation of any license or certification required to practice.”¹⁷

Transgender-related health care services vary based on individual needs, age, and stage in the journey. Such services can take different forms: mental health care, puberty blockers, hormone therapy or surgical intervention. However, in 15 states, there is pending legislation that, if passed, would result in consequences for health care providers ranging from losing their licenses to being charged with a felony for providing medically appropriate and necessary gender-affirming care.¹⁸

As held by many courts, transgender people are protected under the Equal Protection clause of the Constitution.¹⁹ In *Rumble* and *Cruz*, refusing care to transgender people based on their transgender status is deemed discrimination under section 1557 of the

¹⁶ AL SB219, *Vulnerable Child Compassion and Protection Act*.

¹⁷ OK SB1819.

¹⁸ *Supra* note 1.

¹⁹ *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. Nov. 21, 2017) (discrimination against transgender people is gender-based discrimination under the Equal Protection Clause of the Constitution). *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. May 30, 2017) (holding that discrimination against transgender students constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution). *Dodds v. US Dept. of Education*, 845 F.3d 217 (6th Cir. Dec.16, 2016) (holding that discrimination against transgender students likely constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution). *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. Dec. 6, 2011) (holding that termination of employee based on her gender transition, transgender status and unsubstantiated “bathroom concerns” constitutes sex-based discrimination in violation of the Equal Protection Clause of the U.S. Constitution). *Brown v. Dept. of Health and Hum. Servs.*, No. 8:16DCV569, 2017 WL 2414567 (D. Neb. June 2, 2017) (holding that discrimination against transgender people constitutes sex discrimination that is subject to heightened scrutiny under the Equal Protection Clause of the Constitution).

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Affordable Care Act (the “ACA”).²⁰ Legislation that instructs providers to refuse care based on who the patient is has been held to be unconstitutional and discriminatory.²¹

When physicians provide treatments and services for some patients, but withhold them from others because they are transgender, it violates equal protection principles and the Constitution. Many physicians give puberty suppressants for precocious puberty (administration is off-label for gender-affirming care); for example, cisgender patients get mastectomy and chest reconstruction, and patients are given hormone therapy for various medical conditions.

Bills criminalizing providers are based on the premise that gender-affirming care should not be administered, and physicians will be punished for providing medically appropriate, necessary care, beneficial to the patient. Seizing licenses and charging physicians with crimes for appropriate medical practice will only restrict availability and burden access to care.

In August 2015, the American Bar Association adopted Resolution 115, urging “federal, state, local, territorial, and tribal governments not to impose upon medical facilities or healthcare providers licensing or other regulatory requirements that are not medically necessary or that have the purpose or effect of restricting availability or burdening patients’ access to healthcare services.”²² From ramifications of professional discipline and suspended licenses to charging providers with felonies, this is precisely what legislation penalizing providers accomplishes.

The American Academy of Family Physicians strongly opposes political intrusion into the doctor-patient relationship because it endangers the health of their patients to criminalize physicians performing necessary care, and restricts access to care.²³ This statement of support was joined by the American Psychiatric Association, the American College of Physicians, the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics and the American Osteopathic Association.²⁴ The statement cited serious concerns over how laws of this nature will inevitably undermine the trust shared between a doctor and a patient, and that their education, training and expertise are needed to guide decisions about medical care. The statement encourages lawmakers to partner with them to expand health care coverage rather than restricting it.²⁵ One pediatrician and adolescent medicine specialist worried that these bills would falsely

²⁰ *Rumble v. Fairview Health Servs.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (holding that discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557 of the Affordable Care Act). *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. Jul. 5, 2016) (holding that discrimination on the basis of gender identity is sex discrimination under Section 1557 of the Affordable Care Act). *Cruz v. Zucker*, 218 F.Supp.3d 246 (S.D.N.Y. Nov. 14, 2016) (holding that transgender specific healthcare coverage is required by law regardless of age).

²¹ *Supra* note 20.

²² See 15A115.

²³ *AAFP Objects to Interference With Doctor-Patient Relationship*, (May 17, 2019, 3PM), <https://www.aafp.org/news/government-medicine/20190517interference.html>.

²⁴ *Id.*

²⁵ *Id.*

portray her lifesaving work as harmful and abusive, further stigmatizing transgender people and disregarding consultations with her medical team, minors' caregivers and her adherence to established guidelines.²⁶

B-Penalizing Parents

Currently, five states have legislation moving forward that penalizes parents for "assisting, coercing or providing for" gender-affirming healthcare for their minor by finding them guilty of abuse or neglect.²⁷ In fact, West Virginia's bill states that parents cannot even consent for their minor to have gender-affirming care.²⁸

Tennessee's bill will penalize parents if they facilitate care for their minor child before puberty, or without the gatekeeping of at least three physicians. The bill states:

A person shall not provide or facilitate the provision of sexual identity change therapy to a minor who has not yet entered puberty. (2) A person shall not provide or facilitate the provision of sexual identity change therapy to a minor who has entered puberty unless the parent or legal guardian of the minor provides a signed, written statement recommending sexual identity change therapy for the minor from: (A) Two (2) or more physicians licensed under title 63, chapter 6 or 9; and (B) One (1) or more physicians licensed under title 63, chapter 6 or 9, who is board certified in child and adolescent psychiatry, and who is not the same person as any physician whose written recommendation is used to satisfy subdivision (b)(2)(A). (c)(1) A violation of this section is punishable as child abuse pursuant to § 39-15-401.²⁹

Missouri's bill proposes, "A person commits the offense of abuse or neglect of a child if such person assists, coerces, or provides for a child who is under eighteen years of age to undergo any surgical or hormonal treatment for the purpose of gender reassignment."³⁰

West Virginia takes a different approach to denying access to minors: "Any minor seeking gender reassignment surgery before reaching 18 years of age shall be denied any such request, on the basis that the minor cannot provide consent for gender reassignment surgery, by any licensed healthcare provider that provides services in this state. No parent, guardian, or other legal custodian of a minor child seeking gender reassignment surgery may substitute his or her consent for that of the minor child for purposes of circumventing this section."

Having a supportive family often serves to mitigate health risks for LGBTQ youth,

²⁶ Nadia Dowshen, *The Dangers Of Criminalizing Medical Care For Trans Youth*, THE HILL (Feb. 8, 2020, 9AM), <https://thehill.com/opinion/healthcare/482057-the-dangers-of-criminalizing-medical-care-for-trans-youth>

²⁷ *Supra* note 1.

²⁸ 2020 W. Va. Acts HB4609.

²⁹ TN HB2576.

³⁰ MO HB2051.

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especially for transgender youth.³¹ The AAP emphasizes that the supportive participation of parents is associated with more positive outcomes in both mental and physical health, allowing transgender youth to focus on things like academics and socializing.³² Without that parental support, many youth are at risk of homelessness, violence, poverty, self-harm, substance abuse and sexually risky behaviors.³³

Gatekeeping, the requirement that mental health care professionals must approve a request for gender-affirming care, is a barrier to access. As in the Tennessee bill, it often requires visits to multiple providers which is costly, if even feasible depending on location. It creates a double standard that transgender people, but not cisgender people, must meet, to get medically necessary care. Transgender people report being dehumanized by the evaluations, having to prove their “transness.”³⁴

It is counterintuitive to criminalize the very life-saving healthcare and affirming family support that professionals acknowledge. Yet, this tactic is used because it is one of the few barriers to minors’ obtaining care when they have supportive parents. If a family is supporting a minor and able to get them medically necessary healthcare, there is no reason why legislation should prevent them from doing so.

The Pediatric Endocrine Society strongly condemns public statements that contradict evidence-based standard-of-care recommendations due to the risks to transgender youth and their families.³⁵ These bills are not just discriminatory, but dangerous.

West Virginia’s bill states that minors may not consent to their own treatment, nor may parents consent on their behalf. It is well-established law that parents have the right to speak for their minors regarding medical treatment. Under the *parens patriae* doctrine, the state may overrule a parent’s authority when they refuse lifesaving or therapeutic care for their minor.³⁶ That is not the case here. In fact, it is overreach to take away parents’ right to consent to medically sound, necessary health care. Nowhere is this in the best interest of the minor.³⁷

II. Restricting Access to Gender-Affirming Healthcare: Withholding Government Funds

A-Medicaid

³¹ Lisa Simons, et. al., *Parental Support and Mental Health Among Transgender Adolescents*, 53 J. Adolesc. Health 791 (2013).

³² *Supra* note 15.

³³ Carly Guss, et. al., *Transgender and Gender Nonconforming Adolescent Care: Psychosocial and Medical Considerations*, 27 Curr Opin Pediatr. 421 (2015); Laura L. Kimberly et. al., *Ethical Issues in Gender Affirming Care for Youth*, 142 J. Pediatr. 1 (2018).

³⁴ *Supra* note 15.

³⁵ Pediatric Endocrine Society, *Pediatric Endocrine Society Statement Against Public Discourse that Risks the Well-being of Transgender and Gender Diverse Youth and their Families*, Oct. 28, 2019.

³⁶ Kathryn Hickey, *Minors’ Rights in Medical Decision Making*, 9 JONAS Healthc Law Ethics Regul 100, (2007)

³⁷ Aviva L. Katz, et. al., *Informed Consent in Decision Making in Pediatric Practice*, 138 J. Pediatr. e1 (2016).

Medicaid is currently the nation's largest health insurer, because many low-income Americans cannot get insurance through employment and cannot afford to purchase health plans themselves.³⁸ In addition, nearly all children in foster care receive health care through state Medicaid programs.³⁹ The National US Transgender Survey found that 13% of transgender people were insured through Medicaid. The ACA required Medicaid to cover gender-affirming care beginning in 2016, but that did not happen everywhere.⁴⁰ Some states violated the law by denying payment. Last year, the American Civil Liberties Union (the "ACLU") filed suit challenging an Iowa state law barring Medicaid coverage for gender affirmation surgery, alleging that it violates Iowa's civil rights act.⁴¹ Wisconsin tried to ban trans-affirming coverage, but it was overturned in Federal Court last summer.⁴² Currently, there is a case pending in Alaska, as well. The plaintiff is arguing that the ban on gender-affirming healthcare under Medicaid violates the Equal Protection Clause of the 14th amendment.⁴³

The American Medical Association, the American Psychological Association, the National Center for Transgender Equality and the National LGBT Task Force, have been calling for both private and public insurers to cover medically necessary gender-affirming treatments.⁴⁴ Transition-related care is not elective. It is medically necessary and urgently needed, essential basic health care.⁴⁵ The study found that participants were less likely than the general population to have employer-sponsored or individual health insurance and more likely to be covered by public programs (like Medicaid).⁴⁶ The National Institute of Health presented *Journal of Bioethics* research promoting public funding as a matter of 'clinical necessity and justice.'⁴⁷

Case law also supports putting public funds toward coverage for gender-affirming healthcare.⁴⁸

³⁸ Kellan Baker, et. al., *The Medicaid Program and LGBT Communities: Overview and Policy Recommendations*, (August 9, 2016, 9:02 am) <https://www.americanprogress.org/issues/lgbtq-rights/reports/2016/08/09/142424/the-medicaid-program-and-lgbt-communities-overview-and-policy-recommendations/>

³⁹ Child Welfare Information Gateway. (2015). Healthcare coverage for youth in foster care—and after. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau. https://www.childwelfare.gov/pubPDFs/health_care_foster.pdf.

⁴⁰ <http://www.newnownext.com/trans-health-care-under-medicaid/10/2019/>

⁴¹ Rox Laird, *Iowa Sued Over Ban on Medicaid Funds for Sex-Change Surgery*, THE COURTHOUSE NEWS, May 31, 2019. <https://www.courthousenews.com/iowa-sued-over-ban-on-medicaid-funds-for-sex-change-surgery/>

⁴² *Supra* note 32

⁴³ Renee Gross, *Lawsuit challenges state's Medicaid policy denying transgender-related health care coverage*, KBBI, March 6, 2019. <https://www.kbbi.org/post/lawsuit-challenges-state-s-medicaid-policy-denying-transgender-related-health-care-coverage-0#stream/0>

⁴⁴ *Id.*

⁴⁵ *Supra* at note 5

⁴⁶ *Id.*

⁴⁷ Johann J. Go, *Should Gender Reassignment Surgery be Publicly Funded?*, 15 J Bioeth Inq. 527 (2018).

⁴⁸ *Tovar v. Essentia Health*, cv-16-100-DWF-LIB (D. Minn. Sept. 20, 2018) (holding that a health care plan that excluded health services related to gender dysphoria discriminated against transgender people in violation of the Health Care Rights Law (Section 1557 of the Affordable Care Act), which prohibits

Yet, even when Medicaid is required to cover gender-affirming surgery, obtaining such surgery is a challenge due to the limited number of available surgeons who are Medicaid providers and accept its low reimbursement rates.⁴⁹ Because there is no universal rule, confusion between state and federal Medicaid laws and common claim denials often convince people to give up.⁵⁰

While section 1557 of the ACA protects transgender people against discrimination in healthcare, a recent rewrite by the federal government may leave them without recourse.⁵¹ Because of their increased incidence of poverty, unemployment, lack of education, and abuse by the public and the police, all rooted in discrimination and bias, transgender and non-binary people are more likely to have poor health, and be more dependent on Medicaid than the general population.⁵²

B-Prison Health Care

With states attempting to restrict access to gender-affirming care using Medicaid coverage as a tool, future legislation may attempt to target people in prison or juvenile facilities because they too are provided state-funded healthcare. State departments of corrections or juvenile justice agency policy may prohibit or impose barriers to obtaining gender-affirming care, such as so called “freeze-frame” policies that limit care to whatever detainees were receiving on the date of their incarceration.⁵³

The struggle to ensure that transgender people in prisons, jails, and juvenile facilities have access to gender-affirming care has long been a problem in the correctional and delinquency system. Since the 1970s, established law held that anyone in custody

discrimination in health care). *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018) (holding that a state employee health plan refusal to cover transition-related care constitutes sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause). *Flack v. Wisconsin Department of Health Services*, 18-cv-309, 2018 WL 3574875 (W.D. Wis. Jul. 25, 2018) (holding that Medicaid exclusion targeting transgender people constitutes sex discrimination under Affordable Care Act and Equal Protection Clause).

⁴⁹ Sam McQuillen, *Transgender Medicaid Patients Face Coverage Barriers Despite Law*, BLOOMBERG LAW, Sept. 10, 2019, 5:26AM. <https://news.bloomberglaw.com/health-law-and-business/transgender-medicare-patients-face-coverage-barriers-despite-law>

⁵⁰ *Id.*

⁵¹ Corrine Lewis, et. al., *Federal Government Moves to Eliminate Protections in Health Care for Transgender Americans*, THE COMMONWEALTH FUND, May 28, 2019, available at <https://www.commonwealthfund.org/blog/2018/federal-protections-health-care-risk-transgender-americans>

⁵² *Id.*

⁵³ *Federal Court Rules in Favor of Transgender Inmate*, Seattle Times, May, 23, 2018. <https://www.seattletimes.com/nation-world/federal-court-rules-in-favor-of-transgender-missouri-inmate/>; Georgia Department of Juvenile Justice, Policy # 23.3, *Lesbian, Gay, Bisexual, Transgender, Intersex (LGBTI)* (October 30, 2015), Sec. V(A). <http://www.djj.state.ga.us/Policies/DJJPolicies/Chapter23/DJJ23.3LGBTI.pdf>.

deserves adequate healthcare.⁵⁴ In *Estelle v. Gamble*,⁵⁵ the Court held that deprivation of healthcare constituted cruel and unusual punishment under the Eighth Amendment to the Constitution and introduced the concept of “deliberate indifference.” *Estelle v. Gamble* prohibits ignoring the serious medical needs of prisoners, creating a mandate to provide all people in custody with access to medical care.⁵⁶ Prisoners don’t have the freedom to choose whether they pay out of pocket for healthcare, have employer-sponsored insurance, purchase insurance from the marketplace, or get Medicaid; even going to a hospital Emergency Department for care, regardless of ability to pay, is not an option.⁵⁷ It is accepted that if correctional facilities do not provide medically necessary healthcare, inmates cannot tend to their own needs. Society must. There are certainly public health reasons for the prison system to provide care.⁵⁸

When discussing inmate healthcare, there is seldom dispute over whether treatment for heart disease, diabetes or STDs is justified. However, gender-affirming treatment is met with raised eyebrows because society has not generally accepted this as medically necessary care. Yet, failing to provide gender-affirming, medically necessary care has been found to be a violation of the Eighth Amendment.⁵⁹ In fact, the American Psychological Association published a statement expressing the need for transition-related care for transgender people in institutional settings and calls on institutions to provide that care.⁶⁰ Last year, the United States Court of Appeals for the Ninth Circuit decided that an inmate was entitled to gender-affirming surgery after prison officials were deliberately indifferent to her gender dysphoria, violating the Eighth Amendment.⁶¹

C-Federal Agency Funds

The Department of Health and Human Services (HHS) recently issued a “conscience rule” allowing providers to deny care to patients on the basis of their religious beliefs. Health care organizations that refused to adhere to the ruling would lose government funding.⁶² The U.S. District Court for the Southern District of New York ruled that HHS overstepped

⁵⁴ American Medical Association, *Transgender prisoners have fundamental right to appropriate care*, May 17, 2019. <https://www.ama-assn.org/delivering-care/population-care/transgender-prisoners-have-fundamental-right-appropriate-care>.

⁵⁵ 429 U.S. 97 (1976) ([Eighth Amendment] principles establish the government’s obligation to provide medical care for those whom it is punishing by incarceration.)

⁵⁶ *Supra* note 46.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Norsworthy v. Beard*, 87 F. Supp. 3d 1164 (N.D. Cal. 2015)(permitting Eighth Amendment claim where officials denied surgery on the grounds of “medical indifference”); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (holding that Wisconsin’s blanket rule against state funds being used to treat prisoners diagnosed with gender dysphoria constituted cruel and unusual punishment)

⁶⁰ National Center for Transgender Equality, *Policies To Increase Safety And Respect For Transgender Prisoners*, (Oct. 2018).

⁶¹ Amanda Peacher, *Court Says Idaho Must Provide Gender Confirmation Surgery To Transgender Inmate*, NPR, Aug. 23, 2019, 4:23PM, <https://www.npr.org/2019/08/23/753788697/court-says-idaho-must-provide-gender-confirmation-surgery-to-transgender-inmate>

⁶² Alex Bollinger, *Judge throws out Trump’s religious exemption rule that allowed doctors to discriminate*, LGBTQ Nation, Nov. 6, 2019. <https://www.lgbtqnation.com/2019/11/judge-throws-trumps-religious-exemption-rule-allowed-doctors-discriminate/>

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its authority. The law violated Title VII of the Civil Rights Act and the Emergency Medical Treatment & Labor Act (EMTALA) patient dumping law.⁶³

Restricting medically necessary gender-affirming care by withholding government funds exacerbates the paucity of care available to transgender people, especially those who have no choice of provider. Care decisions must be based on medical, and not financial or political, considerations.⁶⁴ The transgender community faces many barriers to healthcare: lack of medical provider knowledge, inability to pay/lack of insurance, fear of stigmatization, harassment, discrimination and socioeconomic barriers.⁶⁵ Access to care is inequitable, and transgender youth face substantially increased barriers to appropriate care.⁶⁶ Public funding helps bridge the gap in coverage. While it is not a panacea, it's a start. But medically necessary care must be publicly covered, whether by Medicaid, Corrections, or any other publicly funded health program, because discrimination has no place in the examining room.

CONCLUSION

In an age when we are concerned about the erosion of our Constitutional rights, this resolution will ensure that everybody, regardless of gender identity or expression, is afforded equal protection of the law. This report demonstrates the many routes legislators are taking to restrict access to healthcare for transgender people. Healthcare should not be withheld due to income or under threat or be granted depending on the patient's identity. This resolution will encourage attorneys and legislators to stand up against these injustices and insist on transgender person's rights.

Respectfully Submitted,

Wendy K. Mariner
Chair, Section of Civil Rights and Social Justice
August 2020

⁶³ *Id.*

⁶⁴ Notes 6 and 7, *supra*.

⁶⁵ Carly Guss, et. al., *Transgender and Gender Nonconforming Adolescent Care: Psychosocial and Medical Considerations*, 27 Curr Opin Pediatr. 421 (2015); Corrine Lewis, et. al., *Federal Government Moves to Eliminate Protections in Health Care for Transgender Americans*, THE COMMONWEALTH FUND, May 28, 2019 <https://www.commonwealthfund.org/blog/2018/federal-protections-health-care-risk-transgender-americans>; Joshua D. Safer, et. al., *Barriers to Care for Transgender Individuals*, 23 Curr Opin Endocrinol Diabetes Obes. 168 (2016).

⁶⁶ Laura L. Kimberly et. al., *Ethical Issues in Gender Affirming Care for Youth*, 142 J. Pediatr. 1 (2018).

GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Wendy K. Mariner, Chair

1. Summary of Resolution(s).

The resolution opposes all federal, state, local, territorial and tribal legislation, regulation, and agency policy that discriminates against transgender and non-binary people on the basis of gender identity and/or that imposes barriers to obtaining or providing medically necessary care to affirm an individual's gender identity.

2. Approval by Submitting Entity.

The Council of the Section of Civil Rights and Social Justice approved sponsorship of this resolution at its Spring Meeting on April 24, 2020.

The Commission on Sexual Orientation and Gender Identity approved sponsorship of this resolution on May 5, 2020.

The Health Law Section approved cosponsorship of the resolution on May 3, 2020.

The HIV/AIDS Impact Project approved cosponsorship by an online vote on May 5, 2020.

The Center for Human Rights approved cosponsorship of the resolution on May 4, 2020.

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

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This resolution is consistent with the following existing ABA policy:

97A113 - This resolution supports legislation which ensures comprehensive health care for children 18 years of age and younger.

15A115 – This resolution urges federal, state, local, territorial, and tribal governments not to impose upon medical facilities or healthcare providers licensing or other regulatory requirements that are not medically necessary or that have the purpose or effect of restricting availability or burdening patients' access to healthcare services.

14A114B - This resolution is to put the American Bar Association on record as recognizing the rights of LGBT people as basic human rights and opposing laws, regulations, customs, and practices that discriminate against them, because of their sexual orientation and urging an end to them. It would also put the Association on

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record as supporting the right of LGBT people to live securely, safely, without fear, and able to exercise the rights, privileges, and immunities of any other citizen without regard to their sexual orientation. It urges peer associations of lawyers and individual colleagues at the Bar to help LGBT people vindicate their rights through legal redress and support those of their colleagues at the Bar that do so. It also urges the US Government to take steps through diplomatic channels to support such rights.

19A115F - This resolution urges Congress to ensure that the health care delivered by the Indian Health Service (IHS) is exempt from government shutdowns and federal budget sequestrations on par with the exemptions provided to the Veterans Health Administration.

18A104C - This resolution supports an interpretation of Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), that its prohibition on sex discrimination by covered health programs or activities includes but is not limited to discrimination on the basis of sexual orientation and gender identity.

18M116A - This resolution supports an interpretation of Title VII of the Civil Rights Act of 1964 that defines sex discrimination by covered employers to include discrimination on the basis of sexual orientation and gender identity.

19M114 - This resolution urges Congress to enact the federal Equality Act, H.R. 2282 (115th Congress), or similar legislation which explicitly affirms that: (1) discrimination because of sexual orientation or gender identity is sex discrimination prohibited by the Civil Rights Act of 1964 and certain other federal statutes; and (2) federal statutory protections for religious freedom do not authorize violation of nondiscrimination laws, and affirms that religiously neutral laws of general applicability prohibiting discrimination based on sexual orientation or gender identity do not improperly burden the religious free exercise rights of those operating places of public accommodation

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. Alabama (AL SB219), Ohio (OK SB1819), Colorado (HB20-1114), Idaho (HB 465), Oklahoma (SB 1819), Missouri (HB 1721), South Carolina (H. 4716), Kentucky (HB 321), South Dakota (SD H. 4716), Iowa (HF 2272), Illinois (HB3515), Florida (SB 1864), West Virginia (HB4609) and Mississippi (SB 2490) are among the states proposing consequences to those who provide gender-affirming medical care to minors. At least five states also have legislation moving forward that penalizes parents for “assisting, coercing or providing for” gender-affirming healthcare for their minor by finding them guilty of abuse or neglect, or removes their right to consent.
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 or Commission staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

9. Disclosure of Interest. N/A

10. Referrals.

- Criminal Justice Section
- Standing Committee on Legal Aid and Indigent Defendants
- Section of State and Local Government Law
- Commission on Disability Rights
- Commission on Domestic and Sexual Violence
- Commission on Youth at Risk
- Commission on Hispanic Legal Rights and Responsibilities
- Center on Children and the Law
- Commission on Homelessness and Poverty
- Coalition on Racial and Ethnic Justice
- Section of Dispute Resolution
- Commission on Racial and Ethnic Diversity in the Profession
- Commission on Women in the Profession
- Section of Litigation
- Diversity and Inclusion Advisory Council
- Standing Committee on Armed Forces Law
- Judicial Division
- Senior Lawyers Division
- Young Lawyers Division
- Law Student Division
- Government and Public Sector Division

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution opposes all federal, state, local, territorial and tribal legislation, regulation, and agency policy that discriminates against transgender and non-binary people on the basis of gender identity and/or that imposes barriers to obtaining or providing medically necessary care to affirm an individual's gender identity.

2. Summary of the Issue that the Resolution Addresses

Legislation has been introduced in more than 20 states attempting to restrict access to gender-affirming healthcare, especially for minors. Transgender minors are more likely to suffer anxiety, depression, and substance abuse, and there is a well-documented risk of suicide without treatment. Healthcare options for transgender people are not widely available, and additional barriers make it most difficult for people without resources to access.

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

Regardless of the avenue the bills take to limit access, this resolution will deter legislators from introducing or advancing such dangerous bills, which interfere with the medical treatment and personal medical decisions belonging to the gender non-conforming patient. Policy makers have no place between doctor and patient and these bills demonstrate why. The ABA will be making a strong statement that the transgender community must be treated equally, and all gender nonconforming people are protected, by law, from discrimination in healthcare.

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

None known.

AMERICAN BAR ASSOCIATION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and
2 tribal legislatures to enact legislation, and correctional and detention facilities for both
3 adults and minors to enact policies requiring that all incarcerated persons are provided
4 with the following:

- 5
- 6 a.) soap, paper towels, hand sanitizer, and facial tissues in sufficient quantities to
 - 7 prevent the transmission of infectious disease;
 - 8 b.) personal protective equipment including personal sanitizing products and face
 - 9 masks that are effective in preventing existing and emerging infections in sufficient
 - 10 quantities to prevent the transmission of infectious disease; and
 - 11 c.) sufficient facilities for hand washing, including unrestricted access to clean water
 - 12 and working sinks.

REPORT

Introduction

Over 2.3 million people are confined in American correctional and detention facilities. Over the past 40 years the United States has seen a 500% increase in inmates due to changes in sentencing laws and policy. Every year, 600,000 people enter prisons and people are jailed 10.6 million times annually. This leads to financial burdens and overcrowding. Many correctional facilities fail to provide inmates with sufficient personal hygienic items and adequate hygienic infrastructure to maintain basic health and to prevent the spread of infectious disease. In the midst of the COVID-19 pandemic, these deficits are especially threatening to the health of inmates and whomever comes in contact with them. This purpose of this resolution is to ensure safety and to protect public health during the pandemic.

According to the Center for Disease Control and Prevention (CDC), handwashing is one of the best ways to protect oneself from getting sick. Under normal circumstances, a person should wash their hands before eating, before and after treating an open wound, after using the toilet, blowing their nose, coughing or sneezing, and after handling garbage.

In pandemic conditions, the CDC recommends a person wash their hands after touching items or surfaces frequently touched by others, and before touching their eyes, nose, or mouth. This increased frequency requires more supplies than usual and access to clean, functioning water sources. However, for over 2 million people in jails, prisons, and detention facilities in the United States, this practice, with this level of regularity, is nearly impossible.

Current Prison Conditions

Many states require, by law, that certain items be issued to inmates. Others are less specific, so it is difficult to determine the exact types and quantity of products, and the frequency of distribution mandated.

Hygienic infrastructure, such as sinks with clean, running water, and hygiene products, including soap, toilet paper, and paper towels are basic necessities to prevent the spread of disease.¹ Everyone in these facilities should have sufficient access to these necessities, yet they rarely do. Some facilities provide prisoners with basic sanitary supplies, including soap, and toilet paper. However, the quantity and variety is limited and often restricted. Basic handwashing is a challenge when there is limited access to running water, and pipes are contaminated. Hand and respiratory hygiene are important steps to preventing transmission of infectious disease.

¹ Centers for Disease Control and Prevention, *Guidance on Management of COVID-19 in Correctional and Detention Facilities*, (2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited May 3, 2020).

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“Jails and prisons are often dirty and have really very little in the way of infection control,” said Homer Venter, former chief medical officer at New York city’s notorious Rikers Island jail complex. “There are lots of people using a small number of bathrooms. Many of the sinks are broken or not in use. You may have access to water, but nothing to wipe your hands off with, or no access to soap.”²

In most prisons, hand sanitizer with a high percentage of alcohol, the variety that kills coronavirus, is banned. Inmates in New York State prisons were producing large quantities of hand sanitizer that they were prohibited from using.³ They are especially vulnerable to an outbreak because of their close quarters and their health is contingent upon access to sufficient, proper washing facilities.

In a Texas immigration detention facility, migrant women were only given one small packet of shampoo to wash their entire bodies. As a result, women would go days without showering.⁴ In the South Louisiana Processing Center, more than 70 detainees in a dorm share only 5 bars of soap.⁵ Inmates in Twin Towers Correctional Facility reported, there is no regular delivery of soap and cleaning supplies.⁶

In Alabama, a report issued by the Department of Justice found broken pipes, open sewage, and dilapidated personal hygiene facilities. One Alabama prison is reported to only have three or four working sinks at a time in a dorm housing over 200 men. In an honor dorm, housing older or longer-term inmates, there were 13 sinks for 350 men.⁷

At the Mississippi State Penitentiary at Parchman, the health department found broken sinks and toilets in cells, holes in cell walls, widespread mold and mildew in showers, and sanitation problems in kitchens.⁸ As a result, inmates are dehydrated for days because

² Keri Blakinger and Beth Schwartzapfel, *When Purell is Contraband, How Do You Contain Coronavirus?*, THE MARSHALL PROJECT (March 6, 2020), <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus>.

³ Josiah Bates, *New York Is Making its Own Hand Sanitizer Amid the Coronavirus Outbreak — Using Prison Labor*, TIME (March 19, 2020, 3:17pm), <https://time.com/5799710/new-york-hand-sanitizer-prison-labor/>.

⁴ Stephanie Grob Plante, *How a lack of personal care products contributes to harrowing conditions for detained migrants*, VOX (July 3, 2019), <https://www.vox.com/the-goods/2019/7/3/20681071/border-detention-aoc-shampoo-personal-hygiene>.

⁵ Alan Gomez, Maria Clark, Rebecca Plevin, *‘Terrified of dying’: Immigrants beg to be released from immigration detention as coronavirus spreads*, USA TODAY (April 8, 2020), <https://www.usatoday.com/story/news/nation/2020/04/07/covid-19-hits-ice-detention-migrants-say-they-cant-clean-stay-safe/2953170001/>.

⁶ Alene Tchekmedyan, Matt Hamilton, *L.A. jail inmates say lack of soap and toilet paper heightens coronavirus fear: ‘Like slow torture’*, (March 30, 2020), <https://www.latimes.com/california/story/2020-03-30/coronavirus-inmates-hygiene-supply-shortage-la-jails>.

⁷ Melissa Brown, *Alabama prisons block personal, legal visits amid coronavirus pandemic*, (March 18, 2019), <https://www.montgomeryadvertiser.com/story/news/2020/03/19/alabama-prisons-ready-covid-19-pandemic-contagious-coronavirus/5063084002/>.

⁸ Michelle Liu, *No water, no lights and broken toilets: Parchman health inspection uncovers hundreds of problems, many repeat violations*, (August 5, 2019), <https://mississippitoday.org/2019/08/05/no-water-no-lights-and-broken-toilets-parchman-health-inspection-uncovers-hundreds-of-problems-many-repeat-violations/>.

they are afraid to drink water that is brown and smells like sewage from pipes that are covered with rust and mold.

The Rapid Spread of COVID-19

While other infectious diseases have hit the United States, none since the 1918 Flu pandemic has had such a chilling impact on society. The last time we faced a global pandemic, spring 2009, was the H1N1 virus (Swine Flu).⁹ In one year, the CDC estimated that the United States had 60.8 million cases, 274,304 hospitalizations and 12,469 deaths.¹⁰ Prisoners were largely spared, despite the facilities' conditions and the concerns of the Departments of Corrections.

Now, we are fighting a far more deadly pandemic, COVID19 (coronavirus). As of May 3, 2020, there were 1.2 million cases and 69,500 deaths in the United States. Coronavirus was identified in early winter 2019 and reached the United States late January/early February 2020. Schools, businesses and government buildings closed and the public has been asked to quarantine to flatten the curve of the disease. Our healthcare system cannot handle the many people who need the critical care caused by this novel virus.

As of May 3rd, 2020,¹¹ the Federal Bureau of Prisons (BOP) confirmed 1984 federal inmates and 346 BOP staff with positive COVID19 test results nationwide. There were 40 COVID19 inmate deaths. As of May 28, 2020, there were 1,392 confirmed cases of COVID-19 among individuals who are or were in the custody of U.S. Immigration and Customs Enforcement (ICE), and 44 confirmed cases of ICE employees at detention centers. To date, ICE has only tested 2,670 detained individuals for COVID-19; as of May 23, 2020, nearly 26,000 individuals remained in ICE custody.¹² Two gentlemen have died after contracting COVID-19 in ICE detention.¹³

As states have attempted to take steps to stop the spread of the coronavirus, infections amongst inmates and jail staff continue to rise at an exponential rate. In Illinois, the number of detainees infected with coronavirus at the Cook County Jail in Chicago rose to over 500 as of May 4, 2020, 6 having died.¹⁴ According to the New York Department of Corrections, Rikers Island Jail has a 9.7% infection rate, versus 2-3% infection rate found in most other correctional facilities and the general population.¹⁵ In Texas, cases have been quickly rising as 22 incarcerated people and five prison employees died in the three

⁹ 2009 H1N1 Flu ("Swine Flu") and You, (Feb. 10, 2010), <https://www.cdc.gov/h1n1flu/qa.htm>.

¹⁰ CDC Estimates of 2009 H1N1 Influenza Cases, Hospitalizations and Deaths in the United States, available at https://www.cdc.gov/h1n1flu/estimates_2009_h1n1.htm (last visited May 9, 2020).

¹¹ <https://www.bop.gov/coronavirus/>.

¹² <https://www.ice.gov/coronavirus>.

¹³ <https://www.buzzfeednews.com/article/hamedaleaziz/immigrant-ice-coronavirus-death>.

¹⁴ COVID-19 Cases at CCDOC, available at <https://www.cookcountysheriff.org/covid-19-cases-at-ccdoc/> (last visited May 4, 2020).

¹⁵ COVID-19 Infection Tracking in NYC Jails, THE LEGAL AID SOCIETY, available at <https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/> last visited May 4, 2020.

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months since the pandemic's arrival. In some states, the sharp increase in cases can be attributed to aggressive testing but other states have been doing little testing if any.¹⁶

Nationwide, according to the Equal Justice Initiative, "the known infection rate for COVID-19 in jails and prisons is about 2½ times higher than in the general population. More than 44,000 incarcerated people and staff have coronavirus infections and 462 have died" as of May 21, 2020.¹⁷ In more than half the states, COVID-19 has infected youth, staff, but usually both in juvenile facilities where 70% of youth are held on non-violent offenses and facilities are overcrowded.¹⁸ Although, we may never know the true impact on the incarcerated population of the United States. The testing capability is low, we are a world leader in mass incarceration, and personal protective equipment has been sparse. The health of the prison population has not been prioritized.¹⁹ There have been recommendations by advocacy groups and public health professionals to release aging, infirm and non-violent offenders to reduce the density in prisons. Most states are not heeding the call and each day they wait, disease spreads.

The CDC determined many coronavirus cases are asymptomatic, and symptoms may appear 2-14 days after exposure.²⁰ To reduce the spread and "flatten the curve," maintaining the good health of the prison population is vital. Because COVID-19 is frequently asymptomatic, inmates continue to interact with correctional officers and staff while unknowingly shedding virus. Even with visitation and volunteer programs on hold at most facilities because of the pandemic, people regularly enter and leave the facility every day. If exposed through close contact with asymptomatic inmates, they carry it into the community housing the prison, their home community, and possibly public transportation, also close quarters with the public. The spread of disease in prisons pose elevated risk to homeless shelters because occupants of one institution often find themselves in the other.²¹ Without adequate testing, it is difficult to know how many inmates or correctional officers have been infected. Each person, inmate and staff, must be presumed a vector who can spread the virus within or outside the facility, and must take the best health precautions possible.

Products for Purchase

¹⁶ Katie Park, Tom Meagher And Weihua Li, *Tracking the Spread of Coronavirus in Prisons*, The Marshall Project, April 24, 2020. <https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-coronavirus-in-prisons>.

¹⁷ Equal Justice initiative, Covid-19's Impact on People in Prison, (May 2020). <https://eji.org/news/covid-19s-impact-on-people-in-prison/>.

¹⁸ Josh Rovner, *COVID-19 in Juvenile Facilities*, The Sentencing Project, (May 19, 2020). <https://www.sentencingproject.org/publications/covid-19-in-juvenile-facilities/>.

¹⁹ Talha Burki, *Prisons Are 'In No Way Equipped' To Deal With COVID 19*, 395 The Lancet 1411 (May 2020). [https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(20\)30984-3.pdf](https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(20)30984-3.pdf).

²⁰ *Symptoms of Coronavirus*, CDC, available at <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last visited May 4, 2020).

²¹ Stephen Metraux PhD, Caterina G. Roman PhD, and Richard S. Cho MCP, *Incarceration and Homelessness*, National Symposium on Homelessness Research (2007), <https://www.huduser.gov/publications/pdf/p9.pdf>.

According to the Vera Institute, in 2015, the annual budget for state prisons ran from \$65 million-\$8 billion, depending on the size of the state system.²² Over 65% of the budget is for personnel costs. Prisons are responsible for providing adequate security, staff to run facilities, provide services, food, and programming, sufficient recreational and educational opportunities, infrastructure maintenance and upkeep, and health care for a large population with significant physical and mental health issues.²³

Among the products inmates can purchase from the prison commissary are snacks, postage and toiletries. Although, prisons provide soap, they often do not provide enough. In 2016, Massachusetts prisoners purchased 245,000 bars of soap costing \$215,057, an average of 22 bars of soap annually, above what is provided by the correctional facilities.²⁴ However, Massachusetts Department of Corrections claims to provide a bar of soap a week to each inmate.

Purchasing from the prison commissary is expensive. A bar of can cost over \$2. Prison wages average 14-63 cents per hour, so saving for a bar of soap takes time. Inmates who cannot afford the commissary rely on family support, or do without. During a pandemic, like COVID19, this has high-risk ramifications for the entire prison population, staff and inmates alike, since handwashing is one of the few preventive measures available to reduce the spread of infectious disease. The health of an entire population in close quarters cannot depend on the buying power of an incarcerated workforce being paid far below minimum wage.

Additional Protections During Pandemics

Face masks and some hand sanitizers can limit the spread of infectious diseases, including COVID19. While medical face masks have been in short supply and need to be reserved for health care providers, masks made of other materials are helpful to prevent an outbreak.²⁵ Because a large percentage of those infected with COVID19 are asymptomatic, healthy individuals should also wear face masks help prevent virus transmission.²⁶ In prisons, where people do not have the opportunity for social distancing, face masks are an additional precaution that can prevent the spread of disease in close quarters.

Some correctional facilities have allowed inmates to wear masks but others have not and where they have not, the death toll continued to rise. In New York State, after the disease spread and people in prisons died, prison officials changed course and issued face masks

²² *The Price of Prisons: Prison Spending in 2015*, 2020, <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-price-of-prisons-2015-state-spending-trends-prison-spending>.

²³ Ibid.

²⁴ Stephen Raheer, *The Company Store: A Deeper Look at Prison Commissaries*, May 2018, <https://www.prisonpolicy.org/reports/commissary.html>.

²⁵ Angel N. Desai, MD, MPH and David M. Aronoff, MD, *Masks and Coronavirus Disease 2019 (COVID-19)*, JAMA (April 17, 2020), <https://jamanetworka.com/journals/jama/fullarticle/2764955>.

²⁶ Id.

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to 41,000 inmates.²⁷ Like manufacturing hand sanitizer, inmates were tasked with making face masks, but not allowed to wear them, with fatal results.²⁸

Proper hand hygiene is the best preventive measure against contracting COVID19. However, even medical professionals do not have access to running water as often as necessary. Hand sanitizer with 75% alcohol content has been found effective to kill the COVID19 virus.²⁹ The Departments of Corrections in almost 20 states, and the Federal prison system prohibit hand sanitizer for fear that inmates will consume it or start fires.³⁰ The CDC recommended that correctional facilities relax the rules. Some facilities distributed sanitizer in a controlled way, others relaxed the rules completely, and some still prohibit it.³¹ Until an effective, non-alcohol based sanitizer is created, correctional facilities need to decide whether the harm from disease to its charges and staff outweighs the risks of distributing effective alcohol based sanitizer.

Eighth Amendment Concerns

The Eighth Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Prisoners are entitled to sanitary toilet facilities³² and basic supplies such as toothbrushes, toothpaste, soap, sanitary napkins, razors, and cleaning products.³³ The Eighth Amendments prohibition against cruel and unusual punishment protects your right to safe and humane conditions. If prison conditions deprive you of a basic human need, such as sanitation or hygiene, you can challenge them. To prevail, the conditions must be “restrictive and even harsh.”³⁴ In *Farmer v. Brennan* the court put forth an objective standard; you need to show you were deprived of a basic human need, or exposed to serious harm. The court will examine whether the condition(s) you are challenging could seriously affect your health or safety. *Wilson v. Seiter* set the subjective standard.³⁵ You must demonstrate that the officials knew you were being deprived or harmed and did not respond reasonably. To prevail you must show how you were injured and prove that the

²⁷ David Brand, *New York State Will Give All Inmates Face Masks as COVID19 Death Toll Rises*, THE QUEENS EAGLE, May 7, 2020, <https://queenseagle.com/all/new-york-state-will-give-all-inmates-face-masks-as-covid-19-death-toll-rises>.

²⁸ *Supra* at 3.; *Id.*

²⁹ *COVID19 Hand Sanitizers Inactivate Novel Coronavirus, Study Finds*, MEDICAL NEWS TODAY, <https://www.medicalnewstoday.com/articles/covid-19-hand-sanitizers-inactivate-novel-coronavirus-study-finds#Two-formulations> (2020).

³⁰ Casey Tolan, *Hand sanitizer is still considered contraband in some prisons around the country*, CNN, (May 6, 2020). <https://www.cnn.com/2020/05/05/us/coronavirus-prison-hand-sanitizer-contraband-invs/index.html>.

³¹ *Id.*

³² *DeSpain v. Uphoff*, 264 F.3d 965 (10th Cir. 2001).

³³ *Gillis v. Litscher*, 468 F. 3d 488 (7th Cir. 2006).

³⁴ *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

³⁵ 501 U.S. 294 (1991).

denial of a basic need caused your injury.³⁶ You must demonstrate that the officials acted with ‘deliberate indifference.’³⁷

Inmates are not permitted to use hand sanitizer, and social distancing measures cannot be taken because of overcrowding and space constraints. Measures to prevent infectious disease in prison are limited. Prison officials are required to provide soap, paper towels and clean water, among other basic provisions. If incarcerated persons are denied these basic sanitary and hygienic necessities, and it leads to a coronavirus infection, prison officials could be successfully challenged under the Eighth Amendment.

American Bar Association Policy

There is precedent for the American Bar Association’s involvement in public health issues. Public health and the law have long been intertwined. Over 15 years ago, the American Bar Association adopted a resolution urging its members to become more familiar with public health law in the event of infectious disease outbreaks, and to become involved in the preparedness of our communities to ensure that public health measures are protective of civil and constitutional rights.³⁸ It is in this vein that we recommend this resolution.

In the American Bar Association Criminal Justice Standards on the Treatment of Prisoners, there is an entire section devoted to prison conditions for the welfare of inmates that states, “correctional authorities should provide prisoners, without charge, basic individual hygiene items appropriate for their gender.”³⁹ Clean water, soap, paper towels and facial tissues are basic.

Most recently, the American Bar Association adopted resolution 109c supporting the provision of menstrual hygiene products and toilet tissues for incarcerated women.⁴⁰ This addressed the need for necessary hygiene products that prisons were not or were inadequately providing for inmates. It is the responsibility of prisons to provide for the basic needs of the people in their care.

In light of the COVID19 pandemic, and the American Bar Association’s history of supporting both public health recommendations and prisoner’s rights, this resolution conforms to the Association’s objectives and is aligned with previous policy. COVID19 isn’t just a hygiene issue. It is in the interest of the staff and the surrounding community to encourage the proper hygiene needed to prevent an outbreak, which does not confine itself to the prison walls.

Conclusion

³⁶ Id.

³⁷ Id.

³⁸ ABA Resolution 04M102.

³⁹ ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS (3d ed. 2011), Standard 23-3.5(c).

⁴⁰ ABA Resolution 19M109c.

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Mass incarceration is an American social problem with enormous, negative public health ramifications. Although there is no quick fix, there are ways to improve the conditions and outcomes for inmates. Simple provisions like adequate soap, paper towels and tissues along with a clean, well-functioning water system will make a difference to the health of millions of Americans.

Respectfully submitted,

Wendy Mariner
Chair, Civil Rights and Social Justice Section
August 2020

GENERAL INFORMATION FORM

Submitting Entity: Civil Rights and Social Justice Section

Submitted By: Wendy Mariner, Chair

1. Summary of Resolution(s).

This resolution urges federal, state, local, territorial, and tribal legislatures to enact legislation, and correctional and detention facilities to enact policies, to provide incarcerated people, both adults and minors, with access to sufficient quantities of soap products, paper towels and facial tissues, clean water and adequate facilities for hand washing and face masks and sanitizing products.

2. Approval by Submitting Entity.

This resolution was passed by the Civil Rights and Social Justice Council on April 24, 2020.

The Criminal Justice Section approved co-sponsorship of this resolution on May 22, 2020.

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

No.

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

There are three policies previously adopted by the American Bar Association that are relevant to this resolution, and this one is consistent with them. The first policy, 19M109C urged the provision of sufficient toilet paper and feminine hygiene products to all women prisoners. The second, American Bar Association *Criminal Justice Standards on the Treatment of Prisoners* Standards 23-3.5(c) stated that ccorrectional authorities should provide prisoners, without charge, basic individual hygiene items appropriate for their gender, as well as towels and bedding, which should be exchanged or laundered at least weekly, and that Prisoners should also be permitted to purchase hygiene supplies in a commissary. The third policy, 04A102, stressed the importance of the American Bar Association and its lawyers and members to address new public health threats and ensure that public health measures are protective of civil and constitutional rights.

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.

Not applicable.

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

This policy will be used as a basis of advocacy in federal, state, local, territorial and tribal correctional systems.

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.

Not applicable

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

Standing Committee on Legal Aid & Indigent Defense
Commission on Hispanic Legal Rights & Responsibilities
Commission on Homelessness and Poverty
Commission on Immigration
Commission on Racial & Ethnic Diversity in the Profession
Coalition on Racial & Ethnic Justice
Commission on Youth at Risk
Young Lawyers Division
Law Student Division
Government and Public Sector Lawyers Division
National Conference of Federal Trial Judges
National Conference of State Trial Judges
Judicial Division
Law Practice Division
Section of Science & Technology Law
Health Law Section
Section of Litigation

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges federal, state, local, territorial, and tribal legislatures to enact legislation, and correctional and detention facilities to enact policy, to provide all incarcerated adults and minors with sufficient access to soap products, paper towels and facial tissues, clean water and adequate facilities for hand washing, and face masks and sanitizing products.

2. Summary of the Issue that the Resolution Addresses

In order to prevent the vast transmission of infectious disease, inmates, being in close quarters, will be able to practice proper hand and respiratory hygiene with adequate cleaning products and facilities.

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

Currently, many correctional facilities have broken sinks, one sink provided for too many people, inadequate quantities of soap and paper towels, rusted pipes and sewage leaking into the water supply. This resolution addresses both the lack and/or shortage of supplies.

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

None.

AMERICAN BAR ASSOCIATION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
CRIMINAL JUSTICE SECTION
SECTION OF STATE AND LOCAL GOVERNMENT LAW
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
COALITION ON RACIAL AND ETHNIC JUSTICE
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial and
2 tribal governments to enact and enforce legislation directing law enforcement officials and
3 election officials to establish a protocol where pretrial detainees, who are eligible to
4 register to vote or vote in the jurisdiction in which they are detained are given the
5 opportunity to register to vote and cast ballots in their respective federal, state, and local
6 elections; and
7

8 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
9 territorial and tribal governments to promulgate and enforce regulations that facilitate the
10 participation of such pretrial detainees in all federal, state, local, and special elections,
11 including the ability to register to vote, obtain a ballot, and have that ballot delivered to
12 the appropriate elections office.

REPORT

SUMMARY

The American Bar Association proposes this Resolution to reinforce voting rights by obligating jurisdictions to enact legislation that provides eligible pretrial detainees the necessary information and resources to register to vote and cast ballots in elections in the jurisdiction in which they are detained.

INTRODUCTION

The American Bar Association has a long history of enacting policies that encourage voter participation and civic engagement, and that protect the rights of Americans to vote by urging the elimination of barriers that discriminate against certain groups by making it more difficult for them to vote. Many of these policies deal with reforming the process of voting itself; calling for legislation to ensure equal protection of the voting rights of all groups. One such group is pretrial detainees, who possess the right to vote,¹ and whose rights are currently being denied by the courts, legislatures, and jail administrators.

The American Bar Association, in Criminal Justice Standard 19-2.6 on “Prohibited collateral sanctions” has already adopted and implemented a policy prohibiting jurisdictions from imposing collateral sanctions, including the “depriv[ation] of the right to vote, except during actual confinement.”² Collateral sanctions are “legal penalt[ies], disabilit[ies] or disadvantage[s], ... that [are] imposed on a person automatically *upon that person’s conviction for a felony, misdemeanor or other offense*, even if it is not included in the sentence.”³ Depriving pretrial detainees of their right to vote is the imposition of a collateral sanction *prior* to being convicted of a crime and thus cannot be imposed under that standard. This penalty directly undermines the central notion of our criminal justice system where one is innocent until proven guilty, and is an impermissible deprivation of due process that should be rectified.

This resolution builds upon both of these long-standing values and democratic ideals of protecting the right to vote and the rights of those accused of crimes.

BACKGROUND

The United States derives its legitimacy as a representative democracy from the consent of the governed. Therefore, the voices of its citizens are instrumental to both the existence and progress of this nation. Since its inception, America has consistently expanded the right to vote, exemplifying its deep historical devotion to this central right of citizenship.⁴

¹ Murphree v. Winter, 589 F. Supp. 374, 380 (S.D. Miss. 1984) (holding that, under the equal protection clause of the Constitution, a state statute that denies pretrial detainees the right to vote must be interpreted to allow pretrial detainees to vote, or it becomes unconstitutional).

² Feb. 2010, Standard 19-2.6, Standard 19-2.6 Criminal Justice Section available at: https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_collateral_blk/#2

³ Standard 12-2.6 (emphasis added).

⁴ The 15th Amendment eliminated racial barriers to voting in 1870; the 19th Amendment enfranchised women in 1920; the Indian Citizenship Act enfranchised Native Americans in 1924; The Civil Rights Act of 1964 ensured all men and women over 21 regardless of race, religion, or education could vote, with

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However, despite these significant advances, the United States falls behind most developed democracies in its rates of voter participation, in part due to the exclusion of millions of eligible voters from the democratic process. Today, State and federal policies persist in ways that mirror those of the Jim Crow Era, by subtly discouraging or overtly impeding the voter participation of minority groups. While the post-Reconstruction era suffered from grandfather clauses, poll taxes, literacy tests, and Ku Klux Klan intimidation at the polls, today, jail administrators withhold information and materials that pretrial detainees, whose rights have not been curtailed as a consequence of conviction, need in order to vote. This particular violation of due process rights, coupled with demoralizing patterns of mass incarceration, normally affects minority communities disproportionately. By stifling the voices of this portion of the United States population, such disenfranchisement imposes an unmistakably undemocratic burden on what is meant to be a process epitomizing democracy.

Most importantly, though, voting is a fundamental right of American citizenship. All citizens are granted the power to contribute to their nation's government by voting in elections to convey opposition or support for policies or public officials. The right to vote and participate in the democratic process is, like paying taxes, as much of a civic responsibility as it is a civil right. Thus, governing bodies possess a fiduciary duty to fiercely protect the right to vote for all citizens. This not only reflects a legal obligation, but also expresses the deeply held sentiments of the majority of the nation. After polling a significant proportion of Americans, over 80% reported believing that it is crucial that no eligible voters are denied the exercise of their rights.⁵

Unfortunately, the well-entrenched significance of the right to vote has hardly been reflected in the patterns of voter turnout observed in recent United States elections. According to the US Census Bureau, of the 245.5 million Americans ages 18 and older in November 2016, only about 157.6 million reported being registered to vote.⁶ Only about 137.5 million of those registered actually voted. The voter turnout percentage for the 2016 presidential election was just over 55%, meaning nearly half of all eligible voters did not, or could not, vote.

Historical progress in the expansion of voting rights to additional demographic groups continues to be turned back by policies that impose restrictions on voting, such as the implementation of overly burdensome photo ID voting requirements, or requirements that voters provide documentary proof of citizenship. Sadly, these kinds of policies have left thousands of voters on the sidelines. In times like these, undermining the voting rights of

elimination of literacy tests and poll taxes trailing shortly after; and the 26th Amendment lowers the voting age to 18.

⁵ "Elections in the U.S.: Priorities and Performance." *Pew Research Center for the People and the Press*, 26 Apr. 2018, available at www.people-press.org/2018/04/26/3-elections-in-the-u-s-priorities-and-performance/.

⁶ DeSilver, Drew. "U.S. Trails Most Developed Countries in Voter Turnout." *Pew Research Center*, Pew Research Center, 21 May 2018, available at www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/.

eligible citizens is not only unconstitutional, but also counterproductive to the central goals of this democracy.⁷

Currently, approximately 536,000 individuals are held in local jails while awaiting their trials, which amounts to over 20% of the total incarcerated population in the United States.⁸ Many of these Americans held in jail and awaiting trial are legally eligible to vote. Regardless, statistics collected during each election cycle indicate that countless numbers of these detainees, a group which is overwhelmingly comprised of people from low-income communities of color, are explicitly excluded from voting due to structural barriers created within our criminal justice system.⁹ Fostering the right to vote and the accessibility of voting materials and information for pretrial detainees is essential.

THE PROBLEM: Deprivation of the voting rights of pretrial detainees

“The traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction...[otherwise], the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”

- United States Supreme Court, *Stack v Boyle* (342 U.S. 1, 4 (1951))

“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized....”

- United States Supreme Court, *Reynolds v. Sims* (1964)

The right to vote is foundational and is enumerated in at least eight separate instances in the Constitution of the United States.¹⁰ Moreover, the United States Supreme Court has clearly recognized the “fundamental”¹¹ status of voting. As observed by the Supreme Court, “no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”¹² This powerful opinion

⁷ <https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf>.

⁸ Prison Policy Initiative, “Mass Incarceration: The Whole Pie 2018” Press release, March 14, 2018, available at <https://www.prisonpolicy.org/reports/pie2018.html>.

⁹ Root, Danielle, and Lee Doyle. “Protecting the Voting Rights of Americans Detained While Awaiting Trial.” *Center for American Progress*, 23 Aug. 2018, 9:00 AM, available at www.americanprogress.org/issues/democracy/reports/2018/08/23/455011/protecting-voting-rights-americans-detained-awaiting-trial/.

¹⁰ The Constitution makes mention of voting rights procedure and protection in Article 1, Section II Clause I (1789); Amendment XII (1804); Amendment XIV (1868); Section 1, Amendment XV (1870); Amendment XVII (1913); Amendment XIX (1920); Section 1, Amendment XXIV (1920); Section 1, Amendment XXVI (1971).

¹¹ *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966).

¹² *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

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demonstrates that the freedom we enjoy as Americans is dependent on citizens' right to vote.

However, pretrial detainees are systematically prevented from participating in the democratic process, which, in turn, violates their substantive due process rights under the Fourteenth Amendment. While there is no existing legislation that bars them from voting, court decisions, coupled with jail administrators' weak enforcement of this right in various states, chip away at this group's constitutional right to vote.

Due to their confinement, pretrial detainees are forced to rely solely on jail administrators to gain access to the materials and information needed to exercise their fundamental right to vote. However, administrators do not always prioritize election information and accessibility.¹³ Further, due to the complications of certain state laws, jail administrators may not know about their eligibility and fail to provide access to voter registration forms, absentee ballots, voting booths, or essential information pertaining to the eligibility of their pretrial detainees.¹⁴ The government's failure to enforce voting laws and educate jail administrators constitutes an infringement on a pretrial detainees' due process rights, as such neglect directly deprives a pretrial detainees' right to vote. If the state remains passive on this issue, pretrial detainees will continue to have no other ability to exercise their right to vote due to their confinement. It is the responsibility of the government and its employees to be well informed and provide their pretrial detainees with everything they need to vote, as the "right of suffrage is a civil right of the highest order."¹⁵

Recent developments in effecting the rights of pretrial detainees include, but are not limited to, the following actions:

Indiana: Indiana state regulations specified that sheriffs "shall make arrangements with elections officials to facilitate an inmate's right to vote by absentee ballot."¹⁶ In contravention of this legislation, no ballots were given out in the 2016 election, prompting a group of pretrial detainees to seek redress in court.¹⁷ It was discovered that since 2012, the Allen County Election Board had no communication with the sheriff's office, making it plausible that eligible, detained voters were similarly disenfranchised in past elections.¹⁸

Maryland: A group of pretrial detainees in a jail in Prince George's County, Maryland, filed a complaint stating that there "was no official local or statewide policy, procedure, or plan to register eligible voters desiring to do so by the October 18, 2016 deadline, or distribute

¹³ Dave Gong, "Inmates often miss chance to vote," *The Journal Gazette*, May 15, 2016, available at <http://www.journalgazette.net/news/local/Inmates-often-miss-chance-to-vote-13029092>.

¹⁴ Wood and Bloom, "De Facto Disenfranchisement"; Shane Benjamin, "Most Jail Inmates Have the Right to Vote, But Few Do," *The Durango Herald*, August 31, 2016, available at <https://durangoherald.com/articles/108912>.

¹⁵ *Or. v. Mitchell*, 400 U.S. 112, 139 (1970).

¹⁶ Complaint of plaintiff, *Buroff v. Gladieux*, No. 1:2017cv00124 (N.D. Ind. 2017), page 6, No 33, available at <https://www.courtlistener.com/recap/gov.uscourts.innd.89877/gov.uscourts.innd.89877.28.0.pdf>.

¹⁷ *Buroff v. Gladieux*, 2018 U.S. Dist. LEXIS 83887.

¹⁸ Complaint of plaintiff, *Buroff v. Gladieux*, No. 1:2017cv00124 (N.D. Ind. 2017), page 8, No 44, available at <https://www.courtlistener.com/recap/gov.uscourts.innd.89877/gov.uscourts.innd.89877.28.0.pdf>.

ballots, absentee or otherwise, to pre-trial detainees...who are registered voters wanting to exercise their right to vote.” The complaint also alleged that there was no information on “voting, voter eligibility, or voter registration” or “access to the ballot for persons eligible to register and/or vote.” Rather than addressing the clear accessibility violations present, the Maryland district court dismissed the case and held that those detained were unable to identify any specific provisions of Maryland election law which overtly prohibited or even burdened them from voting.¹⁹

Ohio: In 2018, the Campaign Legal Center (CLC) and partners filed a lawsuit against the state of Ohio. Their allegations covered the following: the state of Ohio excluded some pretrial detainees who had been arrested directly preceding an election from its emergency absentee ballot procedure. Due to their confinement, those arrested failed to meet and register for Ohio’s absentee ballot deadline. Yet, Ohio state laws gave special treatment for those hospitalized or whose children were hospitalized. Specifically, an exception was created which allowed this class of voters to register and obtain an absentee ballot after the absentee ballot deadline. This exception was not available for pretrial detainees, thus directly violating the Equal Protection Clause. On November 2019, the U.S. District Court in the Southern District of Ohio ruled in favor of CLC and ordered the state of Ohio to discontinue its practice of disenfranchising qualified voters.²⁰ However, the Court of Appeals for the Sixth Circuit reversed the District Court, holding that detainees should have anticipated that they would be arrested and incarcerated, and thus prevented from meeting the deadline for requesting a ballot.²¹

These cases are only the ones that have been reported. Who knows how many pretrial detainees have been and continue to be subjected to such disenfranchisement?

Many of those who are detained before their trials are entirely unaware that they are eligible to vote, either because they have been misinformed or simply don't know. This delivers a detrimental blow to the democratic process, one that thrives on the critical engagement of all population groups.

The disproportionate impact on low-income, African-American, and Latino communities

The United States comprises roughly 4% of the world’s population, yet detains nearly 22% of the global population.²² Since the 1980s, the rate of incarceration has increased by more than 500%, with over 2.2 million people currently detained in prison or jail in the

¹⁹ Johnson v. Prince George’s County Board of Elections, DKC 17-2867 (D. Md. February 27, 2018), available at <https://casetext.com/case/johnson-v-prince-georges-nty-bd-of-elections>.

²⁰ <https://campaignlegal.org/document/mays-v-larose-order-granting-summary-judgment-and-class-certification>.

²¹ Mays v. LaRose, No. 19-4112 (6th Cir. March 3, 2020), available at <https://www.demos.org/sites/default/files/2020-03/40-1%20-%206th%20Circuit%20Opinion%20and%20Order.pdf>.

²² Roy Walmsley (November 21, 2013). World Prison Population List (tenth edition). International Centre for Prison Studies. Retrieved July 11, 2014. available at http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_10.pdf.

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United States.²³ Considering the current state of both veiled and explicit disenfranchisement of pretrial detainees, coupled with the steadfastly escalating rates of mass incarceration in the United States, there is a clear danger to the democratic system. Systemic mass incarceration disproportionately targets communities of color and of low socioeconomic status. African-Americans account for 30% of those arrested for drug law violations and 40% of those incarcerated for those offenses in state or federal prisons, despite only comprising 13% of the United States population.²⁴ Further, according to U.S. Bureau of Justice statistics in 2016, African-Americans were 3.5 times more likely to be incarcerated than white Americans.²⁵ Nationwide, people of color are being incarcerated in jails at a rate seven times that of white people.²⁶ Such patterns of incarceration are also observable at the local level. African-Americans made up 39% of all those detained in Florida jails in 2015, despite comprising roughly 17% of the total state population. That same year, Cook County, Illinois reported that African-Americans made up nearly 70% of the jail population.²⁷

Similar ramifications are felt by low income Americans, with research reflecting that the average income of all males in pretrial detention is roughly \$15,600 a year,²⁸ falling far short of the livable wage in the U.S. which lies at \$24,000 for a family of four,²⁹ or other studies finding that working families with two parents and two children necessitate an income of nearly \$49,000.³⁰ Jail and monetary bail requirements coupled with racial discrimination exacerbate the overrepresentation of these communities in prison and jail systems, making them especially susceptible to disenfranchisement as pretrial detainees.

According to the U.S. Constitution, and the Universal Declaration of Human Rights, to which the United States is a signatory, American citizens do possess the equal right to exercise their voices as members of this democratic nation. That right is hardly operationalized equally in practice. Individuals of low socioeconomic status and people of color comprise a majority of the population of pretrial detainees, whose voting rights

²³ "Issues: Incarceration." *The Sentencing Project*, www.sentencingproject.org/issues/incarceration/.

²⁴ *The Drug War, Mass Incarceration and Race*. *The Drug War, Mass Incarceration and Race*, The Drug Policy Alliance, June 2015 available at: https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf

²⁵ U.S. Bureau of Justice Statistics, *Prisoners in 2016*, (Feb. 2018).

²⁶ Zhen Zeng, "Jail Inmates in 2016" (Washington: Bureau of Justice Statistics, 2018), available at <https://www.bjs.gov/content/pub/pdf/ji16.pdf>

²⁷ Vera Institute, "Incarceration Trends: Cook County, IL," last accessed July 2018 available at <http://trends.vera.org/rates/cook-county-il?incarcerationData=all>

²⁸ Root, Danielle, and Lee Doyle. "Protecting the Voting Rights of Americans Detained While Awaiting Trial." *Center for American Progress*, 23 Aug. 2018, 9:00 AM, www.americanprogress.org/issues/democracy/reports/2018/08/23/455011/protecting-voting-rights-americans-detained-awaiting-trial/.

²⁹ Amadeo, Kimberly. "How Much Do You Need to Live in America?" *The Balance*, The Balance, 12 June 2019, available at www.thebalance.com/living-wage-3305771.

³⁰ Lin, James, and Jared Bernstein. "What We Need to Get by: A Basic Standard of Living Costs \$48,778, and Nearly a Third of Families Fall Short." *Economic Policy Institute*, 29 Oct. 2008, available at www.epi.org/publication/bp224/.

are under attack.³¹ Systematically undermining the voting rights of these demographic groups results in policies and leadership that do not reflect the priorities and commitments of these communities

If significant segments of the national population are not making it to the polls to vote on policies and representatives that affect their lives, then American democracy is not properly functioning. The disenfranchisement of pretrial detainees manifests itself as a major contributor to voter suppression, influencing the already highly inconsistent voter turnout rates in the United States. While compiled statistics taken during the 2018 midterm elections showed that voter turnout rate increased for Black, Hispanic, Asian, and white communities, such progress has not always been linear; the voter turnout in the 2012 national election was reported as lower than those elections of 2008 and 2004. The voting rights of pretrial detainees must be enforced to afford Americans the equitable opportunity to exercise their right to vote.³²

The Solution: How voting rights of pretrial detainees can be guaranteed

This resolution ultimately proposes that all pretrial detainees are given the opportunity to exercise a constitutional right that should never have been taken away from them: the right to vote.

The resolution recommends the means by which governmental entities can accomplish this, including enacting regulations that direct each State and local Department of Corrections or sheriff's office to provide each pretrial detainee who is eligible to register to vote or vote in the jurisdiction in which he or she is detained a voter registration application and detailed information about detainees' voting rights, procedures, and relevant dates and deadlines. The regulations should ensure that voter registration forms, ballot applications, and ballots are provided to pretrial detainees with prepaid postage and preaddressed envelopes, or otherwise may be mailed free of charge, and the pretrial detainees access to educational programming and voting materials, such as ballots and voter guides, with ample time to review them before any federal, state, or local election.

Governmental entities can also accomplish this by enacting policies and regulations that ensure that all relevant sheriff's deputies, public defenders, probation officers, reentry personnel, and jail personnel are informed of a pretrial detainee's ability to register and vote, and ensure the timely submission of resident pretrial detainees' voter registration forms and sealed ballots to the intended election office.

The resolution also encourages each State to partner with local Board of Elections and Department of Corrections to consider the following procedures:

³¹ "Disproportionate Pretrial Detention of People of Color Drives Mass Incarceration." *Equal Justice Initiative*, 17 Dec. 2015, available at eji.org/news/people-of-color-disproportionately-detained-pretrial.

³² Admin. "2012 Election Turnout Dips Below 2008 and 2004 Levels: Number Of Eligible Voters Increases By Eight Million, Five Million Fewer Votes Cast." *Bipartisan Policy Center*, 25 Jan. 2013, available at bipartisanpolicy.org/press-release/2012-election-turnout-dips-below-2008-and-2004-levels-number-eligible/.

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- A. establish polling locations inside each facility where pretrial detainees are housed;
- B. facilitate same day registration on election days; and
- C. facilitate in-person voting by affidavit ballot on election days.

Several states have made real progress toward the goal of affording pretrial detainees their voting rights:

Illinois: Though several states have already contributed to the effort of protecting this community's constitutional right to vote, Illinois stands out as a model in local and state advocacy. In Cook County, Illinois, Chicago Votes worked in collaboration with community advocates and the Cook County Sheriff's Office to facilitate monthly voter registration drives, voter education, and in-person voting in the Cook County Jail. While eligible voters in the jail were required to vote by absentee ballot, the program simulated in-person voting by bringing voting booths to the jail for people to cast their absentee ballots in privacy, as they would if they were not detained. Local legislation followed, establishing the Cook County Jail as an official poll site. Local advocacy led to statewide reform, and on August 2019, SB 2090 was signed into law by Illinois Governor Pritzker. SB 2090 requires county jails and election authorities to collaborate in creating a process that ensures that eligible pre-trial detainees are given the opportunity to vote by mail. The law also provides that if the county has a population of 3,000,000 or more, the election authority is required to establish a temporary branch polling place in the county jail. SB 2090 ensures that pretrial detainees are given the chance to register to vote as well.³³

In addition, numerous non-profit organizations have developed initiatives that support the active effort to protect the voting rights of pretrial detainees in other states, including:

Alaska: In Juneau, Alaska, the Alaska Division of Elections partnered up with volunteers from the League of Women Voters to develop voter registration centers at various correctional facilities to assist inmates in applying for absentee ballots in upcoming midterm elections.³⁴

Maryland: Citizens United for Rehabilitation of Errants (CURE), a national grass-roots organization that is focused on reforming our incarceration system, has gained approval to begin the registration of prisoners in the Baltimore City Jail.³⁵

California: In Los Angeles, California, the ACLU SoCal's Unlock the Vote campaign and several community partners increase voting access by mailing "Know Your Rights" materials to incarcerated individuals in Los Angeles and Orange County jails. The

³³ <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=101-0442>.

³⁴ James Brooks, "Pilot Program Aids Voter Registration, Absentee Balloting for Eligible Prisoners in Alaska," Juneau Empire, July 14, 2018, available at <http://juneauempire.com/state/news/2018-07-14/pilot-program-aids-voter-registration-absentee-balloting-eligible-prisoners>.

³⁵ https://www.prisonpolicy.org/scans/sp/fd_jailbasedvotercamprepost.pdf.

organizations also directly educate and register individuals who are incarcerated inside Los Angeles jails, and recently-released individuals from Orange County jails.³⁶

New York: Pro-voter initiatives in New York City feature collaborative efforts between the Department of Correction, the Campaign Finance Board, and the Legal Aid Society to pick up voter registration paperwork and absentee ballots from city jails and deliver them to the Board of Elections in order to ensure that they will be received by election deadlines.³⁷

Similar actions have been taken by many other organizations, such as the Jewish Employment and Vocational Services in Philadelphia, the NAACP in Pike County, Mississippi, and the Citizens United for Rehabilitation of Errants in Washington D.C.

Conclusion

The American Bar Association should support the adoption of legislation that strengthens the voting rights of pretrial detainees. This would begin to reverse and ameliorate the damage already done by unconstitutionally depriving individuals of the due process rights to which they are entitled. Further, it would also affirm the United States' commitment to voting rights, by recognizing the central importance of voting to citizenship and individual agency, as well as by combating political apathy and buttressing civic engagement. Enfranchising and accommodating the circumstances of pretrial detainees would also recognize the equally important participation of these eligible voters who cannot make it to the polls because they are detained and who are denied alternative voting methods. Such efforts are consistent with the American Bar Association's longstanding commitment to guaranteeing and facilitating the right to vote, and would commemorate, in this 100th Anniversary year of the 19th Amendment, the forward march of progress in expanding the franchise.

Respectfully submitted,

Wendy Mariner, Chair
Section of Civil Rights and Social Justice
August 2020

³⁶ <https://www.aclusocal.org/en/unlockthevote>.

³⁷ Noah Manskar, "Rikers Island Detainees Get Help Casting Votes From De Blasio," New York City Patch, August 7, 2018, available at <https://patch.com/new-york/new-york-city/rikers-island-detainees-get-help-casting-ballots-de-blasio>.

GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Wendy Mariner, Chair

1. Summary of Resolution. This resolution calls for law enforcement and election officials to establish protocols whereby eligible pretrial detainees will be able to register and vote in the jurisdiction where they are confined, and for governmental entities to promulgate regulations to facilitate the participation of pretrial detainees in the electoral process, including registration, voting, and the delivery of ballots to the appropriate election office.

2. Approval by Submitting Entity. The Section of Civil Rights and Social Justice approved sponsorship of this program at its Spring Council Meeting on April 24, 2020.

The Standing Committee on Legal Aid and Indigent Defendants approved cosponsorship of this policy on May 5, 2020.

The Criminal Justice Section approved cosponsorship of this policy on May 26, 2020.

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

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 writing and supporting resolutions that encourage voter participation and civic engagement, and that protect the rights of Americans to vote by calling for the elimination of barriers that discriminate against certain groups by making it more difficult for them to vote. Many of these policies deal with reforming the process of voting itself, either calling for legislation to ensure equal protection of the voting rights of all groups: 15A104 (Ensuring Maximum Wait Times at Polls); 14A113B (Voting Rights of Individuals with Disabilities); 13A10E (Establishing Coverage Formula for the Voting Rights Act); 11A121 (Improving Voter Registration Practices); 10A114 (Modernizing Voter Registration); Criminal Justice Standard 23-8.9 (Transition to the Community); 08A119A (Administration of Elections); 07A121 (Voting Administration Disability Rights); 06BOG2.3 (Reauthorization of Voting Rights Act); 05A108 (Voting Rights Act); 01A112B (Polling Places for Elections); 99A115 (District of Columbia Voting Rights); 93A116 (Voting Rights for the Homeless); 92A10H (Voting Rights for American Territories); 90A300 (Voter Registration); and 74A116.11 (Voter Registration by Mail). Numerous policies also encourage the establishment of educational resources to bolster civic engagement and understanding of the nuances and importance of democratic participation: 17A117B (Voter Education); 99A104 (Increasing Voter Participation); 89A124B (Voter Participation); and 79M127 (Voter Participation). These standards support the proposed resolution and supplement its policy recommendations.

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

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6. Status of Legislation. N/A

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. N/A

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

Administrative Law Section
Standing Committee on Election Law
Public Education Division
Center for Human Rights
Coalition on Racial and Ethnic Justice
Government and Public Sector Lawyers Division
Section of Civil Rights and Social Justice
Criminal Justice Section
Section of State and Local Government Law
Section of Business Law
Solo, Small Firm and General Practice Division
Law Student Division
Young Lawyers Division

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls for law enforcement and election officials to establish protocols whereby eligible pretrial detainees will be able to register and vote in the jurisdiction where they are confined, and for governmental entities to promulgate regulations to facilitate the participation of pretrial detainees in the electoral process, including registration, voting, and the delivery of ballots to the appropriate election office.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the extensive history of recognizing the fundamental and basic human right to vote by the United States, and calls attention to the various attacks against this very right in the past decades, particularly with respect to the disenfranchisement of pretrial detainees. This resolution also addressed the substantive equality issues at play for these eligible American voters who, in theory, possess the equal right to vote as well, but in practice, are physically and metaphorically barred from voting due to the deprivation of their voting rights without constitutional due process. Due to this nation's history and modern patterns of mass incarceration which disproportionately target members of minority communities, those voting rights of Black, Hispanic, and other minority communities are most heavily at stake.

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

The proposed policy proposition will call direct attention to the erosion of the voting rights of pretrial detainees in states nationwide, and will also highlight the fundamental value of voting rights to this democracy. In outlining the need for pretrial detainee enfranchisement, this policy will also assign responsibility to jail administrators as authorized by local, federal, state, tribal and territorial governments to provide eligible voters being detained while awaiting trial with the necessary materials and instruction needed to vote and exercise their civil liberties.

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

No minority views have been identified or expressed.

AMERICAN BAR ASSOCIATION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
HIV/AIDS IMPACT PROJECT COMMITTEE
CENTER FOR HUMAN RIGHTS
HEALTH LAW SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges the United States Department of
- 2 Defense to declare that: (a) HIV status alone has no impact on service members' ability
- 3 to fully execute their duties and is not a determinant of fitness for duty; and (b) HIV is not
- 4 a medical condition that should disqualify a person from enlistment, appointment,
- 5 commissioning, deployment or retention in the U.S. military.

REPORT

Introduction

People join the United States Armed Forces for many reasons. For some, it's an honor and pride, the love of our country, to be able to serve in a most time-honored tradition; for others, it is a way of creating more discipline and direction in their lives or moving out of challenging economic circumstances. For many, it is a combination of all of these things.

However, people living with HIV are treated differently. They are not allowed to join the military, regardless of how long they have been in treatment or how well managed and controlled their HIV is.¹ Furthermore, those who are diagnosed with HIV after entering military service are prevented from deploying into combat zones or on contingency deployments, even after they have stabilized their treatment and have suppressed their viral load.² Those who remain are not allowed to move from enlisted to officer status.³

The current United States Department of Defense policy has not changed in decades, although the treatment, prevention and prognosis for people living with HIV have dramatically improved, completely changing the nature of this medical condition.

The bar to deployment is not only outdated, stigmatizing, and unnecessarily restrictive, but it can also negatively affect service members' ability to remain in the military or to meet their military career goals. The fact is their health condition does not affect their fitness to serve, nor does it jeopardize the health of others. It's time to change U.S. Military policy toward people living with HIV. Modern medicine renders the policy obsolete, because it is no longer justified by current science. This resolution urges the US Military to end its draconian policy of discriminating against individuals living with HIV.

Background

In 1985, the life expectancy for a person with HIV was severely curtailed. For a long time, there were no treatments at all. As monotherapy and dual therapy treatments became available, they had toxicities and side effects that made them difficult to take. Even when combination antiretroviral therapies that were effective in combatting the virus became available, they were complicated to take and involved significant side effects.⁴ Over time, more effective medications that were easier to take and have fewer side effects were developed. Because of the tremendous health benefits, in 2012, the standard of care became immediate treatment with antiretroviral drugs as soon as possible after

¹ Dept. of Defense Instruction (DOD I) 6130.03, "Medical Standards For Appointment, Enlistment, Or Induction Into The Military Services," May 6, 2018.

² DOD I 6490.07, "Deployment-Limiting Conditions for Service Members and Civilian Employees," Feb. 5, 2010.

³ DOD I 6485.01, "Human Immunodeficiency Virus (HIV) in Military Service Members," June 7, 2013.

⁴ Alice Tseng, Jason Seet and Elisabeth J. Phillips, The evolution of three decades of antiretroviral therapy: challenges, triumphs and the promise of the future, *Br J Clin Pharmacol.* 2015 Feb; 79(2): 182–194. (2017). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4309625/>

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diagnosis.⁵ Today, most people with HIV who are in treatment take one or two pills once a day and experience few to no side effects.⁶

This has transformed HIV from a debilitating and invariably fatal condition into a manageable chronic condition with life expectancy commensurate with those who do not have HIV.⁷ Today, more than 1.1 million people are living with HIV in the United States, and more are receiving effective care and treatment each year.⁸

The military currently allows people with certain medical conditions requiring a daily medication to enlist, deploy, and commission in the U.S. military. For instance, those with dyslipidemia (abnormal lipid count in the blood) or hypothyroidism or who use hormone replacement for dysmenorrhea or birth control are permitted to join the military, to commission and to deploy without obtaining a waiver.⁹ Similarly, people who require certain assistive devices—such as glasses to correct their vision or an inhaler to control asthma—are permitted to join the military, to commission and to deploy without obtaining a waiver.¹⁰ The loss or destruction of these assistive devices could have a significant and possibly immediate impact on a service member's ability to perform their duties, while the loss or destruction of HIV medications would not. The need for a daily medication should not serve as an impediment to full military service.

Transmission

When HIV was first identified in the 1980s, the prognosis was dire and transmission was unchecked. Behavioral changes, particularly “safer sex” practices and the implementation of universal precautions in other settings, were the primary tools for slowing spread of the disease. When combination antiretroviral therapy was introduced in 1996, it worked by attacking the virus through multiple mechanisms and preventing it from reproducing, thereby decreasing the person's viral load.¹¹ Though it took years to recognize it, a side benefit of viral suppression was the inability to transmit HIV.¹² Around 2011, researchers started working to verify the anecdotal evidence that a suppressed viral load greatly reduced or eliminated the risk of HIV transmission through sexual activity.

⁵ Ibid.

⁶ Ibid.

⁷ Avert, “Life expectancy for people with HIV is now near-normal – but only for those accessing treatment,” May 15, 2017, www.avert.org/news/life-expectancy-people-hiv-now-near-normal-%E2%80%93-only-those-accessing-treatment.

⁸ Centers for Disease Control and Prevention, Basic Statistics: HIV Basics, (March 2020).

⁹ DODI 6130.03 at 39, § 5.24(n); DODI 6130.03 at 39, § 5.24(k); DODI 6130.03 at 23, § 5.13(d); DODI 6490.07, *passim* (not requiring a deployment waiver for these conditions).

¹⁰ Ex. 1, DODI 6130.03 at 13, § 5.4; DODI 6490.07, Encl. 3(d) (setting limit for deployment with asthma).

¹¹ Tseng, *supra* note 3.

¹² Moncivaiz and Alexander, CD4 vs. Viral Load: What's in a Number?, (2018). <https://www.healthline.com/health/hiv-aids/cd4-viral-count#importance-of-regular-testing>.

Researchers have now confirmed that an individual with an undetectable viral load has almost no chance of transmitting HIV to another person through sexual activity.¹³ The risks of transmission through military activities is relatively low in the absence of treatment, and with treatment those risks are also likely reduced to near zero.¹⁴ And while the effect of a suppressed viral load on the risk of transmission via blood donation is not known, service members with HIV know not to donate blood, and many protocols are in place to protect the military blood supply.¹⁵

Evolution of Military Policy

Since 1985, new recruits have been tested for HIV. If they test positive, they cannot join the armed forces, a policy that continues today.¹⁶ Active duty service members are tested for HIV every two years, unless medically indicated for more frequent testing for other reasons.¹⁷

Service members who become HIV positive while serving are generally not discharged, but they are re-stationed to the United States and prohibited from deploying to any location with temporary (non-fixed) medical facilities. This severely curtails their ability to advance or to have a fulfilling career in the military.¹⁸

Recently, the Air Force started discharging some Airmen recently diagnosed with HIV. Even though these individuals have already reached viral suppression and are otherwise in good health, the Air Force has started discharging them based on their purported inability to deploy worldwide. These discharges are despite an Air Force regulation that states: “Asymptomatic HIV alone is not unfitting for continued service.”¹⁹

Service members living with HIV are also not allowed to commission as officers. Because entry (accession) standards are applied to those seeking a commission, service members with HIV do not qualify.²⁰ This is despite the fact that officers living with HIV are presently serving and simply became HIV positive after commissioning as officers.

Though Military personnel policies regarding people living with HIV may have been reasonable when HIV was a debilitating and invariably fatal condition, they no longer are.

¹³ National Institute of Health, *HIV Undetectable=Untransmittable (U=U), or Treatment as Prevention*, NIAID, (2019). <https://www.niaid.nih.gov/diseases-conditions/treatment-prevention>

¹⁴ *Roe v. Dep’t of Defense*, 947 F.3d 207, 227 (4th Cir. 2020); *see also* Expert Report of Craig W. Hendrix, M.D., ¶¶ 48-51 (*Roe v. Esper*, Case No. 1:18-cv-1565 (LMB/IDD) (EDVA 2018), Dkt. No. 257-43).

¹⁵ *See* Air Force Instruction 44-178, Attach. 13 at 43-44 (form Airman diagnosed with HIV must sign acknowledging they cannot donate blood); AR 600-110 at 15, § 3, ¶ 4-9 ((form Soldier diagnosed with HIV must sign acknowledging they cannot donate blood); DOD Instruction 6480, “Armed Services Blood Program Operating Procedure,” (August 1996).

¹⁶ DODI 6485.01, *supra* note 3.

¹⁷ DOD, HA-04-007, Policy Memorandum: “Human Immunodeficiency Virus Interval Testing,” (March 2004); *see also* DODI 6485.01, Encl. 3 at 6, § 1(c)(1); AR 600-110 at 21, § 1, ¶ 6-2; AFI 44-178 at 5, § 2.2.2..

¹⁸ Bryce H.P. Mendez, Cong. Research Serv., IF11238, HIV/AIDS in the Military (2019).

¹⁹ *Roe v. Shanahan*, 359 F. Supp. 3d 382 (E.D. Va. 2019).

²⁰ Mendez, *supra* note 18.

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People living with HIV who receive appropriate care and maintain a normal CD4 count are immunologically healthy and fully capable of performing their duties as service members.²¹ The already low risks of transmission through military service, even in a deployed environment, are reduced to essentially zero by effective treatment and a suppressed viral load.²² The safety of the military blood supply is not reduced by people living with HIV who are aware of their status.²³ No one should be prohibited from joining the armed forces merely because they are living with HIV, and their service should not be restricted based solely on their HIV status. Today, the restrictions placed on service members with HIV are no longer justifiable and are therefore discriminatory.

Relevant ABA Policy

The American Bar Association has a long history of enacting policy that supports individuals living with HIV. The first ABA policy dealing with HIV/AIDS issues was passed in 1988. In all, 12 resolutions have passed the ABA House of Delegates, the most recent in February of 2018.²⁴ There are two resolutions in particular that are consistent with this resolution and support the need for its passage.

The first is resolution 04M103B. This resolution urges the federal government to implement HIV/AIDS-related initiatives in a manner consistent with international human rights law and science-based prevention, care, support and treatment objectives and endorses the United Nations Declaration of Commitment on HIV/AIDS, dated June 2001. For over 15 years, the ABA has maintained a policy that the federal government's HIV-related initiatives should be based on current science-based prevention. As indicated earlier in this report, individuals living with HIV pose no significant safety risk.

The second resolution is 18M300. This resolution urges governments and relevant private entities to recognize that transmission of the human immunodeficiency virus (HIV), which causes Acquired Immune Deficiency Syndrome (AIDS), is driven by certain "social determinants of health" that law can address, including, among others, poverty, stigma, discrimination, and racism; housing, food, and transportation insecurity; overcriminalization of HIV non-disclosure; and misinformation about HIV transmission risk.

This resolution urges our government to use the law to address discrimination against people living with HIV. Individuals who are barred and/or discharged from the US Military or from accession and/or deployment are the victims of discrimination based not on science, but on misinformation or social stigma. It is consistent with and in furtherance of existing ABA policy

CONCLUSION

²¹ Expert Report of Craig W. Hardy, M.D., *supra* at n.14.

²² NIH, *supra* note 9.

²³ American Red Cross, What You Must Know Before Giving Blood. <https://www.redcrossblood.org/donate-blood/manage-my-donations/rapidpass/what-you-must-know-before-blood-donation.html>

²⁴ 18M300

This is not 1989, nor is it 1996, or even 2010. Individuals living with HIV are able to live healthy, normal lives thanks to significant advancements in science and treatment. In a time where discrimination is on the rise, now more than ever the US government should not be following policy that bars otherwise qualified individuals from serving in the US Military. This report makes it clear that the US Military's policies regarding individuals living with HIV are outdated, draconian, and discriminatory. Any individual living with HIV who is otherwise qualified to serve should be able to serve, period. The ABA should support this resolution to end discrimination against those living with HIV by our US Military.

Respectfully submitted,

Wendy Mariner
Chair, Section of Civil Rights and Social Justice
August 2020

Victor M. Marquez
Chair, Commission on Sexual Orientation and Gender Identity
August 2020

Margaret Drew
Chair, HIV/AIDS Impact Project Committee
August 2020

GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice, Commission on Sexual Orientation and Gender Identity, HIV/AIDS Impact Project Committee, Center for Human Rights

Submitted By: Wendy K. Mariner, Victor Marquez, Margaret Drew

1. Summary of the Resolution. This resolution urges the Department of Defense to recognize that: (a) HIV status alone has no impact on service members' ability to fully execute their duties and is not a determinant of fitness for duty; and (b) HIV is not a medical condition that should disqualify a person from enlistment, appointment, commissioning, deployment or retention in the U.S. military.
2. Approval by Submitting Entity. The Section of Civil Rights and Social Justice approved sponsorship of this Resolution on April 24, 2020.

The Commission on Sexual Orientation and Gender Identity approved sponsorship of this resolution on May 4, 2020.

The HIV/AIDS Impact Project approved sponsorship of this Resolution on May 4, 2020.

The Center for Human Rights voted to cosponsor this resolution on May 4, 2020.

3. Has this or a similar resolution been submitted to the House or Board previously? No.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

There are two existing policies that are relevant to this resolution. These existing ABA policies would be enhanced and strengthened by the adoption of this policy. The two relevant policies are:

04M103B - This resolution urges the federal government to implement HIV/AIDS-related initiatives in a manner consistent with international human rights law and science-based prevention, care, support and treatment objectives and endorses the United Nations Declaration of Commitment on HIV/AIDS, dated June 2001.

18M300 - This resolution urges governments and relevant private entities to recognize that transmission of the human immunodeficiency virus (HIV), which causes Acquired Immune Deficiency Syndrome (AIDS), is driven by certain "social determinants of health" that law can address, including, among others, poverty, stigma, discrimination, and racism; housing, food, and transportation insecurity; overcriminalization of HIV non-disclosure; and misinformation about HIV transmission risk.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? NA
6. Status of Legislation. N/A
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 or Commission staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.
9. Disclosure of Interest. NA
10. Referrals.

Standing Committee on Legal Assistance for Military Personnel
Standing Committee on Armed Forces Law
Military and Veterans Legal Center
Public Education Division
Center for Human Rights
Coalition on Racial and Ethnic Justice
Law Student Division
Young Lawyers Division
Criminal Justice Section
Section of State and Local Government Law

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EXECUTIVE SUMMARY1. Summary of the Resolution.

This resolution urges the Department of Defense to recognize that: (a) HIV status alone has no impact on service members' ability to fully execute their duties and is not a determinant of fitness for duty; and (b) HIV is not a medical condition that should disqualify a person from enlistment, appointment, commissioning, deployment or retention in the U.S. military.

2. Summary of the issue that the resolution addresses.

The US Military currently is following policies that discriminates against individuals living with HIV. Individuals who are otherwise qualified are barred from joining the US Military. Additionally, those who are serving in the US Military with HIV have been subject to restrictions on deployment, ascension within the US Military, and in some cases discharge.

3. Please explain how the proposed policy position will address the issue.

This resolution urges the US Military to change its outdated and discriminatory policies toward those living with HIV. The ABA will be making a strong statement that those living with HIV have a place in the US Military and should be able to serve, unrestricted, if they are otherwise qualified.

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

None known.

AMERICAN BAR ASSOCIATION**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
SECTION OF STATE AND LOCAL GOVERNMENT LAW
COMMISSION ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
COUNCIL FOR DIVERSITY IN THE EDUCATIONAL PIPELINE
COALITION ON RACIAL AND ETHNIC JUSTICE
COMMISSION ON DISABILITY RIGHTS
CENTER FOR HUMAN RIGHTS****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

1 RESOLVED, That the American Bar Association urges that, in all states, territories and
2 tribes, the highest courts or legislative bodies charged with the administration of justice,
3 admission to the bar, or regulation of the legal profession, require that lawyers, judges,
4 commissioners, referees, probation officers, and court personnel whose job requires
5 interacting with the public receive periodic training regarding implicit biases that
6 addresses, at minimum, the following subjects: sex, race, color, religion, ancestry,
7 national origin, ethnic group identification, age, disability, medical condition, genetic
8 information, marital status, sexual orientation, gender expression and gender identity; and
9

10 FURTHER RESOLVED, That the American Bar Association urges that, in all states,
11 territories, and tribes, the highest courts or legislative bodies, or agencies and boards that
12 license and regulate the medical profession or social service professions, require
13 that medical professionals and social service professionals who work with the public
14 receive periodic training regarding implicit biases that addresses, at minimum, the
15 following subjects: sex, race, color, religion, ancestry, national origin, ethnic group
16 identification, age, disability, medical condition, genetic information, marital status, sexual
17 orientation, gender expression and gender identity.

REPORT

Initially conceived in 1995 by psychologists Mahzarin Banaji and Anthony Greenwald,¹ “implicit bias” has become a salient term in the domains of advocacy, litigation, and sociology, elucidating the pervasive impacts of unconsciously held biases. The American Bar Association (ABA) adopts this Resolution to foster and expand our continued support of increasing implicit bias awareness and education.

The ABA has an enduring history of supporting Resolutions that aim to proactively address and combat the effects of biases in professional and legal settings. Specifically, in August of 2017, the House of Delegates passed [Resolution 121 \(17A121\)](#), focused on developing de-biasing training to be incorporated into initial judicial training and continued judicial education.² The Resolution also encouraged local and state bar associations to offer these trainings free-of-cost to courts to decrease potential impediments to the enactment of the recommendation. This proposed Resolution seeks to expand the ideals set forth in 2017A121 to other professionals outside of the judiciary.

Another Resolution that exemplifies the diligence that the ABA in years past has demonstrated toward the initiative of alleviating the impact of implicit biases includes [Resolution 16A116](#), entitled Discrimination and Implicit Bias in Jury Service. The Resolution encouraged amending the *ABA Principles for Juries and Jury Trials* to require courts to educate and instruct jurors on how to be cognizant of their potential implicit biases which may impact their perceptions of the trial.³

This Resolution bolsters the recommendations of the two past resolutions listed above and furthers the veracity of the ABA’s commitment to eradicating the effects of implicit biases by establishing a mandate to a significant body of professionals who interact with the greater public to enact methods of opposing implicit biases that adversely affect marginalized and disenfranchised communities.

In 2008, the House of Delegates adopted Goal III as one of the ABA’s central tenets.⁴ Goal III delineates the ABA’s commitment to eliminating bias and enhancing diversity. Adapted from 1986’s Goal IX, the objective was designed “[t]o promote full and equal participation in the legal profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities.”⁵ To support these efforts, through the co-sponsorship of the Commission of Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, the Commission on Disability Rights, and the Commission on Women in the Profession, the ABA publishes

¹ Renee Montagne, How the Concept of Implicit Bias Came into Being. *npr*, Oct. 17, 2016, <https://www.npr.org/2016/10/17/498219482/how-the-concept-of-implicit-bias-came-into-being>.

² [17A121](#).

³ [16A116](#).

⁴ ABA Commission on Disability Rights, “Goal III,” American Bar Association, *available at* https://www.americanbar.org/groups/diversity/disabilityrights/initiatives_awards/goal_3/.

⁵ *Id.*

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an annual [Combined Goal III Report](#), detailing bias reduction and diversity efforts throughout the Association.⁶

The ABA Section of Litigation developed an [Implicit Bias Toolbox](#) as a comprehensive resource through their Implicit Bias Initiative.⁷ The Toolbox features materials to host implicit bias training sessions with recommendations for best practices of administration, including choosing a diverse panel to present the session. The Toolbox references two primary sources of information: a past ABA collaborative effort, *Building Community Trust Model Curriculum and Instruction Manual*, developed through the co-sponsorship of the ABA Criminal Justice Section, the Section of Civil Rights and Social Justice, and the Coalition on Racial and Ethnic Justice and the National Center for State Courts' Toolbox approach; these sources supplement the self-guided presentation with a wealth of accumulated information and the perspective of an additional toolbox technique.⁸

Many members of the House of Delegates have already received implicit bias training, which has been provided to the Board of Governors and governing councils of many sections and other ABA entities. Moreover, implicit bias tests are remarkably educational and personally revealing when taken; to experience that fact, House members are urged to visit [Project Implicit](#),⁹ Harvard's home to implicit bias information and tests, to take one of the several short implicit attitude tests hosted on the website.

Further, this Resolution upholds the progression of many current legislative initiatives, requiring continuing professional education programs to incorporate implicit bias education, such as AB241¹⁰ and AB242¹¹ in California, which detail comprehensive implicit bias training programs to be implemented for medical and legal professionals.

This report details current active legislation related to the implementation of implicit bias training programs in many states and congress. Additionally, this report highlights the impact of implicit biases across professional fields and the resulting decreased accessibility and potentially lethal consequences of unconsciously held beliefs. In recognition of an inability to standardize procedures for public interactions across varying professional positions, this resolution does not offer a specific recommendation for the parameters of the training programs; conversely, this report features an array of different programs to show the flexibility and fluidity of implementation.

⁶ ABA Commission on Disability Rights et al., *Combined Goal III Report*, American Bar Association, April 2018, available at https://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/Combined_Goal3_Report%202016-17-reposted-2018.pdf.

⁷ ABA Section of Litigation, *Toolbox: Implicit Bias Initiative*, American Bar Association, April 15, 2019, <https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox/>.

⁸ *Id.*

⁹ Project Implicit. *Harvard*, (2011), available at <https://implicit.harvard.edu/implicit/takeatest.html>.

¹⁰ Implicit bias: continuing education: requirements, AB-241, (2019-2020), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB241

¹¹ Courts: attorneys: implicit bias: training, AB-242, (2019-2020), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB242

I. History and Rationale in Support of Implicit Bias Training

An expression of bias is a departure from a “neutral” attitude which would fairly allocate equal recognition to all persons—regardless of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, disability, medical condition, genetic information, marital status, sexual orientation, gender expression and gender identity, or other potentially marginalized attributes.¹² These biases may result in obstacles to employment, including barriers in the hiring process, mannerisms in social interactions, including the evaluation of facial expressions or body language, and perceptions of actions, including the influence on decision making relative to those actions.¹³ The debilitating effects of implicit biases decrease the possibility of the diversity of professionals in a given field and the equitable access of marginalized communities to programs and resources.

Great Britain’s Equality and Human Rights Commission’s report, *Unconscious bias training: an assessment of the evidence for effectiveness*, revealed that the administration of Implicit Attitude Tests aided in beginning the conversation and raising awareness regarding discrimination of marginalized communities, with the corollary result of reducing implicit biases.¹⁴ The training, while reducing implicit biases, cannot remove biases.¹⁵ However, starting the conversation and implementing programs to ensure uniformity in procedures that may otherwise negatively impact individuals due to the unintentional revealing of marginalized features (not requesting names or gender identification on resumes, for example) may be a sufficient measure to combat the effects of persistent biases.¹⁶

With respect to the potential of Amicus Curiae brief drafting, the Supreme Court of the United States has acknowledged the importance of recognizing implicit biases multiple times. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, which centrally featured arguments concerning Housing Discrimination under the Fair Housing Act, Justice Kennedy, in his majority opinion, stipulated that disparate impact liability “permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”¹⁷ In this opinion, he references, thereby establishing the Court’s recognition of, both the existence of unconscious prejudices and their ability to elude typical procedures which would account for and aim to stifle explicit discriminatory intent. Similarly, in *Watson v. Fort*

¹² Jerry Kang, National Campaign to Ensure the Racial and Ethnic Fairness of America’s State Courts, *Implicit Bias - A Primer for Courts* (Aug. 2009), <http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf>.

¹³ *Id.*

¹⁴ Doyin Atewologun, Tinu Cornish, & Fatima Tresh, Unconscious bias training: An assessment of the evidence for effectiveness. *Equality and Human Rights Commission*: 113, 6, Mar. 2018, http://www.ucd.ie/equality/t4media/ub_an_assessment_of_evidence_for_effectiveness.pdf.

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 8.

¹⁷ *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* 576 U.S. 3 (2015), available at https://www.supremecourt.gov/opinions/14pdf/13-1371_8m58.pdf.

Worth Bank & Trust, Justice O'Connor affirmed that "even if it is assumed that discrimination by individual supervisors can be adequately policed through disparate treatment analysis, that analysis would not solve the problem created by subconscious stereotypes and prejudice".¹⁸ In each of these circumstances, the Court accepted the existence of harmful repercussions due to implicit biases, thereby setting precedents for usage of the concept in future arguments.

II. EEOC Initiatives and Programs

The Equal Employment Opportunity Commission ("EEOC") implemented its program, Eradicating Racism & Colorism from Employment ("E-RACE"), from 2008 to 2013, with the primary goal of developing "enforcement efforts to address contemporary forms of overt, subtle and implicit bias" through engaging legal and educational avenues.¹⁹ The EEOC's deference to the importance and impact of implicit bias training and education is evident through the listed objectives of the E-RACE program. The EEOC offered its own training courses with the foundational principles of addressing "disparate impact, cultural competency, innovative remedies, new research on the efficacy of diversity programs, and effectively using ORIP [Office of Research Information and Planning] reports," which are compilations of instances of discrimination used to prosecute allegations of biased treatment.²⁰ Further, the EEOC demonstrated their appreciation of the gravity of implicit bias education as they pledged to collaborate with small and mid-sized companies to inform on commonly encountered issues.²¹

The EEOC identified "discrimination based on race and other prohibited bases, such as credit and background checks, arrest and conviction records, employment tests, subjective decision making, and exclusions based on names, zip codes or geographic areas and other factors" as frequently occurring, covert instances of biases which they must bear the responsibility of investigating and prosecuting.²² As these seemingly neutral concepts are widely commonplace, the potential for abuse has the capacity to pervade virtually all spheres which intersect with the general public, including hiring processes, university acceptance, and medical intake examinations.

In order to address these forms of covert and unconscious biases, the EEOC African American Workgroup Report recommends implementing unconscious bias training programs for all members of a company or organization.²³ The Workgroup specifically recommends hiring committees receive customized training to address how the above

¹⁸ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 989-991 (1988), available at <https://caselaw.findlaw.com/us-supreme-court/487/977.html>.

¹⁹ Significant EEOC Race/Color Cases (Covering Private and Federal Sectors), *U.S. Equal Employment Opportunity Commission*, (2019), available at <https://www.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm>.

²⁰ E-RACE Goals and Objectives, *U.S. Equal Employment Opportunity Commission*, (2019), <https://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm>.

²¹ *Ibid.*

²² *Ibid.*

²³ EEOC African American Workgroup Report, *U.S. Equal Employment Opportunity Commission*, available at <https://www.eeoc.gov/federal/reports/aawg.cfm>.

listed biases inhibit equitable consideration for applicants with marginalized attributes.²⁴ Further, administrators should offer programs that foster open dialogue regarding implicit biases, moderated by academic and social science researchers to increase awareness and educate all employees about implicit bias theory.²⁵ In efforts to bridge the gap between the detachment often enshrouding a formal educational approach, the Workgroup suggests including interactive exercises into the training programs, which would allow participants to act out scenarios in which implicit biases negatively impact individuals.²⁶ These interactive programs should be designed to cultivate engaging discussions during which participants can evaluate the cause of the offense and discuss “micro-inequities,” which are small slights, subtle discrimination and tiny injustices in the workplace.”²⁷

III. Importance and Examples of Tailored Implementation Across Professional Fields

Diminishing the effects of implicit biases largely comes from education and raising awareness about the corrosive nature of unconsciously held beliefs.²⁸ Tailoring the goals of implicit bias trainings to individual professions helps account for circumstances specific to that profession; a doctor encounters vastly different circumstances compared to an attorney; consequently, they should be made aware of potential biases specific to their fields; .

In employment and hiring processes, a common barrier to equitable treatment is the existence of unintentional characteristic identification on hiring applications. The initial hypothesis presented in a study by Meraiah Foley and Sue Williamson, “Does anonymizing job applications reduce gender bias?” was that anonymity alone would serve to eliminate gender bias and increase diversity in the hiring process.²⁹ However, without the additional element of education, these results alone revealed that employers often exercised circuitous means of determining gender on applications, and as such the obstacles created from implicit biases persisted.³⁰ When the employers were educated about how preconceived ideas tainted their attempts of evaluating applicants based on merit, the impact of implicit biases was lessened.³¹ The authors of the study encouraged coupling education with standardization in order to maximize desired results.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Refer to note 14.

²⁹ Meraiah Foley and Sue Williamson, “Does anonymising job applications reduce gender bias? Understanding managers’ perspectives” *Gender in Management*, Vol. 33 No. 8, pp. 623-635 (November 6, 2018), available at <https://www.emerald.com/insight/content/doi/10.1108/GM-03-2018-0037/full/html>.

³⁰ Ibid. See also Meraiah Foley and Sue Williamson, “Unconscious Bias Training: The ‘Silver Bullet’ for Gender Equity?” *Australian Journal of Public Administration*, vol. 77, no.3, pp. 355-359 (March 11, 2018), available at <https://doi.org/10.1111/1467-8500.12313>.

³¹ Ibid.

Conversely, in arguing for tailored implementation, it is imperative in some fields, like the medical and social services³² professions, for example, that standardization is not too limiting during initial evaluation as all individuals are the result of both their environment and genetic predispositions. However, though the results of the evaluations may differ, the offered care should be of a consistent caliber, as the Hippocratic Oath, binding all physicians promises strict, ethical fairness to be offered to all patients.³³ Regardless, there is strong evidence to suggest that disparities in quality and variety of treatment may be due to stereotyped perceptions of patients with respect to their potentially marginalized features, including race, ethnicity, age, sex, and gender identity.³⁴

Further, as physicians are often operating under time sensitive scenarios, the convenience of subscribing to stereotypes may prove both enticing and seemingly necessary; however, given the potentially lethal implications and proven disparities in healthcare received, notably across the racial spectrum, it is incredibly important to develop training programs that acknowledge the high-risk of physician-patient interactions and the often-mandated rapid decision-making of physicians.³⁵ In studies of race in emergency rooms, it was found that Black and Hispanic patients were seven times less likely to receive opioids than White, Non-Hispanic patients with similar injuries.³⁶ This convincing evidence, among many similar reports of racial disparities in healthcare, suggest race influences doctors' decision-making over the symptoms the patients actually present.³⁷

Additionally, according to the Centers for Disease Control, Black women are three to four times more likely to die from complications in childbirth than White women.³⁸ This discrepancy, while sometimes due to split-second decision-making during delivery, is often the result of the inferior quality of prenatal care offered to Black women, particularly when analyzing race as intersected with their socio-economic status.³⁹

These two findings regarding race depict merely a glimpse of the means by which implicit biases can pervade both emergency and long-term care. As such, a training tailored to specifically account for both urgent and continued care while also addressing the nuances of individualized circumstances would hopefully result in reduced disparities in treatment across all patients, regardless of race, status, or ability.

³² The American Board of Examiners in Clinical Social Work defines the field to include child and family services, court & forensic services, elder care, home health care, hospice, palliative and rehabilitative care, public & private school services, public sector health/mental health services, residential treatment, and other social services.

³³ Molly Carnes, Elizabeth N. Chapman, & Anna Kaatz, Physicians and Implicit Bias: How Doctors May Unwittingly Perpetuate Health Care Disparities. *Journal of General Internal Medicine*: 28(11), 1504-1510, April 11, 2013, available at <https://link.springer.com/article/10.1007/s11606-013-2441-1>.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ American Heart Association News, "Why are black women at such high risk of dying from pregnancy complications?" February 20, 2019, available at <https://www.heart.org/en/news/2019/02/20/why-are-black-women-at-such-high-risk-of-dying-from-pregnancy-complications>.

³⁹ Ibid.

Another mechanism of implicit bias training that has shown to be effective is “lovingkindness meditation.” In the study, “The nondiscriminating heart: Lovingkindness meditation training decreases implicit intergroup bias” it was found that following six-weeks of lovingkindness meditation, there was a notable decrease in “automatically activated, implicit attitudes toward stigmatized social groups.”⁴⁰ This is not to suggest that meditation is the appropriate method of reducing implicit biases in all circumstances; the presentation of this finding is only to emphasize that the training program urged by this resolution may manifest in a wide array of forms, each with their individual merits, so long as they adhere to a few key standards, namely their prolonged implementation and a capacity to measure progress.⁴¹ This is by no means an exhaustive record of all types of programs but a sampling of a representative few.

IV. Examples of Legislation

In recent years, many state and federal governing bodies have drafted and passed legislation regarding the creation and mandated participation in periodic implicit bias trainings for numerous professional fields, including judiciary systems, educational instructors, healthcare professionals, and law enforcement. The text and specifications of the programs vary greatly; however, the same general goal is consistently established: decreasing the impact of the implicit biases of professionals who interact with the public. Among that myriad of legislation is the following.

California

- On October 2, 2019, the Governor of California approved Assembly Bill No. 241, which mandates that by January 1, 2022, all continuing education programs for physicians must specifically educate regarding methods to diminish the effects of implicit bias in treatment of patients.⁴²
- Additionally, on October 2, 2019, the Governor of California approved Assembly Bill No. 242, which authorized the Judicial Council to develop “racial, ethnic, and gender bias, and sexual harassment training and training for any other bias based on sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation.”⁴³ Further, the Bill requires that the California State Bar include within its mandatory continuing legal education (MCLE)

⁴⁰ Y. Kang, J. R. Gray, & J. F. Dovidio. The nondiscriminating heart: Lovingkindness meditation training decreases implicit intergroup bias. *Journal of Experimental Psychology: General*, 143(3), 1306-1313. (2014), available at <http://dx.doi.org/10.1037/a0034150>.

⁴¹ Janice Gassam, “Does Unconscious Bias Training Really Work?” Forbes, Oct. 29, 2018, <https://www.forbes.com/sites/janicegassam/2018/10/29/does-unconscious-bias-training-really-work/#27d5dd96b8a2>.

⁴² Implicit bias: continuing education: requirements, AB-241, (2019-2020), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB241.

⁴³ Courts: attorneys: implicit bias: training, AB-242, (2019-2020), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB242.

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programs implicit bias education and de-biasing trainings; the MCLE requirements go into effect on January 1, 2022.⁴⁴

- On August 12, 2019, the California State Senate motioned to place Assembly Bill No. 243 on suspense file.⁴⁵ The Bill argues for the revision of current Peace Officer standards from requiring implicit bias refresher courses every five-years to every two-years.⁴⁶

Section 1 of the text of all three Bills recognizes that all persons, regardless of characteristics, possess implicit biases, which typically disfavor marginalized and historically exploited or disenfranchised communities.⁴⁷ This normalization of the concept of implicit biases may contribute to the alleviation of tensions around the idea by emphasizing the widespread commonality, which in turn highlights the importance of addressing this universally impactful issue.

Florida

The Florida State Senate passed House Bill 463, which suggests that the Florida State Supreme Court develop implicit bias training for the Florida State judiciary.⁴⁸

New York

In 2019, the New York State Senate passed Senate Bill S215B, requiring “Anti-bias and inclusion training programs” for, among others, all private contractors that interact with the public to participate in biannually.⁴⁹

Texas

Effective September 1, 2019, Texas passed House Bill 607, requiring cultural competency and implicit bias training for general practitioners, pediatricians, obstetricians, and gynecologists who apply to renew their licenses; this training is to be a part of their continuing education credits.⁵⁰ The Bill additionally outlines definitions of “cultural competence” and “implicit bias.”⁵¹

Vermont

On February 21, 2019, Bill H.305 was proposed in Vermont, stipulating that within the first 90 days of employment, all state employees must participate in a four-hour in-person

⁴⁴ Ibid.

⁴⁵ Implicit bias training: peace officers, AB-423, (2019-2020), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB243.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ An act to amend the executive law, in relation to requiring the division of human rights to develop an anti-bias and inclusion training program, 215B, (2019-2020), <https://legislation.nysenate.gov/pdf/bills/2019/S215B>.

⁵⁰ An act relating to continuing education in cultural competence and implicit bias for certain physicians, HB 607, (2019-2020), <https://capitol.texas.gov/tlodocs/86R/billtext/html/HB006071.htm>.

⁵¹ Ibid.

implicit bias training.⁵² Subsequently, every two years, state employees must complete an additional two-hour in-person implicit bias training.⁵³

United States Congress

Introduced in the House of Representatives on May 22, 2019, H.R.2902 aims to address high morbidity and mortality rates of mothers throughout the process of maternity care, including prenatal care, delivery, and postnatal care.⁵⁴ Section 4 of the Bill, entitled Implicit Bias Training for Health Care Providers, establishes a grant program through which the Secretary of Health and Human Services will allocate funds to support the facilitation of implicit bias training programs, designed to increase equity in maternity care for all women, in opposition to negatively held implicit attitudes.⁵⁵

V. Conclusion

Implicit bias training serves as an important first step with respect to mitigating and eradicating workplace bias as it starts the conversation about marginalized identities. To properly promulgate the message regarding the dangers of implicit biases, it is crucial to ensure that regulatory standards are put in place – ensuring that training is conducted periodically with mechanisms for measuring progress and ensuring that governmental resources are readily available for purposes of accountability and establishing standards.⁵⁶

Implicit biases in the legal profession may result in excessive charges, ineffective assistance of counsel, or wrongful prosecution, condemning an individual to be permanently entrenched in a system due to unreasonable biases as opposed to facts. Implicit biases in the medical profession may result in disparities in treatment, leading to potential increases in morbidity and mortality rates. The longer implicit biases continue to infect these narratives, the more diluted the system becomes, creating the illusion that remedies may be too costly or too unattainable to achieve. This resolution supports imposing implicit bias training standards, tailored to varying professions, to prevent further casualties from this often subtle and abstract systemic epidemic.

This report referenced many tailored examples of implicit bias training programs and legislative requirements, but advocates for no individual model. No two programs were perfectly identical; however, each exists as a uniquely valuable contribution toward the advancement of a more equitable society. With the abundance of possibilities in designing effective policy, there is little excuse not to pursue avenues of implementation.

⁵² An act relating to requiring implicit bias training for State employees, H.305, (2019-2020), <https://legislature.vermont.gov/Documents/2020/Docs/BILLS/H-0305/H-0305%20As%20Introduced.pdf>.

⁵³ Ibid.

⁵⁴ Maternal CARE Act, H.R.2902, 116th Congress, (2019-2020), <https://www.congress.gov/bill/116th-congress/house-bill/2902/text?r=26&s=1>.

⁵⁵ Ibid.

⁵⁶ Meraiah Foley and Sue Williamson, “Unconscious Bias Training: The ‘Silver Bullet’ for Gender Equity?” March 11, 2018, <https://doi.org/10.1111/1467-8500.12313>.

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Respectfully submitted,

Wendy K. Mariner
Chair, Section of Civil Rights & Social Justice
August 2020

GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Wendy K. Mariner, Chair

1. Summary of Resolution(s). This Resolution urges the highest courts or legislative bodies of all states, territories, and tribes that are charged with the administration of justice, admission to the bar, or regulation of the legal profession, to require that lawyers, judges, commissioners, referees, probation officers and court personnel whose job requires interacting with the public, as well as those agencies, and boards that license and regulate the medical profession or social services professions, to receive periodic training regarding implicit biases that addresses, at minimum, the following subjects: sex, race, color, religion, ancestry, national origin, ethnic group identification, age, disability, medical condition, genetic information, marital status, sexual orientation, gender expression and gender identity.
2. Approval by Submitting Entity. The Council of the Section of Civil Rights and Social Justice approved sponsorship of the Resolution during its Spring Meeting on May 4, 2020.

The Center for Human Rights voted to cosponsor this resolution at the Midyear Meeting on February 16, 2020.

The Commissions on Sexual Orientation and Gender Identity and Hispanic Legal Rights and Responsibilities approved cosponsorship of this resolution on May 21, 2020.

The Commission on Disability Rights approved cosponsorship of this resolution on May 21, 2020.

The Coalition on Racial and Ethnic Justice approved cosponsorship of this resolution on May 22, 2020.

The Council on Diversity in the Educational Pipeline approved cosponsorship of this resolution on May 22, 2020.

3. Has this or a similar resolution been submitted to the House or Board previously? The ABA has an enduring history of supporting Resolutions that aim to proactively address and combat the effects of biases in professional and legal settings. Specifically, in August of 2017, the House of Delegates passed Resolution 121, focused on developing de-biasing training for initial judicial training and continued education.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? Resolution 2017AM121, focused on developing de-

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biasing training to be incorporated into initial judicial training and continued judicial education. Resolution 2016AM116 encouraged the court to educate and instruct jurors on how to be cognizant of their potential implicit biases which may impact their perceptions of the trial.

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.

California:

- AB 241: Status – Approved by Governor; Chaptered by Secretary of State - Chapter 417, Statutes of 2019.
- AB 242: Status – Approved by Governor; Chaptered by Secretary of State - Chapter 418, Statutes of 2019.
- AB 243: Status – Active Bill; In committee: Held under submission.

Colorado:

- CO Rev Stat § 24-31-315: Status – Adopted.

Florida:

- HB 463: Status – Withdrawn.

Massachusetts:

- Bill H.3612: Status – Accompanied study orders (H4767) and (H4449).

Minnesota:

- 626.8469: Status – Adopted.

Nebraska:

- Legislative Bill 390: Status – Approved by the Governor on April 24, 2019.

Nevada:

- AB 478: Status – Passed on May 30, 2019.

New Jersey:

- AB 4679: Status – Passed by the Assembly on June 27, 2019; Engrossed (50% progression); Referred to Senate Education Committee.

New York:

- Senate Bill S215B: Status – Returned from Assembly to Senate, & Referred to Senate Labor Committee on January 8, 2020.

Texas:

- House Bill 607: Status – Introduced to House Public Health Committee on February 21, 2019.

Vermont:

- Bill H.305: Status – Introduced and Referred to the Committee on Government Operations on February 21, 2019.

Congress:

- H.R. 2902: Status – Referred to the House Committee on Energy and Commerce on May 22, 2019, and Subcommittee on Health on May 23, 2019.
- H.R. 4776: Status – Referred to the House Committee on Education and Labor on October 21, 2019.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. This Resolution does not mandate the details of the training. How often the training should occur and how long it should be are details better left up to the individual jurisdiction, and tailored to each profession.
8. Cost to the Association. Adoption of this 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.
 - Center for Human Rights
 - Center on Children and the Law
 - Coalition on Racial and Ethnic Justice
 - Commission on Disability Rights
 - Commission on Domestic & Sexual Violence
 - Commission on Hispanic Legal Rights and Responsibilities
 - Commission on Homelessness and Poverty
 - Commission on Law and Aging
 - Commission on Legal Problems of the Elderly
 - Commission on Racial and Ethnic Diversity in the Profession
 - Commission on Sexual Orientation and Gender Identity
 - Commission on Women in the Profession
 - Commission on Youth at Risk
 - Criminal Justice Section
 - Diversity and Inclusion Advisory Council
 - Family Law Section
 - Government and Public Sector Lawyers Division
 - Health Law Section
 - Judicial Division
 - Law Student Division
 - Section of Administrative Law and Regulatory Practice
 - Section of Alternative Dispute Resolution
 - Section of Litigation
 - Section of State and Local Government Law
 - Senior Lawyers Division
 - Standing Committee on Armed Forces Law
 - Standing Committee on Legal Aid and Indigent Defendants
 - Tribal Court Council
 - Young Lawyers Division
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Paula Shapiro, Director

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges the highest courts or legislative bodies of all states, territories, and tribes that are charged with the administration of justice, admission to the bar, or regulation of the legal profession, to require that lawyers, judges, commissioners, referees, probation officers and court personnel whose job requires interacting with the public, as well as those agencies, and boards that license and regulate the medical profession or social services professions, to receive periodic training regarding implicit biases that addresses, at minimum, the following subjects: sex, race, color, religion, ancestry, national origin, ethnic group identification, age, disability, medical condition, genetic information, marital status, sexual orientation, gender expression and gender identity.

2. Summary of the Issue that the Resolution Addresses

An expression of bias is a departure from a “neutral” attitude which would fairly allocate equal recognition to all persons —regardless of race, color, gender identification, sexual orientation, socio-economic status, physical and mental disabilities, or other potentially marginalized attributes. These biases may result in obstacles to employment, including barriers in the hiring process, mannerisms in social interactions, including the evaluation of facial expressions or body language, and perceptions of actions, including the influence on decision making relative to those actions. The debilitating effects of implicit biases decreases the possibility of the diversity of professionals in a given field and the equitable access of marginalized communities to programs and resources.

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

This Resolution proactively addresses and combats the effects of biases in professional and legal settings, in furtherance of the ABA’s long-standing commitment to eliminating bias and enhancing diversity, by ensuring implicit bias training for all of those included in the resolution.

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

None have been identified.

AMERICAN BAR ASSOCIATION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
CRIMINAL JUSTICE SECTION
LAW STUDENT DIVISION
SECTION OF STATE AND LOCAL GOVERNMENT LAW
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
COALITION ON RACIAL AND ETHNIC JUSTICE

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local,
2 territorial, and tribal governments to:

- 3
4 a. repeal laws that disenfranchise persons based upon criminal conviction;
5 b. restore voting rights to those currently and formerly incarcerated, including
6 those on probation, parole, or any other community-based correctional
7 program;
8 c. assure that no person convicted of crime is disenfranchised because of
9 nonpayment of a fine, court costs, restitution or other financial obligations
10 imposed as a result of a criminal conviction.

11
12 FURTHER RESOLVED, That the American Bar Association amends the Criminal
13 Justice Standards on Collateral Sanctions and Discretionary Disqualification of
14 Convicted Persons (3d Edition, 2004) as follows:

15
16 Standards 19-2.6 **Prohibited collateral sanctions**

17 Jurisdictions should not impose the following collateral sanctions:

- 18 (a) deprivation of the right to vote.

REPORT

The franchise has long been valued as a fundamental right of citizenship. It is enshrined in the Universal Declaration of Human Rights as one of the basic human rights of all individuals¹ and in the International Covenant on Civil and Political Rights.² Yet, millions of Americans are still denied the right to vote. Frequently disenfranchised groups include racial and ethnic minorities, the homeless, disabled persons, and those who have committed crimes.³ Amendments to the U.S. Constitution and federal and state statutes have removed prohibitions on voting eligibility based on race, color, previous condition of servitude, sex, and age.⁴ However, the reality is very different. Several states are pursuing the arc of continued, if uneven, progress in voting rights by ending prohibitions on voting by people who have been convicted of a criminal offense. There are good reasons for this: (1) disenfranchising people based on criminal conviction is arguably unconstitutional because of its legacy as a tool to deprive African Americans of the right to vote and its continued disproportionate effects on populations defined by race, color, and national origin; (2) voting rights are a concomitant of United States citizenship; (3) voting is an internationally recognized human right; and (4) prisoner suffrage has value as a component part of the re-entry and reformation process.

This Resolution follows a long American Bar Association (“ABA”) tradition affirming and supporting the expansion of Americans’ right to vote. This Resolution supports that progression by urging removal of restrictions on voting by incarcerated citizens and citizens under an order of imprisonment.⁵ In other words, beyond the many state laws that currently regulate re-enfranchisement after incarceration, this resolution calls for a guarantee of the right to vote for prisoners while incarcerated.

The Resolution would have the effect of amending the ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Standard 19-2.6, which currently states that jurisdictions should not deprive people of their right to vote, except during actual confinement.⁶ It does so by urging removal of the stated exception of time “during actual confinement” from the broad right to vote granted to convicted persons. While the ABA Criminal Justice Standards do not oppose depriving those actually incarcerated of the right to vote during their imprisonment, this Resolution makes explicit the extension of the right to vote during confinement. The Criminal Justice Standards also make clear that voting rights continue during periods of probation and parole.

¹ Article 21, United Nations, [https://undocs.org/A/RES/217\(III\)](https://undocs.org/A/RES/217(III)).

² Article 25, United Nations (ratified by the United States in 1992), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

³ *STUDY GUIDE: The Right to Vote*, University of Minnesota Human Rights Center (February 16, 2019), <http://hrlibrary.umn.edu/edumat/studyguides/votingrights.html>.

⁴ United States Constitution, Amendments XV, XIX, XXVI.

⁵ *Hunter v. Underwood*, 471 U.S. 222 (1985) (states may disenfranchise criminals but “not with a racially discriminatory intent”).

⁶ *ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, American Bar Association 37-8 (3rd ed. 2004).

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Further, ABA guidelines state that the right to vote should not be curtailed as a consequence of an individual's ongoing criminal justice debt obligations in the form of fines, fees, restitution or other costs resulting from or relating to a criminal justice charge or criminal justice program.⁷ This resolution implements the ABA guidelines by ensuring that no person convicted of crime is disenfranchised because of an inability to pay a fine, court costs, restitution, or other financial obligations imposed as a result of a criminal conviction.

HISTORICAL CONTEXT

The British brought the notion of the forfeiture of rights to the 13 colonies through the punishment of attainder⁸ which resulted in "forfeiture of all property, inability to inherit or devise property, and loss of all civil rights,"⁹ generally as a penalty for treason. During the revolutionary period, however, there was an opposing argument that voting was a natural right that accompanied personhood.¹⁰ This premise would later become the basis of the creation of the Declaration of Human Rights, which enshrined the right to vote as one of the basic human rights of all people.¹¹

The Founding Fathers drafted the Constitution to reflect their belief in the sovereignty of the people.¹² A great many of the Founders believed that voters should be committed to the new country or capable of reasoned judgment, although not all agreed on the criteria for assessing those characteristics.¹³ After ratification of the Constitution, several states enacted laws with different limits on who could exercise the right to vote, such as property ownership, payment of taxes, and being a free white male over a certain age. Other states allowed voting by freed enslaved persons or noncitizens.¹⁴ Kentucky disenfranchised those convicted of crimes in its 1792 Constitution, which provided: "laws shall be made to exclude from office and from suffrage those who shall thereafter be convicted of bribery, perjury, forgery, or other high crimes or misdemeanors."¹⁵ Many states enacted similar laws.¹⁶

⁷ American Bar Association, Presidential Task Force on Building Public Trust in the American Justice System, *Ten Guidelines on Court Fines and Fees*, https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf (Aug. 2018).

⁸ *Supra* note 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Supra* note 1.

¹² Publius [James Madison] THE FEDERALIST XXXIX (Jan. 16, 1788), in THE DEBATE ON THE CONSTITUTION, PART TWO, at 27 (Bernard Bailyn, ed. 1993) (defining a republic to be "a government which derives all its powers directly or indirectly from the great body of the people).

¹³ Allan J. Lichtman, THE EMBATTLED VOTE IN AMERICA 8-35 (2018).

¹⁴ *Id.*

¹⁵ K.Y. Const. Art. 8, (1792).

¹⁶ Lichtman, *supra* note 17.

I. The United States has recognized the right to vote as a basic human right.

After World War II, the United States, under the leadership of First Lady Eleanor Roosevelt, led the creation of the Universal Declaration of Human Rights, which was adopted without dissent by the General Assembly of the United Nations in 1948. The Declaration was intended to enumerate the basic and fundamental freedoms to which all human beings are entitled. While the Declaration is not binding, it includes rights that encompass human dignity, such as freedom, justice and peace. Article 21 of the Universal Declaration of Human Rights recognizes that every person has the fundamental right to a participatory government, which includes the right to take part in the government of his/her country, directly or through freely chosen representatives.

The Declaration of Human Rights is implemented by other international agreements that are binding on the countries that ratify them. One such agreement is the International Covenant on Civil and Political Rights ("ICCPR"), which was ratified by the United States on June 8, 1992.¹⁷ Article 25 of the ICCPR states that every citizen shall have the right and opportunity to vote.¹⁸ Article 2 further states that each country agrees to ensure the individual rights of its citizens "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹⁹

II. The United States Constitution guarantees the right to vote, and prisoner disenfranchisement laws have been used to circumvent the right of African Americans to vote.

After the Civil War, as states revised their Constitutions, disenfranchisement laws became tools to maintain white supremacy and keep African Americans from the political process.²⁰ In 1868, the 14th Amendment granted full citizenship rights, including the right to vote, to all men who were born or naturalized in the United States.²¹ The 15th Amendment prohibits states from conditioning the right to vote on race. To circumvent these Constitutional Amendments, certain states created criminal disenfranchisement

¹⁷ Jimmy Carter, *U.S. Finally Ratifies Human Rights Covenant*, The Carter Center (February 27, 2019) <https://www.cartercenter.org/news/documents/doc1369.html>.

¹⁸ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

¹⁹ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. (The United States, at the time of ratification, made a number of declarations and reservations, one of which included: (1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in article 2, paragraph 1 and article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective.)

²⁰ Staples, Brent, "A Crucial Right Restored in Virginia," April 26, 2016, The New York Times. Retrieved from: <https://takingnote.blogs.nytimes.com/2016/04/26/a-crucial-right-restored-in-virginia/>.

²¹ U.S. Const. amend XIV.

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laws that have disproportionately affected minorities through mass incarceration.²² In 1976, 1.17 million people were disenfranchised due to a felony conviction.²³ By 1996, that number grew to 3.34 million.²⁴ In 2016, an estimated 6.1 million people were disenfranchised due to criminal conviction.²⁵

A. Felony disenfranchisement has created a racial divide by disproportionately impacting minorities.

In 1870, the 15th Amendment was enacted to eliminate barriers to voting based on race. The Fifteenth Amendment provides that the right of U.S. citizens to vote shall not be denied or abridged by any state on account of race or color.²⁶ However, many states enacted legislation with the express purpose of preventing blacks from voting. A pamphlet, circa 1900, entitled *What a Colored Man Should Do To Vote* lists the barriers that were put in place to prevent African-Americans from voting.²⁷ These include: poll taxes, literacy tests, property ownership, excessive residency requirements, and being convicted of “almost any” crime.²⁸ Legislative debates in several jurisdictions made explicit the pernicious intent of felony disenfranchisement laws to prevent African Americans from voting.

B. Because of its disproportionate racial effects, prisoner disenfranchisement should be viewed in the same light as other formerly disenfranchised groups.

An analogous argument can be found in the debate about women's suffrage. The notion that women should not have the right to vote stemmed from historical views on women and their proper role in the family and in society. Women were denied the right to vote in Great Britain and were subsequently denied the right to vote in the United States. The opposing sentiment that suffrage is a human right, that it is a natural component of citizenship, resurfaced during the women's suffrage movement. The 1848 Declaration of Sentiments, which was based on the Declaration of Independence, detailed the views of the early suffragists. It stated in pertinent part:

He has compelled her to submit to laws, in the formation of which she had no voice. Having deprived her of this first right of a citizen, the elective

²² Staples, Brent, “A Crucial Right Restored in Virginia,” April 26, 2016, The New York Times. Retrieved from: <https://takingnote.blogs.nytimes.com/2016/04/26/a-crucial-right-restored-in-virginia/>.

²³ *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, The Sentencing Project 3 (Christopher Uggen, Ryan Larson, Sarah Shannon, 2016).

²⁴ *Id.*

²⁵ *Id.*

²⁶ U.S. Const. amend. XV.

²⁷ *What a Colored Man Should Do To Vote*, African American Pamphlet Collection (Library of Congress, Press of E.A. Wright) (March 28, 2019 10:48 PM) <https://www.loc.gov/teachers/classroommaterials/primarysourcesets/civil-rights/pdf/vote.pdf>.

²⁸ *Id.*

franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides.²⁹

Women found no refuge in the Constitution when seeking the right to vote; rather, they looked to the states to guarantee their right to the ballot. In 1869, Wyoming became the first state to grant women the right to vote. Former Wyoming Governor Campbell said, regarding women's suffrage, "no legislature has the right to disenfranchise its own constituents."³⁰ Eighteen other states joined Wyoming in granting full or partial suffrage to women before the passage of the Nineteenth Amendment to the U.S. Constitution in 1920.

Improvements in the lot of prisoners have also been made at the state level. Attempts to pass a federal law, even a floor, for prisoner re-enfranchisement have thus far been unsuccessful.

III. The right to vote is concomitant with United States citizenship.

The most significant civil rights problem is voting. Each citizen's right to vote is fundamental to all the other rights of citizenship.

- Robert F. Kennedy

One does not lose citizenship upon being convicted of a crime. Thus, one should not lose the right to vote upon conviction either. Specifically, the right to vote is "a badge of dignity and personhood."³¹ It is an indispensable part of a civil democratic society. Participation in one's society allows citizens to voice their views on the conditions under which they live. It allows people to have a say on how their children's schools are run, how their family's tax money is spent, or how the prices of prescription drugs are regulated. People do not become divorced from issues of society merely because they are incarcerated.

A. Children of incarcerated and formerly incarcerated people are disadvantaged by disenfranchisement laws.

Prisoners and formerly incarcerated persons have an interest in the effectiveness of school policies, among other policies that affect the lives of their children. In 2007, 1.7 million children had a parent in prison.³² Disenfranchisement laws impede parents' ability to care for their children by eliminating their voice from the local school district. These laws also disproportionately affect minority children. Black children are 7.5 times more

²⁹ *Voting Rights for Women*, Library of Congress <https://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/elections/voting-rights-women.html>.

³⁰ *Women Suffrage*, Mary Schons, National Geographic (2011) <https://www.nationalgeographic.org/news/woman-suffrage/>.

³¹ *Voting Behind Bars: An Argument for Voting by Prisoners*, Marc Mauer (2011) <https://www.sentencingproject.org/wp-content/uploads/2016/01/Voting-Behind-Bars-An-Argument-for-Voting-by-Prisoners.pdf>.

³² *Fact Sheet: Parents in Prison*, The Sentencing Project (2012) <https://www.sentencingproject.org/wp-content/uploads/2016/01/Parents-in-Prison.pdf>.

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likely than white children to have a parent in prison.³³ Hispanic children are 2.6 times more likely to have a parent in prison.³⁴

B. Prisoner disenfranchisement erodes the basic principle of “no taxation without representation.”

Incarcerated and formerly incarcerated people have an interest in how tax dollars are spent. Obligations like paying taxes and healthcare costs do not dissipate once a person is convicted of a crime. In fact, in most states prisoners are required to work for wages that are a fraction of the federal minimum wage. Also, in most states, prisoners are required to pay a co-pay to receive medical treatment. While prisons provide minimal health care needs, prisoners are accessed co-pay fees ranging from two to five dollars in most cases.³⁵ Incarcerated people typically earn 14 to 63 cents per hour.³⁶ “In West Virginia, a single visit to the doctor would cost almost an entire month’s pay for an incarcerated person, who makes six dollars per month.”³⁷

One of the most extreme cases is Texas, where prisoners have a yearly \$100 co-pay fee and a zero dollar minimum wage.³⁸ Co-pay fees are established by state legislatures. Incarcerated people should be able to voice their opinions on this important issue that directly affects them and their families.

C. Incarcerated persons should have an avenue to voice concern about prison conditions.

In January 2020, the Governor of Mississippi shut down a unit in Parchman prison after the ninth person was pronounced dead in the facility that month. Inmates had been calling for reforms in treatment and the deteriorating conditions. After a rash of violence, the prison instituted a lockdown that denied some prisoners access to showers and clean water. Buildings were in disrepair, where they were taking in rain, had broken toilets, and had electrical and heating issues. A lawsuit filed on behalf of 29 inmates claims that “individuals held in Mississippi’s prisons are dying because Mississippi has failed to fund its prisons, resulting in prisons where violence reigns because they are understaffed.” The Mississippi Constitution provides that people convicted of 10 enumerated crimes permanently lose their right to vote. The state’s Attorney General has expanded the list to include another 12 offenses, such as carjacking and timber larceny.³⁹ The funding and management of prisons are issues that directly affect incarcerated people and upon which they should have a vote.

³³ *Id.*

³⁴ *Id.*

³⁵ *The Steep cost of medical co-pays in prison puts health at risk*, Wendy Sawyer (Prison Policy Initiative, 2017) <https://www.prisonpolicy.org/blog/2017/04/19/copays/>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Santana, Rebecca, “Mississippi felons push court to restore voting rights”, AP News, Retrieved from: <https://apnews.com/b34a318e6e594ea586756d82ce7c718d>

IV. Maine, Vermont, and Puerto Rico recognize the right to vote for incarcerated persons.

In Maine, Vermont and Puerto Rico, those convicted of a felony do not lose their right to vote, even while they are incarcerated. Prisoners vote by absentee ballot. In 16 states and the District of Columbia, individuals with a felony conviction lose their voting rights while incarcerated, and their voting rights are restored upon release. In 21 states, those convicted of a felony lose their voting rights during incarceration, and for a period of time after, typically while on parole and/or probation, and they may also have to pay any outstanding fines, fees or restitution before their rights are restored as well. In 11 states, individuals with a felony conviction lose their voting rights indefinitely for some crimes, or require a governor's pardon in order for voting rights to be restored, face an additional waiting period after completion of sentence (including parole and probation) or require additional action before voting rights can be restored.⁴⁰

While Maine and Vermont are the only states that allow voting *from prison*, many states have liberalized their felon disenfranchisement laws in recent years.

In November 2018, Florida voters approved Amendment 4 automatically restoring voting rights for people who have completed their sentences for felonies other than murder or sex crimes. The Florida legislature then passed a bill, SB 7066, requiring that felons settle their financial obligations to the court before having their eligibility to vote restored. Gov. Ron DeSantis signed the bill into law on June 28, 2019. Judge Robert L. Hinkle of the United States District Court in Tallahassee temporarily blocked SB 7066 in October 2019. During the trial in April and May 2020, Judge Hinkle noted that SB 7066 had a clear “racial impact” because so many Floridian convicted of felony black or Latino. On May 24, 2020, Judge Hinkle granted a permanent injunction, and held that requiring people with serious criminal convictions to pay court fines and fees before they can register to vote is unconstitutional. Judge Hinkle described the restriction as an unconstitutional “pay-to-vote system,” and concluded that the “Twenty-Fourth Amendment precludes Florida from conditioning voting in federal elections on payment of these fees and costs.”⁴¹

In California, more than 50,000 people serving felony sentences had their voting rights restored via Assembly Bill 2466, effective January 1, 2017.⁴² The provision applies to inmates in county jails, but not those in state and federal prisons.⁴³ Nearly 150,000 of that state's over 240,000 inmates continue to be disenfranchised despite California's strides to advance prisoner suffrage.

⁴⁰ National Conference of State Legislatures, *Felon Voting Rights*, <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (Oct. 24, 2019).

⁴¹ Mazzei, *Florida Law Restricting Felon Voting Is Unconstitutional, Judge Rules*, New York Times, <https://www.nytimes.com/2020/05/24/us/florida-felon-voting-court-judge-ruling.html> (May 24, 2020).

⁴² Gov. Brown Signs Bill Giving Right To Vote To Thousands of Felons, San Francisco CBS News (September 28, 2016) <https://sanfrancisco.cbslocal.com/2016/09/28/gov-brown-signs-bill-giving-right-to-vote-to-felons-who-are-not-in-prison/>.

⁴³ *Id.*

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In 2016, Former Virginia Governor Terry McAuliffe signed an executive order restoring voting rights to more than 200,000 people with felony convictions. Virginia's Supreme Court invalidated this order, but the former governor countered this move by restoring rights to more than 172,000 people individually.⁴⁴ Virginia Senate Joint Resolution No. 8, which was introduced on December 3, 2019, seeks to amend the Constitution of Virginia to allow incarcerated individuals (as well as those judged mentally incompetent) to vote. The proposed bill provides that the only qualifications for voting are citizenship, age, residency, and voter registration, states that "[e]very person who meets these qualifications shall have the fundamental right to vote in the Commonwealth, and such right shall not be abridged by law."⁴⁵

Many other states have also instituted various re-enfranchisement policies. In 2019, Arizona removed the requirement to pay outstanding fines before rights are automatically restored for people convicted of first-time felony offenses. In 2019, Colorado restored voting rights to persons on parole. Connecticut restored voting rights to persons on probation in 2001, and repealed requirement to present proof of restoration in order to register in 2006. In 2013, Delaware repealed the five-year waiting period for most offenses. In 2019, Kentucky restored voting rights post-sentence for non-violent felony convictions via executive order. In 2018, Louisiana authorized voting for residents who have not been incarcerated for five years including persons on felony probation or parole. In 2007, Maryland repealed lifetime disenfranchisement, and in 2016 restored voting rights to persons on probation and parole. In 2005, Nebraska repealed lifetime disenfranchisement and replaced it with two-year waiting period. In 2019, Nevada and New Jersey restored voting rights to persons on probation and parole. In 2001, New Mexico repealed lifetime disenfranchisement. In 2018, New York restored voting rights to persons on parole via executive order. In 2006, Rhode Island restored voting rights to persons on probation and parole. In 2006, Tennessee streamlined restoration process for most persons upon completion of sentence. In 1997, Texas repealed two-year waiting period to restore rights. In 2009, Washington restored voting rights for persons who exit the criminal justice system but still have outstanding financial obligations. In 2017, Wyoming removed application process and automatically restored voting rights to persons convicted of first-time non-violent felony offenses who have completed their community supervision.⁴⁶

The ABA Criminal Justice Section Council was asked to cosponsor this resolution with the Section on Civil Rights and Social Justice. During discussion of the resolution, the Council reviewed the ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3d Ed. 2004), Standard 2.6 (a),

⁴⁴ Barthel, *Nearly 200,000 Formerly Incarcerated Virginians Have Their Voting Rights Back. Will They Use Them?*, <https://wamu.org/story/19/11/05/nearly-200000-formerly-incarcerated-virginians-have-their-voting-rights-back-will-they-use-them/> (Nov. 5, 2019).

⁴⁵ Valentine, *Virginia legislators propose amendment allowing incarcerated felons and persons judged mentally incompetent to vote*, <https://news.ballotpedia.org/2020/01/06/virginia-legislators-propose-amendment-allowing-incarcerated-felons-and-persons-judged-mentally-incompetent-to-vote/> (Jan. 6, 2020).

⁴⁶ Chung, *Felony Disenfranchisement: A Primer* *Felony Disenfranchisement*, <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> (June 27, 2019).

which states that no one should be deprived of their right to vote “except during actual confinement.”⁴⁷ For all of the reasons in this Report, the Council approved the resolution and voted to amend Standard 2.6(a) so that it would not conflict with the resolution.

VI. Conclusion

The right to vote is fundamental to United States citizenship and traditional notions of human dignity. Over the years, the country has recognized that more and more citizens are entitled to that basic human right. Moreover, the right to vote recognizes and affirms each individual’s stake in our system of governance and encourages each one to participate productively in civic life. Federal, state, local, territorial, and tribal governments should not disenfranchise people due to a criminal conviction, whether they are in prison or upon completion of their sentences.

Respectfully submitted,

Wendy K. Mariner
Chair, Section of Civil Rights and Social Justice
August 2020

⁴⁷ ABA CJS Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3d Ed. 2004), Standard 2.6: Prohibited Collateral Sanctions; Jurisdictions should not impose the following collateral sanctions: (a) deprivation of the right to vote, except during actual confinement.

GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Wendy Mariner, Chair

1. Summary of Resolution(s). This resolution calls upon governments at all levels to repeal disenfranchisement laws based upon criminal conviction, to restore voting rights, both during and post-imprisonment, to those disenfranchised due to criminal conviction, and to assure that no person convicted of a crime is disenfranchised because of nonpayment of fees, fines, or restitution associated with that conviction. It further amends the Criminal Justice Standards on Collateral Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3d Edition, 2004) to state that a jurisdiction should not deprive a prisoner of the right to vote, even during actual confinement,
2. Approval by Submitting Entity. The Section of Civil Rights and Social Justice approved sponsorship of the resolution by vote of its council on April 24, 2020.

The Law Student Division approved sponsorship of the resolution by an online vote of its council on April 7, 2020.

The Criminal Justice Section approved co-sponsorship of this resolution during its council meeting on May 1, 2020.

The Standing Committee on Legal Aid and Indigent Defendants approved co-sponsorship of this resolution on May 5, 2020.

3. Has this or a similar resolution been submitted to the House or Board previously?
N/A
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The *American Bar Association Criminal Justice Standard on Collateral Sanctions and Discretionary Disqualification of Convicted Persons* 19-2.6 is related to this resolution. It states that jurisdictions should not deprive people of their right to vote, except during actual confinement. The proposed policy would amend standard 19-2.6 to include the period of confinement as part of the guarantee of voting rights.

The *ABA Criminal Justice Standard on Treatment of Prisoners* 23-8.9 is also particularly relevant to this resolution, as it mentions that “upon release, each prisoner who was confined for more than three months should possess or be provided with (iv) a voter registration card or general instructions on how to register to vote, if eligible upon release.” These standards support the proposed resolution and supplement its proposed courses of action.

The ABA Presidential Task Force on Building Public Trust in the American Justice System's *Ten Guidelines on Court Fines and Fees* state that the right to vote should not be curtailed as a consequence of an individual's ongoing criminal justice debt obligations in the form of fines, fees, restitution or other costs resulting from or relating to a criminal justice charge or criminal justice program. These guidelines directly support this resolution.

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

6. Status of Legislation. N/A

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. N/A

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

Standing Committee on Election Law
 Election Law Advisory Committee
 Public Education Division
 Center for Human Rights
 Coalition on Racial and Ethnic Justice
 Senior Lawyers Division
 Young Lawyers Division
 Section of State and Local Government Law

11. Contact Name and Address Information.

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls upon governments at all levels to repeal disenfranchisement laws based upon criminal conviction, to restore voting rights, both during and post-imprisonment, to those disenfranchised due to criminal conviction, and to assure that no person convicted of a crime is disenfranchised because of nonpayment of fees, fines, or restitution associated with that conviction. It further amends the Criminal Justice Standards on Collateral Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3d Edition, 2004) to state that a jurisdiction should not deprive a prisoner of the right to vote, even during actual confinement,

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the plight of millions of United States citizens who are deprived of their voting rights due to criminal conviction. While state laws vary, only Maine, Vermont, and Puerto Rico allow voting from prison. This resolution calls for re-enfranchisement of those convicted of crimes, both during and after their incarceration, during any period of probation or parole, and irrespective of any fees, fines, or restitution associated with the conviction.

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

The proposed policy addresses disenfranchisement and its role in voter suppression by offering legislation that restores the right to vote for persons convicted of a crime, whether they are currently or formerly imprisoned. This resolution recommends that convicted individuals be restored suffrage as it affords them the opportunity to make decisions that affect their futures and aids their re-entry into society.

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

Not at this time.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local,
2 territorial, and tribal governments to use a considered and measured approach in
3 adopting and utilizing virtual or remote court proceedings established as a result
4 of the COVID-19 pandemic, prioritizing use of such procedures for essential
5 proceedings and those cases in which litigants consent to the use of virtual or
6 remote processes;

7
8 FURTHER RESOLVED, That the American Bar Association urges federal, state,
9 local, territorial, and tribal governments to form appropriate committees, including
10 representatives of all constituencies involved in or affected by the type of court or
11 proceeding under consideration, to establish or review the use of virtual or remote
12 court proceedings and make recommendations for procedures, revisions of
13 procedures and best practices;

14
15 FURTHER RESOLVED, That the American Bar Association urges federal, state,
16 local, territorial, and tribal governments to ensure that virtual or remote court
17 proceedings guarantee equal access and meet standards of fundamental fairness
18 and due process. Such proceedings must be tailored to the needs of participants
19 and take into account the type of case and proceeding to be conducted, the
20 participants involved, and whether participants are likely to be represented by
21 counsel. To do this, jurisdictions should:

22 (1) Consider the ability of all participants to access and fully participate in
23 the proceedings, including:

- 24 a. Ensuring that participation options for virtual or remote court
25 proceedings are free for participants and observers;
26 b. Providing options concerning participation and permitting
27 participants to select the means of participation best suited to
28 them without prejudice;
29 c. Allowing participants to alter their chosen means of participation
30 for each proceeding;
31 d. Providing necessary supports for those who, for financial,
32 technological, language access, disability, or other reasons, may
33 not be able to fully participate without assistance;

- 34 e. Ensuring that methods of participation reduce, to the fullest extent
- 35 possible, any prejudice that might result from the circumstances
- 36 of participation;
- 37 f. Ensuring that participants are not obligated or pressured to waive
- 38 constitutional rights; and
- 39 (2) Enable and encourage full attorney-client relationships, including
- 40 permitting private consultation both before and during court proceedings
- 41 and guaranteeing the confidentiality of such communications, as well as
- 42 access to other litigation assistance programs previously available;

43
44 FURTHER RESOLVED, That the American Bar Association urges federal, state,
45 local territorial and tribal governments to provide advance notice of proceedings
46 and ensure full and meaningful public access to virtual proceedings, while also
47 protecting the privacy of those proceedings legally exempted from public access;

48
49 FURTHER RESOLVED, That the American Bar Association urges federal, state,
50 local, territorial, and tribal governments to reintroduce in-person court options as
51 soon as safely feasible as determined by public health officials; and

52
53 FURTHER RESOLVED, That the American Bar Association urges federal, state,
54 local, territorial, and tribal governments to study the impacts of virtual or remote
55 court procedures and take steps to halt, alter, or revise virtual or remote court
56 procedures if such study suggests prejudicial effect or disparate impact on case
57 outcomes.

REPORT

During the COVID-19 pandemic, courts have endeavored to find ways to operate safely, while also ensuring that essential proceedings continue. In many jurisdictions, this has involved quickly setting up remote or virtual courts, using meeting technologies such as Zoom or Go to Meeting. In Texas, for example, on Thursday, March 19, 2020, the Office of Court Administration advised judges that they had acquired 600 Zoom licenses to permit courts to go online starting Tuesday, March 24, 2020. In the first month of operation, Texas has held “more than 8,500 separate proceedings . . . involving 113,000 participants and just over 1,300 judges.”¹ According to the National Center for State Courts, at least 40 states have issued some guidance on holding virtual or remote hearings, but the approaches vary widely.² As of May 3, 2020, only eight state court systems have announced plans to reopen.³

Many of the virtual or remote court procedures currently in use were established quickly. As they are being implemented, numerous questions have arisen over how to conduct virtual or remote court fairly, including:

- How to create procedures that ensure equal access for all participants?
- How to ensure that the circumstances of participation (video vs. telephone, background, and lighting) do not unfairly prejudice the proceeding in favor of or against a participant?
- How to share documents in real time with proceeding participants and ensure, for example, the timely and effective transmission of court orders and notices?
- How to ensure that attorneys have a full and contemporaneous opportunity to consult privately with clients during proceedings?
- How to provide public and media access to courts held virtually/remotely? Once available, should such proceedings be subject to recording and available after the live event? If so, for how long?

It is likely that these procedures will be in use, at least in part, for some time to come. As courts seek to implement or expand the use of emergency procedures for virtual or remote court, it is important not to lose sight of the important questions raised by these procedures.⁴ This Resolution seeks to encourage each jurisdiction employing virtual or

¹ Erik De la Garza, *Texas Courts Zoom Forward with Virtual Hearings*, Courthouse News Service (April 24, 2020).

² *Id.* As of May 4, 2020, the National Center for State Courts website on Virtual Hearings listed five states as having statewide orders requiring courts to close and mandating virtual court proceedings: Delaware, Connecticut, New Jersey, New Mexico and Alaska. An additional fourteen states have statewide orders urging the use of virtual hearings, including Wisconsin, California, Texas, Illinois and New York. National Center for State Courts, Virtual Courts Chart (visited May 4, 2020), available at <https://www.ncsc.org/>.

³ National Center for State Courts, Statewide Plans to Resume Court Operations Chart (visited May 4, 2020), available at <https://www.ncsc.org/> (listing and linking to plans from Montana, Wisconsin, Texas, Arkansas, Tennessee, South Carolina, Florida and Pennsylvania).

⁴ This Resolution does not take a position on whether the use of virtual or remote court proceedings are legal or constitutional. For an overview of past rulings on the use of virtual or remote court proceedings in various types of hearings, see Mike L. Bridenback, *Study of State Trial Courts Use of Remote Technology*,

remote court: (1) to establish committees to review procedures; (2) to take steps to ensure equal access, due process and fundamental fairness; (3) to further ensure that the public, including the media, has access to court proceedings unless an appropriate exception applies, in which case the privacy of the proceeding should be protected, and (4) to study the impact of these procedures for possible prejudicial effect or disparate impact on outcomes. The Resolution further urges jurisdictions to reintroduce in-person court options as soon as safely feasible as determined by public health officials.

Virtual and Remote Court Procedures

Our objective, in the short term, is to carefully expand virtual access, keeping in mind the special challenges faced by the self-represented and those lacking the technology to participate in a virtual forum. In the long term, of course, we want to return to normal operations whenever that becomes possible and appropriate.

- New York Chief Justice Janet DiFiore⁵

Access to Courts

Virtual and remote court procedures not only provide a method of safely holding critical hearings during the COVID-19 pandemic but may also serve to expand convenient access to courts in appropriate instances. Attending court in person is often difficult. It commonly requires individuals to take a full day off work, arrange childcare and travel to and from the courthouse, which may be some distance from their residence, and may or may not be accessible by public transportation. Many times, the individual arrives at court only to wait a considerable time for his or her case to be called and then participates in only a brief hearing resulting in the setting of another hearing date. For example, in a low-level criminal case, a status hearing commonly involves only a short exchange regarding discovery, status of plea negotiations and when the case will be ready for trial. Similarly, a status conference in a child neglect case may be a relatively short conversation noting that nothing has changed and that the continuation of the current plan and placement remains appropriate. In such cases, the ability to attend a hearing by phone or video conference may provide greater efficiency, as well as cause far less disruption and expense for the parties involved. For this reason, remote court procedures have been used in some rural communities for a long time.⁶

National Association of Presiding Judges and Court Executive Officers, April 2016, available at <http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf>. The Report notes that some court have found video and remote court procedures inadequate for bail proceedings, for some plea hearings, for evidentiary hearings and for trials. *Id.* at 4-7.

⁵ Erik De la Garza, *Texas Courts Zoom Forward with Virtual Hearings*, Courthouse News Service (April 24, 2020).

⁶ See, e.g., Alaska R. Civ. P. 99 – Telephonic Participation in Civil Cases, available at <https://casetext.com/rule/alaska-court-rules/alaska-rules-of-civil-procedure/part-xiii-general-provisions/rule-99-telephonic-participation-in-civil-cases>. (“The court may allow one or more parties, counsel, witnesses or the judge to participate telephonically in any hearing or deposition for good cause

However, virtual and remote court procedures, if mandated, also raise the possibility of restricting access or causing prejudice. Many individuals lack the technology, connectivity, communication or other skills necessary to effectively participate in such proceedings without assistance. When designing and evaluating virtual and remote court procedures, it is important to keep in mind these potential participants and their struggles.

In many essential and time-sensitive civil proceedings, such as family court proceedings, litigants are not represented by counsel. Depending on case type and location, between 65% and 100% of litigants in civil cases are self-represented, which translates into an estimated 30 million self-represented litigants per year going through the civil courts.⁷ Similarly, in the lowest level criminal cases, in which the potential punishment is limited to a fine, most individuals are not represented. In criminal cases, approximately 80% of all defendants qualify for public defense services, generally indicating that their family income is at or near the poverty line.⁸ Income matters because many of the procedures for virtual or remote court require the participant to have internet or a phone line. Legal aid providers and public defenders report that even telephonic hearings can be problematic. Very few people have land line phones and many clients who have cell phones⁹ use prepaid calling plans that may run out or go inactive during periods of personal economic stress.¹⁰

While internet access continues to improve, a substantial number of individuals and communities still lack access. According to a Pew study released in 2019, 10% of American adults do not use the internet.¹¹ This percentage rises to almost 30% for adults with less than a high school education.¹² Adults from households earning less than \$30,000 a year are also far less likely to use the internet in comparison to higher earning counterparts.¹³ Another Pew study noted that about one quarter of rural adults report that

and in the absence of substantial prejudice to opposing parties.”). See also, Alaska Superior Court, Form on Telephonic Appearance, available at <https://public.courts.alaska.gov/web/forms/docs/tf-710.pdf>.

⁷ Self-Represented Litigant Network Brief, *How many SRL's? (SRLN 2019)*, available at <https://www.srln.org/node/548/srln-brief-how-many-srls-srln-2019>. It is noteworthy that the vast majority of the litigants who receive help from legal aid are self-represented, with approximately 95% of the cases handled by LSC grantees closing with brief service or advice and counsel.

⁸ Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, November 2000, available at <https://www.bjs.gov/content/pub/pdf/dccc.pdf>. (“At felony case termination, court-appointed counsel represented 82% of State defendants in the 75 largest counties.”).

⁹ Cell phone use is widespread. According to a Pew Study, 96% of adults use a cell phone and 81% of use a smartphone. For a substantial number (37%), the smartphone is their primary way of accessing the internet. Mobile Technology and Home Broadband, Pew Research, June 13, 2019, available at <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/>.

¹⁰ Use of prepaid cell phones is very common. In 2013, about 1 in 3 cell phone users used a prepaid cell phone. See Marc Lifsher, *More Cellphone Users Switch to Prepaid Plans*, PHYS, Feb. 22, 2013, available at <https://phys.org/news/2013-02-cellphone-users-prepaid.html>. See also Bruce Wilkinson, *What's Driving the Growth of Pre-Paid Cell Phones*, Nielsen, April 30, 2010, available at <https://www.nielsen.com/us/en/insights/article/2010/whats-driving-the-growth-of-pre-paid-cell-phones/>.

¹¹ Monica Anderson, et al., *10% of Americans don't use the internet. Who are they?*, April 22, 2019, available at <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/>.

¹² *Id.*

¹³ *Id.*

“access to high-speed internet is a major problem in their local community.”¹⁴ Even in suburban and urban areas, substantial numbers of adults (13% and 9% respectively) report major problems with internet access.¹⁵ Percentage of adults using broadband at home also differs by race, with almost 80% of white adults reporting home broadband access, compared to 66% of black adults and 61% of Hispanic adults.¹⁶

Access is not made equal by simply providing the technology and instructions. Even when an individual is able to obtain access to internet to participate in virtual proceedings, the conditions of their home or surroundings may unwittingly create prejudice or bias.¹⁷ Legal aid providers and public defenders have expressed concern that, unlike in courtrooms, where they can discuss and even assist their clients with appropriate clothing and other aspects of presentation, they cannot go to their homes and ensure that the space is clear and quiet, and that the client has appropriate lighting, etc. before the start of a video proceeding. A cluttered or dirty home, a noisy or crowded space, or even a particular poster or book could leave an impression that harms a litigant.¹⁸

Creating equal access to virtual and remote court proceedings may require having both phone and internet options for virtual or remote court, as well as establishing free access points, perhaps at social service organizations, for individuals to attend proceedings and obtain assistance, if needed, in how to participate. What those options are and how they are established may differ by jurisdiction. Participants should be permitted to choose the option that works best for them in consultation with their attorney, if represented. Participants should be given a choice for each hearing or proceeding, as circumstances may change. For example, a litigant might prefer a telephonic option from home for a set hearing, but if the hearing is part of a larger docket call, may prefer to go to a portal at a social service agency so as not to waste prepaid minutes. Similarly, the ability to use a portal might be critical to ensure the safe participation of an individual alleging domestic

¹⁴ Monica Anderson, *About a quarter of rural Americans say access to high-speed internet is a major problem*, Sept 10 2018, available at <https://www.pewresearch.org/fact-tank/2018/09/10/about-a-quarter-of-rural-americans-say-access-to-high-speed-internet-is-a-major-problem/>.

¹⁵ *Id.*

¹⁶ Pew Research, *Internet/Broadband Face Sheet*, June 12, 2019, available at <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

¹⁷ This concern goes well beyond the potential for prejudice based on appearance, extending to concerns that participants may be subject to pressures or coaching during participation. For example, a domestic violence victim may feel extreme pressure not to participate in a hearing or to lie if he/she is required to appear from a home shared with the alleged abuser.

¹⁸ It is noteworthy that in almost every Best Practices list for conducting online meetings or events, the list notes that lighting and background are critical to how you are perceived. See, e.g. Career Partners International, *6 Best Practices for Virtual Meetings*, March 27, 2020, available at <https://www.cpiworld.com/6-best-practices-virtual-meetings/> (noting that “what’s behind you really matters,” as do lighting, camera angle and distracting noises). The Texas Courts COVID page provides Best Practice recommendations for judges. Some of the tips include: “Position the camera at your eye level or slightly above eye level; Be mindful of what is behind you, choose a solid neutral wall if possible - or use our [Judicial Virtual Background](#); Check the lighting. Light from a window behind you might blind the camera, making you look dark. Light above you in the center of a room might also cast shadows. Ideally, position a lamp, or sit facing a window, where light is directly on your face. Also be aware that your monitor casts light that can make you look blue.” See Texas Judicial Branch, *Tips for Successful Hearing*, available at <https://www.txcourts.gov/programs-services/electronic-hearings-with-zoom/>.

abuse and seeking a protection order. If able to subsequently obtain safe, separate housing, appearing from home may be safer and easier thereafter.¹⁹ Flexibility is critical. The COVID-19 pandemic is likely to create economic instability for the foreseeable future, and thus jurisdictions must assume that circumstances for litigants will also remain in flux.²⁰

Different access options alone may also not be sufficient to permit participation, particularly for those individuals with disabilities or language access issues. For example, hearing impaired clients may require real time court transcription or captioning to participate. In some courtrooms prior to the pandemic, this service was provided, for free, via CART.²¹ Zoom and other platforms for online or remote hearings may be deficient for these participants. Similarly, those with language access issues may need a supplementary system to real-time translation or for the court to ensure a translator is available for the online or remote proceeding.²²

When considering access, participation is one factor. Another is distribution of necessary orders and other paperwork. Zoom and other meeting-based platforms do not easily allow someone to upload a document to participants, and yet the contemporaneous sharing of written agreements, orders, and other documents can be critical to ensuring that everyone in attendance at a hearing leaves with the same understanding of what has been agreed to or ordered. Many courts are using a secondary platform, such as Dropbox or a court-specific portal, to exchange or distribute documents, but this adds a layer of technological complexity. It also does not address access for the visually impaired or the public. Participants should similarly be given options regarding how to receive documents and be able to select the options that work best for them. In addition to documents, the process for distributing notices to litigants should be confirmed regularly, and where feasible, duplicative options should be used to account for potential changes in circumstances and uncertainty.

Access issues will remain complicated during the process of re-opening when a combination of in-person and remote appearances may occur. Procedures should seek to guard against the risk that one of the parties is not prejudiced by manner of

¹⁹ Remote appearance may improve the conditions of appearance for those who find in person appearance in court stressful or traumatic.

²⁰ The Texas Access to Justice Commission created a primer for judges on best practices for conducting Zoom hearings with self-represented litigants. After noting that some self-represented litigants use phone plans and may have limited minutes that preclude even telephone participation in Zoom hearings, the document candidly admits, “We do not have a solution for this problem, and welcome your ideas.” See Texas Access to Justice Commission, Best Practices for Courts in Zoom Hearings Involving Self Represented Litigants, available at <https://www.txcourts.gov/media/1446335/zoomsrbestpractices.pdf>.

²¹ CART stands for Communication Access Real-Time Translation. For more information, see American Judges Foundation and National Court Reporters Foundation, *Communication Access Real-Time Translation (CART) in the Courtroom: Model Guidelines* (Sept 2002), available at <https://www.ncra.org/docs/default-source/uploadedfiles/governmentrelations/cart-in-the-courtroom-model-guidelines.pdf>.

²² Some jurisdictions are endeavoring to address these issues. See, e.g., The California Commission on Access to Justice, Remote Hearings and Access to Justice During COVID-19 and Beyond (May 18, 2020), available at <https://calatj.egnyte.com/dl/dpk9zAsQxd/>.

appearance. As soon as feasible, the option of appearing in person should be permitted, particularly for those litigants or parties concerned about access or potential prejudice.

Attorney-Client Relationships and Access to Legal Assistance

In establishing or reviewing virtual or remote court procedures, special attention should be paid to effectuating the attorney-client relationship. At in-person court proceedings, attorneys typically meet with the client immediately prior to the proceeding, often near the courtroom, to address last minute considerations. If a client has a question or concern during the court proceeding, the client can consult with the attorney at counsel table or, if necessary, request a brief recess for a more private and thorough consultation. Replicating this level of communication and consultation in virtual or remote court proceedings is difficult. Every possible effort should be made to do so, and particular attention should be paid to providing support and assistance for vulnerable litigants or witnesses, such as children.

Courts have attempted to ensure full attorney-client communication during virtual or remote court proceedings, but often these efforts are complicated by the same issues of technical experience and access addressed above. Texas courts, which use Zoom for most court hearings, encourage the use of breakout rooms for attorney-client communications. Observing these hearings, however, it was common to see judges disconnect participants instead of relocating them to breakout rooms and/or to see witness participants erroneously decline invitations to breakout rooms and then court administrators and/or judges having challenges inviting them to the breakout room again. In one instance, an attorney suggested that the other participants, including the judge, prosecutor, and court personnel, simply mute themselves during her conference with her client, either not realizing or not caring that this would still permit them, and the online observers, to hear that conference. During some criminal hearings involving in-custody defendants, the deputy at the jail kept declining rather than accepting invitations to breakout rooms, making it impossible for in-custody defendants to confer with their attorneys. While we can expect judges, attorneys and jail personnel to improve in their use of this technology, in each case, it is often a new experience for litigants, meaning that problems with technology and various work arounds and alternative options will continue to be necessary.

Perhaps more importantly, for in-custody defendants, the breakout room mechanism creates privacy from the judge, prosecutor, and on-line observers, but does not create privacy from the multiple deputies and other personnel in the hearing room at the jail. As virtual or remote court proceedings are examined or established, special attention must be paid to ensuring that litigants can have full and confidential access to their attorney for consultation and explanation, even if this delays the proceedings. The technological methods of doing this as simply as possible may differ by procedure and platform utilized. In undertaking to form or evaluate consultation capabilities, jurisdictions are encouraged not to rely on a request for such consultation from litigants. Far too often, if the judge asks a litigant if he or she understands, the litigant will reply “yes” automatically when, if given the opportunity to ask questions of counsel, the individual would ask several questions. Therefore, it may be advisable for the judge or presiding authority to plan or require short

breaks throughout proceedings to allow for such consultation,²³ rather than asking if consultation is required or expecting the litigant to request such consultation if needed.

It is unlikely that any virtual procedure can effectively mimic the communication opportunities provided by in-person hearings. Whatever procedures are put in place, significant training should be provided, and made mandatory if feasible, to ensure that judges, court administrators and attorneys are facile at using the mechanisms that permit confidential attorney-client conversations, as well as the exchange of documents and enable them to assist litigants and other participants in using these procedures. Such trainings should pay special attention to the particular challenges faces by criminal defendants, self-represented litigants and litigants with disabilities.

It is also important that courts seek to ensure that litigants are informed about and have access to the legal and non-legal resources that were accessible before virtual and remote proceedings were introduced. For example, civil litigants often do not have access to free legal counsel, but do have access to lawyer-of-the-day programs or other legal assistance programs, which provide assistance in answering questions about proceedings, helping to prepare forms, etc. Often these programs are located in courthouses and litigants are referred by court personnel. Courts should diligently seek to inform litigants participating in virtual or remote proceedings about these programs and how to access them. If necessary, courts should postpone proceedings to permit a litigant to seek assistance.

Public Access and Privacy Concerns

The Sixth Amendment to the U.S. Constitution guarantees a defendant a right to a public trial.²⁴ The U.S. Supreme Court has held that the press and public have a right under the First Amendment to attend trials,²⁵ as well as other court proceedings.²⁶ Public access is also the means by which family members and loved ones of litigants, defendants or other participants can attend the proceedings.²⁷ Public access is fundamental to protecting the integrity of the judicial system and maintain the trust of the public, and courts should therefore take meaningful steps to protect the constitutional rights at stake, including the right of access, with narrow limitations on such access imposed only for the compelling reasons that would typically justify closure. The temptation to close a courtroom for administrative convenience or through lack of effort to establish means of remote or virtual access must not be condoned.

²³ The mechanism for consultation need not be complex. Oftentimes, it is sufficient to permit a lawyer and client to leave the virtual courtroom or courtroom call, talk to each other privately by phone, and then rejoin the call. Such consultations should be readily available and encouraged.

²⁴ See, e.g., Fed. R. Crim. P 53 (“Except as otherwise provided by statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.”).

²⁵ *Richmond Newspapers, Inc. v. Virginia* (1980)

²⁶ *El Vocero de Puerto Rico v. Puerto Rico* (1993).

²⁷ The right to a public trial entitles a criminal defendant “at the very least . . . to have his friends, relatives and counsel present, no matter with what offense he may be charged.” *In re Oliver*, 333 U.S. 257, 272 (1948). Exclusion of family members from the courtroom has been held to violate the Sixth Amendment. See, e.g., *United States v. Rivera*, No 10-50426, (9th Cir. June 22, 2012).

As courts have moved online, many have not prioritized public access. Many do not have public access at all. When a public feed is available, the manner in which many courts share virtual or remote proceedings is confusing and often deficient. There is no public notice that informs observers of which hearings will be streamed when and where, what type of proceeding is to be heard and who the litigants are.

In jurisdictions providing public access, that access is typically via a YouTube or Facebook Live Feed, rather than the court website. In watching or listening to a streamed or broadcast hearing, no header is provided concerning the case, the personnel, or even the type of docket. In in-person criminal proceedings, the judge, prosecutor, defense attorney and accused are identifiable both by where they stand or sit in the courtroom. Most online platforms do not similarly allow a party to lock a view into place, and there is therefore no discernable way to distinguish attorneys from the court personnel or from the litigants.

Establishing the electronic means of allowing remote access is only the first step; courts must make meaningful efforts to ensure that the time and virtual location of hearings are known to the public through each court's web site. Technically allowing for access while leaving the public and other participants in the dark about how to connect to the audio or video feed is not sufficient. The daily docket information for each court system should be centralized on one page on the court's web site with links to the hearings and instructions on how to connect. Additionally, encouraging individuals to introduce themselves and/or label their feed with their correct name and position/title, would improve public understanding of hearings significantly.

At the same time, the right of the public and press to attend court proceedings is not absolute. In some proceedings, the right of a particular litigant or witness to privacy or continued anonymity trumps the right of public access. For example, juvenile court proceedings in some states are closed to limit the future consequences for the minor.²⁸ A judge may also close a proceeding that would otherwise be open to the public to protect the identity of an undercover officer or a child witness.²⁹ Protecting the privacy of these court proceedings that should remain private is as important as ensuring public access to those that should be made public. Virtual and remote court procedures must therefore both ensure privacy in appropriate cases, something difficult to guarantee on many of the online platforms, and ensure public and media access in the majority of cases to which there is a right of access.

Moreover, the right of public access to a courtroom does not extend to recording the proceedings. The debate over cameras in courtrooms has been going on for decades,

²⁸ See, e.g., Rasmussen, Kristen, *Access to Juvenile Justice*, The Reporters Committee for Freedom of the Press, at 4-5, available at <https://www.rcfp.org/wp-content/uploads/imported/SJAJJ.pdf>. The right of access to juvenile proceedings, where it exists, is usually statutory and not based on the First Amendment. See, e.g., *San Bernardino County Dep't of Pub. Social Seres. v. Superior Court*, 283 Cal. Rptr. 332, 338-39 (Cal. Ct. App. 1991) (The First Amendment right of access does not extend to juvenile delinquency hearings).

²⁹ See, e.g., *State v. Ucerio*, 450 A.2d 809 (RI 1982).

with proponents arguing that broadcasting permits the public to understand the justice system, and opponents arguing that cameras may distract participants and require the counsel to create two levels of argument—one on the law and one for the public. While many courts allow recordings, many other courts still forbid such recordings.³⁰ Allowing remote access to court proceedings over the internet, however, subjects all such proceedings to possible recording. While a request can be made that no one record the proceedings,³¹ the judge cannot effectively bar such recordings.

Establishing and Reviewing Virtual or Remote Court Procedures

Procedures for holding virtual and remote court proceedings must take into account the complex considerations of participant access, public access/privacy, and attorney/client relationships. To establish or review such procedures, as soon as practicable, each jurisdiction should establish a committee or committees to solicit feedback on and review virtual or remote court procedures. Some courts are already taking steps to create such review committees. In England, for example, recognizing that COVID-19 “resulted in significant changes in the operation of the civil justice system, particularly the swift expansion of the use of remote hearings,” the Civil Justice Council established a committee to solicit feedback on remote hearing procedures and “identify areas where additional work may be needed.”³² This is likewise happening in some states in the U.S., such as in North Carolina where Chief Justice Cheri Beasley established a Task Force to “recommend directives and policy changes” to court operations.³³

Separate committees may be necessary to review types of courts and/or court proceedings. For example, “criminal proceedings may present different issues such as the right to confrontation and exchange of signed paperwork during the hearing. Jury trials bring a unique challenge with the involvement of jurors.”³⁴

³⁰ See National Center for State Courts, *Cameras in the Court – Resource Guide*, March 20, 2019, available at <https://www.ncsc.org/Topics/Media/Cameras-in-the-Court/Resource-Guide.aspx> (noting that most states permit exceptions regardless of which predominant rule they have adopted).

³¹ Texas has encouraged judges to make this request and post a watermark on the broadcast that says Do Not Record. The instructions for judges in Texas also provide information on how to delete the YouTube recording following the proceeding. See Texas Instructions on Creating a Court YouTube Channel, available at https://81db691e-8a8c-4e25-add9-60f4845e34f7.filesusr.com/ugd/64fb99_eb8a7a1d2fd04e1e8d4d542990b7a945.pdf.

³² Courts and Tribunals Judiciary, *Rapid Consultation: The impact of COVID-19 measures on the civil justice system*, May 1, 2020, available at <https://www.judiciary.uk/announcements/rapid-consultation-the-impact-of-covid-19-measures-on-the-civil-justice-system/>.

³³ Press Release, *Chief Justice Beasley Forms COVID-19 Task Force*, April 30, 2020, available at <https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-forms-covid-19-task-force>.

Wisconsin similarly formed a Task Force. See *Task Force to look at safe operations in state courts during COVID-19 pandemic*, April 29, 2020, available at https://madison.com/wsj/news/local/crime-and-courts/task-force-to-look-at-safe-operations-in-state-courts-during-covid-19-pandemic/article_074c4636-537c-5e95-8252-aea7fabf6e61.html.

³⁴ JTC Quick Rapid Response Bulletin, *Strategic Issues to Consider when Starting Virtual Hearings*, April 7, 2020, available at <https://www.ncjfcj.org/wp-content/uploads/2020/04/COSA-NSCSC-and-NACM-JTC-Response-Bulletin-Strategic-Issues-to-Consider-When-Starting-Virtual-Hearings-.pdf>.

In establishing committee(s) to review virtual or remote court procedures, special care should be taken to include representation and seek feedback from all groups who participate in the procedures or are impacted by such procedures.³⁵ In civil cases, this includes not only judges and attorneys, but also court staff, litigant representation, including representation from legal aid organizations, Access to Justice Commission representation, media representatives and possibly the juror administration officials. Committees addressing criminal court virtual and remote proceedings, should include not only judges, public defenders, prosecutors, and private attorneys, but also jail staff, pretrial services, probation and parole services, victims or victims' advocates, media representatives, and possibly juror administration officials. Such committees should also seek input broadly from participants, observers and other interested groups to ensure the consideration of all comments, concerns or issues raised by these procedures.

Encouraging Study of the Impacts of Virtual or Remote Court Procedures:

In addition to addressing concerns identified by the diverse participants in courts, jurisdictions should be concerned about the potential unseen and inadvertent harms that might arise from virtual and remote court procedures. Very little is known about the impact of viewing individuals through a screen, as opposed to in-person. The few studies that have examined the impact or remote video on court proceedings suggest that there could be significant impacts on case outcomes.

In 1999, Cook County, Illinois (Chicago) began holding most bail hearings in felony cases using a closed-circuit television procedure. The defendant remained at the detention center for the bail hearing. A study of the impact of this procedural change was conducted

³⁵ The committee established in England has solicited feedback from all those who have been involved in proceedings to date, specifically requesting feedback on the following questions:

- What is working well about the current arrangements?
- What is not working well about current arrangements?
- Which types of cases are most suited to which type of hearings and why?
- How does the experience of remote hearings vary depending on the platform that is used?
- What technology is needed to make remote hearings successful?
- What difference does party location make to the experience of the hearing?
- How do remote hearings impact on the ability of representatives to communicate with their clients?
- How do professional court users and litigants feel about remote hearings?
- How do litigants in person experience hearings that are conducted remotely?
- How do remote hearings impact on perceptions of the justice system by those who are users of it?
- How is practice varying across different geographical regions?
- What has been the impact of current arrangements on open justice?
- What other observations would you make about the impact of COVID-19 on the operation of the civil justice system?

Courts and Tribunals Judiciary, *Rapid Consultation: The impact of COVID-19 measures on the civil justice system*, May 1, 2020, available at <https://www.judiciary.uk/announcements/rapid-consultation-the-impact-of-covid-19-measures-on-the-civil-justice-system/>

by a research team from Northwestern University led by Shari Seidman Diamond.³⁶ The study concluded that “defendants were significantly disadvantaged by the videoconferenced bail proceedings.”³⁷ Specifically, “[t]he average bond amount for the offenses that shifted to televised hearings increased by an average of 51%.”³⁸ The researchers noted that the disparity may have been, in part, caused by the quality of the technology, the lack of “eye contact” caused by watching the screen rather than the camera, the process negatively impacting the ability or willingness of the defendant to speak up during a hearing, or the negative impact of the proceeding on attorney-client communication.³⁹

An observational study of videoconferenced immigration hearings conducted in 2004-2005 found such hearings “a poor substitute for in-person hearings.”⁴⁰ The study found that the use of videoconferences reduced the ability or opportunity of immigrants to speak or ask questions and lessened their ability to communicate with their attorneys⁴¹. The conferences were also plagued by technical difficulties, with almost half of observed cases experiencing one or more problems.⁴² The study called for a “moratorium on videoconferencing in removal cases until it can be improved.”⁴³ A different study of the use of teleconferencing in immigration proceedings determined that remote hearings impacted outcome, lessening the likelihood asylum would be granted.⁴⁴

These studies raise serious concerns that virtual and remote court procedures might impact outcomes, including potentially increasing pre-trial detention and other incarceration or exacerbating racial, ethnic and economic disparities. It is incumbent on the jurisdictions seeking to use these procedures to conduct research on the impact of their use becomes more acute.⁴⁵ Some such studies are already underway. For example, a study in Indiana is examining how new virtual platforms such as Zoom hearings may inadvertently magnify biases against unrepresented persons and how these platforms can be redesigned to address these biases and improve the user experience.

³⁶ Shari Seidman Diamond, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. of Crim. L. & Criminology 869 (2010).

³⁷ *Id.* at 898.

³⁸ *Id.* at 897.

³⁹ *Id.* at 898-99.

⁴⁰ The Legal Assistance Foundation of Metropolitan Chicago and the Chicago Appleseed Fund for Justice, *Videoconferencing in Removal Hearings: A Case Study of the Chicago Immigration Court*, Aug. 2, 2005, at 5, available at http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf.

⁴¹ *Id.*

⁴² *Id.* at 6-7.

⁴³ *Id.* at 8.

⁴⁴ Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 271 (2008).

⁴⁵ The RAND Corporation recently conducted a review of existing research on remote and virtual proceedings, convening an Advisory Workshop and publishing a set of recommendations regarding needed research. Camille Gourdet, et al., *Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology*. RAND Corporation, 2020. https://www.rand.org/pubs/research_reports/RR3222.html.

Similarly, studies should be conducted to determine whether permitting virtual or remote participations in courts increases access. Does it reduce failure-to-appear rates and default judgments? If possible, litigant satisfaction should also be examined.

Jurisdictions should, where feasible, conduct such research or, at a minimum, cooperate with researchers who wish to study the impact of these procedures. Jurisdictions should also review any research when published and adapt, revise or discontinue procedures as warranted, particularly if disparate or harmful impacts are suggested.

Considerations for Review:

The proposed Resolution highlights certain important criteria that should be considered by jurisdictions in evaluating virtual and remote court procedures to guarantee equal access and fundamental fairness. Chief among these considerations is that virtual or remote proceedings should be tailored to the needs of participants and take into account the type of case and proceeding, the participants involved, and whether participants are represented by counsel. The use of virtual and remote proceedings should be limited to those litigants who consent after being fully informed of the manner of the proceeding and the technological requirements for participation. During this public health emergency, it may also be necessary to conduct essential hearings remotely, such as hearings where one or both parties would be negatively impacted by delay. Essential hearings would include initial appearances for detained individuals, petitions for protective orders, initial hearings in child removal cases, and emergency requests for release based on COVID-19 concerns.

The Resolution further urges jurisdictions to:

- (1) Consider the ability of all participants to access and fully participate in the proceedings, including:
 - a. Ensuring that participation options for virtual or remote court proceedings are free for participants and observers;
 - b. Providing options concerning participation and permitting participants to select the means of participation best suited to them without prejudice;
 - c. Allowing participants to alter their chosen means of participation for each proceeding;
 - d. Providing necessary supports for those who, for financial, technological, language access, disability, or other reasons, may not be able to fully participate without assistance;
 - e. Ensuring that methods of participation reduce, to the fullest extent possible, any prejudice that might result from the circumstances of participation;
 - f. Ensuring that participants are not obligated or pressured to waive constitutional rights; and
- (2) Enable and encourage full attorney-client relationships, including permitting private consultation both before and during court proceedings and guaranteeing the confidentiality of such communications; and

Whether to Continue Virtual and Remote Proceedings Beyond the Pandemic:

As noted above, virtual or remote participation in court proceedings has the potential to ease and expand access to the courts, reducing the costs of appearance, as well as reducing the incidents of failure to appear and default judgments. At the same time, the few studies conducted raise serious concerns that virtual appearance may impact outcome and exacerbate bias. Moreover, in criminal cases, the right of confrontation requires in-person trials.⁴⁶ In such cases, an in-person hearing is required and such hearings have generally been delayed during this crisis. Continued delay of these proceedings is harmful, not only for those for whom the investigation and resolution of criminal charges or other important legal matters has been delayed, but also for courts, which are facing an increasing backlog of such hearings. The Resolution therefore urges jurisdictions to reintroduce in-person court options as soon as safely feasible as determined in consultation with public health officials. Thereafter, virtual or remote participation in court proceedings should be governed by informed consent in order to maximize its ability to increase access, while permitting those concerned about potential harm to proceed in person. In certain types of proceedings, virtual and remote court appearance may be antithetical to due process, and such determinations should be respected. For example, based on a comprehensive review of immigration proceedings, including the existing studies concerning the negative impact of video appearance on outcomes for noncitizens in such proceedings, the ABA House of Delegates adopted a Resolution providing that such video appearances should be “limited to procedural matters” and permitted only after the noncitizen gives informed consent.⁴⁷ Nothing in this Resolution is intended to conflict with or override such specific recommendations with regard to particular kinds of hearings.

Conclusion:

The COVID-19 pandemic has forced courts to adapt quickly. Many courts have responded by moving to remote or virtual court proceedings for essential hearings. Others are considering doing so, and still others are considering further expansions of their platforms. Such innovation is necessary to maintain safety during the pandemic and may also provide means of increasing access, but the evaluation of these platforms to ensure that they protect litigants’ rights and ensure fundamental fairness is equally important. It is incumbent upon jurisdictions to conduct this analysis and, as necessary, alter their remote or virtual court procedures to ensure full access by participants, encourage and enable attorney-client communications and other forms of assistance, and appropriately balance public access with privacy concerns. Jurisdiction should also encourage and support further in-depth study of the impacts of virtual and remote procedures to determine the extent to which they improve access and whether they, unwittingly, produce bias or disparate impacts.

⁴⁶ The right to confront witnesses is “[o]ne of the fundamental guarantees of life and liberty . . . long deemed [] essential for the due protection of life and liberty.” *Union. v. Pointer v. Texas*, 380 U.S. 400 (1965) (overruling *West v. Louisiana*, 194 U.S. 258 (1904)).

⁴⁷ Resolution 10M114B, available at https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2010/2010_my_114b.pdf.

Finally, jurisdictions should reintroduce in-person court proceedings as soon as safely feasible, in consultation with public health experts. Such re-opening is critical to ensuring as minimal delay as possible in those proceedings that require in-person participation, as well as providing the full array of access options to all litigants.

Respectfully submitted,

Theodore Howard
Chair, Standing Committee on Legal Aid and Indigent Defendants

August 2020

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Legal Aid and Indigent Defendants

Submitted By: Theodore Howard, Chair

1. Summary of Resolution(s). This Resolution seeks to encourage each jurisdiction employing virtual or remote court: (1) to establish committees to review procedures; (2) to take steps to ensure equal access, due process and fundamental fairness; (3) to further ensure that the public, including the media, has access to court proceedings unless an appropriate exception applies, in which case the privacy of the proceeding should be protected, and (4) to study the impact of these procedures for possible prejudicial effect or disparate impact on outcomes. The Resolution further urges jurisdictions to reintroduce in-person court options as soon as safely feasible as determined by public health officials.

2. Approval by Submitting Entity.
May 5, 2020

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

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

There is a policy regarding appearance by video in Immigration proceedings. 10M114B provides that video appearance should be limited to procedural matters and utilized only with the informed consent of the noncitizen. As addressed in the Report, nothing in this Resolution is intended to conflict with this existing policy.

There are numerous ABA policies concerning the accessibility of the courts, the use of technology in the courts, and the evaluation of court procedures as they impact those with barriers to access. See, e.g., 91A115 (Recommendations for improving access for the elderly and persons with disabilities), 95M106 (Urging experimentation to broadcast court proceedings, including by video), 95M301 (Affirming access to the justice system irrespective of financial status), 96M114 (Urging safeguards in court rules and legislation to avoid deprivation of access to justice due to economic status), 02M112 (Promoting accessibility to the courts for persons with disabilities), 04A103B (Addressing electronic discovery rules), 11M10A (Supporting improvements to the federal courts' CM/ECF systems), 14A105A (Opposing the delay to the right to a civil jury due to financial circumstances).

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.

Numerous jurisdictions are looking for guidance on how to establish and evaluate court proceedings during the COVID-19 crisis. This Resolution and Report would be distributed to key constituencies to provide guidance with staff support available to help access additional, more detailed materials such as the studies and resources cited in the Report. The Resolution would also be posted on SCLAID's COVID-19 Resources webpage.

8. Cost to the Association.

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

9. Disclosure of Interest.

N/A

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

Center for Public Interest Law
 Center for Innovation
 Commission on Immigration
 Commission on Disability Rights
 Forum on Communications Law
 Judicial Division
 Section on Civil Rights and Social Justice
 Section of Criminal Justice
 Section on Dispute Resolution
 Section on Family Law
 Section on Litigation
 Section of State and Local Government Law
 Solo, Small Firm and General Practice Division

11. Contact Name and Address Information (Contacts prior to meeting).

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12. Contact Name and Address Information (To Present at House of Delegates).

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution seeks to encourage each jurisdiction employing virtual or remote court: (1) to establish committees to review procedures; (2) to take steps to ensure equal access, due process and fundamental fairness; (3) to further ensure that the public, including the media, has access to court proceedings unless an appropriate exception applies, in which case the privacy of the proceeding should be protected, and (4) to study the impact of these procedures for possible prejudicial effect or disparate impact on outcomes. The Resolution further urges jurisdictions to reintroduce in-person court options as soon as safely feasible as determined by public health officials.

2. Summary of the Issue that the Resolution Addresses

During the COVID-19 pandemic, courts have endeavored find ways to operate safely, while also ensuring that essential proceedings continue. In many jurisdictions, this has involved quickly setting up remote or virtual courts, using meeting technologies such as Zoom or Go to Meeting. Because these procedures were established in response to a crisis, time could not be taken to fully consider the impact of these procedures on access – both for participants and the public, privacy and attorney-client relationships.

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

The proposed Resolution urges jurisdictions to create committee(s), including all key stakeholders, to review existing or planned virtual or remote court procedures and provides a set of criteria for evaluation. The criteria prioritizes ensuring equal and full access for all participants, maintaining a robust attorney-client relationship, and ensuring public access or privacy of proceedings as appropriate for the type of hearing. The Resolution further calls on jurisdictions to reestablish in-person hearings as soon as feasible as dictated by public health considerations and to study or support the studying of procedures for possible bias or disparate impact and make adjustments accordingly.

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

No dissenting views have been articulated. The Resolution was crafted based on discussions with numerous other groups including individuals working with the COVID-19 Task Force and the Section on Civil Rights and Social Justice. However, due to time constraints, the language is being distributed to most groups in conjunction with this submission. SCLAID anticipates receiving significant comments and making changes to both the Resolution and Report in response to these comments.

AMERICAN BAR ASSOCIATION

OFFICE OF THE SECRETARY

RESOLUTION WITH REPORT ON ARCHIVING

RESOLUTION

RESOLVED, That the Association policies set forth in Attachment 1 to Report 400A, dated August 2020, are archived and no longer considered to be current policy of the American Bar Association and shall not be expressed as such; and

FURTHER RESOLVED, That policies which have been archived may be reactivated at the request of the original sponsoring entities. If the original sponsoring entities no longer exist, requests may be brought to the Secretary to be placed on a reactivation list for action by the House of Delegates. Such reactivated policies shall be considered current policy for the Association and shall be expressed as such; and

FURTHER RESOLVED, That the Board of Governors may act to reactivate policies when the House of Delegates is not in session.

REPORT

At the 1996 Annual Meeting, the House of Delegates adopted a set of Recommendations establishing a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant and is to be presented to the House at the Annual Meeting. *See Report 400 attached as Appendix A.* The Resolution now before the House affects policies 10 years old or older. The Board of Governors or House of Delegates adopted these policies in 2010.

To accomplish this objective, the Policy and Planning Division compiled an index of such policies set forth in either the *ABA Policy and Procedures Handbook* or the American Bar Association Legislative Issues list maintained by the Governmental Affairs Office. Some 61 policies were thus identified. Each entity, which had been the original sponsor, was sent a list of the policies it had sponsored. In cases where the original sponsoring entity was no longer in existence, the policies were sent to an appropriate successor entity. The 28 entities to which the policies were sent are listed in *Appendix B*.

Each entity was asked to identify which of the policies should be archived and which should be retained as current policy. In addition, each was requested to identify and include a recommended disposition for any other policies that had been generated which were not in the materials they received.

In adopting Recommendation 400 in 1996, the House realized that there might be old and outdated policies which would not be identified through this process. The House, therefore, included a provision to deal with this issue by providing that such policies would also be archived. *See Appendix A, paragraph 6.* The second Resolved clause in this Resolution implements that provision with respect to all policies 20 years old or older.

Policies that are archived pursuant to the Resolution are not considered to be rescinded. Rather, the Association will retain them for historical purposes, however, they cannot be expressed as ABA policy. Those retained as current policy through this process will be reviewed again in 10 years. Retained policies are listed in *Appendix C*.

Respectfully submitted,

Mary L. Smith, Secretary
American Bar Association

August 2020

400A

Attachment 1

Policies to be Archived

- 22. Statutory First Sale Doctrine in Section 109(a) of the U.S. Copyright Act
Section of Intellectual Law
February 2010 (10M109)
- 40. Medicare, Medicaid and SCHIP Extension Act of 2007
Young Lawyers Division
August 2010 (10A101)
- 53. Reaccreditation of the Social Security Disability Advocacy Program
Standing Committee on Specialization
August 2010 (10A112)

Attachment 1

Policies to be Archived

22. Statutory First Sale Doctrine in Section 109(a) of the U.S. Copyright Act
Section of Intellectual Law
February 2010 (10M109)

RESOLVED, That the American Bar Association urges courts to interpret the statutory first sale doctrine in Section 109(a) of the U.S. Copyright Act and the copyright owner's importation right in Section 602(a) to exclude application of the first sale doctrine to the importation of goods embodying a copyrighted work that were not manufactured in the United States.

40. Medicare, Medicaid and SCHIP Extension Act of 2007
Young Lawyers Division
August 2010 (10A101)

RESOLVED, That the American Bar Association urges Congress to amend the Medicare, Medicaid and SCHIP Extension Act of 2007 ("the Act") to create a safe harbor provision precluding the assessment of civil penalties against responsible reporting entities, as defined under the Act, that follow a process reasonably designed to obtain information from or that rely upon information verified by claimants regarding entitlement to or receipt of Medicare benefits.

53. Reaccreditation of the Social Security Disability Advocacy Program
Standing Committee on Specialization
August 2010 (10A112)

RESOLVED, That the American Bar Association grant reaccreditation of the Social Security Disability Advocacy program of the National Board of Social Security Disability Advocacy, division of the National Board of Legal Specialty Certification of Wrentham, Massachusetts until the adjournment of the House of Delegates meeting in August 2015.

Appendix A

Approved by the House of Delegates, August 1996

Report No. 400

The resolution was approved as amended as follows:

RESOLVED, That the American Bar Association adopts a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant. Such archived policies will be retained for historical purposes but shall not be considered current policy for the Association and shall not be expressed as such.

FURTHER RESOLVED, That the archiving shall be implemented as follows:

1. All policies adopted by the House of Delegates shall be reviewed, with the exception of uniform state laws, model codes, guidelines, standards, ABA Constitution and Bylaws, and House Rules of Procedures.
2. To phase in this process, the periodic mandated review will in the first year, 1997, address policies 20 years old or older; in the second, year policies 15 years old or older; and in the third year and each year thereafter, policies 10 years old or older.
3. Prior to each Annual meeting, a list of affected policies will be compiled and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.
4. At each Annual Meeting, a recommendation will be submitted to archive certain policies and the House will vote on the recommendations.
5. Those policies which are not archived will be subject to review every ten years thereafter.
6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.
7. This archival process is not intended to affect the rights of any member of the

400A

House to propose amendments or rescission of any policies as presently permitted under House rules.

FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.

400A

Appendix B

The entities below reviewed and recommended disposition of the policies contained in the report:

Sections and Divisions

Business Law
Civil Rights and Social Justice
Criminal Justice
Intellectual Property Law
International Law
Litigation
National Conference of Specialized Court Judges
Paralegals
Solo, Small Firm and General Practice
Tort Trial and Insurance Practice
Young Lawyers

Standing Committees

Client Protection
Election Law
Ethics and Professional Responsibility
Gun Violence
Legal Aid and Indigent Defendants
Public Education
Specialization

Commissions

Domestic and Sexual Violence
Homelessness and Poverty
Immigration
Law and Aging
Women in the Profession
Youth at Risk

Task Forces

Task Force on Federal Agency Preemption of State Tort Laws
Task Force on Gatekeepers Regulation and the Profession

State, Local and Territorial Bar Associations

New York State Bar Association

Member

Jayne E. Fleming, ABA Member

Appendix C Retained Policies

1. Local Rankings of Law Firms and Law Schools
New York State Bar Association
February 2010 (10M10A)
2. Accreditation of the Social Security Disability Advocacy Program
Standing Committee on Specialization
February 2010 (10M100)
3. United Nations Convention on Contracts for the International Carriage of Goods
Tort Trial and Insurance Practice Section
February 2010 (10M101)
4. Youth Involved with the Juvenile or Criminal Justice Systems
Criminal Justice Section
February 2010 (10M102A)
5. Development of Simplified Miranda Warning Language for use with Juvenile
Arrestees
Criminal Justice Section
February 2010 (10M102B)
6. Comprehensive Review of the Misdemeanor Provisions of their Criminal Laws
Criminal Justice Section
February 2010 (10M102C)
7. Criminal Trial Court Involving Felony or Serious Misdemeanor
Criminal Justice Section
February 2010 (10M102D)
8. Communication between Parents in Correctional Custody and their Children
Criminal Justice Section
February 2010 (10M102E)
9. Criminal Defendants and Prisoners
Criminal Justice Section
February 2010 (10M102F)

10. Decisions should not be made by Partisan Political Interests
Criminal Justice Section
February 2010 (10M102G)
11. Adopts the Black Letter of the ABA Criminal Justice Standards on the Treatment
of Prisoners
Criminal Justice Section
February 2010 (10M 102I)
12. John R. Justice Prosecutors and Defenders Incentive Act of 2008
Criminal Justice Section
February 2010 (10M 102J)
13. Model Act Governing Standards for the Care and Disposition of Disaster Animals
Tort Trial and Insurance Practice
February 2010 (10M103A)
14. Universal 24-Hour Health Coverage
Tort Trial and Insurance Practice
February 2010 (10M103B)
15. Fundamental Protections of Article 36 to the Vienna Convention on Consular
Relations Article 36
Section of Litigation
February 2010 (10M104)
16. Veterans Administration Medical Centers
Commission on Homelessness and Poverty
February 2010 (10M105A)
17. Runaway and Homeless Youth Act
Commission on Homelessness and Poverty
February 2010 (10M105B)
18. Paralegal Educational Programs
Standing Committee on Paralegals
February 2010 (10M106)

400A

19. Elimination of Pay and Gender Discrimination
Commission on Women in the Profession
February 2010 (10M107)
20. United Nations Convention on the Rights of Persons with Disabilities
Section of International Law
February 2010 (10M108B)
21. Measures are necessary to avoid the imminent risk of Breach by the United States
Section of International Law
February 2010 (10M108C)
23. Child Welfare Financing Laws
Commission on Youth at Risk
February 2010 (10M110)
24. Government Sponsored Debt Relief for Lawyers Serving our Nation in Uniform
Solo, Small Firm and General Practice Division
February 2010 (10M113)
25. Congress to Amend the Immigration and Nationality Act
Commission on Immigration
February 2010 (10M114A)
26. Improve Immigration Courts
Commission on Immigration
February 2010 (10M114B)
27. Immigration Appeals
Commission on Immigration
February 2010 (10M114C)
28. Federal Judicial Review of Immigration Decisions
Commission on Immigration
February 2010 (10M114D)
29. Article I Court
Commission on Immigration
February 2010 (10M114F)

30. Violence Against Women Act
Commission on Domestic & Sexual Violence
February 2010 (10M115)
31. United States Department of Justice Confidential Investigation
Criminal Justice Section
August 2010 (10A100A)
32. Prosecutorial Misconduct
Criminal Justice Section
August 2010 (10A100B)
33. Immigration Advice to Indigent Non-U.S. Citizens
Criminal Justice Section
August 2010 (10A100C)
34. Forensic Science Research
Criminal Justice Section
August 2010 (10A100D)
35. Identified Forensic Science Service Providers
Criminal Justice Section
August 2010 (10A100E)
36. Forensic Science Community into the Nation's System of Homeland Security
Criminal Justice Section
August 2010 (10A100F)
37. Medicolegal Death Investigations
Criminal Justice Section
August 2010 (10A100G)
38. Nationwide interoperability of the Automated Fingerprint Identification System
Criminal Justice Section
August 2010 (10A100H)
39. Fair Trial in Sentencing Proceeding.
Criminal Justice Section
August 2010 (10A100I)

400A

- 41. Black Letter Principles and Standards of the Judicial Excellence
National Conference of Specialized Court Judges
August 2010 (10A102)
- 42. Adopts the Black Letter Model Rules for Client Trust Account Records
Standing Committee on Client Protection
August 2010 (10A103)
- 43. Adopts the ABA Model Access Act, dated August 2010
Section of Litigation
August 2010 (10A104)
- 44. Black Letter and Commentary ABA Basic Principles of a Right to Counsel
Standing Committee on Legal Aid and Indigent Defendants
August 2010 (10A105)
- 45. Protection and Advocacy System
Commission on Law and Aging
August 2010 (10A106A)
- 46. Administration to Reauthorize the Older Americans Act of 1965 as Amended
Commission on Law and Aging
August 2010 (10A106B)
- 47. Urges the United State to Ratify the Comprehensive Nuclear Test Ban Treaty
Section of International Law
August 2010 (10A107A)
- 48. Education and Training for Judges in the United States and Abroad
Section of International Law
August 2010 (10A107B)
- 49. Paralegal Education Program
Standing Committee on Paralegal
August 2010 (10A108)
- 50. Provide Legal Counsel to Children and/or Youth
Commission on Youth at Risk
August 2010 (10A109A)

51. All Students Experience High Quality Civic Learning
Standing committee on Public Education
August 2010 (10A110)
52. Eliminate all Legal Barriers to Civil Marriage between Two Persons of the Same Sex
Social Rights and Civil Justice
August 2010 (10A111)
54. Amends the Application Section of the 2007 ABA Model Code of Judicial Conduct
Standing Committee on Ethics and Professional Responsibility
August 2010 (10A113)
55. Improve Voter Registration Practices
Standing Committee on Election law
August 2010 (10A114)
56. All Newly Manufactured Semi-Automatic Pistols be Fitted with Microstamping Technology
Standing Committee on Gun Violence
August 2010 (10A115)
57. Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing
Task Force on Gatekeepers Regulation and the Profession
August 2010 (10A116)
58. Preemption of State Tort Law
Task Force on Federal Agency Preemption of State Tort Laws
August 2010 (10A117)
59. Visa Program
Section of Business Law
August 2010 (10A300)
60. International Copyright Treaties
Section of intellectual Law
August 2010 (10A301)

400A

61. Displaced Women and Children in Haiti
Jayne E. Fleming, ABA Member
August 2010 (10A302)

GENERAL INFORMATION FORM

Submitting Entity: Secretary of the Association

Submitted By: Mary L. Smith

1. Summary of Resolution:

In an ongoing effort to keep the Association's policies up to date, this resolution consists of policies 10 years old or older. A policy that is archived is not rescinded. It is retained for historical purposes but cannot be expressed as current policy of the ABA. The Secretary recommends that the policies set forth in Attachment 1 of the resolution be archived.

2. Approval by Submitting Entity:

The policies that have been placed on the archival list were reviewed by the entities that originally submitted them. In cases in which the submitting entity is now defunct, a successor entity was given the policy to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

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

Although the Association has from time to time culled its records, the policies on the archival list have not been subject to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

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

The archiving of any policy would have no effect on existing policies.

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

Resolution 400, adopted August 1996, mandates the annual review of policies 10 years old or older.

6. Status of Legislation:

N/A

400A

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

The Policy and Procedures Handbook will be updated to reflect those policies that have been archived.

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

None.

9. Disclosure of Interest: N/A.

10. Referrals.

The policies identified in the Resolution with Report have been circulated to 28 entities as noted in Appendix B and will also be sent to the Government Affairs Office.

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

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marysmith828@hotmail.com

Shirley Myles
American Bar Association
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312/988-5169
Shirley.Myles@americanbar.org

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

Mary L. Smith
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marysmith828@hotmail.com

EXECUTIVE SUMMARY1. Summary of the Resolution

This resolution archives Association policies that are 10 years old or older. A policy that is archived is not rescinded. It is retained for historical purposes but cannot be expressed as a current position of the ABA.

2. Summary of the Issue which the Recommendation Addresses

The archiving project, mandated by the House of Delegates in 1996, will improve the usefulness of the catalogued Association positions on issues of public policy. Many of the Association's positions were adopted decades ago and are no longer relevant or effective.

3. An Explanation of How the Proposed Policy will Address the Issue

The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

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

None at this time.

AMERICAN BAR ASSOCIATION

OFFICE OF THE SECRETARY

RESOLUTION WITH REPORT ON ARCHIVING

RESOLUTION

1 **RESOLVED**, That the Association policies adopted in 2000 which were previously
2 considered for archiving but retained as set forth in Attachment 1 to Report 400B dated
3 August 2020, are archived and no longer considered to be current policy of the American
4 Bar Association and shall not be expressed as such;

5
6 **FURTHER RESOLVED**, That policies which have been archived may be reactivated at
7 the request of the original sponsoring entities. If the original sponsoring entities no
8 longer exist, requests may be brought to the Secretary to be placed on a reactivation list
9 for action by the House of Delegates. Such reactivated policies shall be considered
10 current policy for the Association and shall be expressed as such; and

11
12 **FURTHER RESOLVED**, That the Board of Governors may act to reactivate policies
13 when the House of Delegates is not in session.

REPORT

Pursuant to Report 400, adopted by the House of Delegates in 1996, the Association is annually required to review policies adopted by the House of Delegates that have been in existence ten years or more. *See Report 400 attached as Appendix A.* Those policies that are outdated, duplicative, inconsistent with current policy or no longer relevant are to be archived. The review process operates from the premise that any policy on the list will be archived unless there is a request to remove it from the archival list and retain it as current policy. Once archived, it may no longer be cited as current policy. An archived policy is not considered to be rescinded, but rather is retained by the Association for historical purposes only.

Several years ago, the Resolution and Impact Review Committee reviewed the current archiving procedure and determined that it was time to revisit policies that were originally considered for archiving but retained. To date, every policy that is at least ten years old has been considered for archiving once. In the first several years after the procedure was instituted, over 1000 policies were examined. Of those, about one-third were archived. In subsequent years, policies were examined when they became 10 years old. The vast majority of policies that were passed in the last twenty years have been retained at the request of the sponsoring entity, the Office of Governmental Affairs or a member of the House.

This year, the policies adopted in 2000 which were previously considered for archiving but retained were reviewed. The process of reviewing previously retained policies began in spring of 2012 and will continue annually. To accomplish this objective, the Policy and Planning Division compiled an index of such policies set forth in either the *ABA Policy and Procedures Handbook* or the American Bar Association Legislative Issues list maintained by the Governmental Affairs Office. Some 31 policies were thus identified. Each entity, which had been the original sponsor, was sent a list of the policies it had sponsored. In cases where the original sponsoring entity was no longer in existence, the policies were sent to an appropriate successor entity. The 21 entities to which the policies were sent are listed in *Appendix B*.

Each entity was asked to identify which of the policies should be archived and which should be retained as current policy. In addition, each was requested to identify and include a recommended disposition for any other policies that had been generated which were not in the materials they received. Those retained as current policy through this process will be reviewed again in 10 years. Retained policies are listed in *Appendix C*.

Respectfully submitted,

Mary L. Smith, Secretary
American Bar Association
August 2020

Attachment 1

Policies to be Archived

1. Unauthorized Practice of Law
Ohio State Bar Association
February 2000 (00M8A)

Attachment 1

Policies to be Archived

1. Unauthorized Practice of Law
Ohio State Bar Association
February 2000 (00M8A)

RESOLVED, That each jurisdiction is urged to establish and implement effective procedures for the discovery and investigation of any apparent violation of its laws prohibiting the unauthorized practice of law and to pursue active enforcement of those laws;

FURTHER RESOLVED, That each jurisdiction is urged to encourage all members of the public to report to the designated authority each instance of an applicant violation of the laws prohibiting the unauthorized practice of law;

FURTHER RESOLVED, That each state, territorial and local bar association is urged to establish and support a mechanism for reporting to the designated authority in the applicable jurisdiction and for eliminating instances of the unauthorized practice of law by individuals or organizations;

FURTHER RESOLVED, That each member of the bar is encouraged to report to the relevant bar associations and the designated authority in the applicable jurisdiction each instance of an apparent violation of any law prohibiting the unauthorized practice of law;

FURTHER RESOLVED, That the American Bar Association shall establish and support a mechanism for identifying and reporting to state, territorial and local bar associations and designated authorities instances of persons or organizations engaging in the unauthorized practice of law in more than one jurisdiction.

Appendix A

Approved by the House of Delegates, August 1996

Report No. 400

The resolution was approved as amended as follows:

RESOLVED, That the American Bar Association adopts a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant. Such archived policies will be retained for historical purposes but shall not be considered current policy for the Association and shall not be expressed as such.

FURTHER RESOLVED, That the archiving shall be implemented as follows:

1. All policies adopted by the House of Delegates shall be reviewed, with the exception of uniform state laws, model codes, guidelines, standards, ABA Constitution and Bylaws, and House Rules of Procedures.
2. To phase in this process, the periodic mandated review will in the first year, 1997, address policies 20 years old or older; in the second year, policies 15 years old or older; and in the third year and each year thereafter, policies 10 years old or older.
3. Prior to each Annual meeting, a list of affected policies will be compiled and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.
4. At each Annual Meeting, a recommendation will be submitted to archive certain policies and the House will vote on the recommendations.
5. Those policies which are not archived will be subject to review every ten years thereafter.
6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.
7. This archival process is not intended to affect the rights of any member of the House to propose amendments or rescission of any policies as presently permitted under House rules.

FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.

400B

Appendix B

The entities below reviewed and recommended disposition of the policies contained in the report:

Standing Committees

Armed Forces Law
Standing Committee on Armed Forces Law
Paralegal

Sections and Divisions

Business Law
Civil Rights and Social Justice
Criminal Justice Section
Intellectual Property Law
International Law
Judicial Division
Legal Education and Admission to the Bar
Litigation
Public Contract
Public Education
Young Lawyers Division

Commissions

Domestic and Sexual Violence
Law and Aging
Women in the Profession

State, Local and Territorial Bar Associations

Association of the Bar of the City of New York
Bar Association of the District of Columbia
Bar Association of San Francisco
Illinois State Bar

Appendix C
Retained Policies

2. Court of Appeals Decisions
The Bar Association of the District of Columbia
February 2000 (00M8B)
3. Correction Systems Review Sentencing and Correctional Policy
Criminal Justice Section
February 2000 (00M102B)
4. Protection of Adults
Commission on Law and Aging
February 2000 (00M106)
5. Federal Rules of Civil Procedure
Section of Litigation
February 2000 (00M107)
6. Rule of Law
Standing Committee on Public Education
February 2000 (00M108)
7. Political Contributions
Business Law Section
February 2000 (00M110)
8. Approval, reapproval and Extensions in Legal Assistance Educational Programs
Standing Committee on Paralegals
February 2000 (00M112)
9. Campaign Finance Reform
Association of the Bar of the City of New York
August 2000 (00M10A)
10. Copyright Licensing Protection
Hartford County Bar Association
August 2000 (00M10B)
11. Federal Court Jurisdiction
The Bar Association of the District of Columbia
August 2000 (00M10C)
12. Legal Fees
Illinois State Bar Association
August 2000 (00M10F)

400B

13. United Nations
The Bar Association of San Francisco
August 2000 (00M10H)
14. Health Care
Commission on Law and Aging
August 2000 (00A102)
15. Standards for Approval of Law Schools
Standing committee on Paralegal
August 2000 (00A103)
16. Pay Judge Advocates
Standing Committee on Armed Forces Law
August 2000 (00A104)
17. Rights of Children
Section of International Law
August 2000 (00A106A)
18. Child Exploitation
Section of International Law
August 2000 (00A106B)
19. Election and Campaign Activity on the Internet
Standing Committee on Election Law
August 2000 (00A108)
20. Standards for State Judicial Retirement
Criminal Justice Section
August 2000 (00A108)
21. Visitation
Commission on Domestic and Sexual Violence
August 2000 (00A109A)
22. Mediation
Commission on Domestic and Sexual Violence
August 2000 (00A109B)
23. Model Procurement Code for State and Local Government^{6s}
Section of Public Contract Law
August 2000 (00A110)

24. Domestic Violence Remedies and Protection for Adolescents
Young Lawyers Division
August 2000 (00A111)
25. Health Care
Commission on Women in the Profession
August 2000 (00A112)
26. Administrative Procedure Act Proceedings
Judicial Division
August 2000 (00A113)
27. Standards for State Judicial Retirement
Judicial Division
August 2000 (00A114)
28. Biological Evidence
Criminal Justice Section
August 2000 (00A115)
29. Administrative Procedure Act Proceedings
Section of Administrative Law and Regulatory Practice
August 2000 (00A116B)
30. Provisional Approval
Section of Legal Education and Admissions to the Bar
August 2000 (00A300A)
31. Patent and Trademark Fees
Section of Intellectual Property Law
August 2000 (00A301)

400B

GENERAL INFORMATION FORM

Submitting Entity: Secretary of the Association

Submitted By: Mary L. Smith

1. Summary of Resolution:

In an ongoing effort to bring the Association's policies up to date, this resolution consists of the review of policies adopted in 2000 which were previously considered for archiving but retained. A policy that is archived is not rescinded. It is retained for historical purposes but cannot be expressed as a current position of the ABA. The Secretary recommends that the policies set forth in Attachment 1 of the resolution be archived.

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The policies that have been placed on the archival list were reviewed by the entities that originally submitted them. In cases in which the submitting entity is now defunct, a successor entity was given the policy to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

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

Although the Association has from time to time culled its records, the policies on the archival list have not been subject to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

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

The archiving of any policy would have no effect on existing policies.

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

Resolution 400 mandates the review of policies 10 years old or older.

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 Policy and Procedures Handbook will be updated to reflect those policies that have been archived.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

The policies identified in the Resolution with Report have been circulated to 21 entities as noted in Appendix B, and also will be sent to the Government Affairs Office.

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

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3. An Explanation of How the Proposed Policy will Address the Issue

The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

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None at this time.

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**AMERICAN BAR ASSOCIATION
HOUSE OF DELEGATES
2020 VIRTUAL ANNUAL MEETING**

AUGUST 3-4, 2020

DAILY JOURNAL

<u>RPT NO.</u>	<u>PROPOSED BY</u>	<u>SHORT TITLE</u>	<u>ACTION</u>
<u>10A</u>	NEW YORK CITY BAR ASSOCIATION NEW YORK STATE BAR ASSOCIATION	Urges the United States to take all necessary and proper actions within its power to end the ongoing armed conflict in the Northwest and Southwest regions of Cameroon.	Approved
<u>10B</u>	VIRGIN ISLANDS BAR ASSOCIATION	Supports an interpretation of the Equal Protection Clause of the Fifth Amendment which would guarantee that all Americans residing in all United States territories who are otherwise eligible to receive federal benefits under the SSI program are entitled to receive them.	Approved
<u>10C</u>	VIRGIN ISLANDS BAR ASSOCIATION	Reaffirms prior ABA policy supporting an amendment to the United States Constitution to provide for participation of citizens in American territories to vote in national elections.	Approved as Revised*
<u>10D</u>	VIRGIN ISLANDS BAR ASSOCIATION LAW STUDENT DIVISION	Urges federal, state, territorial and tribal governments, bar associations, and/or Commercial Lenders to develop and implement programs to assist law students, recent graduates, and young lawyers experiencing financial hardship due to postponed bar exams and/or deferred employment or unemployment during the COVID-19 pandemic.	Approved
<u>10E</u>	MASSACHUSETTS BAR ASSOCIATION INTERNATIONAL LAW SECTION	Urges support for pending U.S. legislation to address violations of governing instruments for Hong Kong and Rule of Law.	Approved

* See attached

<u>10F</u>	MASSACHUSETTS BAR ASSOCIATION NEW YORK CITY BAR ASSOCIATION INTERNATIONAL LAW SECTION	Urges the Department of Homeland Security (DHS) to maintain the Student and Exchange Visitor Program's temporary exemption for continuing, incoming, and future nonimmigrant student visa holders taking any combination of in-person, hybrid, and online classes for the duration of the COVID-19 pandemic.	Approved
<u>10G</u>	VIRGIN ISLANDS BAR ASSOCIATION SECTION OF STATE AND LOCAL GOVERNMENT LAW LAW STUDENT DIVISION	Urges that the highest court or bar admissions authority in each jurisdiction cancel the in-person bar examinations currently scheduled for September 9-10, 2020, and September 30-October 1, 2020, and not administer any other in-person bar examination until and unless public health authorities determine that the examination can be administered in a manner that ensures the health and safety of bar applicants, proctors, and other staff.	Approved
<u>10H</u>	KING COUNTY BAR ASSOCIATION	Urges federal, state, local, territorial, and tribal governments to address the COVID-19 eviction and housing crisis and its collateral harm by (1) providing rental assistance to rental property owners where tenants are facing COVID-19 economic hardship, and (2) precluding in tenant screening practices the use of nonpayment of rent or eviction records that occur during a particular jurisdiction's COVID-19 pandemic state of emergency or in the 90 days immediately following the lifting of such emergency.	Approved
<u>10I</u>	CALIFORNIA LAWYERS ASSOCIATION	Urges federal, state, local, territorial and tribal governments to enact legislation that imposes civil and criminal sanctions for lynching others on the basis of race, color, national origin, age, gender, sexual orientation, gender identity, religion, or the presence or appearance of mental or physical disability and imposes criminal and civil sanctions.	Approved as Revised*

* See attached

11-1	CONSTITUTIONAL AMENDMENT	Amends §1.2 of the Association's Constitution to include the following language as one of the purposes of the Association: "to defend the right to life of all innocent human beings, including all those conceived but not yet born."	Postponed Indefinitely
11-2	CONSTITUTIONAL AMENDMENT	Amends §6.8 to include the South Asian Bar Association of North America (SABA) as an affiliated organization of the American Bar Association (ABA) and be represented in the ABA House of Delegates accordingly.	Withdrawn
11-3	CONSTITUTIONAL AMENDMENT	Amends §31.7 of the Association's Constitution to change the name of the Standing Committee on Legal Aid and Indigent Defendants to the Standing Committee on Legal Aid and Indigent Defense and amend its jurisdictional statement.	Approved
11-4	HOUSE RULES AMENDMENT	Amends §44.2(b) of the Rules of Procedure of the House of Delegates to provide a presenter five minutes to present a resolution when the Chair of the House of Delegates invokes the rules of limited debate.	Approved
11-5	HOUSE RULES AMENDMENT	Amends §45.1 and §45.2 of the Rules of Procedure of the House of Delegates to add the requirement that a resolution must advance one or more of the ABA's Four Goals.	Motion to postpone failed; Not approved
100A	YOUNG LAWYERS DIVISION	Urges all employers in the legal profession to implement, maintain, and encourage the use of paid family leave policies for the birth, adoption, or foster placement of a child.	Approved
100B	YOUNG LAWYERS DIVISION SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE LAW STUDENT DIVISION SECTION OF STATE AND LOCAL GOVERNMENT LAW CRIMINAL JUSTICE SECTION	Supports the interpretation that "race," as included in antidiscrimination statutes, be not limited to the color of one's skin, but rather, includes other physical and cultural characteristics associated with race; urges federal, state, local, territorial, and tribal governments to enact legislation banning race discrimination on the basis of the texture, style, or appearance of a person's hair; encourages all federal, state, tribal, territorial, and local court systems, in	Approved

conjunction with state, territorial, tribal and local bar associations, to carefully review their discrimination policies and provide implicit bias training to eradicate discrimination on the basis of the texture, style, or appearance of a person's hair; and supports enactment of the Creating a Respectful and Open World for Natural Hair Act of 2019 (S. 3167, H.R. 5309, 116th Congress) or similar legislation that advances antidiscrimination on the basis of the texture, style, or appearance of a person's hair.

<u>101</u>	STANDING COMMITTEE ON ELECTION LAW SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE COMMISSION ON DISABILITY RIGHTS SENIOR LAWYERS DIVISION SECTION OF STATE AND LOCAL GOVERNMENT LAW	Adopts the <i>American Bar Association Election Administration Guidelines and Commentary</i> , dated August 2020, supplanting all earlier versions; recommends that all election officials ensure the integrity of the election process through the adoption, use, and enforcement of the Guidelines; and urges that federal, state, local, territorial, and tribal governments provide state, local, territorial, and tribal election authorities with adequate funding to implement the Guidelines and Commentary.	Approved
<u>102A</u>	INTERNATIONAL LAW SECTION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES TORT TRIAL AND INSURANCE PRACTICE SECTION CRIMINAL JUSTICE SECTION WASHINGTON STATE BAR ASSOCIATION	Urges federal, state, territorial and tribal governments to enact and enforce legislation that prohibits and penalizes the possession, sale, and trade of shark fins; urges that all nations enact laws that prohibit and penalize the possession, sale, and trade of shark fins; and encourages all international, regional, national, and state bar associations, and international organizations, to promote policies and laws that prohibit and penalize the possession, sale, and trade of shark fins.	Approved
<u>102B</u>	INTERNATIONAL LAW SECTION SECTION OF DISPUTE RESOLUTION	Urges all nations, including the United States, to become a party to and implement the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.	Approved

<u>102C</u>	INTERNATIONAL LAW SECTION CENTER FOR HUMAN RIGHTS	<p>Urges the United States, other nations, and the United Nations to facilitate and promote neutral and inclusive dialogues between the government of Cameroon and separatist leaders; urges adequate funding by the United States and other nations for the United Nations Office for the Coordination of Humanitarian Affairs' Humanitarian Response Plan; urges the United States, other nations, and the United Nations to urge the government of Cameroon and separatist groups, as applicable, to comply with their obligations under international human rights and international humanitarian law; urges the Commonwealth of Nations, the International Organization of La Francophonie, and the African Union to substantially support the above efforts and promote a peaceful resolution to the conflict; and urges the President of the United States to continue to withhold beneficiary country status under the U.S. Trade and Development Act of 2000 until the Cameroon government demonstrates measurable progress in establishing the rule of law, including by providing fair trials for prisoners detained in connection with protests against the government.</p>	Approved
<u>103</u>	COMMISSION ON DISABILITY RIGHTS SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE	<p>Urges federal, state, local, territorial, and tribal governments to adopt and enforce legislation and educational policy that 1) prohibits school personnel from using seclusion, mechanical, and chemical restraints on preschool elementary and secondary students, 2) prohibits school personnel from using physical restraint unless the student's behavior poses an imminent danger of serious physical injury to self or others, 3) prohibits the use of restraints in a face-down position or any other position that is likely to impair a student's ability to breathe, in situations where physical restraint is used, and 4) requires professional development and ongoing training in positive behavior interventions and trauma-informed care.</p>	Approved

<u>104A</u>	STANDING COMMITTEE ON SPECIALIZATION	Grants reaccreditation to the Social Security Disability Law program of the National Board of Trial Advocacy of Wrentham, Massachusetts, and the Business Bankruptcy Law, Consumer Bankruptcy Law, and Creditors' Rights Law programs of the American Board of Certification of Cedar Rapids, Iowa.	Approved
<u>104B</u>	STANDING COMMITTEE ON SPECIALIZATION	Adopts certain clarifying revisions to Standard 4.06(C) Written Examination of the Standing Committee on Specialization's Standards for the Accreditation of Specialty Certification Programs for Lawyers, dated August 2020.	Approved
<u>105</u>	COMMISSION ON LAW AND AGING SENIOR LAWYERS DIVISION SECTION OF REAL PROPERTY, TRUST, AND ESTATE LAW COMMISSION ON DISABILITY RIGHTS	Urges Congress to create and fund a Guardianship Court Improvement Program for adult guardianship (following the model of the State Court Improvement Program for child welfare agencies created in 1993) to support state court efforts to improve the legal process in the adult guardianship system, improve outcomes for adults subject to or potentially subject to guardianship, increase the use of less restrictive options than guardianship, and enhance collaboration among courts, the legal system, and the aging and disability networks.	Approved
<u>106A</u>	CRIMINAL JUSTICE SECTION	Urges criminal justice stakeholders to consider using a restorative justice response to crime as one effective alternative, or adjunct to, a criminal adjudicatory process, in appropriate cases; urges federal, state, local, territorial and tribal governments to develop grant and funding streams to enable criminal justice stakeholders and community partner organizations to develop, maintain, and assess the effectiveness of restorative justice programs in a data-driven manner; and urges the National Institute of Justice to prioritize and make publicly available an evaluation of restorative justice practices nationwide.	Approved

<u>106B</u>	CRIMINAL JUSTICE SECTION	Adopts the black letter of the <i>ABA Standards for Criminal Justice: Discovery, Fourth Edition</i> , dated August 2020, to supplant the Third Edition (August 1994) of the <i>ABA Standards for Criminal Justice: Discovery</i> .	Approved
<u>107</u>	STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS	Amends Model Rule 1.8(e) by adding a narrow exception to the Rule that will increase access to justice for the most vulnerable clients.	Approved as Revised*
<u>108A</u>	SECTION OF INTELLECTUAL PROPERTY LAW SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE	Urges Congress to enact legislation authorizing one or more principal officers, who are appointed by the President and confirmed by the Senate, to review decisions of the Patent Trial and Appeal Board (PTAB) determining the patentability of any claim reviewed by the PTAB before such decisions become final decisions of the U.S. Patent and Trademark Office (USPTO), and that the legislation should also restore Title 5 removal protections for Administrative Patent Judges (APJs) of the PTAB.	Approved
<u>108B</u>	SECTION OF INTELLECTUAL PROPERTY LAW	Supports, in principle, a transparent administrative process or processes to remove trademark registrations from the U.S. Patent and Trademark Office's Principal or Supplemental Register.	Approved
<u>109A</u>	SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR	Concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Definitions, Standards, and Rules of the <i>ABA Standards and Rules of Procedure for Approval of Law Schools</i> , that change the approval process for distance education programs to a substantive change process (Standard 105 and Rule 24) as required by the U.S. Department of Education, rather than the current variance process (Standard 107).	Approved

* See attached.

<u>109B</u>	SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR	Concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Rule 2 of the <i>ABA Standards and Rules of Procedure for Approval of Law Schools</i> , authorizing the Council to act quickly to address an emergency impacting multiple law schools—either regionally or nationally, by providing temporary relief from a rule or the requirements of a standard to allow law schools to respond to the emergency.	Approved
<u>109C</u>	SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR	Concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Rules 2, 22, 24, 27, 29, and 39 of the <i>ABA Standards and Rules of Procedure for Approval of Law Schools</i> .	Approved
<u>109D</u>	SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR	Concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Standards 102, 103, and 105 of the <i>ABA Standards and Rules of Procedure for Approval of Law Schools</i> .	Approved
<u>110</u>	STANDING COMMITTEE ON LEGAL ASSISTANCE FOR MILITARY PERSONNEL COMMISSION ON HOMELESSNESS AND POVERTY SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE SECTION OF STATE AND LOCAL GOVERNMENT LAW	Urges Congress and the Administration to require the Department of Veterans Affairs (VA) to remove regulatory barriers to full accreditation of Tribal Veterans Service Officers (TVSOs); provide sufficient federal funding for establishing and operating TVSOs where a tribal community is economically disadvantaged; and urges that when the Department of Veterans Affairs promulgates rules and regulations governing agent accreditation or the administration of programs, benefits, treatment, and services for veterans on Tribal land, the proposals be culturally competent, acknowledge the status of federally-recognized tribes as domestic dependent sovereigns, and be consistent with prevailing laws of sovereignty.	Approved
<u>111A</u>	SECTION OF LITIGATION SECTION OF INTERNATIONAL LAW	Adopts the “Best Practices for Third-Party Litigation Funding” dated August 2020.	Approved

<u>111B</u>	SECTION OF LITIGATION SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE COMMISSION ON YOUTH AT RISK COMMISSION ON HOMELESSNESS AND POVERTY COALITION ON RACIAL AND ETHNIC JUSTICE	Urges all federal, state, tribal, local, and territorial governments to adopt policies and contractual provisions that: 1) prohibit conducting strip searches of children and youth, except in exceptional circumstances, 2) require that, if the child or youth must be strip-searched, the search is conducted in a manner that respects the sexual orientation and gender identity of the child or youth and is the least intrusive manner possible, 3) prohibit body cavity searches of children and youth; and encourages court systems, lawyers, law schools, and bar associations to promote awareness of the harmful effects of strip searches and body cavity searches of children and youth, including trauma and re-victimization.	Approved as Revised*
<u>112</u>	STANDING COMMITTEE ON PARALEGALS	Grants approval to 1 paralegal education program, grants reapproval to 10 programs, withdraws the approval of 4 programs at the request of the institutions, and extends the term of approval to 48 programs.	Approved
<u>113A</u>	COMMISSION ON DOMESTIC & SEXUAL VIOLENCE SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS CENTER FOR HUMAN RIGHTS	Urges Congress to re-authorize and fully fund the Violence Against Women Act and similar legislation: 1) Preserves the protections approved in the 2013 reauthorization of VAWA, and continues to respond to emerging challenges and to the concerns from the field of expert professionals, 2) Improves services, minimizes bias, and prioritizes safety, autonomy, and support for all victims of gender-based violence, with a particular emphasis on the self-defined needs of marginalized and underserved groups, 3) Enhances judicial, legal, and law enforcement tools that respond to domestic violence, dating violence, sexual assault, and stalking in a trauma-informed way, 4) Strengthens the healthcare system's comprehensive and trauma-informed response to domestic violence, dating violence, sexual assault, and stalking, 5) Provides economic and housing opportunities and protections for victims of domestic violence, dating violence, sexual assault, and stalking, including non-	Approved

* See attached.

discrimination protections, and 6) Implements evidence-based prevention and educational programs that encourage healthy relationships and teach how to respond to attitudes and behaviors contributing to sexual and domestic violence.

113B	COMMISSION ON DOMESTIC & SEXUAL VIOLENCE SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS CENTER FOR HUMAN RIGHTS	Urges federal, state, local, territorial, and tribal governments to enact legislation and policies to require all health care providers to obtain specific informed patient consent in advance for all pelvic examinations.	Approved as Revised*
113C	COMMISSION ON DOMESTIC & SEXUAL VIOLENCE CRIMINAL JUSTICE SECTION SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS CENTER FOR HUMAN RIGHTS	Adopts the eight principles and accompanying commentary set forth in the U.S. Department of Justice December 15, 2015 guidance titled <i>Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence</i> ; and urges all federal, state, territorial, local and tribal law enforcement agencies in the United States to: (1) adopt those same principles; (2) provide periodic training to all law enforcement agency personnel to promote compliance with those principles; and (3) engage in regular review of compliance efforts and make any necessary adjustments to improve compliance.	Approved
114	CENTER FOR HUMAN RIGHTS	Urges all national governments to observe, respect, and protect the independence of the International Criminal Court; and condemns threats by governments to the International Criminal Court and its officers and personnel in the performance of their duties.	Approved

* See attached.

<u>115</u>	COMMISSION ON YOUTH AT RISK SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE COMMISSION ON IMMIGRATION	Recognizes that effective reforms of legal systems that affect the fundamental rights of children and youth cannot be accomplished without active participation by individuals who experienced those systems as children and youth; encourages attorneys, judges, advocates, legislators, bar associations, and law schools to promote effective, ongoing, and authentic engagement in legal system reform and advocacy efforts by individuals who have experienced those systems as children and youth and to remove barriers to that engagement; urges law schools, bar associations, law firms, and other professional organizations to create pathways for individuals with lived experience in legal systems that affect children and youth to pursue and succeed in legal and advocacy careers, both within youth-serving systems and more broadly in the legal profession; and calls on organizations focused on improving legal systems that affect children and youth to incorporate individuals who experienced those systems as children into leadership positions.	Approved
<u>116A</u>	SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE COALITION ON RACIAL AND ETHNIC JUSTICE	Urges federal, state, local, territorial, and Tribal governments to enact legislation that requires: 1) law enforcement agencies to keep records of instances in which lethal force is used, 2) the appointment of a fully independent special prosecutor whenever a person's death occurs in the custody of or during an encounter with a police officer or other law enforcement officer, and 3) a showing of objective reasonable necessity to establish a defense in criminal cases involving lethal force use by a police or other law enforcement officer.	Approved as Revised*
<u>116B</u>	SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE SECTION OF STATE AND LOCAL GOVERNMENT LAW COMMISSION ON HOMELESSNESS & POVERTY	Urges federal, state, local, territorial, and tribal governments to: 1) adopt and enforce fair lending laws and other federal, state and local laws targeting unfair or deceptive acts or practices, 2) adopt laws and policies that promote the adoption of an enhanced non-discrimination compliance system for a vehicle loan, 3) adopt legislation requiring the timely notice and disclosure of pricing	Approved as Revised*

* See attached

of add-on products by dealers on each vehicle through reasonable means; urges Congress to amend the Equal Credit Opportunity Act to require documentation and collection of the applicant's race, gender or national origin for non-mortgage credit transactions, specifically for vehicle transactions; and encourages state, local, territorial and tribal bar associations to offer educational programming and materials to lawyers and consumers to help them understand and navigate purchases and financing of vehicles.

<u>116C</u>	SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE COMMISSION ON SEXUAL ORIENTATION & GENDER IDENTITY HEALTH LAW SECTION CENTER FOR HUMAN RIGHTS	Opposes federal, state, local, territorial and tribal legislation, regulation, and agency policy that discriminates against transgender and non-binary people on the basis of gender identity and/or that imposes barriers to obtaining or providing medically necessary care to affirm an individual's gender identity.	Approved
<u>116D</u>	SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE CRIMINAL JUSTICE SECTION	Urges federal, state, local, territorial, and tribal legislatures to enact legislation, and correctional and detention facilities for both adults and minors to enact policies requiring that all incarcerated persons are provided with: 1) soap, paper towels, hand sanitizer, and facial tissues in sufficient quantities to prevent the transmission of infectious disease; 2) personal protective equipment including personal sanitizing products and face masks that are effective in preventing existing and emerging infections in sufficient quantities to prevent the transmission of infectious disease; and 3) sufficient facilities for hand washing, including unrestricted access to clean water and working sinks.	Approved
<u>116E</u>	SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE CRIMINAL JUSTICE SECTION SECTION OF STATE AND LOCAL GOVERNMENT LAW	Urges federal, state, local, territorial and tribal governments to: 1) enact and enforce legislation directing law enforcement officials and election officials to establish a protocol where pretrial detainees, who are eligible to register to vote or vote in the jurisdiction in which they are detained are given the opportunity to register to vote and cast ballots in their respective federal, state, and local elections; and 2)	Approved

	STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS COALITION ON RACIAL AND ETHNIC JUSTICE	promulgate and enforce regulations that facilitate the participation of such pretrial detainees in all federal, state, local, and special elections, including the ability to register to vote, obtain a ballot, and have that ballot delivered to the appropriate elections office.	
116F	SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE COMMISSION ON SEXUAL ORIENTATION & GENDER IDENTITY CENTER FOR HUMAN RIGHTS HEALTH LAW SECTION	Urges the United States Department of Defense to declare that: (a) HIV status alone has no impact on service members' ability to fully execute their duties and is not a determinant of fitness for duty; and (b) HIV is not a medical condition that should disqualify a person from enlistment, appointment, commissioning, deployment or retention in the U.S. military.	Withdrawn
116G	SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE SECTION OF STATE AND LOCAL GOVERNMENT LAW COMMISSION ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES COMMISSION ON SEXUAL ORIENTATION & GENDER IDENTITY COUNCIL FOR DIVERSITY IN THE EDUCATIONAL PIPELINE COALITION ON RACIAL AND ETHNIC JUSTICE COMMISSION ON DISABILITY RIGHTS CENTER FOR HUMAN RIGHTS	Urges that, in all states, territories and tribes, the highest courts or legislative bodies charged with the administration of justice, admission to the bar, or regulation of the legal profession, require that lawyers, judges, commissioners, referees, probation officers, and court personnel whose job requires interacting with the public receive periodic training regarding implicit biases that addresses, at minimum: sex, race, color, religion, ancestry, national origin, ethnic group identification, age, disability, medical condition, genetic information, marital status, sexual orientation, gender expression and gender identity; and urges that, in all states, territories, and tribes, the highest courts or legislative bodies, or agencies and boards that license and regulate the medical profession or social service professions, require that medical professionals and social service professionals who work with the public receive periodic training regarding the implicit biases previously noted.	Approved as Revised*

* See attached

<u>116H</u>	SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE CRIMINAL JUSTICE SECTION LAW STUDENT DIVISION SECTION OF STATE AND LOCAL GOVERNMENT LAW STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS COALITION ON RACIAL AND ETHNIC JUSTICE	Urges federal, state, local, territorial, and tribal governments to: 1) repeal laws that disenfranchise persons based upon criminal conviction, 2) restore voting rights to those currently and formerly incarcerated, including those on probation, parole, or any other community-based correctional program, 3) assure that no person convicted of crime is disenfranchised because of nonpayment of a fine, court costs, restitution or other financial obligations imposed as a result of a criminal conviction; and amends the Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3d Edition, 2004).	Approved
<u>117</u>	STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS	Urges federal, state, local, territorial, and tribal governments to: 1) use a considered and measured approach in adopting and utilizing virtual or remote court proceedings established as a result of the COVID-19 pandemic; 2) form appropriate committees to establish or review the use of virtual or remote court proceedings and make recommendations for procedures, revisions of procedures and best practices; 3) ensure that virtual or remote court proceedings guarantee equal access and meet standards of fundamental fairness and due process; 4) provide advance notice of proceedings and ensure full and meaningful public access to virtual proceedings, while also protecting the privacy of those proceedings legally exempted from public access; 5) reintroduce in-person court options as soon as safely feasible as determined by public health officials, and 6) study the impacts of virtual or remote court procedures and take steps to halt, alter, or revise virtual or remote court procedures if such study suggests prejudicial effect or disparate impact on case outcomes.	Approved as revised and amended

<u>300A</u>	<p> CYBERSECURITY LEGAL TASK FORCE STANDING COMMITTEE ON LAW AND NATIONAL SECURITY SCIENCE & TECHNOLOGY LAW SECTION STANDING COMMITTEE ON ELECTION LAW SECTION OF STATE & LOCAL GOVERNMENT LAW SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE SENIOR LAWYERS DIVISION CRIMINAL JUSTICE SECTION STANDING COMMITTEE ON PUBLIC EDUCATION </p>	<p> Recommends that Congress, state and local governments, election officials, and private sector entities to address the spread of disinformation that interferes with voting and other core electoral processes and to protect democratic institutions in the U.S. </p>	<p>Approved</p>
<u>300B</u>	<p> CYBERSECURITY LEGAL TASK FORCE STANDING COMMITTEE ON LAW AND NATIONAL SECURITY STANDING COMMITTEE ON PUBLIC EDUCATION SCIENCE & TECHNOLOGY LAW SECTION SECTION OF STATE & LOCAL GOVERNMENT LAW STANDING COMMITTEE ON ELECTION LAW SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE SENIOR LAWYERS DIVISION CRIMINAL JUSTICE SECTION </p>	<p> Urges federal, state, local, territorial, and tribal governments and private sector entities to promote digital literacy, civic education, and public awareness to build societal resilience to domestic and foreign malign disinformation operations. </p>	<p>Approved</p>

<u>301A</u>	SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE COALITION ON RACIAL AND ETHNIC JUSTICE CRIMINAL JUSTICE SECTION COMMISSION ON HOMELESSNESS & POVERTY COMMISSION ON DISABILITY RIGHTS COMMISSION ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION COMMISSION ON DOMESTIC & SEXUAL VIOLENCE COMMISSION ON SEXUAL ORIENTATION & GENDER IDENTITY COMMISSION ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES CALIFORNIA LAWYERS ASSOCIATION	Urges federal, state, local, territorial, and tribal governments to enact legislation to curtail the defense of qualified immunity in civil actions brought against law enforcement officers.	Approved
<u>301B</u>	SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE COALITION ON RACIAL AND ETHNIC JUSTICE COMMISSION ON HOMELESSNESS AND POVERTY COMMISSION ON DISABILITY RIGHTS COMMISSION ON DOMESTIC & SEXUAL VIOLENCE COMMISSION ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES COMMISSION ON SEXUAL ORIENTATION & GENDER IDENTITY CRIMINAL JUSTICE SECTION	Urges the American Bar Association to, consistent with its demonstrated values, propose Juneteenth be recognized as a national, paid legal holiday.	Approved

SECTION OF STATE AND
LOCAL GOVERNMENT
LAW
CALIFORNIA LAWYERS
ASSOCIATION

<u>301C</u>	SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE	Urges the federal government to desist from the use of force by federal agents to suppress lawful First Amendment activity, opposes the targeted use of force against journalists, legal observers, and others, denounces the deployment of unidentified federal officers or officers using unmarked vehicles to suppress lawful First Amendment activity and to remove individuals from city streets, and calls upon the United States Department of Justice and Department of Homeland Security to cease and publicly renounce such tactics, and to investigate their use.	Approved
<u>400A</u>	RESOLUTION WITH REPORT ON ARCHIVING	Recommends that certain Association policies that pertain to public issues and are 10 years old or older be archived.	Approved
<u>400B</u>	RESOLUTION WITH REPORT ON ARCHIVING	Recommends that certain Association policies that pertain to public issues that were adopted in 2000 which were previously considered for archiving but retained be archived.	Approved

RESOLUTION

1 ~~RESOLVED, That the American Bar Association reaffirms its support for an amendment~~
2 ~~to the United States Constitution to provide for participation of citizens in American~~
3 ~~territories to vote in national elections; and.~~

4 ~~FURTHER~~ RESOLVED, That the American Bar Association opposes, as violative of the
5 Equal Protection Clause, the provisions of the federal Uniformed and Overseas Citizens
6 Absentee Voting Act (UOCAVA), which permit former residents of a state who have
7 moved to American Samoa or the Commonwealth of the Northern Marianas Islands to
8 continue to vote in national elections in that state, while denying those same rights to
9 those who have moved from a state to the U.S. Virgin Islands, Puerto Rico, and Guam.

Deletions struck through; additions underlined

RESOLUTION

RESOLVED, That the American Bar Association urges the United States, other nations and the United Nations to express their support and take actions in furtherance of such support for the autonomy, rule of law, judicial independence, and protection and respect for human rights in the Hong Kong Special Administrative Region (the “HKSAR”), as established by the *1984 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong* (the “Joint Declaration”) and the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (the “Basic Law”);

FURTHER RESOLVED, that the American Bar Association supports enactment by the United States of legislation, or as appropriate, implementation of policies and procedures, that:

- condemns all acts by the People’s Republic of China (“the PRC”) that violate its obligations under international and national law, including the Joint Declaration and the Basic Law;
- calls upon all nations of the world to stand with the people of Hong Kong in support of the rule of law;
- provides for targeted sanctions, freezing of assets, travel bans and similar measures against persons or entities who materially contribute to the contravention of obligations under international or national law, as well as financial institutions that conduct significant transactions with persons or entities described above;
- identifies and implements a process to give ~~stipulates that~~ any permanent resident of the HKSAR, with no other right of abode as provided under HKSAR law, access to seek protection through the refugee resettlement process, ~~is eligible for asylum in the United States and is authorized to apply for asylum, where appropriate~~ including at the U.S. Consulate General in Hong Kong and Macau, or if in or at the borders of the United States, through asylum or temporary protected status, until the United States Secretary of State certifies to the United States Congress, under the United States Hong Kong Policy Act of 1992, that the HKSAR has regained a high degree of autonomy; and
- commits resources to monitor and regularly report on the status of the autonomy, rule of law, judicial independence, and protection of and respect for human rights in the HKSAR; and

FURTHER RESOLVED, That the American Bar Association reaffirms its call upon the PRC to allow free movement of persons to and from the HKSAR and further urges the United States to use its influence to encourage the continuance and growth of democratic institutions in Hong Kong.

Deletions struck through; additions underlined

AMERICAN BAR ASSOCIATION

CALIFORNIA LAWYERS ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges Congress to enact the Emmett Till
2 Antilynching Act or similar legislation to provide that whoever conspires with another
3 person to violate section 245, 247, or 249 of ~~this~~ United States Code title 18 or section
4 901 of the Civil Rights Act of 1968 ([42 U.S.C. 3631](#)) shall be punished in the same manner
5 as a completed violation of such section, except that if the maximum term of imprisonment
6 for such completed violation is less than 10 years, the person may be imprisoned for not
7 more than 10 years.

8
9 [FURTHER RESOLVED, That the American Bar Association urges state, local, territorial,](#)
10 [and tribal governments to enact legislation containing criminal and civil sanctions to](#)
11 [prohibit lynching, conspiracies to lynch, attempts to lynch, or solicitations to lynch a](#)
12 [person, no matter the form or manner in which the lynching may take place or is proposed](#)
13 [to take place, on the basis of race, color, national origin, age, gender, sexual orientation,](#)
14 [gender identity, religion, ~~the presence or appearance of mental or physical disabilities~~](#)
15 [disability, government position, or association with any political or non-governmental](#)
16 [organization.](#)

Deletions struck through; additions underlined

RESOLUTION

RESOLVED, That the American Bar Association amends Rule 1.8(e) and related commentary of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

Model Rule 1.8: Current Clients: Specific Rules

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; ~~and~~

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client ~~pro bono~~ through a nonprofit legal services or public interest organization and a lawyer representing an indigent client ~~pro bono~~ through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses ~~if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle.~~ The ~~legal services must be delivered at no fee to the indigent client and the~~ lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such ~~financial assistance to gifts to prospective~~ clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

Comment

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses,

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because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts ~~if financial hardship would otherwise prevent the client from instituting or maintaining pending or contemplated litigation or administrative proceedings or from withstanding delays that would put substantial pressure on the client to settle.~~ Gifts permitted under paragraph (e)(3) include modest contributions ~~as are reasonably necessary~~ for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. ~~Modest gifts are~~ A gift is allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective financial assistance to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, ~~including modest gifts may be provided~~ pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

[No other changes proposed in the commentary to this Rule except renumbering succeeding paragraphs.]

Deletions struck through; additions underline

RESOLUTION

1 RESOLVED, That the American Bar Association urges all federal, state, local, territorial,
2 and tribal governments to adopt policies and contractual provisions that prohibit
3 conducting strip searches of children and youth, except in exceptional circumstances,
4 where the searches are permitted only:

- 5
6 (1) when the child or youth is in custody;
7 (2) when there is ~~probable cause to believe~~reasonable suspicion that the child or
8 youth possesses or has had immediate access to an implement that poses a threat
9 of imminent bodily harm to themselves or others;
10 (3) after all other less intrusive methods of discovering and removing the implement
11 have been exhausted, including the use of alternative search techniques that can
12 be performed while the child or youth is fully clothed; and
13 (4) after the child or youth has been given notice, in a manner that is consistent with
14 the child's or youth's primary language and developmental stage, and that takes
15 into account accommodations for disability, that they will be searched and that they
16 have the opportunity to reveal any implement they are carrying instead of being
17 searched; and
18

19 FURTHER RESOLVED, That the American Bar Association urges all federal, state, local,
20 territorial, and tribal governments to adopt policies and contractual provisions that require
21 that, if the child or youth must be strip-searched, the search is conducted in a manner
22 that respects the sexual orientation and gender identity of the child or youth and is the
23 least intrusive manner possible; and
24

25 FURTHER RESOLVED, That the American Bar Association urges all federal, state, local,
26 territorial, and tribal governments to adopt policies and contractual provisions prohibiting
27 body cavity searches of children and youth; and
28

29 FURTHER RESOLVED, That the American Bar Association encourages court systems,
30 lawyers, law enforcement leaders, medical professionals law schools, and bar
31 associations to promote awareness of the harmful effects of strip searches and body
32 cavity searches of children and youth, including trauma and re-victimization.

Deletions struck through; additions underlined

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RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and
2 tribal governments to enact legislation and policies to require all health care providers—
3 ~~including facilities, physicians, physician assistants, residents, nurses, radiologists and~~
4 ~~sonographers, therapists, laboratory technicians, midwives, and health care students—~~
5 to obtain specific informed patient consent in advance for all ~~medically unnecessary~~ pelvic
6 examinations.

Deletions struck through; additions underlined

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, tribal, and
2 territorial governments to enact legislation that requires law enforcement agencies to
3 keep records of all instances in which lethal force is used or a claim is made that non-
4 lethal force is excessive, by maintaining the known or reasonably available demographic
5 data of all persons against whom lethal force is used, including but not limited to race,
6 color, national origin, age, gender, sexual orientation or gender identity, religion, the
7 presence of mental or physical disability, whether the person was fleeing at the time,
8 whether the individual possessed a weapon (including the type of weapon), and whether
9 a body camera was used;

10
11 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
12 tribal and territorial governments to enact legislation to provide, when a person's death
13 occurs in the custody of or during an encounter with a law enforcement officer acting in
14 the officer's official capacity, a mechanism to ensure fair and independent evaluation,
15 referral to an independent entity for an investigation, and, as appropriate, prosecution by
16 an independent entity; ~~FURTHER RESOLVED, That the American Bar Association urges~~
17 ~~federal, state, local, tribal, and territorial governments to enact legislation requiring the~~
18 ~~appointment of a fully independent special investigator and a fully independent special~~
19 ~~prosecutor whenever a person's death occurs in the custody of or during an encounter~~
20 ~~with a police or other law enforcement officer acting in the officer's official capacity;~~
21
22

23 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
24 tribal, and territorial governments to enact or amend, as necessary, laws to provide that
25 the reasonableness of police use of force should be judged on the basis of objective
26 necessity ~~legislation that requires a police officer who is charged with a crime resulting~~
27 ~~from the excessive or lethal use of force and who claims self-defense or defense of others~~
28 ~~to prove that the use of force was objectively necessary;~~
29

30 FURTHER RESOLVED, that the American Bar Association urges Congress to fund a
31 nationally respected entity independent of law enforcement to develop and keep current
32 a national data base that records disciplinary actions against and complaints of excessive
33 force by law enforcement officers, including action by any government or tribal entity
34 revoking a law enforcement officer's certificate or license, and to require all law
35 enforcement agencies receiving federal funds to record and report to that entity all said
36 disciplinary actions and complaints;
37

38 FURTHER RESOLVED, that the American Bar Association urges all federal, state, local,
39 tribal, and territorial governments to enact legislation that (a) prohibits the use of
40 chokeholds, any other carotid restraint or any induced method of asphyxiation by law
41 enforcement officers, (b) eliminates no-knock warrants in drug cases, (c) eliminates rules
42 and procedures ~~_(such as New York State's Section 50-A)_~~ which prevent disclosure of

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43 citizen complaints or disciplinary actions against law enforcement officers, and (d)
44 expresses the duty of every law enforcement officer to act to prevent and stop the use of
45 excessive force or improper use of lethal force by another law enforcement officer; and
46
47 FURTHER RESOLVED, that the American Bar Association supports the “Justice in
48 Policing Act”, H.R.7120, and similar federal, state, local, tribal, and territorial legislation
49 whose purpose is “to hold police accountable, change the culture of law enforcement and
50 build trust between law enforcement and our communities.”

Deletions struck through; additions underlined

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RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial and
2 tribal governments to:

3
4 a) ~~adopt and~~ enforce fair lending laws and other federal, state and local laws targeting
5 unfair or deceptive acts or practices to address discrimination in vehicle sales and
6 financing markets;

7
8 b) adopt laws and policies that promote the adoption of an enhanced
9 nondiscrimination compliance system for dealer compensation for arranging and/or
10 originating a vehicle finance contract by offering a safe harbor against pricing
11 discrimination claims for dealers that faithfully implement the NADA/NAMAD/AIADA
12 Fair Credit Compliance Policy and Program; ~~loan or a flat percentage fee for dealer~~
13 ~~compensation;~~ and

14
15 c) adopt legislation requiring that the purchase of any voluntary vehicle protection
16 product may not be made a condition of the sale or lease of the vehicle, and that there
17 is clear and conspicuous disclosure of pricing of voluntary protection products by
18 dealers through reasonable means, such as a pricing sheet, menu, and/or website,
19 before a consumer purchases a vehicle; ~~the timely notice and disclosure of pricing of~~
20 ~~add-on products by dealers on each vehicle through reasonable means, such as a~~
21 ~~pricing sheet and/or website prominently displayed and available at its location, before~~
22 ~~a consumer negotiates to purchase a vehicle;~~

23
24
25 ~~FURTHER RESOLVED, That the American Bar Association urges Congress to amend~~
26 ~~the Equal Credit Opportunity Act, 15 U.S.C 1691, to require documentation and collection~~
27 ~~of the applicant's race, gender and national origin for vehicle credit transactions, through~~
28 ~~applicant voluntary self-identification using disaggregated racial and ethnic categories,~~
29 ~~made available through a Demographic Information Addendum, or some equivalent~~
30 ~~measurement;~~

31
32 FURTHER RESOLVED, That the American Bar Association encourages state, local,
33 territorial and tribal bar associations to work with consumer, dealer and creditor
34 representatives to offer educational programming and materials to lawyers and
35 consumers to help them understand and navigate purchases and financing of vehicles
36 and understand consumers' legal rights with respect to such purchases and loans.

RESOLUTION

1 RESOLVED, That the American Bar Association urges that, ~~in~~ all states, territories and
2 tribes, ~~the highest courts or legislative bodies charged with the administration of justice,~~
3 ~~admission to the bar, or regulation of the legal profession,~~ require that lawyers, judges,
4 commissioners, referees, probation officers, and court personnel ~~whose job requires~~
5 ~~interacting with the public~~ receive periodic training regarding implicit biases that
6 addresses, at minimum, the following subjects: sex, race, color, religion, ancestry,
7 national origin, ethnic group identification, age, disability, medical condition, genetic
8 information, marital status, sexual orientation, gender expression and gender identity; and
9

10 FURTHER RESOLVED, That the American Bar Association urges that, ~~in all~~ states,
11 territories, and tribes, ~~the highest courts or legislative bodies, or agencies and boards~~
12 ~~that license and regulate the medical profession or social service professions,~~ require
13 that medical professionals and social service professionals who work with the public
14 receive periodic training regarding implicit biases that addresses, at minimum, the
15 following subjects: sex, race, color, religion, ancestry, national origin, ethnic group
16 identification, age, disability, medical condition, genetic information, marital status, sexual
17 orientation, gender expression and gender identity.
18

19 FURTHER RESOLVED, That the American Bar Association urges jurisdictions requiring
20 implicit bias training to collect and assess data to evaluate the effectiveness of the training
21 in reducing implicit bias and implement other appropriate strategies for reducing implicit
22 bias.

Deletions struck through; additions underlined

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RESOLUTION

1 RESOLVED, That the American Bar Association applauds the work of federal,
2 state, local, territorial and tribal courts and the members of federal, state, local
3 territorial and tribal bars for their thoughtful and innovative approaches to
4 administer the justice system and protect the interests of litigants during the
5 COVID-19 pandemic;

6
7 ~~FURTHER RESOLVED, That the American Bar Association urges that mandatory~~
8 ~~use of virtual or remote court procedures established as a result of the COVID-19~~
9 ~~pandemic be limited to essential proceedings, defined as preliminary proceedings~~
10 ~~that have the potential to result in the detention or release of an individual from~~
11 ~~custody and other critical civil proceedings such as temporary orders of protection,~~
12 ~~interim child custody or child welfare orders or other temporary injunctions or~~
13 ~~orders concerning the safety or placement of an individual, as well as hearings on~~
14 ~~petitions necessary to protect constitutional rights;~~

15
16 FURTHER RESOLVED, That the American Bar Association supports a considered
17 and measured approach in adopting and utilizing virtual or remote court
18 proceedings established as a result of the COVID-19 pandemic, prioritizing use of
19 such procedures for essential proceedings and those cases in which litigants
20 consent to the use of virtual or remote processes.

21
22 FURTHER RESOLVED, That the American Bar Association urges regular review
23 of any decision to detain an individual pending a final proceeding made during a
24 period of mandatory use of virtual or remote court proceedings;

25
26 FURTHER RESOLVED, That the American Bar Association urges that any
27 authorization of mandatory use of virtual and remote court proceedings during the
28 COVID-19 pandemic ~~include a self-executing expiration provision to take effect~~
29 ~~within a designated period of time that is~~ continue for as short a time as possible
30 and in no event longer than the duration of the declaration of emergency issued in
31 the jurisdiction;

32
33 FURTHER RESOLVED, That the American Bar Association urges that use of
34 virtual or remote court proceedings ~~beyond essential proceedings~~ be permitted
35 when litigants have ~~provided informed~~ consented to the use of such procedures,
36 including being offered ~~either a safe, as determined by independent medical~~
37 ~~experts, in-person proceeding or~~ a delay until ~~such~~ a safe, in-person proceeding
38 can be held;

39
40 FURTHER RESOLVED, That the American Bar Association urges that no person
41 consenting to the use of virtual or remote court proceedings be required to sign a

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blanket waiver of rights or waive the right to have the procedure or outcome of the proceeding be subject to appellate or post-conviction review;

FURTHER RESOLVED, That the American Bar Association urges the formation of committees to conduct evidence-based reviews of the use of virtual or remote court proceedings and make recommendations for procedures, revisions of procedures and best practices to ensure that they are guaranteeing all applicable constitutional rights and ensure that attorneys can comply with their professional ethical obligations. Such committees should include representatives of all constituencies involved in or affected by the type of court or proceeding under consideration;

FURTHER RESOLVED, That the American Bar Association urges that all virtual or remote court proceedings be tailored to the needs of participants and take into account the type of case and proceeding to be conducted, the participants involved, and whether participants are likely to be represented by counsel, by:

(1) Considering the ability of all participants to access and fully participate in the proceedings, including:

- a. Ensuring that participation options for virtual or remote court proceedings are free for participants and observers;
- b. Providing options concerning participation and permitting participants to select the means of participation best suited to them without prejudice;
- c. Allowing participants to alter their chosen means of participation for each proceeding;
- d. Providing necessary support for those who, for financial, technological, language access, disability, or other reasons, may not be able to fully participate without assistance;
- e. Ensuring that methods of participation reduce, to the fullest extent possible, any prejudice that might result from the circumstances of participation;
- f. Providing contingencies for possible technological or access problems during the proceeding;
- g. Guaranteeing that participants are not pressured or obligated to waive constitutional rights;

(2) Providing training on applicable procedures, including training on possible areas of technological bias;

(3) Providing additional funding to assist courts, legal aid and public defense providers, prosecutors, and social service providers to expand and improve access to virtual and remote court proceedings, particularly for those who may require financial, technological, language access, or other specialized assistance;

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- 84 (4) Protecting full attorney-client relationships, including providing access
85 for private consultation both before and during court proceedings and
86 guaranteeing the confidentiality of such communications; and
87 (5) Enabling and encouraging access to other litigation assistance
88 programs and self-help programs previously available;
89

90 FURTHER RESOLVED, That the American Bar Association urges that advance
91 notice be provided to the public of all virtual or remote proceedings and that full
92 and meaningful public access to such proceedings be guaranteed, while also
93 protecting the privacy of those proceedings legally exempted from public access;
94 and
95

96 FURTHER RESOLVED, That the American Bar Association urges that virtual and
97 remote court procedures be studied for purposes of developing best practices and
98 determining possible biases, and that, if such studies suggest prejudicial effects or
99 disparate impacts on particular litigants or case outcomes, steps should be taken
100 to halt, alter, or revise virtual or remote court procedures.

MEMORANDUM

TO:

FROM: Select Committee

SUBJECT: 2020 Virtual Annual Meeting of the American Bar Association and
Meeting of the House of Delegates

DATE: September 3, 2020

REPORT ON THE ABA VIRTUAL ANNUAL MEETING

The 143rd and first ever Virtual Annual Meeting of the American Bar Association (the “ABA” or the “Association”) was held August 3-4, 2020. A wide variety of programs were sponsored by committees, sections, divisions, forums and affiliated organizations. The House of Delegates met virtually for one and a half days. The Meeting of the Membership was held, and the Nominating Committee also met virtually.

The Nominating Committee hosted a Candidates Forum on Saturday, August 1, 2020. The candidate for President-Elect for the 2021-2022 term, Deborah Enix-Ross of New York, seeking nomination at the 2021 Midyear Meeting, gave remarks to the Nominating Committee and to the members of the Association.

THE HOUSE OF DELEGATES

The House of Delegates of the American Bar Association (the “House”) met on Monday, August 3, and Tuesday, August 4, 2020. William R. Bay of Missouri, Chair of the House of Delegates, presided.

A historical recording of the invocation and brief remarks were given by recently departed Congressman John Lewis. The Chair of the House Committee on Credentials and Admissions, Eileen M. Letts of Illinois, welcomed the new members of the House and moved that the electronic roster be approved as the permanent roster for this meeting of the House. The motion was **approved**.

Christina Plum of Wisconsin, Chair of the Committee on Rules and Calendar, provided a report on the Final and Consent Calendars for the House. She stated that all supplemental materials for the House were sent electronically and posted on the House’s webpage. She moved to adopt the final and consent calendars and also to approve the list of individuals who sought privileges of the floor. Ms. Plum also proposed a special rule which provided that if no salmon slips were filed in opposition to a resolution, the number of speakers on such resolutions would be limited to no more than three speakers. All motions were **approved**. Ms. Plum noted that the deadline for submission of Resolutions with Reports for the 2021 Midyear Meeting is Wednesday, November 18, 2020, while the deadline for Informational Reports is Friday, December 4, 2020.

Ms. Plum reminded the House of the treatment of Reports 400A and 400B regarding the archiving of policies.

Ms. Plum noted that in an effort to streamline ceremonial activities in the House, while continuing to respect and acknowledge deceased members of the House, the practice for memorials during the meeting of the House will be to acknowledge photos and observe a moment of silence for former members of the House.

Secretary Mary L. Smith of Illinois moved that the proposed Summary of Action for the House for the 2020 Austin Midyear Meeting be adopted as the official record of the House. The motion was **approved**. Secretary Smith moved that the House adopt the recommendations for the continuation of certain special committees and commissions (Report 177A). The motion was **approved**. Secretary Smith noted the submission of Report No. 177, the Board of Governors Informational Report.

Deceased members of the House were named and remembered by a moment of silence.

For more details of the House meeting, see the following two-part report of the House session. The first part of the report provides a synopsis of the speeches and reports made to the House. The second part provides a summary of the action on the resolutions presented to the House.

I. SPEECHES AND REPORTS MADE TO THE HOUSE OF DELEGATES

Statement by the Chair of the House of Delegates

William R. Bay of Missouri, Chair of the House of Delegates, welcomed the delegates to the House and thanked the ABA Media Relations & Strategic Communications for informing ABA members, the legal community, and the general public about developments in the House.

Before moving forward with his remarks, Chair Bay conducted several test votes to ensure the proper functioning of the voting tool. In his statement to the House, Chair Bay discussed the procedure for addressing the business of the House and reminded members that the House Rules of Procedure could be found on page 47 of the Association's Constitution and Bylaws. He recognized and thanked members of the various House Committees. Chair Bay also recognized the Committee on Rules and Calendar, chaired by Christina Plum of Wisconsin, which also includes members Roula Allouch of Kentucky, Aurora Austriaco of Illinois, William D. Johnston of Delaware, and Tommy D. Preston, Jr. of South Carolina.

Statement by the ABA President

President Judy Perry Martinez expressed her appreciation and love for her husband and their children, as well as her colleagues at Simon, Peragine, Smith & Redfearne LLP. She also noted that ABA work is not possible without the dedication of our staff, led by Jack Rives.

We miss gathering in person, but far worse are the economic and health setbacks, pain and suffering that many have experienced as a result of COVID-19. Our organizations and institutions cannot do what needs to be done without the support and involvement of each and every one of us. In the words of the ABA's recent report on women lawyers of color, we must ensure that nobody gets left out or gets left behind as they pursue a career of service in the law. Only our dedication to a truly diverse and inclusive legal profession will enable us to achieve equal justice and liberty for all.

The ABA's Coordinating Group on Practice Forward is harnessing experts from across the Association and beyond to address emerging practice needs of lawyers across practice settings. Many of our members are struggling in their practices and they, along with law students and law graduates, are owed our support and assistance as we all move through and beyond these difficult times.

We must pledge that another day will not go by without raising our voices to ensure that the legal system is more just than it was the day before. It is our responsibility to fight injustice, especially injustice caused by laws and practices that are racist or unjust in words or effect. It is our responsibility to fight injustice when police inflict disproportionate force against Black men and women. When the rule of law and human rights are threatened, whether domestically or on the other side of the globe, when leaders stoke hate and fear and their targets suffer, when peaceful protesters are met with violence, when government leaders abuse their power, act illegally or do what may be technically legal yet not what our country stands for, it is our responsibility to defend what our democracy is all about.

We lawyers need to give full throated support to the rule of law and serve as coworkers, volunteers, poll watchers, and community champions of the right for all to vote freely and fairly. In 1866, Francis Ellen Watkins Harper said "We are all bound up together in one great bundle of humanity" at the National Women's Rights Convention in New York City. And society, she continued, "cannot trample on the weakest and feeblest of its members without receiving the curse in its own soul." These themes ring true for the soul of America today. The soul of America will be freed of its curse because of what the ABA and lawyers across America stand for.

We believe in dignity. We believe that every person in our country is afforded constitutional rights. We do what we do because justice matters. And our children's children will be told the truth of our time, that it was the lawyers who held tight to the principal that we are all created equal, endowed with certain inalienable rights, and that among these are life, liberty and pursuit of happiness.

Statement by the Executive Director

Chair Bay reminded delegates that they received a link to the report of Executive Director Jack L. Rives of Illinois and that they should take the opportunity to view it.

Executive Director Rives talked about how the Association and profession must adapt. The changes we thought would occur over the next five to ten years are happening now, forcing dramatic changes over a short period of time. Executive Director Rives talked about the

devastating impact of the pandemic, including on the legal profession in particular.

Executive Director Rives is optimistic because the Association was prepared. The Association had business continuity plans in place and transitioned to a virtual workplace relatively seamlessly. All of a sudden, what we thought would be ABA next, has become ABA now. By the time stay-at-home orders were issued, the Association had already implemented its continuity and work from home plans.

A few of the core essential staff members talked about how they protected everything from the Association's servers to the plants that staff had left in their offices. The Association deployed laptops and VPNs to staff who were now working remotely. IT was fielding 200-250 inquiries a day at their peak, and were able to provide support to ensure that Association operations continued with minimal interruptions.

Executive Director Rives' report also talked about how the Association responded to the necessary cancellation of numerous ABA meetings, and the expertise they developed on *force majeure* clauses. Despite hundreds of meetings cancelled or rescheduled, no cancellation fees were incurred. This has resulted in a savings of over \$5,300,000. Meetings and Travel is now using the information and knowledge gained to inform the contracts they craft and enter relating to future meetings.

Executive Director Rives talked about the value proposition and the move to a sensible dues structure. There are now only five price points for membership, as well as quite a few new and added benefits of membership. The CLE marketplace has more than 600 courses available to members for free.

This experience has shown that we are able to rise to the challenge. The Board of Governors met via Zoom and had a very productive meeting. When the pandemic closed Congressional offices, ABA Day shifted to an all-online "ABA Day Digital." A lot of those meetings took place via Zoom, Microsoft Teams, or Google Hangouts. Over 15,000 people engaged in the event through Twitter.

The Antitrust Section pivoted to a virtual meeting. It usually has 3400 attendees, but in a virtual context, it attracted 19,000 attendees. It is viewed as an investment in the Section and the Association. The commitment from the staff and volunteer leaders ensures we show the world what we have in terms of advocating for the rule of law and member benefits.

To date, we have achieved 95% of our target for total dues paying members and 232% of our goal for new dues paying members. Dues revenue is at 92% of the target. Of the lawyer members, almost all now pay dues. We now deliver value to those dues paying members in order to achieve the goals of our association – serve our members, improve our profession, eliminate bias and enhance diversity, and promote the rule of law here and overseas.

SCOPE Nominating Committee

W. Andrew Gowder, Jr., Chair of the Committee on Scope and Correlation of Work ("SCOPE"), nominated Amy Lin Meyerson of Connecticut to serve on the Committee for a five-

year term, beginning at the conclusion of the 2020 Annual Meeting. The motion was **approved**. Later that day, the House elected Ms. Meyerson to serve on SCOPE.

Passing of the President's Gavel and Statement by President-Elect

ABA President Judy Perry Martinez introduced President-Elect Trish Refo. President-Elect Refo may be best known for her service as Past Chair of the Section of Litigation. However, she has led many ABA efforts, including ABA Day and the Standing Committee on Membership. President Martinez passed the gavel with warmth and hope to President-Elect Refo.

The Honorable Mary Schroeder of the United States Court of Appeals for the Ninth Circuit administered the oath of office to President-Elect Refo. The oath was administered in front of the home built by Justice Sandra Day O'Connor and where she lived when she was appointed as the first woman justice of the United States Supreme Court.

President Refo explained that we meet at a moment of great challenge for our nation. The pandemic has upended our communities and our lives and we are suffering an unimaginable loss of life. We grieve for the family and loved ones of those whom we have lost.

We are facing and will continue to face a tsunami of legal issues that arise from this pandemic. At the same time, the cries for racial equity and an end to systemic racism reverberate on our streets and in our souls. As stewards of the American judicial system, we have to own the shortcomings throughout that system that disadvantage Black Americans and create barriers to them. We also have to own the barriers in our own profession that still exist and make it vastly harder for Black lawyers to thrive and for Black women lawyers in particular.

We are the largest voluntary association of lawyers in the world, and we have work to do. We will continue our work to lead the legal profession and the justice system through this pandemic. To say that it has been a time of change for our profession is a huge understatement.

President Refo has been practicing from home for the last five months. With all of this change and disruption comes real opportunity, and that is where we are focused. The Practice Forward initiative is harnessing the power of the Association and its entities to help America's lawyers navigate this new environment and thrive. Chaired by Bill Bay and Laura Farber, it is coordinating our work across the Association to respond to changes in the practice of law.

At the same time, the ABA will continue our commitment to addressing the staggering legal needs arising out of this pandemic. Jim Sandman has agreed to Chair the Task Force on Legal Needs Arising Out of the Pandemic will be focused on these efforts.

We will also intensify our work on racial equity and anti-racism. Our Center for Diversity and Inclusion will continue to lead and partner on critical efforts to eliminate racism, bias, and discrimination in all its forms and to enhance diversity, equity, and inclusion in our Association, in the profession, and in our justice system. President Refo has asked each entity within the Association to move racial equity and anti-racism to the top of their agendas for the

coming year and new initiatives will be announced soon.

As we advance the cause of justice, we will also watch regulatory changes in several states intended to improve access to justice. There are differing views on these experiments, and so we are going to help study the actual results. The ABA will work with the academy and the regulators to agree on measures and metrics that will tell us whether and how these innovations are bridging the access to justice gap.

We stand for a judiciary that is fair, impartial, and independent of every administration. We stand for the equal treatment of every person by the police and our justice system. We stand for the rule of law in which citizens and the government are held to account and where the laws are administered fairly and without regard to privilege. And we stand for free and fair elections where eligible citizens get to vote without impediments and have their votes counted. We will stand for all of these values at home and around the world. If President Refo can help anywhere in the world to advance the rule of law and the cause of justice, she will be there. She will stand anywhere for the values we believe in.

President Refo closed by recognizing President Martinez for her leadership, grace, untiring dedication, and laser-focused vision. We are better as individuals and as an Association for her amazing leadership. President Refo thanked her husband, Don, her son, Andrew, and her family and friends for their love, support, and example of dedication to duty. President Refo also recognized her colleagues at Snell and Wilmer and the firm chair, as well as the late John Bouma, whose example of professionalism, service to the bar and to the community will always be her north star.

Statement by the Treasurer

ABA Treasurer Michelle A. Behnke of Wisconsin covered three items: the year to date results, the trends she's seen, and the FY 2021 budget.

Revenue was down significantly. Expenses were managed down significantly. Despite that management, we are running a deficit. Consolidated revenue through May was \$135 million. That was almost \$30 million less than budget. Much of it is attributable to lower dues revenue, meeting fees, advertising, and royalties. Grants were also affected by the pandemic.

Shifting to expenses, actual expenses were almost \$24 million below budget. All reporting lines saw favorability. The favorability actually came from things like lower meeting and travel expenses, lower compensation, fringe benefits, and lower advertising and marketing expenses. On a consolidated basis through May 2020, we're showing a deficit of a little more than \$6 million. Investment activity also shows a loss of \$5.8 million. We have used \$12.6 million to support our operations and the value proposition. Our assets stand at \$282 million, most of which is long term investments. Total liabilities are \$158 million. Notably, our pension liability only gets revalued once a year as of August 31, and that liability is likely to increase given the decrease in interest rates that we've been seeing.

Turning to the trends, Treasurer Behnke noted that non-dues revenue has not followed a trend over the last four years. Since a good portion of our non-dues revenue comes from

discretionary spending such as advertising, travel and meeting, we expect to see some softness in our non-dues revenue in the coming year. Growing revenue, especially non-dues revenue, is the only way we can get off of the expense reduction treadmill that we've been on lately. Treasurer Behnke encourages members to think about how to increase non-dues revenue.

Next, the general operation expense has gone down by \$18 million since 2017. A good deal of that has come from reduction in staff, but some of it has come from relocating staff or shifting staff to grants and sections. Because people and space are the largest part of our operations, any further reductions will require consideration of what we do, where we do it, and how we do it. Now is an excellent time to do that strategy work.

Finally, the FY 2021 budget has a balanced budget as to general operations at \$78.5 million. The sections line is not yet balanced because sections still have a bit more time to complete their budgeting work. Treasurer Behnke took a moment to recognize those sections who considered whether they could give back some or all of the general operations funding they would otherwise receive to support their operations. Collectively, the sections agreed to give back almost \$1.7 million. While we are presenting a balanced budget for general operations, we are also mindful of the pandemic and that we don't know the full effects on our operations and our members. We are preparing to pivot as we learn more.

In closing, Treasurer Behnke thanked members of the Financial Services Team, Treasurer-Elect Kevin Shepherd, and CFO Bill Phelan. Treasurer Behnke has strived to provide good information to the Association's decision-makers and to engage in discussions about important financial policies so that we could ensure that there are always sufficient funds to support the Association's mission. She reported that it was an honor and privilege to serve as the Association's Treasurer.

Election of Officers and Members of the Board of Governors

On behalf of the Nominating Committee, Justice Adrienne Nelson of Oregon, Chair of the Steering Committee of the Nominating Committee, reported on the nominations for officers of the Association and members of the Board of Governors. The House of Delegates elected the following persons for the terms noted:

OFFICERS OF THE ASSOCIATION

President-Elect for 2020-2021 Term
Reginald M. Turner, Jr. of Michigan

Secretary for 2020-2023
Pauline A. Weaver of California

Chair, House of Delegates for 2020-2022
Barbara J. Howard of Ohio

Treasurer for 2020-2023

Kevin Shepherd of Maryland

MEMBERS OF THE BOARD OF GOVERNORS (2020-2023 Term)

District Members

District 1: Russell F. Hilliard of New Hampshire
District 2: Kevin J. Curtin of Massachusetts
District 4: John C. Cruden of the District of Columbia
District 6: Honorable Pamila J. Brown of Maryland
District 12: Linda S. Parks of Kansas
District 19: Andrew M. Schpak of Oregon

Section Members-at-Large

Criminal Justice Section

Lucian E. Dervan of Tennessee

Section of Environment, Energy and Resources

Sheila Slocum Hollis of the District of Columbia

Litigation Section

Koji F. Fukumura of California

Young Lawyers Division

Shayda Z. Le of Oregon

Goal III Minority Member-at-Large

Marvin S. C. Dang of Hawaii

Goal III Woman Member-at-Large

Vickie Yates Brown Glisson of Kentucky

Law Student

Johnnie Nguyen of Colorado

It was noted that the Association's Constitution provides that the President-Elect automatically becomes the President at the conclusion of the Annual Meeting and Patricia Lee Refo of Arizona will assume that office.

Remarks by President-Elect Nominee

Incoming President-Elect Reginald M. Turner of Michigan thanked the Nominating Committee and members of the House of Delegates for this opportunity to serve our Association. President-Elect Turner thanked Immediate Past President Martinez and President Refo for including him in their planning and for their wisdom and due diligence in leading the ABA. Past-President Dennis Archer was President-Elect Turner's mentor and encouraged President-Elect Turner to join the ABA when he was still in law school.

President-Elect Turner compared the stress of the COVID pandemic and social unrest to the 1967 Detroit riots stoked by police brutality. President-Elect Turner's father worked 24 hour shifts as a Detroit police officer for what felt like an eternity. After the riot, the police department created a Citizens Complaint Bureau and President-Elect Turner's father was promoted to detective in that unit. A short time later, Father William Cunningham, a Catholic priest, teamed up with a Detroit housewife and mother to found Focus Hope. Its mission was to recognize the dignity and beauty of every person and pledge intelligent and practical action to build metropolitan Detroit community, where all people may live in freedom, harmony, trust and affection. President-Elect Turner's family was paired with suburban family in a cultural exchange program, designed to take away some of the barriers that led to the riot. When President-Elect Turner was a few years older, he told his father he wanted to be a police officer like him. His father smiled and told him that he wanted him to be a lawyer like his friend Eliot Hall, who was a pioneer in the corporate legal community in Detroit.

We expect lawyers to practice law with integrity, civility, and concern for both paying and pro bono clients. The ABA is our collective effort to fulfill that hope. Those entrusted with bar leadership must endeavor to be truly representative.

We serve in an era of proliferation of lawyer organizations and available CLE content on the internet from many new providers. The ABA has responded with our member value initiative to build a more engaged, supportive, and financially stable Association.

President-Elect Turner observed that our members want us to address public policy issues central to the administration of justice. The ABA seeks to increase understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and around the world. We work for just laws, human rights, a fair and efficient legal system, and meaningful access to justice for all. Our members want sound fiscal management, cost efficient services, strong support for diversity and inclusion programs, and access to justice initiatives.

President-Elect Turner will strive to fulfill the expectations of President-Elect and President. He will strive to listen and learn from ABA members in our sections, divisions, and entities in an effort to understand how we can collectively and collegially fulfill the ABA's mission to serve equally our members, our profession, and the public by defending liberty and delivering justice as the national representative for the legal profession.

Remarks by Chairman of the Board of Directors of the Legal Services Corporation

John G. Levi, Chairman of the Board of Directors of Legal Services Corporation (LSC), thanked the ABA, President Martinez, and President-Elect Refo for their past and ongoing support of LSC. The LSC is grateful for the work of SCLAID, the Standing committee on Pro Bono, the Center for Pro Bono, and the Governmental Affairs Office.

Mr. Levi recognized the ABA's seamless transition to a virtual version of ABA Day, and the fact that it was a testament to the Association's resourcefulness and commitment to the cause of equal justice.

LSC's grantees are facing surging demand. Low income Americans face eviction filings and foreclosures, file for unemployment insurance, seek help accessing health care, and try to obtain protective orders to respond to spikes in domestic, elder, and child abuse. In a recent survey, Kentucky legal aid reported a 3000% increase in unemployment claims over last year. Southeast Louisiana has seen a 670% increase in requests for legal help with unemployment cases. Shelby County, Tennessee resumed hearings last month with 9,000 pending eviction cases, about a third more than this time last year.

Indeed, last year, in the midst of a robust economy, 42% of the legal problems presented received no service of any kind, and only 27% were served fully. As LSC's grantees try to cope with a huge increase in demand, they are also facing sharp funding cuts from states sources and decreased income from IOLTA accounts.

As grateful as LSC is for the \$50 million that Congress awarded for COVID-related services during the recently enacted CARES Act, it is nowhere near adequate to address the needs in good times, let alone what LSC's grantees now face. In fact, LSC's current funding is actually half of what in today's dollars would have been the \$880 million appropriated just two years after LSC's founding in the 1970s.

This year, LSC will be requesting an appropriation for 2022 that is substantially higher than has ever been requested before. LSC's grantees need that funding. We are at an all-hands on deck juncture if we are to preserve the integrity of the criminal justice system and public's confidence. As officers of the court and leaders of the profession, it is our duty to lead these efforts.

Mr. Levi closed by citing Congressman John Lewis, who asked "if not us, then who? If not now, then when?"

II. RESOLUTIONS VOTED ON BY THE HOUSE

A brief summary of the action taken on resolutions brought before the House follows. The resolutions are categorized by topic areas and the number of the resolution is noted in brackets.

[10A] On behalf of the New York City Bar Association, Sheila Boston of New York moved Resolution 10A urging the United States to take all necessary and proper actions within its power to end the ongoing armed conflict in the Northwest and Southwest regions of Cameroon. Doris Toyon, who received privileges of the floor, spoke in favor of the resolution. Victoria Safran, who received privileges of the floor, also spoke in favor of the resolution. The resolution was **adopted**.

[10B] On behalf of the Virgin Islands Bar Association, Tom Bolt of the Board of Governors moved Resolution 10B supporting an interpretation of the Equal Protection Clause of the Fifth Amendment which would guarantee that all Americans residing in all United States territories who are otherwise eligible to receive federal benefits under the SSI program are entitled to receive them. The resolution was **adopted**.

[10C] On behalf of the Virgin Islands Bar Association, Anthony Ciolli of the Virgin Islands moved Resolution 10C reaffirming prior ABA policy supporting an amendment to the United States Constitution to provide for participation of citizens in American territories to vote in national elections. The resolution was **adopted as revised**.

[10D] On behalf of the Virgin Islands Bar Association, Anthony Ciolli of the Virgin Islands moved Resolution 10D urging federal, state, territorial and tribal governments, bar associations, and/or Commercial Lenders to develop and implement programs to assist law students, recent graduates, and young lawyers experiencing financial hardship due to postponed bar exams and/or deferred employment or unemployment during the COVID-19 pandemic. Michaela Posner of California spoke in favor of the resolution. Christopher Jennison of Maryland spoke in favor of the resolution. The resolution was **adopted**.

[10E] On behalf of the Massachusetts Bar Association, Steven Richman of New Jersey moved Resolution 10E urging support for pending U.S. legislation to address violations of governing instruments for Hong Kong and Rule of Law. Past President Michael Greco spoke in favor of the resolution. The resolution was **adopted**.

[10F] On behalf of the Massachusetts Bar Association, Alice Richmond of Massachusetts moved Resolution 10F urging the Department of Homeland Security (DHS) to maintain the Student and Exchange Visitor Program's temporary exemption for continuing, incoming, and future nonimmigrant student visa holders taking any combination of in-person, hybrid, and online classes for the duration of the COVID-19 pandemic. Michael Burke of Washington D.C. spoke in favor of the resolution. Joan Howland of Minnesota spoke in favor of the resolution. The resolution was **adopted**.

[10G] On behalf of the Virgin Islands Bar Association, Patricia Salkin of New York moved Resolution 10G urging that the highest court or bar admissions authority in each jurisdiction cancel the in-person bar examinations currently scheduled for September 9-10, 2020, and September 30-October 1, 2020, and not administer any other in-person bar examination until and unless public health authorities determine that the examination can be administered in a manner that ensures the health and safety of bar applicants, proctors, and other staff. Hulett Askew of Georgia moved to postpone the resolution indefinitely. Anthony Ciolli of the Virgin Islands spoke in opposition to the motion to postpone indefinitely. Darin Scheer of Wyoming spoke in favor of the motion to postpone indefinitely. Dan Rodriguez of Illinois spoke in opposition to the motion to postpone indefinitely. Mike Byowitz of New York spoke in opposition to the motion to postpone indefinitely. The motion to postpone indefinitely failed. Hulett Askew of Georgia spoke in opposition to the resolution. Deborah Merritt, who received privileges of the floor, spoke in favor of the resolution. Darin Scheer of Wyoming spoke in opposition to the resolution. Michaela Posner of California spoke in favor of the resolution. Tanesha Hackett of Mississippi spoke in favor of the resolution. The resolution was **adopted**.

[10H] On behalf of the King County Bar Association, James Sandman of Washington D.C. moved Resolution 10K urging federal, state, local, territorial, and tribal governments to address the COVID-19 eviction and housing crisis and its collateral harm by (1) providing rental assistance to rental property owners where tenants are facing COVID-19 economic hardship,

and (2) precluding in tenant screening practices the use of nonpayment of rent or eviction records that occur during a particular jurisdiction's COVID-19 pandemic state of emergency or in the 90 days immediately following the lifting of such emergency. John McKay of Washington, who received privileges of the floor, spoke in favor of the resolution. Orlando Lucero of New Mexico spoke in favor of the resolution. The resolution was **adopted**.

[10I] On behalf of the California Lawyers Association, Emilio Varanini of California moved Resolution 10I urging federal, state, local, territorial and tribal governments to enact legislation to prohibit lynching, conspiracies to lynch, attempts to lynch, or solicitations to lynch a person, no matter the form or manner in which the lynching may take place or is proposed to take place, on the basis of race, color, national origin, age, gender, sexual orientation, gender identity, religion, or the presence or appearance of mental or physical disability and imposes criminal and civil sanctions. Stephen Saltzburg of Washington D.C. spoke in favor of the resolution. Laura Farber of California spoke in favor of the resolution. The resolution was **adopted**.

[11-1] Association Member Edward Haskins Jacobs of the Virgin Islands presented and Secretary Mary L. Smith of Illinois moved Report 11-1 amending §1.2 of the Constitution to include the following language as one of the purposes of the Association: "to defend the right to life of all innocent human beings, including all those conceived but not yet born." Mr. Jacobs of the Virgin Islands spoke in favor of the resolution. Michael Reed, Chair of the Standing Committee on Constitution and Bylaws, reported that the Committee reviewed the resolution and found that it was inconsistent with §1.2 of the ABA Constitution. Mark Schickman of California moved to postpone the resolution indefinitely. Richard Leefe of Louisiana spoke in opposition to the motion to postpone indefinitely. Mr. Jacob spoke in opposition to the motion to postpone indefinitely. Alice Richmond of Massachusetts spoke in favor of the motion to postpone indefinitely. The resolution was **postponed indefinitely**.

[11-2] Aastha Madaan of California withdrew Resolution 11-2 amending §6.8 to include the South Asian Bar Association of North America ("SABA") as an affiliated organization of the American Bar Association (ABA) and be represented in the ABA House of Delegates accordingly. The motion was **withdrawn**.

[11-3] The House **approved by consent** Resolution 11-3 amending §31.7 to change the name of the Standing Committee on Legal Aid and Indigent Defendants to the Standing Committee on Legal Aid and Indigent Defense and amend its jurisdictional statement.

[11-4] The House **approved by consent** Resolution 11-4 amending §44.2(b) of the House Rules of Procedure of the House of Delegates to provide a presenter five minutes to present a resolution when the Chair of the House of Delegates invokes the rules of limited debate.

[11-5] Robert M. Carlson of Montana moved Resolution 11-5 amending §§45.1 and 45.2 of the Rules of Procedure of the House of Delegates to add the requirement that a resolution must advance one or more of the ABA's Four Goals. Kevin Curtin of Massachusetts moved to postpone the resolution indefinitely. Deborah Enix-Ross of New York spoke in opposition to the motion to postpone indefinitely. Mark Agrast of Washington D.C. spoke in favor of the motion to postpone indefinitely. Treasurer Michele Behnke spoke in opposition to the motion to postpone indefinitely. The motion to postpone indefinitely failed. Estelle Rogers of California

spoke in opposition to the resolution. Nate Alder of Utah spoke in favor of the resolution. Stephen Saltzburg of Washington D.C. spoke in opposition to the resolution. The resolution was **not adopted**.

[100A] The House **approved by consent** Report 100A urging all employers in the legal profession to implement, maintain, and encourage the use of paid family leave policies for the birth, adoption, or foster placement of a child.

[100B] The House **approved by consent** Report 100B supporting the interpretation that “race”, as included in antidiscrimination statutes, be not limited to the color of one’s skin, but rather, includes other physical and cultural characteristics associated with race; urges federal, state, local, territorial, and tribal governments to enact legislation banning race discrimination on the basis of texture, style, or appearance of a person’s hair; encourages all federal, state, tribal, territorial, and local court systems, in conjunction with state, territorial, tribal and local bar association, to carefully review their discrimination policies and provide implicit bias training to eradicate discrimination on the basis of texture, style, or appearance of a person’s hair; and supports enactment of the Creating a Respectful and Open World for Natural Hair Act of 2019 (S. 3167, H.R. 5309, 116th Congress) or similar legislation that advances antidiscrimination on the basis of the texture, style, or appearance of a person’s hair.

[101] The House **approved by consent** Report 101 adopting the *American Bar Association Election Administration Guidelines and Commentary*, dated August 2020, supplanting all earlier versions; recommends that all election officials ensure the integrity of the election process through the adoption, use, and enforcement of the Guidelines; and urges that federal, state, local, territorial, and tribal governments provide state, local, territorial, and tribal election authorities with adequate funding to implement the Guidelines and Commentary.

[102A] On behalf of the International Law Section, Gabrielle Buckley of Illinois moved Resolution 102A urging federal, state, territorial and tribal governments to enact and enforce legislation that prohibits and penalizes the possession, sale, and trade of shark fins; urges that all nations enact laws that prohibit and penalize the possession, sale, and trade of shark fins; and encourages all international, regional, national, and state bar associations, and international organizations, to promote policies and laws that prohibit and penalize the possession, sale, and trade of shark fins. Holly Polglase of Massachusetts spoke in favor of the resolution. The resolution was **adopted**.

[102B] On behalf of the International Law Section, Steven Richman of New Jersey moved Resolution 102B urging all nations, including the United States, to become a party to and implement the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. The resolution was **adopted**.

[102C] On behalf of the International Law Section, Michael Burke of Washington D.C. moved Resolution 102C urging the United States, other nations, and the United Nations to facilitate and promote neutral and inclusive dialogues between the government of Cameroon and separatist leaders; urges adequate funding by the United States and other nations for the United Nations Office for the Coordination of Humanitarian Affairs’ Humanitarian Response Plan; urges the United States, other nations, and the United Nations to urge the government

of Cameroon and separatist groups, as applicable, to comply with their obligations under international human rights and international humanitarian law; urges the Commonwealth of Nations, the International Organization of La Francophonie, and the African Union to substantially support the above efforts and promote a peaceful resolution to the conflict; and urges the President of the United States to continue to withhold beneficiary country status under the U.S. Trade and Development Act of 2000 until the Cameroon government demonstrates measurable progress in establishing the rule of law, including by providing fair trials for prisoners detained in connection with protests against the government. The resolution was **adopted**.

[103] On behalf of the Commission on Disability Rights, Denise Avant of Illinois moved Resolution 103 urging federal, state, local, territorial, and tribal governments to adopt and enforce legislation and educational policy that 1) prohibits school personnel from using seclusion, mechanical, and chemical restraints on preschool elementary and secondary students, 2) prohibits school personnel from using physical restraint unless the student's behavior poses an imminent danger of serious physical injury to self or others, 3) prohibits the use of restraints in a face-down position or any other position that is likely to impair a student's ability to breathe, in situations where physical restraint is used, and 4) requires professional development and ongoing training in positive behavior interventions and trauma-informed care. Leslie Margolis, who received privileges of the floor, spoke in favor of the resolution. Robert Dinerstein, who received privileges of the floor, spoke in favor of the resolution. The resolution was **adopted**.

[104A] The House **approved by consent** Report 104A granting reaccreditation to the Social Security Disability Law program of the National Board of Trial Advocacy of Wrentham, Massachusetts, and the Business Bankruptcy Law, Consumer Bankruptcy Law, and Creditors' Rights Law programs of the American Board of Certification of Cedar Rapids, Iowa.

[104B] The House **approved by consent** Report 104B adopting certain clarifying revisions to Standard 4.06(C) Written Examination of the Standing Committee on Specialization's Standards for the Accreditation of Specialty Certification Programs for Lawyers, dated August 2020.

[105] On behalf of the Commission on Law and Aging, Louraine Arkfield of Arizona moved Resolution 105 urging Congress to create and fund a Guardianship Court Improvement Program for adult guardianship (following the model of the State Court Improvement Program for child welfare agencies created in 1993) to support state court efforts to improve the legal process in the adult guardianship system, improve outcomes for adults subject to or potentially subject to guardianship, increase the use of less restrictive options than guardianship, and enhance collaboration among courts, the legal system, and the aging and disability networks. Robert Dinerstein, who received privileges of the floor, spoke in favor of the resolution. The resolution was **adopted**.

[106A] The House **approved by consent** Report 106A urging criminal justice stakeholders to consider using a restorative justice response to crime as one effective alternative, or adjunct to, a criminal adjudicatory process, in appropriate cases; urges federal, state, local, territorial and tribal governments to develop grant and funding streams to enable criminal justice

stakeholders and community partner organizations to develop, maintain, and assess the effectiveness of restorative justice programs in a data-driven manner; and urges the National Institute of Justice to prioritize and make publicly available an evaluation of restorative justice practices nationwide.

[106B] On behalf of the Criminal Justice Section, Stephen Saltzburg of Washington D.C. moved Resolution 106B adopting the black letter of the *ABA Standards for Criminal Justice: Discovery, Fourth Edition*, dated August 2020, to supplant the Third Edition (August 1994) of the *ABA Standards for Criminal Justice: Discovery*. Neal Sonnett of Florida spoke in favor of the resolution. The resolution was **adopted**.

[107] On behalf of the Standing Committee on Ethics and Professional Responsibility, Barbara Gillers of New York moved Resolution 107 amending Model Rule 1.8(e) by adding a narrow exception to the Rule that will increase access to justice for the most vulnerable clients. Robert Grey of Virginia spoke in favor of the resolution. Stephen Saltzburg of Washington D.C. spoke in favor of the resolution. The resolution was **adopted as revised**.

[108A] The House **approved by consent** Report 108A urging Congress to enact legislation authorizing one or more principal officers, who are appointed by the President and confirmed by the Senate, to review decisions of the Patent Trial and Appeal Board (PTAB) determining the patentability of any claim reviewed by the PTAB before such decisions become final decisions of the U.S. Patent and Trademark Office (USPTO), and that the legislation should also restore Title 5 removal protections for Administrative Patent Judges (APJs) of the PTAB.

[108B] The House **approved by consent** Report 108B supporting, in principle, a transparent administrative process or processes to remove trademark registrations from the U.S. Patent and Trademark Office's Principal or Supplemental Register.

[109A] The House **approved by consent** Report 109A concurring in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Definitions, Standards, and Rules of the *ABA Standards and Rules of Procedure for Approval of Law Schools*, that change the approval process for distance education programs to a substantive change process (Standard 105 and Rule 24) as required by the U.S. Department of Education, rather than the current variance process (Standard 107).

[109B] The House **approved by consent** Report 109B concurring in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Rule 2 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*, authorizing the Council to act quickly to address an emergency impacting multiple law schools—either regionally or nationally, by providing temporary relief from a rule or the requirements of a standard to allow law schools to respond to the emergency.

[109C] The House **approved by consent** Report 109C concurring in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Rules 2, 22, 24, 27, 29, and 39 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

[109D] The House **approved by consent** Report 109D concurring in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2020 to Standards 102, 103, and 105 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

[110] The House **approved by consent** Report 110 urging Congress and the Administration to require the Department of Veterans Affairs (VA) to remove regulatory barriers to full accreditation of Tribal Veterans Service Officers (TVSOs); provide sufficient federal funding for establishing and operating TVSOs where a tribal community is economically disadvantaged; and urges that when the Department of Veterans Affairs promulgates rules and regulations governing agent accreditation or the administration of programs, benefits, treatment, and services for veterans on Tribal land, the proposals be culturally competent, acknowledge the status of federally-recognized tribes as domestic dependent sovereigns, and be consistent with prevailing laws of sovereignty.

[111A] On behalf of the Section of Litigation Dennis Drasco of New Jersey moved Resolution 111A adopting the “Best Practices for Third-Party Litigation Funding” dated August 2020. Jeffrey Greenbaum of New Jersey spoke in favor of the resolution. Steven Richman of New Jersey also spoke in favor of the resolution. The resolution was **adopted**.

[111B] On behalf of the Section of Litigation Eileen Letts of Illinois moved Resolution 111B urging all federal, state, tribal, local, and territorial governments to adopt policies and contractual provisions that: 1) prohibit conducting strip searches of children and youth, except in exceptional circumstances, 2) require that, if the child or youth must be strip-searched, the search is conducted in a manner that respects the sexual orientation and gender identity of the child or youth and is the least intrusive manner possible, 3) prohibit body cavity searches of children and youth; and encourages court systems, lawyers, law schools, and bar associations to promote awareness of the harmful effects of strip searches and body cavity searches of children and youth, including trauma and re-victimization. The resolution was **adopted as revised**.

[112] The House **approved by consent** Report 112 granting approval to 1 paralegal education program, grants reapproval to 10 programs, withdraws the approval of 4 programs at the request of the institutions, and extends the term of approval to 48 programs.

[113A] The House **approved by consent** Report 113A urging Congress to re-authorize and fully fund the Violence Against Women Act and similar legislation: 1) Preserves the protections approved in the 2013 reauthorization of VAWA, and continues to respond to emerging challenges and to the concerns from the field of expert professionals, 2) Improves services, minimizes bias, and prioritizes safety, autonomy, and support for all victims of gender-based violence, with a particular emphasis on the self-defined needs of marginalized and underserved groups, 3) Enhances judicial, legal, and law enforcement tools that respond to domestic violence, dating violence, sexual assault, and stalking in a trauma-informed way, 4) Strengthens the healthcare system’s comprehensive and trauma-informed response to domestic violence, dating violence, sexual assault, and stalking, 5) Provides economic and housing opportunities and protections for victims of domestic violence, dating violence, sexual assault, and stalking, including non-discrimination protections, and 6) Implements evidence-

based prevention and educational programs that encourage healthy relationships and teach how to respond to attitudes and behaviors contributing to sexual and domestic violence.

[113B] On behalf of the Commission on Domestic and Sexual Violence Mark Schickman of California moved Resolution 113B urging federal, state, local, territorial, and tribal governments to enact legislation and policies to require all health care providers to obtain specific informed patient consent in advance for all medically unnecessary pelvic examinations. Wendy Mariner of Massachusetts spoke in favor of the resolution. The resolution was **adopted as revised**.

[113C] On behalf of the Commission on Domestic and Sexual Violence Mark Schickman of California moved Resolution 113C adopting the eight principles and accompanying commentary set forth in the U.S. Department of Justice December 15, 2015 guidance titled *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*; and urges all federal, state, territorial, local and tribal law enforcement agencies in the United States to: (1) adopt those same principles; (2) provide periodic training to all law enforcement agency personnel to promote compliance with those principles; and (3) engage in regular review of compliance efforts and make any necessary adjustments to improve compliance. The resolution was **adopted**.

[114] On behalf of the Center for Human Rights, Neal Sonnett of Florida moved Resolution 114 urging all national governments to observe, respect, and protect the independence of the International Criminal Court; and condemns threats by governments to the International Criminal Court and its officers and personnel in the performance of their duties. Ambassador Stephen Rapp, who received privileges of the floor, spoke in favor of the resolution. Past President Michael Greco spoke in favor of the resolution. The resolution was **adopted**.

[115] On behalf of the Commission on Youth at Risk, Christina Plum of Wisconsin moved Resolution 115 recognizing that effective reforms of legal systems that affect the fundamental rights of children and youth cannot be accomplished without active participation by individuals who experienced those systems as children and youth; encourages attorneys, judges, advocates, legislators, bar associations, and law schools to promote effective, ongoing, and authentic engagement in legal system reform and advocacy efforts by individuals who have experienced those systems as children and youth and to remove barriers to that engagement; urges law schools, bar associations, law firms, and other professional organizations to create pathways for individuals with lived experience in legal systems that affect children and youth to pursue and succeed in legal and advocacy careers, both within youth-serving systems and more broadly in the legal profession; and calls on organizations focused on improving legal systems that affect children and youth to incorporate individuals who experienced those systems as children into leadership positions. Dafna Gozani, who received privileges of the floor, spoke in favor of the resolution. Lily Colby, who received privileges of the floor, also spoke in favor of the resolution. The resolution was **adopted**.

[116A] On behalf of the Section of Civil Rights and Social Justice, Mark Schickman of California moved Resolution 116A urging federal, state, local, territorial, and Tribal governments to enact legislation that requires: 1) law enforcement agencies to keep records of instances in which lethal force is used, 2) the appointment of a fully independent special prosecutor whenever a person's death occurs in the custody of or during an encounter with a police officer or other law

enforcement officer, and 3) a showing of objective reasonable necessity to establish a defense in criminal cases involving lethal force use by a police or other law enforcement officer. Past President Robert Grey of Virginia spoke in favor of the resolution. Lillian Moy of New York also spoke in favor of the resolution. The resolution was **adopted as revised**.

[116B] On behalf of the Section of Civil Rights and Social Justice, Estelle Rogers of California moved Resolution 116B urging federal, state, local, territorial, and tribal governments to: 1) adopt and enforce fair lending laws and other federal, state and local laws targeting unfair or deceptive acts or practices, 2) adopt laws and policies that promote the adoption of an enhanced non-discrimination compliance system for a vehicle loan, 3) adopt legislation requiring the timely notice and disclosure of pricing of add-on products by dealers on each vehicle through reasonable means; urges Congress to amend the Equal Credit Opportunity Act to require documentation and collection of the applicant's race, gender or national origin for non-mortgage credit transactions, specifically for vehicle transactions; and encourages state, local, territorial and tribal bar associations to offer educational programming and materials to lawyers and consumers to help them understand and navigate purchases and financing of vehicles. James Pierson, who received privileges of the floor, spoke in favor of the resolution. Barbara Mayden of Tennessee spoke in favor of the resolution. The resolution was **adopted as revised**.

[116C] On behalf of the Section of Civil Rights and Social Justice, Mark Schickman of California moved Resolution 116C opposing federal, state, local, territorial and tribal legislation, regulation, and agency policy that discriminates against transgender and non-binary people on the basis of gender identity and/or that imposes barriers to obtaining or providing medically necessary care to affirm an individual's gender identity. Bobbi Bittker, who received privileges of the floor, spoke in favor of the resolution. Mark Agrast of Washington D.C. also spoke in favor of the resolution. The resolution was **adopted**.

[116D] The House **approved by consent** Report 116D Urges federal, state, local, territorial, and tribal legislatures to enact legislation, and correctional and detention facilities for both adults and minors to enact policies requiring that all incarcerated persons are provided with: 1) soap, paper towels, hand sanitizer, and facial tissues in sufficient quantities to prevent the transmission of infectious disease; 2) personal protective equipment including personal sanitizing products and face masks that are effective in preventing existing and emerging infections in sufficient quantities to prevent the transmission of infectious disease; and 3) sufficient facilities for hand washing, including unrestricted access to clean water and working sinks.

[116E] On behalf of the Section of Civil Rights and Social Justice, Estelle Rogers of California moved Resolution 116E urging federal, state, local, territorial and tribal governments to: 1) enact and enforce legislation directing law enforcement officials and election officials to establish a protocol where pretrial detainees, who are eligible to register to vote or vote in the jurisdiction in which they are detained are given the opportunity to register to vote and cast ballots in their respective federal, state, and local elections; and 2) promulgate and enforce regulations that facilitate the participation of such pretrial detainees in all federal, state, local, and special elections, including the ability to register to vote, obtain a ballot, and have that ballot delivered to the appropriate elections office. Harold Pope of Michigan spoke in favor of

the resolution. Erica Cervantes, who received privileges of the floor, spoke in favor of the resolution. The resolution was **adopted**.

[116F] On behalf of the Section of Civil Rights and Social Justice, Estelle Rogers of California withdrew Resolution 116F urging the United States Department of Defense to declare that: (a) HIV status alone has no impact on service members' ability to fully execute their duties and is not a determinant of fitness for duty; and (b) HIV is not a medical condition that should disqualify a person from enlistment, appointment, commissioning, deployment or retention in the U.S. military. The resolution was **withdrawn**.

[116G] On behalf of the Section of Civil Rights and Social Justice, Mark Schickman of California moved Resolution 116G urging that, in all states, territories and tribes, the highest courts or legislative bodies charged with the administration of justice, admission to the bar, or regulation of the legal profession, require that lawyers, judges, commissioners, referees, probation officers, and court personnel whose job requires interacting with the public receive periodic training regarding implicit biases that addresses, at minimum: sex, race, color, religion, ancestry, national origin, ethnic group identification, age, disability, medical condition, genetic information, marital status, sexual orientation, gender expression and gender identity; and urges that, in all states, territories, and tribes, the highest courts or legislative bodies, or agencies and boards that license and regulate the medical profession or social service professions, require that medical professionals and social service professionals who work with the public receive periodic training regarding the implicit biases previously noted. Lillian Moy of New York spoke in favor of the resolution. Andrew Gowder of South Carolina spoke in favor of the resolution. The resolution was **adopted as revised**.

[116H] On behalf of the Section of Civil Rights and Social Justice, Jamie Hawk of Washington moved Resolution 116H urging federal, state, local, territorial, and tribal governments to: 1) repeal laws that disenfranchise persons based upon criminal conviction, 2) restore voting rights to those currently and formerly incarcerated, including those on probation, parole, or any other community-based correctional program, 3) assure that no person convicted of crime is disenfranchised because of nonpayment of a fine, court costs, restitution or other financial obligations imposed as a result of a criminal conviction; and amends the Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3d Edition, 2004). Andrew Gowder of South Carolina spoke in favor of the resolution. The resolution was **adopted**.

[117] On behalf of the Standing Committee on Legal Aid and Indigent Defendants, Theodore Howard of Washington D.C. moved Resolution 117 urging federal, state, local, territorial, and tribal governments to: 1) use a considered and measured approach in adopting and utilizing virtual or remote court proceedings established as a result of the COVID-19 pandemic; 2) form appropriate committees to establish or review the use of virtual or remote court proceedings and make recommendations for procedures, revisions of procedures and best practices; 3) ensure that virtual or remote court proceedings guarantee equal access and meet standards of fundamental fairness and due process; 4) provide advance notice of proceedings and ensure full and meaningful public access to virtual proceedings, while also protecting the privacy of those proceedings legally exempted from public access; 5) reintroduce in-person court options as soon as safely feasible as determined by public health officials, and 6) study the impacts of

virtual or remote court procedures and take steps to halt, alter, or revise virtual or remote court procedures if such study suggests prejudicial effect or disparate impact on case outcomes. Richard Bien of Missouri moved to amend the resolution to address potential separation of powers issues, clarify its scope, and the idea of an expiration date. Stephen Saltzburg spoke in opposition to the motion to amend. Linda Murnane of Ohio spoke in favor of the motion to amend. Cynthia Orr of Texas spoke in opposition to the motion to amend. The motion to amend passed. The resolution **was adopted as revised and amended**.

[300A] On behalf of the Cybersecurity Legal Task Force, Lucy Thompson of Washington D.C. moved Resolution 300A recommending that Congress, state and local governments, election officials, and private sector entities address the spread of disinformation that interferes with voting and other core electoral processes and to protect democratic institutions in the U.S. Suzanne Spaulding of Virginia, who received privileges of the floor, spoke in favor of the resolution. Judith Miller of Maryland spoke in favor of the resolution. The resolution was **adopted**.

[300B] On behalf of the Cybersecurity Legal Task Force, Lucy Thompson of Washington D.C. moved Resolution 300B urging federal, state, local, territorial, and tribal governments and private sector entities to promote digital literacy, civic education, and public awareness to build societal resilience to domestic and foreign malign disinformation operations. Suzanne Spaulding of Virginia, who received privileges of the floor, spoke in favor of the resolution. Judith Miller of Maryland spoke in favor of the resolution. The resolution was **adopted**.

[301A] On behalf of the Section of Civil Rights and Social Justice, Estelle Rogers of California moved Resolution 301A urging federal, state, local, territorial, and tribal governments to enact legislation to curtail the defense of qualified immunity in civil actions brought against law enforcement officers. Paul Wolfson of Washington D.C., who received privileges of the floor, spoke in favor of the resolution. Neal Sonnett of Florida spoke in favor of the resolution. Judith Miller of Maryland spoke in favor of the resolution. The resolution was **adopted**.

[301B] On behalf of the Section of Civil Rights and Social Justice, Mark Schickman of California moved Resolution 301B urging the American Bar Association to, consistent with its demonstrated values, propose Juneteenth be recognized as a national, paid legal holiday. Deborah Enix-Ross of New York spoke in favor of the resolution. Incoming President-Elect Reginald Turner of Michigan spoke in favor of the resolution. The resolution was **adopted**.

[301C] On behalf of the Section of Civil Rights and Social Justice, Estelle Rogers of California moved Resolution 302 urging the federal government to desist from the use of force by federal agents to suppress lawful First Amendment activity, opposes the targeted use of force against journalists, legal observers, and others, denounces the deployment of unidentified federal officers or officers using unmarked vehicles to suppress lawful First Amendment activity and to remove individuals from city streets, and calls upon the United States Department of Justice and Department of Homeland Security to cease and publicly renounce such tactics, and to investigate their use. Stephen Saltzburg of Washington D.C. spoke in favor of the resolution. Oregon Attorney General Ellen Rosenblum spoke in favor of the resolution. The resolution was **adopted**.

[\[400A\]](#) The House **approved by consent** Resolution 400A recommending that certain Association policies that pertain to public issues and are 10 years old or older be archived.

[\[400B\]](#) The House **approved by consent** Resolution 400B recommending Recommends that certain Association policies that pertain to public issues that were adopted in 2000 which were previously considered for archiving but retained be archived.

Closing Business

Chair Bay recognized Aurora Austriaco of Illinois, who moved the Host Resolution. The resolution was **approved**.

Chair Bay Final Remarks and Passing of the Gavel

Chair Bay briefly reflected on his time as Chair of the House of Delegates. He recognized his fellow officers and discussed all of the positive changes made within the Association and within the profession in the last two years. Chair Bay came into the position pledging to listen and is proud of the work that the House of Delegates has done to listen to members of the Association and of the profession. Chair Bay recognized the Technology and Communications Committee, the Resolution and Impact Committee, the Select Committee, the Drafting Committee, and the Steering Committee of the Nominating Committee for their leadership in implementing changes to improve how we operate. Chair Bay recognized the Rules and Calendar Committee for all their work, and Christina Plum of Wisconsin in particular. Chair Bay then passed the gavel to incoming Chair Barb Howard of Ohio.

Chair Barbara J. Howard recognized Marty Balogh, who is retiring after 42 years working for the Association. Chair Howard also thanked President Martinez for her leadership during the pandemic and social unrest. Chair Howard also recognized Chair Bay for his leadership during the first virtual meeting of the House of Delegates.

At the conclusion of the meeting of the House of Delegates on Tuesday, August 4, 2020, Chair Howard recognized Christina Plum of Wisconsin, who then moved the House adjourn *sine die*. The motion was **approved**.