NYSBA

Staff Memorandum

EXECUTIVE COMMITTEE
Agenda Item #18(b)

REQUESTED ACTION: Consideration of co-sponsorship of resolutions being presented to the ABA House of Delegates.

Attached are nine reports scheduled for presentation to the ABA House of Delegates at its February 2012 Midyear Meeting in New Orleans. As in the past, you are asked to consider whether any of these reports would be appropriate for NYSBA co-sponsorship. The reports may be summarized as follows:

- Report 101B recommends governments to adopt pretrial discovery procedures requiring laboratories to produce comprehensive and comprehensible laboratory and forensic science reports for use in criminal trials.

- Report 101C urges judges to consider a series of factors in determining whether expert testimony should be presented to a jury and instructing the jury in its evaluation of expert scientific testimony in criminal and delinquency proceedings.

- Report 101D urges judges and lawyers to consider a series of factors in formulating jury *voir dire* in criminal cases where forensic scientific evidence is contested.

- Report 101F supports policies and practices that preclude triggering immigration consequences for noncitizen defendants who plead guilty in therapeutic courts as a condition of receiving alternative-to-incarceration treatment unless and until the court accepting the plea imposes final sentence as a result of the defendant's non-compliance.

- Report 103 urges courts to consider and respect foreign data protection and privacy laws, and the interests of any person who is subject to or benefits from such laws, with regard to data that is subject to preservation, disclosure, or discovery.

- Report 108 urges states and other bar admission authorities to adopt rules, regulations and procedures to accommodate the needs of military spouse attorneys who move frequently.

- Report 114 urges the Federal Bureau of Investigation to expand the definition of rape in the Uniform Crime Reporting Summary Program.

- Report 300 recommends the adoption of "Guidelines for Conduct of Experts Retained by Lawyers."

- Report 301 recommends support for the principle that the award of damages or injunctive relief under state or federal antitrust and competition law should require a finding of "competitive" injury of a type that harms not just the plaintiff(s), but also harms competition itself.

These reports were circulated for review to a number of Association sections and committees. As of this writing, the Special Committee on Immigration Representation has indicated that it supports co-sponsorship of Report 101F; attached is an e-mail from Jojo Annobil, co-chair of the committee, indicating the basis for support.

The report will be presented at the January 26 meeting by Vince Doyle.

Baxter, Kathy

From: Rifkin, Richard
Sent: Tuesday, January 17, 2012 2:17 PM
To: Baxter, Kathy
Subject: FW: Emailing: 2012_hod_midyear_meeting_executive_summary_index.authcheckdam.pdf

We have identified the following resolutions as possibility being of interest: 101B, 101C, 101D, 101F, 108, 114 and 301. The e-mail below from the Committee on Immigration Representation concerning 101F is the only response I have received. I also note that we had agreed to co-sponsor 113 at last summer's meeting when it was withdrawn because of the objections of the chief judges. That dispute has been resolved and it is back on the agenda. Vince has said that the Exec does not need to reconsider.

From: Annobil, Jojo [mailto:JAnnobil@legal-aid.org]
Sent: Friday, December 30, 2011 1:49 PM
To: Rifkin, Richard
Cc: 'jmacri@nysda.org'; Bentley, Andria
Subject: Re: Emailing: 2012_hod_midyear_meeting_executive_summary_index.authcheckdam.pdf

Dear Mr. Rifkin;

Thanks for sending us the ABA resolutions. Joanne Macri and I are co-chairs of the Special committe on Immigration Representation. Upon review of the various resolutions, the Special Committee on Immigration Representation urges the NYSBA to co-sponsor the ABA's Criminal Justice Section, Commission on Immigration resolution on page 101F. Thousands of immigrants, many of whom have maintained lengthy lawful permanent residence in the U.S., face unintended immigration consequences which may include mandatory immigration detention and deportation, because the broad interpretation of what constitutes a "conviction" for immigration purposes includes any admission, plea of guilt or plea nolo contendere that may be required before the successful completion of a diversionary treatment program, even when such a program results in the subsequent dismissal of the underlying criminal charge. Moreover, the broad interpretation prevents immigrants from taking advantage of diversionary programs which is geared towards giving criminal defendants a chance to address conditions that brought them into contact with the Criminal Justice system. Immigrants are therefore forced to take pleas with adverse immigration consequences and to forego more favorable dispositions such as rehabilitative treatment that may result in an outright dismissal or reduction of the underlying offense. This resolution will impact thousands of immigrants who are facing criminal charges and are referred to drug treatment, mental health courts and other specialized programs designed to provide rehabilitation while avoiding the unintended and devastating consequences of detention, deportation and expulsion from the United States.

If you have any questions please do not hesitate to email either me of Joanne Macri who is copied on this email.

Wish you a Happy New Year.

From: Rifkin, Richard [mailto:RRIFKIN@NYSBA.ORG]
Sent: Friday, December 23, 2011 10:37 AM
To: jhimes@labaton.com <jhimes@labaton.com>; marvin@schelaw.com <marvin@schelaw.com>; Annobil, Jojo; jmacri@nysda.org <jmacri@nysda.org>; karenhennigan@yahoo.com <karenhennigan@yahoo.com>; lancer@ruppbaase.com <lancer@ruppbaase.com>
Cc: Bardwell, Tiffany <TBARDWELL@NYSBA.ORG>; Johnson, Patricia <PJOHNSON@NYSBA.ORG>; Bentley, Andria <ABENTLEY@NYSBA.ORG>; Herron Arthur, Gloria <GARTHUR@NYSBA.ORG>
Subject: Emailing: 2012_hod_midyear_meeting_executive_summary_index.authcheckdam.pdf

Attached are the resolutions, along with supporting reports, that are expected to be presented at the meeting of the ABA House of Delegates, which will take place on February 6 and 7. Some may be removed from the agenda and others added, but this is the current tentative agenda.

This is being sent to each of you because there are one or more resolutions that fall within the work of your section or committee. Vince Doyle has met with some of the leaders of the Association and New York's ABA Delegation, and is now asking for comments on the resolutions I have identified below. The delegation will be meeting on Monday, January 24 and the Association's Executive Committee will be meeting on Thursday, January 26.

Your comments will serve two purposes. If there is a matter on which the Association has established policy, the question will be whether the Association wishes to formally co-sponsor the resolution. That is a question for the Executive Committee. If there are any resolutions on which we have established policy, we would appreciate your recommendation as to whether NYSBA should be a co-sponsor.

Even if we do not have established policy, members of the New York delegation will be called upon to vote on these resolutions. Your guidance and advice would be useful to those members in deciding how to cast their votes.

Given the tight timetable, we recognize that you may not be able to go through the formal process within your section or committee for reaching decisions. However, informal guidance, from the leadership or those with special expertise in an area, would be helpful. Please send your comments to me before January 24. I will pass them on as appropriate.

The following are the items on which comments are sought:

101B – Criminal Justice Section

101C – Criminal Justice Section

101D – Criminal Justice Section

101F – Special Committee on Immigration Representation

108 – Special Committee on Veterans

114 – Criminal Justice Section

301 – Antitrust Section

Thank you for your consideration of these items, and a good holiday to all.

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges federal, state, territorial, and local governments to adopt pretrial discovery procedures requiring laboratories to produce comprehensive and comprehensible laboratory and forensic science reports for use in criminal trials to include identification of:

1. the procedures used in the analysis,
2. the results of the analysis,
3. the identity, qualifications, and opinion of the analyst,
4. the identity and qualifications of those who participated in the testing including peer review or other confirmatory tests; and
5. any additional information that could bear on the validity of the test results, interpretation or opinion.

REPORT

Current ABA Discovery Standards provide for the discovery of expert testimony and scientific reports: [1]

> Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons. With respect to each expert whom the prosecution intends to call as a witness at trial, the prosecutor should also furnish to the defense 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.[2]

Although this Standard requires the disclosure of laboratory reports, it does not specify the content of the report. In contrast, the DNA Standards go much further and specify the contents of laboratory reports in detail and list types of discoverable materials. See Appendices A and B. This Resolution bridges the *gap* between the two standards. It applies whenever a lab report is required to be disclosed, including defense reports.

Laboratory Reports

Virtually all jurisdictions have comparable provisions. For example, Federal Rule 16(a)(1)(F) makes the "results or reports of any physical or mental examination and of any scientific tests or experiments" discoverable. Unfortunately, these rules do not specify the content of a laboratory report.

Melendez-Diaz v. Massachusetts[3] illustrates the problem. According to the Supreme Court, the laboratory report in that case "contained only the bare-bones statement that '[t]he substance was found to contain: Cocaine.' At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed."[4]

In contrast, the Civil Rules require that the report must contain: (i) a complete statement of all opinions the expert will express and the basis and reasons for them; (ii) the data or other

---

[1] This resolution was developed by a Forensic Science Task Force whose membership includes: Professor Myrna S. Raeder (Co-chair), Matthew F. Redle (Co-chair), Barry A.J. Fisher (retired lab director), Judge Ronald S. Reinstein, Betty Layne DesPortes, and Professor Paul G. Giannelli.

[2] ABA STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND TRIAL BY JURY Standard 11-2.1(a)(iv) (3d ed. 1996).

[3] 129 S. Ct. 2527 (2009).

[4] *Id.* at 2537 (citation omitted). *Melendez-Diaz* is important for another reason. The Court appeared to approve at least some types of notice-and-demand statutes. Such statutes require defense counsel demand the presence of the analyst, once notified that the prosecution intends to introduce a laboratory report. Defense counsel, however, cannot intelligently waive the presence of the analyst unless counsel understands details of the analysis.

information considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous ten years; (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case.[5]

The bare-bones reports in criminal cases *are a product of the adversary system, not science.*[6] *The Journal* of Forensic Sciences, the official publication of the American Academy of Forensic Sciences, published a symposium on the ethical responsibilities of forensic scientists in 1989.[7] One article discussed a number of unacceptable laboratory reporting practices, including (1) "preparation of reports containing minimal information in order not to give the 'other side' ammunition for cross-examination," (2) "reporting of findings without an interpretation on the assumption that if an interpretation is required it can be provided from the witness box," and (3) "[o]mitting some significant point from a report to trap an unsuspecting cross-examiner."[8] These practices could be curbed, if not eliminated, by requiring comprehensive laboratory reports.

Comprehensive Reports

In general, the report should be sufficiently comprehensive so that an independent expert can identify the process used and the conclusions reached. The commentary to the DNA Standards explains:

> DAB and CODIS Standards require reports to include (1) a case identifier, (2) a description of evidence examined, (3) a description of the methodology, (4) the locus tested, (5) the results and /or conclusions, (6) an interpretative statement (either quantitative or qualitative), (7) the date issued, (8) the disposition of evidence, and (9) a signature and title, or equivalent identification, of the person(s) accepting responsibility of the content of the reports.[9]

The commentary goes on to state that:

---

[5] FED. R. CIV. P. 26(a)(2)(B)(i)-(vi).

[6] As one scientist has observed: "For a report from a crime laboratory to be deemed competent, I think most scientists would require it to contain a minimum of three elements: (a) a description of the analytical techniques used in the test requested by the government or other party, (b) the quantitative or qualitative results with any appropriate qualifications concerning the degree of certainty surrounding them, and (c) an explanation of any necessary presumptions or inferences that were needed to reach the conclusions." Professor Anna Harrison, Mount Holyoke College, *Symposium on Science and The Rules of Legal Procedure*, 101 F.R.D. 599, 632 (1984).

[7] Joseph L. Peterson, *Symposium: Ethical Conflicts in the Forensic Sciences*, 34 J. FORENSIC SCI. 717-93 (1989).

[8] Douglas M. Lucas, *The Ethical Responsibilities of the Forensic Scientist: Exploring the Limits*, 34 J. FORENSIC SCI. 719, 724 (1989). Lucas was the Director, Centre of Forensic Sciences, Ministry of the Solicitor General, Toronto, Ontario.

[9] ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE Standard 16-3.3 cmt. at 73. *See also* DAB Standard 11.1.2 (1998); CODIS Standards for Forensic DNA Testing Laboratories Standards 11.1.2.

ASCLD requires laboratory reports to include (1) an "accurate summary of significant material contained in the case notes," (2) "interpretive information as well as examination results wherever possible," and (3) identification of "the analyst(s) and, if appropriate, the testing methodology."[10]

The National Academy of Sciences 2009 report on forensic science commented on the issue:

> As a general matter, laboratory reports generated as the result of a scientific analysis should be complete and thorough. They should contain, at minimum, "methods and materials," "procedures," "results," "conclusions," and, as appropriate, sources and magnitudes of uncertainty in the procedures and conclusions (e.g., levels of confidence). Some forensic science laboratory reports meet this standard of reporting, but many do not. Some reports contain only identifying and agency information, a brief description of the evidence being submitted, a brief description of the types of analysis requested, and a short statement of the results (e.g., "the greenish, brown plant material in item #1 was identified as marijuana"), and they include no mention of methods or any discussion of measurement uncertainties.[11]

Comprehensible

The National Academies 2004 report on bullet lead noted that "a section of the laboratory report translating the technical conclusions into language that a jury could understand would greatly facilitate the proper use of this evidence in the criminal justice system."[12]

The DNA Standards contain a comparable provision. The commentary to Standard 16-3.3(c) explains:

> This Standard requires that a section of the laboratory report translate the scientific result into language that a nonscientist would understand. The purpose of forensic DNA testing is to assist the criminal justice system in fulfilling its function to convict the guilty and exonerate the innocent. Accordingly, participants in the system need to understand the significance of the test results. Overworked prosecutors and defense attorneys do not always have time to sort through data in order to appreciate the probative value of the lab analysis. They will, in any case, find a comprehensible summary useful in consulting with and questioning persons with greater expertise than they possess. Jurors may also welcome a written summary that they can understand

---

[10] DNA STANDARDS, *supra* note 9, at cmt. at 73.

[11] 1 NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: THE PATH FORWARD 21 (2009) [hereinafter NAS FORENSIC SCIENCE REPORT].

[12] NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, FORENSIC ANALYSIS: WEIGHING BULLET LEAD EVIDENCE 110-11 (2004) [hereinafter WEIGHING BULLET LEAD EVIDENCE].

without "translation" by an expert. Nobody is in a better position to summarize the results for the participants than the examiners themselves.[13]

Additional Information

The phrase "any additional information that could bear on the validity of the test results, interpretation or opinion" is taken from the DNA Standard 16-3.3, which governs laboratory reports. This would cover such things as the *limitations* of the technique. A National Academies 2004 report on bullet lead addressed this issue: "The conclusions in laboratory reports should be expanded to include the limitations of compositional analysis of bullet lead evidence. In particular, a further explanatory comment should accompany the laboratory conclusions to portray the limitations of the evidence. . . Finally, measurement data (means and standard deviations) for all of the crime scene bullets and those deemed to match should be included."[14]

The National Academy of Sciences 2009 report on forensic science also addressed this issue. Reports "must include clear characterizations of the limitations of the analyses, including measures of uncertainty in reported results and associated estimated probabilities where possible."[15]

Conclusion

In addition to due process concerns, comprehensive discovery serves several other purposes. First, by ensuring that the examiner has followed the prescribed procedure and by permitting external review, full discovery is a quality control mechanism. Second, such discovery assists attorneys in preparing for trial and thus render effective representation. Third, defense counsel's decision to seek appointment of a defense expert often requires a preliminary assessment by an expert. An expert might be willing to offer such an assessment, based upon the information contained in a comprehensive, without compensation.

Respectfully submitted,
Janet Levine
Chair, Criminal Justice Section
February 2012

---

13 DNA STANDARDS, *supra* note 9, at Standard 16-3.3(c) cmt. at 75.
14 WEIGHING BULLET LEAD EVIDENCE, *supra* note 12, at 110-11.
15 NAS FORENSIC SCIENCE REPORT, *supra* note 11, at 21-22.

APPENDIX A

DNA Evidence Standard 16-3.3 Laboratory reports

(a) A summary of all DNA testing and data interpretation should be recorded promptly in a report.

(b) The report should be sufficiently comprehensive so that an independent expert can identify the process used and the conclusions reached. Specifically, the report should include:

- (i) what was tested,
- (ii) who conducted the testing,
- (iii) identification of the protocol used in the testing and any deviation from the protocol,
- (iv) the data and results produced by the testing or data interpretation,
- (v) the examiner's interpretation of the results and conclusions therefrom,
- (vi) the method and results of any statistical computation, and
- (vii) any additional information that could bear on the validity of the test results, interpretation or opinion.

(c) A separate section of the report should explain the test results, interpretation and opinion in language comprehensible to a layperson.

APPENDIX B

DNA Evidence Standard 16-4.1 Disclosure

(a) The prosecutor should be required, within a specified an reasonable time prior to trial, to make available to the defense the following information and material relating to DNA evidence:

- (i) laboratory reports as provided in Standard 16-3.3;
- (ii) if different from or not contained in any laboratory report, a written description of the substance of the proposed testimony of each expert, the expert's opinion, and the underlying basis of that opinion;
- (iii) the laboratory case file and case notes;
- (iv) a curriculum vitae for each testifying expert and for each person involved in the testing;
- (v) the written material specified in Standard 16-3.1(a);
- (vi) reports of all proficiency examinations of each testifying expert and each person involved in the testing, with further information on proficiency testing discoverable on a showing of particularized need;
- (vii) the chain of custody documents specified in Standard 16-2.5;
- (viii) all raw electronic data produced during testing;

(ix) reports of laboratory contamination and other laboratory problems affecting testing procedures or results relevant to the evaluation of the procedures and test results obtained in the case and corrective actions taken in response; and

(x) a list of collected items that there is reason to believe contained DNA evidence but have been destroyed or lost, or have otherwise become unavailable;

(xi) material or information within the prosecutor's possession or control, including laboratory information or material, that would tend to negate the guilt of the defendant or reduce the punishment of the defendant.

(b) The defense should be required, within a specified and reasonable time prior to trial, to make available to the prosecution the information and material in subdivision (a)(i) through (ix) of this standard for each expert whose testimony the defense intends to offer.

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Janet Levine, Chair

1. Summary of Resolution(s). The resolution urges governments at various levels to require laboratories producing reports for use in criminal trial to adopt pretrial discovery procedures requiring comprehensive and comprehensible laboratory and forensic reports that include a number of identified criteria.

2. Approval by Submitting Entity. The resolution was approved by the Criminal Justice Section Council at its October 29, 2011 meeting.

3. Has this or a similar resolution been submitted to the House or Board previously? This resolution fills a gap left by relevant ABA Criminal Justice Standards. See #4, below.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The ABA House of Delegates has approved two sets of ABA Criminal Justice Standards with relevant provisions: *Discovery* (3d edition, approved at the 2004 Annual Meeting) and *DNA Evidence* (3d edition, approved at the 2006 Annual Meeting.

   Subsection (a)(iv) of *Discovery* Standard 11-2.1 on "Prosecutorial Disclosure" provides that the prosecutor should disclose to the defense at a reasonable time prior to trial "any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons. . . "

   DNA Standard 3.3 on "Laboratory reports" requires a comprehensive report of all DNA testing that includes "what was tested, who conducted the testing, identification of the protocol used and any deviation from the protocol, the data and results produced by the testing or data interpretation, the examiner's interpretation of the results and conclusions, the method and results of any statistical computation, and any additional information that could bear on the validity of the test results. DNA Standard 4.1 on "Disclosure" calls for requiring the prosecutor, within a specified and reasonable time prior to trial, to make the laboratory report and other specified information and material related to DNA evidence available to the defense.

The proposed resolution fills the gap between the *Discovery Standards* which are not as specific as the DNA Standards with respect to the contents of the report and the *DNA Standards* which do not apply to laboratory reports about non-DNA forensic evidence.

5. What urgency exists which requires action at this meeting of the House?
The 2009 National Academy of Sciences report, *Strengthening Forensic Science in the United States: A Path Forward* specifically mentioned that "laboratory reports generated as the result of a scientific analysis should be complete and thorough. They should contain, at minimum, "methods and materials," "procedures," "results," "conclusions," and, as appropriate, sources and magnitudes of uncertainty in the procedures and conclusions (e.g., levels of confidence)." NAS Report at 21. Given the concerns expressed in the report about the introduction of certain forensic science evidence at trial, adequate discovery is essential for lawyers to be able to appropriately evaluate such evidence. Forensic science evidence has been an issue in a number of the wrongful conviction cases. This resolution closes a gap that currently exists in discovery ABA standards in order to diminish the likelihood of additional wrongful convictions and to better ensure the integrity of forensic evidence presented at trial.

6. Status of Legislation. (If applicable)

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
The resolution and report will be distributed to organizations of judges and lawyers, as well as to forensic science organizations. CLE and media outreach is also contemplated concerning this discovery issue and the related trial issues in the other forensic science resolutions being currently proposed.

8. Cost to the Association. (Both direct and indirect costs) --- No cost to the Association is anticipated.

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

10. Referrals: Concurrently with the submission of this resolution to the ABA Policy Administration Office for calendaring on the House of Delegates agenda for the 2012 Midyear Meeting, it is being circulated to the chair (or president) and staff director (or executive director) of the following ABA entities and outside organizations:

Standing Committees
Ethics and Professional Responsibility
General Practice, Solo and Small Firm Division
Governmental Affairs
Gun Violence
Legal Aid and Indigent Defense
Substance Abuse

Special Committees and Commissions
American Jury Project
Bioethics and the Law
Death Penalty Representation Project
Domestic and Sexual Violence
Coalition on Racial and Ethnic Justice
Youth at Risk

Sections and Divisions
Government and Public Sector Lawyers
Individual Rights and Responsibilities
Judicial Division
Litigation
National Conference of Federal Trial Judges
National Conference of State Trial Judges
National Conference of Specialized Court Judges
Science and Technology Law
State and Local Government Law
Young Lawyers Division

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

Professor Myrna Raeder
Southwestern Law School
3050 Wilshire Boulevard
Los Angeles CA 90010
PH: 213/738-6775 Cell: 310/770-8111
Email: mraeder@swlaw.edu

Professor Paul Giannelli
Case Western University Law School
11075 East Boulevard
Cleveland OH 44106
PH: 216/368-2098
E-mail: paul.giannelli@case.edu

101B

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

Stephen A. Saltzburg, Section Delegate
George Washington University Law School
2000 H Street NW
Washington DC 20052-0026
PH: 202/994-7089; 202 /489-7464 (cell)
E-mail: ssaltz@law.gwu.edu

William N. Shepherd, Section Delegate
Holland & Knight LLP
Suite 1000
222 Lakeview Ave
West Palm Beach, FL 33401-6148
PH: 561/650-8338; 561/723-9669 (cell)
E-mail: william.shepherd@hklaw.com

EXECUTIVE SUMMARY

1. Summary of the Resolution
The resolution urges governments at various levels to require laboratories producing reports for use in criminal trials to adopt pretrial discovery procedures requiring comprehensive and comprehensible laboratory and forensic science reports, and lists relevant factors to be included in such reports.

2. Summary of the Issue that the Resolution Addresses
Laboratory reports that are not comprehensive and comprehensible do not serve the discovery process well. To be useful and not misleading, laboratory reports should at least specify the procedures used in the analysis; the results of the analysis; the identity, qualifications, and opinion of the analyst; the identity, qualifications, and contributions of others who participated in the testing, and any additional information that could bear on the validity of the test results, interpretation or opinion.

3. Please Explain How the Proposed Policy Position Will Address the Issue
The resolution encourages discovery rules requiring that laboratory reports be comprehensive and comprehensible.

4. Summary of Minority Views
None known.

101C

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges judges to consider the following factors in determining the manner in which expert testimony should be presented to a jury and in instructing the jury in its evaluation of expert scientific testimony in criminal and delinquency proceedings:

1. Whether experts can identify and explain the theoretical and factual basis for any opinion given in their testimony and the reasoning upon which the opinion is based.
2. Whether experts use clear and consistent terminology in presenting their opinions.
3. Whether experts present their testimony in a manner that accurately and fairly conveys the significance of their conclusions, including any relevant limitations of the methodology used.
4. Whether experts explain the reliability of evidence and fairly address problems with evidence including relevant evidence of laboratory error, contamination, or sample mishandling.
5. Whether expert testimony of individuality or uniqueness is based on valid scientific research.
6. Whether the court should prohibit the parties from tendering witnesses as experts and should refrain from declaring witnesses to be experts in the presence of the jury.
7. Whether to include in jury instructions additional specific factors that might be especially important to a jury's ability to fairly assess the reliability of and weight to be given testimony on particular issues in the case.

101C

REPORT Field Code Changed

The criminal justice system requires an integrated system of forensic science and the law.[1] The National Academy of Sciences (NAS) Report[2] on forensic science, which was issued in 2009, raised numerous issues about the presentation of expert testimony at trial. These issues are significant. As the Supreme Court reminded us in *Daubert*: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it."[3] The NAS Report highlighted the limitations and failings of our criminal justice system with respect to forensic science testimony and evidence. The need for reform and opportunities for change, however, are not confined to the laboratories and are not limited to the work of forensic scientists. The trial attorneys must approach forensic science evidence with better education, skill, and knowledge than they have demonstrated in the past. Judges and juries cannot properly assess the weight of the forensic science evidence if attorneys do not adequately investigate and present such evidence. In any complex case involving contested forensic science issues or case where the contested forensic science issues are difficult to comprehend, the parties and the court should be encouraged to find innovative solutions to facilitate jury understanding, such as accommodations in the trial structure to permit expert witnesses from both sides to testify sequentially or permitting jurors to actively participate in questioning the expert witnesses.

Many of the reported problems with forensic science evidence have resulted from the failures of trial attorneys to investigate thoroughly forensic science evidence, the misunderstandings of trial attorneys concerning the nature of that evidence and misstatements by trial attorneys concerning the weight to be attributed to that evidence. Until an elevation in the knowledge base of trial attorneys is achieved,[4] the adversarial system will continue to falter with respect to the proper presentation of forensic science evidence.

In investigating, assessing, and presenting forensic science evidence, attorneys should consider the following:

- The extent to which a particular forensic science discipline is founded on reliable scientific methodology that gives it the capacity to accurately analyze evidence and report findings;

- The extent to which examiners in a particular forensic science discipline rely on human interpretation; and

---

[1] This resolution was developed by a Forensic Science Task Force whose membership includes: Professor Myrna S. Raeder (Co-chair), Matthew F. Redle (Co-chair), Barry A.J. Fisher (retired lab director), Judge Ronald S. Reinstein, Betty Layne DesPortes, and Professor Paul G. Giannelli.

[2] NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) [hereinafter NAS FORENSIC SCIENCE REPORT].

[3] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993) (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound: It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

[4] See ABA House of Delegates Recommendation 100E Adopted August 9-10, 2010, Item 10 (need for forensic science training for lawyers and judges).

- The extent to which the examiner using the particular forensic science technique in the case followed established procedures and standards in examining the evidence.

By keeping these considerations in mind during the investigation and presentation of forensic science evidence, attorneys will better inform the jury of the relevant contested forensic science issues in the case. The evidence presented relevant to these considerations will also provide the underlying basis for instructions to the jury concerning the relevant forensic science issues.

1. Basis and Reasoning for Expert Opinion

This provision tracks the ABA Standards on DNA Evidence[5] and extends it to other forensic disciplines.

2. Clear and Consistent Terminology

The NAS Report on forensic science voiced concern about the use of terms such as "match," "consistent with," "identical," "similar in all respects tested," and "cannot be excluded as the source of." These terms can have "a profound effect on how the trier of fact in a criminal or civil matter perceives and evaluates scientific evidence."[6] Such terms need to be defined and standardized, according to the Report. Moreover, ABA Resolution 100E(4) recommends: "the development and adoption of standards and common terminology for the clear communication of scientific testing results including, wherever possible, uniform report content within disciplines."

3. Accurate and Fair Testimony; Limitations of Technique

This provision tracks the ABA Standards on DNA Evidence[7] and extends it to other forensic disciplines. It also adds a phrase on the limitations of a technique. The NAS Report recommended that a technique's limitations be acknowledged in both court testimony and laboratory reports.[8]

Microscopic hair analysis illustrates the importance of this point. In *Williamson v. Reynolds*,[9] a federal habeas corpus case, an expert testified at trial that hair samples were "consistent microscopically."[10] What does the term "microscopically indistinguishable" or "consistent with" mean? The probative value of this conclusion would, of course, vary if only a hundred people had microscopically indistinguishable hair as opposed to several million. As one hair examiner wrote: "If a pubic hair from the scene of a crime is found to be similar to those

---

5 ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE, Standard 16-5.3(a) (3d ed. 2007) [hereinafter DNA EVIDENCE].

6 NAS FORENSIC SCIENCE REPORT, *supra* note 2, at 21.

7 DNA EVIDENCE, *supra* note 5, Standard 16-5.3(b).

8 *Id.* at 21-22.

9 Williamson v. Reynolds, 904 F. Supp. 1529, 1558 (E.D. Okl. 1995), *rev'd sub nom. on this ground*, Williamson v. Ward, 110 F.3d 1508, 1523 (10th Cir. 1997).

10 *Id.*

from a known source, [the courts] do not know whether the chances that it could have originated from another source are one in two or one in a billion."[11] In sum, the evidence may have little probative value, and yet the jury might not appreciate this fact.[12]

This problem was exacerbated in *Williamson* because the expert went on to explain: "In other words, hairs are not an absolute identification, but they either came from this individual or there is—could be another individual *somewhere in the world* that would have the same characteristics to their hair."[13] This is a gross overstatement. If it were true, hair evidence would be nearly on a par with nuclear DNA profiling. It is not. In final argument, the prosecutor proclaimed: "[T]here's a match."[14] Even the state appellate court misunderstood the testimony, writing that the "hair evidence placed [petitioner] at the decedent's apartment."[15] Moreover, one study found that the traditional adversary procedures—cross-examination, the presentation of opposing experts, and jury instructions—do not cure the problem.[16]

Failure to clearly state the limitations of a technique can have serious consequences, as suggested by the role that microscopic hair analysis played in many of the wrongful conviction cases. A 1996 Department of Justice report discussing the exonerations of the first twenty-eight convicts through the use of DNA technology highlighted the significant role that hair analysis played in a number of these miscarriages of justice, including some death penalty cases.[17] Two years later, a Canadian judicial inquiry into the wrongful conviction of Guy Paul Morin was released. His original conviction was based, in part, on hair evidence. The judge conducting the inquiry recommended that "[t]rial judges should undertake a more critical analysis of the admissibility of hair comparison evidence as circumstantial evidence of guilt."[18] A 2008 study of 200 DNA exoneration cases reported that hair testimony had been presented in forty-three of the original trials.[19] A subsequent examination of 137 trial transcripts in exoneration cases concluded: "Sixty-five of the trials examined involved microscopic hair comparison analysis. Of those, 25—or 38%—had invalid hair comparison testimony. Most (18) of these cases

---

[11] B.D. Gaudette, *Probabilities and Human Pubic Hair Comparisons,* 21 J. FORENSIC SCI. 514, 514 (1976).

[12] *See* United States v. Frazier, 387 F.3d 1244, 1263 (11th Cir. 2004) ("[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse.").

[13] *Williamson*, 904 F. Supp. at 1554 (emphasis added).

[14] *Id.* at 1557.

[15] Williamson v. State, 812 P.2d 384, 397 (Okla. Crim. App. 1991).

[16] *See* Dawn McQuiston-Surrett & Michael J. Saks, *The Testimony of Forensic Identification Science: What Expert Witnesses Say and What Factfinders Hear,* 33 LAW & HUM. BEHAV. 436, 451 (2009) ("These results should give pause to anyone who believes that the traditional tools of the adversarial process (e.g., cross-examination, opposing experts, instructions) will readily undo the effects of misleading expert testimony.").

[17] EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996), available at http://www.ncjrs.gov/pdffiles/dnaevid.pdf [hereinafter Exonerated by Science].

[18] HON. FRED KAUFMAN, THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (Ontario Ministry of the Attorney General 1998) (Recommendation 2), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/.

[19] Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 81 (2008).

involved invalid individualizing claims."[20]

Overstatements

The NAS Report also criticized exaggerated testimony such as claims of perfect accuracy, infallibility, or a zero error rate: "[I]mprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence."[21]

"Zero Error Rate"

For example, in *United States v. Havvard*,[22] which involved a *Daubert* challenge to fingerprint evidence, the expert claimed the "error rate for the method is zero."[23] Note the word *method* in the above quote. Examiners argued that, while individual examiners may make mistakes, the methodology itself is perfect. However, the dichotomy between "methodological" and "human" error rates in this context is "practically meaningless"[24] because the examiner is the method.[25]

The NAS Report addressed this point: "Although there is limited information about the accuracy and reliability of friction ridge analyses, claims that these analyses have zero error rates are not scientifically plausible."[26] The Report goes on to comment: "Some in the latent print community argue that the method itself, if followed correctly . . . has a zero error rate. Clearly, this assertion is unrealistic . . . . The method, and the performance of those who use it, are inextricably linked, and both involve multiple sources of error (e.g., errors in executing the process steps, as well as errors in human judgment.)"[27]

Several courts have also commented on this issue. For example, in *United States v. Mitchell*,[28] the Third Circuit commented: "Testimony at the *Daubert* hearing indicated that some latent fingerprint examiners insist that there is no error rate associated with their activities . . . . This would be out-of-place under Rule 702."[29] The same issue arose in a firearms identification case. In *United States v. Glynn*,[30] the court wrote that "[t]he problem is compounded by the

---

20 Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 47 (2009).

21 NAS FORENSIC SCIENCE REPORT, *supra* note 2, at 4.

22 117 F. Supp. 2d 848 (S.D. Ind. 2000), *aff'd*, 260 F.3d 597 (7th Cir. 2001).

23 *Id.* at 854.

24 *See* Jennifer L. Mnookin, *Fingerprint Evidence in an Age of DNA Profiling*, 67 BROOK. L. REV. 13, 60 (2001). *See also* Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985, 1040 (2005) ("in fingerprint practice the concept is vacuous").

25 *See* Sandy L. Zabell, *Fingerprint Evidence*, 13 J.L. & POL'Y 143, 172 (2005) ("But, given its unavoidable subjective component, in latent print examination people *are* the process.") (emphasis added).

26 NAS FORENSIC SCIENCE REPORT, *supra* note 2, at 142.

27 *Id.* at 143.

28 365 F.3d 215 (3d Cir. 2004) (admitting fingerprint evidence).

29 *Id.* at 245-46.

30 578 F. Supp. 2d 567 (S.D.N.Y. 2008).

tendency of ballistics experts . . . to make assertions that their matches are certain beyond all doubt, that the error rate of their methodology is 'zero,' and other such pretensions."[31]

"Hundred Percent Accurate"

In a different firearms identification case, *United States v. Monteiro*,[32] the court noted that:

> The examiners testified to the effect that they could be 100 percent sure of a match. Because an examiner's bottom line opinion as to an identification is *largely a subjective one*, there is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a "match" to an absolute certainty, or to an arbitrary degree of statistical certainty.[33]

The NAS Report concurred: "The insistence by some forensic practitioners that their disciplines employ methodologies that have perfect accuracy and produce no errors has hampered efforts to evaluate the usefulness of the forensic science disciplines."[34] In 2000, Stephen Bunch, an FBI firearms identification expert, wrote:

> [T]here is no rational or scientific ground for making claims of absolute certainty in any of the traditional identification sciences, which include fingerprint, document, firearms, toolmark, and shoe and tire-tread analysis. Case-specific conclusions of identity rest on a fundamental proposition, or hypothesis; namely, that no two fingerprints, bullets, etc., from different sources will appear sufficiently similar to induce a competent forensic examiner to posit a common source. But as any logician or philosopher of science would insist, no hypothesis can be proved absolutely.[35]

In its first report on DNA profiling, the National Academy of Sciences report commented: "Prosecutors and defense counsel should not oversell DNA evidence. Presentations that suggest to a judge or jury that DNA typing is infallible are rarely justified and should be avoided."[36]

"Scientific"

The use of terms such as "science" or "scientific" in presenting expert testimony may also be problematic. In 1995, a federal district court in *United States v. Starzecpyzel*[37] concluded that "forensic document examination, despite the existence of a certification program, professional journals and other trappings of science, cannot, after *Daubert*, be regarded as 'scientific . . . knowledge.'"[38] The court further stated that "while scientific principles may

---

31 *Id.* at 574.
32 407 F. Supp. 2d 351 (D. Mass. 2006).
33 *Id.* at 372 (emphasis added).
34 NAS FORENSIC SCIENCE REPORT, *supra* note 2, at 47.
35 Stephen G. Bunch, *Consecutive Matching Striation Criteria: A General Critique*, 45 J. FORENSIC SCI. 955, 956 (2000).
36 NATIONAL RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 26 (1992).
37 880 F. Supp. 1027 (S.D.N.Y. 1995).
38 *Id.* at 1038.

relate to aspects of handwriting analysis, they have little or nothing to do with the day-to-day tasks performed by [Forensic Document Examiners] . . . . [T]his attenuated relationship does not transform the FDE into a scientist."[39]

Although the court went on to admit the testimony as technical evidence, it placed conditions on its admissibility.[40] Because FDEs use terms such as "laboratory" and refer to authorities with titles containing the words "science" or "scientific," there is a risk, according to the court, that jurors may bestow upon FDEs the aura of the infallibility of science. Consequently, these terms should not be used in the expert's testimony. Moreover, the court approved a jury instruction, which stated that "FDEs offer practical, rather than scientific expertise."[41] Similarly, in *United States v. Glynn*,[42] a firearms identification case, the court stated: "Based on the *Daubert* hearings this Court conducted . . . , the Court very quickly concluded that whatever else ballistics identification analysis could be called, it could not fairly be called 'science.'"[43]

The NAS Report provides some support for this position: "The law's greatest dilemma in its heavy reliance on forensic evidence . . . concerns the question of whether—and to what extent—there is *science* in any given forensic science discipline."[44] A subsequent passage concludes: "Much forensic evidence—including, for example, bite marks and firearm and toolmark identifications—is introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline."[45]

Philosophers of science disagree about the definition of "science,"[46] and the Supreme Court in *Kumho Tire* rejected the distinction between science and technical evidence for purposes of applying the *Daubert* test because such a distinction would be difficult to draw.[47] Moreover, claiming the mantle of "science" is a two-edged sword. It may impress the jury, but it also subjects the field to the rigors of the scientific method. The forensic identification

---

39 *Id.* at 1041.

40 In the court's view, *Daubert* did not apply to nonscientific experts. The court relied on the following statement in *Daubert*: "Our discussion is limited to the scientific context because that is the nature of the expertise offered here." 509 U.S. at 590 n.8. This position was undercut by *Kumho Tire*, which held that all expert testimony must pass the *Daubert* reliability test. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 149 (1999).

41 880 F. Supp. at 1049.

42 578 F. Supp. 2d 567 (S.D.N.Y. 2008).

43 *Id.* at 570.

44 NAS FORENSIC SCIENCE REPORT, *supra* note 2, at 9.

45 *Id.* at 107-08.

46 The Supreme Court quoted one definition in *Daubert*: KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability."). *Daubert*, 509 U.S. at 593.

47 The Court wrote: "[I]t would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. There is no clear line that divides the one from the others." *Kumho Tire*, 526 U.S. at 148.

disciplines are ultimately subjective, and there are often no meaningful standards[48] —factors that undercut any claims that these techniques are "scientific."

"Reasonable Scientific Certainty"

The expression "reasonable scientific certainty," which is often included (and sometimes demanded) in expert testimony is another phrase that should be avoided.[49] The phrase, which combines two suspect words— "scientific" and "certainty"—has no scientific meaning.

Although it is used frequently in cases, its legal meaning is ambiguous at best. Sometimes the phrase seems to be used as a confidence statement (i.e., "I am confident of my opinion."), in which case the expert could avoid the term altogether and directly testify how confident she is in her opinion.[50] In some cases, the phrase means something quite different. In *State v. Holt*,[51] for instance, the expert testified, based on neutron activation analysis, that two hair samples were "similar *and* ... *likely* to be from the same source."[52] The Ohio Supreme Court ruled that expert testimony is admissible only if the opinion is based upon "reasonable scientific certainty." For that court, reasonable scientific certainty meant that the expert had to testify that the hair sample *probably* came from the defendant and not that it *possibly* came from him.[53]

Holt conflicts with the views other courts and scholars. Experts frequently testify that two samples "could have come from the same source" or "were likely to be from the same source."[54] Such testimony meets the relevancy standard of Federal Rule 401, and there is no requirement in the Federal Rules of Evidence that an expert's opinion be expressed in terms of "probabilities." Thus, in *United States v. Cyphers*,[55] the expert testified that hair samples found

---

48 "Often there are no standard protocols governing forensic practice in a given discipline. And, even when protocols are in place . . . , they often are vague and not enforced in any meaningful way." NAS FORENSIC SCIENCE REPORT, *supra* note 2, at 6.

49 The terms "reasonable medical certainty" and "reasonable ballistic certainty" are similarly problematic.

50 *See* James E. Hullverson, *Reasonable Degree of Medical Certainty: A Tort et a Travers*, 31 ST. LOUIS U.L.J. 577, 582 (1987) ("[T]here is nevertheless an undercurrent that the expert in federal court express some basis for both the confidence with which his conclusion is formed, and the probability that his conclusion is accurate.").

51 246 N.E.2d 365 (Ohio 1969).

52 *Id.* at 368.

53 The requirement that experts testify in terms of probability may have originated as a "sufficiency" rule in civil cases in which causation was an issue. It may then have been improperly converted into an "admissibility" rule in civil cases and then improperly transplanted into criminal cases. *See* PAUL C. GIANNELLI, BALDWIN'S OHIO PRACTICE, EVIDENCE § 702.6 (3d ed. 2010) (describing the Ohio experience with the term).

54 *E.g.*, People v. Horning, 102 P.3d 228, 236 (Cal. 2004) (expert "opined that both bullets and the casing could have been fired from the same gun . . . ; because of their condition he could not say for sure"); Luttrell v. Commonwealth, 952 S.W.2d 216, 218 (Ky. 1997); State v. Reynolds, 297 S.E.2d 532, 539-40 (N.C. 1982). *See also* State v. Boyer, 406 So. 2d 143, 148 (La. 1981) (reasonable scientific certainty not required where expert testifies concerning the presence of gunshot residue based on neutron activation analysis).

55 553 F.2d 1064 (7th Cir. 1977).

on items used in a robbery "could have come" from the defendants.[56] The defendants argued that the testimony was inadmissible because the expert did not express his opinion in terms of reasonable scientific certainty. The Seventh Circuit responded: "There is no such requirement."[57]

The ambiguity of the term is illustrated in *Burke v. Town of Walpole*,[58] a bite mark identification case, in which the First Circuit had to interpret the term as used in an arrest warrant:

> [W]e must assume that the magistrate who issued the arrest warrant assigned no more than the commonly accepted meaning among lawyers and judges to the term "reasonable degree of scientific certainty"—"a standard requiring a showing that the injury was *more likely than not* caused by a particular stimulus, based on the general consensus of recognized [scientific] thought." Black's Law Dictionary 1294 (8th ed. 2004) (defining "reasonable medical probability," or "reasonable medical certainty," as used in tort actions). That standard, of course, is fully consistent with the probable cause standard.[59]

In sum, it seems doubtful that a jury would translate "scientific certainty" only as "more probable than not."

The phrase has come under attack in recent cases. In *United States v. Glynn*,[60] the court ruled that the term "reasonable scientific certainty" could not be used in a firearms identification case. In light of the expert's admission concerning the subjective nature of the examination, "the Government did not seriously contest the Court's conclusions that ballistics lacked the rigor of science and that, whatever else it might be, its methodology was too subjective to permit opinions to be stated to 'a reasonable degree of ballistic certainty.'"[61]

In 2009, a district court in *United States v. Taylor*[62] wrote: "[B]ecause of the limitations on the reliability of firearms identification evidence discussed above, Mr. Nichols will not be permitted to testify that his methodology allows him to reach this conclusion as a matter of scientific certainty. Mr. Nichols also will not be allowed to testify that he can conclude that there is a match to the exclusion, either practical or absolute, of all other guns. He may only testify that, in his opinion, the bullet came from the suspect rifle to within a reasonable degree of

---

56 *Id.* at 1072. *See also* United States v. Davis, 44 M.J. 13, 16 (C.A.A.F. 1996) ("Evidence was also admitted that appellant owned sneakers which 'could have' made these prints.").

57 553 F.2d at 1072. *See also Boyer*, 406 So. 2d at 148 (reasonable scientific certainty not required where expert testifies concerning the presence of gunshot residue based on neutron activation analysis).

58 405 F.3d 66 (1st Cir. 2005).

59 *Id.* at 91 (emphasis added).

60 578 F. Supp. 2d 567 (S.D.N.Y. 2008).

61 *Id.* at 571. In *United States v. Willock*, 696 F. Supp. 2d 536, 546 (D. Md. 2010), based on a comprehensive magistrate's report, held that "Sgt. Ensor shall not opine that it is a 'practical impossibility' for a firearm to have fired the cartridges other than the common 'unknown firearm' to which Sgt. Ensor attributes the cartridges." Thus, "Sgt. Ensor shall state his opinions and conclusions without any characterization as to the degree of certainty with which he holds them." *Id.* at 549.

62 663 F. Supp. 2d 1170 (D. N.M. 2009).

certainty in the firearms examination field."[63]

However, replacing the term "reasonable scientific certainty" with the term "reasonable ballistic certainty" does not solve the problem.[64] This phrase suffers from the same defects.

4. Lab Error, Contamination, and Mishandling

This provision tracks the ABA Standards on DNA Evidence[65] and extends it to other forensic disciplines.

5. Claims of Uniqueness

Claims of uniqueness must rest on empirically based research. In *Daubert*, the Supreme Court quoted philosopher Carl Hempel: "[T]he statements constituting a scientific explanation must be capable of empirical test."[66] For example, DNA evidence does not claim "uniqueness." Although it is generally accepted that every person's DNA is unique (except identical twins), current techniques, such as STRs, do not establish that uniqueness. Instead, a random match probability is presented.

Moreover, the precise claim must be examined. "Even if no two people had identical *sets* of fingerprints, this did not establish that no two people could have a *single* identical print, much less an identical *part* of a print."[67] Also, the examiner is comparing *impressions of fingerprints*, not friction ridges on fingers. Every time a fingerprint impression is left by a person, it differs in some respects from other impressions left by that same person. Further, crime scene prints are typically partial—and distorted due to pressure. Thus, because there frequently are "dissimilarities" between the crime scene and record prints, the examiner must decide whether there is a *true* dissimilarity, in which case there is an exclusion ("no match"), or whether the dissimilarity is due to distortion or an artifact, in case a "match" is permissible.[68] The same issue arises in other forensic disciplines.

Courts have responded in different ways to claims of uniqueness. Due to a lack of foundational research, several courts have limited the scope of handwriting testimony, permitting expert testimony about the similarities and dissimilarities between exemplars but not the specific

---

63 *Id.* at 1180.

64 In addition to the cases cited in the text, the following courts take this approach: Commonwealth v. Pytou Heang, 942 N.E.2d 927, 945 (Mass. 2011) ("Where a qualified expert has identified sufficient individual characteristic toolmarks reasonably to offer an opinion that a particular firearm fired a projectile or cartridge casing recovered as evidence, the expert may offer that opinion to a 'reasonable degree of ballistic certainty.'").

65 DNA EVIDENCE, *supra* note 5, Standard 16-5.3(d).

66 *Daubert*, 509 U.S. at 593. CARL HEMPEL, PHILOSOPHY OF NATURAL SCIENCE 49 (1966).

67 Mnookin, *supra* note 24, at 19.

68 Commonwealth v. Patterson, 840 N.E.2d 12, 17 (Mass. 2005) ("There is a rule of examination, the 'one-discrepancy' rule, that provides that a nonidentification finding should be made if a single discrepancy exists. However, the examiner has the discretion to ignore a possible discrepancy if he concludes, based on his experience and the application of various factors, that the discrepancy might have been caused by distortions of the fingerprint at the time it was made or at the time it was collected.").

conclusion that the defendant was the author ("common authorship" opinion).[69] Although the courts have used this approach most frequently in handwriting cases, they have sometimes applied it to other types of forensic expertise such as firearms examinations.[70] One court took a less restrictive approach, ruling that the expert would be permitted to testify only that it was "more likely than not" that recovered bullets and cartridge cases came from a particular weapon.[71]

"To the Exclusion of All Others"

Experts frequently testify that they have made a match "to the exclusion of all other firearms."[72] This is simply another way of claiming uniqueness. In *United States v. Green*,[73] the court questioned such testimony: "O'Shea [the expert] declared that this match could be made 'to the exclusion of every other firearm in the world.' . . . That conclusion, needless to say, is extraordinary, particularly given O'Shea's data and methods."[74] Further, in 2008, a year before the NAS report on forensic science was issued, a different NAS report, one on computerized ballistic imaging, addressed this issue. The report cautioned: "*Conclusions drawn in firearms identification should not be made to imply the presence of a firm statistical basis when none has been demonstrated.*"[75] In particular, that report was concerned about testimony cast "in bold absolutes" such as that a match can be made to the exclusion of all other firearms in the world: "Such comments cloak an inherently subjective assessment of a match with an extreme probability statement that has no firm grounding and unrealistically implies an error rate of zero."[76] Some courts are in accord.[77]

Individualization. At present, it is easier to identify what an expert should *not* say than to prescribe what an expert may legitimately opine at trial. Indeed, some scholars have questioned whether individualization is even achievable.[78] Other scholars do not accept this "radical skepticism" and believe that such an approach would mislead the jury in the other direction—by

---

69 *See* United States v. Oskowitz, 294 F. Supp. 2d 379, 384 (E.D.N.Y. 2003) ("Many other district courts have similarly permitted a handwriting expert to analyze a writing sample for the jury without permitting the expert to offer an opinion on the ultimate question of authorship."); United States v. Rutherford, 104 F. Supp. 2d 1190, 1194 (D. Neb. 2000).

70 *See* United States v. Green, 405 F. Supp. 2d 104, 107 (D. Mass. 2005).

71 United States v. Glynn, 578 F. Supp. 2d 567, 575 (S.D. N.Y. 2008).

72 *See* 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 14.01, at 706 n.1 (4th ed. 2007) (citing FBI HANDBOOK OF FORENSIC SCIENCES 57 (rev. ed. 1994)).

73 United States v. Green, 405 F. Supp. 2d 104 (D. Mass. 2005).

74 *Id.* at 107 (citations omitted).

75 NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, BALLISTIC IMAGING 82 (2008).

76 *Id.*

77 *See* United States v. Alls, slip opinion, No. CR2-08-223(1) (S.D. Ohio Dec. 7, 2009) ("Although Ms. McClellan may testify as to her methodology, case work, and observations in regards to the casing comparison she performed for this case, she may not testify as to her opinion on whether the casings are attributable to a single firearm to the exclusion of all other firearms."); *Diaz*, 2007 WL 485967, at *1.

78 Michael J. Saks & Jonathan J. Koehler, *The Individualization Fallacy in Forensic Science Evidence*, 61 VAND. L. REV. 199 (2008).

vitiating the probative value of the evidence.[79] This position, however, does not endorse the overstatements described above. Nor does it minimize the risk of misleading the jury or give the expert carte blanche authority:

> Let us assume that the jury gets the message—a match is not an absolute identification. Can the criminalist do something more to explain its probative value? Obviously, this depends on what is known about the frequency of the identifying trait in the relevant population. Are the features very common, rarely seen, or somewhere in between? There will be occasions when such qualitative testimony is reasonable. When no duplicates have been seen after systematic, careful and (one hopes) representative studies, a criminalist determined to refer to uniqueness might even assert that a trait is either unique or very rare in a population.[80]

6. Declaration of Expertise

ABA Civil Trial Practice Standard 14 provides: "The court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion and counsel should not ask the court to do so."[81] This ABA policy should be extended to criminal cases. As one court has noted,

> Great care should be exercised by a trial judge when the determination has been made that the witness is an expert. If the jury is so informed such a conclusion obviously enhances the credibility of that witness in the eyes of the jury. All such ruling should be made outside the hearing of the jury and there should be no declaration that the witness is an expert.[82]

In 1994, Judge Richey recommended this approach, noting that such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and protects against the jury's being "overwhelmed by the so-called 'experts.'"[83]

7. Additional Factors for Consideration in Jury Instructions in Cases Where Forensic Science Evidence is Contested

The court should consider whether additional factors such as those set forth below might be especially important to a jury's ability to fairly assess the reliability of and the weight to be

---

79 David H. Kaye, *Probability, Individualization and Uniqueness in Forensic Science Evidence: Listening to the Academies*, 75 BROOK. REV. 1163, 1185 (2010).

80 *Id.* at 1180.

81 ABA CIVIL TRIAL PRACTICE STANDARD 14 (2007).

82 Luttrell v. Commonwealth, 952 S.W.2d 216, 218 (Ky.1997). *See also* United States v. Laurienti, 611 F.3d 530, 547 (9th Cir. 2010) ("To the extent that Defendants argue that the district court abused its discretion by failing to describe Meyer as an 'expert' in front of the jury, we disagree. The determination that a witness is an expert is not an express imprimatur of special credence; rather, it is simply a decision that the witness may testify to matters concerning 'scientific, technical, or other specialized knowledge.' Fed.R.Evid. 702.").

83 Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537, 559 (1994).

101C

given testimony on particular issues in the case.[84]

1. The extent to which the particular forensic science technique or theory used in the analysis is founded on a reliable scientific methodology that gives it the capacity to accurately analyze evidence and report findings;

2. The extent to which the forensic science examiner followed or did not follow the prescribed scientific methodology during the examination;

3. The extent to which the particular forensic science technique or theory relies on human interpretation that could be tainted by error;

4. The extent to which the forensic science examination in this case may have been influenced by the possibility of bias;

5. The extent to which the forensic science examination in this case uses operational procedures and conforms to performance standards established by reputable and knowledgeable scientific organizations;

6. The extent to which the forensic science examiner in this case followed the prescribed operational procedures and conformed to the prescribed performance standards in conducting the forensic science examination of the evidence;

7. The qualifications of the person(s) conducting the forensic science examination;

8. Whether he handling and processing of the evidence that was tested was sufficient to protect against contamination or alteration of the evidence;

9. The extent to which the particular forensic science technique or theory is generally accepted within the relevant scientific community;

10. The reasons given by the forensic science examiner for the opinion;

11. Whether the forensic science examiner has been certified in the relevant field by a recognized body that evaluates competency by testing;

12. Whether the facility is accredited by a recognized body if accreditation is appropriate for that facility;

13. The extent to which the forensic science examiner has complied with applicable ethical

---

[84] The court should instruct the jurors only on the factors relevant to the specific forensic science evidence in the case as presented by the parties. Not all factors will be relevant in every case. Parties should consider limiting the instruction to the most probative contested factors to avoid overwhelming the jury with a "laundry list" of factors that may diminish the jury's consideration of the most probative evidence.

obligations;

14. Whether the physical observations made by the forensic science examiner are observable by others;

15. Other evidence of the accuracy of the forensic science examiner's conclusions;

16. The extent to which the forensic science technique or theory has undergone validation;

17. The known nature of error associated with the forensic science technique or theory;

18. The fact that the nature and degree of error associated with the forensic science technique or theory (why and how often incorrect results are obtained) cannot or has not been determined;

19. The estimation of uncertainty (the range of values encompassing the correct value at a defined confidence interval) associated with the forensic science technique or theory.

Courts have the responsibility to ensure jurors understand the law they are to apply, the issues they will be asked to determine, and the factors they may properly consider in determining those issues. The goals of jury instructions are to increase the legal accuracy of verdicts, and thereby avoid reversals, and to improve juror comprehension of presented evidence.

Unfortunately, jury instructions are frequently written in complicated legal terminology that is not readily accessible to jurors. Pattern jury instructions, while reducing reversals by using language from appellate opinions setting legal standards, do not necessarily track the specific issues of the case and do not improve juror comprehension or help them to properly assess the weight of the evidence. This is particularly true with forensic science evidence. Few pattern jury instructions address the factors jurors may use in determining the weight of the evidence or guide jurors on the proper use of evidence concerning the reliability of forensic science examinations. Instructions should be provided to jurors that are tailored to the facts of each individual case and where forensic science evidence is contested, the instructions should reflect the evidence presented and the factors affecting the reliability of the evidence. Preliminary instructions should be used to provide guidance on the contested forensic science issues to improve juror comprehension. See Principle 6 C, ABA Principles for Juries and Jury Trials, 2005.[85] The above list of additional factors identifies many of the considerations that jurors should consider in evaluating contested forensic science evidence presented at trial.

Respectfully submitted,
Janet Levine
Chair, Criminal Justice Section
February 2012

---

[85] These instructions should be given in addition to the standard jury instructions explaining the difference between lay witnesses and witnesses who are permitted to give opinion, without vouching for the witnesses by having the court designated them as "experts."

101C

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Janet Levine, Chair

1. Summary of Resolution(s). The resolution urges judges who have decided to admit expert forensic science testimony to consider a number of factors in determining the manner in which that evidence should be presented to the jury and how to instruct the jury in its evaluation of scientific testimony in criminal and delinquency proceedings.

2. Approval by Submitting Entity. The resolution was approved by the Criminal Justice Section at its October 29, 2012 Fall meeting.

3. Has this or a similar resolution been submitted to the House or Board previously? Many of the factors that the pending resolution asks judges to consider in determining the admissibility of forensic evidence are contained in Standard 5.3 (Presentation of Expert Testimony) of the *ABA Criminal Justice Standards on DNA Evidence* (approved 2006 Annual Meeting). For example, the DNA Standards have the same or similar requirements as the current proposal's subsections --- 1, 3, 4, and 5. The requirement in subsection 2 that experts use clear and consistent terminology in presenting their opinions drew from Resolution 100E(4) (2010 Annual Meeting) which urged federal funding to, inter alia, "facilitate the development and adoption of standards and common terminology for the clear communication of scientific testing results.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The DNA Standards noted above are relevant, and some of the factors contained in those Standards would be extended here to include non-DNA-related forensic evidence. The resolution's call for common terminology which is consistent with Resolution 100E(4).

5. What urgency exists which requires action at this meeting of the House? The 2009 National Academy of Sciences report, *Strengthening Forensic Science in the United States: A Path Forward* mentions difficulties with jurors' understanding and correctly interpreting forensic science evidence, which can sometimes caused by misleading presentation and instructions. The NAS Report suggests model jury instructions as a way to facilitate jury decision-making. Concerns about the presentation of forensic science evidence have also recently appeared in the Supreme Court's Confrontation Clause jurisprudence, and have been an issue in some cases where defendants were wrongfully convicted. Currently,

there is little, if any, guidance about the presentation of forensic science evidence at trial after judges have determined its admissibility, or factors to be considered in jury instructions. Use of the listed factors will enhance jurors' understanding of such evidence, and facilitate reasoned decisions.

6. Status of Legislation. (If applicable).

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
The resolution and report will be distributed to organizations of judges and lawyers, as well as forensic science organizations. CLE and media outreach is also contemplated concerning and this resolution and the related voir dire and discovery issues in the other forensic science resolutions being currently proposed.

8. Cost to the Association. (Both direct and indirect costs) --- No cost to the Association is anticipated.

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

10. Referrals. Concurrently with the submission of this resolution to the ABA Policy Administration Office for calendaring on the House of Delegates agenda for the 2012 Midyear Meeting, it is being circulated to the chair (or president) and staff director (or executive director) of the following ABA entities and outside organizations:

Standing Committees
Antitrust Law
Ethics and Professional Responsibility
General Practice, Solo and Small Firm Division
Governmental Affairs
Gun Violence
Legal Aid and Indigent Defense
Substance Abuse

Special Committees and Commissions
American Jury Project
Bioethics and the Law
Death Penalty Representation Project
Domestic and Sexual Violence
Coalition on Racial and Ethnic Justice

101C

Sections and Divisions
Government and Public Sector Lawyers
Individual Rights and Responsibilities
Judicial Division
Litigation
National Conference of Federal Trial Judges
National Conference of State Trial Judges
National Conference of Specialized Court Judges
Science and Technology Law
State and Local Government Law
Taxation
Young Lawyers Division

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

Professor Myrna Raeder
Southwestern Law School
3050 Wilshire Boulevard
Los Angeles CA 90010
PH: 213/738-6775 Cell: 310/770-8111
Email: mraeder@swlaw.edu

Professor Paul Giannelli
Case Western University Law School
11075 East Boulevard
Cleveland OH 44106
PH: 216/368-2098
E-mail: paul.giannelli@case.edu

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

Stephen A. Saltzburg, Section Delegate
George Washington University Law School
2000 H Street NW
Washington DC 20052-0026
PH: 202/994-7089; 202 /489-7464 (cell)
E-mail: ssaltz@law.gwu.edu

William N. Shepherd, Section Delegate
Holland & Knight LLP
Suite 1000
222 Lakeview Ave
West Palm Beach, FL 33401-6148
PH: 561/650-8338; 561/723-9669 (cell)
E-mail: William.shepherd@hklaw.com

101C

EXECUTIVE SUMMARY

1. Summary of the Resolution
This resolution urges judges who have decided to admit expert testimony to consider a number of factors in determining the manner in which that evidence should be presented to the jury and how to instruct the jury in its evaluation of expert scientific testimony in criminal and delinquency proceedings.

2. Summary of the Issue that the Resolution Addresses
While forensic scientific evidence can be extremely valuable, it can be difficult for lay jurors to understand and weigh its relevance to the case before them. It is important, therefore, that the experts who present it will do so in a manner that accurately and fairly conveys its significance and the significance of their conclusions. In addition, jury instructions can help focus the jurors on the relevant forensic science issues.

3. Please Explain How the Proposed Policy Position Will Address the Issue
The proposed policy will provide judges a checklist of questions to consider in assessing how experts should present contested forensic science evidence, and the nature of jury instructions that should be given to jurors.

4. Summary of Minority Views
None known.

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges judges and lawyers to consider the following factors in formulating jury *voir dire* in criminal cases where forensic science evidence is contested:

1. Jurors' understanding of general scientific principles, including specialized training in science, knowledge or education in science and experience with laboratory practices;

2. Jurors' understanding of specific scientific principles relevant to the forensic science evidence that may be presented at trial, including specialized training, knowledge or education in the specific scientific discipline used in the case;

3. Any preconceptions that jurors may have about the forensic science evidence; and

4. Jurors' bias for or against scientific evidence, including whether scientific results will be accepted or rejected without consideration.

REPORT

Voir dire is one of the most important aspects of any jury trial.[1] Purposes of jury *voir dire* are to obtain information relevant to prospective jurors' backgrounds and experiences to impanel a fair and appropriate jury. At its most fundamental, jury *voir dire* is necessary to impanel a fair and impartial jury by revealing a potential juror's bias or inability to judge the evidence and apply the relevant law. Additionally, jury *voir dire* enables attorneys to appropriately exercise peremptory challenges by providing information about jurors' experiences and understanding of scientific evidence. This information also assists the parties in tailoring the presentation of scientific evidence to the selected jurors' capabilities and experiences, enabling an effective presentation most likely to increase jurors' understanding of the scientific principles involved in the case. "*Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently."[2]

Limitations on the scope of *voir dire* are certainly an appropriate exercise of judicial discretion to ensure the orderly administration of justice and to protect the reasonable privacy expectations of potential jurors, but courts should be circumspect about excluding or unduly curtailing questions concerning forensic science evidence. Although the relatively low level of scientific literacy in the general population and the legal profession (*See* National Academy of Sciences (NAS) Report pp. 234-238) may make scientific assessments of reliability (such as validation, uncertainty measurement, and statistical association) somewhat difficult to initially comprehend, the evidence is necessary for the jurors' proper determinations of weight of the evidence and to avoid misleading the jurors about the significance of the evidence. To decrease possible confusion of the issues, the parties should strive to present evidence in terms and using concepts familiar to the jurors. Additional questioning to ascertain jurors' prior experiences with science will permit more effective presentations of scientific evidence to permit more informed jury decisions concerning forensic evidence.[3] In some cases, the complexity of the scientific evidence or the seriousness of the potential penalties may warrant providing a written questionnaire for prospective jurors to allow expanded inquiry into these areas and provide enhanced opportunities for jurors to supply detailed responses.[4] The scope and extent of the questioning should always be tailored to the specific issues in controversy in the case.

---

1 This resolution was developed by a Forensic Science Task Force whose membership includes: Professor Myrna S. Raeder (Co-chair), Matthew F. Redle (Co-chair), Barry A.J. Fisher (retired lab director), Judge Ronald S. Reinstein, Betty Layne DesPortes, and Professor Paul G. Giannelli.

2 J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 143-144 (1994).

3 *See* Standard 15-2.2 of the ABA Criminal Justice Standards on Trial By Jury (1993)(discussing the use of specialized questioning).

4 *See* ABA Principles for Juries & Jury Trials, Principle 11 and accompanying commentary, at 71-72 (2005); ABA Criminal Justice Standards on Trial By Jury, Standard 15-2.2 and accompanying commentary, at 169 (1993).

101D

In a criminal case involving contested forensic science evidence, *voir dire* should include questions relevant to the nature of the case and the characteristics of the jurors. Questions should ascertain the prospective jurors' qualifications with respect to the forensic science testimony, including the jurors' preconceptions about science and familiarity with the concepts and factors relevant to determining the probative value of the scientific evidence, by addressing the following factors:

1. Jurors' understanding of general scientific principles, including specialized training in science, knowledge or education in science and experience with laboratory practices;
2. Jurors' understanding of specific scientific principles relevant to the forensic science evidence that may be presented at trial, including specialized training, knowledge or education in the specific;
3. scientific discipline utilized in the case [chemistry, toxicology, engineering, etc.];
4. Any preconceptions that jurors may have about the forensic science evidence; and
5. Jurors' bias for or against scientific evidence, including whether scientific results will be accepted or rejected without consideration.

Model *voir dire* questions should be developed to reflect the topics that arise in cases where forensic evidence is disputed. Examples of some possible types of questions are set forth below, with the understanding that the actual wording of questions and the extent of questioning will depend on the nature of the forensic dispute being litigated.

General Introduction:

This trial will involve the presentation of forensic science evidence and the testimony of witnesses described as experts in various fields, including [forensic science disciplines or areas of expertise of anticipated experts].

Education and Training:

1. Do you have any specialized training in science, [chemistry, statistics, or alternative fields implicated by the forensic science disciplines anticipated in the case]?

2. Do you have any specialized knowledge or experience in science, [chemistry, statistics, or alternative fields implicated by the forensic science disciplines anticipated in the case]?

3. [For forensic science disciplines that involve laboratory analysis] Have you ever taken chemistry or other science classes with a laboratory component?

Experience:

1. Have you ever consulted with a scientist or a specialist in a medical field?

2. If so, did you consider the following in selecting the scientist or specialist:

    a. the education and training of the scientist or specialist

    b. whether the scientist or specialist was certified or licensed by an authoritative agency

3. Have you ever relied on the results of a scientific analysis (including a medical diagnosis)?

4. If so, did you consider the following in deciding whether to rely on the results:

    a. Whether the testing involved was generally accepted or commonly encountered?

    b. Whether the results were obtained pursuant to established procedures and standards

    c. Whether any error rate was reported with the results

    d. Whether the laboratory or anyone interpreting the results had a financial interest in the results

    e. Whether the results are from a licensed or accredited laboratory

    f. Whether the person interpreting the results was certified or licensed by an authoritative agency

    g. Whether the results were confirmed by a second test

5. If two or more expert witnesses disagree about the results of a forensic science analysis, would you ignore the results or give no weight to the results in reaching a verdict?

Potential bias:

1. Do you believe that the results of a scientific analysis in [forensic science disciplines or areas of expertise of anticipated experts] are always accurate?

2. Would you give greater or lesser weight to the results of a forensic science analysis conducted by a government employee?

101D

3. If two or more expert witnesses disagree about the results of a forensic science analysis, do you think that the fact of disagreement among experts means that the results of the analysis are unreliable?

Questions should also be developed for forensic science topics that involve subjective determination so that the lawyers can ascertain the weight that a juror will give to an expert's opinion. This is particularly important when an expert testifies to the existence or nonexistence of patterns that may not coincide with the juror's own observations.

Attention to voir dire concerning disputed forensic science issues in criminal cases is long overdue. Hopefully this resolution will focus the criminal justice community on the importance of ascertaining the qualifications and potential biases of jurors on forensic topics that may be a key to determining a defendant's guilt or innocence.

Respectfully submitted,
Janet Levine
Chair, Criminal Justice Section
February 2012

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Janet Levine, Chair

1. Summary of Resolution(s). The resolution urges judges and lawyers to consider potential jurors' understanding of general scientific principles, scientific principles relevant to forensic science, and preconceptions or bias with respect to forensic scientific principles in formulating *jury voir* dire questions.

2. Approval by Submitting Entity. The proposed resolution was approved by the Criminal Justice Section Council at its October 29, 2011 Fall meeting.

3. Has this or a similar resolution been submitted to the House or Board previously? At the 1993 Midyear Meeting, the House of Delegates approved a 3rd edition of *ABA Criminal Justice Standards on Trial by Jury* that, in Standard 15-2.4 (Conduct of *voir dire* examination) require the examination to be "sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges." This same language was included in Principle 11(B) of a comprehensive set of "Principles for Juries and Jury Trial" approved at the 2005 Midyear Meeting. The Principles (11(A) also suggest that in "appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise." Standard 6-2.6 (Duties to juries) of the *ABA Criminal Justice Standards on The Special Functions of the Trial Judge* calls on the trial judge to "conduct the trial in such a way as to enhance the jury's ability to understand the proceedings . . ." None of the existing ABA policies – including a set of *Standards on DNA Evidence* approved at the 2006 Annual Meeting and several "stand alone" resolutions on biological evidence – explicitly address *voir dire,* issues relating to forensic science.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? See above. The proposed resolution would supplement the existing policies on voir dire to explicitly include consideration of issues relating to forensic science.

5. What urgency exists which requires action at this meeting of the House?
The 2009 National Academy of Sciences report, *Strengthening Forensic Science in the United States: A Path Forward* mentioned the possibility that jurors have unrealistic expectations concerning forensic science evidence, which has the potential of affecting outcomes at trial. This resolution addresses a gap in current practice by identifying topics that are relevant to *voir dire* concerning contested forensic science evidence. Currently,

there is little guidance about factors to be considered by judges and lawyers in formulating relevant *voir dire* questions. This poses a problem in light of the number of criminal cases in which forensic science evidence is presented. The listed factors will help evaluate jurors' understanding of such evidence, thereby facilitating jury selection and presentation of evidence at trial.

6. Status of Legislation. (If applicable).

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
The resolution and report will be distributed to organizations of judges and lawyers. CLE and media outreach is also contemplated concerning this issue and the related discovery and trial issues in the other forensic science resolutions being currently proposed.

8. Cost to the Association. (Both direct and indirect costs) --- No cost to the Association is anticipated.

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

10. Referrals. Concurrently with the submission of this resolution to the ABA Policy Administration Office for calendaring on the House of Delegates agenda for the 2012 Midyear Meeting, it is being circulated to the chair (or president) and staff director (or executive director) of the following ABA entities and outside organizations:

Standing Committees
Ethics and Professional Responsibility
General Practice, Solo and Small Firm Division
Governmental Affairs
Gun Violence
Legal Aid and Indigent Defendants
Substance Abuse

Special Committees and Commissions
American Jury Project
Bioethics and the Law
Death Penalty Representation Project
Domestic and Sexual Violence
Coalition on Racial and Ethnic Justice

Sections and Divisions
Antitrust Law Section
Government and Public Sector Lawyers

Individual Rights and Responsibilities
Judicial
Litigation
National Conference of Federal Trial Judges
National Conference of State Trial Judges
National Conference of Specialized Court Judges
Science and Technology Law
State and Local Government Law
Taxation
Young Lawyers Division

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

Professor Myrna Raeder
Southwestern Law School
3050 Wilshire Boulevard
Los Angeles CA 90010
PH: 213/738-6775 Cell: 310/770-8111
Email: mraeder@swlaw.edu

Professor Paul Giannelli
Case Western University Law School
11075 East Boulevard
Cleveland OH 44106
PH: 216/368-2098
E-mail: paul.giannelli@case.edu

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

Stephen A. Saltzburg, Section Delegate
George Washington University Law School
2000 H Street NW
Washington DC 20052-0026
PH: 202/994-7089; 202 /489-7464 (cell)
E-mail: ssaltz@law.gwu.edu

William N. Shepherd, Section Delegate
Holland & Knight LLP
Suite 1000
222 Lakeview Ave
West Palm Beach, FL 33401-6148
PH: 561/650-8338; 561/723-9669 (cell)
E-mail: william.shepherd@hklaw.com

101D

EXECUTIVE SUMMARY

1. Summary of the Resolution: The resolution urges judges and lawyers to consider potential jurors' understanding of general scientific principles, scientific principles relevant to forensic science, and preconceptions or bias with respect to forensic scientific principles in formulating jury *voir dire* questions.

2. Summary of the Issue that the Resolution Addresses: Jury *voir dire* is necessary to impanel a fair and impartial jury by revealing potential jurors' biases and ability to judge the evidence and apply the relevant law. Since there is a relatively low level of scientific knowledge in the general population, it is essential in cases involving scientific evidence that prospective jurors are asked questions that reveal their understanding or capacity for understanding the basic scientific principles involved.

3. Please Explain How the Proposed Policy Position Will Address the Issue: V*oir dire* questioning to ascertain prospective jurors' knowledge, capacity to understand, perceptions, and biases with respect to forensic science will permit selection of jurors able to understand and weigh the evidence to be presented and will facilitate more targeted and therefore more effective presentations of scientific evidence, resulting in more informed jury decisions.

4. Summary of Minority Views
None known.

101F

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION
COMMISSION ON IMMIGRATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association supports legislation, policies, and practices that allow equal and uniform access to therapeutic courts and problem-solving sentencing alternatives, such as drug treatment and anger management counseling, regardless of the custody or detention status of the individual.

FURTHER RESOLVED, That the American Bar Association urges that provisions of the Immigration and Nationality Act that are determined to be ambiguous be construed in favor of the use of rehabilitative problem-solving courts.

FURTHER RESOLVED, That the American Bar Association opposes interpretations of, and amendments to, the Immigration and Nationality Act that classify participation in, or the entry of a provisional plea upon commencement of a drug treatment or other treatment program offered in relation to problem-solving courts or other diversion programs as a "conviction" for immigration purposes.

REPORT

Eliminating Adverse Immigration Consequences of Rehabilitative Sentencing Alternatives

I. Introduction

For two decades, rehabilitative sentencing alternatives, such as drug and domestic violence courts, have made positive inroads in reducing recidivism and costs associated with incarceration. According to a 2005 U.S. Government Accountability Office (GAO) Study, "problem-solving" drug court rehabilitative programs, which permit treatment of addiction in lieu of incarceration, significantly reduced recidivism.[1] Recent studies of domestic violence courts, which offer intensive anger management treatment and monitoring as an alternative to incarceration, have found that such programs enhance victims' and perpetrators' satisfaction with outcomes, and deliver more services to victims and their families.[2] Domestic violence alternative sentencing programs also tend to process cases more quickly, reduce the rate of case dismissals, and make it more likely that perpetrators comply with judge-ordered conditions and remain in batterer and other programs.[3] Yet, for many immigrants, including lawful permanent residents of the United States, problem solving rehabilitative alternatives are never an option, because adverse immigration consequences would follow enrollment in a rehabilitative program.[4]

Problem-solving courts such as drug treatment courts, mental health courts, and more recently, veterans' courts, have become part of the mainstream of criminal justice in the United States. These courts, operating under principles of therapeutic jurisprudence, seek to use their authority to benefit defendants appearing before them by diverting them from jail to alternative-to-incarceration programs. However, these courts are not accessible to everyone who could benefit.

Noncitizens cannot avail themselves of the benefits of therapeutic courts, which results in an inequity with a high personal cost to the individual, his or her family and community, and society as a whole. In most, if not all of these courts, the prosecution and court require the entry of a guilty plea as a condition of participation. For noncitizens, however, the entry of a guilty plea will result in deportation, detention or other serious immigration consequences. In many jurisdictions, the successful

---

[1] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES (Feb. 2005).

[2] *See, e.g.*, Pamela M. Casey and David B. Rottman, *Problem Solving Courts: Models and Trends*, JUSTICE SYSTEM JOURNAL (Jan. 2005).

[3] *See id.*

[4] *See* INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48) (defining "conviction" for immigration purposes); *Matter of Ditren*, 2008 WL 486849 (BIA Jan. 23, 2008); *see also* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICA'S PROBLEM SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 44 (Sept. 2009).

completion of a court treatment mandate resulting in a dismissal of the case is meaningless for immigration purposes and the alien will be deported.

Noncitizens should have uniform access to therapeutic courts. Firstly, uniform access is desirable because of the overwhelming evidence of the benefits of these courts to defendants, prosecution and the criminal justice system. Additionally, Congress' intent when passing the 1996 amendment to the Immigration and Nationality Act was to clarify "conviction" and not allow for a conviction for therapeutic courts to serve as the basis for a deportation order.

Currently, in an overwhelming majority of cases, noncitizens do not have access to therapeutic courts due to their pretrial detention once immigration has placed a detainer, or "immigration hold." This occurs because, in most jurisdictions, once a noncitizen is arrested, for any offense, immigration is contacted and almost automatically places a detainer on the individual. This means that once the individual is released from criminal court custody (whether on bond or because the case has been closed), immigration officials are given 48 hours to transfer the individual to their custody for placement into removal proceedings.

Most therapeutic courts and diversion programs require that the person is not in custody for entry into and participation in the program. Therefore, noncitizens are being denied equal access to this program, and, as a result, are being denied an alternative to resolve their case. Many times, given the harsh immigration penalties currently in place, noncitizens who would otherwise be eligible for diversion or therapy are forced to take their cases to trial. In immigrant heavy jurisdictions, this will only result in additional crowding of an already burdened system, especially given the cost in lengthy pretrial detention and/or trials for individuals who are unable or unwilling to plead guilty given the immigration penalties that would result.

One possible solution is for jurisdictions to develop a way for these programs to be made available to those in pretrial custody. Possible alternatives include: jail or pretrial detention center courts or programs, video conferencing of the diversion classes that many jurisdictions use to be shown in the jails, and/or other programs that a particular jurisdiction sees fit based on its needs.

In a series of recent cases, some U.S. immigration officials, including the Board of Immigration Appeals ("BIA"), have curtailed the availability of problem solving rehabilitative programs to immigrants, by interpreting the Immigration and Nationality Act's ("INA") "conviction" definition to reach immigrants who have chosen treatment alternatives offered by problem-solving courts, subjecting these individuals to adverse immigration consequences as a result of participation in state rehabilitative programming.[5] This forces immigrants who do not want to be deported to go to trial rather than avail themselves of treatment opportunities. This approach deprives

[5] *See, e.g., Matter of Marin-Cabllero*, 2008 WL 4222184 (BIA Aug. 29, 2008); *Matter of Ditren*, 2008 WL 486849 (BIA Jan. 23, 2008).

immigrants of due process and undermines problem-solving courts' ability to serve immigrant families and communities. Imposing adverse immigration consequences for participation in state rehabilitative programming is also at odds with the ABA's enthusiastic support for problem-solving courts.[6] This recommendation proposes that the treatment of alternative sentences in the immigration enforcement context should reinforce rather than undermine the efficacy of problem solving alternative sentencing programs.

To support cost-savings and crime reduction through rehabilitative problem-solving alternatives, and to permit equal access to these programs for immigrants, including especially lawful permanent residents, the definition of "conviction" for immigration enforcement purposes should exclude rehabilitative diversionary programs, so that immigrants are able to participate in the programs offered by problem-solving courts without fear of deportation. The Department of Justice should issue an interpretation that defines participation in a post-plea diversionary program as outside the INA's definition of "conviction." Further, in immigration litigation the "conviction" definition should be interpreted to exclude such participation. Finally, Congress should pass legislation to clarify that the "conviction" definition is not intended to reach diversionary programs offered by problem-solving courts. These reforms would protect the ability of noncitizens that are lawful permanent residents of the United States to participate equally in problem-solving rehabilitative programs, and would promote uniformity and predictability in immigration enforcement.

This recommendation would thus affirm the important role of problem solving rehabilitative sentencing alternatives and would promote uniform and fair results in immigration proceedings.

II. Immigrants and Problem-Solving Courts

Immigration officials' position on the immigration consequences of participation in problem-solving courts, especially the BIA's recent, unpublished interpretations of the immigration laws, threaten the viability of problem-solving courts' programs for a substantial population of immigrants, including many thousands of lawful permanent residents. Specifically, the BIA has recently taken the position in two single-member unpublished decisions that the term "conviction" in the INA extends to include situations in which an immigrant successfully completes a court-involved drug treatment program and all criminal charges are dismissed.[7] The BIA's initial rulings on this matter of first impression have found that the initial plea taken as a condition of such programs constitutes a "conviction" and therefore a deportable offense under the immigration laws.[8] In another recent single-member unpublished decision, the BIA held that an immigrant who was detained soon after taking a guilty plea and entering into drug

---

[6] American Bar Association policy, *Drug Courts*, adopted February 1994.

[7] *Matter of Ditren*, 2008 WL 486849 (BIA Jan. 23, 2008)(appeal of denial of motion to terminate); *Matter of Ditren*, 2008 WL 1924630 (BIA Apr. 14, 2008)(appeal of denial of motion to reconsider).

[8] *Matter of Ditren*, 2008 WL 486849 (BIA Jan. 23, 2008); *Matter of Ditren*, 2008 WL 1924630 (BIA Apr. 14, 2008).

treatment should be denied bond. The BIA based its reasoning on the fact that the immigrant had not successfully completed treatment—*even though his failure to complete treatment was caused by his immigration detention.*[9] These cases demonstrate the detention and deportation obstacles faced by immigrants who choose to pursue treatment in a program offered by a problem-solving court as an alternative to a traditional criminal prosecution.

This emerging position presents troubling due process concerns. Ignoring the dismissal of charges or withdrawal of pleas in court-involved drug treatment programs results in unpredictability and unfairness because the alternative proceedings do not protect the full plethora of rights at the core of the traditional adversarial criminal justice system.[10] Defendants in such programs give up valuable procedural protections in order to participate, including their rights to a jury trial, to confront and cross-examine witnesses, to challenge the admissibility of evidence, to seek to suppress unlawfully obtained evidence, to seek appellate review of the proceedings, and other core protections.[11]

Moreover, because there is never a judgment ordered for those who successfully complete treatment, there is no mechanism to guarantee that the defendants' rights were protected during the proceedings. An individual who faces immigration consequences due to a criminal proceeding involving a drug treatment program is unfairly penalized. He or she is deprived of the right to seek redress for misadvice or any other legal defects in the initial taking of the plea, since the plea has already been vacated as part of the criminal proceeding. He cannot bring a state post-conviction motion to vacate his supposed "conviction," since under state law, no conviction exists. Similarly, since no judgment of conviction exists, he has no ability to seek appellate review of the proceedings. Yet, certain immigration officials would have the unreviewable proceedings serve as a basis for deportation. This raises serious due process concerns as to limits on defendants' opportunity to be heard on such legal and constitutional issues relating to their criminal cases and the resulting elimination of any avenues for relief in criminal or immigration court.

---

[9] *Matter of Marin-Caballero*, 2008 WL 4222184 (BIA Aug. 29, 2008). Mr. Ramiro Marin Caballero was placed into removal proceedings because of his participation in a drug treatment program. Mr. Caballero, a 20-year old citizen of Mexico, had lived in the United States since age ten. Brief of Respondent at 2-3, *Matter of Marin-Caballero*, No. A 70-974-665 (Immigration Court, San Francisco Jun. 24, 2008). In 2007, he was arrested and charged with criminal possession of narcotics. *Id.* He pled *nolo contendre* to unlawful possession pursuant to a state rehabilitative statute and entered into drug treatment. *Id.* A few months later, he was served with a Notice to Appear; at his first hearing, he was ordered into mandatory detention. *Id.* At his subsequent bond hearing, the IJ denied Mr. Caballero bond; the BIA affirmed.

[10] *See, e.g.*, Mai Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender about Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 52 (2000-01); Hon. Peggy Fulton Hora, Hon. William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 521 (1999).

[11] *See* Quinn, *supra* note 35, at 52; Hora, et al., *Therapeutic Jurisprudence, supra* note 35, at 521.

This emerging position also creates a difficult conundrum for immigrant communities and problem-solving courts, as it basically excludes all immigrants, lawful or not, from their model. If the severe collateral consequence of deportation follows successful participation in a program, many immigrants will be unable to participate. Excluding such a large population from problem-solving courts is troubling, given the documented cost savings and crime reduction benefits that such courts produce for society overall. Furthermore, the emerging position creates difficult administrative problems for the criminal justice system as a whole, as fair administration of problem-solving courts would require much more sophisticated counseling of immigrants regarding the risks of opting into diversion programs.

III. Application of INA "Conviction" Definition to Immigrants' Participation in Problem-Solving Courts

Criminal proceedings qualify as a conviction for immigration purposes when they meet one of two statutory definitions. First, proceedings constitute a "conviction" if they result in "a formal judgment of guilt of the alien entered by a court."[12] Second, proceedings constitute a conviction if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.[13]

This definition creates multiple interpretive problems that have not as of yet been fully explored by the BIA or the U.S. Circuit Courts of Appeals. The Second and Third Circuits have explored the question of at what point in state criminal proceedings "a formal judgment of guilt of the alien" is "entered by a court."[14] However, the second part of the definition has received less scrutiny. As more cases such as those described above work their way through the appellate process, courts will have to engage in more careful analysis about, *inter alia*: 1) when "adjudication of guilt has been withheld"; 2) whether a voluntary treatment program should be considered "ordered" or "imposed" by a judge; 3) whether drug treatment or other treatment or rehabilitation should be considered a "punishment, penalty or restraint on . . . liberty." Furthermore, courts will additionally have to decide what evidence suffices to meet each of these elements.[15]

Each of these questions of statutory interpretation can—and should—be approached from the perspective of encouraging state experimentation with problem-solving courts to achieve federally recognized objectives. A reasonable construction of the statute is that a voluntary treatment program is not "ordered" or "imposed" by a judge, but elected by an immigrant who so chooses that option over convention criminal

---

[12] INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).
[13] *Id.*
[14] *Puello v. Bureau of Citizenship and Immigration Services*, 511 F.3d 324 (2d Cir. 2007).
[15] *See, e.g., Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001)(remanding for further proceedings because government had not established evidentiary link between period of probation served and criminal case at issue in Notice to Appear).

justice processing. A further reasonable construction of the statute is that treatment, counseling, and rehabilitative services are not a "punishment, penalty or restraint on . . . liberty", but rather provide an opportunity on an elective basis to address destructive habits or behaviors. Given the vast amount of data on the success of problem-solving courts in reducing recidivism, lowering crime, and cutting costs,[16] interpretive questions about the relationship between treatment programs and immigration law should be decided in ways that support this success.

IV. History of Problem-Solving Courts

Problem solving courts first came into being in the late 1980s, but in recent years an increasing number of states have created alternative courts that provide individual treatment.[17] Drug treatment courts pioneered these alternatives to the adversarial criminal justice system and have spurred similar developments in cases relating to driving under the influence (DUI) and domestic violence.

• Drug Treatment Courts

Drug treatment courts aim to encourage individuals dependent on drugs and alcohol to break free from their addictions. These courts emerged in 1989, at a time when trial courts were overburdened with a significant number of drug-related cases.[18] Since then, drug treatment courts have been one of the fastest growing innovations in the criminal justice system.[19] Drug treatment courts depart from the traditional adversarial model and encourage a team approach to substance abuse treatment for defendants.[20] The defendant works with the court and other community actors to promote public safety through substance abuse treatment.[21] Drug treatment courts usually proscribe a multiphase treatment process, including stabilization, intensive treatment, and transition.[22]

---

[16] *See, e.g.*, C. West Huddleston III et al., Office of National Drug Control Policy, *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States* 2 (2005), http://www.ndci.org/publications/10697_PaintPict_fnl4.pdf (stating that "No other justice intervention brings to bear such an intensive response with such dramatic results – results that have been well documented through the rigors of scientific analysis.").

[17] American Bar Association, Judicial Division, Standards Relating to Trial Courts: Procedures in Drug Treatment Courts 5 (2001), *available at* http://www.abanet.org/jd/ncstj/pdf/drugctstandfinal.pdf [hereinafter ABA drug treatment court procedures].

[18] *Id.*

[19] *Id.*

[20] The "team approach" embodied by drug treatment courts involves local service providers, the larger community, and state-level organizations representing law enforcement, vocational rehabilitation, education, and housing. U.S. Dept. of Justice, Defining Drug Courts: The Key Components 1 (2004), *available at* http://www.ojp.usdoj.gov/BJA/grant/DrugCourts/DefiningDC.pdf [hereinafter Defining Drug Courts].

[21] ABA drug treatment court procedures, *supra* note 7, at 6.

[22] The stabilization phase may include screening, education, and initial treatment assessment. Intensive treatment usually includes individual and group counseling as well as other therapies. The transition phase includes social reintegration, employment assistance, housing services, education, and related services. Defining Drug Courts, *supra* note 10, at 1.

Though drug court models vary, many utilize a model in which a defendant is offered a choice between a traditional criminal prosecution, and the opportunity to pursue drug treatment.[23] If a person chooses to pursue treatment, a program may require an initial plea of guilty, with the promise that the plea will be vacated and all charges dismissed or reduced, upon successful completion of the program.[24] Drug courts have increasingly resorted to requiring upfront pleas not to punish participants or create a barrier to reintegration, but to "ensure compliance with court orders and provide swift sentencing" if the individual were to fail the drug treatment program.[25] While this alternative model was first introduced in relation to drug-related offenses, the methodology of drug treatment courts has expanded to juvenile proceedings, DUI cases, and domestic violence cases, among other areas.

- **DUI Courts**

Drug treatment courts provided a workable model for the creation of DUI courts in recent years. Though fatalities resulting from drunk driving steadily declined through the 1980s and 1990s, a worrisome trend accompanied this progress: the majority of drivers involved in alcohol-related traffic fatalities were serious drunk drivers and many were repeat offenders.[26] In order to treat the root of offenders' drinking problems, advocates used the drug court treatment model to implement a court-monitored treatment program for DUI offenders in many states.[27] DUI courts have adopted the approach of drug treatment courts, focusing on reducing recidivism and increasing the likelihood of successful rehabilitation through early, continuous, and intensive judicially supervised treatment.[28] Courts focused solely on DUI cases can ensure that alcohol-dependent individuals receive treatment shortly after arrest and that treatment is delivered in a supervised manner.[29]

- **Domestic Violence Courts**

States are also experimenting with applying the problem-solving approach to cases of domestic violence. Some states and localities have adopted domestic violence courts, the cornerstone of which is the integration of victim and offender-oriented

---

[23] National Association of Drug Court Professionals, *Defining Drug Courts: The Key Components* 6-7 (1997), *available at* http://www.nadcp.org/docs/dkeypdf.pdf.

[24] New York City Bar, *The Immigration Consequences of Deferred Adjudication Programs in New York City* 2 (2007), *available at* http://www.nycbar.org/pdf/report/Immigration.pdf.

[25] Memorandum from the Immigrant Defense Project of the New York State Defenders Association to the Brooklyn District Attorney's Office, Immigrant Participation in Treatment Diversion Programs 2 (Jan. 12, 2007).

[26] Chuck Pena, American Council on Alcoholism, Why do we need DUI courts?, http://www.aca-usa.org/whyduicourts.htm (last visited Mar. 31, 2009).

[27] *Id.*

[28] *Id.*

[29] National Drug Court Institute, DWI Courts and DWI/Drug Courts: Reducing Recidivism, Saving Lives, http://www.ndci.org/dwi_drug_court.htm (last visited Mar. 31, 2009) [hereinafter DWI Courts].

services throughout the legal process.[30] These problem-solving courts build strong relationships with service providers, encouraging offenders to seek treatment in community-based intervention programs. Such offender treatment programs provide support for abusers who want to address their behavior and encourage victims who want to stay with their partners to report incidents of violence.[31] Treatment services offered to defendants in domestic violence cases are matched by victim support, including services aimed at increasing victims' independence from their abusers.[32] While these courts are a relatively recent development,[33] they represent an emerging trend at the state and local level to encourage non-traditional rehabilitative approaches to solving social problems previously handled exclusively through probation or incarceration.

V. Benefits of Problem-Solving Courts

Therapeutic courts promote recovery through a coordinated response to defendants with substance abuse problems.[34] Therapeutic courts benefit defendants by diverting them from jail to alternative-to-incarceration programs. The scientific evidence is overwhelming that adult therapeutic courts reduce crime, reduce substance abuse, improve family relationships, and increase a defendant's earning potential.[35] Additionally, these courts return net dollar savings back to their communities that are at least "two to three times the initial investments."[36] In 2007, the American Bar Association adopted a policy recommended by the Commission on Effective Criminal Sanctions urging that all levels of government "support and fund programs that offer community based treatment alternatives to incarceration."[37]

The defendant benefits from a therapeutic court by diverting them from jail to alternative-to-incarceration programs. An arrest can be a traumatic event, creating an immediate crisis that forces an individual to address his or her substance abuse. The period immediately after an arrest provides a "critical window of opportunity for

---

[30] Robyn Mazur & Liberty Aldrich, *What Makes a Domestic Violence Court Work? Lessons from New York*, 42 A.B.A. Judges' J. 6 (2003), *available at* http://www.courtinnovation.org/_uploads/ documents/ whatmakesdvcourtwork.pdf.

[31] Christopher D. Maxwell et al., Results from the Brooklyn Domestic Violence Treatment Experiment 3, http://www.ncjrs.gov/pdffiles1/nij/199728.pdf.

[32] Mazur & Aldrich, *supra* note 20, at 7-9.

[33] Innovations regarding domestic violence courts have mainly occurred since the late 1990s. *Id.* at 5-6.

[34] "Defining Drug Courts: The Key Components" January 1997, Reprinted October 2004. The National Association of Drug Court Professionals; Drug Court Standards Committee

[35] NADCP, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS: The Facts on Adult Drug Courts: Updated 6/29/10, Douglas B. Marlowe, J.D., Ph.D. P. 7

[36] NADCP, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS: The Facts on Adult Drug Courts: Updated 6/29/10, Douglas B. Marlowe, J.D., Ph.D. P. 7

[37] (ABA Policy 103A)

intervening and introducing treatment."[38] By taking judicial action promptly after the arrest, the justice system can capitalize on this crisis nature of a defendant.[39]

Outside the treatment advantages, therapeutic courts also benefit the defendant by allowing him or her to return to society without a criminal conviction. Normally, if the defendant's sentencing is deferred if he or she opts to participate in treatment. When the defendant successfully completes the court mandate the case is dismissed or the charges are reduced. Therefore, the defendant has great incentive to succeed to receive the benefit of plea vacatur. Additionally, it is beneficial for prosecutors because they are not worried about lost witnesses or stale evidence that may result from a deferred prosecution.

Studies have found that therapeutic courts reduce criminal recidivism. By 2006, the scientific community had concluded beyond a reasonable doubt from advanced statistical procedures that drug courts reduce criminal recidivism, typically measured by fewer re-arrests for new offenses and technical violations.[40] In each analysis, the results revealed that drug courts significantly reduced crime rates by an average of approximately eight to twenty-six percent.[41] The government research agencies have concluded similar results. The Government Accountability Office concluded in a 2005 GAO report that therapeutic courts reduce crime.[42]

Another benefit is the cost-effectiveness and returned net investment of the therapeutic courts. A recent cost-related study concluded that drug courts produce an average of $2.21 in direct benefits to the criminal justice system for every $1.00 invested—a 221% return on investment.[43] These savings reflect measurable cost-offsets to the criminal justice system stemming from reduced re-arrests, law enforcement contacts, court hearings, and use of jail or prison beds.[44] The result has been net economic savings to local communities ranging from approximately $3,000 to $13,000 per drug court participant.[45]

For noncitizens, however, the entry of a guilty plea will result in deportation, detention or other serious immigration consequences. It is not only the undocumented alien facing these consequences, but lawful permanent residents, refugees and visa

---

[38] Defining Drug Courts: The Key Components" January 1997, Reprinted October 2004. The National Association of Drug Court Professionals; Drug Court Standards Committee

[39] "Defining Drug Courts: The Key Components" January 1997, Reprinted October 2004. The National Association of Drug Court Professionals; Drug Court Standards Committee

[40] NADCP, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS: The Facts on Adult Drug Courts: Updated 6/29/10, Douglas B. Marlowe, J.D., Ph.D.

[41] *Id.* at 1.

[42] GAO Report

[43] Bhati, A. S., Roman, J. K., & Chalfin, A. (2008). To treat or not to treat: Evidence on the prospects of expanding treatment to drug-involved offenders. Washington, DC: The Urban Institute.

[44] NADCP, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS: The Facts on Adult Drug Courts: Updated 6/29/10, Douglas B. Marlowe, J.D., Ph.D. P.3

[45] NADCP, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS: The Facts on Adult Drug Courts: Updated 6/29/10, Douglas B. Marlowe, J.D., Ph.D. P.4 e.g., Aos et al., 2006; Carey et al., 2006; Finigan et al., 2007; Loman, 2004; Barnoski & Aos, 2003; Logan et al., 2004.

holders are subjected to the consequences as well. Additionally, some defenders are reluctant to counsel their clients to plead guilty if there is a moderate likelihood they can win an acquittal, regardless that their clients are in need of drug treatment.[46] However, a court system which allows for the defendant's criminal record to be expunged may sway a "conscientious defender" to advise their client in favor of treatment.[47] The possibility that defendants could end up without a conviction—and in some jurisdictions no publicly accessible record at all—may motivate defenders to encourage their clients to enter a plea and receive drug treatment.

- **Problem-solving courts successfully reduce recidivism.**

While problem-solving courts are still relatively recent innovations developed over the past two decades, evaluations indicate that they have successfully reduced recidivism, lessened substance abuse and related criminal offenses, and promoted public safety.[48] Individual studies of DUI courts have also indicated high success rates in reducing recidivism.[49] Because of the strong link between substance abuse and other criminal offenses,[50] success in stemming substance addiction also reduces other crimes. The multidisciplinary approach of drug treatment courts and the involvement of various community resources not only reduce recidivism but increase the likelihood that participants will have the necessary tools to repair their relationships with their greater community.[51] While ending substance addiction is a worthy accomplishment in itself, the success of problem-solving courts extends beyond the formerly-addicted individuals and generates significant benefits for the larger public.

- **Problem-solving courts are cost-effective.**

Problem-solving courts that focus on treatment of addiction generate significant cost savings throughout the criminal justice system. Evaluations of drug treatment courts, for example, demonstrate that the courts generate savings in jail costs, probation supervision, and police overtime.[52] Treatment-based courts also generate

---

[46] Source 3

[47]

[48] Steven Belenko, National Center on Addiction and Substance Abuse, Research on Drug Courts: A Critical Review 12 (1998), http://www.ndci.org/admin/docs/casa.pdf.

[49] DWI Courts, *supra* note 19.

[50] Individuals addicted to substances are more likely to engage in other forms of criminal activity. Richard S. Gebelein, U.S. Dept of Justice, Sentencing & Corrections Issues for the 21st Century, The Rebirth of Rehabilitation: Promise and Perils of Drug Courts 3 (2000), http://www.ncjrs.gov/pdffiles1/nij/181412.pdf.

[51] C. West Huddleston, III et al., U.S. Department of Justice, Painting the Current Picture: A National Report Card of Drug Courts and Other Problem Solving Court Programs in the United States 1, 2 (2005), *available at* http://www.ndci.org/publications/10697_PaintPict_fnl4.pdf ("In this blending of systems, the drug court participant undergoes an intensive regimen of substance abuse and mental health treatment, case management, drug testing, and probation supervision while reporting to regularly scheduled status hearings before a judge with specialized expertise in the drug court model (Fox & Huddleston, 2003). In addition, drug courts may provide job skills training, family or group counseling, and many other life-skill enhancement services.").

[52] National Drug Court Institute, National Drug Court Institute Review 34 (1998), http://www.ndci.org/admin/docs/ndcir11.pdf.

savings in victimization, theft reduction, public assistance, and medical claims costs.[53] The economic benefits of the treatment offered through problem-solving courts are substantial, with one study finding the benefits of treatment to be seven times higher than the costs of providing treatment services.[54]

- **Problem-solving courts represent state-level innovations that should be respected at the federal level.**

States' experiences with problem-solving courts demonstrate state capacity for innovation and these advances should be respected and encouraged at the federal level as principles of comity urge respect for state court decisions. The federal government collects information on the successes of these courts and extracts best practices from state experiences,[55] thereby sharing the achievements of state innovation across borders. Federal officials should respect the States' innovative measures to stem such problems as substance addiction, domestic violence, and drunk driving, rather than undermine them through application of the federal immigration laws.

VI. Conclusion

In its reports and policy recommendations, the ABA has consistently recognized the importance of rehabilitative criminal justice alternatives and fairness and due process in immigration determinations. This recommendation builds on past ABA policies by protecting against the effective exclusion of immigrants from rehabilitative alternatives due to adverse immigration consequences triggered by an overly expansive definition of "conviction" that includes elective diversion to rehabilitative treatment programs.

This recommendation recognizes the central role of rehabilitative sentencing alternatives in reducing costs and recidivism and increasing the safety and stability of affected communities, for citizens and immigrants alike. The recommendation would protect the rights of immigrants, provide for efficiency in state criminal justice systems, and improve the administration of justice.

For all of these reasons, we urge the House to adopt this recommendation.

Respectfully submitted,
Janet Levine
Chair, Criminal Justice Section
February 2012

---

[53] *Id.* at 35. The analysis of one county's drug treatment court showed a savings of $2.4 million in costs related to the criminal justice system, and approximately $10.2 million in total savings throughout the county. *Id.*

[54] *Id.* at 36.

[55] Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts & Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 834 (2000).

101F

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Janet Levine, Chair
Criminal Justice Section

1. Summary of Resolution(s).

The resolution supports policies and practices that preclude triggering immigration consequences for noncitizen defendants who plead guilty in therapeutic courts as a condition of receiving alternative-to-incarceration treatment unless and until the court accepting the plea imposes final sentence as a result of the defendant's non-compliance.

2. Approval by Submitting Entity.

The proposed resolution was approved by the Criminal Justice Section Council at its October 29, 2012 meeting.

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

There have been resolutions to protect noncitizens who have been convicted of crime from automatic deportation and resolutions supporting various kinds of treatment courts but none explicitly linking the two, as does the current resolution.

At the 2006 Midyear Meeting, the House approved Resolution #300 urging Congress to restore authority to state and federal sentencing courts to waive a noncitizen's deportation or removal based upon a finding at sentencing that removal is unwarranted in the particular case or alternatively to give such waiver authority to an administrative court or agency. The resolution also urged immigration authorities not to consider low-level state offenses as "aggravated felonies" subject to mandatory deportation. This latter provision was also included in Resolution #114A at the 2010 Midyear Meeting which, in addition, urged Congress to eliminate the retroactive application of aggravated felony provisions and restore an immigration judge's authority to consider a discretionary application for cancellation of removal for certain lawful permanent residents convicted of an aggravated felony, based on humanitarian and other grounds. Concern about the issue of immigration consequences of criminal proceedings for non-U.S. citizen defendants was also addressed in Resolution #100C at the 2010 Annual Meeting; this resolution urged government funding to state and federal public defender offices and legal aid programs for providing advice about such consequences to indigent non-U.S. citizens.

Specialized courts were supported in Resolutions #101A at the 2001 Annual Meeting (drug courts) and #116 at the 2003 Midyear Meeting.

Concerns about the collateral sanctions of convictions are also addressed in at least two sets of ABA Criminal Justice Standards: *Collateral Sanctions and Discretionary Disqualification of Convicted Persons* (approved at the 2003 Annual Meeting) and *Pleas of Guilty* (approved at the 1997 Annual Meeting). Standard 19-2.3 (Notification of collateral sanctions before plea of guilty) of the standards on collateral sanctions calls on courts to ensure that the defendant has been informed of any automatically-imposed collateral sanctions that will result from a plea in the case, and the standards on guilty pleas require defense counsel, to the extent possible, to determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might result from entry of the contemplated plea.

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

   See #3, above. This resolution would encourage policymakers to adopt explicit immigration-related policies that parallel more general ABA policies to reduce and ameliorate the collateral consequences of arrest and conviction, thereby encouraging noncitizen defendants to participate in the sorts of therapeutic court programs the ABA has previously endorsed for defendants in general.

5. What urgency exists which requires action at this meeting of the House?

   The urgency revolves around the fact that considerable numbers of noncitizen defendants are going without treatment for conditions that contribute to or facilitate criminal behavior because the therapeutic programs available to otherwise similarly-situated defendants require a guilty plea that subjects noncitizen defendants to immigration consequences. The sooner such defendants participate in therapeutic programs, the sooner these conditions can be addressed. This resolution can stimulate legislators and other policymakers to facilitate such participation.

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 policy will be distributed to various stakeholders in criminal justice, including but not limited to the Department of Justice, Immigration and Customs Enforcement, and immigration advocacy groups in order to encourage and facilitate adoption of similar policies. The policy is also expected to be featured on the Criminal Justice Section website and in Section publications.

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

   No cost is anticipated.

9. Disclosure of Interest. (If applicable)

   None known.

10. Referrals.

    Concurrently with the submission of this resolution to the ABA Policy Administration Office for calendaring on the House of Delegate agenda for the 2012 Midyear Meeting or at the request of Rules and Calendar, it is being circulated to the chair (or president) and staff director (or executive director) of the following ABA entities and outside organizations:

    Standing Committees
    Governmental Affairs
    Gun Violence
    Law and National Security
    Legal Aid and Indigent Defendants
    Substance Abuse
    Special Committees and Commissions
    Center for Human Rights
    Coalition on Racial and Ethnic Justice
    Commission on Domestic and Sexual Violence
    Commission on Homelessness and Poverty
    Commission on Immigration
    Commission on Disability Rights
    Commission on Youth at Risk
    Sections and Divisions
    Health Law
    Family Law
    General Practice, Solo and Small Firm Division
    Government and Public Sector Lawyers Division
    Individual Rights and Responsibilities
    International Law
    Judicial Division
    Litigation
    National Conference of Federal Trial Judges
    National Conference of State Trial Judges
    National Conference of Specialized Court Judges
    State and Local Government Law
    Young Lawyers Division

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

Hon. Matthew D'Emic
New York State Supreme Court
320 Jay Street
Brooklyn, NY 11201-2935
Phone: 347/296-1031
Email: mdemic@courts.state.ny.us

Sara Dill
Law Offices of Sara Elizabeth Dill
35 E Wacker Dr 9th Floor
Chicago, IL 60601-2341
Phone: 312/564-5670
E-mail: saraedill@gmail.com

Anne Swern
Kings County DA's Office
350 Jay Street Fl 19
Brooklyn, NY 11201-2904
Phone: 718/ 250-3939
E-mail: swernaj@brooklynda.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.)

Stephen A. Saltzburg, Section Delegate
George Washington University Law School
2000 H Street NW
Washington DC 20052-0026
PH: 202/994-7089; 202 /489-7464 (cell)
E-mail: ssaltz@law.gwu.edu

William N. Shepherd, Section Delegate
Holland & Knight LLP
Ste 1000
222 Lakeview Ave
West Palm Beach, FL 33401-6148
PH: 561/650-8338; 561/723-9669 (cell)
E-mail: William.Shepherd@hklaw.com

101F

EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution supports policies and practices that preclude triggering immigration consequences for noncitizen defendants who plead guilty in therapeutic courts as a condition of receiving alternative-to-incarceration treatment unless and until the court accepting the plea imposes final sentence as a result of the defendant's non-compliance.

2. Summary of the Issue that the Resolution Addresses

In recent decades, problem-solving courts such as drug treatment courts, mental health courts, and more recently, veterans' courts, have become part of the mainstream of criminal justice in the United States. The courts allow defendants to deal with issues that have caused or contributed to the charges against them and, upon successful completion of certain requirements, have the charges against them dismissed. Typically, the entry of a guilty plea is required as a condition of participation in these therapeutic courts. For noncitizens, however, the entry of a guilty plea is likely to result in deportation, detention or other serious immigration consequences. In many jurisdictions, the successful completion of a court treatment mandate resulting in a dismissal of the case is meaningless for immigration purposes and the alien will be deported.

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

The proposed policy will provide noncitizen defendants the same access to therapeutic courts as citizens defendants have.

4. Summary of Minority Views

None known.

AMERICAN BAR ASSOCIATION

SECTION OF INTERNATIONAL LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges that U.S. federal, state, territorial, tribal and local courts consider and respect the data protection and privacy laws of any foreign sovereign, and the interests of any person who is subject to or benefits from such laws, with regard to data that is subject to preservation, disclosure, or discovery.

REPORT

"Commerce among nations should be fair and equitable." Benjamin Franklin

"Cross-border discovery has become a major source of international legal conflict, and there is no clear, safe way forward. At the heart of these conflicts are vastly differing notions of discovery and data privacy and protection. And the frequency and intensity of these conflicts is heightened by an expanding global marketplace and the unabated proliferation of Electronically Stored Information ('ESI')." [1]

I. Introduction

With the exponential increase in the global reach of corporations and other commercial entities, an increasing number of disputes in U.S. courts involve protected data situated in and subject to the laws of foreign countries, many with notions of privacy and disclosure that differ from or are much stricter than those in the United States. Those notions of privacy are, quite frequently, given less than due consideration by courts in the United States. Yet, the daily interfaces essential to cross-border commerce and dialogue, including through electronic information transfers, call for recognition of the exigencies of other legal systems, and where warranted, application of their privacy and data protection laws.

The U.S. Supreme Court recognized the need to respect non-U.S. law in the discovery context of civil litigation at least as far back as 1987, when it held in *Aerospatiale v. District Court of Iowa*,[2] that international comity compels "American courts (to) take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state."[3]

More recently, the need for consideration of the interests of non-U.S. litigants in an age of interconnected commerce was emphasized by U.S. District Court Judge John Gleeson, who wrote in *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,* "by its very nature, international comity sometimes requires American courts to accommodate foreign interests even where the foreign system strikes a different balance between opposing policy concerns."[4]

As both *Aerospatiale* and *In Re Payment Card Interchange Fee* recognize, protecting data privacy and disclosing information for purposes of litigation and arbitration need not be mutually exclusive. Properly applied, U.S. law already provides a clear and workable standard for resolving the conflict. Nevertheless, U.S. courts have often misapplied the standard and ruled

---

[1] *The Sedona Framework® for Analysis of Cross-Border Conflicts: A Practical Guide to Navigating the Competing Currents of International e-Discovery and Data Privacy* (Public Comment Version August 2008) (hereinafter "Sedona Framework") at 1, available at www.thesedonaconference.org.

[2] Société Nationale Industrielle Aérospatiale and Société de Construction d'Avions de Tourisme v. United States District Court for the Southern District of Iowa, 482 U.S. 522 (1987)

[3] *Id.* at 546. The Court set forth a five-factor balancing test for the application of non-U.S. data protection law, discussed in greater detail below.

[4] 05-MD-1920 (JG)(JO) (E.D.N.Y. August 27, 2010) at *19-20.

that the needs of the proceeding before them inevitably must take precedence over the privacy and data protection concerns of other nations. Litigants often face a Hobson's Choice: violate foreign law and expose themselves to enforcement proceedings that have included criminal prosecution[5], or choose noncompliance with a U.S. discovery order and risk U.S. sanctions ranging from monetary costs to adverse inference jury instructions[6] to default judgments. The current state of jurisprudence in this regard, then, is inconsistent with promotion of rule of law, as it facilitates violation of law, either abroad or here.

In a time in which the world has, in the words of the author Thomas L. Friedman, become "flatter,"[7] that is, more closely connected over shorter time-distances than at any previous point in its history, failure to give—or to appear to give—due recognition to the concerns of privacy and data protection of other nations can result in a host of negative consequences. The courts of other countries may take a similarly hardened view of U.S. laws and regulations to the detriment of U.S. litigants in their courts. Rulings by courts here and abroad that may be seen as parochial or insufficiently accommodating of interests and mores of other legal regimes could stymie the growth of global commerce, including the cross-border movement of personnel and the hiring of local employees.

This resolution seeks to restore the true balancing function of *Aerospatiale* by urging federal and state courts to carefully consider, and appropriately respect, the Data Protection and Privacy laws of foreign countries as they concern the disclosures of data subject to protection by the laws of those countries.

II. Overview of the Issue

In practice, U.S. courts rarely take cognizance of foreign privacy statutes (including data privacy laws and bank secrecy legislation, as well as the so-called "blocking" statutes) in a manner that might delay, limit or preclude pre-trial discovery. A litigant who, concerned about violation of privacy and data protection laws in countries with applicable jurisdiction, declines to follow the U.S. discovery order to produce the data or documents may face severe sanctions that can result in the imposition of costs or other penalties that can lead to loss of the case.[8]

---

[5] *See, e.g., In re Advocat Christopher X*, Cour de Cassation, Chambre Criminelle, Paris, Dec. 12, 2007, No. 07-83228.(conviction for violation of France's Blocking Statute and imposition of monetary fine affirmed).

[6] In instructing a jury on an adverse inference, the court advised the jurors that they may presume that the information not produced at trial would be adverse to the position of the party who had the responsibility to produce it. *See Zubulake v. UBS Warburg LLC ("Zubulake IV")*, 220 F.R.D. 212, 219-222 (S.D.N.Y. 2003).

[7] Friedman, Thomas L., *The World Is Flat* (Metropolitan Books 2007).

[8] See *Lyondell-Citgo Refining, LP v. Petroleos de Venezuela, S.A*, 2005 WL 1026461 (S.D.N.Y. 2005), in which the defendant, faced with a court order to produce minutes of a meeting of the Board of Directors, which would have violated Venezuela's Special Law Against Information Systems Crimes, as the minutes evidenced the locations of named individuals (Directors) at a location and on a date certain, accepted an adverse inference instruction. Violation of The Special Law Against Systems Crimes entailed criminal sanctions. See also *United States v. Vetco*, 691 F.2d 1281 (9th Cir. 1981); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992). *Cf., Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) *("Zubulake V)*, the trial court denied a motion to set aside the verdict of a jury in a gender discrimination matter had awarded $29.3 million in less then thirty minutes, following an adverse inference instruction. See also *The Pension Committee of the University of Montreal Pension Plan, et. al. v. Banc of America Securities, LLC*, et. al., No. 05 Civ. 9016, 2010 U.S. Dist. LEXIS 4546, at *1-2 (S.D.N.Y. Jan. 15, 2010) (Amended Order); *Qualcomm v. Broadcom*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008)

At least one court has recognized that there is another way. In the 2001 case of *In re Vitamins Litigation.*[9] the court crafted a means by which it would work with the parties to "safeguard defendants from liability" under Swiss and German law, while at the same time assessing the potential harm to plaintiffs if production of the information were to be denied.[10] Most U.S. courts, though, reflexively default to the perceived procedural needs of the litigation over the potential risks to the litigants under foreign privacy and data protection laws. Global commerce has advanced considerably since 2001, making the need for such balanced solutions as urged by this resolution that much more imperative.

Understanding the nature of the conflict between expansive U.S. notions of discovery in civil litigation (on the one hand) and restrictive concepts of data protection under foreign law (on the other) requires a grasp of the fundamental legal, historic and cultural national interests at stake. Critical to the dispute over data flow and disclosure is the notion of privacy. A right to privacy is explicitly enshrined in the constitutions of countries as diverse as Belgium, Japan, and Brazil. For European counties, in particular, the notion of privacy is bound up with human rights principles, in particular under the *European Convention for the Protection of Human Rights and Fundamental Rights*, as it has been interpreted by the European Court of Human Rights in Strasbourg,[11] and the *Charter of Fundamental Rights of the European Union*[12]

For European Union Member States, data protection and privacy legislation must comply with *Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data* (hereafter the "Directive"). The Directive, and the opinions of the bodies charged with interpreting and implementing it, such as the EC Article 29 Working Party on Data Protection, clearly reflect the primacy of individual privacy. The Directive binds EU Member States and establishes a "floor" for privacy.[13] E.U. Member States may enact enabling legislation that is stricter than the Directive, and many have done so. In addition, many jurisdictions outside the E.U. have adopted the Directive in part, or have modeled their laws upon the EC Privacy Directive to a significant degree.[14] Thus, the EC Privacy Directive is a good place to begin this analysis.

($6,000,000 costs assessed, adverse inference instruction given, patents sued upon held unenforceable due to discovery abuses, and attorneys referred for discipline for failure to produce emails as directed by court).

[9] No. 99-197TFH, 2001 WL 1049433 (D.D.C. June 20, 2001).

[10] *Sedona Framework* at 24.

[11] Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms explicitly recognizes that "[e]veryone has the right to respect for his private and family life, his home and his correspondence" and that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." These provisions have been interpreted and applied by the European Court of Human Rights in a number of significant cases, including in the field of data protection. See generally http://www.echr.coe.int/echr/homepage_EN.

[12] Art. 8(1): "Everyone has the right to the protection of personal data concerning him or her." See generally www.europarl.europa.**eu/charter**/pdf/text_en.pdf

[13] Correspondingly, HIPAA provides a minimal standard for medical privacy protection in the United States.

[14] Privacy and data protection laws in many parts of the world are, to greater or lesser degrees, modeled on the European Union Privacy Directives. *See, e.g.*, Chile, *Law for the Protection of Private Life* (Law 19,628 1999); Argentina: *Law for the Protection of Personal Data* (Law 25,321 2000); Japan: *Personal Information Protection Act* (Law n. 25,326 2000); *Personal Information Protection and Electronic Documents Act*, S.C. 2000 Ch. 5 (Can). *Sedona Framework, supra* note 43, at 3-4.

Three relevant factors bear emphasis. First, the definition of "Personal Data" protected under the EC Privacy Directive is broad, covering any data that may be traced to an identifiable person.[15] E-mail, the most sought form of electronic evidence in litigation and arbitration, is considered "Personal Data" by the European Commission, and subject to all restrictions on transfer in the Directive and Member States' enabling legislation, including the possibility of criminal sanctions.[16] Second, under the Directive, Personal Data may not be transferred beyond the European Economic Area (the E.U. Member States plus Switzerland, Norway, Iceland and Liechtenstein) to a country with lesser standards of Personal Data protection without consent of the data subject, unless certain protections are in place, such as those afforded by the U.S. Safe Harbor Program (which was painstakingly negotiated with E.U. authorities) or in Model Clauses approved by all E.U. Member States in data transfer agreements.[17] Currently, the European Commission considers only five countries to have acceptable standards of data protection and privacy, and the United States is not among them.[18] Third, a number of EU Member States have enacted "blocking statutes" specifically preventing the transfer of certain categories of data for use in foreign judicial proceedings (discussed in greater detail below). Some of these provisions carry criminal sanctions.[19]

To take another example of the primacy of privacy beyond the United States, Canadian law takes a much more expansive view of privacy than does U.S. law. To illustrate, a Canadian business desiring to film its parking lot for security purposes would have to implement a plan that limits the individuals with access to the film to security personnel and select others, limits the use to security purposes, provides for a limited retention period, and so forth.[20] Uses exceeding those in the plan could subject the collecting parties to liability under Canadian laws. Privacy laws in Canada exist at both the federal and provincial levels of government. There are two federal privacy statutes: the Privacy Act[21], which is intended to protect the privacy of personal information held by government agencies, and the Personal Information Protection and

---

[15] EU Data Protection Directive defines personal data as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity." *See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995* on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281, 23/11/1995 P. 0031– 0050, available in English at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML (hereinafter "the Directive").

[16] *See, e.g.,* Italy: Italian Law 196/2003.

[17] Neither the U.S. Safe Harbor Program nor the Model Clauses in data transfer agreements permit onward transfer or Personal Data, such as to courts or counsel.

[18] Countries considered to have equivalent standards of privacy are Argentina, Canada, Israel, Switzerland, and Uruguay.

[19] *See, e.g.,* Switzerland: Swiss Penal Code Articles 271 and 273. Privacy laws carry criminal penalties outside the European Union. See *Lyondell-Citgo Refining, LP v. Petroleos de Venezuela, S.A*, 2005 WL 1026461 (S.D.N.Y. 2005), in which the defendant, faced with a court order to produce minutes of a meeting of the Board of Directors, which would have violated Venezuela's Special Law Against Information Systems Crimes, as the minutes evidenced the locations of named individuals (Directors) at a location and on a date certain, accepted an adverse inference instruction. Violation of The Special Law Against Systems Crimes entailed criminal sanctions.

[20] Guidance on Covert Video Surveillance in the Private Sector, http://www.priv.gc.ca/information/pub/gd_cvs_20090527_e.cfm.

[21] Privacy Act, R.S.C, 1985, c. P-21, http://laws-lois.justice.gc.ca/eng/acts/P-21/index.html.

Electronic Documents Act[22] ("PIPEDA"), which is intended to protect the privacy of personal information held by non-governmental organizations.[23] "Personal information" is defined under PIPEDA as "information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization."[24]

The combined effect of these kinds of restrictions on parties in U.S. litigation can be significant. The whipsaw of competing requirements engendered by discovery demands to foreign litigants in U.S. courts, or those with non-U.S. data, can subject to them to the Hobson's Choice that may lead them to ask the following question, when faced with a U.S. court order requiring production in litigation: "Do you prefer I go to jail here, or there?"

Yet another key element in the conflict over data transfers for litigation is the fundamental distinction in the role of pretrial information exchange in civil law countries versus common-law jurisdictions. The scope of pre-trial discovery under U.S. law is as wide as it is deep, even permitting discovery of evidence that is not necessarily admissible and may never see the light of a courtroom. In civil jurisdictions, parties exchange electronic data and paper documents in a process known as "Disclosure." The court directs each party to disclose materials that support its case or, in some instances, the adversary's case. This information most often is stated with significant specificity.

There have been attempts in Europe to accommodate U.S interests, in the interest of international comity and facilitating global commerce. *Derogations,* or exceptions, exist in most civil law jurisdictions, and common-law countries to permit the transfer of Personal Data for U.S. litigation as long as it is conducted through the process specified in the country's laws, such as enabling legislation for the Hague Convention on the Taking of Evidence Abroad.[25] This treaty was the factual predicate for the Court's consideration in *Aerospatiale.* The Hague Convention instituted a uniform procedure for the issuance of "letters of request" (a/k/a "letters rogatory"). Letters of request are petitions from a court in one nation to a designated central authority in another, requesting assistance from that authority in obtaining relevant information located within its borders. France, in particular, has instituted an expedited consideration procedure under Article 2 of the Hague Convention to handle requests for pre-trial discovery.[26]

In 2008, the EC Article 29 Working Party on Data Protection published Working Document WP158, in which the needs of data transfer for U.S. litigation were explicitly recognized, and a procedure was set forth for culling Personal Data to be transferred and filtering it for sensitive information and data that are not relevant to the claims in the U.S. lawsuit. In this way, the Working Party explained, the interests of U.S. litigation could be accommodated, while the intrusion on the privacy of the data subjects could be minimized.[27] In 2009, the French data

---

[22] Personal Information and Electronic Documents Act, S.C. 2000, c.5 ("PIPEDA"), http://laws-lois.justice.gc.ca/eng/acts/P-8.6/index.html.

[23] Links to the various provincial privacy laws are available on the website of Office of the Privacy Commissioner of Canada, .http://www.priv.gc.ca/resource/prov/index_e.cfm.

[24] PIPEDA, Section 2, http://laws-lois.justice.gc.ca/eng/acts/P-8.6/FullText.html.

[25] *Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (1972) (hereinafter "Hague Evidence Convention").

[26] Articles 733 through 748 of the *Nouveau Code de Procedure Civile.*

[27] European Union Article 29 Data Protection Working Party, Working Document 1/2009 on Pre-trial Discovery for Cross Border Civil Litigation 8 (WP 158, 2009), available at

protection authority, the CNIL, published an opinion in which it, too, acknowledged the necessity of Personal Data transfers for U.S. litigation, and set forth the means by which the disclosures could take place in accordance with French law.[28]

Nonetheless, U.S. courts "have generally rejected the interests of civil law jurisdictions in protecting their data from U.S.-based discovery."[29] Even where a need for privacy and confidentiality is recognized, federal and state judges tend to rely on protective orders and confidentiality stipulations to protect privacy and secrecy. While "attorneys' eyes only" provisions are familiar here, they are foreign to non-U.S. litigants and are viewed with suspicion, at the least. That suspicion is not unwarranted: given the preeminence that U.S. courts ascribe to the custom of "open courts," the protected information, whether or not subject to a protective order or a confidentiality stipulation, would become public if attached as exhibits to a publicly-filed motion, or introduced into evidence at trial. Accordingly, such orders and agreements do not necessarily reassure the holders of non-U.S. information that is subject to protection that confidentiality will be assured or that the non-disclosure requirements of the home country will be honored.

III. The Problem In U.S. Courts

In practice, U.S. courts rarely enforce the prohibitions of foreign privacy statutes (including data privacy laws and bank secrecy legislation, as well as the so-called "blocking" statutes) in a manner that would preclude or limit pre-trial discovery sought pursuant to the Federal Rules of Civil Procedure.[30] When U.S. courts have stayed production or ordered litigants to resort to other means to seek production (*e.g.*, under the Hague Evidence Convention), it is typically because they have concluded that (1) the information is not important to the case or is available elsewhere; (2) the producing party likely would face criminal prosecution for producing the information; (3) the foreign country's interest in protecting its information is vitally important; or, (4) more likely, a combination of all of these considerations.[31]
In considering the risk of hardship to the producing party, U.S. courts tend to consider insufficient the fact that production of the information would be illegal in the foreign country and, instead, require a strong indication that hardship would *in fact* result in the particular case.[32]

---

http://ec.europa.eu/justice_home/fs/privacy/index_en.htm (hereinafter "E.U. Working Document"). The Working Document also stated, however, that the derogation in Articles 7 (c) and 7(f) for disclosures of personal information in compliance with a legal obligation may not apply to obligations imposed by non-E.U. states. *Id.* at 9.

[28] *Délibération n°2009-474 du 23 juillet 2009 portant recommandation en matière de transfert de données à caractère personnel dans le cadre de procédures judiciaires américaines dites de "Discovery."* [Opinion No. 2009-474 of July 23, 2009, Making Recommendations about the Transfer of Personal Data in American Discovery Proceedings.] available in English at http://www.cnil.fr/english.

[29] *Sedona Framework* at 17.

[30] *See* James Chalmers, *The Hague Evidence Convention and Discovery Inter Partes: Trial Court Decisions Post-Aérospatiale*, 8 Tul. J. Int'l & Comp. L. 189, 190-91 (2000); Jenia Iontcheva, *Sovereignty on our* Terms, 110 YLJ 885, 887 (2001); *see also, Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, No. 04 C 3109, 2005 U.S. Dist. LEXIS 20049, *17-18 (N.D. Ill. Sept. 12, 2005).

[31] *See, e.g., In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992, 998-99 (10th Cir. 1977); *cf. In re Baycol Products Litigation*, 348 F.Supp.2d 1058, 1059-61 (D. Minn. 2004) (holding Hague Convention procedure applied because Convention was only way to obtain requested discovery and foreign law did not necessarily prohibit such discovery); Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958).

[32] *See Cochran Consulting, Inc.* v. *Uwatec USA, Inc.*, 102 F.3d 1224, 1231 (Fed. Cir. 1996).

In assessing the competing interests of the relevant jurisdictions, U.S. courts frequently conclude that, while a foreign country's general interest in protecting information of its nationals is legitimate, it does not suffice to preclude or restrict production.

There are several types of non-United States legislation to which a litigant might be subject in responding to discovery requests in connection with proceedings in the United States, including blocking statutes, data privacy legislation, and bank secrecy laws. [33] Ultimately, however, U.S. courts rarely sustain an argument that these laws limit or excuse compliance with a discovery request under U.S. procedures, such as the Federal Rules of Civil Procedure.[34]

A. Discovery "Blocking" Statutes Around the Globe

U.S. courts typically use the term "blocking statute" to refer to foreign laws that limit or prevent disclosure in connection with proceedings in other jurisdictions of documents and information located in the foreign country.[35] Various countries have enacted some form of "blocking" statutes, including Australia, Canada, France, Japan, Sweden, The Netherlands, the United Kingdom, and Japan.[36] The most restrictive of these may be the French blocking statute, French Penal Code law No. 80-538 of July 16, 1980. The statute prohibits "any person to request, to investigate or to communicate in writing, orally or by any other means, documents or information relating to economic, commercial, industrial, financial or technical matters leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as a

---

[33] There is a host of other foreign laws that restrict the collection or distribution of information under various circumstances. Some courts refer to these laws as blocking statutes; but, unlike the blocking statutes discussed below, they are not designed merely to block discovery in connection with foreign legal proceedings, but rather were enacted for some other purpose. *See, e.g., Reinsurance Co. of America, Inc.* v. *Administratia Asigurarilor de Stat*, 902 F.2d 1275 (7th Cir. 1990) (discussing a Romanian service secrets law); *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992) (considering a Chinese state secrets act); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 998-99 (10th Cir. 1977) (discussing a Canadian law regulating the dissemination of information relating to nuclear energy). Courts tend to employ the same analytical criteria to assess efforts to invoke these protections in response to discovery requests in United States litigation as they employ to adjudicate challenges to discovery requests under the types of legislation discussed below. *See, e.g., Richmark*, 959 F.2d at 1474-75. As a result, as in the case of challenges based on blocking statutes, data privacy laws and bank secrecy legislation, U.S. courts tend to order production despite the prohibitions of these other types of privacy statutes. *See Richmark Corp.*, 959 F.2d at 1475-78; *U.S. v. Vetco, 691 F.2d 1281, 1287 (9th Cir. 1981)*; *Alfadda v. Fenn, 149 F.R.D. 28, 40 (S.D.N.Y. 1993)*; *Reino De Espana* v. *American Bureau of Shipping*, 2005 WL 1813017, No. 03-CIV-3573 (LTS/RLE), at *9 (S.D.N.Y. August 1, 2005).

[34] *See* James Chalmers, *The Hague Evidence Convention and Discovery Inter Partes: Trial Court Decisions Post-Aérospatiale*, 8 Tul. J. Int'l & Comp. L. 189, 190-91 (2000); Jenia Iontcheva, *Sovereignty on our Terms*, 110 YLJ 885, 887 (2001).

[35] *See* The Sedona Conference, *Framework for Analysis of Cross-Border Discovery Conflicts*, 17-22 (2008). In recent years, some courts have referred to any foreign statute that regulates the collection and dissemination of data as a "blocking statute," although this is not technically correct. *See* Joe Baker, *District Court Orders Production Despite German Data Protection Act,* Georgetown Law Center E-Discovery Blog, http://www.law.georgetown.edu/cleblog/post.cfm/district-court-orders-production-despite-german-data-protection-act (March 18, 2001).

[36] *See* Marc J. Gottridge and Thomas Rouhette, *Blocking Statutes Bring Discovery Woes*, N.Y. Law Journal, n.6 (April 30, 2008).

part of such proceedings."[37] Violations of this statute can be punished by imprisonment for up to six months and a fine of up to €18,000.[38]

Punishment under the French blocking statute had been considered rare. However a criminal conviction has brought new attention to the risks of ignoring that law. In 2007, a French lawyer was convicted of, and fined €10,000 for, violating the blocking statute in connection with discovery in proceedings involving the California Insurance Commissioner.[39] Courts in the United States nevertheless continue to hold that the risk of prosecution under the French blocking statute is not significant.[40] In *In re Global Power Equipment Group Inc.*, the court nonetheless held that the risk of prosecution under the French blocking statute was not significant. While the responding party identified one case (*Christopher X)* in which the French blocking statue had been used to prosecute a French national for engaging in discovery without following the Hague Convention, it had, according to the court, identified only *one* case.[41]

B. United States Courts' Analysis of Conflicts Between U.S. Discovery Requirements and Foreign Discovery and Blocking Statutes

Discovery in civil proceedings in the federal courts in the United States is governed primarily by the Federal Rules of Civil Procedure.[42] Those discovery requirements are considered among the most extensive of the pre-suit disclosure requirements of any jurisdiction.[43] This broad scope of discovery can conflict with foreign privacy, data protection or "blocking" statutes. Litigants subject to obligations under both U.S. discovery requirements and disclosure restrictions under the laws of other jurisdictions may apply to the U.S. court to limit or excuse compliance with aspects of the U.S. discovery procedures or to conduct discovery under alternative procedures, such as the Hague Convention. Yet U. S. courts have, for the most part, have defaulted to the Federal Rules of Civil Procedure in a manner not entirely consistent with the requirements of the *Aeropsatiale* balancing test.

The *Aerospatiale* Court observed that "the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation than petitioners' proposed general rule [mandating resort to Hague Convention procedures in the first instance] would generate."[44] The Court held that, in conducting this analysis, courts should give appropriate deference to relevant legislation and particularities of other jurisdictions:

---

[37] Bates C. Toms III, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 Int'l L. 585 (1981); *Soletanche & Rodio, Inc.* v. *Brown & Lambrecht Earth Movers, Inc.*, 99 F.R.D. 269, 273–74 (N.D. Ill. 1983).

[38] *See id.*

[39] *See In re Advocat Christopher X*, Cour de Cassation, Chambre Criminelle, Paris, Dec. 12, 2007, No. 07-83228.

[40] *See In re Global Power Equipment Group Inc.*, 2009 WL 3464212 at *15.

[41] *Id.*

[42] *See In re Automotive Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 300 (3d Cir. 2004).

[43] *See* Rule 26(b)(1), Fed.R.Civ.P. ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

[44] Société Nationale Industrielle Aérospatiale and Société de Construction d'Avions de Tourisme v. United States District Court for the Southern District of Iowa, 482 U.S. 522 at 543-44 (1987) (notes omitted).

> American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. . . . In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. . . . . *American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.* (emphasis supplied).[45]

The *Aerospatiale* decision identified certain criteria as relevant to this comity analysis, referring to the considerations set out in the *Restatement of Foreign Relations Law of the United States* (Revised) § 437(1)(c).[46] Those considerations include: (1) The importance to the litigation of the information requested; (2) the specificity of the request; (3) whether the information originated in the United States; (4) whether alternative means exist to obtain the information; and (5) whether the interests of the United States outweigh the interests of the foreign jurisdictions in maintaining confidentiality.[47] The party opposing discovery bears the burden of proof on these considerations.[48] U.S. courts often have added a factor to this test to address the potential hardship that a producing party might suffer from compliance with the discovery requests.[49]

Notwithstanding these factors, and the Supreme Court's admonition in *Aerospatiale* that courts should assess carefully the competing interests of the relevant jurisdictions, in practice, courts in the United States rarely uphold the requirements of a foreign "blocking" statute to prohibit or limit production pursuant to discovery requests under the Federal Rules of Civil Procedure.[50] Frequently, the courts' rationale is that foreign discovery "blocking" statutes are overly broad and designed to thwart American-style discovery.[51] Some courts, though, have, applied the

---

[45] *Id.* (citing *Hilton* v. *Guyot*, 159 U.S. 113 (1895)).

[46] (Tent. Draft No. 7, 1986) (approved May 14, 1986) ("Restatement").

[47] *See id.* at 544 n.28. *See also Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1474-75 (9th Cir. 1992) (noting that *Aerospatiale* endorsed this non-exhaustive test based on the Restatement).

[48] *See Strauss* v. *Credit Lyonnais, S.A.*, 249 F.R.D. 429, 435 (E.D.N.Y. 2008); *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 354 (D. Conn. 1991).

[49] *See id. (*citing *U.S.* v. *Vetco*, 691 F.2d 1281, 1289-90 (9th Cit. 1981)) (describing several factors taken into account by the 9th Circuit.); *In re Air Cargo Shipping Servs. Antitrust Litig.*, -- F.R.D. --, 2010 WL 1189341, No. 06-MD-1775, at *2 (E.D.N.Y. March 29, 2010).

[50] *See, e.g., In re Air Cargo Shipping Servs.*, 2010 WL 1189341 at *3-4; *In re Global Power Equipment Group Inc.*, 2009 WL 3464212 at *1, *16; *Bodner* v. *Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000); *MeadWestvaco Corp.* v. *Rexam PLC*, 2010 WL 5574325, No. 1:10cv511 (GBL/TRJ), at *2 (E.D. Va. December 14, 2010); *Remington*, 107 F.R.D. at 644.

[51] *See MeadWestvaco Corp.*, 2010 WL 5574325 at *2 (concluding that that the French blocking statute is "overly broad and vague" and finding that it should not be afforded much deference); *Bodner*, 202 F.R.D. at 375 ("as held by numerous courts, the French Blocking Statute does not subject defendants to a realistic risk of prosecution, and cannot be construed as a law intended to universally govern the conduct of litigation within the jurisdiction of a United States court."); *In re Global Power Equipment Group Inc.*, 2009 WL 3464212 at *15-16 (compelling discovery pursuant to the Federal Rules of Civil Procedure and holding that the French Blocking Statute "does not subject defendants to a realistic risk of prosecution"); *In re Air Cargo Shipping Servs.*, 2010 WL 1189341 at *3-4 (declining to provide protection mandated by the French "blocking" statute even though there was no bad faith on the part of the producing party and there existed a risk of prosecution by the French government because of the importance of the requested documents to the outcome of the case, the occurrence of only one prosecution under the French statute and the prior production of similar information U.S. courts).

Hague Convention procedures.[52] In addition, a New Jersey court has held that courts should apply the Hague Convention before invoking state or federal procedural rules if a party opts to seek discovery pursuant to Hague Convention procedures, unless compliance will cause undue prejudice.[53]

(a) Balancing of National Interests

U.S. courts often state that they consider as the most important factor in the Restatement test the balancing of national interests.[54] When analyzing blocking statutes, however, courts tend to conclude that this factor weighs heavily in favor of unrestrained enforcement of the discovery requests because of the courts' view that the *raison d'être* of "blocking" statutes is to protect foreign nationals from discovery in external proceedings.[55] In contrast, U.S. courts tend to describe the competing United States interest in terms of allowing the orderly resolution of disputes, vindicating the rights of plaintiffs, or enforcing United States law and to find that interest to be controlling in the resolution of the discovery dispute.[56]

This resolution seeks to provide guidance to courts by urging them to give consideration to the national interests behind the non-U.S. statutes and weigh them in the manner the Supreme Court directed in *Aerospatiale.* The result of a failure to do so may impede the orderly flow of electronic commerce between nations by, among other things, provoking non-U.S. courts to harden their attitude with regard to the application of U.S. law.[57]

(b) Importance of Documents to the Case

When analyzing the importance of the documents to the matter, "where the outcome of litigation does not stand or fall on the present discovery order, or where the evidence sought is cumulative of existing evidence, courts have generally been unwilling to override foreign secrecy laws."[58] Yet, when courts consider the evidence to be "directly relevant" to the case, they generally conclude that this factor weighs in favor of production.[59] It is predictable that courts will apply this reasoning in many civil litigation contexts, such as employment discrimination cases, commercial contract disputes or Foreign Corrupt Practices Act litigation.

---

[52] *See In re Perrier Bottled Water Litig.*, 138 F.R.D. 348 (D. Conn. 1991) (granting a protective order directing the application of the procedures set forth in the Hague Convention).

[53] *See Husa v. Laboratoiries Servier S.A.*, 326 N.J. Super. 150, 152, 156, 158 (App. Div. 1999) (reversing the trial court's decision not to use the Hague Convention procedures where the plaintiffs sought to take the depositions of individuals living in France).

[54] *See In re Air Cargo Shipping Servs. Antitrust Litig.*, 2010 WL 1189341 at *4.

[55] *See id*; *Remington Prods., Inc. v. N. Amer. Philips Corp.*, 107 F.R.D. 642, 651 (D.C. Conn. 1985).

[56] *See In re Air Cargo Shipping Servs.*, 2010 WL 1189341 at *2 (characterizing the interest of the United States as enforcing antitrust laws, which are "essential to the country's interests in a competitive economy."); *In re Global Power Equipment Group Inc.*, 2009 WL 3464212 at *14 (holding that the United States has a substantial interest in "the prompt, economical and orderly administration of its bankruptcy cases"); *Richmark*, 959 F.2d at 1477 (finding that the United States' interest was in vindicating the rights of plaintiffs and enforcing the judgments of U.S. courts).

[57] See, ABA Resolution 113A Report and Recommendation, available at http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2011_hod_annual_meeting_113a.authcheckdam.doc; Resolution approved at http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2011_hod_annual_meeting_daily_journal_FINAL.authcheckdam.pdf. *See also,* Mackinnon v. Donaldson, [1986] Ch. 482, 494 (Justice Hoffman for the court: "If you join the game you must play according to local rules."

[58] *Richmark Corp.*, 959 F.2d at 1475; *see also In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d at 999.

[59] *See, e.g., In re Global Power Equipment Group Inc.*, 2009 WL 3464212 at *13, *16; *Richmark*, 959 F.2d at 1475.

(c) Specificity of the Request

In assessing the specificity of the disputed requests, courts tend to look more favorably on specific, rather than generalized, requests for information.[60] However, even if a large amount of information is requested, U.S. courts generally will require compliance with the requests, if the courts consider them limited in time or scope,[61] despite the second *Aerospatiale* criterion that courts should consider the *specificity of the request* in deciding whether to apply non-U.S. law.[62]

(d) Location of the Information

In analyzing the factor of the location of information, courts typically will look to whether the requested information is located only within the foreign country, and whether it originated there.[63] The courts also may consider the location of the individual or entity with custody or control of the information.[64]

(e) Alternate Means of Obtaining the Information

In determining whether there is an alternate means of obtaining the information, U.S. courts generally look to whether the information can be easily obtained elsewhere without violating foreign law.[65] In the Ninth Circuit, courts have specified that they will consider as an appropriate alternative only those sources that yield information that is "substantially equivalent" to the requested production.[66]

(f) Hardship to the Producing Party

U.S. courts have been inconsistent in requiring compliance with a discovery request if it would expose the producing party to criminal penalties in a foreign country.[67] If there has never or seldom been a prosecution under the "blocking" statute, a court likely will not hold that this factor favors enforcing a prohibition on, or limitation of, the requested production.[68] U.S. courts have considered more seriously specific circumstances that indicate that the party likely would suffer punishment from compliance with the disputed discovery requests[69], though in one case a defendant faced with almost certain prosecution was left with no practical choice but to decline to follow the court's production and order and, instead, to accept the sanction of an adverse inference instruction.[70] The current resolution seeks to redress this unfortunate situation by urging courts to take appropriate consideration of the jeopardy in which a failure to apply foreign data protection law may place a litigant.

---

[60] *See Richmark*, 959 F.2d at 1475.
[61] *See id.*
[62] Notes 59-61, *supra.*
[63] *See id.*; *Reinsurance Co. of America* v. *Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1281 (7th Cir. 1990).
[64] *See In re Global Power Equipment Group Inc.*, 2009 WL 3464212 at *13.
[65] *See Richmark Corp.*, 959 F.2d at 1475.
[66] *See Id*; *Vetco*, 691 F.2d at 1290.
[67] *See Richmark*, 959 F.2d at 1477; *Reinsurance Co. of America, Inc.*, 902 F.2d at 1280 (noting that hardship should be considered when determining whether to enforce production).
[68] *See In re* Air Cargo Shipping Servs., 2010 WL 1189341 at *3 (noting that the French "blocking" statute has been used to prosecute only one individual, under distinguishable circumstances that did not involve a U.S. court order for discovery); *In re Global Power Equipment Group Inc.*, 2009 WL 3464212 at *15 (holding that the risk of prosecution under the French blocking statute was not significant because the responding party identified only one case, *Christopher X*, in which it had been used); *Remington*, 107 F.R.D. at 647 (noting that the Dutch blocking statute had never resulted in a prosecution).
[69] *See Cochran Consulting, Inc.* v. *Uwatec USA, Inc.*, 102 F.3d 1224, 1231 (Fed. Cir. 1996) (declining to require discovery, in part, because "the threat of Swiss sanctions was explicit.").
[70] *Lyondell-Citgo Refining, LP v. Petroleos de Venezuela* 2005 WL 1026461 (S.D.N.Y. 2005); *See also* note 13, *infra.*

IV. Data Privacy Statutes

Data privacy statutes are laws enacted by governments to protect certain types of personal information.[71] For example, in the EU Data Protection Directive of 1995, the European Union requires that all member states enact laws protecting the collection, processing and dissemination of data outside of the EU.[72] This directive limits the ability of litigants even to preserve information for compliance with discovery requests, let alone disclose that information, in United States litigation.

U.S. courts typically analyze applicability of foreign data privacy law to discovery requests under the Federal Rules of Civil Procedure under the same balancing approach that they use in adjudicating efforts to invoke the protections of "blocking" statutes.[73] One could argue, however, that U.S. courts should give more deference to foreign legislation in balancing the national interests underpinning data protection statutes than they do in assessing requested recognition in U.S. litigation of discovery "blocking" statutes, and some courts have done so.[74]

A. U.S. Court Decisions Regarding Data Privacy Statutes

Yet, the relatively sparse case law indicating respect for foreign data privacy law still reflects an aversion to foreign data privacy statutes and an inclination by United States courts to order traditional discovery even when it conflicts with that legislation.[75] In at least one case, however, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation* the court was willing to block discovery based upon a balancing of national interests. Plaintiffs in *Payment Card* alleged that certain companies had engaged in activities in the United States that violated American antitrust laws, and sought discovery of materials held by the defendants that were produced during a European Union investigation for similar antitrust violations in the EU by the same companies.[76] The EU agency instructed the defendants not to release this material and intervened as *amicus curiae*, arguing that such materials had to be kept confidential to encourage cooperation and honesty in future investigations.[77] Siding with the defendants and the EU

---

[71] *See* Colleen Conry and Shannon Capone Kirk, *Discovery Double-Bind: Compliance With US Discovery Obligations and Foreign Data Privacy Laws*, Third International Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum, Rome (May 2009).

[72] *See* Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (October 24, 1995).

[73] *See, e.g.*, *In re Vitamins Antitrust Litig.*, 2001 WL 1049433, No. 99–197 (TFH), at *4-5 (D.D.C. June 20, 2001) (applying Restatement standard to adjudicate applicability of German and Swiss data protection laws to Federal Rules of Civil Procedure); *Columbia Pictures Indus.* v. *Bunnell*, 2007 WL 2080419, No. CV 06-1093 (FMC/JCX), at *12 (C.D. Cal. May 29, 2007) (ordering production of server logs potentially in violation of a Dutch data privacy statute because of the importance of the documents to the case and a lack of alternate means to obtain the information).

[74] *See Volkswagen, A.G.* v. *Valdez*, 909 S.W.2d 900, 902 (Tex. 1995) (noting that German privacy rights are considered by some "equal in rank to the right of freedom of speech" and finding that the trial court abused its discretion in ordering production in violation of German law); *In re Vitamins*, 2001 WL 1049433 at *14 (opining that "the Court must carefully consider the sovereign interests" at issue).

[75] *See* James Chalmers, *The Hague Evidence Convention and Discovery Inter Partes: Trial Court Decisions Post-Aérospatiale*, 8 Tul. J. Int'l & Comp. L. 189, 190-91 (2000); Jenia Iontcheva, *Sovereignty on our Terms*, 110 YLJ 885, 887 (2001); *Columbia Pictures Indus.*, 2007 WL 2080419 at *12-13; *In re Lernout & Hauspie Secs. Litig.*, 218 F.R.D. 348, 352-53 (D. Mass. 2003); *but see Volkswagen, A.G.* v. *Valdez*, 909 S.W.2d at 902-03.

[76], No. 05-MD-1720 (JG)(JO), 2010 WL 3420517, *1-4 (E.D.N.Y. Aug. 27, 2010).

[77] *Id.* at *1-4, *9.

agency, the court held that the EU's "interest in confidentiality outweighs the plaintiffs' interest in discovery of the European litigation documents."[78]

V. Bank Secrecy Statutes

Various countries have enacted statutes specifically designed to protect against disclosure of banking information.[79] Typically, U.S. courts invoke the same Restatement criteria in determining whether to sustain those protections in response to U.S. discovery as they apply to discovery objections premised on "blocking" statutes and data protection legislation.[80]

Some U.S. courts have recognized that protecting bank secrets can be a valid interest of a foreign country.[81] Nonetheless, in evaluating that interest courts, focus upon whether the foreign government has specifically objected to the discovery order.[82] U.S. courts also take into consideration in balancing competing interests any applicable exceptions to the foreign law and any ability of a banking customer to waive secrecy,[83] and thus frequently enforce U.S. discovery requirements over challenges predicated on foreign bank secrecy statutes.[84] For example, in one federal court decision, the court ordered production of the requested information in violation of a French bank secrecy statute, finding that the documents potentially showing that the producing party was aware that it was assisting a terrorist organization were vital to the outcome of the case, the request was narrowly tailored, the only other way to obtain the information was through the Hague Convention, and both the United States and France have a strong interest in protecting against terrorism.[85]

---

[78] *Id.* at *9; *see also In re Rubber Chemicals*, 486 F. Supp. 2d 1078 (N.D. Cal. 2007) (reaching similar outcome to ensure integrity of EU leniency program that "allows cartel participants to confess their wrongdoing in return for prosecutorial leniency").

[79] *See, e.g., Strauss* v. *Credit Lyonnais, S.A.*, 249 F.R.D. 429, 435-36 (E.D.N.Y. 2008) (addressing French bank secrecy laws); *Minpeco, S.A.* v. *Conticommodity Servs., Inc.*, 116 F.R.D. 517, 529 (S.D.N.Y. 1987) (considering Swiss bank secrecy laws); *U.S.* v. *Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985) (examining Cayman Islands law).

[80] *See, e.g., Strauss*, 249 F.R.D. at 438.

[81] *See id.* at 525; *Davis*, 767 F.2d at 1035.

[82] *See Strauss*, 249 F.R.D. at 438; *Davis*, 767 F.2d at 1035 ("The absence of any objection by the Cayman government to the subpoena and subsequent order ... is significant."); *U.S.* v. *Vetco, Inc.*, 691 F.2d at 1289 (concluding that U.S. interest in discovery outweighed interests underlying Swiss statutes because the case did not involve "a totally Swiss interest in confidentiality").

[83] *See Strauss*, 249 F.R.D. at 438; *Davis*, 767 F.2d at 1035 (noting that a Cayman Islands banking privacy statute did not "provide a blanket guarantee of privacy").

[84] *See Davis*, 767 F.2d at 1033-36; *Strauss*, 242 F.R.D. at 210-24; *Bodner*, 202 F.R.D. at 375; *In re Grand Jury Proceedings*, 532 F.2d 404, 409 (5th Cir. 1976); *Alfadda v. Fenn*, 149 F.R.D. 28, 40 (S.D.N.Y. 1993).

[85] *See Strauss*, 242 F.R.D. at 210-24. However, in balancing competing considerations, the court in *Minpeco* did not require production in conflict with Swiss bank secrecy statutes because it determined that the balance was nearly level, and a great deal of similar information had already been produced by other parties. *See Minpeco*, 116 F.R.D. at 523-38. The district court found that, although the United States had a compelling interest in enforcing its antitrust and commodities fraud statutes, compliance with the disputed discovery requests would expose the producing party to the risk of not only imprisonment, but also of administrative sanctions, including the revocation of the bank's license. Further, the Swiss government had submitted to the court written objections to the requested discovery; and the producing party was no longer a primary defendant to the case, as a result of which it could not avoid production and the consequent foreign risks by settling the litigation. *See id.* at 537. Ultimately, the court concluded that a determining factor in the balance was that the requested discovery was largely cumulative and, therefore, unnecessary because a significant amount of information already had been produced. *See id.* at 537-39.

103

VI. CONCLUSION

Privileging the interests of U.S. litigants to discovery without due regard to the requirements of the relevant foreign legislation often places parties in the perilous situation of having to choose between inconsistent legal requirements and perhaps to incur sanctions under one legal system or the other. Permitting broad discovery in disregard or even defiance of foreign protective legislation can ultimately impede global commerce harm the interests of U.S. parties in foreign courts and provoke retaliatory measures. The American Bar Association, in pursuit of its mission to uphold the rule of law, therefore urges U.S. courts to respect the obligations of litigants to follow *all* laws applicable to their positions in the litigation and, where possible in the context of the proceedings before them, permit compliance with non-U.S. data protection and privacy laws.

Respectfully Submitted,

Michael E. Burke, Chair
ABA Section of International Law
February 2012

GENERAL INFORMATION FORM

Submitting Entity: Section of International Law

Submitted By: Michael E. Burke, Chair, Section of International Law

1. Summary of Resolution(s).
This Resolution requests the ABA to urge U.S. courts to take into consideration and respect non-U.S. data protection and privacy laws that affect the litigants before them concerning data that is subject to preservation, disclosure or discovery. In practice, U.S. courts rarely take cognizance of foreign privacy statutes (including data privacy laws and bank secrecy legislation, as well as the so-called "blocking" statutes) in a manner that might delay, limit or preclude pre-trial discovery. As a result a litigant who, concerned about the consequences of violation of privacy and data protection laws in countries with applicable jurisdiction, declines to follow the U.S. discovery order to produce protected data or documents may face severe sanctions that can result in the imposition of costs or other penalties that can lead to loss of the case.

   The current Resolution seeks to address the untenable Hobson's Choice in which the current state of jurisprudence, in this time of accelerating global commerce and concomitant data flows, places litigants.

2. Approval by Submitting Entity.
Yes, the Section of International Law Council approved the R&R on October 15, 2011.

3. Has this or a similar resolution been submitted to the House or Board previously?
We are unaware of any similar resolution that has previously been submitted to the House or Board.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?
This Resolution does not affect any existing policies of the Association. It promotes the proper application of the well-established doctrine of comity and its approach is consistent with the approach of Resolution 113A, which was approved by the House of Delegates in August 2011, and the approach to consideration of privacy imperatives in law enforcement investigatory activities in Proposed Resolution 105.

5. What urgency exists which requires action at this meeting of the House?

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.
Subject to consultation with the GAO and with their assistance, if the House of Delegates adopts the resolution, we would plan on sending copies of it and the report to the Judicial Conference of the United States as well as to similar U.S. state judicial conferences, as well as the American and Federal Judges Association, and similar U.S. state bodies.

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

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

10. Referrals.

This resolution is being provided to other ABA entities for support. It is being provided to the following ABA entities for possible co-sponsorship:

All Sections and Divisions.

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

Kenneth N. Rashbaum, Esq.
Chair, Data Protection and Privacy Team,
International Litigation Committee
Rashbaum Associates, LLC
515 Madison Avenue, Suite 500
New York, New York 10022
Tel: 212-421-2823
Fax: 212-308-7677
krashbaum@rashbaumassociates.com

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

Michael H. Byowitz
Section Delegate to the HOD
Wachtell Lipton Rosen & Katz
51 West 52nd Street
New York, Ny 10019-6119
Tel: 212-403-1268
Fax: 212-403-2268
mhbyowitz@wlrk.com

EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution requests the ABA to urge U.S. courts to take into consideration and respect non-U.S. data protection and privacy laws that affect the litigants before them concerning data that is subject to preservation, disclosure or discovery. In practice, U.S. courts rarely take cognizance of foreign privacy statutes (including data privacy laws and bank secrecy legislation, as well as the so-called "blocking" statutes) in a manner that might delay, limit or preclude pre-trial discovery. As a result a litigant who, concerned about the consequences of violation of privacy and data protection laws in countries with applicable jurisdiction, declines to follow the U.S. discovery order to produce protected data or documents may face severe sanctions that can result in the imposition of costs or other penalties that can lead to loss of the case. The current Resolution seeks to address the untenable Hobson's Choice in which the current state of jurisprudence, in this time of accelerating global commerce and concomitant data flows, places litigants.

2. Summary of the Issue that the Resolution Addresses

U.S. courts have often misapplied the standard on application foreign data protection and privacy laws and ruled that the needs of the proceeding before them inevitably must take precedence over the privacy and data protection concerns of other nations. Litigants often face a Hobson's Choice: violate foreign law and expose themselves to enforcement proceedings that have included criminal prosecution, or choose noncompliance with a U.S. discovery order and risk U.S. sanctions ranging from monetary costs to adverse inference jury instructions to default judgments. The current state of jurisprudence in this regard, then, is inconsistent with promotion of rule of law, as it facilitates violation of law, either abroad or here. In addition permitting broad discovery in disregard or even defiance of foreign protective legislation can ultimately impede global commerce may impede the orderly flow of electronic commerce between nations by, among other things, provoking non-U.S. courts to harden their attitude with regard to the application of U.S. law.

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

Protecting data privacy and disclosing information for purposes of litigation and arbitration need not be mutually exclusive. Properly applied, U.S. law already provides a clear and workable standard for resolving the conflict. This resolution seeks to provide guidance to courts by urging them to give consideration to the national interests behind the non-U.S. laws and weigh and apply in a manner that demonstrates respect for those laws and the principles of international comity.

4. Summary of Minority Views

None known at this time.

AMERICAN BAR ASSOCIATION

COMMISSION ON WOMEN IN THE PROFESSION
COMMISSION ON RACIAL AND ETHNIC DIVERSITY
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SECTION OF STATE AND LOCAL GOVERNMENT LAW
STANDING COMMITTEE ON ARMED FORCES LAW
NATIONAL ASSOCIATION OF WOMEN LAWYERS
STANDING COMMITTEE ON LEGAL ASSISTANCE FOR MILITARY PERSONNEL
NATIONAL CONFERENCE OF ADMINISTRATIVE LAW JUDICIARY
NATIONAL CONFERENCE OF WOMEN BAR ASSOCIATIONS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges state and territorial bar admission authorities to adopt rules, regulations, and procedures that accommodate the unique needs of military spouse attorneys who move frequently in support of the nation's defense, including but not limited to:

1. Enacting "admission by endorsement" for military spouse attorneys, whereby a member in good standing of one jurisdiction who possesses the requisite good moral character required for admission would be admitted without examination to the practice of law in another jurisdiction, provided that the applicant demonstrates presence in that jurisdiction due to a spouse's military service and complies with all ethical, legal, and continuing legal education obligations;

2. Reviewing current bar application and admission procedures to ensure that they are not unduly burdensome to military spouse attorneys and that their applications are handled promptly;

3. Encouraging mentorship programs to connect military spouse attorneys with local members of the bar; and

4. Offering reduced bar application and membership fees to military spouse attorneys who are new to the jurisdiction or who no longer reside in the jurisdiction but wish to retain bar membership.

REPORT

Background

The American Bar Association recognizes the unique responsibilities and challenges faced by the military and their families. "Being in the military is a 24/7 commitment that takes its members and their families across the country, and around the world," according to ABA Immediate Past President Stephen N. Zack.[1] By adopting this Resolution, the legal community will support military spouses as they strive to maintain their legal careers in this 24/7 lifestyle.

The legal profession has a long history of ensuring that legal procedures do not unduly prejudice servicemembers and their families.[2] The Soldiers' and Sailors' Civil Relief Act of 1940[3] was amended in 1942 to add a section specifically extending certain protections to military dependents, including spouses, "to avoid situations in which dependents suffered as a result of the servicemember's period of service."[4] A number of amendments have increased the protections available to both servicemembers and their families.

The ABA continues to support legislation enhancing and strengthening legal protections for servicemembers and their families. According to Dennis Archer, ABA President in 2003:

> The [Servicemembers Civil Relief Act] gives the men and women of our military additional peace of mind, by protecting their rights and interests when they answer the call to duty. More so than words of praise or promise, the Servicemembers Civil Relief Act demonstrates to our soldiers, sailors and their families that our nation values their sacrifice and is behind them, absolutely.[5]

---

[1] Alexandra Buller, *ABA Launches New Website for Military Families*, (May 2011), available at www.abanow.org/2011/05/aba-launches-new-website-for-military-families.

[2] "During the Civil War, Congress enacted legislation suspending any statute of limitations where the war worked to thwart the administration of justice. In World War I, the Soldiers' and Sailors' Civil Relief Act of 1918 directed trial courts to take whatever action equity required when servicemembers' rights were involved in a controversy." The Judge Advocate General's Legal Center & School, U.S. Army, JA 260, Servicemembers Civil Relief Act at 1-1 (March 2006) (citations omitted) (hereinafter "JAG SSCRA Report"), available at www.americanbar.org/content/dam/aba/migrated/legalservices/lamp/downloads/SCRAguide.authcheckdam.pdf.

[3] 54 Stat. 1178 (1940).

[4] JAG SSCRA Report at 4-1.

[5] Dennis Archer, ABA President, "Statement Re: The Signing of the Servicemembers Civil Relief Act" (Dec. 23, 2003), available at www.abanow.org/2003/12/statement-re-the-signing-of-the-servicemembers-civil-relief-act; *see also* "ABA President Urges Congress to Adopt Servicemembers' Legal Protection Act" (June 24, 2004), available at www.abanow.org/2004/06/aba-president-urges-congress-to-adopt-servicemembers'-legal-protection-act and ABA Resolution 114 (Feb. 2009) (supporting authorizing civil enforcement actions, private rights of action, and attorney fees for violations of the Servicemembers Civil Relief Act.).

The ABA House of Delegates has adopted many policies supporting and advancing the personal rights and interests of American servicemembers and their families, including the following: urging provision of civil legal assistance to low income military servicemembers and their dependents (8/90, 2/03, and 2/07); supporting federal legislation for advance medical directives prepared for members of the armed forces and their spouses to be recognized as lawful notwithstanding state and territorial law (8/94); protecting military homeowners, including spouses, by allowing them to maintain as a principle residence a home from which they are absent due to military orders (2/00); urging rules permitting children of deployed servicemembers to attend pre-deployment local public schools tuition free even when required to move outside the school district to reside with a temporary caretaker due to a parent's deployment (2/07); urging reexamination of the *Feres* doctrine whereby servicemembers are denied the benefits of the Federal Tort Claims Act (8/08); and ensuring participation in U.S. elections of military personnel and overseas civilians (2/11).

This Resolution differs from other legislation and ABA policies supporting military families by recognizing military spouses as peers, rather than as clients. However, the ideals underlying the ABA's endorsement of the Servicemembers Civil Relief Act, and of other legislation and administrative action supportive of servicemembers, are the same ideals compelling support for this Resolution. After nearly a decade of armed conflict that has strained military families, the legal community should recognize the sacrifices of military families within its own ranks by easing the licensing restrictions and burdens on military spouses.

Unique Challenges Faced by Military Families

Unlike the civilian sector, the United States Uniformed Services is not an optional assignment-based system. National security dictates that military families move based upon the needs of the service and servicemembers may face criminal penalties if they fail to report to a duty station as ordered.[6] Thus, attorney spouses who seek to maintain successful legal careers face unique challenges due to their geographic insecurity.

The current system creates burdens for military spouse attorneys, who must apply for and take the bar exam every two to three years in a new jurisdiction or live and work separate from their servicemember husband or wife. Neither option is appealing, and the latter is nearly impossible, especially in families with children. Many military spouse attorneys work because of financial need, especially attorneys who have student loans to repay.[7]

---

[6] UCMJ, 10 U.S.C. § 885 (Desertion); UCMJ, 10 U.S.C. § 886 (Absence Without Leave); *see also* Paul von Zielbauer, *The Army is Cracking Down on Deserters*, N. Y. Times (April 9, 2007), available at www.nytimes.com/2007/04/09/us/09awol.html?pagewanted=print.

[7] "DoD believes spouse employment is necessary for many military families to meet basic family expenses." United States General Accounting Office, *Military Personnel Active Duty Benefits Reflecting Changing Demographics, but Opportunities Exist to Improve* (Sept. 2002) at 8, available at www.gao.gov/new.items/d02935.pdf.

As an example, Hon. Erin Wirth, co-founder of the Military Spouse JD Network[8] and Coast Guard spouse, graduated from law school sixteen years ago. Since then, she has moved seven times, taken and passed the full bar exam in three different jurisdictions, been admitted on motion to work for legal aid after being unable to qualify for admission on motion based on years of practice in a fourth jurisdiction, and practiced for the federal government in two other jurisdictions. She has held eleven full or part time jobs, a number of which do not qualify as the full time practice of law frequently necessary to qualify for admission on motion. She has not held the same job for more than three years. To the extent that her experience is atypical, it is because her husband has not been stationed in a war zone, overseas, or in a jurisdiction for less than a year.[9]

Because of geographic insecurity and licensing restrictions, military spouse attorneys are not encouraged to pursue the legal profession due to lack of financial incentives, educational opportunities, and role models. Attorney military spouses who are currently practicing law must give up traditional careers in order to support the servicemember, or, alternatively, the servicemember is forced to leave the military, causing the military to lose smart, extensively trained, highly skilled, and talented servicemembers.

This Resolution supports the legal rights and standing of United States servicemembers and their families by urging that bar admission authorities ease unreasonable burdens on them. Recognizing that frequent transfers are required of military families, bar admission authorities in each state and territory are urged to adopt rules, regulations, and procedures that accommodate the unique needs of military spouse attorneys, including but not limited to: license by endorsement, revised application and admission procedures, mentorship, and fee reductions. Under this Resolution, military spouse attorneys would be full members of the bar and subject to the same ethical, legal, and continuing legal education requirements as other attorneys in the jurisdiction to ensure the protection of clients. Reducing licensing restrictions will improve employment opportunities and the well-being of military families, upon whose service our country's defenses depend.

The Mobility Required of Military Families

Military families face unique challenges as they protect our freedom. As explained by the Ohio Women's Bar Association:

The backbone of the United States military is the family that supports them

---

[8] Mary Reding, Esq. and Hon. Erin Wirth formed the Military Spouse JD Network so that military spouse attorneys could advocate, educate, and network. *See* www.MilitarySpouseJDNetwork.org.

[9] *See* Laura Dempsey, *The Military vs. Marriages*, The Washington Post (Feb 19, 2008), available at www.washingtonpost.com/wp-dyn/content/article/2008/02/18/AR2008021801538.html ("I've been a lawyer and an Army wife for 10 years. In that period, I've moved seven times. I've taken four different bar exams and held five different jobs. My income has been taxed in at least five states. My children have had five different nannies. I think it's safe to say that military wives like me face career obstacles that few civilian wives could appreciate.").

> while they are at home and away.... Most military spouses are in the labor market, either employed or looking for employment.[10] However, the unemployment rate for military spouses is three times as high as their civilian counterparts.[11] There have been many studies on why this is the case, but one of the most evident causes is the fact that military families move on average every two to three years.[12] Only 10% stay on the same base for longer than five years.[13] This has a direct impact on military spouses obtaining and maintaining a career, specifically in the legal profession as a practicing attorney.[14]

Nationally, research confirms that military spouses[15] are more likely to be unemployed than their civilian counterparts.[16] Military wives also have a much greater tendency to be underemployed as compared to a weighted group of civilian wives.[17] Military wives who are employed earn less, on average, than do civilian wives.[18] This is true, even though "military wives have higher levels of education compared with their civilian counterparts."[19] When controlled for differences, "the disparity between military and civilian wife unemployment becomes even clearer and the impact of the husband's military service is revealed as the major explanatory factor."[20]

A typical military family moves every two to three years, in addition to periods of temporary duty or extended unaccompanied deployments.[21] It is not uncommon for a

---

[10] DoD, *Report on Military Spouse Education and Employment* (Jan. 2008) at 2, available at images.military.com/spouse/Report_to_Congress_on_Military_Spouse_Education_and_Employment_Jan_2008.pdf; *see also* Bluestar Families, *2010 Military Lifestyle Survey, Executive Summary* (Sept. 2010) at 8, available at www.bluestarfam.org/resources/Surveys.

[11] DoD, *Report on Military Spouse Education and Employment* at 2.

[12] DoD, *Report on Military Spouse Education and Employment* at 2; United States Government Accountability Office, *Military Personnel Active Duty Benefits Reflecting Changing Demographics, but Opportunities Exist to Improve* (Sept. 18, 2002) at 8, available at www.gao.gov/new.items/d02935.pdf.

[13] DoD, *Report on Military Spouse Education and Employment* at 2; Nelson Lim, Daniela Golinelli, Michelle Cho, *'Working Around the Military' Revisited,* RAND Corporation at 18-19 (2007), available at www.rand.org/pubs/monographs/2007/RAND_MG566.pdf("only10 percent of military wives had stayed in one location" as compared with half of civilian wives.).

[14] Ohio Women's Bar Association, *Report & Recommendation - Provisional Bar Membership*, (May 2009),available at www.owba.org/Resources/Documents/Military_Spouses_Report_and_Recommendation.pdf.

[15] Although most of the research has focused on wives, research on military husbands finds similar results. RAND 2007 at xvi.

[16] Margaret Harrell, Nelson Lim, Laura Werber Castaneda, Daniela Golinelli, *Working Around the Military Challenges to Military Spouse Employment and Education,* RAND Corporation at 40 (2004), available at www.rand.org/pubs/monographs/2004/RAND_MG196.pdf; RAND 2007 at xiii, xiv, xx.

[17] Nelson Lim, David Schulker, *Measuring Underemployment Among Military Spouses*, RAND Corporation at xvi (2010).

[18] RAND 2004 at 48; RAND 2007 at xiii, xiv.

[19] RAND 2004 at 15.

[20] RAND 2004 at 40; see also 61 ("residential mobility negatively affects the labor market conditions of military wives").

[21] Active duty spouses thirty years old or younger move every thirty-three months due to the service member's change of duty station, on average. Defense Manpower Data Center, *Military Family Life Project* (2010), available at conferences.cna.org/pdfs/longitudinalstudy.pdf.

servicemember to be transferred more than fifteen times in a thirty-year career, including tours overseas. Military spouses are more than nine times as likely to have moved across state lines in the last year relative to the total population. Research indicates that "the feature of military life that most negatively affects military wives' careers is being asked to move often and far."[22]

For the servicemember these moves are generally not avoidable, optional, or voluntary. According to the 2007 RAND report, "unlike civilian couples, who can make relocation decisions considering advantages and disadvantages for all family members, military couples must move according to the timing and placement of the service members' new assignment."[23]The failure to comply with transfer orders may be chargeable as a federal offense. Not being where he or she is required to be—when they are required to be there—can result in a court-martial conviction for the military member. Potential penalties include jail, loss of rank, or dishonorable discharge.[24] For the spouse of a servicemember, transfer orders are voluntary only in a technical sense. It is unreasonable to expect military spouses who want to maintain their legal careers to live apart from the servicemember, over and above the time they are separated by deployments and unaccompanied tours of duty. Most spouses, especially those with children, choose to accompany the servicemember, disrupting their personal lives and damaging their careers in the process.

Current National Initiatives to Reduce Burdens on Military Spouses

Recently Congress specifically recognized and ameliorated some of the hardships endured by military spouses based solely on their marital status and their spouses' profession through the Military Spouses Residency Relief Act.[25] The Military Spouses Residency Relief Act amends the Servicemembers Civil Relief Act to provide that a spouse shall neither lose nor acquire domicile or residence in a state when the spouse is present in the state solely to be with the servicemember in compliance with the servicemember's military orders. This change is part of the national initiative to reduce the burden on military families as they move from state to state.

The White House, through its Joining Forces initiative, is leading efforts to reduce licensing restrictions and improve employment opportunities for military spouses in every profession. This coordinated and comprehensive federal approach to supporting military families is outlined in the 2011 White House initiative, "Strengthening Our Military Families: Meeting America's Commitment," which states:

---

[22] RAND 2004 at 18.
[23] *See* RAND 2007 at 4, *see also* 20 ("military couples have less choice of when or where to move" than civilian couples.).
[24] Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment, other than death, as a court-martial may direct. UCMJ, 10 U.S.C. § 885 (although death has not been imposed since 1945).
[25] 50 U.S.C. App. 595 Public Law 111-97 (Nov. 11, 2009); *see also* www.servicemembers.gov (USDOJ Civil Rights Division).

> The challenge is to reduce the barriers that currently prevent military spouses from maintaining a career or employment on a normal progression path regardless of relocation. The lack of broad-based reciprocity among the states to recognize professional licenses or certificates held by military spouses creates a significant barrier to employment. Additionally, frequent moves result in military spouses incurring high costs for recertification and increased delays before they are able to work due to state licensing requirements in fields such as teaching and medical services. Finally, employers may need more exposure to the benefits of hiring military spouses.[26]

The Department of Defense ("DoD") is also concerned about the impact of spouse employment on military recruitment and retention.[27] Inability to pursue employment increases stress and friction within a marriage that can lead to dissatisfaction with the military lifestyle. The failure of a military spouse to find appropriate and fulfilling employment has an impact on the whole family and can be the driving factor in the servicemember's leaving the service prematurely. As a consequence, years of education and training devoted to that servicemember will be wasted.

The ability to maintain or transfer a professional license when moving from state to state has a direct impact on the ability of the spouse to find employment. The DoD Military Community and Family Policy office has addressed the licensing issue through state legislation for those career fields that are governed by state regulatory agencies.[28] This includes nearly all medical professionals, real estate brokers, and social workers just to name a few. The practice of law is not governed by a state regulatory agency, therefore the legislation that the DoD has advocated for does not include the practice of law. This Resolution identifies specific ways the legal profession, itself, can develop career opportunities and eliminate professional licensing barriers for military spouse attorneys.

The Current Bar Admission Process Creates Barriers for Military Spouse Attorneys

The Military Spouse JD Network ("MSJDN"), the leading network of military

---

[26] White House, *Strengthening Our Military Families: Meeting America's Commitment* (2011), available at www.defense.gov/home/features/2011/0111_initiative/strengthening_our_military_january_2011.pdf.

[27] Defense Manpower Data Center, *Survey of Active Duty Spouses* (2008), available at www.dmdc.osd.mil/appj/dwp/index.jsp.

[28] Lisa Daniel, *Military Spouses Get Help With Professional Licenses*, American Forces Press Service, (June 13, 2011), available at www.defense.gov/news/newsarticle.aspx?id=64285. "States that have enacted laws for endorsement of licenses -- or those waiting for a governor's signature -- are Arizona, Colorado, Kansas, Montana, North Carolina, New York and Texas. States that allow temporary licenses are Alaska, Florida, Kentucky, Missouri, Ohio, South Carolina and Tennessee. Utah allows nonresident military spouses to use out-of-state licenses, and Virginia allows military spouses who leave the state to re-use the license upon their return."

spouse attorneys, reports that less than a third of its members have full-time employment as attorneys and that approximately half of its members are underemployed in non-attorney positions such as paralegal work, working part-time, or unemployed and actively looking for work. MSJDN members report that licensing restrictions limit their ability to find full time employment as attorneys. These findings are consistent with national statistics regarding the proportionately higher rates of unemployment and underemployment among military spouses.

Current bar admission rules hinder the ability of military spouses who are attorneys to practice their profession. Bar admission rules do not provide a mechanism for admission of military spouses temporarily stationed in the jurisdiction or for those who move frequently, often with tours overseas. Military spouse attorneys struggle to become licensed and maintain their licenses for each jurisdiction in which they are transferred.

Although many jurisdictions have rules allowing attorneys to be admitted on motion or through reciprocity, those provisions are too limited for military spouse attorneys. Military spouse attorneys have trouble meeting the "previous practice" requirements when: they are recently admitted; their military spouse has been assigned overseas; they have breaks in employment between duty stations; they have held non-attorney or part-time positions; or they have been unable to find legal work at a duty station.

Since over ninety percent of military spouses are women, the current system also has a disproportionately negative impact on women.[29] Application of current bar admission regulations to military spouse attorneys disproportionately affects the number of women in the legal profession. To the extent these women are unable to become licensed as they move from state to state and overseas, they lose the ability to contribute to and participate in the legal profession. Therefore, allowing military spouse attorneys to maintain their careers supports diversity in the legal profession.

The Resolution

Appropriate accommodations for military spouse attorneys benefit both the legal community and the military, while maintaining a high level of professionalism. This Resolution would allow military spouse attorneys to maintain their careers while continuing to support the servicemember and our country. By passing this Resolution, the ABA will stimulate discussion of this issue, which will in turn raise awareness on the part of bar admission authorities, legal employers, and the legal community of the impact of military service on their families. These discussions will take place in conjunction with the publicity from the White House Joining Forces initiative.[30]

---

[29] Military wives are more racially and ethnically diverse than civilian wives. RAND 2007 at xiv.

[30] Current publicity includes Stephen Spielberg, Oprah Winfrey, and Tom Hanks public service announcements encouraging support of military families, 2011, available at www.whitehouse.gov/joiningforces/photo-video.

Permitting qualified military spouse attorneys to maintain their legal practice is a significant benefit to their clients. As technology improves, more clients and employers want to retain military spouse attorneys who are transferred. Because of unauthorized practice of law regulations, in many jurisdictions, those attorneys cannot maintain their employment and continue to serve their clients when transferred to and residing in a new jurisdiction.[31] Thus, clients lose the benefit of being represented by their preferred attorney, who has invested time and resources on their behalf.

The skills developed by military spouse attorneys benefit their clients and the legal community. Military spouses understand the complexities of military life and are well suited to serve clients in the military, either though paid or volunteer work. Moreover, the insights gained from practicing law in multiple jurisdictions, the ability to adapt to a rapidly changing environment, and the capacity to learn quickly how to utilize local resources are just a few skills that benefit their clients. Military spouse attorneys are eager to contribute their unique skills and experiences and to utilize the professional education they worked so hard to attain.[32] Moreover, although it is somewhat non-traditional, legal employers in this uncertain economy may benefit from hiring attorneys without a long-term commitment. There are a number of ways that bar admission authorities can ensure that military spouse attorneys have an opportunity to maintain their careers.

1. Bar Admission by Endorsement for Military Spouses

Bar admission by endorsement allows qualified military spouses who are in a jurisdiction due to military orders to be admitted without examination as long as they are members in good standing in another jurisdiction and comply with all legal education requirements. Attorneys admitted by endorsement have the same rights and responsibilities, including compliance with continuing legal education and ethical obligations, as other members of the bar.

To protect the public, jurisdictions retain the right to impose discipline or to revoke privileges to practice, as they would with any attorney admitted in the jurisdiction. Whether an attorney is admitted by examination, by motion based upon years of practice, or by endorsement, they would be subject to the same ethical rules and regulations. The ability to impose discipline would continue when the military spouse attorney moves to a new duty station, just as it would with any other attorney who relocates to another state.

Jurisdictions typically have exceptions to the previous practice requirement for admission. For example, many jurisdictions allow bar admission with no examination or previous practice requirements for admission *pro hac vice*, foreign legal consultants,

---

[31] *See, e.g.*, State Bar of Arizona, *Unauthorized Practice of Law Committee Advisory Opinion 10-02*, February 2010, available at www.azbar.org/media/75280/upl10-02.pdf.

[32] *See* RAND 2004 at 87 ("personal fulfillment was the most frequently cited most important reason for working by spouses" working in professional occupations. "Half of lawyers and professors, ... viewed personal fulfillment as their primary work incentive.").

full-time law school faculty members, clinical law professors and law students, in-house counsel, and non-profit legal service organization providers.

Military spouse attorneys admitted by endorsement would be required to comply with character and fitness regulations and would need to provide (1) proof of good standing in all jurisdictions in which the military spouse is admitted, (2) military orders identifying the applicant as an accompanying dependent, and (3) acknowledgement of attorney disciplinary rules. The burden of determining who is a military dependent rests with the Department of Defense.

It is recommended that good moral character be determined by a background check from the time the applicant was last admitted in another jurisdiction, to avoid a lengthy admission process. Because military spouses move frequently and have lived in many jurisdictions, often for short periods of time, traditional character and fitness forms may be exceedingly (and unnecessarily) lengthy.

2. Bar Application and Admission Procedures

Bar admission authorities can ease the burdens on military spouse attorneys by reviewing the jurisdiction's bar admission requirements to ensure they present no unreasonable obstacles to the practice of law for qualified military spouse attorneys.

The frequent transfers of military families may result in gaps in employment, multiple prior employers, and multiple prior residences. Bar admission authorities should consider whether the reference requirements are appropriate for someone who has moved every two to three years, with tours overseas, and occasional tours of less than a year. For example, Judge Wirth, mentioned above, was required to provide five attorney references in each jurisdiction where admitted for more than six months as well as five character references. This required her to provide, and presumably required the bar to check, twenty-five references. In addition, military spouses may not have practiced in every jurisdiction in which they are admitted, either because of the challenging legal employment market or because the servicemember received new orders reassigning them to another jurisdiction before completing the bar application process or before practicing.

Bar admission authorities should consider whether there is any flexibility in the application deadline so that military families who receive orders after the application deadline are not delayed for six months waiting for the next bar exam. Servicemembers have no control over when transfer orders are issued and, in fact, those orders can be changed at any point. This system makes it impossible for attorneys to plan ahead and apply for bar examinations in a timely fashion. Flexibility should be permitted, where possible, to ensure that licensing and employment is not significantly delayed, especially given the limited amount of time the attorney is likely to be in the jurisdiction.

Gaps in employment and multiple employers or residences can be red flags for bar admission. Character and fitness reviewers should be educated on the frequency

(and necessity) of transfers of military families, so that they do not unduly delay admission. Limiting character and fitness determinations to the time since the applicant was last admitted in another jurisdiction may help avoid a lengthy admission process and reduce the burden on the new jurisdiction.

The changes to the application and admission procedures will not impact the ability of the jurisdiction to ensure the protection to the public from unscrupulous attorneys. Military spouse attorneys will be subject to the same ethical standards, while providing provisions to address the mobility issues that come with military life. In addition, unlike attorneys who undergo character and fitness reviews only at the beginning of their careers, military spouse attorneys will go through them every time they transfer.

3. Mentorship Programs

Participation in mentorship programs is a valuable way military spouse attorneys connect with local members of the bar. Mentorship programs ensure that attorneys new to the jurisdiction are familiar with the nuances of local practice. In addition, for military spouse attorneys who may not know any attorneys in the jurisdiction, mentorships can help develop professional networks, which can be helpful in orienting the military spouse attorney to the jurisdiction's ethics rules as well as for career advancement. According to the 2004 RAND study, "Frequent long-distance moves make it difficult for military wives to develop the kinds of networks that can help them in the labor market."[33] Mentorship programs are crucial for the military spouse's professional development.

4. Reduced fees

Application and membership fees may be reduced for military spouse attorneys who are new to the jurisdiction or who no longer reside in the jurisdiction, but wish to retain bar membership there. As members of multiple bars, the costs of bar membership dues, on top of student loans, can be overwhelming, particularly for military spouse attorneys unable to find full time employment as lawyers. Bar membership, however, helps military spouse attorneys when they are new to the jurisdiction to learn about local practice and helps them to maintain their connection with the jurisdiction after being transferred.

Conclusion

Through the adoption of this Resolution, the ABA articulates its support of military families within the profession by welcoming those attorneys relocating as a result of military orders, while at the same time maintaining a high standard of professionalism and proficiency. While the number of military spouse attorneys is relatively small,[34] this

[33] RAND 2004 at 19 (also noting that "employers may offer them lower salaries, choose not to hire them for key positions, or not invest in their training.").

[34] Less than one percent of Americans serve in uniform. White House, *Strengthening Our Military Families: Meeting America's Commitment* (2011). It is estimated that ten percent of civilian military

rule will not only improve the lives of that group but also open the doors for a growing number of attorney spouses in the future. Easing bar membership burdens will encourage a talented pool of independent, intelligent, and resourceful women and men to begin or continue their legal career. Both the legal community and our Armed Forces will benefit from allowing these individuals to practice in their chosen profession while supporting their spouse's commitment to our country.

Respectfully submitted,

Mary B. Cranston, Chair
ABA Commission on Women in the Profession
February 2012

spouses have advanced degrees, of which a law degree is one of many. Defense Manpower Data Center 2008.

108

GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Women in the Profession

Submitted By: Mary B. Cranston, Chair, Commission on Women in the Profession

1. Summary of Resolution.

The resolution urges state and territorial bar admission authorities to adopt rules, regulations, and procedures that accommodate the unique needs of military spouse attorneys, who move frequently in support of the nation's defense.

2. Approval by Submitting Entity.

The Commission on Women in the Profession has approved submission of this resolution at its August 6, 2011 business meeting

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

No

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

The ABA House of Delegates has adopted many policies supporting and advancing the personal rights and interests of American servicemembers and their families, including the following: urging provision of civil legal assistance to low income military servicemembers and their dependents (8/90, 2/03, and 2/07); supporting federal legislation for advance medical directives prepared for members of the armed forces and their spouses to be recognized as lawful notwithstanding state and territorial law (8/94); protecting military homeowners, including spouses, by allowing them to maintain as a principle residence a home from which they are absent due to military orders (2/00); urging rules permitting children of deployed servicemembers to attend pre-deployment local public schools tuition free even when required to move outside the school district to reside with a temporary caretaker due to a parent's deployment (2/07); urging reexamination of the *Feres* doctrine whereby servicemembers are denied the benefits of the Federal Tort Claims Act (8/08); and ensuring participation in U.S. elections of military personnel and overseas civilians (2/11).

5. What urgency exists which requires action at this meeting of the House?

There is a national movement originating from the White House Joining Forces Initiative, the Department of Defense, and the Military Spouse JD Network to reduce licensing barriers for military spouses. By taking action at this meeting, the House will provide a timely framework for the States to address licensing issues for military spouse attorneys. Moreover, acting now demonstrates the ABA's leadership and continued support of military families.

6. Status of Legislation. (If applicable.)

See above.

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

The policy will be disseminated to the bar admission authorities and state bars of the 50 states with a letter from the appropriate ABA official urging that appropriate accommodations be adopted to support military families and enhance the career development of military spouse attorneys.

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

None.

9. Disclosure of Interest. (If applicable.)

Not applicable.

10. Referrals. (List entities to which the resolution has been referred, the date of referral and the response of each entity if known.)

The resolution with report was referred to the Section of State and Local Government Law on September, 26 2011 which has agreed to cosponsor; and to the Commission on Racial and Ethnic Diversity on October 28, 2011 which has agreed to cosponsor.

On November 4, 2011 the resolution with report was referred to the Section of Individual Rights and Responsibilities, which as agreed to cosponsor; the Section of Legal Education and Admission to the Bar; the Government and Public Sector Lawyers Division, which has agreed to cosponsor; the Young Lawyers Division; the Judicial Division; the Section of Litigation; the Standing Committee on Armed Forces Law, which has agreed to cosponsor; the Standing Committee on Client Protection; the Standing Committee on Ethics and Professional Responsibility; the Standing Committee on Lawyers' Professional Liability; the Standing

Committee on Legal Assistance for Military Personnel, which has agreed to cosponsor; the Standing Committee on Professional Discipline; the Hispanic National Bar Association; the National Association of Women Lawyers, which has agreed to cosponsor; the National Conference of Women's Bar Association, which has agreed to cosponsor; the National Bar Association, and the Conference of Chief Justices and Bar Activities and Services.

11. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

Estelle H. Rogers (Washington DC) 202-337-3332, estellerogers@comcast.net
Mary Reding (CA), 937-609-4549, redingmary@yahoo.com
Hon. Erin Wirth (DC), 202-523-5753, briefcounsel@msn.com
Veronica M. Muñoz (staff) Cell phone: 312-730-7026,
veronica.munoz@americanbar.org

12. Contact Person. (Who will present the report to the House. Please include email address and cell phone number.)

Estelle H. Rogers
4580 Indian Rock Ter, NW
Washington, DC 20007
Cell Phone: 202-337-3332
estellerogers@comcast.net

EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges state and territorial bar admission authorities to adopt rules, regulations, and procedures that accommodate the unique needs of military spouse attorneys, who move frequently in support of the nation's defense.

2. Summary of the Issue that the Resolution Addresses

Current bar admission rules hinder the ability of military spouses who are attorneys to practice their profession. Bar admission rules do not provide a mechanism for admission of military spouses temporarily stationed in the jurisdiction or for those who move frequently, often with tours overseas. Military spouse attorneys have unique burdens in their efforts to become licensed and maintain their licenses for each jurisdiction to which they are transferred.

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

Appropriate accommodations for military spouse attorneys benefit both the legal community and the military, while maintaining a high level of professionalism. This resolution would encourage licensing authorities to adopt policies that would allow military spouse attorneys to maintain their careers while continuing to support their servicemember spouses, as well as our country. By passing this resolution, the ABA will also stimulate discussion of this issue, which will in turn raise awareness on the part of bar admission authorities, legal employers, and the legal community of the impact of military service on their families.

4. Summary of Minority Views

The Commission is not aware of any formal opposition at this time.

AMERICAN BAR ASSOCIATION

COMMISSION ON DOMESTIC & SEXUAL VIOLENCE
CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges the Federal Bureau of Investigation to expand the definition of rape in the Uniform Crime Reporting Summary Reporting Program to include all forms of non-consensual sexual penetration, regardless of gender, orifice penetrated, mode of penetration, or presence of force.

REPORT

The FBI's Uniform Crime Reporting System Does Not Accurately Report Sex Crimes

The FBI created the UCR system in 1927 in order to collect uniform police statistics from local police departments. Over 17,000 law enforcement agencies nationwide voluntarily contribute their crime statistics.[1] The UCR system has become a collective effort on the part of city, county, state, tribal and federal law enforcement agencies to present a nationwide view of crime.[2]

UCR data have been considered the authoritative source of nationally representative information on crime. According to the Government Accountability Office, UCR data are used by policy makers, the media, and researchers to describe and understand crime and police activity.[3] In addition, Congress allocates federal funds to state and localities based on these data.[4]

"Forcible rape," is defined by the UCR as "the carnal knowledge of a female, forcibly and against her will."[5] This definition, unchanged since 1927, is exceedingly narrow, including only forcible male penile penetration of a female. It excludes oral and anal penetration, rape of males, penetration of the vagina and anus with an object or body part other than the penis, rape of females by females, and non-forcible rape. The force requirement also excluded rape victims incapable of giving consent because of youth, disability, or drugs.

"Forcible rape" is the only sex crime included in the FBI's category of serious crimes, or Part I crimes. All other sex crimes are relegated to a secondary broad undifferentiated Part II data category of crimes that is not used as a barometer of serious crime and therefore is not shared with the public to the same extent as Part I crime data.

In the intervening years since the UCR created its definition of rape, America has significantly expanded its understanding of rape, and states have revised their laws accordingly. Many state criminal laws now recognize that all forms of non-consensual sexual penetration regardless of gender, orifice penetrated, mode of penetration, or presence of force are felonies and as serious as the criminal conduct included in the UCR definition of rape.

---

[1] Federal Bureau of Investigation, U.S. Department of Justice, *Uniform Crime Reporting Handbook* 77 (2004) [hereinafter *Handbook*].
[2] *Id.*
[3] Government Accountability Office, *Community Police Grants: COPS Grants Were a Modest Contributor To The Decline In Crime In The 1990's* (Report to the Chairman, Committee on the Judiciary House of Representatives) (2005), cited by James P. Lynch, *Missing Data and Imputation in the Uniform Crime Reports and the Effects on National Estimates*, 24 J Contemporary Crim. Justice 69 (Feb. 2008).
[4] *Id.*
[5] Handbook, *supra* note 3, at 19.

The inconsistencies between the UCR's reported data on rape and the broader statutory definitions of serious sex crimes promulgated by state legislatures impact society's response to sex crimes on a number of levels.

On one level, it means we lack reliable data on the scope of serious sex crimes brought to the attention of law enforcement and law enforcement response to them. It is not possible to manage – or improve – what is not measured.

The lack of solid data about the incidence and disposition of rape and other sex crimes also means we, as a society, do not really know how prevalent this violent crime is, how safe our citizens are, or how effective are the methods used to investigate and apprehend perpetrators.

By diminishing the scope of the problem, the narrow definition of rape also reduces the ability to develop programs and policies that appropriately respond to the problem, thus hampering law enforcement and victim assistance efforts. It affects all those who would help the victims, from the decision-makers who control funds for investigation and prosecution of sex crimes to rape crisis centers who provide essential victim services to community organizations concerned with crime in their communities. Accurate information is essential to funding the work of all these parties, and the data on rape and other sex crimes currently reported by the UCR are not adequate.

Conclusion

The FBI must update the definition of rape to conform to modern understanding that all forms of non-consensual sexual penetration, regardless of gender, orifice penetrated, mode of penetration, or presence of force, are serious sexual assaults. Updating the definition will produce more reliable data on the scope of serious sex crimes brought to the attention of law enforcement and law enforcement response to them. More accurate information will then be conveyed to the public about the prevalence of serious sex crime and the effectiveness of law enforcement methods to investigate and apprehend perpetrators, increase resources needed to address sex crimes.

Respectfully Submitted,

Debbie Segal, Chair
ABA Commission on Domestic & Sexual Violence
February 2012

GENERAL INFORMATION FORM

Submitting Entity: Commission on Domestic & Sexual Violence

Submitted By: Debbie Segal, Chair

1. **Summary of Resolution(s).**
   The Resolution supports amending the UCR definition of rape to ensure that all forms of non-consensual sexual penetration, regardless of gender, orifice penetrated, mode of penetration, or presence of force are included.

2. **Approval by Submitting Entity.**
   The Commission voted to support the resolution and report on October 15, 2011.

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 adopted policy #115 (Midyear 2010) which provides, in relevant part:

   > [The] Association urges Congress to re-authorize and fully fund [...] legislation that:
   >
   > 1. Enhances judicial, legal and law enforcement tools to combat domestic violence, dating violence, sexual assault, and stalking; [...]

   This policy would not be adversely affected by the adoption of the proposed policy.

5. **What urgency exists which requires action at this meeting of the House?**
   The Criminal Justice Information Services Division's Advisory Policy Board (APB) Uniform Crime Reporting (UCR) Subcommittee met on October 18, 2011 to discuss the definition of rape in the UCR Summary Reporting System (SRS). As a result of that meeting, they forwarded to the APB for vote at their December 6-7 meeting in Albuquerque, New Mexico a recommendation to expand the UCR SRS definition to "Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without their consent." This definition is consistent with this resolution.

   According to ABC News, the APB accepted the subcommittee's recommendation at its December meeting, and Director Mueller has announced his intention to implement the definitional change "sometime this spring". See http://abcnews.go.com/blogs/politics/2011/12/fbi-to-change-definition-of-forcible-rape/

114

6. **Status of Legislation. (if applicable)**
   There is no legislation related to this resolution (but see #5 above).

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**
   If adopted, this policy will allow members (as well as staff and GAO) to continue to advocate for FBI implementation of the new definition.

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

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

10. **Referrals.**
    Criminal Justice Section
    Family Law Section
    Individual Rights & Responsibilities Section
    Litigation Section
    State and Local Government Law Section
    Tort, Trial and Insurance Practice Section
    Government & Public Sector Lawyers Division
    General Practice, Solo & Small Firm Division
    Judicial Division
    Law Student Division
    Young Lawyers Division
    Commission on Women in the Profession
    Commission on Mental & Physical Disability Law
    Commission on Sexual Orientation & Gender Identity
    Commission on Youth at Risk
    Commission on Homelessness and Poverty
    National Association of Women Lawyers
    National Association of Women Judges
    National Conference of Women's Bar Associations
    National District Attorneys Association
    National LGBT Bar Association
    National Native American Bar Association
    National Asian Pacific American Bar Association
    National Bar Association

11. **Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)**
Vivian Huelgo, Chief Counsel
Commission on Domestic & Sexual Violence
740 15th Street, NW
Washington, DC 20005
Phone: (202) 662-8637
Email: vivan.huelgo@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)**
Cheryl Niro, Board of Governors Liaison
Robinson Niro LLC
321 N. Clark St., Floor 500
Chicago, IL 60654-4769
Ph: (708) 714-1993
(we do not currently have a cell phone contact number for Ms. Niro)
cheryl.niro@robinsonniro.net

114

EXECUTIVE SUMMARY

1. **Summary of the Resolution.**

   The Resolution supports amending the UCR definition of rape to ensure that all forms of non-consensual sexual penetration, regardless of gender, orifice penetrated, mode of penetration, or presence of force are included.

2. **Summary of the issue that the resolution addresses.**

   The FBI created the Uniform Crime Reporting (UCR) system in 1927 in order to collect uniform police statistics from local police departments. Over 17,000 law enforcement agencies nationwide voluntarily contribute their crime statistics. UCR data have been considered the authoritative source of nationally representative information on crime.

   Serious questions exist, however, as to whether this data is in fact reliable as far as sex crimes are concerned. The UCR definition of rape, unchanged since 1927, is exceedingly narrow, including only forcible male penile penetration of a female. It excludes oral and anal penetration, rape of males, penetration of the vagina and anus with an object or body part other than the penis, rape of females by females, and non-forcible rape.

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

   The proposed policy position will allow the ABA to act in support of a revised UCR rape definition.

   The Criminal Justice Information Services Division's Advisory Policy Board (APB) Uniform Crime Reporting (UCR) Subcommittee met on October 18, 2011 to discuss the definition of rape in the UCR Summary Reporting System (SRS). As a result of that meeting, they forwarded an amended definition of rape to the APB for vote at their December 6-7, 2011 meeting in Albuquerque, New Mexico.

   According to ABC News, the APB accepted the subcommittee's recommendation at its December meeting, and Director Mueller has announced his intention to implement the definitional change "sometime this spring". See http://abcnews.go.com/blogs/politics/2011/12/fbi-to-change-definition-of-forcible-rape/

   If adopted, this policy will allow members (as well as staff and GAO) to continue to advocate for FBI implementation of the new definition.

4. **Summary of any minority views.**

   None to date.

Pursuant to §45.5 of the House Rules of Procedure, this late report will be considered by the House of Delegates if the Committee on Rules and Calendar recommends a waiver of the time requirement and that recommendation is approved by a two-thirds vote of the delegates voting.

AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association adopts the Guidelines for Conduct of Experts Retained By Lawyers, dated February 2012.

FURTHER RESOLVED, That the American Bar Association urges counsel to consider utilization of the Guidelines in retaining experts for client matters.

ABA GUIDELINES FOR CONDUCT FOR EXPERTS RETAINED BY LAWYERS (February 2012)

INTRODUCTION

The ABA Section of Litigation Task Force on Expert Code of Ethics was appointed by Section of Litigation Chair Hilarie Bass to explore the creation of a code of ethics or guidelines for conduct of experts who are retained by lawyers on behalf of their clients. While many experts have ethical codes applicable to their chosen professions, there are no uniform standards that apply to the retention and employment of experts. As a result, there are issues presented when experts are retained by lawyers on behalf of their clients in connection with litigated or transactional matters. The lack of consistent standards has led to (a) inconsistent expectations of experts' required conduct, (b) unnecessary surprises that have negatively impacted the lawyer-expert relationship, and (c) disqualification motions challenging the conduct of certain experts. At a minimum, such problems have distracted both lawyers and experts from focusing on the matters for which the experts were retained, have delayed proceedings and have added unnecessary expense.

The Guidelines that follow are an effort to create uniform best practices of what lawyers should seek from experts who are retained by lawyers on behalf of their clients. It is hoped that the Guidelines will be promulgated to the legal profession for use in connection with retaining experts. Thereafter, lawyers will be able to refer to the Guidelines in their discussions with experts regarding the type of conduct they expect. Lawyers may even seek to incorporate them into their retainer letters, if appropriate. By utilizing these Guidelines it is hoped that lawyers, experts and clients will have a common understanding of what is expected and as a result that future problems can be minimized or avoided.

These Guidlines are not intended to impose a professional obligation on lawyers to use them and a failure to do so is not intended to be deemed a professional lapse. If a retaining lawyer chooses to use them in discussions with experts, they would govern only the relationship between the retaining lawyer and the expert, and, therefore, will not create any duties to or rights for the adverse party or its counsel. Accordingly, whether the Guidelines are followed or not should not be the subject of discovery by the adverse party. If a lawyer practices in a jurisdiction in which there is a risk of discovery relating to the use of the Guidelines, that risk should be taken into account in determining the extent to which the lawyer will seek to formalize the use of the Guidelines in his or her relationship with the expert. The Guidelines are also not intended to create standards for disqualification, which are a matter for continuing development by the courts.

PREAMBLE

These Guidelines apply to lawyers' retentions of experts in connection with services provided to assist the lawyer's client, whether in connection with an engagement regarding a litigated matter, or otherwise. Experts are also subject to the applicable ethical codes of

conduct of their professions or professional associations. These Guidelines supplement and are in addition to any such codes or standards and are not intended to create any lesser standards of conduct that otherwise govern the expert's profession.

Comment

The purpose of these Guidelines is to set forth appropriate guidelines for conduct of experts that should apply to engagements by a lawyer of an expert on behalf of a client. The intent is for them to apply to all litigated matters, whether civil or criminal, whether the expert is proposed as a testifying expert or simply retained as a consulting expert, and apply to matters to be resolved in court, by arbitration, mediation or through any other recognized ADR procedure. They also are intended to apply to other matters in which lawyers retain experts on behalf of clients, including matters involving commercial transactions and internal investigations. The extent which the lawyer chooses to require the expert to follow them will depend upon the nature of the engagement and the jurisdiction or jurisdictions in which it will be performed.

The range of expertise required in connection with legal matters is obviously quite broad and experts may have ethical requirements governing their chosen profession or field of expertise. These Guidelines are not intended to supplant any such ethical requirements or create any lesser standards of conduct. They are intended to create a set of best practices that lawyers should seek to apply to the conduct of all experts retained by lawyers on behalf of their clients. In so doing, it is hoped that clients, retaining lawyers and experts, will have a clear and common understanding of the expert's expected conduct.

I. INTEGRITY/PROFESSIONALISM

An expert shall act with integrity and in a professional manner throughout an engagement.

Comment

Lawyers and their clients are entitled to expect all experts to act with integrity and in a professional manner in any engagement and maintain the highest standards of ethical conduct. This set of guidelines will not be able to address every possible area of concern in the lawyer-client-expert relationship, but certain minimum expectations seem not only essential but also obvious. An expert should not knowingly violate these Guidelines, knowingly assist or induce another to do so, or do so through the acts of another. An expert should not commit any act that reflects adversely on the expert's honesty, trustworthiness or fitness to serve as an expert. An expert should not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. An expert should disclose to the retaining lawyer any facts or actions bearing upon the above conduct, including pending investigations, indictments or criminal charges, and any disciplinary action taken against the expert by any credentialing, licensing, accrediting, or other professional organization.

II. COMPETENCE

An expert shall not undertake an engagement unless the expert is competent to do so.

Comment

An expert should: (1) be competent to perform the entire scope of an engagement; (2) be capable of acquiring any additional necessary competencies to perform the engagement; or (3) decline, withdraw from, or circumscribe the engagement.

Being Competent

Prior to accepting an engagement the expert should determine whether he or she can perform the engagement competently. Competency requires:

1. The ability to properly identify the problems or issues to be addressed;

2. The specialized knowledge, training or experience to complete the entire scope of the engagement in a professional manner; and

3. Recognition of and compliance with the laws and regulations that apply to the expert and/or the engagement.

Competency may apply to factors such as the expert's familiarity with a specific field of endeavor, specific laws, rules and regulations, an analytical method, or an industry, if such factors are necessary for an expert to develop credible and objective conclusions, opinions or observations. The expert is responsible for having the competency to address those factors or for following steps to supplement the expert's current level of knowledge through additional reliable sources including the use of other experts.

Acquiring Competency

If an expert determines that he or she is not competent to complete an entire engagement, either at the outset, or during the course of the engagement, then the expert should:

1. Disclose to the retaining lawyer the area or areas in which he or she may lack knowledge, training or experience;

2. Take all steps necessary or appropriate to complete the engagement competently; and

3. Disclose to the retaining lawyer the steps the expert undertook to complete the engagement competently, including the identification of all sources relied on for completing the engagement.

Competency can be acquired in various ways including association with another expert or other person whom the retained expert reasonably believes has the necessary knowledge, education, training or experience. If the engagement cannot be completed competently, then the expert must decline the engagement or withdraw from the engagement.

III. CONFIDENTIALITY

The expert shall treat any information received or work product produced by the expert during an engagement as confidential, and shall not disclose any such information except as required by law, as retaining counsel shall determine and advise, or with the consent of the client.

Comment

This Guideline requires all information received and work product produced during an engagement to be treated as confidential except as required by law or with the consent of the client.

The common law has long recognized that client confidences shared with legal counsel must be protected from disclosure to third parties. Confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship." Comments, ABA Model Rules of Professional Conduct, Rule 1.6 "Confidentiality of Information," Comment 2.

Similarly, expert witnesses who are engaged on behalf of clients in legal matters must generally protect confidential information from disclosure to third parties. Disclosure of confidential information can serve as grounds for disqualification of an expert witness. *See, e.g., Northbrook Digital LLC v. Vendio Services, Inc.*, 2009 WL 5908005, at *I (D. Minn. Aug. 26, 2009); *Koch Refining Co. v. Jennifer L. Boudreaux M/V*, 85 F.3d 1178, 1182-83 (5th Cir. 1996). "Courts have inherent power to disqualify expert witnesses both to protect the integrity of the adversary process and to promote public confidence in the legal system," *BP Amoco Chemical Co. v. Flint Hills Res., Inc.*, 500 F. Supp.2d 957, 959 (N.D. Ill. 2007). Disqualification of experts, nonetheless, is viewed as a drastic measure not to be taken lightly. *Id.* at 960.

A two-part test is generally followed when a court determines whether an expert should be disqualified because he or she has improperly disclosed confidential information: (1) the retaining party and the expert must have had a relationship that permitted the retaining party to have a reasonable expectation that its communication with the expert would remain in confidence; and (2) confidential information must have been provided to the expert by the party seeking disqualification. *Koch Refining*, 85 F.3d at 1182-1183. *See also Northbrook Digital LLC*, 2009 WL 5908005, at *I. This test also is employed when an expert has a prior relationship with an opposing party. *See Ascom Hasler Mailing Systems, Inc. v. United Stated Postal Service*, 267 F.R.D. 9, 12 (D.D.C. 2010).

The determination of whether a party has a reasonable expectation of a confidential relationship with an expert depends on a wide range of factors, including "whether the expert met once or several times with the moving party; was formally retained or asked to prepare a

particular opinion; or was asked to execute a confidentiality agreement." *Northbrook Digital LLC*, 2009 WL 5908005, at *2. The conduct guideline set forth above concerning confidentiality reinforces and is consistent with the rules generally applied by courts.

Lawyers should remind experts, preferably in writing, of their obligation to maintain the confidentiality of confidential information. Experts should acknowledge their obligation to preserve confidentiality. And lawyers and/or clients should identify information as confidential at the time it is provided so there can be no confusion as to an expert's obligations.

Because confidentiality is so important to a lawyer's relationship with his or her client, as well as to the integrity of the judicial process as a whole, information regarding the engagement should only be disclosed to third parties when explicit consent is provided by the client or when disclosure is otherwise required by law. Requests for such information by third parties, either informal or by legal process, should be referred to retaining counsel or the client so that confidentiality may be protected. Certain engagements may never become public and the expert should not be placed in the position of making determinations regarding what documents or information should be deemed confidential. It is preferable that a client's consent to the disclosure be provided in writing, although this is not required.

Certain matters are required by law to be disclosed in certain experts' reports. Federal Rule of Civil Procedure 26 requires certain disclosures regarding expert testimony in the form of written expert reports, and in other circumstances, in lawyer disclosures. Written reports are to include the identity of the expert, all opinions the witness will express and the basis and reasons for them, the facts or data considered by the witness in forming them, exhibits that will be used to summarize or support them, the witness's qualifications, including a list of all publications authored in the previous ten years, a list of cases in which the witness testified at trial or by deposition in the past four years, and a statement of expert compensation. Fed. R. Civ. P. 26(a)(2)(B). Many state courts have similar requirements. Certain other lawyer disclosures must be made with respect to testifying experts not required to provide written reports. Fed. R. Civ. P. 26(a)(2)(C). Examples of situations in which disclosure to a third party may be required by law include direct court orders requiring disclosure and ethical rules imposed on experts under the law, such as an engineer's obligation to notify authorities of conditions that may put human life in jeopardy. Other examples may exist as well. The expert should be advised that the expert should not be making the decision of what is required by law to be disclosed, but should refer all requests for information and defer all decisions on what to disclose to retaining counsel.

IV. CONFLICTS OF INTEREST AND DISCLOSURE

Unless the client provides informed consent, an expert should not accept an engagement if the acceptance would create a conflict of interest, *i.e.*, that the expert's provision of services will be materially limited by the expert's duties to other clients, the expert's relationship to third parties, or the expert's own interests. To facilitate a determination of whether a conflict of interest exists, the expert should disclose to the client or retaining lawyer all present or potential conflicts of interest. Among the matters that shall be disclosed are the following:

1. **Financial interests or personal or business relationships with lawyers, clients, or parties involved or reasonably likely to be involved in the matter.**

2. **Communications or contacts with any adverse party or lawyer.**

3. **Prior testimony, writings or positions of the expert in the last 7 years in other matters that bear on the subject matter of the engagement.**

4. **Determinations in the last 7 years in which a judge has opined adversely on the expert's qualifications or credibility, or in which any portion of an expert's opinion was excluded on substantive grounds going to the soundness of the opinion or its credibility.**

The duty to disclose is a continuing obligation. Therefore, the expert should supplement all these disclosures as needed.

Comment

Although there are no studies available to document the frequency of conflict of interest problems arising with respect to expert witnesses, the concern is raised by anecdotal evidence as well as numerous court decisions treating expert disqualification issues in particular cases.

The recommended Guidelines are not intended to prescribe criteria to determine whether and when experts should be disqualified, a subject that the evolving case law will continue to address. Nor are the proposed Guidelines intended to supplant standards that some professions have defined for their own members concerning conflicts of interest and disclosure issues. To the extent this Guideline contains more expansive disclosure obligations than the expert's profession requires, it should be followed. The Guidelines require disclosure so that conflicts can be addressed by clients and lawyers based on sufficient disclosure of the issues prior to any engagement.

Many of the disqualification controversies have arisen when experts are consulted by one side but later hired by another. In general, "side-switching" disputes turn upon factors such as whether there was an objectively reasonable expectation of confidentiality and whether confidential information was disclosed to the expert who was later retained by the opposing party. *See Paul v. Rawling Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988). Another scenario occurs with respect to an expert who, prior to the conclusion of the engagement, joins or is affiliated with an organization that also has members working for the opposing side. The Guidelines take no position concerning the extent to which one professional's knowledge would be imputed to another member of the same firm. Should such problems arise, and irrespective of whether disqualification is requested or granted, any such organization should build a firewall between any professional, with past or present involvement on one side of an engagement ,and those with any such involvement on an opposing side. Whether this will be sufficient protection to prevent disqualification is an issue for the courts. These Guidelines do not suggest that the same issues would be presented in an academic setting.

Relationships that should be disclosed include financial interests, and personal or business relationships with adverse or other lawyers, clients or other parties, all of which have the potential for creating conflicts of interest. This of course would not require disclosure of casual contact in professional settings but if there is doubt as to whether the relationship is sufficiently casual, the expert should err on the side of disclosure. To the extent these relationships are covered by confidentiality agreements, that fact should be disclosed along with enough information that may properly be disclosed to allow the retaining lawyer to make an informed judgment. This disclosure requirement not only pertains to relationships with the existing parties but also relates to relationships with other parties who are reasonably likely to become involved. Thus, for example, if the expert has an ongoing relationship with a manufacturer of a given product and the engagement relates to an action against another manufacturer of the same type of product, the relationship with the first manufacturer is one that should be disclosed.

Communications with the adverse party or its lawyer are another area of required disclosure. The adverse party might have contacted the expert to explore retention of that expert before the expert was approached by the current retaining lawyer. Or the expert may be approached by the adverse party to retain the expert for another matter during the course of an engagement. These contacts should be promptly disclosed so that they may be fully explored by the retaining lawyer.

The Federal Rules of Civil Procedure currently require the disclosure of all matters in which the expert testified in the past four years and a list of all publications authored in the past ten years. But the disclosure obligation to retaining lawyers and their clients should go beyond those required disclosures. The retaining lawyer is entitled to know about all prior testimony, published writings or positions by an expert, at least in the last 7 years, that directly bear on the subject matter of the engagement. This of course would not require disclosure of testimony, unpublished writings or opinions protected by confidentiality orders or agreements or require the expert to search materials not accessible to the expert. The goal is to inform the retaining lawyer of materials that may be useful to the other side in cross examination. Inconsistent positions, whether in testimony, writings, speeches, or otherwise, to the extent discovered by the adverse party, will likely be the subject of cross-examination by the adverse party. The retaining lawyer should be aware of these positions from the outset of the engagement. Surprises are never helpful. To the extent positions were not necessarily inconsistent but directly bear on the subject matter of the engagement, those differences may also have the potential to impact the expert's credibility. Accordingly, these positions also should be disclosed to the retaining lawyer. By referring to opinions that directly bear on the subject matter of the engagement, the Guideline again refers to opinions that could be used in cross examination.

Court rulings that reflect unfavorably upon the expert's earlier testimony should also be disclosed. These include determinations by a court that an expert was not qualified in a field of engagement. Retaining lawyers should also be advised of prior rulings in which all or part of an expert's opinion was excluded on substantive grounds going to the soundness of the opinion or its credibility, or in which a judge commented adversely on an expert's qualification or credibility. Again, the goal is to make the lawyer aware of materials reasonably likely to be discovered by the adverse lawyer. It is not intended to require experts to retain materials they

would not ordinarily retain or to breach any confidential relationships. These disclosures would not be required if an expert witness were excluded because the testimony was cumulative or not a proper subject for expert testimony, reasons which do not challenge the underlying soundness of the expert's opinion or expertise. Adverse court determinations may not be insurmountable obstacles but the retaining lawyer should be informed of such facts from the outset so that the lawyer can make the required evaluation.

These disclosure obligations are continuing throughout the engagement. Relationships may change during the course of an engagement or contacts by an adverse party may occur with respect to a new potential matter. Accordingly, all of the above disclosures should be supplemented as needed.

V. CONTINGENT COMPENSATION OF EXPERTS IN LITGATED MATTERS

The expert shall not accept compensation that is contingent on the outcome of litigation.

Comment

Compensation of experts in litigated matters should be determined at the outset of an engagement and should be structured to preserve the integrity of the expert's opinion. The arrangement for a contingent fees has the great potential to undercut the opinions to be offered and interfere with the objectivity of the expert. Contingent fees are so universally rejected that many codes that govern particular fields of expertise already prohibit compensation dependent upon or contingent on the outcome of the matter.

The ABA Model Rules of Professional Conduct prohibit offering an inducement to a witness that is prohibited by law. Rule 3.4(b). Comment 3 explains that, under the common law in most jurisdictions, it is improper to pay an expert a contingent fee. As the Annotated Model Rules explain, the expert's fees may not be contingent on the outcome "because of the improper inducement this might provide to an expert to testify falsely to earn a higher fee. *See New England Tel. & Tel. Co. v. Bd. of Assessors*, 468 N.E.2d 263 (Mass 1984) (majority rule 'is that an expert witness may not collect compensation which by agreement was contingent on the outcome of a controversy')." Annotated Model Rules at 329 (6th Ed. 2007). The prior Code of Professional Responsibility expressly prohibited contingent fees for expert witnesses. DR7-109. While some cases have permitted contingent fees to consulting experts, such as those who located testifying experts, *see Ojeda v. Sharp Cabrillo Hospital*, 10 Cal. Rptr. 2d 230 (Ct. App. 1992); *Schackow v. Medical-Legal Consulting Service, Inc.*, 416 A.2d 1303 (Md. Ct. Spec. App. 1980), the better view is expressed in those cases finding such fees against public policy. *See, e.g., First Nat'l Bank v. Malpractice Research*, 688 N.E.2d 1179 (Ill. 1997) (against public policy to permit a consulting firm to be paid pursuant to a contingency fee arrangement where the firm would locate and retain expert witnesses as well as act as a consultant); *Dupree v. Malpractice Research, Inc.*, 445 N.W.2d 498 (Mich. 1989) (against public policy to pay a consulting firm on a contingency fee basis where that firm provided "access to several medical experts....and provided considerable advice on trial techniques with suggested supporting expert

testimony"); *see also Polo by Shipley v. Gotchel*, 542 A.2d 947 (N.J. Super. Ct. Law Div. 1987) (contingent fee consulting contract inconsistent with court rules, statutes and public policy).

In addition, it is unethical for lawyers to share legal fees with experts. Rule 5.4 of the ABA Model Rules of Professional Conduct dictates that a lawyer or law firm shall *not* share legal fees with a non-lawyer. Similarly, Rule 1.5 of the Model Rules of Professional Conduct addresses fees. Subsection (e) describes the requirements for the division of fee between lawyers who are not in the same firm may be made. None of those requirements could be met by a fee arrangement with an expert witness.

Furthermore, other professions bar contingent fees to experts. For example, Opinion 9.07 (medical testimony) from the American Medical Association states as follows:

> Physician testimony must not be influenced by financial compensation; for example, it is unethical for a physician to accept compensation that is contingent upon the outcome of litigation.

Similarly, Opinion 6.01 (contingent physician fees) states as follows:

> If a physician's fee for medical service is contingent on the successful outcome of a claim, such as a malpractice or worker's compensation claim, there is the ever-present danger that the physician may become less of a healer and more of an advocate or partisan in the proceedings. Accordingly, a physician fee for medical services should not be based on the value of the service provided by the physicians of patient and not on the uncertain outcome of a contingency that does not in any way relate to the value of the medical service.
>
> A physician's fee should not be made contingent on the successful outcome of medical treatment. Such arrangements are unethical because they imply that successful outcomes from treatment are guaranteed, thus creating unrealistic expectations of medicine and false promises to consumers.

The American Society of Appraisers recently revised their Principles of Appraisal Practice and Code of Ethics. Section 7 addresses unethical and unprofessional appraisal practices. The first area they addressed under unethical and unprofessional practices are contingent fees (Section 7.1). The wording of Section 7.1 is somewhat similar to the way that the American Medical Association has dealt with doctors' acting as expert witnesses. Section 7.1 concludes by stressing that "[t]he Society declares that the contracting for or acceptance of any such contingent fee is unethical and unprofessional.]"

The American Society of Questioned Document Examiners has a code of ethics for their members. Each member of the Society is to abide by certain rules of conduct. One of the rules of

conduct is that "no engagement shall be undertaken on a contingent fee basis." There are other groups that have adopted similar language.

Contingent fees should be contrasted to other fee arrangements which are certain or fixed at the outset of an engagement but payment is deferred to the conclusion of the matter. Such arrangements, however, should not make payment of the arranged fee dependent on the success or outcome of the matter. In addition, this Guideline is limited to experts retained in litigated matters in recognition of the fact that certain experts in transactional matters, such as investment bankers, commonly have fee arrangements which provide that a portion of their compensation is contingent on the completion of the transaction.

416

REPORT

The Report establishes Guidelines for Conduct of Experts Retained By Lawyers on behalf of their clients. While many experts have ethical codes applicable to their chosen professions, there are no uniform standards that apply to the retention and employment of experts that separately address the issues presented when experts are retained by lawyers on behalf of their clients in connection with litigated or transactional matters.

The lack of consistent standards has led to (a) inconsistent expectations of expert's required conduct, (b) unnecessary surprises that have negatively impacted the lawyer-expert relationship, and (c) disqualification motions challenging conduct of experts, which has, at a minimum, distracted lawyers and experts from focusing on substantive matters and caused delay and unnecessary expense. These Guidelines establish standards of required conduct by experts retained by lawyers on behalf of their clients so that lawyers, experts and clients will have a common understanding of what is expected and so that future problems can be minimized or avoided.

Upon adoption, these Guidelines of Conduct will be promulgated to the legal profession for use in connection with retaining experts. Thereafter, lawyers will be able to incorporate the Guidelines in retainer letters and obtain the agreement of experts to adhere to the Guidelines.

These Guidelines of Conduct are not intended to impose a professional obligation on lawyers to use them and a failure to seek to incorporate them into retainer agreements is not intended to be deemed a professional lapse. Moreover, to the extent they are incorporated into retainer agreements, they then would govern only the relationship between the retaining lawyer and the expert, and, therefore, they are not intended to create any duties to the adverse party or its counsel. Accordingly, compliance with them or a failure to do so should not be the subject of discovery by the adverse party. The Guidelines are also not intended to create standards for disqualification, which are a matter for continuing development by the courts.

The Guidelines set forth five basic standards that govern the lawyer-expert relationship. They require: Integrity/Professionalism, Competence, Confidentiality, Avoiding Conflicts of Interest and Avoiding Contingent Compensation of Experts in Litigated Matters. Conflicts of interest are sought to be avoided by requiring disclosure to the hiring lawyer in four basic areas: those addressing (1) financial or personal or business relationships; (2) communications or contacts with an adverse party or lawyer; (3) prior testimony or positions in other matters that bear on the subject matter of the engagement; and (4) prior court determinations that an expert was not qualified or not credible. The disclosure obligations seek to provide a framework for informed judgments to be made by retaining lawyers at the outset of engagements to avoid future issues. It is also our hope that the system will be improved as a whole when clear Guidelines are established for expert conduct.

I. INTEGRITY/PROFESSIONALISM

An expert shall act with integrity and in a professional manner throughout an engagement.

This Standard requires experts to act with integrity and in a professional manner in any engagement and maintain the highest standards of ethical conduct. At a minimum, it requires that an expert not commit any acts that reflect adversely on the expert's honesty, trust, worthiness or fitness to serve as an expert, nor engage in conduct involving dishonesty, fraud, decent or misrepresentation.

II. COMPETENCE

An expert shall not undertake an engagement unless the expert is competent to do so.

This Standard requires that experts not undertake engagements unless competent to do so and addresses what should be done when the expert lacks competence, in whole or in part, to undertake or complete an engagement. If the expert is not competent to complete an entire engagement, he or she must disclose the areas in which there is a lack of competence and how the expert will acquire that competence, such as by associating with another expert with the required competence, or decline or withdraw from the engagement.

III. CONFIDENTIALITY

The expert shall treat any information received or work product produced by the expert during an engagement as confidential, and shall not disclose any such information except as required by law, as retaining counsel shall determine and advise, or with the consent of the client.

This Standard requires all information received and work product produced by the expert during an engagement to be treated as confidential except as required by law or with the consent of the client.

Because confidentiality is so important to a lawyer's relationship with his or her client, as well as to the integrity of the judicial process as a whole, information regarding an engagement should only be disclosed to third-parties when explicit consent is provided by the client or when the disclosure is otherwise required by law. Certain engagements may never become public and the expert should not be placed in the position of making determinations regarding what documents or information should be deemed confidential. Requests for such information by third-parties should be referred to retaining counsel so that the client's rights to confidentiality may be protected.

IV. CONFLICTS OF INTERESTS AND DISCLOSURE

Unless the client provides informed consent, an expert shall not accept an engagement if the acceptance would create a conflict of interest, *i.e.*, that the expert's provision of services will be materially limited by the expert's duties to other clients, the expert's relationship to third parties, or the expert's own interests. To facilitate a determination of whether a conflict of interest exists, the expert shall disclose to the client or retaining lawyer all present or potential conflicts of interest. Among the matters that shall be disclosed are the following:

1. **Financial interests or personal or business relationships with lawyers, clients, or parties involved or reasonably likely to be involved in the matter.**

2. **Communications or contacts with any adverse party or lawyer.**

3. **Prior testimony, writings or positions of the expert in the last 10 years in other matters that bear on the subject matter of the engagement.**

4. **Determinations in the last 10 years in which a judge has opined adversely on the expert's qualifications or credibility, or in which any portion of an expert's opinion was excluded on substantive grounds going to the soundness of the opinion or its credibility.**

The duty to disclose is a continuing obligation. Therefore, the expert should supplement all these disclosures as needed.

Conflicts of interest involving experts is a matter that has been addressed by many courts. It is not the intent of this Standard to prescribe criteria to determine whether and when experts should be disqualified, a subject that evolving case law will continue to address. Instead, it seeks to avoid conflicts of interests and requires disclosure to the retaining lawyer of relationships and facts that create or have the potential to create conflicts of interest, so that the retaining lawyer may make informed judgments at the beginning of an engagement to avoid surprises or potential future problems.

Disclosure is also required of certain prior positions of the expert that may be problematic or the subject of cross-examination by the adverse party. For the same reason, this disclosure obligation also pertains to prior court rulings that reflect adversely upon the expert's qualifications or credibility.

V. CONTINGENT COMPENSATION OF EXPERTS IN LITIGATED MATTERS

The expert shall not accept compensation that is contingent on the outcome of litigation.

This Standard requires the compensation of experts in litigated matters to be determined at the outset of an engagement and structured to preserve the integrity of the expert's opinion. Contingent fees for experts have a great potential to undercut the opinions to be offered, interfere with the objectivity of the expert and should not be permitted. This Standard is limited to experts retained in litigated matters in recognition of the fact that certain experts in transactional matters, such as investment bankers, commonly have fee arrangements which provide that a portion of their compensation is contingent on the completion of the transaction.

CONCLUSION

It is hoped that these Guidelines of Conduct for Experts Retained By Lawyers will be a helpful step in creating common expectations and consistent conduct governing the relationship between experts and lawyers who hire experts for client matters. By agreeing to follow these Guidelines, lawyers and experts will avoid many potential pitfalls that can destroy or diminish the lawyer-client-expert relationship. In many respects they reflect the best practices that already are observed by those who currently enter into lawyer-expert engagements on a regular basis. The disclosure obligations will provide a framework for informed judgments to be made regarding retention at the outset of an engagement so that experts and lawyers can thereafter focus on the assignments at hand and avoid the unnecessary distractions, costs and delay that inevitably occur when ethical issues arise. In addition, it is hoped that the system will be improved as a whole when clear Guidelines are established for required conduct.

Respectfully Submitted,

Ronald Marmer, Chair
Section of Litigation
February 2012

GENERAL INFORMATION FORM

Submitting Entity: Section of Litigation

Submitted by: Ronald Marmer, Chair, Section of Litigation

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

The Guidelines set forth five basic standards that govern the lawyer-expert relationship. They require: Integrity/Professionalism, Competence, Confidentiality, Avoiding Conflicts of Interest and Avoiding Contingent Compensation of Experts. Conflicts of interest are sought to be avoided by requiring disclosure to the hiring lawyer in four basic areas: those addressing (1) financial or personal or business relationships; (2) communications or contacts with an adverse party or lawyer; (3) prior testimony on positions in other matters that bear on the subject matter of the engagement; and (4) prior court determinations that an expert was not qualified or not credible. The disclosure obligations seek to provide a framework for informed judgments to be made by retaining lawyers at the outset of engagements to avoid future ethical issues. It is also hoped that the system will be improved as a whole when clear Guidelines are established for required ethical conduct.

2. **Approval by Submitting Entity:**

February 9, 2011

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

Yes, but it was withdrawn.

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

This Resolution does not affect any existing policies of the Association. It continues the Association's tradition of approving "best practices" and encouraging high ethical conduct.

5. **What urgency exists which requires action at this meeting of the House?**

These Guidelines are the result of a year-long project by the Section of Litigation to develop Guidelines of conduct for experts retained by lawyers. If these Guidelines are adopted by the House, it is the Section of Litigation's intention to promulgate them to the Bar so that they may be incorporated by lawyers in retainer agreements when retaining experts to work on client matters. The timely adoption of these Guidelines will encourage consistent ethical conduct and place the ABA in a leadership role on these issues.

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

N/A

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

None.

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

N/A

9. **Referrals.**

This resolution has been sent to other ABA entities requesting support or co-sponsorship:

Section of Administrative Law and Regulatory Practice
Section of Antitrust Law
Section of Business Law
Section of Criminal Justice
Section of Dispute Resolution
Section of Environment, Energy and Resources
Section of Family Law
General Practice, Solo and Small Firm Division
Government and Public Sector Lawyers Division
Section of Health Law
Section of Individual Rights and Responsibilities
Section of Intellectual Property Law
Section of International Law
Judicial Division
Section of Labor and Employment Law
Section of Law Practice Management
Law Student Division
Section of Legal Education and Admissions to the Bar
Section of Public Contract Law
Section of Public Utility, Communications and Transportation Law
Section of Real Property, Trust and Estate Law
Section of Science and Technology Law
Senior Lawyers Division
Section of State and Local Government Law
Section of Taxation
Section of Tort Trial and Insurance Practice
Young Lawyers Division
Section of Affordable Housing and Community Development Law
Section of Air and Space Law

Section of Communications Law
Section of Construction Industry
Section of Entertainment and Sports Industries
Section of Franchising

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

Jeffrey J. Greenbaum, Esq.
Co-Chair of Task Force on Expert Code of Ethics
Sills Cummis & Gross P.C.
One Riverfront Plaza
Newark, New Jersey 07102
Phone: 973.643.5430
Fax: 973.643.6500
Email: jgreenbaum@sillscummis.com

or

Section Delegate Lawrence J. Fox (see § 11 below)

11. **Contact Name and Address Information:** (Who will present the report to the House?)

Lawrence J. Fox
Delegate, Section of Litigation
Drinker Biddle & Reath, LLP
One Logan Square, Suite 2000
Philadelphia, PA 19106
Phone: 215.988.2714
Fax: 215.988.2757
Mobile: 215.816.8571
Email: lawrence.fox@dbr.com
Email: lawrence.fox@yale.edu

300

EXECUTIVE SUMMARY

1. Summary of the Resolution

The Guidelines set forth five basic standards that govern the lawyer-expert relationship. They require: Integrity/Professionalism, Competence, Confidentiality, Avoiding Conflicts of Interest and Avoiding Contingent Compensation of Experts. Conflicts of interest are sought to be avoided by requiring disclosure to the hiring lawyer in four basic areas: those addressing (1) financial or personal or business relationships; (2) communications or contacts with an adverse party or lawyer; (3) prior testimony on positions in other matters that bear on the subject matter of the engagement; and (4) prior court determinations that an expert was not qualified or not credible. The disclosure obligations seek to provide a framework for informed judgments to be made by retaining lawyers at the outset of engagements to avoid future ethical issues. It is also hoped that the system will be improved as a whole when clear Guidelines are established for required ethical conduct.

2. Summary of the Issue that the Resolution addresses

The Report establishes Ethical Guidelines for Experts retained by lawyers on behalf of their clients. While many experts have ethical codes applicable to their chosen professions, there are no uniform ethical standards that apply to all experts or that separately address the issues presented when experts are retained by lawyers on behalf of their clients in connection with litigated or transactional matters.

The lack of consistent standards has led to inconsistent expectations of required conduct, to unnecessary surprises that have negatively impacted the lawyer-expert relationship, and to disqualification motions challenging the conduct of experts, which has, at a minimum, distracted lawyers and experts from focusing on the substantive matter and caused delay and unnecessary expense. These Guidelines seek to establish standards of required ethical conduct so that lawyers, experts and clients will have a common understanding of what is expected and so that future problems can be minimized or avoided.

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

These Guidelines will seek to establish standards of required ethical conduct so that lawyers, experts and clients will have a common understanding of what is expected and future problems can be minimized or avoided. It will serve as a guide for lawyers in retaining experts and making sure that the proper questions are asked to avoid potential conflicts of interest. By incorporating these Guidelines in retainer letters, lawyers will also be able to contractually require their experts to comply with these ethical standards.

4. Summary of Minority Views

None of which we are aware.

Pursuant to §45.5 of the House Rules of Procedure, this late report will be considered by the House of Delegates if the Committee on Rules and Calendar recommends a waiver of the time requirement and that recommendation is approved by a two-thirds vote of the delegates voting.

AMERICAN BAR ASSOCIATION

SECTION OF ANTITRUST LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association supports the principle that the award of damages or injunctive relief under federal or state antitrust and competition law should require a finding of "competitive" injury of a type that harms not just the plaintiff or plaintiffs, but also harms competition itself.

REPORT

I. INTRODUCTION

This report presents the views of the American Bar Association Section of Antitrust Law that antitrust plaintiffs must prove antitrust injury, *i.e.*, injury to the competitive process and not simply harm to one or more competitors, in order to recover in an antitrust action. The recent decision by the California Court of Appeals in *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*, 131 Cal. Rptr. 3d 519 (Cal. App. 2011), ruling that proof of injury to a competitor is sufficient to establish antitrust injury, directly conflicts with a solid line of Supreme Court authority that to prove antitrust injury plaintiff must adduce proof of actual harm to the marketplace and not merely harm to a competitor. This decision is erroneous and should be reversed.

II. RESOLUTION

The Section of Antitrust Law recommends that the American Bar Association support the principle that the award of damages or injunctive relief under federal or state antitrust and competition law should require a finding of "competitive" injury of a type that harms not just the plaintiff or plaintiffs, but also harms competition itself.

III. REASONS WHY THE AMERICAN BAR ASSOCIATION SHOULD SUPPORT THE REQUIREMENT OF PROOF OF INJURY TO THE COMPETITIVE PROCESS AS WELL AS INJURY TO THE PLAINTIFF IN ACTIONS UNDER FEDERAL OR STATE ANTITRUST LAW.

The Supreme Court has long held that the antitrust laws "were enacted for the protection of *competition*, not *competitors*. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (citation omitted; emphasis in the original). *Brunswick* ruled that in addition to proving an injury to business or property causally linked to an antitrust offense, a private plaintiff must also demonstrate antitrust injury —"injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful." *Id.* at 489; *Pool Water Products v. Olin Corp.*, 258 F3d 1024, 1034 (9th Cir. 2001) ("To show antitrust injury a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior since it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition"); *see Morrison v. Viacom, Inc.* 66 Cal. App. 4th 534, 548 (1998) ("An 'antitrust injury' must be proved"). Accordingly, a plaintiff can meet the antitrust injury requirement if and only if it can prove actual impact on competition in the market – traditionally in the form of higher prices to consumers or lower output in the marketplace. See *United States v. Syufy Enterprises*, 903 F.2d 659, 668 (9th Cir. 1990) ("It can't be said often enough that the antitrust laws protect competition, *not* competitors.") (Emphasis is original).

301

The decision by the California Court of Appeals in *Flagship Theatres of Palm Desert, LLC v. Century Theatre, Inc.*, 131 Cal. Rptr. 3d 519 (Cal. App. 2011) is at odds with the well-established antitrust injury doctrine. Although the Court of Appeals acknowledged that antitrust injury was an essential element of a Cartwright Act claim, *id.* at 528-29, it further held that an antitrust plaintiff is not required "to show actual harm to competition" to prove antitrust injury, *id.* at 529.

The California Court of Appeals held that to meet the antitrust injury requirement a plaintiff need only show that it was harmed by conduct that "'stems from a competition-reducing aspect or effect of the defendant's behavior.'" *Flagship Theatres*, 131 Cal. Rptr. 3d at 530. It is undoubtedly true that for standing purposes an antitrust plaintiff must show that it was harmed by a defendant's conduct. That formulation, however, only comprises "half the battle." As detailed above, post-*Brunswick* cases further require that an antitrust plaintiff also demonstrate that the conduct have an actual impact on consumers in the market beyond harm to the plaintiff. Indeed, were it otherwise, then the plaintiff in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) would have prevailed because it claimed individual harm arising out of Atlantic Richfield's (then) per se illegal maximum retail price fixing agreements. Yet, the Supreme Court expressly held that harm to the individual plaintiff was not sufficient to meet the antitrust injury requirement because, even if defendants' conduct were per se unlawful, the plaintiff failed to show actual harm to competition. *See id.* at 337-40, (explaining that plaintiff may have been subject to per se violation but no antitrust injury because defendant's pricing was not predatory and therefore plaintiff could not demonstrate harm to the competitive process). As the Supreme Court made clear, an antitrust plaintiff cannot "equate injury in fact with antitrust injury." *Id.* at 339, n.8.

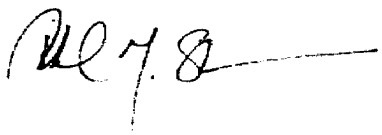
Indeed, it is precisely because an antitrust plaintiff must demonstrate an actual lessening of competition to meet the antitrust injury requirement that the Ninth Circuit has expressly rejected this Court's contrary rationale-that a showing of anticompetitive effect under the rule of reason is "irrelevant" to the antitrust injury requirement. *Flagship Theatres*, 131 Cal. Rptr. 3d at 529, n. 8. In *Cascade Health Solutions v. Peace Health,* 515 F.3d 883, 911 n.21 (9th Cir. 2008), the Ninth Circuit ruled that proving anticompetitive effect "is no different than the general requirement of 'antitrust injury' that a plaintiff must prove in any private antitrust action." *Id.* (citing *Brunswick*). In so ruling the Ninth Circuit explained that the requirements are coextensive because all private plaintiffs must prove an "adverse effect on competition" under the "preexisting requirement of antitrust injury under *Brunswick*," *Id.*

In short, a long line of authority dating back to *Brunswick* holds that to prove antitrust injury a plaintiff must present evidence of actual harm to the market, and not simply harm to the plaintiff. If allowed to stand, the holding of the California Court of Appeals would become an outlier directly at odds with dozens of modern cases construing the antitrust injury requirement and would open a Pandora's Box by divorcing antitrust law from competitive harm to the market.

IV. CONCLUSION

The American Bar Association Section of Antitrust Law respectfully requests approval of the proposed resolution.

Respectfully submitted,



Richard M. Steuer
Chair, Section of Antitrust Law
February 2012

301

GENERAL INFORMATION FORM

Submitting Entity: Section of Antitrust Law

Submitted By: Richard M. Steuer, Chair

1. Summary of Resolution(s).

   The Section of Antitrust Law recommends that the American Bar Association adopt a policy that supports the principle that the award of damages or injunctive relief under federal or state antitrust and competition law should require a finding of "competitive" injury of a type that harms not just the plaintiff or plaintiffs, but also harms competition itself.

2. Approval by Submitting Entity.

   This resolution and report was approved by the Section Council on November 16, 2011.

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

   No similar resolution has been submitted to the House of Delegates or Board of Governors.

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

   No relevant policies currently exist.

5. What urgency exists which requires action at this meeting of the House?

   The Section of Antitrust Law seeks approval of the resolution at this time to support the filing of an Association brief *amicus curiae* in the California Supreme Court in *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*

6. Status of Legislation. (If applicable)
   See paragraph 5.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
   The Section of Antitrust Law will seek approval to support the filing of an Association brief *amicus curiae* in the California Supreme Court in *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*

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

   Adoption of the resolution would not result in direct or indirect costs to the Association.

9. Disclosure of Interest. (If applicable)

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

10. Referrals.

    This resolution is being submitted to all Sections and Divisions prior to the meeting of the House of Delegates at which it will be presented.

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

    Richard M. Steuer
    Chair, ABA Section of Antitrust Law
    Mayer Brown, LLP
    1675 Broadway
    New York, New York 10019-5620
    212-506-2530
    212-849-5530 (fax)
    rsteuer@mayerbrown.com

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

    Joseph G. Krauss
    Delegate, Section of Antitrust Law
    Hogan Lovells
    Suite 800E, 555 13th Street, NW
    Washington, DC 20004-1171
    202/637-5832
    joseph.krauss@hoganlovells.com

    Bernard A. Nigro, Jr.
    Delegate, Section of Antitrust Law
    Fried, Frank, Harris, Shriver & Jacobson LLP
    801 17th Street, NW
    Washington, DC 20006-3912
    202/639-7373
    barry.nigro@friedfrank.com

301

EXECUTIVE SUMMARY

Submitting Entity: Section of Antitrust Law

Submitted by: Richard M. Steuer
Chair

1. Summary of Resolution

The Section of Antitrust Law recommends that the American Bar Association adopt a policy that supports the principle that the award of damages or injunctive relief under federal or state antitrust and competition law should require a finding of "competitive" injury of a type that harms not just the plaintiff or plaintiffs, but also harms competition itself.

2. Summary of Issue That the Resolution Addresses

A case pending in the Supreme Court of State of California involves a decision by the California Court of Appeals that antitrust injury is established by proof of injury to a competitor.

3. Explanation of How the Proposed Policy Position Will Address the Issue

In this Resolution and Report, the Section of Antitrust Law recommends the adoption of policy to support the filing of an ABA brief *amicus curiae* in support of the antitrust injury standard.

4. Summary of Any Minority Views that Have Been Identified

The Section of Antitrust Law is not aware of any minority views that are relevant to this resolution.