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ABA House of Delegates Considers Policies on Use of Foreign Law, Gun Control, and Duty of Care at Annual Meeting

The American Bar Association's House of Delegates will consider a number of resolutions at its annual meeting in Toronto on August 8 and 9. If adopted, these resolutions become official policy of the Association. The ABA, maintaining that it serves as the national representative of the legal profession, may then engage in lobbying or advocacy of these policies on behalf of its members. What follows is a summary of some of these proposals. (Please see the bottom of this page for details on proposals concerning judicial disqualification.)

Consideration of Foreign Law in the U.S.

The Section of International Law will submit Recommendation 113A, which "opposes federal or state laws that impose blanket prohibitions on consideration or use of foreign or international law and opposes federal or state laws that impose blanket prohibitions on consideration or use of the entire body of law or doctrine of a particular religion." Currently, in approximately 20 states, more than 40 pieces of legislation have been proposed that would restrict the use or consideration of foreign, international, or religious law in state courts. The sponsors of this resolution argue that these legislative bills violate federal constitutional rights, are a burden on business in U.S. foreign commerce, and are duplicative of existing laws.

Most proposed bills and amendments use broad language that refers to restricting the general use of foreign or religious law in the judicial process. However, the sponsors of this resolution claim that "many of these legislative initiatives are aimed at Islamic law," such as the Oklahoma amendment which tries to "forbid courts from considering 'international law' or a particular religious tradition, most often 'Sharia law.'" They contend that this type of legislation violates provisions of the U.S. Constitution, including the Supremacy Clause, the Contracts Clause, the First Amendment's Free Exercise of Religion Clause, and the Full Faith and Credit Clause.

The sponsors also maintain that these proposed Bills and Amendments would have an adverse effect on business, particularly when negotiating international business deals, because

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Judicial Disqualification Policies to Be Considered by ABA House of Delegates

State judicial ethics codes, both for lower courts and appellate courts; recusal policies; and recent United States Supreme Court decisions on campaign speech have been in the headlines in recent months. To respond to these issues, the ABA's Standing Committee on Judicial Independence proposes Recommendation 107, which will be considered by the ABA's House of Delegates during its annual meeting on August 8 and 9 in Toronto. Recommendation 107 "urges states to establish clearly articulated procedures for: A) Judicial disqualification determinations; and B) Prompt review by another judge

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FROM THE EDITORS

In its mission statement, the American Bar Association declares that it is the "national representative of the legal profession." And, not surprisingly, as the largest professional legal organization in the world, many policy makers, journalists, and ordinary citizens do in fact look to the ABA as a bellwether of the legal profession on matters involving law and the justice system. This is why debate about the work and the activities of the ABA—and the role that it plays in shaping our legal culture—is so very important.

ABA WATCH has a very simple purpose—to provide facts and information on the Association, thereby helping readers to assess independently the value of the organization's activities and to decide for themselves what the proper role of the ABA should be in our legal culture. We believe this project is helping to foster a more robust debate about the legal profession and the ABA's role within it, and we invite you to be a part of this exchange by thinking about it and responding to the material contained in this and future issues.

In this issue, we offer a preview of the ABA's annual meeting in Toronto, including discussing proposals regarding judicial disqualification and profiles of those lawyers being honored by the Association. We also discuss recent scrutiny of the ABA law school accreditation process. And, as in the past, we digest and summarize actions before the House of Delegates.

Comments and criticisms about this publication are most welcome. You can e-mail us at info@fed-soc.org.

2011 ABA Award Recipients

ABA Medal

Each year the American Bar Association awards its highest honor, the ABA Medal, to one or more recipients who make outstanding contributions to the cause of American jurisprudence. This year's joint recipients of the ABA Medal are David Boies and Theodore B. Olson. Mr. Boise is currently the Chairman of the law firm of Boies, Schiller & Flexner LLP, and previously served as Chief Counsel and Staff Director of the United States Senate Antitrust Subcommittee in 1978 and as Chief Counsel and Staff Director of the United States Senate Judiciary Committee in 1979. A few of his notable cases include serving as Special Trial Counsel for the United States Department of Justice in its antitrust suit against Microsoft, collecting a record $4.1 billion for American Express in its antitrust litigation against Visa and MasterCard, and winning a record $1.3 billion jury verdict for Oracle in its copyright infringement suit against SAP.

Mr. Olson is currently a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher, and is a member of the firm's Executive Committee. Previously, Mr. Olson was Solicitor General of the United States from 2001-2004, and was Assistant Attorney General in charge of the Office of Legal Counsel in the U.S. Department of Justice from 1981-1984. In addition to serving in the Department of Justice, Mr. Olson also served as private counsel to Presidents Ronald Reagan and George W. Bush. He has extensive experience at all levels of the state and federal court systems and has won over 75% of the 58 cases he has argued in the Supreme Court. In 2010, President Obama appointed Mr. Olson to serve as a member of the ten-person Council of the Administrative Conference of the United States.

David Boise and Ted Olson served as opposing lead counsel in *Bush v. Gore*, the litigation surrounding the Florida vote count after the 2001 election, with Mr. Boies representing former Vice-President Al Gore and Mr. Olson arguing for President George. W. Bush. They recently joined together to challenge California's Proposition 8 in *Perry v. Schwarzenegger*. Mr. Boise and Mr. Olson have recently been named Co-Chairs of the ABA Task Force on Preservation of the Justice System.

The medal will be awarded during the meeting of the ABA House of Delegates at the Association's Annual Meeting in Toronto.

Margaret Brent Women Lawyers of Achievement Award

This year the Association is awarding the Margaret Brent Women Lawyers of Achievement Award to Eleanor Dean ("Eldie") Acheson, Paulette Brown, Karen J. Mathis, Col. Maritza Ryan, and Hon. Esther Tomljanovich. Chief Justice Beverley McLaughlin of the Supreme Court of Canada is also being honored and will receive a special award. In announcing the honorees, Roberta D. Liebenberg, chairman of the ABA Commission on

Women in the Profession, said, "The Margaret Brent Awards recognize the remarkable achievements and accomplishments of distinguished women lawyers from around the country. Our honorees have not only achieved great professional success, they have also blazed the trail for other women lawyers and served as inspirational role models."

Eleanor Dean ("Eldie") Acheson

Ms. Acheson is currently vice president, general counsel and corporate secretary of National Railroad Passenger in Washington, D.C. She was the first woman associate in the litigation department at Ropes and Gray. President Bill Clinton appointed her to Assistant Attorney General for the Office of Policy Development in 1993. She previously served as the Public Policy & Governmental Affairs Director of the National Gay and Lesbian Task Force.

Paulette Brown

Ms. Brown is a partner and Chief Diversity Officer in the New Jersey office of Edwards Angell Palmer and Dodge LLP. She has extensive litigation experience on employment matters and has argued cases involving sexual harassment, marital status, and race and age discrimination. Previously, Ms. Brown was the president of the Association of Black Women Lawyers of New Jersey. She also served as president of the National Bar Association, and she led a delegation in South Africa to monitor the country's first democratic elections.

Karen J. Mathis

Since September 2009, Ms. Mathis has been the president and CEO of Big Brothers Big Sisters of America, a non-profit committed to helping children of single, low-income, and incarcerated parents succeed in life through mentoring. Before joining Big Brothers Big Sisters, she was the Executive Director for the Central European and Eurasian Initiative Institute for one year. She served as president of the American Bar Association, during which she created the Youth at Risk program and the ABA-Girls Scouts USA program, and she has served as a member of the House of Delegates since 1982. Ms. Mathis practiced law for over 30 years, most recently as a partner of McElroy, Deutsch, Mulvaney & Carpenter, LLP.

Col. Maritza Ryan

A graduate of West Point, Col. Ryan is currently a professor and department head of the United States Military Academy in New York. She became the first female and Hispanic West Point graduate in the history of the academy to be an academic head at West Point. Col. Ryan previously served as a military advisor in Saudi Arabia during Operation Desert Shield and was the only woman in her 1,000-soldier brigade. She was then selected to attend the staff school at Fort Leavenworth in Kansas and after that was assigned a significant position at the JAG headquarters in Washington, D.C.

Hon. Esther Tomljanovich

Judge Tomljanovich has served on the Board of Directors of Medica since 2002 and is a former Minnesota Supreme Court Justice. She was the only woman in her graduating law school class from St. Paul College of Law in 1955, and became the first woman to serve as the state

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Scrutiny of ABA Accreditation of Law Schools

The National Advisory Committee on Institutional Quality and Integrity (NACIQI), the entity which advises the Secretary of Education on accreditation matters and on the eligibility and certification process for institutions of higher education, recently expressed concerns in June about the ABA's role in accrediting law schools while continuing to recommend that the ABA continue its accrediting role. The NACIQI found the ABA out of compliance with 17 regulations, including the criteria to consider student-loan default rates; to solicit and consider public comments; and to set a job placement standard by its member institutions. Three members of the NACIQI opposed the motion to continue the ABA's accreditation, as they expressed concerns that the Association would not be able to remedy some of the out-of-compliance issues.

Law school accreditation has been attracting attention from members of Congress over the last several months, as concerns have grown about increasing student debt and declining job prospects. Enrollment in law schools has surged over the last decade, with tuition increases often exceeding the cost of inflation. Senator Barbara Boxer corresponded with ABA President Stephen Zack this past spring, calling on the ABA to improve its oversight of admissions and post-graduation employment data reported upon by law schools. Her letter was sent in the wake of several

media reports on the manipulation of post-graduation employment and salary data to presumably enhance a law school's rating. Zack replied that the ABA was studying these problems, and the Young Lawyers Division would further study the issue. Senator Boxer responded, thanking Zack for considering her request. She urged the ABA to strengthen its independent oversight of admissions and post-graduation data reported by law schools and to improve access to accurate data for law students across the country. She also urged the ABA to exert additional oversight regarding the lack of retention of merit scholarships, as discussed in a recent *New York Times* article. The article reported that many students lost merit-based scholarships after they failed to maintain the minimum GPA mandated by the scholarship terms. While 38,000 out of 145,000 national law students receive merit-based aid, representing about $500 million in scholarship assistance, no entity, including the ABA, appeared to be monitoring how much of that aid is renewed each year.

Senator Charles Grassley, the Ranking Republican Member of the Senate Judiciary Committee, submitted a letter on July 11 to Stephen Zack. Senator Grassley expressed his dismay that the ABA was "barely granted renewed recognition" as an accreditor. He was particularly concerned that the ABA was insufficiently assessing student-loan default rates in its accreditation process. He cited the same *Times* article that Boxer had discussed, and questioned why the ABA was not exerting sufficient oversight over the awarding of merit scholarships.

Senator Grassley's letter discussed the declining number of jobs available in the legal profession, despite the increasing number of law school graduates. He quoted the *Times* article, which described employment prospects as "bleak" for recent law school graduating classes. Senator Grassley states that this begs the question of how effective the ABA's internal controls are in assessing this situation. He wrote, "As the Ranking Member of the United States Senate Committee on the Judiciary, I have an interest in the health of the legal profession. To the extent that tax dollars are used, I also have an interest in ensuring that the students who take out federally-backed loans are in a position to pay back their loans and that the default rates on those loans do not increase." He then asked the ABA a series of questions and requested written responses. Among the questions he asked:

- Whether the ABA compiles data on scholarship retention;
- Whether the ABA compiles data on the number of merit based scholarship this year, and if not, whether it would begin retaining such data;
- Whether the ABA assists students in assessing whether their loan amount is excessive and able to be repaid;
- How many schools the ABA has accredited in the past two decades, and whether accreditation has been rescinded; and
- Whether the ABA tracks the professional background of its accreditors and what the balance is between academics and practitioners on its accreditation commission.

Senator Grassley requested answers by July 12. On July 20, Stephen Zack responded, stating that he "shared" the Senator's concerns. He emphasized, "No one could be more focused on the future of our next generation of lawyers than the ABA and the legal profession we serve." He noted the dedication of the volunteers serving on the accreditation council. In addressing the issue regarding merit-based aid, Zack observed, "Much of this issue revolves around students making informed, thoughtful choices." He recommended an ABA publication on "The Value Proposition of Going to Law School," along with other resources that describe financing a law school education.

The Section of Legal Education and Admissions to the Bar also responded to Senator Grassley with a memo on the Accreditation Project of the ABA. Regarding merit-based aid, the Section concluded, "We believe that the issue with merit scholarship retention is not based on any 'bait and switch' intention by law schools, but arises because of the affected students' failure to maintain the required grade point average or class rank."

The Section also responded to concerns about the job market for law school graduates and the numbers of law schools accredited in the past couple of decades. The Section wrote:

> The purpose of accredited law schools is to graduate attorneys who can serve the justice system and the long term need for lawyers over a lifetime. Denying accreditation to an otherwise-qualified law school would be a violation of Department of Education regulations. Furthermore, adjustments in the numbers of students enrolling in law school to begin their careers cannot and should not be affected by short-range economic developments. The Section does monitor enrollments and placement and distributes information on both. However, as indicated above, regardless of what some may see as the desirability of

denying access to the legal profession on the basis of even medium-term employment opportunities, the accrediting agency simply cannot lawfully do so.

The Section also noted that while the ABA does not offer education programs or financial services to students, it does hold law schools responsible for providing services such as academic advising, financial aid counseling, and career counseling.

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revisor of statuses. She was appointed as Minnesota's second district court judge in 1977 by Governor Rudy Perpich, and then was appointed to the Minnesota Supreme Court. While on the Supreme Court, Judge Tomljanovich founded the Minnesota Women Lawyers Association and was a member and chair of the Governor's Judicial Selection Commission.

Right Hon. Chief Justice Beverly McLachlin

In 2000, Justice McLachlin became the first woman to hold the position of Chief Justice of the Supreme Court of Canada. Prior to achieving this title, she was a private practice lawyer in Edmonton, Fort St. John, and Vancouver. Beginning in 1974, she taught law as a tenured associate professor at the University of British Columbia. She was first appointed to the Vancouver County Court in 1981 and then the Supreme Court of British Columbia later that year. Her judicial career continued as she was promoted to the British Columbia Court of Appeal in 1985 and became Chief Justice of the Supreme Court of British Columbia in 1988 before being appointed as a justice of the Supreme Court of Canada one year later.

Thurgood Marshall Award

The Association will honor Elaine R. Jones, former Council Member for the ABA Section of Individual Rights and Responsibilities, with the 20th Anniversary Thurgood Marshall Award. Ms. Jones served as the President and Director Counsel, Emeritus of the NAACP Legal Defense and Educational Fund, Inc (LDF). She has been active in the American Bar Association for many years, including previously serving on the Board of Governors and being a current member of the Task Force on the Preservation of the Justice System.

John Marshall Award

Justice Sandra Day O'Connor and William H. Neukom will be presented with the 2011 John Marshall Award at the Association's Annual Meeting in Toronto. According to the ABA, the John Marshall Award is named in honor of the fourth Chief Justice of the United States, "who is credited with establishing the independence of the judiciary and enhancing its moral authority." Justice Sandra Day O'Connor was the first female judge appointed to the United States Supreme Court, where she served for over 25 years. William Neukom served as President of the American Bar Association from 2007-2008 and is the Founder, President, and CEO of the World Justice Project.

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this legislation would make it difficult for these states to "freely negotiate the choice of law term with a foreign company that would insist on the application of law of its own jurisdiction to govern the contract." Moreover, they argue that states with these legislative initiatives appear more hostile to the use of foreign law, which "will likely harden the attitude of foreign jurisdictions with regard to the application of U.S. law."

According to the sponsors, the bills and amendments under consideration are unnecessary because there are already laws in place that protect U.S. citizens from the "application of religious or foreign legal principles which are considered unfair, discriminatory or offensive to basic American values." They concede that some court decisions have raised concerns, but they maintain that ultimately courts will not uphold or enforce a foreign law if it violates state or federal public policy, or does "not meet fundamental standards of fairness and justice."

Opponents of the resolution maintain that the resolution is not well-tailored insofar as it attacks a "straw man" set of issues. Critics of the resolution acknowledge that there is no question that a state constitutional amendment or statutory enactment imposing a "blanket prohibition" on the use of foreign law, or even the recognition of an arbitration award emanating from

an ecclesiastical arbitral panel, is both constitutionally infirm and logistically impracticable. Foreign law is often properly used in admiralty law and in international commerce, sometimes as a matter of treaty but often as a matter of common law.

Critics further point out that the American Laws for American Courts ("ALAC") draft does not have any of the constitutional or practical problems associated with the Oklahoma amendment. The ALAC-formulated legislation has already passed in three states (Tennessee, Louisiana, and Arizona) without any court challenges and has been introduced as pending bills in dozens of other states. Unlike the blanket prohibitions referenced in the Oklahoma amendment, the ALAC proposal limits the application of comity, choice of law, and choice of jurisdiction in state courts only when the foreign judgment, law, or jurisdiction would implicate, in the matter being litigated, a violation of one of the parties' state or federal constitutional liberties. Congress has already passed a similar law to prohibit federal and state courts from granting comity to defamation judgments from jurisdictions that do not have U.S.-level free speech protections. ALAC extends that protection to other fundamental liberties such as due process and equal protection.

Gun Control

The Standing Committee on Gun Violence, and at least one cosponsor, is proposing Recommendation 115, which "supports federal, state, territorial and local laws that give law enforcement authorities broad discretion to determine whether a permit or license to engage in concealed carry should be issued in jurisdictions that allow the carrying of concealed weapons, and opposes laws that limit such discretion by mandating the issuance of a concealed carry permit or license to persons simply because they satisfy minimum prescribed requirements." The resolution also "opposes federal legislation that would force states to recognize permits or licenses to carry concealed weapons issued in other states."

The sponsors recommend giving law enforcement the authority to reject an application to carry a concealed weapon if they deem the person unfit or dangerous, even if the person meets the state requirements to obtain a permit. The sponsors argue that the requirements for obtaining a concealed weapon permit are minimal and not very restrictive, "making permits dangerously easy to acquire." They claim that in the early 20th century "may issue" laws were passed, which gave law enforcement broad discretion in issuing permits to carry concealed weapons (CCW); however, state legislatures began passing "shall issue" laws, which required law enforcement to issue permits to anyone that passed a background check and met state requirements. The sponsors argue that "may issue" laws should be reinstated because "shall issue" laws have led to more persons being allowed to carry concealed weapons, and according to the sponsors, the "carrying of loaded, concealed firearms in public increases the risk of gun-related deaths and injuries."

The sponsors maintain that law enforcement authorities are best suited to determine who is fit to carry a concealed weapon because "they understand the potential impact the issuance of such permits could have on the community" and they are likely to be most "familiar with the applicant's history and reputation." They further maintain that law enforcement officials are at high risk of being targeted with firearms, and therefore they "have a unique interest in seeking to limit the carrying of loaded, hidden guns in public." They refute the perspective that the Second Amendment allows all individuals to carry concealed weapons in public by claiming that the Second Amendment protects an individual's right to possess a gun "in defense of hearth and home," but that right does not extend to public possession of a gun.

Proponents of "shall issue" laws suggest that these laws have led to decreases in crime, but the sponsors of the ABA resolution disagree. The research of economist John Lott, author of *More Guns, Less Crime*, is directly at issue. Sponsors of the ABA resolution contend that his study is flawed and does not prove that more lenient gun laws lead to a decrease in crime because "numerous variables could have an impact on a state's crime rate" and "his research failed to take any of these variables into account." Moreover, the sponsors invoke several studies in various states, including Florida, Texas, and Indiana, which claim that there are large numbers of criminals and dangerous individuals being allowed to carry concealed firearms under lax permit laws.

Critics of the ABA recommendation have responded that the data that the sponsors use to support their argument is faulty. Data on the three states mentioned in the report (Florida, Texas, and Indiana) shows that permit holders are in fact overwhelmingly law-abiding. Over the last two decades, Florida has issued gun permits to over 1.99 million people, and only about 0.01% have had their permits revoked for any type of firearms violation. These low numbers are also seen in Texas, where there were 402,914 license holders in 2009, but only 101 individuals convicted of either a misdemeanor or a felony (a rate of 0.025%), and most of these crimes did

not involve a gun. Furthermore, critics of the resolution reject the proponents' use of data to argue that there are higher crime rates in states with right-to-carry laws. Critics point out that the states that passed right-to-carry laws tended to be states with high crime rates in the first place and, therefore, though the crime rates were still higher in these states after passage of the "shall issue" laws, it was at lower levels.

Regarding John Lott's study in *More Guns, Less Crime*, opponents of the ABA resolution take issue with the sponsors' characterization of his study as "a superficial correlation between the enactment of permissive carrying laws and downward trends in crime." According to the opponents, not only does his research show that right-to-carry laws reduce violent crime, but it also shows that the size of the drop is related to how long the laws have been in effect, which is related to the percent of population with permits. They also suggest that Lott did account for numerous variables when conducting his research, including poverty levels, unemployment rates, measures of welfare payments and unemployment insurance benefits per capita, and several factors regarding law enforcement.

More broadly, opponents say that among peer-reviewed studies in academic journals by criminologists and economists, 18 studies examining national data find that right-to-carry laws reduce violent crime, 10 indicate a small benefit or no discernible effect, and none find a bad effect from the law.

National Criminal Instant Background Check System

The Bar Association of the District of Columbia is sponsoring Recommendation 10A, urging "applicable governmental entities to take all appropriate measures to ensure that the National Criminal Instant Background Check System (NICS) is as complete and accurate as possible." The resolution also supports the principle that "persons who are listed in the NICS system should have a right to administratively challenge and seek judicial review of any such listing, and would call upon all applicable governmental entities to devote adequate resources to fund complete and accurate implementation of the NICS system."

There is controversy over any expansion of the NICS system, with critics saying that checks under the system produce a high rate of false positives, thus denying guns to law-abiding people whose names are similar to individuals who are prohibited from purchasing guns.

Under current United States law, it is a federal felony offense for certain persons to "ship, transport, receive or possess firearms in the United States." One of the purposes of the NICS system is to help enforce these laws, and the FBI maintains an updated list of these persons in the NICS database. The NICS system was adopted as part of the Brady Handgun Violence Prevention Act that was passed in November 1993. Federal Firearms License holders are required to use the NICS system to run a background check on every prospective gun buyer, and if the person is on the "prohibited persons" list, it is illegal for them to purchase a firearm. Although background checks are being performed, the sponsors contend that there are major gaps in the NICS system because records are not being properly forwarded to the FBI for inclusion in the database. Therefore, they maintain that the NICS system is out of date and background checks are ineffective, allowing dangerous individuals to purchase firearms.

The NICS system underwent improvements after the Virginia Tech shootings in 2007. Investigations revealed that the assailant, Seung-Hui Cho, had already been "declared mentally ill by a Virginia special justice, who had also ordered Cho to attend treatment, thereby rendering him a 'prohibited person'" under current federal law. However, due to delayed reporting on his mental health, Cho went undetected by the NICS system and was able to purchase firearms. The NICS Improvement Act of 2007 was signed into law, with the purpose of "providing financial incentives for states to modernize and fully report applicable mental health records to federal authorities for inclusion in the NICS database."

Despite the Improvement Act, the sponsors argue that prohibited persons, particularly illegal drug users and addicts, are still not being consistently reported and included in the NICS database. They claim that one reason for this is because of a Clinton Administration-era policy "which had advised federal agencies not to report people who had voluntarily taken drug tests, for fear that this might deter them from seeking treatment." The sponsors do not believe that reporting drug users to the FBI will deter them from seeking treatment, and even if it did, they maintain that it is much better than risking prohibited persons having access to firearms. Although the NICS Improvement Act of 2007 requires that the military and all federal agencies report people who fail drug tests, the sponsors argue that many agencies do not pass on the records, and therefore the appropriate people never make it onto the prohibited persons list.

Racial Identification

The Center for Racial and Ethnic Diversity, along with at least two cosponsors, is proposing Recommendation

102, urging the "Law School Admissions Council and ABA-approved law schools to require additional information from individuals who indicate on their applications for testing or admission that they are Native American including Tribal citizenship, Tribal affiliation or enrollment number, and/or a 'heritage statement.'"

The sponsors purport that a trend exists among law school applicants to falsely self-identify as Native American, when they are in fact "not of Native American heritage and have no affiliation either politically, racially, or culturally with the native American community." They support this claim by pointing out the discrepancy between Native American graduation rates and census data. According to the census, between 1990 and 2000 the number of American Indian lawyers increased by only 228; however, between the same time period, the ABA-accredited law schools report to "have graduated approximately 2,610 Native American lawyers."

There are currently several hundred independent Native American tribes in the United States. The sponsors of the resolution point out that self-identifying as Native American is unique because in doing so one adopts Native American citizenship, not just the ethnicity. This citizenship comes with specific rights and responsibilities to the tribe, such as "the right to vote, the right to own land, and the responsibility to serve on juries and pay tribal taxes." Members of a tribe are also governed by their own tribal constitution and laws, which are recognized by the federal government. The sponsors assert that the "Native community does not consider it appropriate to self-identify as 'Native American' for official academic and legal purposes, if an individual has only a very loose and tenuous affiliation with a very distant, unconfirmed, and unidentifiable Native American ancestor; combined with no current Tribal membership or citizenship; and/or no ethnic, cultural, community, or personal affiliation."

In an effort to stifle this problem of false identification and improve the accuracy of the statistics for Native American law school applicants, the sponsors propose that the language on law school applications and testing materials require more detailed information from applicants, such as their tribe/village affiliation or their tribe enrollment number.

Resolution 113B—Multilateral Development Banks

The Section of International Law is sponsoring Recommendation 113B that "urges Congress to fund U.S. participation in capital increases and replenishments for the World Bank, the Inter-American Development Bank, the African Development Bank, and the European Bank for Reconstruction and Development." Each of these banks are considered multilateral development banks (MDBs) that, according to the sponsors, "play an essential role in supporting—both financially and technically—programs to combat corruption, strengthen legal institutions, enhance governmental transparency, safeguard liberties, provide legal and civic education, and improve court systems throughout the world."

Every MDB varies in its structure and particular role, but they all function under the same goal of helping impoverished countries stabilize and grow their economies, as well as promoting the rule of law. For example, the World Bank consists of two institutions: the International Bank for Reconstruction and Development, which focuses on middle-income and credit-worthy poorer countries, and the International Development Association, which "assists the world's 79 poorest countries—home to 70% of the globe's poorest people." Both of these institutions also finance legal initiatives in various countries, and in 2008 they "lent a combined $304.2 million for justice sector activities."

During the global financial crisis from 2008-2010, the MDBs tried to help alleviate the burdens on low- and middle-income countries by increasing their lending and providing more grants. Because of these efforts, their capital reserves significantly decreased, and they each have requested a general capital increase (GCI), asking "all bank shareholders to contribute additional funds and/or callable capital" to be able to continue providing assistance to countries in need. The sponsors contend that the member governments, including the U.S., should commit to helping the MDBs revive their depleted budgets, not only because of the global humanitarian contributions they make, but also because it is in the best interest of the United States to support their promotion of economic stability and the rule of law. Furthermore, the sponsors point out that the MDBs are examining their current programs and policies, and "each GCI request from an MDB has been accompanied by a comprehensive reform strategy to ensure more efficient, transparent, and accountable disbursement of funds."

Resolution 125—Duty of Care

Recommendation 125, as proposed by the Standing Committee on Medical Professional Liability and at least three other cosponsors, "opposes federal, state, territorial and tribal laws that would alter the duty of care owed to victims of a natural or manmade disaster by relief organizations and health care practitioners" and "supports programs to educate relief organizations and health care

practitioners about their duty of care owed to victims of a natural or manmade disaster." The sponsors maintain that altering the standard of care "would effectively repeal the existing legal duty of reasonable care following disasters."

According to the sponsors, "everyone has a duty of reasonable care." The Restatement (Third) of Torts is cited to support the argument that every person, including physicians, can be held responsible for negligence if they do not use their knowledge and skills to the best of their abilities, which of course vary with circumstance and resources, such as in a natural disaster. The sponsors maintain that volunteer workers who treat disaster victims should also be held to this standard because "relegating disaster victims to care by practitioners who need not provide even reasonable care brands the volunteers as second-rate practitioners and the victims as second-class patients." Regarding whether "health care practitioners might fail to volunteer to give aid in disasters if they could be sued for malpractice by persons they negligently harmed," the sponsors conclude that there is no evidence that physicians fail to volunteer during a disaster because of the possibility of being sued for malpractice.

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or tribunal, or as otherwise provided by law or rule of court, of denials of requests to disqualify a judge." The recommendation further urges that states holding judicial elections adopt "A) Disclosure requirements for litigants and lawyers who have provided, directly or indirectly, campaign support in an election involving a judge before whom they are appearing; and B) Guidelines for judges concerning disclosure and disqualification obligations regarding campaign contributions."

Last February, at the ABA Midyear Meetings in Atlanta, the Standing Committee proposed a similar resolution. Resolution 115 was withdrawn for further refinement in order for the Committee to ensure that its proposals were "strong and succinct and had received feedback from all parties."

What follows is a short summary of the Standing Committee's recommendation and an overview of the recusal and disqualification policies of some state supreme courts.

Proposal

In Recommendation 107, the Standing Committee notes that the ABA has traditionally assumed a leading role in offering guidance to states on both judicial ethics and judicial conduct. Since 2007, the Standing Committee has exerted leadership through its Judicial Disqualification Project (JDP), with its mission "to survey disqualification rules and practices in state courts around the country, to identify problems and uncertainties that arise under existing regimes, and, if and as appropriate, to propose reforms."

The Standing Committee observes that judicial recusal and disqualification has been a newsworthy topic of late, citing such cases as *Republican Party of Minnesota v. White*, *Caperton v. Massey*, and *Citizens United v. F.E.C.* According to the Standing Committee, "*Caperton* strongly signals the importance . . . of having rules in State judicial codes that can contain the mischief of excessive campaign support in judicial elections. That importance has increased exponentially in the wake of the Court's even more recent decision in *Citizens United*." Furthermore, "*Caperton* and *Citizens United* foreshadow an increase in the number and frequency of disqualification motions, because large corporations and labor unions may now make unlimited expenditures not only in general elections but in judicial elections as well. The mere possibility that a vast influx of additional campaign money might enter the latter arena, which already in the past decade has been saturated with unprecedented campaign support, virulent attack ads, and concomitant diminution in public respect for State judiciaries, makes tighter controls over disqualification imperative."

The Standing Committee then outlines its recommendations concerning disqualification, including urging prompt determination of the merits of a motion to disqualify a judge; urging "meaningful determinations" to explain, in writing, the decision to grant or deny disqualification; and the procedures regarding an appellate review if a motion was denied.

The Standing Committee also proposes that someone other than the judge being challenged should ultimately decide whether that judge should be removed from a case. According to the Standing Committee, "[F]rom the litigant's point of view, from the public policy point of view (promoting public perception of fair and impartial courts), and even from the individual judge's

point of view, States that do not already do so should shift responsibility for deciding disqualification motions (other than review for frivolousness or for compliance with procedural requirements) away from the challenged judge." One alternative offered is "to subject a decision of the challenged justice denying a disqualification motion to review by the rest of the court. Another would be to assign review of the denial (or perhaps even assign the motion itself in the first instance), at least where not otherwise subject to legal or ethical proscriptions, to a special panel of retired judges or justices."

Critics of the proposal challenge removal of a co-equal judge on a state supreme court. They maintain that the proposal potentially violates state constitutions, which often delineate only specific ways a judge can be removed from a case, such as through impeachment, legislative action, or by recommendations of a Judicial Tenure Commission. Removal could damage due process rights if a judge does not have a sufficient means for defending himself from the challenge and would also jeopardize the rights and decisions of voters to elect specific judges to a court and to hear the cases before them, effectively disenfranchising voters. Other critics question whether the rest of the court could be considered impartial in deciding whether to permit a colleague to remain on a case. The sponsor concedes in a footnote that even retention elections can be "contentious," results of which can often leave rancor on a court and a deeper partisan divide amongst judges. Finally, critics have noted, *Caperton* only describes standards for recusal or disqualification; it does not mandate that a body or person other than the judge ultimately make that decision.

The Standing Committee then singles out judicial elections, which require "special considerations," due to the influx of money into the electoral process over the past decade. According to the sponsor, consideration needs to be taken not only with respect to money donated to a judge's campaign, but money received by the judge's opponent (who lost the election) who received substantial donations from a litigant or counsel now before the judge. Both a "debt of gratitude" and a "debt of hostility" need to be taken into account when considering whether a judge should be disqualified. The Standing Committee asserts, "Conceptually, due process would just as logically require disqualification for disproportionate campaign opposition just as with disproportionate campaign support."

The Standing Committee acknowledges that a judge may be unaware of the campaign support given to his or her opponent. A judge may even be unaware or have forgotten the names and amounts given by their own supporters. Therefore, in the wake of the earlier cited Supreme Court decisions, "elected judges will, at a minimum, need to have access to more information in order to be able to make appropriate campaign support disclosures in the cases over which they preside, and donors who are parties or are associated or affiliated with parties before the court (including counsel) must be required to make their own disclosures on the record." Thus, to "enhance practicality and fairness . . . [i]n the absence of a disqualification motion, an elected judge may not be aware that a lawyer or litigant who previously provided substantial campaign support to the election campaign is appearing before him or her and may therefore need help in facilitating that awareness."

Appropriate statutory provisions in state election laws or adopting new rules of court can facilitate awareness. The Standing Committee describes one example:

> One possible approach is to provide that a judge who knows (or learns as a result of the aforementioned disclosures or a disqualification motion) that the judge's campaign, or that of the judge's campaign opponent, received more than a specified amount of support (or percentage of the total campaign support) from donors associated or affiliated with a party or counsel appearing before the court, would then be in a position to advise the parties of his or her intention to withdraw from the case, subject to the ability of the parties to waive disqualification. Each State would be free to set the amount at a level appropriate to its own circumstances.

The Standing Committee also suggests that state courts should discuss incorporating into their disqualification standards a "non-exclusive list of factors" to be considered by a judge in determining whether disqualification is appropriate in the campaign support context. These factors, developed from the amicus brief of the Conference of Chief Justices in the *Caperton* case, were adopted by the Conference of Chief Justices as "Judicial Disqualification Fundamental Principles." They include:

- The level of support given, directly or indirectly, by a litigant in relation both to aggregate support (direct and indirect) for the individual judge's [or opponent's] campaign and to the total amount spent by all candidates for that judgeship;
- If the support is monetary, whether any distinction between direct contributions or independent

expenditures bears on the disqualification question;

• The timing of the support in relation to the case for which disqualification is sought;

• If the supporter is not a litigant, the relationship, if any, between the supporter and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate [or opponent], and (iv) the total support received by the judicial candidate [or opponent] and the total support received by all candidates for that judgeship.

Recusal Policies in the State Courts

Critics of the proposal question the need for disqualification purely because of financial support provided through either direct contributions or independent expenditures. They question whether, in fact, it would ultimately result in the "dramatic escalation in campaign support" that the Standing Committee dislikes. Activists could be motivated to flood their preferred candidate with money, and even if the preferred candidate were to lose, the opponent could be asked to disqualify himself due to the "debt of ingratitude."

In practice, state supreme courts have been sharply divided in crafting recusal policies. For example, the Michigan and Wisconsin Supreme Courts have addressed recusal policy in recent months, with both Courts considering the question of whether a majority of members could move to disqualify a fellow justice. On July 12, the Wisconsin Supreme Court ruled that a majority of the seven-member court "does not have the power to disqualify a judicial peer from performing the constitutional functions of a Wisconsin Supreme Court justice on a case-by-case basis."

The majority noted that the Wisconsin Constitution limited the circumstances when a justice would not be able to perform his or her judicial duty, including impeachment, a disciplinary proceeding, by address of both legislative houses, and by a recall election. Furthermore, the majority argued that its approach reflected the process followed by the U.S. Supreme Court, in which the individual Justice makes the decision whether to disqualify oneself from a case. The majority also cited the fact that the United States Supreme Court did not change its recusal practices after the *Caperton* decision. The Court contended that the opposite decision could lessen the public's view of the Court.

The Wisconsin Supreme Court also found that the public's perception of the Court as an impartial decision-maker would be damaged if four justices forced a fellow justice off a case. The Court stated that it could in fact be deemed a "biased act of four justices who view a pending issue differently from the justice whom they disqualified." The Court also feared that judicial independence could be impaired, as the motions to disqualify "are not made in regard to a justice that the movant believes will decide the pending case in the movant's favor. Rather, they are made to exert pressure on a justice the movant believes will not decide the case as the movant wants it to be decided, or in motions after decision in order to cancel a justice's participation from a decision under which the movant did not prevail."

By contrast, in late 2009, the Michigan Supreme Court issued an amendment to its rules concerning when a judge must recuse oneself from a case. The new rule allowed for a challenge to a denial of disqualification to be heard by the entire court. The three justices in the minority expressed concerns that the decision was unconstitutional. According to Justice Robert Young, "In eliminating all due process protections, compromising and chilling protected First Amendment rights, and conducting secret appeals that might lead to the removal of an elected justice from a case against his will, the majority has created a 21st Century Star Chamber with its new disqualification rule." He questioned whether other justices on the Court could truly be impartial in deciding to remove a fellow justice from a case, particularly a Court that "is riven with deep philosophical, personal, and sometimes frankly partisan cleavages."

The four-justice majority dismissed concerns that "gamesmanship" or "politicization" affected their decision. They stated:

> Moreover, it is a gross perversion of law for Justice [Maura] Corrigan (a dissenter) to allege that, "In one administrative order [the recusal rule], the majority takes away the right of every citizen of Michigan to have his or her vote count." The accurate statement is, with this rule, the Court permits a justice's recusal where that justice is unable to render an unbiased decision and unable or unwilling to acknowledge that fact. The justice system and the Court can only be stronger for it.

Since that rule change, two new justices have joined the Court.

About a dozen states have considered tweaking recusal and disqualification rules since *Caperton*, though only a few have drastically changed their policies. At least one other state, Nevada, rejected proposals that would have required a judge to recuse himself when he received campaign donations over $50,000 or if over 5% of his total donations came from a party or law firm in a particular case.