THE STRUCTURE AND ORGANIZATION OF NEW YORK’S TOWN AND VILLAGE COURTS
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Of Note

THE FOLLOWING CANDIDATES HAVE BEEN NOMINATED FOR THE CITY Bar’s various offices and committees for 2008-2009:

President
Patricia M. Hynes

Vice Presidents
Sheila L. Birnbaum
Peter M. Kougasian
Roger J. Maldonado

Secretary
Sheila S. Boston

Treasurer
Donald S. Bernstein

Executive Committee
Class of 2012
Mark C. Morril
Lynn K. Neuner
David A. Schulz
Jane C. Sherburne

Audit Committee
Robert J. Anello
Laurie Berke-Weiss
Allan L. Gropper
Christopher L. Mann
Marsha E. Simms
LYNN M. KELLY HAS BEEN APPOINTED THE NEW YORK CITY BAR JUSTICE Center’s new Executive Director, taking the helm of one of the city’s premier providers of pro bono services for indigent New Yorkers, including immigrants, victims of violence, ex-offenders trying to re-enter society, the homeless and New Yorkers seeking help on a variety of legal matters.

Ms. Kelly had been the Executive Director of MFY Legal Services since 1998 and has been an active participant and leader at the New York City Bar and other Bar Associations throughout New York State. She has devoted her career to the legal needs of the poor which started upon her graduation from New York University Law School in 1982.

Kelly later became the Director of Litigation in the Harlem Neighborhood Office of the Legal Aid Society and has been a clinical/adjunct professor at New York University School of Law, Fordham University School of Law and New York Law School. Kelly sits on numerous boards, including the Board of Directors for the New York County Lawyers’ Association and was the co-founder of the Coalition of Independent Legal Aid/Legal Services Providers.

“We are thrilled to be joined by a recognized leader in the legal services world who will direct our pro bono efforts. Whether it concerns issues of housing, health care or immigration, no one has more dedication than Lynn when it comes to lawyering for the poor,” says Samuel W. Seymour, Board Chair of the City Bar Justice Center.

According to Barbara Berger Opotowsky, Executive Director of the New York City Bar “With increased demands on attorneys’ time, it is difficult to meet the ever-growing need for pro bono civil legal services. The fact that Lynn knows how to expand and leverage funding and pro bono efforts so that we can reach more people in need is an invaluable resource for both the City Bar and the public.”

THE NEW YORK CITY BAR ASSOCIATION BESTOWED ONE OF ITS HIGHEST honors—honorary membership—upon Iftikhar Muhammad Chaudhry, Pakistan’s Supreme Court Chief Justice. This award recognizes the Chief Justice’s efforts to uphold Pakistan’s independent judiciary. The conferment of honorary membership in Chaudhry’s absence represents the first time in the Association’s history that the requirement of in-person bestowment has been waived. Chaudhry is currently detained under house arrest in the aftermath of Pakistan’s emergency rule.
OF NOTE

In September 2007, prior to President Pervez Musharraf’s suspension of the Pakistani Constitution in early November 2007, the Association’s Honors Committee, chaired by U.S. District Judge Jed S. Rakoff, unanimously recommended Chaudhry’s honorary membership to the Association’s Executive Committee. Chaudhry had intended to visit New York to formally accept the award, but the ongoing political strife has prevented him from leaving Pakistan.

Last spring Chief Justice Chaudhry was suspended by Musharraf, but later reinstated after the suspension was found illegal by Pakistan’s Supreme Court. In November, with the Supreme Court expected to rule within days on the legality of President Musharraf’s re-election, Musharraf declared a state of emergency and suspended the Pakistani Constitution. When the Chief Justice refused to sign the “provisional constitutional order” enabling the emergency decree, Musharraf removed him and many other judges from office and placed them under house arrest.

“Today the New York City Bar Association has been obliged to deviate from a decades–old policy of requiring that honorary membership be presented to the honoree in person,” Judge Rakoff said. “We cannot allow the abysmal events occurring in Pakistan to derail the bestowment of an honor so rightfully deserved. Chief Justice Chaudhry has made tremendous contributions to the independence of Pakistan’s judiciary. We remain hopeful that the Chief Justice will come to New York in the near future to celebrate this honor.”


The New York University School of Law took second place honors. Members of the NYU team included: Alison E. Epting, Kyle W. Hallstrom and Anthony C. DeCinque. Both teams advanced to the final rounds.

Best Brief honors went to Benjamin N. Cardozo School of Law. Best Runner-Up Brief went to the Pace University School of Law. Law students on the Pace team were Delyanne Barros, Lindsey Kneipper and Fatima Silva.

Best Individual Oral Argument went to Jenifer Vakiener of the Benjamin N. Cardozo School of Law. Second Place Best Individual Oral Argument went to Alison E. Epting of the New York University team.
OF NOTE

The final round of the competition was judged by the Hon. Ralph Fabrizio, the Hon. Darrell Gavrin, the Hon. Andrew J. Peck, Michael Cooper, Stuart Summit, and Mary Jo White.

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University of Colorado School of Law took second-place honors. Team members included: Abraham Alexander, Grant Sullivan and Michael Wautlet.

Best Brief honors went to the University of California School of Law at Davis team, whose members included Kathleen Doty, Alacoque Hinga and Irene Zurko. Best Runner-Up Brief went to George Washington University Law School whose team members were: Eric L. Klein and Jonathan C. Bond.

Best Speaker was Rachael Moran of Chicago-Kent College of Law and runner-up honors went to Michael Wautlet of University of Colorado School of Law.

The Honorable Deanell Reece Tacha, Chief Circuit Judge, United States Court of Appeals for the Tenth Circuit, presided on the final bench. Other members of the final bench were: the Hon. Richard Andrias, Appellate Division, First Department; the Hon. Julio M. Fuentes, United States Court of Appeals for the Third Circuit; the Hon. Theodore T. Jones, Jr. New York State Court of Appeals; the Hon. Roslynn Mauskopf, United States District Court, Eastern District of New York; Michel L. Stout, President, American College of Trial Lawyers; and Barry Kamins, President, New York City Bar Association.

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THE THIRD ANNUAL PRESENTATION OF THE THOMAS E. DEWEY MEDAL, given every year to an outstanding assistant district attorney in each of the City’s District Attorney’s offices, was held November 29, 2007, at the Association.

This year’s medal winners were: David E. Greenfield, Bronx County; Michael F. Vecchione, Kings County; Audrey S. Moore, New York County; Johnette Traill, Queens County; and Mario F. Mattei, Richmond County.

Barry Kamins, President of the Association, presented the awards and Hon. John F. Keenan, United States District Judge, Southern District of
New York was the keynote speaker. The award is sponsored by Dewey LeBoeuf LLP, and the winners were selected by the Dewey Medal Committee (Seth C. Farber, Chair).

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THE ASSOCIATION HELD IT’S FOURTH ANNUAL DIVERSITY CONFERENCE, “Getting Serious About Race,” October 29, 2007. The conference was the culmination of a year-long focus on race and ethnicity in the law. The symposium highlighted promising practices and innovative ideas for making meaningful change and tangible progress in recruiting, retaining, and advancing racial/ethnic minorities in the legal profession.

Stephen Young, Senior Partner of Insight Education Systems, delivered his program on “Microinequities—(the small, yet powerful biases communicated in the workplace) and Charles Ogletree, Harvard Law School Jesse Climenko Professor of Law and Vice Dean for the Clinical Programs, spoke on the topic “Race Matters from the Warren to the Roberts Court” and delivered commentary on the Jenna 6 trial.
Recent Committee Reports

**African Affairs**
Letter to President Mbeki of the Republic of South Africa expressing concern over the detention and beating of Morgan Tsvangirai and other members of the Movement for Democratic Change and the arbitrary detention of human and civil rights advocates in Zimbabwe.

Report on Gender-Based Violence Laws in Sub-Saharan Africa. Gender-based violence encompasses acts of violence in the form of physical, psychological, and sexual violence against a person specifically because of his or her gender. The report documents examples of legislation in sub-Saharan Africa designed to combat gender-based violence and evaluates how law can effectively address the challenges associated with violence against women in this region. The report surveys specific gender-based violence legislation with regard to rape, sexual assault, and domestic violence and the existing widespread prohibitions on gender-based violence in international and regional instruments, and discusses the recognition and application of these prohibitions by international tribunals.

**African Affairs/International Human Rights**
Letter to President Kabila for the Democratic Republic of the Congo expressing concern about Ms. Marie-Thérèse Nlandu Mpolo-Nene, a lawyer and former opposition presidential candidate, who is currently being tried by a military tribunal and faces up to 20 years imprisonment. The letter urges that all necessary measures be taken to ensure that Ms. Nlandu be released or, at a minimum, that she receive a fair trial by an independent civilian court.

**Art Law**
Comments submitted to the Mayor’s Office of Film, Theatre & Broadcasting expressing opposition to the Proposed Rules relating to the issuing of permits. The Rules would require permits for a broad range of photographic activity on City property such as parks and streets, and would subject a significant number of artists using hand-held cameras and a single tripod to City regulation. As drafted, the letter argues, the proposed Rules would have a chilling effect on artistic expression and raise constitutional issues.
Bankruptcy and Corporate Reorganization/Consumer Affairs

Personal Bankruptcy: Is it Right for You? This pamphlet explains to individuals who are in debt and considering filing for personal bankruptcy, what the process is and the advantages and disadvantages of filing for personal bankruptcy.

Children, Council on

The Permanency Legislation of 2005: An Unfunded Mandate—Critical Resource Needs for New York City’s Children and Families. This report highlights the impact of New York’s Permanency Legislation of 2005 and makes recommendations to improve the law’s implementation. When a child is removed from his or her home and placed into foster care, the law requires New York’s Family Court to hold permanency hearings so that the child is kept in foster care only as long as necessary. In December 2005, New York State enacted legislation known as the “Permanency Bill” to address numerous issues impacting families before the Family Court and made significant changes to the permanency hearing process in New York State. Specifically, the legislation amended certain provisions of the New York Family Court Act (“FCA”) and the Social Services Law with the goal of moving children more quickly through the foster care system, either toward reunification with their families or toward adoption, guardianship, or custody with other appropriate persons.

Civil Rights

Letter to Congress expressing support for the Deceptive Practices and Voter Intimidation Prevention Act of 2007 (H.R. 1281) which would make unlawful knowingly disseminating false information intended to prevent other persons from exercising their right to vote in federal elections, including disseminating false information about the time, place or manner of voting or qualifications for, or restrictions on, voting, the political affiliations of candidates in closed primaries or explicit endorsement of any candidate for office. In addition, the Act would require the Attorney General to take prompt corrective action where such false information is disseminated and requires the Attorney General to provide reports to Congress that would enable Congress to perform its oversight function.

Amicus Brief: Bismullah v. Gates filed with the U.S. Court of Appeals for the District of Columbia Circuit. The brief addresses a Proposed Order submitted by the Justice Department that would limit the access of attorneys to clients who are detainees at Guantanamo. The Proposed Order
would limit the lawyer to three visits; restrict lawyers’ mail communications; and give the government authority to read and censor content of mail. The brief argues that these restrictions deprive the lawyer of the ability to adequately provide competent and informed representation. Effective assistance of counsel is a matter of right that is implicit in the grant of judicial review by the Detainee Treatment Act since absent effective assistance of counsel judicial review would be meaningless. The brief notes that while the Court has discretion to enter reasonable protective orders to protect national security, it should not issue an order that unreasonably restricts detainees’ right to effective assistance of counsel.

Amicus Brief: *Hepting v. AT & T Corp.* filed with the U.S. Court of Appeals for the Ninth Circuit. The brief argues that NSA’s program of warrantless wiretapping threatens to undermine the fundamental principle of justice that persons accused by the government of wrongdoing have access to legal advice and that such legal advice can only be effective if lawyer-client communications are conducted in confidence without fear that government agents are listening in. Monitoring and wiretapping of communications between lawyers and their clients is unconstitutional, argues the brief, as it chills communication which is protected by the First Amendment and inhibits the effective assistance of counsel guaranteed by the Sixth Amendment.

Amicus Brief: *Arbor Hill v. County of Albany* filed with the U.S. Court of Appeals for the Second Circuit. The brief urges reversal of the holding that one of the factors to be considered in determining attorney’s fees in cases that involve fee-shifting statutes is whether or not the lawyer took the matter on pro bono. The brief urges that when determining the reasonableness of fees awarded under the civil rights law, the court should not alter the fee-shifting provisions of the civil rights laws, which were intended to serve as incentives to civil rights enforcement. The holding would undermine the incentives for private firms to undertake, as part of their pro bono programs, costly and complex civil rights litigation that civil rights organizations or firms do not have the resources to tackle.

Letter to Congress expressing opposition to H.R. 3138, which would enable broad surveillance programs to go forward in the complete absence of judicial review. The letter underscores the importance of having meaningful judicial checks on the exercise of executive power when such fundamental rights are at issue, and urges that Congress not support any
legislation that would disrupt the important balance between individual liberties and national security in the absence of a compelling demonstration of need.

Amicus Brief: *Khaled El-Masri v. United States of America*, filed in the United States Supreme Court, August 2007. The brief urges the court to grant certiorari to review the procedure adopted by the Fourth Circuit of invoking the state secrets privilege to deny a federal forum for the enforcement of individual rights before undertaking available procedures that might permit the litigation to proceed without disclosing state secrets. This procedure, the brief argues, does not reflect a proper regard for the judiciary’s role under the constitutional system of the separation of powers and its capacity to fulfill that role while protecting state secrets.

Letter to Congress discussing the Foreign Intelligence Surveillance Modernization Act of 2007 (H.R. 3782) and the RESTORE Act (H.R. 3773), both of which are intended to replace the Protect America Act and provide protections against warrantless electronic surveillance of Americans. While the RESTORE Act is an acceptable improvement in restoring rights and protections eliminated by the Protect America Act, the Modernization Act would be the better alternative since it offers more complete protection of Americans’ constitutional rights.

Amicus Brief: *ACLU v. National Security Agency*, filed in U.S. Supreme Court, November 2007. The brief argues that the NSA’s admitted practice of wiretapping communications in the name of national security without a court order and meaningful judicial oversight places attorneys in an ethical dilemma of choosing between diligently representing their clients or protecting the confidentiality of the communications with them. Individuals accused of wrongdoing by the Government, the brief argues, must have access to legal advice and such advice can only be effective if communications between lawyer and client are conducted in confidence. The Executive Branch’s national security concerns can be accommodated without compromising individual rights and those injured by government surveillance should be permitted to challenge the lawfulness of such surveillance in a court of law.

Letter to Congress expressing opposition to the FISA Amendments Act of 2007, introduced by Senator Rockefeller. Although the FISA Amendments Act is intended to replace the Protect America Act, it contains many of the same fundamental flaws as it fails to adequately protect the privacy
Letter to Congress expressing support for The Fair Pay Restoration Act (S. 1843). This bill would overturn the recent US Supreme Court decision in *Ledbetter* which ruled that the statute of limitations for bringing a Title VII pay discrimination claim runs from the day of the discriminatory decision. In this case, a victim of pay discrimination, to uphold her claim, would have had to bring her claim within six months of the first discriminatory pay check, even if it was wholly impractical for the new employee to know she was a discrimination victim. This decision, the letter argues, disregards the realities of wage discrimination as employees rarely have access to information about their colleagues’ compensation, and without that information, it is very difficult for employees to detect that an employer is discriminating against them in terms of their compensation at the time when the employer makes the discriminatory decision. As a result of the *Ledbetter* decision, by the time a victim of pay discrimination acquires enough information to realize that he/she has a discrimination claim, he/she will have lost the right to bring that claim under Title VII—even though the discriminatory practice is ongoing. The Act would restore the rule that had been followed by many circuit courts and supported by the Equal Employment Opportunity Commission (“E.E.O.C.”), that every discriminatory paycheck constitutes a new violation of Title VII’s protection against discrimination in compensation.

**Communications and Media Law**

Report expressing support for A.3950/S.2067 which would amend the Judiciary Law to permit news coverage by audiovisual means of courtroom trials in New York State. The report argues that the presence of cameras will not alter the conduct of the trial or disrupt the proceedings and that the cameras merely extend the public’s right to view courtroom trials.

Report expressing opposition to A.8836/S.6005 which would amend New York Civil Rights Law §§50 and 51 and criminalize the use “for advertising purposes” or “for the purposes of trade” of the “name, portrait, voice, signature or picture” of any person who died on or after January 1, 1938 without the written permission of such person’s heirs, estate, or distributees. The report argues that the bill as drafted severely restricts the ability of the media to portray deceased private and public figures in their work and is likely unconstitutional.
**Condemnation and Tax Certiorari**
Report submitted to the New York City Council expressing opposition to Intro. No. 597; amending the Charter of the City of New York in Relation to Tax Appeals, which would significantly alter the structure of both the Tax Commission and Tax Appeals Tribunal.

**Consumer Affairs**
Comments submitted to the New York State Legislature expressing support for amending the New York Fair Debt Collection Practices Act to afford consumers a private right of action against debt collectors who violate the law. The comments note that the statute should also provide for the creation of model collection practices that would amount to a safe harbor for legitimate collection practices; award damages and attorney's fees to successful plaintiffs; and award attorney's fees and costs to defendants who prevail on NYFDCPA claims against plaintiffs who bring such claims in bad faith and for the purpose of harassment.

**Corrections**
Letter to the Joint Committee on Local Rules of the EDNY and the SDNY urging that in all cases involving pro se litigants, counsel attach copies of decisions cited in their memoranda of law or other pleadings when those decisions are unreported and/or available solely in electronic databases.

Comments on Board of Correction Proposed Amendments to Minimum Standards for New York City Correctional Facilities. The comments express serious concerns with several of the proposed amendments and with the fact that the amendments were drafted without benefit of input from the public and offers recommendations for improving the amendments. No need for the proposed amendments has been demonstrated and many of them, the comments argue, jeopardize the privacy of inmates, serve to decrease the dignity with which inmates are treated and pose serious health concerns.

Letter to the New York City Council urging the Council to oppose the Board of Correction's proposed changes to the Department of Correction's existing minimum standards for New York City Correctional Facilities. The majority of the proposed changes were drafted without input from workers, advocates, families or inmates and will not improve the conditions of confinement or public safety.
Criminal Justice, Council on
Testimony before the New York State Commission on Sentencing Reform expressing support in principle for expanded determinate sentencing which, the testimony argues, will streamline New York’s confusing mix of determinate and indeterminate sentences, and improve fairness, workability and public confidence in the criminal justice system. Support for the Commission’s ultimate sentencing proposals, however, would depend on whether the sentence ranges are fair and appropriate.

Criminal Justice Operations
The Immigration Consequences of Deferred Adjudication Programs in New York City. This report examines why noncitizens face deportation and other negative immigration consequences as a result of pleading guilty through deferred adjudication programs and makes recommendations on how to enhance immigrant participation in diversion and rehabilitation programs that would allow them to rejoin their communities as productive law abiding individuals.

Report on Proposed Legislation Creating a Statewide Body to Review Wrongful Convictions. This report supports the purpose of A.4317 and the Governor’s proposed bill, both of which try to tackle the issue of wrongful convictions with the advent of new DNA technology, but concludes that each bill needs to be modified in order to achieve an effective result.

Criminal Law
Report offering comments on the Governor’s Program Bill #29 which addresses issues relating to DNA evidence. Among the recommendations, the report opposes Section 14 of the legislation which would establish a one year deadline for all motions under CPL 440.10 that do not involve claims of newly discovered evidence related to actual innocence [recommendation added by Executive Committee]. The report explains how imposing a deadline on 440 motions, which were designed to provide relief for defendants who wish to collaterally attack a conviction from outside the appellate record, would undermine the purpose of this section and lead to miscarriages of justice.

Among the other provisions of the bill commented upon, the Committee opposed provisions that would permit a public servant to use force when confronted with an offender who does not wish to submit a sample, saying that the official must explain to the offender the legal basis for the DNA requirement and afford the offender the opportunity to consult with counsel.
Criminal Justice, Council on/Criminal Justice Operations
Report supporting A.3640/S.1977 which would amend Section 190.30 of the Criminal Procedure Law by creating subsection (8) which would add an exception for documents that fit the existing definition of “business records” for hearsay purposes, thus permitting the admission of numerous documents to the Grand Jury without requiring the testimony of a live authenticating witness.

Criminal Justice Operations/Criminal Advocacy
Comments on the Kaye Commission Report on Indigent Defense. The comments focus on how the proposal would impact criminal justice operations in New York City and makes recommendations concerning the proposed statewide defender plan. The comments conclude that there should be a Statewide Commission with the power to set and enforce statewide standards, including within New York City, but that plans for the State’s takeover of the direct provision of indigent services should exclude New York City.

Criminal Law
Letter to Congress expressing support for S.186, The Attorney Privilege Protection Act of 2007. If enacted, the Act would end threats to the confidential attorney-client relationship by protecting valid assertions of attorney-client privilege and work product doctrine. It would also prohibit any agent or U.S. Attorney from pressuring any company or organization to: disclose confidential information protected by attorney-client privilege or work product doctrine; refuse to contribute to the legal defense of an employee; refuse to enter into a joint defense, information sharing, or common interest agreement with an employee; refuse to share relevant information with employees that they need to defend themselves; or terminate or discipline an employee for exercising his or her constitutional or other legal rights.

Domestic Violence
Report in support of legislation A.7554/S.4704 which would authorize an experimental program in New York in which orders of protection filed and entered by the family courts in certain counties could be transmitted by fax or electronic means to sheriffs and police departments. It is important that this service occur as quickly as possible, the report argues, because victims continue to be without protection from the time the court issues the order until the time it is served.
Report in support of legislation A.7329/S.4877 which would amend the Domestic Relations Law and Family Court Act to require a court, prior to issuing any order of custody and/or visitation, to review child abuse and maltreatment, orders of protection, warrants of arrest and sex offender registries.

Drugs and the Law
Report supporting A.4867 which would permit the manufacture, delivery, possession, and use of marihuana for medical purposes. The Bill would allow critically ill medical patients in the State of New York to use marihuana as recommended by their physicians as medically beneficial and would remove the threat of a state criminal action against people using marihuana exclusively for medical purposes.

Environmental Law
Letter to Mayor Bloomberg urging that New York City undertake an analysis of the Solid Waste Management Plan including waste reduction and reuse strategies and examine the extent to which disposal technologies might interfere with reuse and reduction efforts.

Estate and Gift Taxation
Report proposing the reinstitution of the federal credit for state death taxes. Although federal legislation eliminated the federal credit for state death taxes for decedents dying after 2004, New York State continues to impose the amount of tax that would have been allowed as a federal credit for state death taxes as it previously existed. This practice, the letter argues, has led to New Yorkers leaving the state in search of a more favorable tax jurisdiction which poses a serious threat to New York’s revenues.

Letter to the IRS commenting on the Gift Tax Consequences of Trust Employing Distribution Committee. The letter argues that where a grantor’s gift to a trust is incomplete, no member of the distribution committee can possess a general power of appointment over the trust property.

Letter to the IRS commenting on the proposed Treasury Regulation 1.67-4. The Proposed Regulation addresses the exception to the 2% of adjusted gross income floor on miscellaneous itemized deductions for certain costs that are paid or incurred in connection with the administration of an estate or a trust, and which would not have been incurred if the property were not held in such estate or trust. The letter first urges that the IRS hold off on the consideration of the Proposed Regulation until after the Su-
The Supreme Court decides the *Rudkin-Knight* case which involves the construction of the specific statutory provision that is addressed by the Proposed Regulation. With respect to the substance of the Proposed Regulation, the letter argues the Proposed Regulation unreasonably construes Section 67(e) to require that bundled trustees’ fees and commissions be unbundled and that the Regulations are arbitrary in their delineation between costs that are considered unique to an estate or trust and those costs that are not.

**Financial Reporting**

**Financial Reporting/Securities Regulation**
Letter to the SEC urging the Commission to undertake a comprehensive review of the rules governing private offerings under the Securities Act of 1933 as they are in need of updating.

**Futures and Derivatives Regulation**
Comments submitted to the National Association of Securities Dealers expressing concerns with Notice to Members 07-27, Member Private Offerings, including the scope of the proposal, the general terms of the proposal and the potential application to privately offered commodity funds.

**Government Ethics**
Report on the Creation of an Independent Ethics Commission. This report offers a brief summary of the existing system of congressional ethics enforcement and urges that Congress consider implementation of an independent ethics commission. An Independent Ethics Commission, the report argues, would provide Congress the best chance to remedy two of the major problems which exist under the current system: 1) the inherent tension that comes with entrusting Members of Congress alone to investigate and discipline their own colleagues and 2) the public’s perception that a weak ethics process allows legislators to engage in misconduct with impunity.

**Health Law/State Affairs**
Amicus Brief: *McKinney v. The Commissioner of the New York State Department of Health*, filed in the New York State Court of Appeals, October
2007. The brief urges the court to hear an appeal as to the constitutionality of the legislation that created the unelected Commission on Health Care Facilities in the 21st Century which developed a plan for closing and consolidating hospitals that has the force of law. The brief argues that the Legislature unconstitutionally delegated its exclusive lawmaking authority to an unelected commission, which in turn created significant health care policy changes. The brief argues that the legislation is unconstitutional on two grounds: first, it fails to meet the constitutional standard that legislative delegations be accompanied by clear policies and standards; and second, it does not meet the requirement that the Legislature actually enact a law rather than allow it to take effect by inaction.

**International Environmental Law**
Letter to Congress urging that it give consent to the ratification of the United Nations Convention on the Law of the Sea (UNCLOS) and join the over 150 counties already signatories to UNCLOS. The declining health of the oceans is a global concern that requires international coordination and cooperation. UNCLOS encourages nations to prevent pollution in their own territorial waters; codifies the establishment of Exclusive Economic Zones; affirms the jurisdiction of nations to enact and enforce appropriate fishery conservation and management within their Zones; and improves the safety and security of worldwide navigation.

**Judicial Selection, Task Force**
Amicus Brief: *New York State Board of Elections v. Lopez Torres* (U.S. Supreme Court, July 2007). The brief argues that the Second Circuit decision, finding unconstitutional New York’s system of nominating Supreme Court Justices should be affirmed. The brief notes that the Association favors a commission-based appointive system for state court judges in place of elections, which would require a constitutional amendment and in the interim supports a legislatively reformed party convention system over a direct primary to curb the abuses of the current judicial selection system. While the Association opposes direct, contested primary elections for judicial candidates because of the deleterious effects that contested primary elections could have upon the administration of justice and upon the state judiciary, the brief argues that the lower courts appropriately utilized this approach as an interim remedy.

**Immigration and Nationality Law**
Letter to Congress expressing concerns with several provisions of the Border Security and Immigration Reform Act of 2007 including that: it nega-
tively alters law and policy related to family-related immigration; it does not provide a path to permanent residence for the future flow of essential and skilled workers; it does not ease the current problem with backlogs; and it creates a legalization process that is unduly long and onerous.

Letter to Congress urging support for S. 774 the Development, Relief, and Education for Alien Minors Act (the DREAM Act) which would amend the Illegal Immigration Reform and Immigration Responsibility Act of 1996 to allow the adjustment of status to permanent residency of foreign born students who are long-term U.S. residents and who entered the U.S. as children. The Act would also increase access to educational financial assistance for these students and permit states to determine state residency for higher education purposes.

Amicus Brief: *Mohamed Rajah v. Alberto Gonzales* filed in the US Court of Appeals for the Second Circuit, December 2007. The brief argues that the Supreme Court’s holding in *Lopez-Mendoza*, restricting application of the Exclusionary Rule in immigration proceedings to egregious violations of the Fourth Amendment, does not preclude application of the *Montilla* Doctrine in instances where the immigration agency violates its own regulations. As a doctrine of agency accountability, the *Montilla* Doctrine serves an important purpose in promoting the rule of law distinct from the role of the Fourth Amendment Exclusionary Rule. The Second Circuit’s distinction between these doctrines, the brief argues, should be preserved and the Court should require that the Department of Homeland Security comply with its rules and regulations in order to uphold basic notions of due process and fair play.

**Information Technology Law**

Report opposing proposed legislation that would amend the Penal Law by expanding New York’s prohibitions against Internet gambling (and gambling in general) to prohibit the mere “endorsement” of gambling. The report expresses concern that the new prohibitions are unnecessary, as present criminal facilitation and aiding and abetting doctrines sufficiently cover conduct directly tied to gambling crimes, and that the inclusion of mere “endorsement” is overbroad and raises serious constitutional concerns.

**International Human Rights**

Letter to the Permanent Representative of the Mission of the Islamic Republic of Iran to the United Nations expressing concern that certain anti-Semitic statements made by Iran’s President violated international law,
specifically Iran’s obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, the United Nations International Covenant on Civil and Political Rights and the Convention on Prevention and Punishment of the Crime of Genocide. A similar letter outlining these concerns was also sent to the U. S. Department of State.

Letter to President Musharraf of the Islamic Republic of Pakistan urging the Pakistani government to comply with its obligations under the Convention on the Elimination of All Forms of Discrimination Against Women and move toward ensuring equality for women by repealing discriminatory laws, making certain that laws are enforced equitably and enhancing public education programs aimed at achieving gender equality.

Letter to Congress urging that it conduct an inquiry into the case of an American citizen, Mr. Amir Mohamed Meshal, who has been held for almost three months in secret detention in Ethiopia. This case, the letter states, raises issues concerning the United States’ compliance with the Constitution and human rights instruments that protect citizens and non-citizens.

Letter to the Association of Southeast Asian Nations expressing concern over the recent crackdown on peaceful protestors in Myanmar, and the ongoing detention of activists and monks there under abusive conditions and without access to counsel.

Letter to General Pervez Musharraf President of the Islamic Republic of Pakistan expressing concern over the situation in Pakistan. Suspending the Constitution by a Provisional Constitutional Order, the letter argues, damages the balance between security and freedom in Pakistan that has been tenuous at best since the original suspension of Chief Justice Iftikhar Muhammed Chaudhry. The letter urges the release of human rights workers, lawyers and other civilians who have been beaten and detained by the police without charge. An independent judiciary is vital for the maintenance of a democratic society. Removing the sitting justices of the Supreme Court and replacing them with judges newly appointed under the Provisional Constitutional Order, the letter points out, undermines any claim of judicial independence.

**International Human Rights/United Nations**

Letter to the Secretary General of the United Nations recommending a plan to implement the responsibility to protect principle and to expand the role of the Special Advisor on the Prevention of Genocide.
Letter to His Excellency Dr. Mahmoud Ahmadinejad, President, Islamic Republic of Iran stating that Dr. Haleh Esfandiari’s baseless arrest and detention violate the Universal Declaration of Human Rights as well as provisions of Iran’s Constitution and urging her release from Evin Prison.

Judicial Administration, Council on/State Courts of Superior Jurisdiction
Letter to Chief Judge Kaye commenting on the July 2006 Report of the Office of Court Administration on the Commercial Division Focus Groups. The letter agrees with the Report’s general conclusion that many aspects of Commercial Division practice have worked well and should be adopted in non-commercial parts. A number of the Report’s specific proposals are addressed in the letter.

Labor and Employment Law
Letter to Congress expressing support for H.R. 1540, the Civil Rights Tax Relief Act of 2007 (CRTRA). The current Internal Revenue Code substantially increases the cost of settlement for employers, while simultaneously reducing recoveries for employees. The CRTRA, by amending the Internal Revenue Service Tax Code, would eliminate non-economic damages from the definition of “gross income”; and permit income-averaging for lump-sum back-pay settlements or awards, making it easier for both employers and employees to settle the vast majority of workplace disputes.

Labor and Employment Law/Legal Issues Affecting People with Disabilities
Best Practices Guidelines for Employers Interviewing Job Candidates with Disabilities. These guidelines provide employers with an understanding of their legal obligations when 1) setting up an interview for a job; 2) conducting an interview; and 3) making pre- and post-conditional offers of employment to a candidate with a disability.

Legal Issues Pertaining to Animals
In response to several fires in pet stores and barns in NYS and around the country which resulted in the deaths of hundreds of animals, bills were introduced in the State Assembly and Senate (A.311/S.558 and A.312/S.559) that would require the implementation of fire safety measures at pet housing facilities. The Committee offered its support with recommendations for these bills. Under current law, licensed pet dealers in New York need only comply with minimum standards of care for animals in their possession which do not include fire safety. The report recommends that at all pet housing facilities meet fire hazard safety standards as required by the
Commissioner of Agriculture and Markets. The report also recommends requiring each pet dealer to install either an automatic dialing service or a fire suppression sprinkler system.

Report supporting A.1839/S.3167 which would authorize the establishment of Senior Pet Companionship Programs to match seniors who have limited social contact with companion animals.

Letters sent to both Stony Brook University Medical School and New York Medical College urging the schools to discontinue the use of live dogs in physiology and surgery laboratories. This letter bases its argument on legal, scientific and ethical grounds.

Report in support of the Pet Safety and Protection Act (S.714/HR1280) which would restrict permissible sources of dogs and cats sold to research facilities. The report argues that the proposed legislation is necessary because of the inadequacies in the existing law and the fact that prior enforcement efforts under the existing law have proved inadequate to protect the animals or to eliminate the fraud and abuse involved in animal trade.

Comments in support of New York City Council bill Intro. No. 389, which would prohibit the display of wild and exotic animals in New York City for public entertainment, including circuses, rodeos, carnivals, and similar undertakings in which animals are required to perform tricks, fight or participate as accompaniment in performances for the amusement or benefit of an audience within New York City. Since the federal animal welfare laws fail to provide adequate safeguards to protect the wild and exotic animals used for entertainment and the people around them, a local law specifying proscribed practices is vital.

Report supporting S.1916/H.R.3295, The Chimpanzee Health, Improvement, Maintenance, and Protection Act (CHIMP Act) which would modify the existing Federal sanctuary system for surplus chimpanzees retired from research to terminate the current authority to recall such surplus chimpanzees for biomedical research under certain circumstances. In addition, the report recommends that the proposed bill be amended to ban the recall of chimpanzees for all purposes including non-invasive behavioral research and specified medical research involving the chimpanzee colony.
Report supporting A.7870/S.5206 which would amend the New York Agriculture and Markets Law to expand the existing aggravated animal cruelty law to cover intentional acts of extreme cruelty to wildlife as defined under Section 11-0103 of the Environmental Conservation Law. Currently, that law covers only domestic animals.

**Lesbian, Gay, Bisexual and Transgender Rights**
Letter to Congress expressing support for the original version of the Employment Non-Discrimination Act (H.R. 2015) which was introduced on April 24, 2007 and opposition to an alternative version of the bill, H.R. 3685 introduced on September 27, 2007, which excludes gender identity as a protected category. Transgender and other gender non-conforming employees are, the letter notes, among those most vulnerable to the disparagement, harassment, unfair treatment, and resulting economic hardship that the original Employment Non-Discrimination Act bill was intended to eradicate.

**Litigation**
Letter to the New York State Legislature urging that it pass legislation providing for judicial raises during the present legislative session. Fair compensation increases are long overdue for New York State judges and the letter argues the failure to provide salary increases depletes the morale of the judiciary, devalues its role and creates a serious threat to the quality of the bench.

**Matrimonial Law**
Report expressing a potential unintended consequence of A.3074 which would amend the statute of limitations for agreements relating to marriage. The Committee supports the intent of the bill which is to toll the statute of limitations during the period when a marriage is viable and no litigation dissolving the marriage has been commenced, as the parties are unlikely to contest a prenuptial agreement while the marriage is still successful. But the report argues that the bill as drafted would make all marital agreements, including separation agreements and stipulations of settlement, susceptible to being attacked in perpetuity. The Committee offered language to correct the oversight in drafting.

**Military Affairs and Justice**
Letter to the Department of Veterans Affairs offering comments on proposed rules for Accreditation of Agents and Attorneys including opposing
a proposed rule which would require attorneys to pass a written examination in order to practice before the Department. The City Bar Justice Center also commented on the proposed rules, noting that the rules should not apply to volunteers handling a case pro bono.

**New York City Affairs**

Report on the financing of the Hudson Yard Development Project provides an extensive review of the financing mechanism being used by New York City for the development of the Hudson Rail Yards, a 45-block area on the far west side of Manhattan adjacent to the mid-Manhattan central business district. The report notes that empowering agencies to incur debt not backed by the City's general revenues raises the same kinds of risks that led to the City's fiscal crisis in the 1970s.

**Non-Profit Organizations**

Letter to the National Conference of Commissioners on Uniform State Laws expressing limited endorsement of the Uniform Prudent Management of Institutional Funds Act. The letter identifies a number of provisions which require revisions before the proposed Act should be adopted.

**Patents**

Amicus Brief: *In Re Seagate Technology LLC*, filed in the United States Court of Appeals for the Federal Circuit, March 2007. The brief argues that producing an opinion of counsel to defend against a charge of willful infringement should not result in an incursion by opposing counsel or the court into privileged communications between a party and its trial counsel, except to the extent that those communications concern the formulation of the opinion itself.

**Personal Income Taxation**

Letter to Congress commenting on the 2007 Reform of Alternative Minimum Tax (AMT). The letter expresses support for a continued increased AMT exemption amount in 2007 as well as support for a short term 2007 AMT Estimated Tax Relief provision of safe harbor from IRS interest and penalties.

**Professional and Judicial Ethics**

Formal Opinion 2007 -03 considers whether a law firm may accept a representation that is adverse to an affiliate of a current corporate client. The opinion finds that a law firm should first ascertain whether its en-
engagement letter with the current corporate client excludes affiliates as entities that the law firm also represents, or whether the engagement letter contains an applicable advance conflicts waiver from the current corporate client, thereby allowing the adverse representation. If consulting the engagement letter does not end the inquiry, the law firm must then analyze whether there is a corporate-family conflict. If such a conflict exists the law firm must secure informed consent before accepting the adverse representation. Law firms may seek to avoid corporate-family conflicts by defining the scope of representations before potential conflicts emerge, and by employing advance waivers when appropriate.

Professional Discipline
Amicus Brief: Departmental Disciplinary Committee for the First Judicial Department v. Richard Zalk, filed in the New York State Court of Appeals, September 2007. The brief urges that the court grant the motion by the respondent for leave to appeal on the basis that the question of whether CPLR 4519 (the Dead Man’s Statute) is applicable to an attorney disciplinary proceeding is a matter of substantial concern to members of the bar generally.

Professional Discipline/Professional and Judicial Ethics/
Professional Responsibility
Comments on the Proposed Ethical Considerations for Lawyer Advertising. In the first instance the report recommends postponing the adoption of any Ethical Considerations until after litigation concerning the rules is concluded. However, in the event that the proposed Ethical Considerations are adopted now the report offers a number of comments including: the definition of lawyer advertising should be clarified to include websites or blogs; subjective comparisons should not all be precluded; it should be made clear that materials whose primary purpose is to educate are not considered solicitation unless they affirmatively suggest to the recipient to hire the lawyer; the extraterritorial reach of the rules should be limited; and an Ethical Consideration should be added which clarifies that if a law firm has no principal office it need not declare one.

Professional Responsibility
Comments on the October 2007 ABA proposed amendments to Rule 3.8: Special Responsibilities of a Prosecutor. The comments support the proposed amendments in general as a necessary and worthwhile addition to the ethics rules governing prosecutors while recommending a number of drafting changes.
Real Property Law
Model Contract of Sale for Office, Commercial and Multi-Family Residential Premises and Commentary. The form is meant to provide a standardized framework for sales of commercial buildings and multi-family residential properties. The form is an updated version of the form contract previously drafted by the Committee on Real Property Law and published by Blumberg & Co. as Form 154. The updated form attempts to provide comprehensive coverage of the bulk of the provisions common to most sales of commercial real estate, including office, commercial, and multi-family residential buildings and should help prevent omissions and allow concentration on the unique aspects of the transaction. The form is accompanied by an extensive commentary regarding its use.

Sex and Law
Letter to Governor Spitzer regarding the antihuman trafficking legislation A.8679/S.5902 which passed both the Senate and Assembly. While urging the Governor to sign the legislation the letter also notes that improvements in the law are still necessary for New York to provide full protection to trafficking victims including: providing a private right of action to trafficking victims; protecting victims of sex trafficking from being prosecuted for prostitution; including a catchall provision in the definition of labor trafficking; and adding an aggravated labor trafficking provision, whereby the use of physical force, or threats of physical injury, would elevate the penalty from a Class D to a Class C felony.

Social Welfare Law
Letter to the New York State Office of Temporary and Disability Assistance urging that New York State eliminate the requirement that applicants for, and recipients of, subsidized child care services demonstrate active pursuit of court-ordered child support as a condition of eligibility to receive subsidized child care assistance. This requirement places extraordinary burdens on families, particularly low income working families and single mothers seeking to enter the workforce and keep their children in high quality early care programs. In addition, the requirement further burdens the Family Court system and leaves the State vulnerable to potential legal challenges.

State Affairs
Report Supporting Legislative Rules Reform: The Fundamentals. This report sets forth proposals to address three fundamental areas of legislative procedure that are in need of reform: resource allocation, committees,
and member items. Reform in these fundamental areas, the report urges, would be an initial step to reforming the entire legislative process and further refine the efficiency and productivity of public policy making and debate in New York State.

**Taxation of Business Entities**

Report Offering Proposed Guidance Regarding U.S. Federal Income Tax Treatment of Certain Lending Activities Conducted within the U.S. The report offers guidance on how to determine when a nonresident alien individual or foreign corporation that is not otherwise subject to U.S. taxation on a net income basis should be treated when engaged in a trade or business with the United States for federal income tax purposes as a result of certain lending activities conducted within the U.S. by or on behalf of that nonresident alien individual or foreign corporation.

**Town and Village Courts, Task Force**

Report making a series of recommendations relating to the training of Town and Village Justices and court clerks including that: bar associations throughout the state establish a committee to identify lawyers to work with the New York State Judicial Institute to present courses of study for Town and Village Justices; the New York State Judicial Institute along with other agencies offer training on court administration, fiscal responsibility and accountability; and the members of any advisory committee established to plan and monitor the training programs be neutral in their positions with respect to the issues that come before Town and Village Courts.

Report regarding the provision of assistance to Town and Village Justices, recommending that: the Office of Court Administration fully fund a large staff of lawyers and administrators to aid the Town and Village Justices; a resource center be adequately funded to maintain regional offices and provide essential services for both lawyer and non-lawyer justices; and until the Center is fully staffed, bar associations throughout the state should identify lawyers who would be willing to answer questions on a volunteer basis.

This report examines the issues facing New York State’s Town and Village Courts and makes recommendations that are designed to increase the likelihood that lawyers will become town and village justices, while respecting the professed desire of communities to have local courts that are close
to the citizens and understand their interests. The recommendations would enable more justices to be lawyers by reducing the number of justices and by enhancing the conditions under which the justices do their work, including benefits, compensation, facilities, and support. The report also recommends that Town and Village Court litigants be given the right to have misdemeanor and certain eviction cases heard by justices who are lawyers, or by judges.

**Trusts, Estates and Surrogate’s Courts**
Proposal to amend the Estates, Powers and Trusts Law to add Section 5-1.5, Revocatory Effects of Divorce, Annulment or Declaration of Nullity, or Dissolution of Marriage on Disposition, Appointment, Provision or Nomination in Governing Instrument Relating to Non-Probate Property and Former Spouse. The proposed amendment would update New York State’s estate planning law in the wake of today’s higher divorce rates and increased use of revocable trusts and non-probate assets and extend revocation upon divorce to non-probate assets.

**Women in the Profession**
Report and Recommendations: Parental Leave Policies and Practices for Attorneys. The needs of new parents and their children are important issues for many lawyers. Parental leave policies need to balance an attorney’s family needs upon the birth or adoption of a child with the employer’s business needs. Recognizing the need for such balance and the lack of practical information about the parental leave practices and policies of New York City legal employers, the Committee disseminated a survey to legal employers in the New York City area about their parental leave policies and practices for attorneys. The Committee also collected information about parental leave policies of other area employers, both within and outside the legal profession. Based on the results of the survey and additional research, the Committee came up with recommendations for model parental leave policies and practices.

Copies of the above reports are available to members at the Association’s website, www.nycbar.org, by calling (212) 382-6624, or by e-mail, at gbrown@nycbar.org.
Structure and Organization of New York’s Town and Village Courts

The Task Force on Town and Village Courts

A. Introduction

On October 27, 2006, Barry Kamins, the President of the New York City Bar Association, announced the formation of a Task Force to address the well-documented problems facing New York State’s Town and Village Courts, also known as the Justice Courts. The Task Force was charged with finding ways to address the problems and to assist in implementing improvements. The Task Force was formed after publication of several articles in The New York Times and analysis of the reports of the New York State Comptroller (“Comptroller”) concerning the Town and Village Courts. The Task Force members are lawyers and judges from diverse parts of the State.


1. In this report, the word “justices” refers to the judges of the Town and Village Courts, while the word “judges” refers to the judges of all other New York courts, who by law must be lawyers.
Since the formation of this Task Force, the Chief Judge has extended the mandate of her Special Commission on the Future of the New York Courts ("Dunne Commission") so that it might study issues concerning the Town and Village Courts. The Fund for Modern Courts also designated a committee to study the issues. Furthermore, in recent months, legislation affecting the structure of the Justice Courts and the qualifications of the justices has been passed and signed. The new statutes are referred to in the text below.

In its research, the Task Force has directed its attention to the concerns set out in the Action Report, to the jurisdiction and structure of the Town and Village Courts, and the qualifications of the justices who sit on those courts.

Since the Task Force was formed, its members have interviewed or otherwise communicated with participants in the justice court system including prosecutors, defense counsel, civil litigators, OCA staff, town and village justices, and non-judicial Justice Court personnel. The Task Force spoke with Robert M. Maccarone, the Director of New York State Commission on Probation and Alternates to Incarceration. The members have also examined responses to questionnaires the Task Force distributed to prosecutors, defense counsel, justices, and court clerks. The questionnaires were distributed by the President of the New York State Magistrates Association and the New York State Magistrates Clerks Association, the defense bar and district attorneys.2


2. The Task Force makes no claim that the use of the questionnaires was a scientific study.
arranged a meeting for the Task Force with participants in that County’s Justice Court system. The Task Force also received assistance in getting information about other states’ practices from the National Judges Association, an association of non-lawyer judges.

The Task Force previously issued three reports: *Memorandum on Justice Court Technology* (March 6, 2007) dealing with computers, recording of court proceedings, and equipment and training to use the new devices; *Recommendations Relating to Training for Town and Village Justices and Court Clerks* (June 11, 2007), dealing with training for justices and non-judicial personnel; and *Recommendations Relating to Assisting Town and Village Justices* (June 11, 2007), dealing with legal and administrative assistance for justices and non-judicial personnel. (These reports are available on the Association’s website, www.nycbar.org.) All told, the four reports present 25 recommendations. (The recommendations of the previous three reports are reprinted in Appendix B.)

**B. The Recommendations**

The Town and Village Courts, established by the New York Constitution, have long been a part of our State’s history. However, just as other judicial or governmental functions, laws and regulations have been part of a world that has changed, the Town and Village Courts have played a role in a legal world that has changed. The Task Force believes that in the current context, if the Town and Village Court structure is to remain at all, there must be prompt implementation of the changes recommended in the Task Force’s four reports. The full set of recommendations is attached as an appendix to this report.

There are currently over 1,200 Town and Village Courts and over 2,000 town and villages justices, all of whom sit on a part time basis. Approximately 68% of the justices are not lawyers. In some counties, such as Westchester County, all of the justices are lawyers. In contrast, many counties in the central, northern and western parts of the State have only a few or no lawyer justices.

The Town and Village Courts have preliminary jurisdiction over all criminal cases, including capital cases, and full jurisdiction over misdemeanors, including assaults. The town and village justices can hold felony hearings, bail hearings, pretrial suppression hearings, and trials, including jury trials when they are authorized. They also hear civil cases involving claims of up to $3,000, as well as summary eviction cases and emergency family court proceedings. Despite this broad authority, under the current system, justices receive limited training and are not reviewed for qualifications to sit, as are other elected judges.
The Task Force believes that all justices of the Town and Village Courts should be lawyers. It also believes that a District Court system with full-time lawyer judges addresses many of the problems that have been identified. However, it also recognizes that neither the move to all lawyer justices nor the adoption by a county or part of a county of a District Court is likely to take place in the short term. Accordingly, the Task Force proposes the changes in the Town and Village Court system reflected in the 25 recommendations set out in this and the other Task Force reports. The 25 recommendations are intended to be complementary; each is intended to enhance the other. They include the transfer of some cases to lawyer justices, consolidation of courts, full-time State supervised non-judicial personnel to provide staffing and assistance, legal training and assistance for justices and non-judicial personnel, state of the art equipment and computers and training to use them, and a record made of each court proceeding. While some of the recommendations can be effectuated more rapidly than others, we urge that all be implemented promptly so that the benefits of the changes can accrue to the court system and those whom it serves. The ten recommendations in this report follow.

RECOMMENDATION 1
The Task Force recommends that the Criminal Procedure Law be amended to require that the justices of the Town and Village Courts who preside over pretrial suppression hearings and jury trials in criminal cases be lawyers and, to meet this requirement, that pretrial suppression hearings and jury trials be transferred to justices who are lawyers or to judges.

The Task Force further recommends that the Criminal Procedure Law be amended to require that in all other cases in which the crimes charged are A, B, or unclassified misdemeanors and the presiding town or village justice is not a lawyer, on request of a party, the case be transferred to a justice who is a lawyer or to a judge.

RECOMMENDATION 2
The Task Force recommends that newly amended Uniform Justice Court Act § 106 (Session Laws 2007 Chapter 321), and rules promulgated pursuant to that section, be applied to facilitate the transfer of cases from town and village lay justices to town and village lawyer justices or judges in order to effectuate Recommendation 1.

RECOMMENDATION 3
The Task Force recommends that the Office of Court Administration
issue plain language forms for pleading in summary proceedings for eviction that are comprehensible to the litigants and require disclosure in the eviction petition of special circumstances, including the presence of an immovable mobile home, building code violations, government rent subsidies, and possible violations of the warranty of habitability.

RECOMMENDATION 4
The Task Force recommends that town and village justices be provided with intensive training on procedural and substantive law applicable to summary proceeding eviction cases.

RECOMMENDATION 5
The Task Force recommends that summary proceedings in eviction cases be decided by lawyer justices or judges when the respondent is pro se and when, on review of the plain language pleadings, there is disclosed the presence of (1) an immovable mobile home, (2) disrepair of the premises raising a question as to whether there is a violation of the warranty of habitability, (3) pending building code violations, or (4) government rent subsidies.

RECOMMENDATION 6
The Task Force recommends that there be further study of civil cases within the jurisdiction of Town and Village Courts to determine whether any additional civil matters present the types of issues that should be heard by lawyer justices or judges, whether there is additional need for plain language forms, and whether intensive training is needed on any specific areas of procedural or substantive law.

RECOMMENDATION 7
The Task Force recommends that each town examine and determine whether consolidation of Town Courts would be beneficial to the town and the Town Court and, where appropriate, pursue consolidation pursuant to Session Laws of 2007, Chapter 237 (amending Uniform Justice Court Act § 106-a).

RECOMMENDATION 8
The Task Force recommends that each village examine and determine whether abolition of the office of village justice would benefit the village and the Village Court and, where appropriate, initiate local legislation pursuant to Village Law § 3-301(2)(a), or, if an inconsistent charter provi-
RECOMMENDATION 9
The Task Force recommends that every Town and Village Court have a court clerk who is trained to prepare the records and documents and satisfy the financial reporting and safeguarding of funds requirements of the applicable statutes and regulations. The clerks should be full time employees of the courts and be fairly compensated. Courts may combine resources to retain a shared court clerk if the work of a single court does not warrant a full time clerk. The clerks should be supervised by a State-compensated employee who also is available to provide assistance to the court clerks.

RECOMMENDATION 10
The Task Force recommends that in planning for consolidation of Town Courts, the elimination of the position of village justice, or the transfer of misdemeanor cases from the Town and Village Courts when there is no available lawyer justice, the Office of State Comptroller re-evaluate the allocation of the revenues of the Town and Village Courts so that legislation can provide to municipalities an appropriate share of the courts’ revenues.

DISCUSSION
C. Features of the Town and Village Courts
This section sets out many of the features of the Town and Village Courts so that the recommendations in all four of the Task Force reports are viewed in context. Reference is made to some of these sections in the commentaries supporting the recommendations. Others serve as background.

1. Local Structure
The Town and Village Courts are established by the New York State Constitution as part of the Unified Court System. NY Const., Art. VI, §§ 1(a), 17. (All references to “Art.” are to the New York State Constitution.) A Town Court sits in the geographic area that constitutes a specific town. A Village Court sits in the village within the boundaries of a town. The two courts service the same populace.

The salaries of town and village justices and the staffs of the Town and Village Courts, as well as expenses of the Courts, are paid by the
municipality, village or town, in which the court is located. Town Law §§ 20(a), 20(b), 27, 116; Village Law § 4-410(2); Judiciary Law §§ 39(1), 200. The expenses of legal education programs given for the justices in lieu of admission to the Bar are paid by the town or village. Uniform Justice Court Act § 105(b) (UJCA).

Both town and village justices are elected for four year terms by the constituents of the town or village they serve and are part-time officials. Art. VI § 17(d); Town Law §§ 20(a) and (b), 24; Village Law §§ 3-301(3), 3-302(3).

Village Courts are not mandatory. If a village decides to have a court, two justices are elected or one is elected justice and a second is appointed an acting justice who presides when the elected justice is not available. Village Law § 3-301(2); Uniform Justice Court Act (“UJCA”) § 106 (1). There are special provisions for additional justices. Village Law § 3-302.

The Board of Trustees of any village may, by resolution or local law, subject to permissive referendum before the voters, establish, increase the number of, or abolish the office of village justice. Village Law § 3-301(2)(a). As noted in Recommendation 7, if a charter establishing a village already exists and contradicts the Village Law provision for abolition of the justice position, only the Legislature can abolish the position. If a Village Court is abolished, the business of the court goes to the Town Court and the fines for violation of village law, ordinances or regulations remain the property of the village. Id.; Office of the State Comptroller, Opportunities for Town and Village Court Consolidation, Doc. 2003-MR-4 at 1 (Nov. 2003) (“Comptroller's November 2003 Report”).

Towns have two justices. Town Law § 20(a), (b). Through a town board resolution and permissive referendum, the number of justices can be reduced to one. Comptroller's November 2003 Report at 1.

By amendment of UJCA § 106-a, effective July 18, 2007, the Legislature expanded the number of towns able to establish a single town court. Under the prior statute, the town boards of two adjacent towns in the same county might authorize a single town court of two justices, one from each town. Under the new amendments, two or more towns that form a contiguous geographic area within the same county are authorized to establish a single town court to be comprised of town justices elected from each of the towns. The procedure may be initiated by the town boards or by petition addressed to each town board, signed by 20% of the voters. After a public hearing, the petition is subject to a vote in a general election. UJCA § 106-a(1).

Because they are established, funded and dissolved by local govern-
ments, are regulated by the Legislature, and have unique reporting and fiscal responsibilities, Town and Village Courts have largely remained separate from the administrative structure of the OCA and without a centralized structure of their own. See Action Plan at 16-18.

2. The Courts

The Town and Village Courts are the only local courts for the 21 counties in which there are no City Courts. Spangenberg Report at 103. The various available sources do not agree on the number of Town and Village Courts. The Comptroller’s website states that there are 1,270 Town and Village Courts; the Dunne Commission (at 21, 81) found 1,277 (Dunne Commission Report at 21, 81); and the Spangenberg Group and OCA found 1,281 (Spangenberg Report at 104 and Appendix N; Action Plan at 8). Approximately 925 are Town Courts and 325 are Village Courts. Dunne Commission at 81; see also Spangenberg Report at 104 and Appendix N (reporting 924 Town and 357 Village Courts).

There are approximately 2,150 Town and Village judgeships.3 (The Comptroller puts the number at 2,250.) As of a year ago, 2,000 offices were filled. Questionnaire responses and information from the decisions of the Commission on Judicial Conduct show that on occasion one person sits on both a town and a village court. See, e.g., Urbana Town Court and Hammondsport Village Court; New Hartford Town Court and New Hartford Village Court; Harrietstown Town Court and Saranac Lake Village Court.

Sixty-eight percent, or 1,350, of the town and village justices are not lawyers. Spangenberg Report at 104, fn 303, 304. It appears that the number of town and village justices in a county who are lawyers increases if the county includes an urban or commercial area or is proximate to one. For example, Task Force interviews and questionnaires revealed that in Westchester County, which is just north of New York City and includes urban centers, all 73 justices are lawyers. In Nassau County, which is just east of New York City, includes urban centers, and has District Courts, all justices in the 64 Village Courts are lawyers. In Suffolk County, which is also east of New York City, with a District Court system in half the county, all justices are lawyers. In Monroe County, which includes Rochester, 32 of 46 justices are lawyers, and in Erie County, which includes Buffalo and Amherst, 50 of the 73 justices are lawyers. In Onondaga County, which includes Syracuse, approximately 22 of 41 justices are lawyers.

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3. In contrast, the other New York courts, all funded by the State, have only approximately 780 judges.
On the other hand, counties in the center of the State (Finger Lakes), the northern part of the State (Adirondack and the Canadian border), and the western part of the State have a smaller number of lawyers sitting as town and village justices. The following are data from several of those counties:

<table>
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<tr>
<th>COUNTY</th>
<th>NUMBER OF JUSTICES</th>
<th>LAWYER-JUSTICES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allegany</td>
<td>36</td>
<td>1</td>
</tr>
<tr>
<td>Franklin</td>
<td>34</td>
<td>1</td>
</tr>
<tr>
<td>Fulton</td>
<td>14</td>
<td>0</td>
</tr>
<tr>
<td>Schuyler</td>
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<td>1</td>
</tr>
<tr>
<td>Sullivan</td>
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<td>12</td>
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</tr>
<tr>
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<td>8</td>
</tr>
<tr>
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<td>3</td>
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<tr>
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<td>0</td>
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<tr>
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<tr>
<td>Greene</td>
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<td>3</td>
</tr>
<tr>
<td>Steuben</td>
<td>50</td>
<td>5</td>
</tr>
</tbody>
</table>

3. Subject Matter Jurisdiction

The Legislature is authorized to prescribe the jurisdiction of the Town and Village Courts. Art. VI § 17(a). That jurisdiction cannot be more expansive than that of the District Court (Art. VI, § 16), and New York City Criminal and Civil Courts. Art. VI, § 15(a).

The Justice Courts have non-criminal jurisdiction over actions and proceedings for the recovery of money or chattels where the monetary amount or value of the property is $3,000 or less; summary proceedings under Real Property Actions and Proceedings Law § 701 and proceedings to render judgment for rent due in any amount; contempt proceedings; small claims matters (UJCA §§ 202, 204, 210, 1802); and proceedings under certain state laws, including, for example, the Environmental Conservation Law § 71-0507, the Navigation Law § 200(5), and the Agriculture and Markets Law § 121(2). They also have jurisdiction to issue temporary
orders of protection or to modify such orders in pending Family Court cases when the Family Court is not in session. CPL § 530.12(3-a), (3-b). Actions for non-compliance with local codes are also within the Courts’ civil jurisdiction.

The Town and Village Courts serve as local criminal courts, CPL § 10.10(3)(d), (e), and have preliminary jurisdiction over all criminal cases— including capital cases. Accordingly, the justices have authority to conduct preliminary hearings, assign counsel, set bail, release on recognizance, and order commitment so that the defendant can be lodged at the appropriate jail (there are limited detention cells in police or trooper facilities). Presumably, they also would have authority to order emergency medical or psychiatric care if required. See UJCA § 2005.

The justices have complete jurisdiction over misdemeanors under the Penal Law (a list of Penal Law misdemeanors is an appendix to the Task Force Recommendations Relating to Assisting Town and Village Justices) and over the hundreds of misdemeanors codified in other statutes, (see, e.g., Environmental Protection Law §§ 71-2710, 71-2711, 71-2715, 71-0101, 71-0207, 71-0513). The jurisdiction also includes violations including such conduct as peddling and improper garbage disposal; and vehicle and traffic infractions under the Vehicle and Traffic Law and traffic rules, regulations and local ordinances, including speeding, failure to obey a traffic control device, seatbelt violations, and driving an unregistered vehicle or one without an inspection sticker.

The justices can hold preliminary felony and misdemeanor suppression hearings, negotiate dispositions, conduct trials (including jury trials where authorized), impose sentences, hear probation violation proceedings, and hold sex offender registration hearings. Proceedings at trial are conducted pursuant to the Criminal Procedure Law. UJCA § 2001.

If a Village Court exists within a district of any county or part of a county having a District Court, the Village Court has no civil jurisdiction and its criminal jurisdiction is defined in the law establishing the District Court. UJCA § 2300(d)(2).

4. Concurrent Jurisdiction

A Village Court that is located wholly or partially in a town has concurrent jurisdiction with the Town Court over civil cases arising in the village. UJCA § 201(b). If there is no Village Court, the matter goes before the Town Court in which the village is located. UJCA § 2101(m)(1). There also is concurrent jurisdiction of the Justice Courts with County Courts over certain Environmental Protection Law offenses, § 71-0513, and with
the Family Court in certain misdemeanor cases. Family Court Act §§ 812, 115(e); CPL §§ 100.07, 530.11, 530.12.

5. Caseload

According to the Action Plan, 2,000,000 cases come before the Town and Village Courts annually. Id. at 8. However, Task Force research led to the conclusion that this number relates only to criminal cases involving fingerprintable offenses and that the actual number of cases before the courts is much higher, but unknown, because of the inadequate way records have been maintained.4

Criminal case statistics, including caseloads, are generally based on fingerprintable offenses. Offenses for which a person must be fingerprinted are a felony, a misdemeanor defined in the Penal Law, a misdemeanor defined outside the Penal Law which would be a felony if the accused had a prior conviction for the crime, loitering for the purpose of engaging in a sexual conduct, and loitering for prostitution. CPL § 160.10. In addition, fingerprints can be taken if the identity of a person charged with a crime cannot be ascertained, if the identification given by the person is believed to be unreliable, or if there is reasonable basis to believe that the person is being sought for a crime. CPL § 160.20(2). All fingerprints are sent by the appropriate agency or officer to the Division of Criminal Justice Services (DCJS). CPL § 160.20.

By contrast, there are some 2400 offenses, posted on the DCJS website, for which no fingerprints are authorized, most of which are within the jurisdiction of Town and Village Courts. These include most misdemeanors and all infractions under state law, as well as offenses under local ordinances. For these cases, no information is forwarded to DCJS or OCA.

In civil cases, aside from the records kept in the court in which the case was pending, there has been no centralized reporting of incoming cases or of those which had been resolved unless a civil judgment had been entered. In the latter circumstance, the cases were reported to the County Clerk’s office with no centralized reporting. (This information was obtained from telephone calls and e-mails with OCA and DCJS.)

Accordingly, only the records of each Town and Village Court reveal the actual caseload, and there is no centralized way to learn that information. It appears that even the records sent to the Comptroller’s office

4. In April, 2007, OCA initiated changes to improve reporting requirements after it was discovered that thousands of cases before the Town and Village Courts were either not centrally recorded as having been resolved or were not resolved. It is too soon to determine how effective these changes have been.
and the Department of Motor Vehicles (DMV) do not contain all the appropriate information and cannot be used to ascertain the Justice Court caseload.

6. Court Revenue and Distribution

The 2005 ranking by the Comptroller’s Justice Court Fund of each Town and Village Court by income (available on line at the Comptroller’s website, www.osc.state.ny.us) shows the total revenue generated in 2005 by all Justice Courts was $212,730,422. The largest revenue generator was the town court of Amherst (Erie County) at $3,191,721.53. The smallest revenue generator was the Village Court of Whitehall (Wayne County) at $25. In 2005, the 15th largest revenue generator yielded $1,420,710.70, but 67 Town and Village Courts received revenue of $5,000 or less.

In 2006, the total revenue of all Justice Courts was $211,795,045. The largest revenue generated was $2,944,174 in the Village Court of Hempstead. The smallest revenue generated was $340 in the Town Court of Fenner. Sixty-six courts had revenue of under $5,000.

The revenue production of the Town and Village Courts is relevant to the issues of consolidation. The question is whether courts should consolidate and reduce expenses when the revenue produced is low.

The sources of the courts’ revenue are bail, surcharges, fines, fees, penalties, and costs paid by litigants. See Office of the State Comptroller Justice Court Fund, Handbook for Town and Village Justices and Court Clerks (2006) (“Handbook”). The revenue generated by the courts is divided by the State Comptroller between the State, county and municipality based on statutes allocating funds. See infra at 66. For example, revenues of $2,521,591 produced by a Town Court yielded $2,225,664 for the town, $4,215 for the county and $291,712 for the State. Where there is a Town Court and a Village Court with concurrent jurisdiction, a fine goes to the municipality with the ordinance that is violated. UJCA § 2021 (first of two sections).

After money is distributed, the municipality then allocates in its annual budget money for the funding of the Town or Village Court. Comptroller’s November 2003 Report at 2.

7. Physical Plant and Security

Justice Courts can hold sessions anywhere in the municipality. UJCA § 106. A town justice can sit in a village that is wholly or partly in the town. Village justices can hold court in a building outside of the village boundaries. A town judge can sit in an adjacent town after following the statutory procedure for doing so. UJCA § 106(1).
There is no requirement upon municipalities to supply space or security for the court and its judges and non-judicial staff. Many of the court facilities share space with other agencies, or use other space, including municipal garages and firehouses.

UJCA § 110 sets out the law-enforcement officers who are to serve the courts. In fact, there is minimal security. Thirty-four of the 64 justices who responded to the Task Force questionnaire wrote that their courtrooms generally have no security, or that what security is provided comes from officers who produce prisoners when criminal cases are heard or when officers appear in court for their cases. Twenty-nine other justices stated that security was provided by the municipality. One justice, who sits on two courts, reported having security in one court but not the other.

The Action Plan explains in detail the problems with local court security provisions and explains how the State will assist in improving this essentially local responsibility. *Action Plan* at 52-58.

**8. Technology**

The equipment and technological devices needed by the Town and Village Courts are intended to be supplied by the municipalities. However, when the funding from the municipalities became hopelessly small, the State enacted the Justice Court Assistance Program (JCAP) which enabled the courts to apply to the State for special grants to purchase needed equipment, computers, law books and supplies. *Action Plan* at 19, 59-60.

The Action Plan confirms what was generally known: the lack of adequate technology in the Town and Village Courts renders the justices and their court clerks, if they have a clerk, unable to carry out their obligations to keep records for the many agencies that require them. Some clerks and justices who responded to the questionnaires noted that computer training is as essential as having the equipment.

Of great importance to the litigants is the failure of many municipalities to provide funding for the Town and Village Courts to make a record of the courtroom proceedings. In the past a special budget line or approval was required or an application for funding was made to provide a reporter. UJCA § 2021 (second section with this number). Lawyers reported that, they themselves often arranged and paid for a court reporter to record the proceedings.

The Action Plan found that, as a general rule, recording was made, if at all, only of trials and hearings. The recording was on a tape device which was frequently inaudible in part or in whole, thereby preventing preparation of a transcript and record for appellate review, except for the
one made by the justice in the return filed pursuant to CPL § 460.10(3)(d). In virtually no instance was a recording made of any other proceeding, even preliminary proceedings in felony cases. The Action Plan found this to be inadequate and explained that the State would undertake to supply digital recorders of a high quality for all proceedings.

The Task Force submitted a report on technology in 2006 making particularized recommendations, including the use of court reporters, so that recording of proceedings could begin immediately.

9. Qualifications for Judicial Office

Residence and citizenship are required. Town Law § 23; Village Law § 3-300. The New York State Constitution does not require that town and village justices be lawyers. Art. VI, § 20 (a), (c). The Legislature can impose that requirement, Art. VI, § 20 (c); Town Law § 31(2), but has not done so. Town or village justices have no restriction on outside employment except for serving as a peace officer (Town Law § 31(4); UJCA § 105(c)). Responses to our questionnaires show that the justices include engineers, employees of large corporations, housewives, factory workers, bus drivers, clerks, printers, farmers, business owners, salespersons, teachers, carpenters, municipal employees, gas company employees, and retired police officers.

Those justices who are not lawyers must take a course of training and education before they can preside. Art. VI, § 20(c); Town Law § 31(2). No other requirements, including those for schooling, experience or legal training, are imposed. (By contrast, state-paid judges must have practiced law for either five or ten years after admission to the Bar, depending on the court on which they sit. Art. VI, § 20.)

Town and village justices are not reviewed for qualifications to sit, as are other elected judges by the newly formed Independent Judicial Election Qualification Commission established for each judicial district. Rules of the Chief Administrator of the Courts, § 150.1, 22 NYCRR § 150.1. Town and village justices are, however, subject to the rules of conduct promulgated by the Chief Administrator of the Courts with the approval of the Court of Appeals. (Art. VI, § 20 (c)). They also are subject to sanctions by the Commission on Judicial Conduct, and a person cannot be a justice if he or she has a felony conviction. Session Laws 2007 ch. 638 (effective August 28, 2007). There is no mandatory retirement age for town and village justices. Judiciary Law § 23.

10. Judicial Compensation

The compensation for the town justices, who are part-time employ-
ees, is fixed and paid by the town board. Town Law §§ 27, 116. The town
also is responsible for the costs of necessary supplies. Town Law § 69. The
compensation of village justices is likewise fixed and paid by the village.
Village Law § 4-410(2).

The salaries of the justices and the court clerks are reported in The
National Municipal Gazetteer New York (Plattsburgh NY: The Target Exchange,
16th edition 2005). It appears from the Gazetteer’s entries that in many
counties village justices are compensated at a lower rate than town justices
and that there are instances in which justices are not compensated. Some
justices are paid by the hour. A sampling from questionnaire responses
shows annual town justice compensation in Berne (Albany County) at
$7,125; Bethlehem (Albany County) at $40,220; Brookfield (Madison County)
at $5,000; Georgetown (Madison County) at $2,000; Montague (Lewis County)
at $400; Osceola (Lewis County) at $900; Lowville (Lewis County) at $6,500;
Angelica (Allegany County); at $3,150; Alma (Allegany County) at $2,880;
and East Hampton (Suffolk County) at $58,240. Annual salaries of St.
Lawrence County town and village justices range from $3,000 to $17,000.

The Comptroller’s records (accessible by internet at www.osc.state.ny.us)
show for each court the annual combined salaries of justices and other
court personnel under the category “personnel services.” These expenses
are as low as $120 in the Village of Hunter (Greene County), $700 in the
Village of Cleveland (Oswego County), and $2,000 in the Village of Cold
Brook (Herkimer County). Other categories of expenses are equipment and
capital outlay and contractual expenditures. The funds allocated for court
expenses are determined by town or village boards in their municipal budgets.
The questions to be asked are whether the courts receive a fair share of the
income they produce and whether the funds allocated to the courts meet
their needs.

11. Court Sessions

Town and village justices have the authority to establish the hours of
court sessions. Responses to Task Force questionnaires as well as court websites
show that the sessions vary, often affected by the primary employment of
the justice, whether in the law or some other occupation. Many justices
sit once a week. Many hold court in the evenings. In jurisdictions where
there is more than one justice, the justices may alternate sessions and
retain the cases they received on intake. The sessions can be dedicated to
specific case categories, such as civil, criminal or small claims. Additional
sessions are scheduled for trials and hearings. Trials are often conducted
in the evening, and, when necessary, extended late into the night.
Justices are available for nighttime arraignments. Such arraignments are necessary for a commitment order to lodge the arrested person in the county jail if there are no local holding facilities.

Two Town Court schedules are illustrative of the variations. In Ossining Town Court (Westchester County), civil, small claims, landlord/tenant and traffic cases are heard on Monday and Thursday at 7:30 p.m. and criminal cases are heard twice each month on Monday at 2:00 p.m. In Ancram (Columbia County), the Court is in session on Wednesday from 6:00 p.m. to about 8:00 p.m. A representative list of the schedules is attached as an appendix to the Task Force Recommendations Relating to Assisting Town and Village Justices. A chart of the schedules of 28 courts in one county is attached to this report as Appendix A. OCA will make efforts to coordinate court sessions, Action Plan at 31, but the numerous sessions at various times strain the resources of court participants.

12. Arraignment and Assignment of Counsel

The Spangenberg Report described the defects in the procedures for assignment of counsel in the Town and Village Courts. The Report stated that justices “often do not understand the law on the right to counsel, or they ignore it. Barriers also exist to the local justices notifying each defendant of their right to counsel and receiving proper waivers of counsel... Frequently, there is no defense counsel present at the initial appearance in the local courts.” Spangenberg Report at 110-111.

The responses to Task Force questionnaires show that in many counties, neither the prosecutor nor the defense counsel is present at night time or off-hours for arraignments held after an arrest. The prosecutor is often called for a recommendation concerning bail and bail is often, but not always, set. One prosecutor reported that the district attorney and the defense counsel are notified of the defendant’s appearance.

Further, according to the questionnaire responses, the adjourned date of a case is set by the judge and is often either the next session of the court, in time for a felony hearing, or on the next “district attorney night.” While several prosecutors said adjourned dates were set to avoid detention of a defendant who does not have a lawyer and in one county felonies were called the next day, it was reported that “a serious problem is defendants remaining in jail after arraignment with no counsel.” One prosecutor was concerned about defendants incarcerated without counsel when the sheriff fails to give the required notice about the case to the Public Defender, and suggested that the town or village justice give the notice.

According to the Spangenberg Report, it appears that section 200.26
of the Uniform Rules for Courts Exercising Criminal Jurisdiction, promul-
gated on March 25, 2005 (22 NYCRR § 220.26(c)), is not being imple-
mented. This section requires the immediate assignment of counsel if the
defendant is eligible, and notice by telephone and fax to defense counsel
and to pretrial services agencies.

Detained defendants are sometimes given a form to request assigned
counsel, but some are unable to complete the forms without assistance.

13. Record-keeping and Administrative and Fiscal Duties

Justices must keep, or arrange to have kept, legible and suitable books,
papers, records and dockets of all civil and criminal proceedings. UJCA §§
107, 2019; Town Law § 31(1)(a). Justices are also responsible for accounting
for their court’s financial transactions, safeguarding public resources
by maintaining bank accounts for timely deposits of court revenues; de-
positing money within 72 hours of receipt; ensuring internal controls to
protect the revenue process; recording financial transactions; and moni-
toring the work of others in the court system. Office of the State Comptroller,
Justice Courts Accountability and Internal Control Systems, Doc. 2005-
Rules for the Justice Courts § 214.9, 22 NYCRR § 214.9. As part of the record-
keeping, all monies received and disbursed by a justice must be accompa-
nied by a receipt or a memorandum or other record as the Comptroller
requires. Town Law § 31(1)(a); Village Law § 4-410(d).

Money must be forwarded to the Comptroller within the first ten
days of the month following collection or, if the filing is electronic through
the Invoice Billing Program, to the municipality’s chief financial officer.
Each payment must be accompanied by a true and complete report in the
form required by the Comptroller. Town Law § 27; Village Law § 4-410 (a),
(b); UJCA § 2021; VTL § 1803; Handbook at 10; Justice Courts Accountability
Report at 7, 10. Money lost or missing is the personal responsibility of the

The Handbook at pages 24-48 sets out the rules for reporting other
financial transactions that are the subject of reporting, including bail
forfeited, bail fees, unclaimed exonerated bail, civil fees, copies, certifi-
cates of disposition, dishonored checks, restitution, and surcharges.

As noted, the time for the distribution of monies to the State, coun-
ties and municipalities can be shortened if all the justices of a court elec-
tronically file their statements using the Invoice Billing Program. In such
cases, the funds go to the municipalities’ Chief Financial Officer who,
following directions from the State Comptroller, distributes the funds to
the State and county and keeps the remainder for the municipality. *Handbook* at 20, 49.

At least annually the justice must submit the court’s records to the town board for examination and audit. Town Law § 31(b). It is generally reported that these municipal audits are not adequately conducted. *Action Plan* at 34.

Civil and criminal case court records must also be maintained. *Uniform Rules of Courts Exercising Criminal Jurisdiction* § 200.23, 22 NYCRR § 200.23 and *Uniform Civil Rules for the Justice Courts* § 214.11, 22 NYCRR § 214.11. In criminal cases the court is required to keep a case file with all papers filed, orders issued, notes made by the court, transcripts, and copies of documents and papers sent to other agencies. An index of cases and a cashbook chronologically listing all receipts and disbursements are separately maintained. In every case, except for parking violations, the court must give a number to each defendant and keep a record of the defendant’s name, address, birth date (if under 19), the section of the state law or local ordinance of every charge, a description of each offense charged and the date, the date of the arrest, the name of the arresting agency or officer, the date of arraignment, the name and address of the prosecutor and defense counsel, a statement of what occurred at arraignment (including a reading of the charges, advisal of rights, assignment of counsel, entry of a plea, release of the defendant, the bail set and the adjournment date), the defendant’s criminal identification number if the charge is a fingerprintable offense, all proceedings that occurred before trial, names and addresses of witnesses, waiver of a jury, case disposition, whether a pre-sentence report is ordered and available, the sentence imposed, and all post-judgment proceedings. *Uniform Rules of Courts Exercising Criminal Jurisdiction* § 200.23, 22 NYCRR § 200.23.

Records must also be made under other statutes. See, e.g., Environmental Protection Law, §§ 71-0209, 71-0211(2); Navigation Law § 200(5); Vehicle and Traffic Law §§ 514, 1180(h), 1624(b).

Court clerks’ responses to the Task Force questionnaires confirm that Town and Village Courts prepare records for their own courts, the State Comptroller, DCJS, OCA, the Probation Department, DMV and TSLED (DMV’s statewide data base for traffic ticket management and accountability system) (*Justice Court Study*, 99-PS-3 at 8 (Office of State Comptroller)), the district attorney, the police, and the parties in both civil and criminal litigation. This paperwork includes orders of eviction, contempt, and protection; entries into the domestic-violence registry; transcripts of civil judgments, and dispositions in criminal and civil cases.
14. Limitations on Legal Practice

Rule 100.6 of the Rules of the Chief Administrative Judge of the Courts places restrictions on the law practice of those lawyers who are part-time justices. Pursuant to the rules (based on the principle that a court is constituted of all the judges elected to sit on it): a justice (1) cannot practice law in the courts in which he or she serves; (2) cannot practice law in a court in the county in which his or her court is located before judges who can practice law (that is, another town or village judge who is a lawyer); (3) cannot act as a lawyer in a proceeding in which he or she was the judge or in related proceedings; a judge cannot allow his or her partners or associates to practice law in the court in which he or she presides; and (4) cannot allow the practice in his or her court of partners or associates of another judge of the same court who can practice law (that is, another town or village judge who is a lawyer). 22 NYCRR § 100.6 (B).

Further, lawyer judges cannot take any judicial assignment such as guardianships. 22 NYCRR §§ 35.2(c)(1), (3)

15. Attorneys before the Courts

Lawyers who regularly appear before the courts include district attorneys, 18(b) panel attorneys, public defenders, legal aid lawyers, legal services lawyers, town or village attorneys and retained counsel. Some defense attorneys and district attorneys reported that the large number of courts made it difficult to have attorneys in the courts for the numerous court sessions. The large number of courts adversely affects the lawyers’ representation by limiting when they can be present. See infra at 63.

District attorneys appear regularly, but not at all sessions, before the Town and Village Courts in criminal cases. The nights on which district attorneys appear in court are called “DA nights.” Town and village prosecutors also often have a caseload based on local code and ordinance violations.

Until 2006, state troopers negotiated dispositions of vehicle and traffic cases that were based on their own arrests. This practice was terminated by the State Police because of questions about its validity. The Legislature passed a measure to restore the practice but it was vetoed by the Governor. Responses to the Task Force questionnaire indicate that the change has resulted in the modification of caseloads in some of the counties in which the district attorneys did not previously prosecute vehicle and traffic offenses but now do so. One prosecutor explained the district attorney has assumed responsibility for the prosecution of vehicle and traffic cases, resulting in an additional 25,000 cases and 60 court appear-
ances each month. Some district attorneys have delegated part or all of the vehicle and traffic caseload to town and village prosecutors.

There is a question whether the prosecution of vehicle and traffic cases by district attorneys affects the distribution of revenues to the municipalities. Fees and fines from moving violations are allocated to the state while those from non-moving violations go to municipalities. Some believe that plea negotiations are affected by whether the prosecutor is a county or municipal official. Others respond that the plea process is fair, and that some adjustment must be made to compensate municipalities.

16. Registered Attorneys
According to the OCA Attorney Registration list (2005 Report of the Chief Administrative Judge, Appendix D), in 49 counties there are fewer than 1000 attorneys and in 46 counties there are fewer than 500 attorneys. The counties with the fewest lawyers are Yates (29) and Schuyler (27). These numbers are relevant to Recommendations 7 and 8 and to the issue of whether use of lay justices is justified by the small pool of lawyers available, and willing, to become justices.

17. Supervising Judges
As recognized by the Action Plan, there is no oversight of Town and Village Courts comparable to that present in the State-funded courts, which have a system of supervising and administrative judges that is supported by non-judicial staff who are concerned with facilities, case flow, court equipment and technology, facilities and security, relationship with other government agencies, public complaints, and internal management issues. Action Plan at 33.

The Action Plan stated that the “budgetary and functional independence of the justice courts would not allow administrative supervision of judges and staff in the same way or to the same extent that OCA manages the state-paid courts,” but that OCA can nevertheless provide some assistance and support. In accord with the appraisals of the needs of the Town and Village Courts and consistent with permissible oversight, OCA appointed eight supervising judges of the state-funded courts who will “trouble-shoot operational difficulties, coordinate the Justice Court, and serve as liaison between the Justice Courts and the OCA.” Id. These state judges, to the extent possible, are to be former town or village justices. Id. The judges have been designated by OCA and are beginning their work.

18. Legal Assistance
The Resource Center was established to provide City Court judges,
town and village justices, and their court staffs with assistance in learning and applying legal principles to a case before them. The State-funded Center is in essence the law secretary for the town and village justices. Approximately five lawyers at the Center respond to requests for information made by town and village justices, City Court judges and their court clerks. Judicial responses to the Task Force questionnaire yielded mixed reviews about the Center.

The Action Plan discussed assuring that the Center provides an effective program. The supervising judges that have been designated by OCA to oversee the Town and Village Courts have noted that the current system of assistance for the justices from lawyers needs enhancement and it has been suggested that Center attorneys should be assigned to specific geographic regions to assist the justices and be available during a trial.

This Task Force issued a report and recommendations in June 2007 about the need to provide legal assistance to the justices. See Recommendations Relating to Assisting Town and Village Justices (June 2007). The Task Force found that a much larger staff of lawyers was needed to assist the approximately 4,000 justices and City Court judges, and their court clerks. Further, the Task Force recommended that specialists in fiscal management and court administration be included in the Center’s staff. Finally, the Task Force recommended that the lawyers providing assistance be available in regional offices or that other arrangements be made to enable the justice requesting help and the lawyer giving it to have face-to-face contact.

19. Court Clerks

The Town and Village Courts have such personnel as are provided by the municipal government. UJCA § 109. The clerk of the Town Court can be employed or discharged from employment only on advice and consent of the justice. Town Law §§ 20(1)(a), (b). The town or village can choose whether to employ any court clerk and some do not. The supervising justices designated to oversee Town and Village Courts have noted that the court staffs vary from court to court based on a municipality’s willingness to hire the court personnel, and that staffing is a problem. Responses to Task Force questionnaires showed, for example, that there is no court clerk in the Towns of LeRoy, Genesee Falls, Bolivar, Belfast, Caneadea, Granger and Byron.

Like the justices’ salaries, the clerks’ compensation and benefits are fixed by the town or village board. In some jurisdictions, the clerk is not paid. Responses to Task Force questionnaires show pension benefits and health insurance vary from municipality to municipality. Some clerks serve
more than one court (for example, in the towns of New Bremen and Croghan).

The websites of the justice courts list the court hours and show that the clerks’ offices are often open for business at times when the courts are not in session, while in other courts the clerks cannot be reached except when the court is in session.

The 33 responses from clerks to the Task Force questionnaires show a wide range of hours worked and compensation for clerks in different courts:

- nine hours per week in one court, compensated at $11.00 per hour and five hours in another court, compensated at $8.00 per hour with a state retirement plan, but no other benefits;
- 30 hours over 4-5 days; compensation was not disclosed; no benefits;
- 20 hours over five days; compensated at $8.25 an hour with no benefits;
- five days a week, 8:30 to 4 p.m.; compensated at $29,999 per year, with benefits and insurance;
- 32 hours a week over four days; compensated at $20,000 per year, with retirement and health insurance;
- 40 hours over five days; compensated at $30,000 per year, with pension and health insurance;
- 33 hours a week; compensated at $32,000 per year, with pension and health insurance;
- six hours over two days at $7.80 an hour with no benefits; and
- 40 hours over five days; compensated at $30,000 per year, with pension but no health insurance.

20. Other states
The National Center for State Courts through the State Court Organization Reference Series tracks the qualifications for judicial office in all the states. The most recent information, from 2004, is included in a series of available tables. Table seven lists, by state, the name of each court in the system, the qualifications to hold office in that court, including a law degree, and whether the court is one of general or limited jurisdiction. U.S. Dep’t of Justice, Bureau of Justice Statistics, State Court Organization 2004, Table 7, Qualifications to Serve as a Trial Court Judge, available at http://www.ojp.usdoj.gov/bjs/abstract/sco04.htm.
Attached to the tables are court organizational charts listing the name of each state court and a list of the cases within the court’s jurisdiction. The names of the courts and the jurisdiction of courts vary from state to state. To learn the types of cases that a lay judge might handle and the required qualifications to sit in that court, Table 7 and the organizational chart would have to be compared. It also appears that examinations of state sentencing statutes, appellate review jurisdiction, and the availability of de novo proceedings would be needed for any study.

Although this investigation was not undertaken by the Task Force, even a cursory review of the documents shows that approximately 26 states use lay judges in some of their courts. Beyond that, it appears that there are great variations in the qualifications for judicial office, the kinds of cases the lay judges are permitted to handle, whether imposition of a jail sentence is permitted, whether a proceeding de novo is allowed, and the scope of an appeal.

The National Judges’ Association supplied basic information about 12 states that use lay judges. Montana, Arizona, Texas, New Hampshire, Nevada, Oklahoma, and Utah provided additional information. The information reveals variations in training, qualifications, and jurisdiction.

D. DISCUSSION OF RECOMMENDATION 1

RECOMMENDATION 1

The Task Force recommends that the Criminal Procedure Law be amended to require that the justices of the Town or Village Courts who preside over pretrial suppression hearings and jury trials in criminal cases be lawyers and, to meet this requirement, that pretrial suppression hearings and jury trials be transferred to justices who are lawyers or to judges.

The Task Force further recommends that the Criminal Procedure Law be amended to require that in all other cases in which the crimes charged are A, B, or unclassified misdemeanors, and the presiding town or village justice is not a lawyer, on request of a party, the case be transferred to a justice who is a lawyer or to a judge.

1. The Views with Respect to Lay Justices

The issue concerning Town and Village Courts that has most caught the attention of the public, the media, and the Bar is whether non-lawyers should be justices of Town and Village Courts. The debate on this has gone on for many years. See generally Doris Marie Provine Judging Credentials: Nonlawyer Judges and the Politics of Professionalism (U. of Chicago 1986). The arguments in favor of using lay justices are that they have been used
for more than 200 years with success: that the justices bring a local informality to the system: that people like to see “their” judge conducting the proceeding: that the justices can do a good job at their work by applying common sense, knowing the community and having good intentions: that the training given the justices informs them of the principles of law needed to preside despite the absence of law school or other legal training; that the law the justices apply is not so complicated as to require law school training and years of practice; and that the number of lawyers living or practicing in some communities is too small to supply the number of judges needed, a situation aggravated by the ethics rules limiting the legal practices of the lawyers who are the part-time justices.

The arguments in favor of requiring that the justices be lawyers are that lawyers have been trained through law school education, years of practice and continuing legal education programs to know the law and to recognize lurking issues, and to internalize complex principles like evidentiary presumptions, due process, equal protection and burdens of proof; that they understand when they need to conduct research and how to do that; that they can converse with and challenge counsel who are arguing issues before them on a more sophisticated level than can lay judges; that they are taught and engage in following the rules of professional ethics, and that this experience becomes the training ground for following the rules of judicial conduct; that equal protection is denied when some litigants in the Justice Courts appear before lay justices while other Justice Court litigants and litigants in all other courts in New York appear before lawyer judges; that current law, even in courts of limited jurisdiction, is far more complicated now than it was when the Justice Court system was set up or last examined; and that the imposition of incarceration upon a defendant in a criminal case by a judge who lacks the traditional legal training and experience is not in accord with due process or public policy.

2. The Constitutional Issue in Criminal Cases.

In New York’s criminal cases the interpretation and application of CPL § 170.25 has been central to the analysis of the right to have a lawyer judge. CPL § 170.25 allows a defendant charged with a misdemeanor pending in a Town or Village Court to make a pretrial motion in a superior court for transfer of the case for presentation to a grand jury and indictment for a felony with consequent removal to a superior court. The defendant must show good cause to believe that the interests of justice require the removal. While the motivation for such a motion is that the town or village justice before whom the case is pending is not lawyer, under the
case law that circumstance does not constitute good cause. The superior court, in the exercise of its discretion, may order that the case be presented to the grand jury if the test of good cause is satisfied. If the defendant’s invocation of section 170.25 is successful and the defendant is indicted for a felony, the case remains in the superior court for proceedings that will be held before a lawyer judge (because all state-funded judges are lawyers). But if the crime charged in the indictment is a misdemeanor, the superior court can transfer the case back to the Town or Village Court under the State Constitution, Art. 6, § 19(b), where the judge may not be a lawyer. *Clute v. McGill*, 229 A.D.2d 70 (3d Dept.), lv. denied 229 N.Y.2d 803 (1997).

In *North v. Russell*, 427 U.S. 328 (1976), the United States Supreme Court was asked to decide whether there was a right to a trial judge who was a lawyer. North challenged his trial before a lay judge for driving while intoxicated. The motion was denied. North pleaded guilty and was sentenced to jail. On appeal he challenged the procedure that compelled him to have a lay judge preside at trial. Under Kentucky law a conviction before a lay judge, whether based on a plea or a verdict, could be appealed as of right to a lawyer judge for a *de novo* jury trial.

In *North*, the Supreme Court contrasted the differences between functions of a judge of general jurisdiction with complex issues, and the functions of a local police court trying drunk driver cases and traffic violations. However, said the Court, once “confinement is an available penalty, the process demands scrutiny.” 427 U.S. at 334. The Supreme Court concluded that it was not necessary to decide whether a lawyer judge was needed in the first instance because in Kentucky all defendants facing incarceration were afforded an absolute and unconditional opportunity to be tried *de novo* before a lawyer judge as if the first proceeding never occurred. While the Supreme Court did not require a first trial before a lawyer judge, it found that a trial before a lay judge did not violate the due process clause of the Federal Constitution as long as an accused who is initially tried before a lay Judge has an effective alternative of a criminal trial before a court with a traditionally law-trained Judge or Judges.

chief, menacing and trespass, crimes punishable by up to one year imprisonment. His case was in the Town Court before a lay judge. He filed a motion pursuant to § 170.25 in the County Court for a removal of the case to that Court. The County Court Judge denied removal concluding that § 170.25 required a showing of good cause for the transfer, which was determined in the discretion of the County Court Judge. The Court held the possibility of a prison sentence was not good cause. Charles was then tried in the Town Court before the lay justice and a jury. He was convicted of menacing and was adjudicated a youthful offender and placed on probation, violation of which could result in incarceration. The conviction was affirmed by the County Court (the reviewing court for Town and Village Court decisions).

On appeal to the Court of Appeals the defendant argued that the conviction was obtained in violation of due process because the trial was held before a lay judge. The now 24-year-old unsigned decision in Charles F. affirmed the conviction per curiam with three judges dissenting in an opinion written by the now Chief Judge Kaye. The majority held that there was no violation of the Federal Constitution and that North was satisfied. The Court wrote that § 170.25 provided the alternative required by North by “establishing a discretionary procedure to divest town and village courts, of, and remove to a superior court, the power to try and determine a criminal case.” 60 NY.2d at 477. The denial of Charles’ motion was correct, said the majority, because the mere allegation that a trial will be or has been before a lay judge, without more, does not justify a transfer even if incarceration is a possibility, and Charles made no other claim of possible prejudice nor provided any other reason for a change of judge either in his motion or his appeal.

In the dissenting opinion, Chief Judge Kaye wrote that defendants facing imprisonment “must have the option to be tried before law-trained Judges.” Id. at 478. This conclusion, said the Chief Judge, was compelled by North. Removal under § 170.25, wrote the Chief Judge, is not an effective alternative to a trial conducted by a lawyer judge unless § 170.25 is read to require removal upon the request of a defendant if incarceration was a possible result of conviction. The dissent found that the right to counsel loses force when a lay judge decides the motions made by counsel, and when there must be assurance that the jury is instructed properly and the evidence rules properly applied. No specific trial error need be claimed.

Given the current state of New York law, the Task Force urges the Legislature and the Executive to amend § 170.25 or enact new legislation to implement the Task Force recommendation.
3. Qualifications of a Judge.

In its discussion of the training of lay judges, the Action Report aptly sets out the purpose and consequences of a law school education:

While award of a law degree and admission to the New York Bar is no guarantee that each judge will be fluent in the complexities of every particular matter that may come before him or her ... there is nearly unanimous agreement that the unique education that law school provides can empower judges to discern, apply and shape the law in ways that non-attorneys can find difficult, if not impossible. The language of the law, the structure and standards of law, and the fundamental guarantees of constitutional and statutory rights conveyed by law are indispensable to our democratic society and thus inseparable from the fair administration of justice. All of these reasons command that all judges—however trained and regardless of the court in which they preside—must be proficient in the law.

Action Plan at 41.

The Action Plan recognizes the significance of law school training by noting the broad scope of knowledge required by a judge and the training needed, and noting that the one week training of lay judges given in the past was insufficient:

There is simply too much for non-attorney justices to learn—civil procedure, criminal procedure, substantive criminal law, the U.S. and New York State constitutional law of search and seizure, the U.S. and New York State constitutional law of right to counsel, admission of evidence, constitutional and statutory jury selection procedures, burdens of proof, criminal sentencing, proper interaction with law enforcement and State agencies, indigency screening for appointed counsel, information technology, judicial ethics, court administration, the sociology and penology of addiction and abuse, as well as a panoply of other cutting-edge topical issues of law and justice — for a single week of basic training to suffice, if it ever could.

Action Plan at 44.

While the Action Plan sets out an expanded training program for lay justices, including basic and advanced courses, it is overly optimistic to
believe that this training will enable them to reason intuitively from fundamental principles of law learned and applied over three years of law school, and to use, by analogy, previously studied subjects to learn other areas of the law and to resolve new issues as they arise in the regular calendar of cases. The training program is not the equivalent of law school, law practice, and continuing legal education. The work of a lay justice, therefore, should be limited consistent with his or her training.

The significance of being a lay judge is raised when the lay judge asks a lawyer with the Resource Center (see supra at 27) for assistance with a legal problem. The Resource Center has lawyers available to give legal advice to the justices when they request it. The question is whether the lay judge is in a position to evaluate the merits of an opinion rendered by the Resource Center lawyer and make an independent assessment as to how the legal issue should be resolved. If the lawyer has been trained in the traditional way and the justice has not, there is no sufficient guarantee that it will be the justice who decides the issue.

Similar concerns apply with respect to ethical canons and rules for judicial conduct. Lawyers, in addition to law-school training, are required to pass the Multistate Professional Responsibility Examination and participate in continuing legal education ethics programs. They have the benefit of discussions of ethics issues that arise virtually every day. This attention by lawyers to the ethics rules provides training for the understanding and application of the rules of judicial conduct should they become judges. On the other hand, lay town and village justices do not share these experiences. Further, the geographic isolation of many lay town and village justices and their part time status are additional factors depriving the justices of ready opportunities to discuss ethics issues.


The legal issues that come before the courts have increased in complexity. The enhanced sanctions that attach to a conviction, even for a misdemeanor, demand a high level of expertise to prevent miscarriage of justice.

Prime examples of this complexity are factually and legally complex pretrial suppression motions. Literally hundreds of decisions are rendered each year on defendants’ motions to suppress physical evidence taken as a result of an illegal stop, detention or arrest, or the fruit of other alleged illegal police conduct; on motions to suppress statements claimed to have been taken in violation of the right to counsel, the right to remain silent, or as the fruit of prior illegal conduct; on motions to suppress identifica-
The suppression testimony alleged to be the result of suggestive or otherwise illegal law enforcement practices, or the fruit of some other official illegality. The applicable principles applicable are derived from the Federal Constitution’s Fourth, Fifth, and Sixth Amendments and the New York State constitutional analogues, as well as the many appellate and trial court opinions of state and federal courts. There are also legal issues of whether there is standing to raise the claims or whether a particular issue is otherwise properly raised by the motion papers. The judge must be sure there is a proper disclosure to the defense of police records. He or she must recognize shifting burdens of proof. Of course, the judge must hold hearings to elicit information about the events in question through the testimony of witnesses and the introduction of other evidence, must make credibility determinations and findings of fact, and must decide the merits of the legal claims. The decisions in the suppression hearings might involve layers of analysis; they are properly often subjects of written opinions.

The body of law protecting the rights of those accused has emerged over the past several decades. Since the seminal cases, e.g. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 364 U.S. 436 (1966), there have been hundreds of decisions adding amazing complexity to the law. The heavily nuanced reasoning involved in these many cases is manifest from even the most cursory examination of the texts used by lawyers and judges to prepare arguments and opinions. See Barry Kamins, *New York Search and Seizure*, (Bender/LexisNexis 2007).

As for trial issues, *Batson v. Kentucky*, 476 U.S. 79 (1986), has revolutionized the procedures used to select jurors and the protection of the jurors' rights to serve. Careful and tactful questioning about highly sensitive issues, such as membership in a racial, ethnic or religious group, are part of the process needed to determine if there is a *prima facie* case of improper use of peremptory challenges to potential jurors.

Elements of many crimes defined both in the Penal Law and other statutes require nuanced analysis of evidence and instructions in a jury trial. These examples are but a few of a large number. The point is that the current legal landscape is more complicated than ever. The breath of possible legal subjects to arise in handling cases as a judge is apparent from the list of courses set out in the Resource Center list of courses, which now includes about 55 subjects.

The complexity of the law is matched by the consequences faced by a defendant who pleads guilty or receives a guilty verdict. While at the moment it is unclear which consequences must be stated on the record by a judge who takes a plea, it is likely that the judge will have to understand, explain and discuss them with lawyers regarding possible case disposition. These consequences affect immigration status; right to public benefits including rent supplements and housing, employment, licensing, sex offender registration, and use of a misdemeanor conviction as a predicate offense in other jurisdictions, especially in the federal courts, if there is a later conviction. The New York State Bar Association Special Committee on Collateral Consequences of Criminal Proceedings lists and discusses the consequences in its 2006 Report, *Reentry and Reintegration, the Road to Public Safety* (May 2006).

The need for justices who are lawyers is apparent. They clearly are better able to learn and comprehend the subject matter. In light of the judge's critical role in the criminal justice system, the parties should be entitled as of right to a lawyer justice or a judge for pretrial hearings or trial and for all proceedings involving a misdemeanor.

5. Resolving Legal Issues

Interviews with, and responses to, Task Force questionnaires from lawyers with broad and lengthy experience in criminal cases before the justice courts largely reflect concern that the lay justices do not have a grasp of the legal issues raised by the cases and have difficulty understanding and applying the legal rules, especially the rules of evidence, at both non-jury and jury trials (which are authorized for all misdemeanors outside of New York City. CPL § 340.40(2)).
Defense lawyers have reported the following (the materials not in quotes are based on interviewers' notes):

The justices do not have an “intuitive” sense of the reasoning process and no opportunity to develop that second sense. There is a dynamic that is absent from the discussion when the judge is not a lawyer.

* * *

Non-lawyer justices tend to miss the constitutional issues. Suppression issues are usually too difficult for the justice to understand and they defer to the district attorney. Justices are weak on the law. Both lawyers and non lawyers do not know the rules of evidence, but lawyers are better prepared to understand.

* * *

Justices expect that criminal cases will be resolved by plea. Justices are unprepared to try cases and do not know the rules of evidence. The justices seek help from the District Attorney who controls the courtroom. A zealous defense overwhelms and angers the justice who does not understand the job of counsel.

* * *

“Lay judges do their best, but do not have the legal training or background to handle cases `legally’ as opposed to `morally’.”

* * *

A twenty year judicial veteran found a defendant guilty after denying a suppression hearing.

* * *

Justices should be trained in the speedy trial issues.

* * *

Judges read the standard charges and do not often use the charges given by counsel.

* * *

To the question whether the rules of evidence are followed “as
well as a town justice with no legal training can – No”. The CPL and CPLR are followed, “but too often [there are] fly by seats decisions by a non-legally trained judge.”

* * *

“Only problems I’ve run into are with justices who are not attorneys. They are unfamiliar with the law and rely on prosecuting/arresting officers. ... [One justice] lets village officers run court. ... Should be a requirement to be attorney or pass some sort of competency test.”

* * *

It is important to note that some of the attorneys who responded to the questionnaires expressed positive opinions of the courts and believe that “the judges are hardworking honest jurists. The attacks on these courts are for the most part unjustified and overblown.”

District attorneys, including those with long tenure, expressed opinions similar to those of the experienced defense counsel:

“The justices do not seem to know the very basic procedural elements to a criminal proceeding, including a proper allocution in a guilty plea.” “No knowledge of evidentiary rules.” “There is also an obvious need for trial training with a heavy emphasis on admissibility of evidence.”

* * *

A problem in practicing in the Justice Courts is the “lack of knowledge regarding procedures and issues of law in many courts.”

* * *

“Poorly trained justices-not necessarily because the training offered is bad but because many lay judges aren’t able to grasp a lot of what they are taught and the training is not enough to make up for the lack of a law degree ...The legal issues are often lost on lay justices because they just fail to understand them. ... Fear by many of the justices of conducting jury trials, resulting in cases sitting until they are so old they can no longer be prosecuted... “Justices who lack an understanding of the rules of evidence.”...
“Justices have lack of knowledge regarding the law.”

Attorneys are needed to preside in misdemeanor cases; non-lawyer judges do not understand the procedure or the law. At trials the justices do not know the rules of evidence and adjourn the cases to avoid trials or refuse to give trials. The judge dismissed hundreds of cases for violation of the speedy trial rules although the adjournments were requested by the defense. No defendant takes a plea with a proper allocution. The justices are not aware of driver’s license suspension and DMV paperwork required. Judges refuse to consider the range of possible sentences.

The justices do not understand the rules of evidence and their application and do not know how to research the issues. The justices largely rely on the prosecutor’s view. The justices do not take pleas with proper allocations explaining the conduct involved. There is no way to know if the elements of the crime are admitted and the justice relies on the assumption that the defendant is guilty. The justices do not tell the defendants the implications of their pleas. Among examples of the weakness in understanding the law the prosecutor noted: a justice asked the prosecutor if the justice’s previous denial of pretrial motions was proper and a justice refused to allow a child to be called as witness because the justice claimed to know from personal knowledge that the child had a problem telling the truth.

“There are few suppression hearings and the justices are not competent to hear them.” The justices cannot “get up to speed” on the evidence rules for a trial.

Decisions of the Commission on Judicial Conduct support the experiences articulated by the lawyers. In the past three years alone, the Commission issued the following relevant decisions: In Matter of Edwards, 2008 Annual Report ___ (July 19, 2007 Comm. on Jud. Conduct) (a lay justice,

5. The decisions and opinions can be found in printable form at the Commission’s website, www.scjc.state.ny.us.
sitting since 1964, awarded specific performance of a contract in a small
claims case when the jurisdiction of the court extended only to granting
damages); In Matter of Hewlett, 2007 Annual Report ___ (May 1, 2006 Comm.
on Jud. Conduct) (lay justice granted default judgments without docu-
mentation of default); In Matter of Greaney, 2007 Annual Report ___ (Dec.
18, 2006 Comm. on Jud. Conduct) (justice failed to effectuate a defendant’s
right to an attorney; attempted to elicit incriminating statements from
the defendant; retained the defendant in jail for 12 days without coun-
on Jud. Conduct) (lay justice failed to understand and apply the law
applicable to contempt proceeding); In Matter of Kennedy, 2005 Annual
Report 196 (Comm. on Jud. Conduct) (parties agreed by stipulation that
the justice released two people charged with felonies on their own recogni-
zance without notice to the prosecutor and refused to conduct arraign-
ments in four cases after the police arrested defendants based on the justice’s
warrants but instead ordered release); In Matter of Gori, 2005 Annual
Report 168 (Comm. on Jud. Conduct) (without any authority, a justice in-
terrogated a relative of the defendant and examined her driver’s license
when she drove the defendant, whose license was suspended, to court); In
Matter of Pisaturo, 2005 Annual Report 228 (Comm. on Jud. Conduct) (justice
imposed fines in VTL cases based on the offenses charged and not based
on the crime of conviction); In Matter of Wright, 2005 Annual Report 244
(Comm. on Jud. Conduct) (justice announced he would not enforce speed
limits on certain parts of a road because he believed the speed limit signs
were illegally posted); In Matter of Barringer, 2005 Annual Report 97 (Comm.
on Jud. Conduct) (justice granted adjournments in contemplation of dis-
missal without the consent of the prosecutor and imposed fines lower
than required by law).

6. Rules Governing Judicial Conduct
Prosecutors have noted the high frequency of ex parte communications
by the justices, and that decisions were made based on such commu-
nications. In responses to Task Force questionnaires and in interviews,
the comments were virtually uniform. Here are examples:

“There is contact with the witnesses because everyone knows
everyone else.”

* * *

“Ex parte communications happen. How frequently, and on what
subjects, depends on the justice. Some justices will ask permission and use alternate phone calls relaying to each lawyer what the other has said. In some, the conversations are not known until much later. In most instances, the lawyers are understanding and will disclose the conversation.”

* * *

“Frequent ex parte communications which are exacerbated by the number of courts versus the staffing levels in prosecutors offices.”

Many decisions of the Commission on Judicial Conduct illustrate the frequency and significance of ex parte communications involving lay town and village justices. As the Commission also recognized in its decisions, these ex parte communications affect the decision making process when litigants are not given notice of or an opportunity to respond to the undisclosed information before the justice. See, e.g., In Matter of Marshall, 2008 Annual Report ___ (July 19, 2007 Comm. on Jud. Conduct), sanction approved, ___ N.Y.3d ___ (No. 106 July 2, 2007) (justice, sitting since 1999, had ex parte communications with the defendants in four building code violations cases and then dismissed the cases in advance of the adjournment date without informing the town attorney or codes inspector. The justice was also found to have altered the records to show an adjourn date. The Commission found that even without the change in records, “her conduct violated well-established ethical standards. ...”); In Matter of Merrill, 2008 Annual Report ___ (May 14, 2007 Comm. on Jud. Conduct) (the Commission found that a justice, sitting since 1989, had improperly engaged in ex parte calls with the complainant’s attorney and the sheriff’s office proposing an interim settlement in a case between the complainant and the justice’s neighbor); In Matter of Edwards, 2008 Annual Report ___ (July 19, 2007 Comm. on Jud. Conduct) (justice who was involved in ex parte communications refused to allow a response from the adverse party or permit cross-examination. The same justice had been sanctioned in 1986 for ex parte communications on behalf of his son. In Matter of Edwards 67 N.Y.2d 153 (1986)); In Matter of Valcich, 2008 Annual Report ___ (August 27, 2007 Comm. on Jud. Conduct) (ex parte communications with witness; justice knew litigants, but did not disclose that); In Matter of LaLonde, 2007 Annual Report ___ (Feb. 14, 2006 Comm. on Jud. Conduct) (justice dismissed VTL charge without notice to prosecutor); In Matter of Hewlett, 2007 Annual Report ___ (May 1, 2006 Comm. on Jud. Conduct) (justice
7. The Opportunity to Appear Before a Lawyer Justice or Judge in a Misdemeanor Case

a. Summary of Recommendation.

Based on the foregoing, the Task Force recommends adoption of statutory changes to provide defendants with the opportunity to have their case heard by a judge who is a lawyer where there is a possibility of a custodial sentence of more than 15 days and in all cases in which a pretrial suppression hearing is requested by the defense. The use of misdemeanors to denote the instances in which lawyer judges should hear cases is logical under New York law. First, the penalties for misdemeanors include a possible sentence of more than 15 days’ incarceration. Second, jury trials are authorized for all misdemeanors, but not lesser offenses. CPL §§ 340.40(1), (2); VTL § 155. Therefore, a defendant’s request for a lawyer judge in a misdemeanor case involving a possible custodial sentence of 15 days or more would be triggered by either a request for a jury trial (in which case transfer to a lawyer-judge would be automatic) or a request for a judge who is a lawyer where there is no jury.

The Task Force also believes that lawyer judges should handle all cases in which a request is made for a pretrial suppression hearing, regardless of the sentence to be imposed, because of the complexity of the applicable law.

b. The Misdemeanor Sentencing Scheme Provides the Framework for Having a Lawyer Justice or Judge in All Cases with a Possible Custodial Sentence of More than 15 days.

Misdemeanors are classified as A, B, and unclassified, PL § 55.05(2),

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and those defined in statutes other than the Penal Law that are without classification are treated as A misdemeanors. PL § 55.10(2)(b). A misdemeanor is an offense other than a traffic infraction for which a term of imprisonment in excess of 15 days up to one year can be imposed. PL §§ 10.00(4); 55.10(2)(c). “A” misdemeanors are punishable by imprisonment of up to one year; “B” misdemeanors by a term of imprisonment of up to three months; and unclassified misdemeanors by the term set out in the law defining the crimes. PL § 70.15(1),(2),(3). The Recommendation includes all misdemeanors set out in both the Penal Law and other statutes and, as a consequence, every case that includes the possibility of incarceration of more than 15 days. Excluded from the Recommendation are Penal Law violations and any offense defined in a statute other than the Penal Law for which a custodial sentence of up to 15 days is authorized. PL §§ 55.10(3)(a); 10.00(3).

The Vehicle and Traffic Law has its own definitional system. A violation of the Vehicle and Traffic Law, or any law, ordinance, order, rule, or regulation regulating traffic, is a traffic infraction unless stated to be a felony or a misdemeanor by the Vehicle and Traffic Law or another law of the State. Traffic infractions are processed in the same way as are misdemeanors (although there is no right to a jury trial), but a traffic infraction is not a crime and a sanction is not penal.

Sanctions for Vehicle and Traffic Law misdemeanors are set out generally unless the section defining the illegal conduct also includes the punishment. VTL § 1801. The custodial sanctions for misdemeanors are up to 30 days for a first offense; up to 90 days for a second offense committed within 180 days of the first; and up to 180 days for a third offense when all three were committed within 180 days. Id. Under the Recommendation, all of these misdemeanors would be subject to a request for a lawyer judge or a mandatory assignment of a lawyer judge if the case is to go to a jury trial. 6

c. Result of the Recommendation.

By selecting jury trials and misdemeanors as the triggers for having a lawyer justice or judge preside, the Task Force Recommendation seeks to include almost every instance in which possible incarceration is more than 15 days. On the other hand, cases with possible sentence of up to 15 days.

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6. Misdemeanors specifically set out in the Vehicle and Traffic Law and within the scope of the Recommendation include tampering with signs relating to vehicular traffic on bridges, §1629(2); traveling on traffic prohibited bridge, §1629(3); failure to exchange information after an accident involving an injury, § 600(2); failure to report an accident, § 605(2); aggravated unlicensed operation of a vehicle, §§ 511(1) and (2).
would remain before lay justices. The Task Force believed the likelihood of a jail sentence in these cases to be minimal. Further, the Task Force could not estimate how many cases with possible sentences of less than 15 days would be involved because they are not fingerprintable and not in a central system (see supra at 13). If they were included within the Recommendation, it might be impossible to effectuate the Recommendation because of the size of the caseload.

8. New Legislation
The recommendation requires new legislation establishing automatic transfer to a lawyer justice or judge for a jury trial or a pretrial suppression hearing, or on request where the charge is a misdemeanor and no jury trial is sought. CPLR § 170.25 should be modified accordingly or a new section enacted. The City Bar will gladly cooperate in the drafting of such legislation.

E. DISCUSSION OF RECOMMENDATION 2
The Task Force recommends that newly amended Uniform Justice Court Act § 106, Session Laws 2007, Chapter 321, and rules promulgated pursuant to that section, be applied to facilitate the transfer of cases from town and village lay justices to town and village lawyer justices or to judges in order to effectuate Recommendation 1.

To enable counsel to exercise the option of having a lawyer justice or a judge preside it might be necessary to transfer cases from a lay justice to a lawyer justice or to a judge of another court. Transfer will be needed in counties in which there are no lawyer justices or too few to meet the caseload needs. (see supra at 10).

The provisions of a newly enacted amendment to UJCA § 106 provide the means to transfer misdemeanor cases to judges or lawyer justices. The legislation (Laws 2007 ch. 321, enacted July 17, 2007) authorizes the temporary assignment to a justice court of a justice of another Town or Village Court, or a judge of a City Court, who resides in the same or an adjoining county.

This statute is intended to provide assistance to Justice Courts where there are backlogs, complex cases, unforeseen conflicts, or other local needs. The statute also provides that the cost of the assignment shall be paid by the state so that political and local issues will not prevent or delay aid to the justice courts where assistance is important to their work. See Sponsor’s Memo to A07374 (2007).

Pursuant to this legislation, a lawyer justice or judge from the same
or an adjoining county can be transferred to preside over cases or conduct trials when a lawyer judge is required. This enables the counties in which there is no lawyer justice, (e.g. Oneida, Fulton, Chenango, and Tioga) and no City Court Judge, to borrow a lawyer justice as needed from an adjoining county. Each of the counties set out above adjoins either four or five other counties from which a transfer could be made. One suggested mechanism for implementing the legislation is the use of a “hub justice” before whom the cases would come or who could transfer the cases to designated lawyer justices.

If the new statute is not applied to allow the needed transfer, or if no lawyer justice or judge would be available despite a permissible transfer from an adjoining county, further amendment to UJCA § 106 should be undertaken. The City Bar Association will be available to assist in the drafting.

F. DISCUSSION OF RECOMMENDATIONS 3, 4 and 5

RECOMMENDATION 3

The Task Force recommends that the Office of Court Administration issue plain language forms for pleading in summary proceedings for eviction that are comprehensible to the litigants and require disclosure in the eviction petition of special circumstances, including the presence of an immovable mobile home, building code violations, government rent subsidies, and possible violations of the warranty of habitability.

RECOMMENDATION 4

The Task Force recommends that Town and Village Justices be provided with intensive training on the procedural and substantive law applicable to summary proceeding eviction cases.

RECOMMENDATION 5

The Task Force recommends that summary proceedings in eviction cases be decided by lawyer justices or judges when the respondent is pro se and when, on review of the plain language pleadings, there is disclosed the presence of (1) an immovable mobile home, (2) disrepair of the premises, raising a question as to whether there is a violation of the warranty of habitability, (3) pending building code violations, or (4) government rent subsidies.

Task Force recommendations 3, 4, and 5 are concerned with summary proceedings in eviction cases. The Justice Courts have concurrent jurisdiction over these cases with County Courts, City Courts with civil jurisdic-
tion, and District Courts where they exist. Real Property Actions and Pro-
cedures Law § 701(RPAPL). In these summary proceedings, courts have ju-
risdiction to hear and decide claims to recover real property, including
trailer park lots for placing mobile homes; to remove tenants; and to
enter judgment for rent due. UJCA § 204; 29A Part 2 McKinney, Judiciary
Law, Siegel, Practice Commentaries to UJCA § 204 at 309 (1989).

These proceedings are initiated by landlords generally as a consequence
of rent non-payment, but there can be other claimed grounds for evic-
tion. The tenant-respondent, who usually appears pro se because he or
she cannot afford a lawyer and legal services attorneys are in short sup-
ply, is entitled to present defenses to the asserted non-payment. The de-
fenses are designed to protect the tenant's interest in housing that is safe
and sanitary, the tenant's rights to remain on the leased property, and to
retain a government rent subsidy or the tenant's ownership interest in a
trailer situated on the manufactured home park lot.

In aid of these rights, the tenant is afforded a non-waivable implied
warranty of habitability. Real Property Law §§ 235-b and 233(m). In Park
West Mgt. v. Mitchell, 47 N.Y.2d 316 (1979), the Court of Appeals explained
the warranty is needed to protect tenants and to provide a basis for comp-
pelling landlords to make repairs. A lease, said the Court, is a sale of shel-
ter and services by a landlord who implicitly warrants that the premises is
fit for human habitation, that the condition of the premises is in accord
with the parties' intended use of the property, and that the tenants are
not subject to any conditions endangering or detrimental to their lives,
safety, or health. Id. at 325. If the warranty is breached the tenant may
withhold rent; the lease is not terminated by the withholding and no
retaliatory conduct can be undertaken. In the view of some commenta-
tors, non-payment of rent is the only meaningful way to enforce the
warranty of habitability, and eliminating rent withholding is against public
policy. 49 McKinney Real Property Law, deWinter & Loeb, Practice Commen-

As part of the tenant's legal response to a petition for eviction, he or
she may seek a reduction in the rent due for the contested period if the
residence was affected by the condition of the premises. The tenant can
also raise the impact of eviction on government rent subsidies and on the
ownership interest he or she may have in a trailer that is in a park lot but
is immovable and therefore lost upon eviction. According to the testi-
mony given at hearings dealing with Town and Village Courts held in
December, 2006, by the New York Assembly Standing Committees on Judi-
ciary and Codes, the town and village justices are largely unaware of these
defenses and protections and of the need to hold hearings to make fact findings.

Further, the testimony about the forms used for pleading in the proceedings as well as a sample of the forms used in at least some jurisdictions, show that the forms are difficult for a lay person to understand. For example, the notice of petition to recover real property tells the pro se tenant to "take notice that your answer may set forth any defense or counterclaim you may have against the petitioner" and to "take notice also that if you shall fail at such time to interpose and establish any defense that you may have to the allegations in the petition, you may be precluded from asserting such defenses or the claim on which it is based in any other action or procedure."

It cannot be assumed that pro se defendants about to be evicted are likely to understand what are defenses and counterclaims to the petition and how to express them. The form leaves unclear whether the tenant must relate information in writing or orally and when that must be done.

The seriousness of eviction cases is self-evident. Not only are the tenant and his or her family affected by a breach of the warranty of habitability or by local code violations that, alone or in combination, constitute a breach of warranty or justify rent abatement, but also the larger community is distressed by the failure to maintain rental premises and low income families rotate in and out of defective housing stock with emergency housing becoming the default residence.

The Commission on Judicial Conduct has issued several decisions which underscore the need for expertise in these cases. In Matter of Ellis, 2008 Annual Report ___ (July 24, 2007 Comm. on Jud. Conduct), the justice, based on ex parte communications, first issued a notice terminating a non-existent tenancy, then issued a warrant of eviction before giving the tenant an opportunity to get a lawyer, and then issued a summons to the tenant to pay rent and taxes. The Commission noted that the justice was biased against the tenant and used a religious epithet against him. Only the intervention of a lawyer prevented a summary eviction. The justice, who began sitting in 1990, explained that he had never handled a case involving evictions or installment land contracts and was unfamiliar with the proceedings.

In Matter of Merrill, 1999 Annual Report 109 (Comm. on Jud. Conduct), the justice assisted the landowner in encouraging the tenant to leave the property, and then presided over the eviction proceeding when it came into the court system. See also In Matter of Holmes, 1998 Annual Report 139 (Comm. on Jud. Conduct) (judge issued a warrant of eviction
based on an ex parte communication); In Matter of Little, 1988 Annual Report 191 (Comm. on Jud. Conduct) (warrant of eviction issued without hearing and judgment).

The recommendation of the Task Force has three aspects: (1) the use of pleadings that will reveal the circumstances underlying a given dispute, (2) thereby enabling a well trained justice, whether or not a lawyer, to identify pertinent issues and, depending on the issues, (3) to refer the case to a lawyer justice or judge for resolution. This fits neatly into the existing statutory plan which already includes concurrent jurisdiction. RPAPL § 701.

G. DISCUSSION OF RECOMMENDATION 6

RECOMMENDATION 6

The Task Force recommends that there be further study of civil cases within the jurisdiction of the Town and Village Courts to determine whether any additional civil matters present the types of issues that should be heard by lawyer justices or judges, whether there is additional need for plain language forms, and whether intensive training is needed on any specific areas of procedural or substantive law.

In the course of its study of Town and Village Courts, the Task Force learned little about how civil cases pending before those courts are processed. It is unknown to the Task Force whether there are issues in connection with civil cases that should be heard by lawyer justices, whether the use of plain language pleadings should be encouraged, or whether additional training is needed by justices in any specific areas of law. Accordingly, the Task Force urges continued efforts to learn about these cases.

H. DISCUSSION OF RECOMMENDATIONS 7 and 8

RECOMMENDATION 7

The Task Force recommends that each town examine and determine whether consolidation of town courts would be beneficial to the town and the town court and, where appropriate, pursue consolidation pursuant to Session Laws of 2007, Chapter 237 (amending Uniform Justice Court Act § 106-a).

RECOMMENDATION 8

The Task Force recommends that villages examine and determine whether abolition of the office of village justice would benefit the village and the village court and, where appropriate, initiate local legislation pursuant to Village Law 3-301(2)(a), or, if an inconsistent charter provision pre-exists
in the Village Law, seek state legislation pursuant to Article 17(b) of the New York Constitution.\(^7\)

The law has long allowed the reduction of the number of town courts by their merger and the abolition of village judgeships so village courts merge with town courts having concurrent jurisdiction. The Task Force recommends consideration and implementation of consolidation (1) to reduce the number of needed justices, making it more likely that lawyers will be available to fill the judgeships at enhanced compensation; (2) to make possible the hiring of trained and fairly compensated non-judicial personnel who undertake record-keeping, court management, and fiscal responsibilities; (3) to reduce the cost of physical plant, security, and technology; and (4) to help the government agencies and institutional defenders that participate in court proceedings to maintain proper staffing of the courts.

1. Moving to Consolidation

In the last year there has been increasing interest in merging and consolidating the services of towns and villages as well as their courts largely for the purpose of saving money. The availability of funds from the State through the Shared Municipal Services awards for studying consolidation\(^8\) and of guidance about the feasibility of government agency mergers,\(^9\) has resulted in merger efforts of local government agencies throughout the State. In April 2007, the Governor established the 15-member Commission on Local Government Efficiency and Competitiveness. The Commission is supported by the Departments of State and Education, and the Comptroller, among others, and its purpose is to explore issues of government merger, consolidation, regionalization, and shared services. The Commission will issue its report by April 15, 2008. In an early publication on local initiatives by counties, the Commission reported that Justice Court merger or consolidation is being considered by government officials in eight counties: Broome, Chemung, Franklin, Genesee, Jefferson, Schuyler, St. Lawrence, and Tompkins. [http://www.nyslocalgov.org/local_initiatives_type.asp#justice](http://www.nyslocalgov.org/local_initiatives_type.asp#justice).

In October 2006, Chautauqua County was reported to be consider-

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\(^9\) Intermunicipal Cooperation and Consolidation (Office of the State Comptroller, 2003). There are 2,300 local governments in New York State, including counties, towns, villages and school districts. Id. at 1. The total number of government agencies providing services is obviously substantially greater.
ing how to merge its 27 towns, 15 villages and two cities. The Village of Windsor was reported to be considering dissolution. In December, 2006, the Village of Johnson City was reported having prepared a petition to dissolve into the Town of Union; the Village of Medina abolished its court and considered a merger with the newly consolidated Town Courts of Shelby and Ridgeway; the Town of Southeast asked the Village of Brewster to study the consolidation of services; the Village of Baldwinsville was studying a merger with the Towns of Lysander and Van Buren. In January, 2007, the Village of Cato was expected to dissolve its court and the Village of Allegany was studying merger with the Town of Allegany. (Information from Beckman Seachrist.com/blog.) In Orleans, two Village Courts, Albion and Medina, were taken over by the town courts. On September 8, 2007, the Press Republican of Plattsburgh reported that the Town and Village of Malone hoped to merge their courts. See Buffalo News, September 28, 2007 opinion editorial supporting consolidation of government services to reduce costs. On the other hand, one village, Monroe, reinstituted its Village Court after a dispute with the town.

In July, 2007, the Legislature and the Governor enacted legislation to make it possible for more than two towns to consolidate their courts. 2007 Sess. Laws ch. 237. UJCA 106-a was amended to allow the town boards of two or more (rather than just two) towns that form a contiguous geographic area within the same county to establish a single Town Court with justices to be elected from each of the towns. The impact of the statute is to allow a greater reduction in the number of courts than was possible under the previous statute.

Village Law 3-301(2)(a) already authorized the village electors to abolish a village judgeship which would result in a transfer of cases to the town court of the town in which the village sits.

2. Impact of the Action Plan

The Action Plan’s concern with the poor conditions of locations used as courtrooms for the Justice Courts (which include garages, firehouses and buildings with other government departments) and with the costs of proper security, including security personnel (see supra at 16) for the courts, has made towns and villages aware of the expense required to put their court facilities in good repair with appropriate security devices. Maintaining the huge number of courts presently in existence is wasteful of both State and local government resources.

Under the Action Plan, town and village courts are to be given new technology and the training to use that equipment. This includes equip-
ment for recording and preserving court proceedings and testimony. The cost of these advances will be wasted if the courts given the technology are themselves not needed or if the equipment supplied is not fully used.

Further, under the Action Plan, an expanded and more intense training program for lay judges will be created. The costs of training include the reimbursement to the justices of the costs of attending the programs as well as payment for the lecturers and their physical sites. These costs are likely to be reduced if there is consolidation and a reduction in the number of justices.

Finally, if the Resource Center is to be effective in helping the justices it should be restructured. The Task Force Recommendations Relating to Assisting Town and Village Justices elaborates on this issue and makes extensive suggestions. It is a costly endeavor. Consolidation of courts is likely to reduce these costs.

3. The Influence of the Comptroller

The New York State Comptroller has urged consolidation of Town Courts and the merger of village court jurisdiction into that of Town Courts. The Comptroller has a constitutional and statutory role in the oversight of the financial operations of the Town and Village Courts. He conducts audits, provides information and technical assistance on record-keeping and fiscal duties of the justices and non-judicial personnel, and, through the Justice Court Fund, collects fees, fines, surcharges and other revenue from the courts.

In 2003, the Comptroller wrote of the courts that were the subject of a study exploring ways to save money:

We estimate that local governments save about $126,000 annually, if operations in these 11 courts were consolidated. In some cases savings would occur if the number of justices were reduced from two to one. In other cases, savings would result if village courts were eliminated and their operations consolidated into town courts.


In a 2005 Comptroller’s report, where the concern was with internal monitoring of records and loss of funds as well as accounting errors by the justices, it is stated:

Another option would be to combine Courts to create fewer, larger Courts. For example, Village courts could be combined
with Town Courts, or Courts with minimal activity could be combined with Courts of neighboring localities. This option can be used now at the local level, and as we noted in an earlier audit, such consolidations also can reduce operating expenses. For example, if all Courts with annual revenues of less than $20,000 were combined to form larger Courts, 310 very small Courts could be eliminated. Larger Courts could implement more segregation of duties, and reducing the number of smaller courts would allow for more effective State oversight. Although there are service implications to such changes, there also are ways to mitigate these issues. For example, typically, there is a “Court night” that occurs one night each week in a town. Combined Courts could alternate the location of the court nights between Towns to maintain the advantages of having the local Court System.


At the December, 2006 State Assembly hearings on Town and Village Courts, the Comptroller stated that audits of the Town and Village Courts had uncovered fiscal mismanagement. The problems noted by the Comptroller’s statement included inadequate internal controls over performance of duties, a lack of oversight, and poorly trained staff. The Comptroller reported in a written submission that many of the problems occurred because the operations of many of the courts were small and there were too few staff to segregate duties and allow internal monitoring, and because training of staff was inadequate. The Comptroller recommended systemic reforms in the “large and decentralized justice court system,” including the assignment of a court clerk to each court, the sharing of resources including technology, improved local municipality oversight, and training for both judicial and non-judicial personnel. Significantly, the Comptroller recommended continuing consideration of consolidation and dissolution of smaller courts. The Comptroller concluded “It is time to examine ways of facilitating consolidation and shared resources for local governments [which] chose to take this step with their courts. ...Triggers could be put in place to require consolidation review when the size or activity of a particular justice court falls below certain thresholds.” (Quotes from the Comptroller’s Submission to the Assembly.)

4. Litigants Before the Courts

The need for consolidation is apparent from the responses to Task Force questionnaires and interviews with district attorneys and defense
counsel. As noted above, the courts set their schedules for daytime or evenings and some begin the sessions at 6:00 p.m. or later. Many defense attorneys supported consolidation of town courts and merger of town and village courts. Some did not because they believed their clients would have problems getting to court due to the lack of public transportation. Others countered that driving to court is not unlike driving to other service providers.

Prosecutors largely supported consolidation of courts. They explained that an assistant district attorney does not appear in a Town or Village Court on each regularly scheduled session. Rather an assistant appears once a week or once a month on a specific schedule. Some reported that there are not enough assistants to cover all the courts that are in session at the same time. This problem is exacerbated in those counties with long distances between courts. In some counties, assistants appear by telephone. Whether there are enough prosecutors available is a function of the county budget, which funds district attorney’s offices.

Prosecutors’ reasons for supporting consolidation and merger have been expressed as:

“Consolidation would probably be helpful. Maybe a single justice court within the county which could be utilized for all trials would be helpful.”

***

[The present system results in] “Lost resources due to travel time and [the] costs of travel and down time”

***

“Too many courts, to few prosecutors, This can be especially problematic when trying to meet time deadlines for preliminary hearings....Frequent ex parte communications which are exacerbated by the number of courts verses the staffing levels in prosecutors officers.

***

“Cannot eliminate non-lawyers unless use a district court system. Prosecutor cannot cover all the courts, especially with taking over VTLs and increase in indictments.”
The number of courts results in an “inefficient use of government resources (i.e. transportation of prisoners, traveling of ADA, PD, Defense Bar, witnesses to several different courts).”

“With the current case load, the system does not work. The prosecutors cannot cover all the courts, especially the traffic courts, which as noted required 60 court appearances a month.”

“Consolidation would make both personnel coverage and so-called ‘man hours’ spent and travel expenses be much more manageable.”

The cost saving and efficiency features of a reduced number of courts are not new to the discussion. In 1996, the County Executive of Rockland County appointed a District Court Committee, chaired by the now Rockland County District Attorney, to study the impact of a change from 22 Town and Village Courts to a District Court system. After extensive research, the Final Report of the Committee concluded that the District Court system would allow faster processing of cases, less travel time for participants in the proceedings, faster trials, more efficient use of attorney and law enforcement time, and law secretaries for the judges. The Report estimated that the community would save $600,000 a year, with all personnel costs paid by the State. The estimated savings to the sheriff’s office would be $140,000 due to reduced transport of prisoners, and elimination of security duties in the courtroom. Even if consolidation of courts would not save as much as a District Court system, the opinion of the experts is that there would be substantial savings and greater efficiency if consolidation and merger were to be implemented.

5. The Social Service Function

An interview with the State Commissioner of Probation and Correctional Alternatives disclosed that the multitude of courts prevents programs providing alternatives to incarceration or in lieu of bail from bringing services to many people. The unavailability of program staff, like OASAS,\textsuperscript{10}

\textsuperscript{10} New York State Office of Alcoholism and Substance Abuse Services under the Mental Health Law.
to cover the many courts prevents immediate assessments for drug and alcohol use and mental health issues. This is particularly disadvantageous to litigants, as it is generally understood that information obtained close to the time of arrest is most accurate and affects the possibility of probation.

6. Conclusion
While the primary purpose of consolidation and merger of Town and Village Courts may be financial savings for municipalities and taxpayers, consolidation and merger can also improve how the Town and Village Courts administer justice and conduct their business. It is likely that the consolidation of courts will reduce the number of justices needed. In that circumstance, the small pool of lawyers who are available and willing to be judges in some counties will be more adequate to supplying the number of judges needed. Further, it is likely that as one merged court absorbs the work of several courts, the smaller number of justices will actually be employed full time with fair and higher compensation. This may make the limitations on law practice (see supra at 25) irrelevant for many lawyers seeking judicial office, and likely encourage more to do so.

1. DISCUSSION OF RECOMMENDATION 9
The Task Force recommends that every Town and Village Court have a court clerk who is trained to prepare the records and documents and satisfy the financial reporting and safeguarding of funds as required by the applicable statutes and regulations. The clerks should be full time employees of the courts and be fairly compensated. Courts may combine resources to retain a shared court clerk if the work of a single court does not warrant a full time clerk. The clerks should be supervised by a State-compensated employee who is also available to provide assistance to the court clerks.

The administrative responsibilities, fiscal obligations and requirements for reporting and for the safekeeping of funds imposed upon town and village justices and the non-judicial personnel of those courts are set out in publications of the State Comptroller as well as the statutes and rules of court. See generally Handbook; Justice Courts Accountability Report; see supra at 22. These obligations are time consuming, complicated, and difficult. See, e.g., Office of the State Comptroller, Town of Cherry Creek Justice Court Report of Examination, 2007M-12 at 7-9 (2007), available at www.osc.state.ny.us/localgov/audits/2007/towns/cherrycr.pdf.

In various audits, the Comptroller has found monitoring, internal controls, timely and accurate record-keeping, and the safeguarding of revenue and incoming funds to be defective. In Task Force interviews, prosecutors
have stated that poor record-keeping of the Justice Courts often affects their ability to obtain court records, including records of disposition of cases. They reported that often there are no court calendars so that the cases on for proceedings are not identified, and that fingerprints had not been sent to DCJS to update NYSID sheets for bail applications. Another reported that the records are sometimes inaccurate, showing, for example, a conviction for the wrong crime.

It is apparent that no part-time justice can fulfill their heavy responsibilities without assistance from a well trained, dedicated court clerk. Further, under the Comptroller’s standard, the work of the clerk and the justice must be monitored either internally or by an outside expert, and many of the courts are too small for internal control staffs.


Accordingly, the Task Force recommends, as the Action Report discussed at 6, 49-50, a trained clerk for every court. The recommendation also includes a state-paid supervisor to monitor the courts’ internal activities and to give assistance as needed. The assistance should be provided not only for records required by the Comptroller but also for those requested by OCA, DMV/TSLED, DCJS, and the court system. The oversight of a state-paid supervisor will not only enhance record-keeping, but also will help in maintaining judicial independence from the town and village boards that pay clerks’ compensation.

The recommendation also seeks fair compensation for the court clerks. The Task Force questionnaire revealed a large variation in compensation (see supra at 29), including benefits paid by the municipalities. The importance of clerks to the operation of the courts warrants their fair compensation.
J. DISCUSSION OF RECOMMENDATION 10

The Task Force recommends that in planning for consolidation of Town Courts, the elimination of the position of village justice, or the transfer of misdemeanor cases from the Town and Village Courts when there is no available lawyer justice, the Office of the State Comptroller reevaluate the allocation of the revenues of the Town and Village Courts so that legislation can provide to municipalities an appropriate share of the courts’ revenues.

As noted earlier (see supra at 15), the funds collected by the Justice Courts go to the Comptroller or the local Chief Financial Officer for distribution to the State, the county, and the municipalities. Statutes designate the recipients of the revenues received by the courts. See, e.g., PL § 60.35; VTL § 1803; Environmental Protection Law §§ 71-0211(1), 71-0507; UJCA §§ 2020; 2021; State Finance Law § 99-a. The municipalities receive a large portion of the money taken in by their Town and Village Courts.

There may be some adverse affect on the municipalities’ income as a result of the recommendations; on the other hand, consolidation and payment by State funds of some of the costs of the Justice Courts may result in lower expenses for municipalities. The recommendation of the Task Force is that, in the course of examining a change in structure, the expertise of the Office of the State Comptroller be used to determine a fair distribution of funds to municipalities. Office of the State Comptroller, Intermunicipal Cooperation and Consolidation at 10-11 (2003) (www.osc.state.ny.us/localgov/pubs/research/cooperation1.pdf).

K. CONCLUSION

The recommendations of this and the prior Task Force reports are designed to increase the likelihood that lawyers will become town and village justices, while respecting the professed desire of communities to have local courts that are close to the citizens and understand their interests. The recommendations provide a way to enable more justices to be lawyers by reducing the number of justices. By enhancing the conditions under which the justices do their work, including benefits, compensation, facilities, and support, it is likely that more attorneys will become interested in being justices and run for office. As consolidation takes place, it is likely that part-time justices will in fact become full-time justices by serving on a merged court, so that lawyers interested in becoming judges would no longer need to maintain law practices with the limitations imposed by law and regulation. These recommendations thus would move forward the process of having a higher percentage of justices be lawyers,
while maintaining respectful deference for communities’ expectations and for litigants in the Town and Village Courts.

October 2007

Task Force on Town and Village Courts

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The Task Force thanks the following advisers for their valuable assistance (the advisers took no position on the final report):

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## SCHEDULE OF COURT SESSIONS IN THE 28 TOWN AND VILLAGE COURTS OF ONE COUNTY
### JANUARY 2006

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<tr>
<th>Sessions</th>
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New York City Bar Association Task Force on Town and Village Courts Recommendations in Prior Reports

Technology
Recommendation 1
The Task Force recommends that proceedings in every case be recorded by court reporters using current technology or by digital recording in lieu of a court reporter present in the courtroom. Measures, including locating and retaining court reporters, should be taken immediately in order to begin the recording in courts with no present system for recording or in which tape recorders are currently used.

Recommendation 2
The Task Force recommends that justices and their court clerks be given access to computers with accompanying uniform and appropriate software for case management, fiscal record keeping, and financial reporting. Further, training in the use of the software should be mandatory with monitoring and assistance available to aid the success of the training.

Recommendation 3
The Task Force recommends that Justices each be given computer access for training, research, conferencing with other judges, and writing opinions and orders.

Recommendation 4
The Task Force recommends the study and consideration of video conferencing for designated court proceedings to avoid delays when the lawyer cannot appear in person or the defendant cannot be transported from a county or local detention facility.

Recommendation 5
The Task Force recommends the expanded use of E-Mail to simplify communications between Justice Courts and everyone else.

Recommendation 6
Computers for both the justice and the clerk should be provided.
Training
Recommendation 1
The Task Force recommends that the New York City Bar Association, working with other bar associations and entities as appropriate, establish a committee to identify volunteer lawyers to work with the New York State Judicial Institute to prepare and present courses of study for basic and advanced programs for Town and Village Justices.

Recommendation 2
The Task Force recommends that the New York State Judicial Institute establish a collaborative program for Town and Village Justices and the clerks of the courts with the Office of Court Administration, Office of the State Comptroller, The Division of Criminal Justice Services and other agencies for Training on court administration and fiscal responsibility and accountability.

Recommendation 3
The Task Force recommends that the members of any advisory committee established to plan and monitor the training programs for the town and village justices be manifestly neutral in their positions with respect to the issues that come before the Town and Village Courts; alternatively, the membership of the Committee should reflect the perspectives of all the litigants before those courts, and not, as proposed, only governmental or prosecutorial interests.

Legal and Administrative Assistance
Recommendation 1
The Task Force recommends that the State, through the Office of Court Administration, fully fund a sufficiently large staff of lawyers (the Resources Center):

- to respond promptly to town and village justices' inquiries about the law and the governing rules of judicial conduct;
- to provide assistance for the evening and night-court sessions held in most Town and Village Courts, as well as for night-time arraignments and bail decision; and
- to prepare and distribute regular updates to relevant laws, regulations, and new case law.

Recommendation 2
The Task Force recommends that the State, through the Office of Court
Administration, fund a staff knowledgeable in court and fiscal management to assist the justices in carrying out their responsibilities as record keepers, finance officers, and administrators of their courts.

**Recommendation 3**
The Task Force recommends that The New York City Bar Association, working with other bar associations and entities as appropriate, identify lawyers who are qualified to assist in answering questions about the law and prepare a list of those who, until the Center is fully staffed, would be available to answer inquiries from Center lawyers that originate with the Town and Village Justices. The names of the lawyers contacted and other information would be disclosed as required by the relevant Ethics Canon to the parties in the cases in which the information is used.

**Recommendation 4**
The Task Force recommends that OCA undertake a project of statewide publicity about the Center, encouraging the justices to call the Center of Assistance, while emphasizing that the decisions made remain the responsibility of the justices.

**Recommendation 5**
The Task Force recommends the establishment of regional offices, especially in areas where the justices are not lawyers; on-site assistance when dealing with difficult cases or issues; small group training sessions; and other face-to-face contacts between Center staff and the justices and court clerks.

**Recommendation 6**
The Task Force recommends that the Center continue its work even if all the town and village justices are required to be lawyers because town and village justices, like judges of other courts, need such assistance.
Model Confidentiality Agreement

The Committee on State Courts of Superior Jurisdiction

The New York City Bar Association Committee on State Courts of Superior Jurisdiction (the “Committee”) has become aware of the substantial expenditure of time and resources of the court and counsel in connection with the negotiation and drafting of confidentiality agreements. It is our impression that confidentiality agreements are used with greater frequency, particularly in cases filed in the Commercial Division. To assist the court and the Bar, and to promote efficiency in these cases, the Committee has drafted a standardized form of confidentiality agreement. The Committee spent a significant amount of time deliberating over the contents of the Stipulation and Order for the Production and Exchange of Confidential Information (“Stipulation and Order”). Our primary concerns related to the filing under seal documents which had been designated as confidential under the Stipulation and Order, and whether to provide a mechanism for the designation of documents classified as “Attorneys’ Eyes Only.”

Filing Under Seal

In New York, there is a strong presumption favoring public legal proceedings and against sealing files without good cause shown. Danco Lab., Ltd. v. Chemical Works of Gedeon Richter, Ltd., 274 A.D.2d 1, 711 N.Y.S.2d 419 (1st Dep’t 2000); In re Twentieth Century Fox Film Corp., 190 A.D.2d 483, 601 N.Y.S.2d 267 (1st Dep’t 1993). NYCRR § 216.1 provides:
Sealing of court records

(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.

(b) For purposes of this rule, “court records” shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).

However, litigants have legitimate concerns about keeping private information private and protecting trade secrets, particularly in this age of electronic filing and the Internet. George F. Carpinello, “Public Access to Court Records In New York: The Experience Under Uniform Rule 216.1 and the Rule’s Future in a World of Electronic Filing,” 66 Alb.L.Rev.1089 (2003). In fact, many proposed confidentiality orders are rejected, particularly in the Commercial Division, because parties attempt to seal files by agreement.

With respect to filing under seal, the Stipulation and Order provides that the party who designated the documents as confidential will be given notice of the other party’s intent to file such material with the court, and the designating party may then file a motion to seal the document or the file within seven days. See e.g. Eusini v. Pioneer Electronics (USA), Inc., 29 A.D.3d 623, 815 N.Y.S.2d 653 (2d Dep’t 2006). The confidential material may not be filed until the court decides the motion to seal. Alternatively, any party may submit confidential documents in a sealed envelope to the clerk of the part or chambers, and the documents will be returned upon disposition of the motion or other proceeding.

**Attorneys’ Eyes Only**

As for “Attorneys’ Eyes Only,” the Committee decided not to include the option for such protection primarily out of a concern that it would be invoked far more than necessary. Inevitable disputes over the propriety of a party’s invoking “Attorneys’ Eyes Only” protection would undercut the overall goal of the Committee to reduce the time required to negotiate confidentiality agreements.
MODEL CONFIDENTIALITY AGREEMENT

Counsel are encouraged to agree to the Stipulation and Order or modify it to accommodate the needs of each case. The court's time spent reviewing the Stipulation and Order will be minimized when the court is informed that the parties have agreed to the Stipulation and Order.

We hope the Stipulation and Order will contribute to the further efficiency of the courts and the bar.

February 2007

Committee on State Courts of Superior Jurisdiction

Andrea Masley, Chair*
Janis M. Felderstein, Secretary

Amy K. Adelman  Karen Greenberg
Frederick A. Brodie*  Natan M. Hammerman*
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Christopher R. Gette  Raymond Leonard Vandenberg
Ann L. Goldweber  Lauren J. Wachtler
Peter G. Goodman*  Elizabeth M. Young

*Members of Subcommittee which drafted agreement.
This matter having come before the Court by stipulation of plaintiff, __________________, and defendant, ___________, for the entry of a protective order pursuant to CPLR 3103(a), limiting the review, copying, dissemination and filing of confidential and/or proprietary documents and information to be produced by either party and their respective counsel or by any non-party in the course of discovery in this matter to the extent set forth below; and the parties, by, between and among their respective counsel, having stipulated and agreed to the terms set forth herein, and good cause having been shown;

IT IS hereby ORDERED that:

1. This Stipulation is being entered into to facilitate the production, exchange and discovery of documents and information that the parties agree merit confidential treatment (hereinafter the “Documents” or “Testimony”).

2. Either party may designate Documents produced, or Testimony given, in connection with this action as “confidential,” either by notation on the document, statement on the record of the deposition, written advice to the respective undersigned counsel for the parties hereto, or by other appropriate means.

3. As used herein:
   (a) “Confidential Information” shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the party designating the material as confidential, be detrimental to the conduct of that party’s business or the business of any of that party’s customers or clients.
   (b) “Producing party” shall mean the parties to this action and any third-parties producing “Confidential Information” in connection with depositions, document production or otherwise, or the party asserting the confidentiality privilege, as the case may be.
   (c) “Receiving party” shall mean the party to this action and/or any non-party receiving “Confidential Information” in connection with depositions, document production or otherwise.

4. The Receiving party may, at any time, notify the Producing party that the Receiving party does not concur in the designation of a document or other material as Confidential Information. If the Producing party does not agree
to declassify such document or material, the Receiving party may move before the Court for an order declassifying those documents or materials. If no such motion is filed, such documents or materials shall continue to be treated as Confidential Information. If such motion is filed, the documents or other materials shall be deemed Confidential Information unless and until the Court rules otherwise.

5. Except with the prior written consent of the Producing party or by Order of the Court, Confidential Information shall not be furnished, shown or disclosed to any person or entity except to:
   a. personnel of plaintiff or defendant actually engaged in assisting in the preparation of this action for trial or other proceeding herein and who have been advised of their obligations hereunder;
   b. counsel for the parties to this action and their associated attorneys, paralegals and other professional personnel (including support staff) who are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder;
   c. expert witnesses or consultants retained by the parties or their counsel to furnish technical or expert services in connection with this action or to give testimony with respect to the subject matter of this action at the trial of this action or other proceeding herein; provided, however, that such Confidential Information is furnished, shown or disclosed in accordance with paragraph 7 hereof;
   d. the Court and court personnel, if filed in accordance with paragraph 12 hereof;
   e. an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer, if furnished, shown or disclosed in accordance with paragraph 10 hereof;
   f. trial and deposition witnesses, if furnished, shown or disclosed in accordance with paragraphs 9 and 10, respectively, hereof; and
   g. any other person agreed to by the parties.

6. Confidential Information shall be utilized by the Receiving party and its counsel only for purposes of this litigation and for no other purposes.

7. Before any disclosure of Confidential Information is made to an expert witness or consultant pursuant to paragraph 5(c) hereof, counsel for the Receiving party shall provide the expert’s written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the party obtaining the certificate shall supply a copy to counsel for the other party at the time of the disclosure of the information required to be disclosed by CPLR 3101(d), except that any certificate signed by an expert or consultant who is not expected to be called as a witness at trial is not required to be supplied.

8. All depositions shall presumptively be treated as Confidential Information and subject to this Stipulation during the deposition and for a period of fifteen (15) days after a transcript of said deposition is received by counsel.
for each of the parties. At or before the end of such fifteen day period, the
deposition shall be classified appropriately.
9. Should the need arise for any of the parties to disclose Confidential Infor-
mation during any hearing or trial before the Court, including through argu-
ment or the presentation of evidence, such party may do so only after taking
such steps as the Court, upon motion of the disclosing party, shall deem
necessary to preserve the confidentiality of such Confidential Information.
10. This Stipulation shall not preclude counsel for the parties from using
during any deposition in this action any documents or information which
have been designated as “Confidential Information” under the terms hereof.
Any court reporter and deposition witness who is given access to Confiden-
tial Information shall, prior thereto, be provided with a copy of this Stipula-
tion and shall execute the certificate annexed hereto. Counsel for the party
obtaining the certificate shall supply a copy to counsel for the other party.
11. A party may designate as Confidential Information subject to this Stipu-
lation any document, information, or deposition testimony produced or given
by any non-party to this case, or any portion thereof. In the case of Docu-
ments, designation shall be made by notifying all counsel in writing of those
documents which are to be stamped and treated as such at any time up to
fifteen (15) days after actual receipt of copies of those documents by counsel
for the party asserting the confidentiality privilege. In the case of deposition
Testimony, designation shall be made by notifying all counsel in writing of
those portions which are to be stamped or otherwise treated as such at any
time up to fifteen (15) days after the transcript is received by counsel for the
party asserting the confidentiality privilege. Prior to the expiration of such
fifteen (15) day period (or until a designation is made by counsel, if such a
designation is made in a shorter period of time), all such documents shall be
treated as Confidential Information.
12. (a) A Receiving Party who seeks to file with the Court any deposition
transcripts, exhibits, answers to interrogatories, and other documents which
have previously been designated as comprising or containing Confidential
Information, and any pleading, brief or memorandum which reproduces,
paraphrases or discloses Confidential Information, shall provide all other
parties with seven (7) days' written notice of its intent to file such material with
the Court, so that the Producing Party may file by Order to Show Cause a
motion to seal such Confidential Information. The Confidential Information
shall not be filed until the Court renders a decision on the motion to seal.
In the event the motion to seal is granted, all deposition transcripts, exhibits,
answers to interrogatories, and other documents which have previously been
designated by a party as comprising or containing Confidential Information,
and any pleading, brief or memorandum which reproduces, paraphrases or
discloses such material, shall be filed in sealed envelopes or other appropri-
ate sealed container on which shall be endorsed the caption of this litiga-
tion, the words “CONFIDENTIAL MATERIAL-SUBJECT TO STIPULATION AND
ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL IN-
FORMATION” as an indication of the nature of the contents, and a statement
in substantially the following form:
“This envelope, containing documents which are filed in this case by (name of party), is not to be opened nor are the contents thereof to be displayed or revealed other than to the Court, the parties and their counsel of record, except by order of the Court or consent of the parties. Violation hereof may be regarded as contempt of the Court.”

(b) As an alternative to the procedure set forth in paragraph 12(a), any party may file with the court any documents previously designated as comprising or containing Confidential Information by submitting such documents to the Part Clerk in sealed envelopes or other appropriate sealed container on which shall be endorsed the caption of this litigation, the words “CONFIDENTIAL MATERIAL-SUBJECT TO STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION” as an indication of the nature of the contents, and a statement in substantially the following form:

“This envelope, containing documents which are filed in this case by (name of party), is not to be opened nor are the contents thereof to be displayed or revealed other than to the Court, the parties and their counsel of record, except by order of the Court or consent of the parties.”

Such documents shall be returned by the Part Clerk upon disposition of the motion or other proceeding for which they were submitted.

(c) All pleadings, briefs or memoranda which reproduces, paraphrases or discloses any documents which have previously been designated by a party as comprising or containing Confidential Information, shall identify such documents by the production number ascribed to them at the time of production.

13. Any person receiving Confidential Information shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms hereof.

14. Any document or information that may contain Confidential Information that has been inadvertently produced without identification as to its “confidential” nature as provided in paragraphs 2 and/or 11 of this Stipulation, may be so designated by the party asserting the confidentiality privilege by written notice to the undersigned counsel for the Receiving party identifying the document or information as “confidential” within a reasonable time following the discovery that the document or information has been produced without such designation.

15. Extracts and summaries of Confidential Information shall also be treated as confidential in accordance with the provisions of this Stipulation.

16. The production or disclosure of Confidential Information shall in no way constitute a waiver of each party’s right to object to the production or disclosure of other information in this action or in any other action.

17. This Stipulation is entered into without prejudice to the right of either party to seek relief from, or modification of, this Stipulation or any provisions thereof by properly noticed motion to the Court or to challenge any designation of confidentiality as inappropriate under the Civil Practice Law and Rules or other applicable law.

18. This Stipulation shall continue to be binding after the conclusion of this litigation except (a) that there shall be no restriction on documents that are
used as exhibits in Court (unless such exhibits were filed under seal); and (b) that a party may seek the written permission of the Producing party or further order of the Court with respect to dissolution or modification of any the Stipulation. The provisions of this Stipulation shall, absent prior written consent of both parties, continue to be binding after the conclusion of this action.

19. Nothing herein shall be deemed to waive any privilege recognized by law, or shall be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure.

20. Within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all Confidential Information produced or designated and all reproductions thereof, shall be returned to the Producing Party or shall be destroyed, at the option of the Producing Party. In the event that any party chooses to destroy physical objects and documents, such party shall certify in writing within sixty (60) days of the final termination of this litigation that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge. Notwithstanding anything to the contrary, counsel of record for the parties may retain one copy of documents constituting work product, a copy of pleadings, motion papers, discovery responses, deposition transcripts and deposition and trial exhibits. This Stipulation shall not be interpreted in a manner that would violate any applicable cannons of ethics or codes of professional responsibility. Nothing in this Stipulation shall prohibit or interfere with the ability of counsel for any party, or of experts specially retained for this case, to represent any individual, corporation, or other entity adverse to any party or its affiliate(s) in connection with any other matters.

21. This Stipulation may be changed by further order of this Court, and is without prejudice to the rights of a party to move for relief from any of its provisions, or to seek or agree to different or additional protection for any particular material or information.

[<FIRM>]
By: ______________________

____________________

New York, New York _____
Tel.: ______________

Attorneys for Plaintiff

Dated: ______________

Dated: ______________

SO ORDERED______________

J.S.C.

[<FIRM>]
By: ______________________

____________________

New York, New York _____
Tel.: ______________

Attorneys for Defendant

S T A T E  C O U R T S  O F  S U P E R I O R  J U R I S D I C T I O N
I, ____________________________________________________________, state that:

1. My address is ________________________________________________________.
2. My present employer is ________________________________________________.
3. My present occupation or job description is ____________________________________

4. I have received a copy of the Stipulation for the Production and Exchange of Confidential Information (the “Stipulation”) entered in the above-entitled action on ____________________.
5. I have carefully read and understand the provisions of the Stipulation.
6. I will comply with all of the provisions of the Stipulation.
7. I will hold in confidence, will not disclose to anyone not qualified under the Stipulation, and will use only for purposes of this action, any Confidential Information that is disclosed to me.
8. I will return all Confidential Information that comes into my possession, and documents or things that I have prepared relating thereto, to counsel for the party by whom I am employed or retained, or to counsel from whom I received the Confidential Information.
9. I hereby submit to the jurisdiction of this court for the purpose of enforcement of the Stipulation in this action.

Dated: ____________________________

IndexNo. ___________
Parental Leave Policies and Practices

*The Committee on Women in the Profession*

I. INTRODUCTION

Parental leave policies need to balance an attorney’s family needs upon the birth or adoption of a child with the employer’s business needs. Recognizing the need for such balance and the lack of practical information about the parental leave practices and policies of New York City legal employers, the New York City Bar’s Committee on Women in the Profession (the “Committee”) decided to study this issue and release a report regarding parental leave policies and practices for attorneys.

In addition, there has been significant media attention focused on the issue of new mothers who leave the workforce and later want to rejoin it (often referred to as “re-entry”). The Committee also hopes that this report will focus attention on how supportive parental leave policies partially can address the re-entry issue. For some attorneys, a supportive parental leave policy may provide them with sufficient leave time to enable them to avoid having to exit the workforce and later reenter it.

In preparing this report, the Committee employed a three-prong approach. First, it prepared and disseminated a survey to legal employers in the New York City area about their parental leave policies and practices for attorneys and then analyzed the results of the survey. Second, it reviewed parental leave policies of other area employers, both within and outside the legal profession, and numerous articles and studies on the issue. Third, it drew on the Committee members’ experiences and thoughts with the view of being practical and responsive to the needs of both attorneys and their employers.

This report includes the Committee’s survey findings and its recom-
mendations for model parental leave policies and practices. It also contains a discussion of the business case supporting the implementation of strong parental leave policies. A “Tip Sheet” is provided at the end of the report to assist attorneys in evaluating parental leave policies and practices and negotiating for parental leave with current and prospective employers. It is the Committee’s hope that this report will provide attorneys and their employers with the necessary information and tools to advocate for and develop and implement these important policies.

A. SUMMARY OF FINDINGS

Survey responses indicate that parental leave for the birth or adoption of a child increasingly is available in some form to attorneys working in New York City. The variance among specific leave policies may be attributed to many factors, including the number of employees (and whether the employer is subject to relevant laws, such as the Family Medical Leave Act (“FMLA”)),¹ the type of organization, and management commitment to strong parental leave policies. In practice, however, the Committee found that even when an employer has a supportive parental leave policy, attorneys often can be reluctant to take the entire amount of the leave due to a fear, real or perceived, that extended leaves are detrimental to career advancement.

As a general matter, large law firms responding to the survey appear to provide stronger parental leave policies than other legal employers. Some job-guaranteed leave, with at least partial pay, is offered almost universally to attorneys following the birth of a child. In contrast, however, benefits for adoptive and non-birth parents²—including, in particular, any significant amount of paid leave—are not as widely available. Encouragingly, though, the trend among employers in general appears to moving toward implementing parental leave policies that offer the same parental leave to mothers who give birth and to parents who adopt children.

The Committee believes that the overall results of the survey illustrate a growing recognition among New York City legal employers of the importance of implementing strong parental leave policies. It is the Committee’s hope that, following the recommendations in this report and building on existing policies, the New York City Bar will help lead the way toward the development and effective implementation of quality

¹. 29 U.S.C. § 2612(a). Under the FMLA, eligible employees are entitled to up to a total of 12 weeks’ unpaid leave during any 12-month period for the birth and care of a newborn or adopted child.
². The term “non-birth parent” as used herein refers to the husband or partner of a woman who gives birth.
parental leave policies that benefit both attorneys and the organizations that employ them. In turn, the Committee hopes that these actions will result in attorneys’ taking the amount of leave within the stated policies they desire rather than the amount that they perceive they can take without career damage. The Committee also hopes that the implementation of these quality parental leave policies will apply to and benefit all employees in the legal profession, not just attorneys.

B. SUMMARY OF RECOMMENDATIONS

The Committee recommends that, at a minimum, law firms and other legal employers formally implement the following policies for their attorneys:

- Three months’ job-guaranteed leave with full pay for new parents, with no loss of seniority or annual salary increase.
- An additional nine months’ unpaid job-guaranteed leave.
- Continuation of health insurance coverage and other benefits for the period covering both paid and unpaid job-guaranteed leave.
- Reimbursement for adoption expenses.

Of course, the Committee recognizes that it may not be feasible for small law firms to fully implement some of these recommendations and that reimbursement for adoption expenses may need to be limited to a reasonable amount.

In addition to the implementation of these recommended policies, it is critical for employers to create a culture that supports these policies and ensure that parental leave practices are consistent with the formal policies. To that effect, the Committee recommends that law firms and other legal employers take the following actions:

- Develop a transparent parental leave policy and make it readily available to all employees (for example, by including the policies in the employee handbook and posting them on relevant internet/intranet sites).
- Create an environment that encourages the use of parental leave at all levels of seniority and take steps to avoid the perception by employees that they will be penalized for taking parental leave.
- Facilitate the reintegration of attorneys returning from parental leave (for example, by maintaining communication with attorneys on leave, exploring flexible work arrangements for
those attorneys returning from leave, and maintaining available training and client contact throughout the leave and establishing a working parent group to assist attorneys transitioning back to work from parental leave).

C. THE BUSINESS CASE FOR STRONG PARENTAL LEAVE POLICIES

Strong parental leave policies have significant business and social benefits. For the employer, such policies favorably can impact the bottom line in the form of (1) greater employee loyalty and productivity, (2) more successful recruitment efforts, especially amongst women, (3) increased employee retention, and (4) enhanced client satisfaction and retention and business development. Strong parental leave policies also have important social benefits including, for example, fostering parent-child bonding and promoting equality in the workplace.

Although legal employers initially may believe that parental leave policies are costly, the failure to provide strong leave policies ultimately may cost employers significant talent, money, and competitive position. Overall, these costs may outweigh the expenses associated with strong parental leave policies.

1. Productivity

Studies reveal that employees who have utilized strong parental leave policies tend to be more committed to their employer and less likely to pursue other job opportunities.3 In addition to engendering institutional loyalty, such policies promote increased productivity, employees are more engaged in workplaces that recognize the importance of time for family or other outside activities and are nearly three times as likely to report job satisfaction, which is a factor linked to productivity.4 Employers contemplating the implementation of a formal parental leave policy should consider such data carefully as it suggests that generous policies may increase profits and improve work product.

2. Recruitment

Strong parental leave policies enhance recruitment efforts in at least two respects. First, an increasing number of law school graduates—both


men and women—are seeking employment that allows them to develop as attorneys without sacrificing their personal and family lives. In a 1998 study by the National Association for Legal Professionals Foundation ("NALP"), more than 33% of men and nearly 66% of women surveyed reported that work/life balance was one of the top three reasons they chose their employer. This rising interest in work/life balance is one of the major trends now affecting attorney recruitment.

Second, these policies increase retention, particularly among women, who now make up half of most graduating law school classes. At a time when the number of law school graduates is stagnating while at the same time law firms' hiring needs are increasing, an employer that does not actively seek to hire and retain women will not be able to obtain the number of top quality lawyers that it needs thus putting it at a competitive disadvantage. As a result of the increased retention of women, legal employers also will have a more diverse workplace of senior female attorneys and partners. This, in turn, will attract more women candidates, who will recognize that the employer is committed to the retention of women on a long-term basis.

3. Employee Retention

Legal employers devote significant resources to recruiting recent law school graduates and lateral hires, training these attorneys, and developing their expertise, but attorneys sometimes leave before a significant return on that investment can be realized (albeit for a variety of reasons). According to a 2005 NALP study, 77% of women associates had left their firms within five years (55 months).

Every one of these lawyers represents a lost investment in recruitment and training, the cost of which can amount to 150% of an attorney's annual compensation. Retention is especially critical when an individual

5. National Association for Legal Professionals Foundation, Keeping the Keepers: Strategies for Associate Retention in Times of Attrition, at 15 (1998) (citing Catalyst: Making the Case, Exec. Summary at 9 (2001)). Responding to this trend, NALP has posted on its website the Survey of Associate Parental Leave Benefits prepared by the American Bar Association Young Lawyers Division Women in the Profession Committee. This report includes a chart summarizing the parental leave policies of almost 50 firms nationwide.


8. ABA Commission on Women in the Profession, Balanced Lives: Changing the Culture of
attorney’s level of skill and experience cannot readily be replaced, or when disproportionate rates of attrition impact firm culture. Although the 2005 NALP study looked at the issue in the law firm context, the conclusions the study reached apply with equal force to other legal employers.

To increase retention rates, legal employers need to respond to the increasing demand for work/life balance. Many attorneys increasingly cite work/life balance as one of the factors affecting their decision to leave a firm.9 Strong parental leave policies reflect an employer’s view of the importance of family and a concern with work/life balance and thus are a critical component of attorney retention. In addition, strong parental leave policies allow those new parents that want more time to be with their child to have such time and thereby may avoid those parents leaving the workforce.

4. Client Satisfaction and Retention and Business Development

Strong parental leave policies can promote client satisfaction and retention as well as business development in a number of ways. While in the short term, any type of leave that is taken by an attorney can have a negative impact on a pending matter, in the long term, the benefits of supportive parental leave policies outweigh the short term disruption.

First, increased retention benefits legal employers by serving the needs of corporate and individual clients, both of which have an interest in retaining attorneys who have been working on their matters. Second, as clients increasingly demand diversity among their outside counsel, law firms that lack diversity risk losing business.10 Corporate clients are beginning to hold law firms accountable for hiring practices; beginning in 1998, more than 500 corporations pledged to give “significant weight” to outside counsels’ “commitment and progress in the area of diversity.”11 These companies have signed onto the “Call to Action,” pursuant to which they agree to work with only those law firms that have “consistently taken action” to increase the number of women and minority lawyers they hire.

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10. Melanie Lasoff Levs, Call to Action Sara Lee’s General Counsel: Making Diversity a Priority; DIVERSITY & THE BAR, (Jan./Feb. 2005); see also Al Driver and Charles R. Morgan, Legal General Counsel—and their Law Firms—Up the Path to Diversity, The Metropolitan Corporate Counsel, Mar. 2006, at 47.
11. Id.
and retain. Both the New York State Bar Association and the New York City Bar now support efforts to require law firms to disclose the composition of assigned legal teams. Strong parental leave policies and practices, such as those recommended by the Committee in this report, can foster such hiring and retention.

Finally, attorneys are more likely to try to bring business to their law firms if their firms’ policies encourage long-term commitment between employer and employee. Accordingly, strong parental leave policies can increase business development.

II. THE SURVEY

The survey was disseminated beginning in the summer of 2005 and continuing through January 2006 to the 118 law firms and corporate law departments that then were signatories to the New York City Bar’s Statement of Diversity Principles. It also was disseminated to approximately 49 other New York City-based law firms, 44 New York City corporate law departments, 10 area law schools, 20 government legal employers in New York City, and 10 legal not-for-profit corporations in New York City. The survey also was provided to legal employers of members of the Committee and entities suggested by Committee members including small, medium, and large law firms. Participants were informed that their individual responses would be kept confidential.

In addition to asking respondents for basic demographic information (e.g., the type of organization, the number of attorneys employed, and whether written policies existed), the survey asked questions relating to job-guaranteed leave policies and payment policies for birth mothers, adoptive parents, and non-birth parents. The survey also asked respondents for information about policies and practices relating to attorneys returning to work following parental leave.

Forty-three employers responded to the survey: 31 law firms (large, medium, and small), six corporations, three not-for-profit corporations, two government offices, and one university. A subcommittee of the Committee...
mittee met through the early part of 2007 to analyze the survey responses. The results of this analysis are set forth below.16

A. PARENTAL LEAVE—BIRTH MOTHER

Virtually all legal employers responding to the survey offer parental leave to attorneys who have given birth. The length of available leave, however, varies, as do the policies regarding pay. While job-guaranteed leave and at least partial pay may be legally mandated in the case of many employers (i.e., by the FMLA, the Pregnancy Discrimination Act,17 and/or state laws), certain benefits, such as additional leave and full pay for the entire leave, are not offered as frequently. In addition, the survey results indicate that employers should strengthen parental leave policies to ensure that attorneys are able, if they so desire, to take available leave, including creating a culture in which employees are not penalized (or do not perceive that they will be penalized) for taking parental leave.

1. Leave Policies

Most survey respondents have written parental leave policies and, although the specific policies vary, all generally cover leave for birth mothers.18 Many large law firms include on their websites a general description of their parental leave policies, including those for birth mothers, as part of their recruiting information.

Only three of the 43 respondents have no written policy. All three of these respondents employ fewer than 50 lawyers. In the absence of a written policy, one of these employers decides whether to grant parental leave on a case-by-case basis, another uses a “short-term illness” policy that allows for up to 12 weeks’ leave with pay and the third follows the FMLA and provides unpaid leave for up to twelve weeks.

The categories below of “job-guaranteed leave without pay” and “paid leave” track two basic questions raised by those considering parental leave. First, “will I have my job when I return?” And, second, “will I be paid while I am on leave?” The survey demonstrated that the more widely-offered

16. While important, parental leave policies for non-attorneys and leave policies regarding elder care and other dependents were not within the scope of the survey and, therefore, are not addressed in this report.

17. 42 USC 2000e(k).

18. As used in the survey, the term “parental leave” encompasses paid, unpaid, or partially-paid leave.
leave mirrors the FMLA and is job-guaranteed leave without pay, during which the employee’s current position, or an equivalent position, is available to the employee when he or she returns to the employer from leave.

a. Job-guaranteed leave without pay
Almost all respondents (42 of 43) offer job-guaranteed leave to mothers after childbirth. Respondents were asked how many additional weeks of job-guaranteed leave they offer to mothers after childbirth, beyond the 12 weeks mandated by the FMLA (if applicable). The responses vary widely, ranging from no additional time to a maximum of nine months of leave (in addition to 12 weeks mandated by the FMLA). Twenty-five of forty-two respondents who provide leave to mothers after childbirth provide some additional time beyond the FMLA-mandated 12 weeks. The amount of time most commonly offered by those employers is an additional 12 weeks. Some respondents provide additional job-guaranteed leave to all attorneys, while others provide it on a case-by-case basis.

b. Paid leave
For birth mothers, the survey asked about the pay practices for both the short-term disability leave period (typically six weeks) and leave that extended beyond the short-term disability period. In general, the majority of law firm respondents provide 12 weeks’ paid maternity leave (inclusive of short-term disability). Non-law firm respondents have more varied practices regarding paid leave.

i. Short-term disability
Respondents were asked to describe their usual pay practice for women during the period of short-term disability before and after childbirth, excluding vacation, sick, and personal time. Full pay for the short-term disability period, which typically is six weeks, is offered by 29 of the 43 respondents. Another eight respondents provide full pay for part of the short-term disability period followed by partial or pro-rated pay, and five respondents provide only the partial pay mandated by state law. Twenty-five of the 43 respondents do not consider seniority when determining

19. Survey questions concerning leave for childbirth assumed a normal, medically uncomplicated delivery, i.e., no additional physical disability issues.

20. Under New York State law, employers must maintain short-term disability insurance for their employees under a plan that provides the employee with one-half of the employee’s weekly wage, to a maximum of $170 per week for the period of short-term disability. NY Workers’ Compensation Law Section 204.
the pay benefit during the period of short-term disability. For those that consider length of service, eight have a one-year minimum and the remainder require anywhere from one month to six years.

ii. Leave beyond short-term disability

Almost half of the 43 respondents provide paid leave for some period of time beyond the period of short-term disability. Of these 23 respondents, 18 employers—mostly large law firms—provide full pay for an extended period of time beyond the short-term disability leave, while five other respondents provide full pay for some more limited time beyond the short-term disability leave.

iii. Minimum length of service

The survey showed that length-of-service requirements for taking leave beyond short-term disability are similar to those requirements for short-term disability: sixteen respondents reported that they have a length-of-service requirement, and twenty-four reported that they do not. As with short-term disability, the most common length of service required to receive the maximum pay benefit for those employers that had such a requirement is one year (eight out of the 43 respondents), with minimum service ranging from one month to two years. In general, length-of-service requirements are used by respondents to trigger the leave benefits beyond short-term disability, but the length of service does not affect the amount of the benefit.

iv. Health insurance

Regardless of legal employers’ pay practices, survey responses suggest that employers often continue to provide health insurance coverage during a birth mother’s leave beyond the short-term disability period. Thirty-nine of 43 respondents provide health insurance coverage for the period of any leave provided to the birth mother.

2. Leave Practices

Beyond gathering information regarding formal policies, the survey sought to assess how these policies are implemented and used. Accordingly, the survey asked how many lawyers from all categories took job-guaranteed leave for childbirth or adoption during the year prior to the survey.

The amount of time taken by women attorneys at law firms after childbirth did not vary greatly. Slightly more than one third of the law firms whose female attorneys took leave for childbirth reported 12 weeks as the most common length of the leave. Approximately 20% of the law firms
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reported that their female attorneys took between 14 and 16 weeks’ leave for childbirth. Thus, more than half of the law firm respondents reported that the most common amount of leave for women attorneys after childbirth was 16 weeks or less. The remaining law firms reported that the most common amount of leave for women attorneys after childbirth was between 17 and 26 weeks, with most of these leave periods lasting fewer than 20 weeks.\textsuperscript{21}

Interestingly, where firms offered more than 12 weeks' leave to women after childbirth, their attorneys appear not to have taken such additional leave.\textsuperscript{22} Rather, the most common amount of leave taken by women attorneys after childbirth remained at 12 weeks, and the average amount of leave taken by women after childbirth was clustered around 16 weeks, even where the firm offered some additional leave. On the other hand, law firms that provided more than 12 weeks' leave tended to report a higher number of weeks taken by women after childbirth, although still well below the number of weeks allowed under the policies. These data suggest that there is a breaking point beyond which women either (i) do not feel comfortable taking all of the leave that is offered perhaps because of a fear that client relationships cannot be maintained or that career advancement might be adversely affected if they take an extended leave;\textsuperscript{23} (ii) do not want to take all of the leave that is offered, or (iii) want to, but cannot, take all of the leave that is offered due to the fact that the leave would be unpaid.

Law firms were asked to break down the numbers of female associates, counsel, and partners who took parental leave after childbirth.\textsuperscript{24} The most common amount of leave taken by women associates after childbirth ranged from 12 weeks to 26 weeks, with 12 weeks being the most common.

The amount of leave taken by women counsel after childbirth (of which there were only 15 reported among all respondents) varied from a

\textsuperscript{21} A 2003 NALP study concluded that 95\% of attorneys at law firms that had a parental leave policy were availing themselves of the leave provided by such policy, at least in part. See New Research from the NALP Workplace Questionnaire (Feb. 2004), http://www.nalp.org/content/index.php?pid=194.

\textsuperscript{22} At law firms with more than 200 attorneys, parental leave for natural childbirth predominantly was taken by associates. Several factors may contribute to this distribution, including the low number of women partners and the timing of career and parenthood.

\textsuperscript{23} In a report on certain Sacramento law firms and corporate legal departments that have pledged to increase the number of women partners and counsel, it was acknowledged that “it takes a strong message from firm management to get women to take advantage of policies spelled out on paper.” See Kathy Robertson, Cracks in the Ceiling, Sacramento Bus. J., Nov. 6, 2006.

\textsuperscript{24} The survey collected insufficient data from non-law firm respondents to draw any meaningful conclusions regarding those legal employers.
low of 1.4 weeks to a high of 30 weeks. The most common birth-related leave taken by women counsel was 12 weeks, with the next most common grouping between 14 and 16 weeks.

Firms responding to the survey reported 36 female partners who took parental leave after childbirth, with their leave ranging from four to 26 weeks. Once again, 12 weeks was most commonly reported amount of leave taken by women partners after childbirth.

B. ADOPTION

Legal employers are beginning to recognize the importance of providing parental leave, both paid and unpaid, for attorneys who adopt children. In addition, employers increasingly are providing adoption expense reimbursement. However, many legal employers still do not provide any adoption leave benefits or, if they do, provide fewer benefits than those they provide for attorneys who take leave for childbirth.

A reasonable leave period is equally important to attorneys who adopt children, no matter the age of the child. Moreover, there are issues specific to adoption that make a leave period particularly important to adoptive parents. These include cultural and language adjustments, attachment and bonding issues, and certain medical issues. Employers also may not realize that adoption can be a lengthy and time consuming process during which adoptive parents may incur costs as high as $50,000. In addition, adoption costs differ from costs that typically may be incurred by a birth parent, which generally are covered by health insurance.

1. Leave Policies

a. Job-guaranteed leave without pay

The survey results indicate that 39 of 43 respondents provide job-guaranteed leave without pay for adoption. Fifteen of these 39 respondents provide attorneys who adopt job-guaranteed leave without pay beyond the 12 weeks’ job-guaranteed leave that entities subject to the FMLA are required to provide. The amount of additional job-guaranteed adoption leave these respondents provide, however, varies greatly, ranging from one week to 36 weeks. Two of the 39 respondents grant requests for additional leave following adoption on a case-by-case basis.

b. Minimum length of service

More than half the respondents who provide job-guaranteed leave without pay following the adoption of a child (23 of 39 respondents) do not require a minimum length of service to be eligible to take this leave. This is similar to the lack of a minimum length-of-service requirement to qualify for unpaid childbirth-related leave. Of the remaining other respondents, eight require at least one year of service for full benefits, while others require a minimum of three or six months of employment.

c. Paid leave

The survey responses indicated a trend toward providing leave for adoption equal to leave for women attorneys after childbirth. With or without a written policy, 31 of 43 respondents provide paid leave for attorneys who adopt, ranging from one to 13 weeks. Thirteen of these 31 respondents provide 12 to 13 weeks’ paid leave; seven respondents provide between 6 and 8 weeks; and the remaining respondents provide one to five weeks. Also, one large financial institution with a New York office offers 16 weeks paid leave at full pay and other financial institutions based in New York City provide 12-13 weeks’ of paid parental leave for both natural birth and adoption.

The majority of respondents who offer paid adoption leave (26 of 31 respondents) provide full pay for the entire period of the leave. The other five respondents provide full pay for a period, followed by partial or prorated pay for the remainder of the leave.

d. Adoption cost reimbursement

Adoption costs can total more than $50,000 and can include agency fees, legal fees, social worker home study fees, governmental fees, medical and living expenses for the birth mother (in certain cases), and domestic

26. The Dave Thomas Foundation for Adoption recently released its 2007 Best Adoption-Friendly Workplaces List, which identifies several law firms that provide 12 weeks’ paid leave, including one firm that offers this benefit to both attorneys and non-attorneys. See http://www.davethomasfoundationforadoption.org/afw/afw_index.asp.

27. Of the 31 respondents that provide paid leave, 26 have a written policy. For the five respondents that do not have formal written policies, the paid leave period is discretionary and ranges from one to 12 weeks.

or international travel costs. Only seven of 43 respondents, however, provide any expense reimbursement for adoption costs, with one employer offering $4,000 per child. In contrast, other New York City employers that did not participate in the survey offer greater reimbursement benefits. For example, a major pharmaceutical company with headquarters in New York City provides $10,000 expense reimbursement.29 A national law firm (with approximately 100 lawyers in its New York office) offers a $7,000 reimbursement for medical expenses of the birth mother of the adopted child,30 while two other law firms and an international bank with a New York office offer a $5,000 reimbursement.31

2. Leave Practices

Six female and one male attorney took job-guaranteed leave without pay for adoption during the year preceding the survey. The six female attorneys took leave ranging from eight to 18 weeks. In two of these cases, a total of 24 weeks of job-guaranteed leave was offered by the employer. The male attorney took one week of leave even though his employer offered four to 12 weeks non-paid leave beyond the twelve weeks of FMLA mandated leave. These data suggest that, similar to leave practices for women attorneys after childbirth, even where an employer offers an extended non-paid parental leave, attorneys who adopt children also do not take such leave.

C. NON-BIRTH PARENTS

The survey responses indicated a growing trend toward providing job-guaranteed leave without pay and some paid leave to non-birth parents. Unfortunately, however, while all of the respondents offer non-birth parents job-guaranteed unpaid leave, as mandated by the FMLA, most do not offer very much paid leave. Among the employers that responded to the survey, the average job-guaranteed paid leave time provided to a non-birth parent is two to three weeks.

There are several notable and encouraging exceptions, however. For example, the New York law office of a large national firm offers the non-birth parent three months’ paid leave (provided that the employee is the

29. See Working Mother at 63 et seq. (Oct. 2006).
31. These policies and others concerning adoption expense reimbursement are reported in The Dave Thomas Foundation for Adoption, 2007 Best Adoption-Friendly Workplaces List. See The Dave Thomas Foundation for Adoption 2007 Best Adoption-Friendly Workplaces List, http://www.davethomasfoundationforadoption.org/afw/afw_index.asp.
“primary caretaker” of the child during the leave period). Also, one local
district attorney’s office offers non-birth parents three months’ paid leave
within the child’s first six months of life (again, provided that the em-
ployee is the “primary caretaker” of the child during the leave period).
Another national law firm offers non-birth parents six weeks’ paid leave
and a second major firm offers four weeks’ paid leave to the “secondary
caregiver.” Several other large law firms with headquarters in New York
City offer non-birth parents or “secondary caregivers” three to four weeks’
paid leave.

Outside the legal profession, certain other professional employers offer
paid leave for non-birth parents. For example, one investment bank of-
fers 20 weeks’ job-guaranteed leave for fathers, with up to six of those
weeks paid, and a major software company offers new fathers 12 weeks’
job-guaranteed leave, with one month fully paid.32

1. Leave Policies
Unfortunately, the majority of survey respondents do not offer any-
thing approaching what is offered by the leaders in this area whose paid
leave policies are highlighted above. While all of the respondents offer
non-birth parents job-guaranteed unpaid leave, as mandated by the FMLA,
most do not offer very much paid leave. Among the employers that re-
sponded to the survey, the average job-guaranteed paid leave time pro-
vided to a non-birth parent is two to three weeks.

2. Leave Practices
Sixteen out of 36 survey respondents who offer non-birth parents
job-guaranteed leave without pay reported that no one had taken such
leave in the year preceding the survey. Half of these respondents are small
employers, with fewer than 100 lawyers. It is possible that none of the
lawyers in these smaller firms had a child during the relevant time period.
For example, one small firm of about 35 lawyers had three lawyers give
birth in 2004, and then no new children until 2006, when two male law-
yers each had a child. The remaining seven respondents reported that
none of their lawyers took non-birth parent leave, including some of the
largest law firms and corporate law departments in New York, which em-
ploy more than 100 lawyers. It seems unlikely that at law firms with hun-
dreds of lawyers, none of those lawyers were non-birth parents; rather,
it seems more likely that non-birth parents at these firms are using

32. See Working Mother at 63 et.seq. (October 2006).
vacation time—which is not reported as parental leave—to be with their new children.

The 20 survey respondents who reported non-birth parents taking leave reported that 131 lawyers took such leave. Twelve of those survey respondents said that their 63 lawyers took only one or two weeks’ leave. The remaining eight survey respondents reported 68 lawyers taking an average of three weeks’ leave. No survey respondent reported any lawyer taking more than four weeks’ non-birth parent leave. This indicates that although some firms offer extended leave for non-birth parents, in practice, few attorneys take the full amount of non-birth parent leave available to them. Further, as a general matter, non-birth parents tend to take leave periods that are drastically shorter than the leave periods taken by women attorneys after childbirth.

III. RECOMMENDATIONS

Based on the foregoing, the Committee makes the following recommendations to legal employers regarding parental leave policies and practices:

A. JOB-GUARANTEED PAID PARENTAL LEAVE

The Committee recommends that all legal employers provide a minimum of three months’ job-guaranteed leave with full pay to all parents, including birth mothers, adoptive parents, and non-birth parents.

In addition, employers should commit themselves to ensuring that attorneys who take parental leave for three months will not forfeit seniority or annual salary increases. Job-guaranteed paid leave is at the heart of a strong parental leave program. It is only when attorneys do not suffer (or perceive that they will not suffer) severe financial consequences or career setbacks as a result of taking parental leave that they will be able to, if they so desire, fully utilize available leave during the first year following birth or adoption. Further, in order to make sure that parental leave practices are consistent with the policies, women partners and counsel and others in senior management should encourage attorneys who want to take extended parental leave to do so. Such encouragement can help establish a culture in which the employee knows that the employer fully supports parental leave and will not penalize them for utilizing available leave. While every attorney will not want to take an extended leave, it is important that all choices are equally respected.

As part of an integrated parental leave policy, legal employers also should ensure that bonuses are not treated in a way that unduly detracts
from paid leave policies. For instance, while pro-rating a bonus may be appropriate, especially for those bonuses that largely are calculated based on billable hours, the bonus should not be unduly reduced.

B. JOB-GUARANTEED UNPAID PARENTAL LEAVE

Beyond the three months’ job-guaranteed paid leave, the Committee recommends that legal employers provide an additional nine months’ unpaid job-guaranteed leave to new parents. The Committee recognizes, however, that small law firms may not be able to provide this benefit in all circumstances. For those attorneys whose want to take extended leave and whose circumstances allow them to utilize unpaid leave, this additional job-guaranteed leave can further ease the transition back to work, resulting in an increased number of attorneys returning from leave. As discussed above, (see Section I(C) concerning the business case for strong parental leave policies), parental leave policies, in turn, can increase loyalty to the employer, improve retention and productivity, and improve client satisfaction and retention as well as contribute to business development.

In order for parental leave policies to be meaningful, employers should continue health insurance coverage and other benefits for the entire period covering both paid and unpaid job-guaranteed leave. For those employees who take unpaid leave, legal employers should consider how attorneys who take other types of extended leave are treated regarding seniority and bonuses. While seniority obviously will be affected by, for example, a one-year leave, employers should ensure that seniority is not unduly or unfairly affected.

C. PARITY OF LEAVE AND ADOPTION EXPENSE REIMBURSEMENT

The adoption process can take years and be costly for a prospective parent even before he or she takes off a single day, paid or unpaid, from work. As previously stated, employers should provide the same guaranteed and paid leave benefits to adoptive parents as they provide to birth and non-birth parents. Specifically, adoptive parents should be offered three months’ job-guaranteed paid leave at full salary without loss of seniority. Further, any annual salary increase or bonus for adoptive parents should be allocated the same way as it is for women attorneys who leave after childbirth.

33. Of the 30 survey respondents that pay a bonus, 13 do not reduce the amount of the bonus due to parental leave. The other 17 respondents pro-rate the bonus based on the period of parental leave. The survey did not ask respondents to provide information on how they treat any potential salary increase during a period of parental leave.
In addition, adoption costs can total more than $50,000 and are not covered by health insurance while birth-related expenses typically are covered. In order to assist adoptive parents, legal employers should provide reimbursement for adoption-related costs, which may be subject to some reasonable maximum limit per adoption.

* * * *

Implementation of these recommendations can best be achieved by having transparent policies relating to parental leave that are clear and easily accessible by employees. In addition, employers should ensure that they have created an environment that fosters parental leave practices that are consistent with formal leave policies, encouraging partners and other senior management to be supportive of parental leave. To further facilitate implementation of these recommendations, legal employers should communicate what is expected of attorneys prior to taking leave and work to assist the re-transition of attorneys returning from parental leave, including by maintaining communication with attorneys on leave so that they have a clear sense of what, if anything, is agreeably expected of them during leave and upon their return. Attorneys who take leave should reach agreement as to the amount of contact and as to reasonable availability to their employer on pending legal matters. If an attorney plans to work during the leave period for any significant amount of time, arrangements should be made for extra leave or possibly some other form of compensation, especially if they are not being compensated during the leave period.

IV. CONCLUSION

The responses to the survey, together with the other information the Committee analyzed in preparing this report, provide a strong foundation for assessing parental leave policies and for developing recommended policies and practices in this area. This report illustrates that a growing number of employers have implemented parental leave policies. At the same time, the survey indicates that there is room to improve both the availability and the quality of parental leave benefits, particularly for adoptive and non-birth parents and for those attorneys who work for employers other than large law firms. It is the intention and the hope of the Committee that this report will increase the focus on parental leave, provide assistance to those attorneys seeking to persuade their employ-
ers to adopt or improve parental leave policies, and motivate legal employers to implement the strong parental leave policies and practices recommended herein.

PARENTAL LEAVE TIP SHEET

When evaluating a potential employer with respect to parental leave policies—and, for those currently employed, to aid in negotiations where no formal or adequate policy exists—the Committee recommends considering the following:34

Finding an Employer of Choice

In considering a new position, do your due diligence:

- Review the organization’s website. It may provide updated comprehensive information regarding parental leave policies and other benefits.
- Enlist resources provided by your law school’s career services, such as NALP directories, alumni, and other materials.
- In addition to this report, consult external sources that list or compile “Great Places to Work,” such as The Vault, Working Mother magazine (and its corresponding website), The Dave Thomas Foundation for Adoption, and American Lawyer. In August 2007, Working Mother and Flex-Time Lawyers published the 50 Best Law Firms for women and will be organizing a forum in 2008 that will report on national trends and recent research on work-life issues. In addition, NALP’s website provides access to its electronic directory of law firm employers, a helpful resource for obtaining information about a firm’s benefits. See www.nalp.org.
- Utilize your networks to locate current or former employees who might share information about the policies and actual practices of the organization, including any discrepancy between the two.
- Look at the senior leadership of the organization. Does it

34. For a more comprehensive guide to selecting an employer of choice with respect to the recruitment, training, retention, and advancement of women attorneys, please review "The Cheat Sheet" developed by the Committee in conjunction with Flex-Time Lawyers LLP. It provides questions to consider when selecting an employer, organized around multiple topics, including work/life balance, leadership accountability, mentoring, career advancement, business development, and networking. The Cheat Sheet is available at http://www.nycbar.org/Diversity/TheCheatSheet.pdf.
reflect a broad array of people in senior roles, including attorneys whom you would view as role models? Have people who have taken parental leaves advanced to partner or a comparable senior position?

**After the Interview**

Once you have an offer, request a copy of the organization’s written policies with respect to parental leave. Discuss the organization’s parental leave policies with the Human Resources staff. Find out relevant information, such as:

- Amount of unpaid parental leave with job-guaranteed return;
- Amount of paid parental leave, if any;
- Treatment of bonus pay and any regular annual salary increase during parental leave;
- Utilization of parental leave by attorneys;
- Availability of short-term or medical disability;
- Amount of expense reimbursement, if any, for adoption costs;
- Effect of taking parental leave on timing or possibility of promotion;
- Treatment of unused vacation, sick, and personal days (are you allowed to bank unused days and add them to your parental leave?);
- Compensation or additional leave time added on if you work from home during part of your leave;
- Transition practices before leaving for and upon returning from parental leave;
- Availability of a flexible return-to-work arrangement following parental leave;\(^\text{35}\) and
- Availability, if any, of on-site or back-up child care facilities.

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\(^{35}\) Assessing the availability of flexible work arrangements—and how to negotiate for one—is beyond the scope of this report, which focuses on parental leave. The two are often linked, however, and some law firms are beginning to institute innovative programs that ease the transition back to work following a parental leave. For resources on alternative work schedules, please consult “In Pursuit of Attorney Work-Life Balance: Best Practices in Management” (NALP 2005); “Better on Balance? The Corporate Counsel Work/Life Report” (PAR 2003); and ABA Commission on Women in the Profession, “Balanced Lives: Changing the Culture of Legal Practice” (2001). The www.pardc.org website also is an excellent resource.
Talking With Your Employer About Parental Leave

Before raising the subject of parental leave with your employer, do your due diligence and gather information:

• Know your organization. Check its website, office manuals and employee handbooks, as well as outside resources about existing parental leave policies and practices (including the types of information listed above under “After the Interview”).

• Gather information about parental leave policies of comparably sized firms or organizations that provide similar compensation to attorneys to use as a benchmark in your discussion. Some of the resources cited in this report may be helpful in gathering this information.

• Make an appointment to discuss your parental leave request and advise your supervisor or partners, where applicable, in advance of the subject of the meeting.

• Take a proactive, solutions-oriented approach; anticipate concerns about work distribution or client relations, for example, and suggest a plan for addressing these issues.

• Submit your proposal in writing, including information about what comparable organizations offer.

• Where applicable, emphasize your long-term value to the organization (be familiar with your past reviews, strengths, and expertise).

• Before taking parental leave, inform your organization whether you want to be available by phone or e-mail while you are on leave and discuss the organization’s expectations regarding your availability during leave.

• If you plan to work for any significant amount of time during your parental leave, ensure that you will receive extra leave or some other form of compensation.

If your organization does not have a parental leave policy or the policy does not meet your needs, the following guidelines may help you in negotiating parental leave for yourself, as well as in persuading your organization to implement or improve parental leave policies:
• Talk informally to other individuals within the organization, including a trusted mentor or colleague who may have previously negotiated a parental leave. Such colleagues can advise you of any challenges faced in such negotiations. If you have a mentor who is more senior or holds managerial responsibilities, ask him or her for advice on how the organization historically has responded to parental leave requests and on how best to craft a successful proposal. Look for precedents for the type of leave you are requesting.

• Look for statements of the organization’s values and stated commitments that might be helpful for you to use in framing your proposal.

• Cite the New York City Bar’s recommendations and the sources contained in this report.

• An important part of your proposal may be to spell out the “business case” for quality parental leave policies to your employer; it may not be obvious to your organization that paid parental leave programs and other similar policies benefit the employer, and not just the employee and the child. Advise your employer of the proven reductions in turnover cost, increased profitability/productivity and enhanced employee loyalty engendered by quality parental leave policies, discussed in Section I(C) of this report. Focusing on the business case for strong parental leave policies also will permit your discussion to transcend the individual aspect of your proposal and focus on the benefit of parental leave to the employer’s bottom line.

• Try to persuade your organization to implement a parental leave policy applicable to all attorneys, so parental leave is not determined on a case-by-case basis (this may lead to parental leave policies being available only to “stars”), but rather is treated as a business benefit akin to health insurance.

August 2007
Committee on
Women in the Profession

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Corporate-Family Conflicts

Committee on Professional and Judicial Ethics

**TOPICS:** Corporate-family conflicts; duty of loyalty; duty to preserve confidences and secrets.

**DIGEST:** When a law firm is approached to represent a client adversely to an entity that is a corporate-family member (an “affiliate”) of a current corporate client, the law firm faces a potentially disabling corporate-family conflict. In response, the law firm should first ascertain whether its engagement letter with the current corporate client excludes affiliates as entities that the law firm also represents, or whether the engagement letter contains an applicable advance conflicts waiver from the current corporate client, thereby allowing the adverse representation. If consulting the engagement letter does not end the inquiry, the law firm must then analyze whether there is a corporate-family conflict. In performing this analysis, the law firm should consider whether: (a) the firm’s dealings with the affiliate during the firm’s representation of the current corporate client, the overlap between that
client and the affiliate in personnel and infrastructure, or other facts would give rise to an objectively reasonable belief on behalf of the client that the law firm represents the affiliate; (b) there is a significant risk that the law firm’s representation of either the current corporate client or the client in the adverse representation (the “adverse client”) would be materially limited by the law firm’s responsibilities to the other client; and (c) during its representation of the current corporate client, the law firm learned confidences and secrets from either the current client or the affiliate that would be so material to the adverse representation as to preclude the law firm from proceeding. If any of these conditions obtain, the law firm must secure informed consent before accepting the adverse representation. Law firms may seek to avoid corporate-family conflicts by defining the scope of representations before potential conflicts emerge, and by employing advance waivers when appropriate.

**CODE:** DR 4-101(B); DR 5-105(A), (B) & (C); DR 5-109; DR 7-101(A)(1) & (2).

**QUESTION**

May a law firm accept a representation that is adverse to an affiliate of a current corporate client?

**DISCUSSION**

**I. CONFLICTS INVOLVING AN AFFILIATE OF A CURRENT CORPORATE CLIENT**

In recent years, corporate merger and acquisition activity has eclipsed all previous records. At the same time, mergers between law firms have become increasingly common, with a resulting increase in the number of clients they represent. Against this backdrop, it is hardly surprising that law firms today often find themselves approached to undertake representations adverse to affiliates of current corporate clients.¹

At times, the need to determine whether the adverse representation

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¹ For a discussion of the subject of “thrust-upon” conflicts, see Ass’n of the Bar of the City of N.Y. Comm. on Prof’l and Judicial Ethics (“ABCNY”), Formal Op. 2005-5.

² In this opinion, the law firm’s existing corporate client is referred to as the “current
raises a corporate-family conflict will be avoided because either (1) the engagement letter, or another agreement, between the current corporate client and the law firm excludes affiliates as entities that the law firm also represents, or the current corporate client has waived the conflict in advance; or (2) the law firm declines the representation because it does not wish to offend its current corporate client.

This opinion offers guidance in analyzing corporate-family conflicts when neither contractual nor business considerations dictate the outcome.

A. The Limits of the “Entity Theory” and of the “No-Affiliates” and “All-Affiliates” Positions

We discuss below several “bright-line” tests that have been considered in analyzing corporate-family conflicts, and conclude that a more nuanced and fact-specific approach is necessary.

DR 5-109 and Model Rule 1.13 provide that a law firm retained by an organization represents the organization and not its constituents. Sometimes referred to as the “entity theory,” this means that although the law firm may be “dealing with the organization’s directors, officers, employees, members, shareholders, or other constituents,” when “it appears that the organization’s interests may differ from those of the constituents with whom the lawyer is dealing,” the law firm must act in the best interests of the organization, rather than of its constituent(s). DR 5-109. Therefore, DR 5-109 and Model Rule 1.13 suggest that, at least when the affiliate is a shareholder of the current corporate client—for example, the parent of a subsidiary—the law firm could represent a new client adversely to the parent on a matter unrelated to the representation of the subsidiary, because the parent is not the law firm’s client. But the entity theory has never been interpreted so expansively as to create a rule that a law firm could represent a new client adversely to a constituent of the current corporate client.

4. This opinion sets forth what is ethically permissible. Of course, a law firm may take a more restrictive view of corporate-family conflicts, and may decline new representations that are nonetheless permissible under this opinion.
firm represents only its current corporate client, and none of the client’s affiliates.\(^5\)

Similarly to the entity theory, the “no-affiliates” position holds that a law firm representing one member of a corporate family “never (by that fact alone), or hardly ever, represents any other affiliated entity. . . .” Wolfram at 299. Under the no-affiliates position, a law firm could almost always represent a new client adversely to the affiliate of a current corporate client if the new matter is unrelated to the lawyer’s representation of the current client. So, for example, under the no-affiliates position, a law firm representing a holding company whose sole, wholly owned subsidiary is a bank, could represent a new client in litigation adverse to the bank, without the consent of the holding company, as long as the litigation involving the bank is unrelated to the work that the law firm has performed for the holding company.\(^6\)

At the other end of the spectrum lies the “all-affiliates” position, which holds that “a lawyer who represents one member of a multi-member corporate family is always deemed to represent all others as well. . . .” Wolfram at 298-99. Under the all-affiliates position, a law firm could never represent a new client in a matter that was adverse to an affiliate of a current corporate client without the current client’s consent. Therefore, under this position, if the current corporate client is a tiny foreign subsidiary of a large holding company with hundreds of subsidiaries—both domestic and foreign—in unrelated industries, all of which are held for investment purposes, the law firm cannot represent a new client adversely to any of the hundreds of subsidiaries in the holding company, absent the consent of the tiny foreign subsidiary.

As this analysis shows, the “entity theory” and the “no-affiliates” and “all-affiliates” positions can yield indefensible results. Thus, a more nuanced and fact-specific approach to corporate-family conflicts is necessary.

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6. A narrow exception exists to the no-affiliates position—the “alter-ego” exception—that extends the law firm’s conflicts to affiliates considered to be alter-egos of the firm’s client. This exception imports a test, which originated in the entirely unrelated context of corporate liability and considerations of veil-piercing and which is shaped by very different considerations, to corporate-family conflicts. Many cases and commentators have rejected using the alter-ego test to analyze corporate-family conflicts. See, e.g., Morrison Knudsen Corp. v. Hancock, Rothert & Buns hot, 69 Cal.App.4th 223, 249, 251-52 (1st Dist. 1999); 1 Geoffrey C. Hazard and W. William Hodes, The Law of Lawyering § 17.9, at 17-29 (3d ed. 2005); Wolfram at 346-47.
II. ETHICAL DUTIES UNDERLYING THE ANALYSIS OF CORPORATE-FAMILY CONFLICTS

Two core ethical duties animate the analysis of corporate-family conflicts: the attorney's duty of loyalty and the attorney's duty to preserve the confidences and secrets of a client.7

A lawyer is a fiduciary. Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2nd Cir. 1976). As a fiduciary, an attorney “is charged with a high degree of undivided loyalty to [the] client.” In re Kelly, 23 N.Y.2d 368, 375 (1968). EC 5-1 states that “[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties.” DR 5-105(A) prohibits a lawyer from undertaking a representation if the lawyer's independent professional judgment on behalf of the client is likely to be adversely affected, or if the representation is likely to involve the lawyer in representing differing interests. Under DR 5-105(C), the lawyer may accept the adverse representation only “if a disinterested lawyer would believe that the lawyer can competently represent the interests of each [client] and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.” See also Model Rule 1.7.

An attorney also has the important duty to preserve client confidences and secrets, and to refrain from using those confidences or secrets to the disadvantage of the client, or for the advantage of the lawyer or another person, absent the client's consent after full disclosure. DR 4-101(B).8 See also Model Rule 1.6. When an attorney is faced with undertaking a representation adverse to an affiliate of a current corporate client, the attorney must be mindful of not violating this duty, even inadvertently.

III. CONSIDERATIONS IN DETERMINING WHETHER A LAW FIRM MAY ACCEPT A REPRESENTATION ADVERSE TO AN AFFILIATE OF A CURRENT CORPORATE CLIENT

A. Is the Affiliate De Facto a Current Client of the Law Firm?

Whether the adverse representation raises a corporate-family conflict

7. The attorney’s duty of zealous representation under DR 7-101 also plays a role in analyzing corporate-family conflicts. Under DR 7-101(A)(1) and (2) a lawyer may not “fail to seek the lawful objectives of the client through reasonably available means,” or “prejudice or damage the client during the course of a professional relationship.” For example, simultaneously representing the adverse client and the current corporate client can chill the law firm’s vigor on behalf of either client.

8. According to Professor Roy Simon, “[t]ogether with the duty of loyalty, this is the most important duty in the Code, and is the bedrock of the adversary system and the attorney-client relationship.” Simon’s N.Y. Code of Prof’l Responsibility Annotated 479 (2006 ed.).
requiring informed client consent rests in part on whether the affiliate is de facto a current client of the law firm. When the engagement letter, or another agreement, has not defined the law firm’s clients to exclude affiliates, and when there is not an advance waiver allowing the law firm to act adversely to the affiliate, then the law firm must consider whether the affiliate is de facto a current client. Although this will turn on the specific facts and circumstances of each representation, set forth below are questions that the law firm should consider in this connection.

i. Does the current corporate client have an objectively reasonable belief that its affiliate has de facto become a current client of the law firm, either because of the law firm’s relationship and dealings with the affiliate during the representation, or because of significant overlaps in personnel and infrastructure between the corporate client and its affiliate?

Corporate affiliation, without more, does not transform all of a current corporate client’s affiliates into clients of the law firm. But the circumstances of a particular representation may be such that the current corporate client has an objectively reasonable belief that some or all of its affiliates have de facto become the law firm’s clients. This may occur, for example, when the law firm is counsel to the parent of a wholly owned subsidiary, and the two corporations share the same officers, directors, or in-house counsel. Although under New York law a subsidiary is legally distinct from its parent, even if it is wholly owned and the two corporations share stockholders, officers, directors, and offices,9 these facts may nevertheless give rise to a reasonable belief that both entities are clients of the law firm. This is especially true if the adverse representation would require the law firm to oppose the same representatives of the affiliate with whom it has regularly communicated while representing the corporate client. Otherwise, an attorney could negotiate in the morning on behalf of the same person whom the attorney is cross-examining in the afternoon.

The caselaw on motions to disqualify in the context of corporate-family conflicts identifies the following factors as relevant to determining whether the affiliate has de facto become a client of the law firm:10


10. See Discotrade v. Wyeth-Ayerst Int’l Inc., 200 F. Supp. 2d 355 (S.D.N.Y. 2002) (disqualifying firm from representation adverse to sister corporation of a current client because their relationship “is so close as to deem them a single entity for conflict of interest purposes”; the sister corporations were subsidiaries of a single corporate parent, shared the same board of
Do the current corporate client and its affiliate share the same directors, officers, management, or other personnel?

Do the current corporate client and its affiliate share the same offices?

Do the current corporate client and its affiliate share the same legal department (or report to the same general counsel)?

Do the current corporate client and its affiliate share a substantial number of corporate services?

Is there substantial integration in infrastructure between the current corporate client and its affiliate, such as shared computer networks, e-mail, intranet, interoffice mail, health benefit plans, letterhead and business cards, etc.?

Standing alone, the presence of one or more of these factors may not warrant the conclusion that the affiliate has de facto become a client. But the greater the overlap between the current client and its affiliate, and
the more that overlap relates to both the existing representation of the current corporate client and the adverse representation, the more objectively reasonable the belief will be that the affiliate has de facto become a client of the law firm.

ii. Is there a significant risk that the law firm’s representation of either the current corporate client or the adverse client in the adverse representation will be materially limited by the law firm’s responsibilities to the other client?

The law firm’s duty of loyalty also requires the law firm to determine whether there is a significant risk that its representation of either its current corporate client or the adverse client will be materially limited by its responsibilities to the other client. For example, we agree with the Committee on Standards of Attorney Conduct of the New York State Bar Association that “before accepting a representation adverse to an affiliate of a corporate client, a lawyer should consider whether the extent of the possible adverse economic impact of the representation on the entire corporate family might be of such magnitude that it would materially limit the lawyer’s ability to represent the client opposing the affiliate with loyalty and zeal.”11 Under those circumstances, “Rule 1.7 will ordinarily require the lawyer to decline representation adverse to a member of the same corporate family, absent the informed consent of the client opposing the affiliate of the lawyer’s corporate client.”12 The same standard applies under the existing provisions of the Code. DR 5-105(B).

iii. During its representation of the corporate client, did the law firm learn confidences and secrets from either the client or its affiliate that would be so material to the adverse representation as to preclude the law firm from proceeding?

While representing the current corporate client, the law firm may have acquired confidences and secrets from the client directly—or from the affiliate to benefit the client—that are highly material to the adverse representation, so that the law firm cannot represent one client without using or disclosing the confidential information of the other. As we explained at length in ABCNY Formal Op. 2005-2, this circumstance would render the law firm unable to proceed, absent consent.13

12. Id.
13. See also, e.g., Restatement (Third) of Law Governing Lawyers, § 20 cmt.d (2000) ("Some-
IV. PROPHYLACTIC MEASURES: AVOIDING CONFLICTS INVOLVING AN AFFILIATE OF A CURRENT CORPORATE CLIENT

The easiest way for a law firm to avoid corporate-family conflicts—at least those that may be anticipated—is to define the scope of the engagement before a potential conflict emerges and the situation becomes contentious. Law firm and client are best served by a frank discussion of potential corporate-family conflicts in advance. ABA Formal Opinion 95-390 (1995) has embraced this approach, stating that the “best solution to the problems that may arise by reason of clients’ corporate affiliations is to have a clear understanding between lawyer and client, at the very start of the representation, as to which entity or entities in the corporate family are to be the lawyer’s clients, or are to be so treated for conflicts purposes.”

Accordingly, law firm and client may choose to define their relationship by agreeing to an advance conflict waiver or by delineating in the engagement letter, or other agreement, those affiliates that the law firm is undertaking to represent. But care should be taken in this regard because “[a] lawyer may not ethically ask for nor may a lawyer agree to any . . . restriction unnecessarily compromising the strong policy in favor of providing the public with a free choice of counsel.” See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-381 (1994); Wolfram at 349. Thus, the law firm and client should be mindful of entering into an agreement which places excessive restrictions on the lawyer’s right to practice, for example, by restricting the law firm from any representation adverse to hundreds of corporate affiliates, both here and abroad.

CONCLUSION

Given today’s ever-burgeoning corporate merger and acquisition activity, the increasing size and complexity of multi-national corporate structures, and frequent law-firm mergers, it is no surprise that law firms can find themselves faced with determining whether they may undertake simultaneous representations both for and against members of the same
corporate family. Although some of these corporate-family conflicts may be averted by either (1) an engagement letter, or other agreement, that delineates which affiliates, if any, of a corporate client the law firm represents, or contains an applicable advance waiver; or (2) a business decision to forgo a new representation adverse to an affiliate of an important corporate client, a law firm may often be required to analyze whether it may accept a new engagement adverse to the affiliate of a current corporate client.

This opinion provides an ethical framework to analyze potential corporate-family conflicts. The law firm should consider whether the affiliate has de facto become a client of the law firm. The relevant considerations, which are highly fact-specific, include the nature of the law firm’s relationship and dealings with the affiliate during its representation of the corporate client, as well as the presence of significantly overlapping personnel and infrastructures between the corporate client and its affiliate. The law firm should also consider (a) the presence of any material limitations on the law firm’s responsibilities to either the current corporate client or the adverse client if the law firm were to accept the adverse representation; and (b) whether the law firm learned confidences and secrets during the representation of the corporate client that would be so material to the adverse representation as to preclude the law firm from proceeding. Although these determinations are not always easily made, a thoughtful analysis should help the law firm decide whether it may proceed without the informed consent of one or both clients.

September 2007
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The Creation of an Independent Ethics Commission

The Committee on Government Ethics

Corruption and ethics in Congress ranked near the top of voters’ concerns in the 2006 mid-term elections. Exit polls showed that 42 percent of voters were “extremely concerned” about the issue.¹ Those results were consistent with earlier polls illustrating the depth of public distrust of Congress. For example, in a poll conducted in January, 2006, 64 percent of those polled said that ethics and honesty in Congress are “not so good” or “poor” and 57 percent agreed that at least half of all Members of Congress accept bribes or gifts that influence their votes.² Public confidence in the current system of congressional ethics and oversight is also low and the desire for reform is clear: 81 percent of Americans are upset about the way the House Ethics Committee is operating;³ 72 percent would be more likely to vote for a candidate who supports creating an independent, bipartisan ethics committee.⁴

It is tempting to conclude that Americans have always lacked basic confidence in the integrity of Congress and other elected officials. In the

³ Democracy Corps Questionnaire (Jan. 22-25, 2006) (24 percent are “extremely” upset, 26 percent “very” upset, and 31 percent “somewhat” upset).
⁴ Id. (43 percent are “much more” likely, 29 percent “somewhat more” likely).
last several decades, we have witnessed a sharp turn for the worse in public attitudes about elected officials that are now accepted as the norm. However, in 1964, 76 percent of Americans answered yes to the question of whether “you can trust the government in Washington to do what is right most of the time.” By 1996, merely 19 percent of Americans agreed.\(^5\)

Many factors contribute to such public skepticism, but scandals from Watergate through the Jack Abramoff lobbying debacle have plainly taken their toll on Americans’ confidence in government.

Public skepticism about the integrity of individual congressional Members naturally implicates the congressional ethics process itself. Where the public has lost faith in the integrity of legislators, it makes sense for the public to also doubt the efficacy of the congressional bodies charged with enforcing existing ethical rules. This is especially true when the responsibility for congressional ethics is entrusted exclusively to members of the institution. Indeed, the U.S. Constitution places ultimate responsibility for the enforcement of congressional ethics in the hands of legislators themselves.\(^6\) This system of self-discipline is carried out by the Senate’s Select Committee on Ethics and, in the House of Representatives, by the House Committee on the Standards of Official Conduct.

Critics of the current ethics process contend that the congressional ethics committees—made up of equal numbers of majority and minority Members—are unable to effectively enforce congressional ethics. One explanation for tepid ethics enforcement is that Members of congressional committees may be naturally disinclined to sanction their colleagues based on norms of collegiality or fear that they themselves could face the perils of aggressive enforcement. On the House side, the reticence to discipline fellow Members has at times allegedly been embodied in the ethics committee’s adherence to an informal “truce” pursuant to which Members of both parties agree not to file any ethics complaints against one another.\(^7\)

In order to address the perception that the system of ethical oversight is broken and restore Americans’ faith in the institution of Congress, many public interest organizations, academics, and other congressional observers have long argued for the creation of an independent ethics commission (“IEC”) that would cover both houses of Congress. An

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IEC, composed of non-congressional members, would assume some of the duties that the congressional ethics committees are currently charged with carrying out. As discussed within, the greater independence of such a non-congressional ethics body is thought to address some of the structural deficiencies inherent in the current system.

Part I of this Report offers a brief summary of the existing system of congressional ethics enforcement. Part II describes briefly some of the features of the IEC proposals recently considered by Congress. This Report does not offer a detailed critique of each proposal, but instead seeks to provide enough details concerning the proposals to give the reader a general understanding of how the proposed independent ethics office could work in practice. Additional details on the legislative proposals to create an IEC are set forth in an Appendix to this Report. The focus of Part III is on the potential benefits that an IEC would offer. Part IV considers some of the objections voiced by opponents of the creation of a Federal IEC. This section of the Report focuses primarily on the constitutional concerns arguably implicated by transferring some responsibilities for ethics enforcement to an independent, non-congressional entity. Part V considers briefly the guidance that can be provided by the States’ experience with IECs, especially the features that influence a commission’s degree of independence. Finally, the Report concludes with our recommendations.

I. THE CURRENT SYSTEM OF CONGRESSIONAL ETHICS ENFORCEMENT

Congress established standing congressional ethics committees in the 1960s—in the Senate in 1964 and the House in 1967.8 Prior to the creation of ethics committees, investigations of congressional misconduct were typically referred to specially-created committees.9 A written code of congressional ethics was first adopted in 1968.10 The actions of legislators were previously judged according to an unwritten set of ethical standards.11

8. See background report entitled “Enforcement of Ethical Standards in Congress,” available at http://www.rules.house.gov/Archives/jcoc2ac.htm, which was prepared in connection with the work of the Joint Committee on the Organization of Congress, 103rd Congress (1993) (last visited June 23, 2007) (hereinafter referred to as “Enforcement of Ethical Standards”). “Enforcement of Ethical Standards” presents some of the analysis and historical background information supporting the Joint Committee’s recommendations regarding the ethics process that are referred to later in this Report.
9. Id.
10. Id.
11. Id.
The Senate’s Select Committee on Ethics (the “Senate Ethics Committee”) is made up of six Senators—three from each party. The House of Representatives’ Committee on Standards of Official Conduct (the “House Ethics Committee”) is made up of ten Representatives, five from each party. All members of both committees continue to exercise, of course, their full slate of legislative responsibilities. Thus, ethics committee members inevitably face the difficult and potentially conflict-laden task of participating in the give-and-take process of legislating while serving on a committee that may be called upon to evaluate and/or censure the conduct of legislators with whom they work on an ongoing basis.

The congressional ethics committees currently review ethics complaints, and, theoretically, when formal disciplinary action is warranted (such as a censure or expulsion in the Senate, or a reprimand in the House) the committees make recommendations to the respective body to be voted upon by the full House or Senate. Without a vote of the full legislative body, the committees may issue letters of reproval or reprimand to Members, but this is not considered a formal disciplinary action by the entire institution such as a censure. Since 1990, ethics enforcement by the House Ethics Committee has been “bifurcated,” whereby a subcommittee consisting of Members of the standing committee reviews initial charges and conducts preliminary investigations. Following this initial procedure, if appropriate, a second subcommittee (made up of the remaining members of the House Ethics Committee) hears the evidence and determines whether the charges are proven. The full Committee then may make disciplinary recommendations to the membership of the House.

In practice, examples of congressional sanctions or expulsion are relatively rare. Historically, 31 Members of Congress have been censured (22 representatives and 9 senators) and 19 Members have been expelled (15 senators and 4 representatives) with the majority of such sanctions relating to support of the Confederacy. While the numbers also show that formal discipline of Members has been infrequent over the last three decades, it should be noted that Members may choose to resign rather than face disciplinary consequences. For instance, in 1995, Senator Robert Packwood of Oregon resigned after the Senate Ethics Committee

12. Id.
13. Id.
recommended his expulsion for misuse of his position and for sexual misconduct.¹⁵

In 1997, the House of Representatives’ rules for filing ethics complaints were modified to prevent private citizens from filing ethics complaints unless a Member of the House serves as a sponsor for the complaint (effectively prohibiting a private citizen from bringing an independent complaint). Specifically, the House Committee on Standards of Official Conduct Rule 15 (d) states: “Information offered as a complaint by an individual not a Member of the House may be transmitted to the Committee, provided that a Member of the House certifies in writing that he or she believes the information is submitted in good faith and warrants the review and consideration of the Committee.”

While the House Ethics Committee is required to report the outcome of any investigation to the full House, it is not required to report any resolutions, reports, recommendations, or advisory opinions to the House. The Committee may, however, choose to do so by majority vote.¹⁶ In addition, the Committee may choose by majority vote to permit the public disclosure of any information or testimony received, the contents of a complaint, or the fact that a complaint was filed.¹⁷ Only the chairman and ranking minority member of the Committee are authorized to make public statements about the Committee’s business.¹⁸ Moreover, the meetings of the House Ethics Committee are generally closed to the public (though certain subcommittee hearings are open unless specifically closed by affirmative vote).¹⁹

According to Standing Rule XXVI of the Senate, Senate Ethics Committee meetings shall be open to the public unless they “will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual.” In that case, the meeting can be closed by majority vote.²⁰ Notably, the Senate Ethics Committee may not divulge to

¹⁵. Id. at “History of disciplinary action.”
¹⁷. Id. at cl. 3 (b)(6).
¹⁸. Id. at cl. 3(h)(1)(B)(i).
¹⁹. Id. at cl. 3 (c)(1-2).
the public any information or materials related to the illegal or improper conduct of Members, officers, or employees subject to investigation.\textsuperscript{21}

\section*{II. PROPOSALS FOR THE CREATION OF A FEDERAL INDEPENDENT ETHICS COMMISSION}

Recent congressional scandals have led to renewed interest in ethics reform generally and in the creation of an independent ethics commission specifically.\textsuperscript{22} Indeed, during the 109th Congress, several bills that would have established an IEC were referred to congressional committees. One bill, in the form of an amendment offered to the Legislative Transparency and Accountability Act of 2006, was ultimately considered and rejected by the Senate.\textsuperscript{23} Although the Senate rejected the proposal, House Speaker Nancy Pelosi appointed a task force of House Members to explore the possible creation of an IEC. The task force was scheduled to report its results by May 1, 2007. As of this writing, the task force has not submitted any formal recommendations to the House.

The current congressional task force is not the first congressional body to study the merits of an IEC. In the 102\textsuperscript{nd} Congress, a joint task force of twenty-eight congressional Members—equally divided among Democrats and Republicans from both Houses—was charged with studying the operations of Congress, including the ethics process, and providing recommendations for reform.\textsuperscript{24} After holding thirty-six hearings and taking tes-

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\textsuperscript{22} The Jack Abramoff lobbying debacle and the congressional page scandal are two of the high-profile congressional ethics scandals that occurred during the 109th Congress. See e.g., “Report Finds Negligence in Foley Case,” \textit{New York Times}, dated December 9, 2006.

\textsuperscript{23} See Senate debate accompanying Amendment No. 3176 to the Legislative and Transparency and Accountability Act of 2006, U.S. Senate, March 28, 2006, available at http://www.thomas.gov/cgi-bin/query/C?r109:./temp/~r109kvqZPE (the “Senate Debate”), at S2447. Amendment No. 3176, which would have created an IEC on the Senate side, was rejected by the Senate on March 28, 2006. See Senate Debate at S2359.

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timony from more than two hundred witnesses, the 1993 congressional
task force completed a comprehensive report on Congress's operations. In
regard to the ethics process specifically, a subcommittee recommended
that a panel of private citizens serve as the fact-finders for the House
Ethics Committee in place of the subcommittee of congressional Mem-
bers then performing that function.25 The involvement of private citizens,
according to the report's drafters, would diminish the “inherent conflict
of interest” that exists with a system of self-discipline and “help restore
the public's credibility in the process.”26 The proposal was never enacted.

Current proposals for the creation of an IEC, while differing with
respect to the degree of independent investigatory powers that would be
afforded to commission members and other factors, share many of the
same features.27 At a minimum, the proposals would generally:

• create an independent ethics body staffed by non-congres-
sional members chosen jointly by congressional leaders of both
parties;
• entrust authority to the commission to initiate an ethics in-
vestigation upon a complaint being filed by a Member of Con-
gress or a private citizen subject to the potential for being over-
ridden by the congressional ethics committees;
• under certain circumstances, grant authority to the commis-
sion to administer oaths, compel testimony and take deposi-
tions to facilitate an investigation; and
• authorize the commission to report the results of any investi-
gation to the congressional ethics committees.

The ethics enforcement process under an IEC would thus generally
proceed as follows: (1) an ethics complaint is filed with the IEC by a
Member or an outside complainant or initiated by the commission itself;
(2) within thirty days of the complaint’s filing, the commission, or the
head of the commission under some proposals, makes an initial determi-
nation whether there are sufficient grounds to conduct an investigation
or whether to dismiss the complaint; (3) the subject of the complaint is
provided the opportunity during that period to respond to the complaint;

The report was silent on the creation of a similar body in the Senate.
26. Id.
27. An Appendix to this Report details some of the key features of four IEC proposals.
(4) the commission may dismiss the complaint if it fails to state a violation, lacks credible evidence or is *de minimis* in nature; where the complaint is dismissed, it may also be referred to the congressional ethics committee for determination of whether the complaint is frivolous; (5) if the commission determines there are sufficient grounds to conduct an investigation, the commission notifies the congressional ethics committee, which can override that determination by a two-thirds, public roll-call vote, accompanied by a report explaining the reasons for overriding the determination; (6) if the ethics committee does not override the determination, the commission conducts an investigation to determine if probable cause exists that an ethics violation has occurred, subject to the same process for possible congressional ethics committee override; (7) if the investigation proceeds, the commission determines whether a violation has occurred and reports to the congressional ethics committee with recommendations for appropriate sanctions.28

Under all of the proposals, the congressional ethics committees would retain *final* authority over the decision to actually discipline a Member. At most, the IEC would have the power to “recommend” appropriate sanctions. This feature is intended to address the primary constitutional objections raised by opponents of an IEC (see *infra* Section IV).

### III. POTENTIAL BENEFITS OF AN INDEPENDENT ETHICS COMMISSION

The creation of an IEC, by transferring some of the initial investigatory powers and responsibilities to an outside body consisting of non-congressional members, seeks to address the potential structural impediments to effective ethics enforcement existing under the current system. As detailed further below, proponents assert that the greater independence of an IEC would help to (a) restore the public’s faith in the ethics process and, more important, in the institution of Congress overall; (b) reduce

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28. The process outlined here was presented by Senator Lieberman during Senate consideration of the legislative amendment, referred to previously, that would have created an IEC to assume responsibilities with respect to the Senate ethics process only. See Senate Debate at S2443-2444. The Senate-only proposal was offered as a compromise to address the concern that a “bicameral” IEC would run afoul of constitutional provisions (see Art. I, § 5, Clause 2, discussed *infra*) entrusting to each house the authority to determine its own rules and punish its own Members. See *Id.* at page S2443 Although the IEC proposals described in the Appendix vary in their specifics, including with respect to whether the IEC would cover one or both houses of Congress, the significant similarities shared by the proposals means the above summary of the ethics process under an IEC would, in large measure, accurately describe the revised process under most of the proposals.
the role of politics in the process of ethics enforcement; and (c) minimize the burdens on legislators currently serving on congressional ethics committees. Although proponents emphasize other benefits (e.g., the involvement of the public as a means to promote ethical behavior), this Report focuses below on the potential benefits already mentioned, most notably, the enhancement of the public’s perception of Congress.

A. Restoring Public Confidence in Congress

In supporting legislation that would have created an IEC, Senator McCain summed up the rationale for the proposal as follows: “[T]he fundamental point is that we need to restore the confidence of the American people in the way we do business.” Senator Lieberman struck the same chord in calling the creation of an IEC a means to restore Congress’s “credibility and legitimacy” with the American people. An IEC is thus viewed by its supporters as a vehicle for addressing the public’s perception that a system of congressional ethics administered entirely by Congress itself is structurally incapable of effectively promoting and enforcing high standards of ethical conduct among its Members.

As illustrated by testimony provided to the 1993 congressional task force, there may be good reason to doubt the efficacy of the current process based on the current structure of congressional ethics committees and the realities of partisan politics. First, unlike other congressional committees, the ethics committees consist of an equal number of Members from each party. Although that membership is meant to ensure bipartisanship, in practice, it has often left the committees deadlocked on the key issue of whether to even commence an investigation in the first instance. Second, members of such committees inevitably must work closely with any congressional Member under potential investigation. Ethics committee members, aware that the assistance of their colleagues on legislative matters may be needed in the future, may be naturally reluctant to commence an investigation that could result in punishment. Third, an investigation may also put legislators in the difficult position of scruti-
nizing behavior that they themselves are engaged in, another potential disincentive to comprehensive ethics enforcement. These are potential impediments that flow directly from the structure of the ethics process itself.

Senator Obama has also described how an additional structural flaw with the current process may contribute to public mistrust: “[T]here’s some good reason for the American people to be skeptical of our enforcement system. After all, we in the Senate are our own judge, jury and prosecutor.” This precise concern was addressed in testimony provided to Congress in 1993 by Professor Dennis P. Thompson of Harvard University. Professor Thompson noted that while there may not be a literal trial of a Member in a given case, the interests of members of the ethics committees, as Members of Congress, are so “closely connected” to that of the individual Member facing a potential ethics inquiry that, in effect, the principle that no person shall serve as a judge in his own case is undermined. The concern may be amplified in the Senate because the Senate ethics process (unlike the House process) is not bifurcated, i.e., Senate ethics committee members that participate in the investigation of a fellow Senator also participate in the committee’s vote on whether to recommend to the full Senate that a Member face discipline.

Critics of the current process argue that instances of congressional discipline have been relatively infrequent, despite public knowledge of congressional misconduct, and that reforms to the system are thus necessary. One such critic points to the fact that in the last twenty years, the two houses of Congress combined have reprimanded or “denounced” only four Members and expelled only one after a federal conviction. Previous examples in which the House disciplinary process has been called into question include the case of Rep. Dan Rostenkowski who never faced congressional discipline despite serving fifteen months in prison for his actions in the House Post Office Scandal and the proceedings involving

33. Statement of Dennis P. Thompson, Harvard University Professor, Hearing Before the Joint Committee on the Organization of Congress (S. Hrg. 103-14), 103rd Congress, February 25, 1993 (the “Thompson Statement”), at 112.
34. Senate Debate at S2442.
36. Id. (relying on James Madison who wrote, “No man is allowed to be a judge in his own case, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal force, nay with greater reason, a body of men are unfit to be both judges and parties at the same time.”)
Rep. Tom DeLay, which stopped short of actual congressional sanctions. More recently, two congressional scandals that appeared to some observers as warranting ethics committee sanctions never resulted in any. First, Rep. Duke Cunningham faced no ethics committee sanctions although engaging in activity that culminated in his guilty plea to accepting $2.4 million in bribes from defense lobbyists and to tax evasion. Second, after a nine-week investigation, the House Ethics Committee, while finding then-Speaker Dennis Hastert and other Republican leaders “negligent” in connection with the congressional page scandal, concluded that no Members violated any House rules and thus recommended no sanctions.

Congressional ethics committees may have reached their decision not to sanction Members in the above cases after thoughtful deliberation and analysis. The reverse, however, may also be true: namely that such examples show the extent to which flaws in the current process conspire to make the discipline of legislators, by legislators themselves, unlikely. Regardless, it seems clear that the public, based in part on such high-profile cases of congressional misconduct that were not met with any congressional sanctions, believes that the current system of ethics enforcement is tilted in favor of weak ethics enforcement or, that when action is taken, partisan politics plays a role in limiting the use of sanctions. This perception undermines the public’s overall faith and confidence in the workings of Congress. Accordingly, at a minimum, the appearance of greater objectivity and independence is an important benefit that will likely be realized by the creation of an IEC.

This potential benefit is not a trivial one. Ethics reforms beyond the IEC proposals described herein have been and continue to be enacted in significant part in the hopes of improving the public’s faith in the legitimacy of the legislative process. To the extent that the effectiveness of Congress rests, at least in part, on the public’s attitudes towards the institution of Congress (as many advocates contend), the problem of public perception becomes a matter of serious concern. Simply put, a legislature’s

38. Id.
41. See, e.g., Senate Debate at S2442.
42. See, e.g., Senate Debate at S2453 (Senator Collins: “We are dealing with a reality that public confidence in Congress is very low. It is perilously low. It makes it difficult for us to pass legislation because the public believes that oftentimes our decisions are not in the public interest but, rather, beholden to some private interest.”)
effectiveness may depend on the goodwill and trust of the constituents that Members of the legislature are elected to serve. Where that trust is diminished, legislator effectiveness can be expected to be impacted as well.

**B. Reducing Political Pressures**

The political pressures placed on congressional ethics committee members when making the decision to commence an investigation “and during the course of an investigation itself” are enormous. Publicity concerning congressional misconduct can affect not only an election for a particular House or Senate seat but the balance of power in Congress overall. In close elections, the impact of an investigation can be significant.  

Members of congressional ethics committees cannot be entirely immune from such political considerations. Examples of how partisan concerns may influence the process are not uncommon. Decreasing the impact of electoral and partisan concerns on investigations of congressional misconduct is thus a potential benefit of an IEC. Investigations conducted by an IEC could also produce electoral consequences, but there is reason to believe that that the decision-making process itself, especially at the outset, would be better insulated from electoral considerations. First, IEC members would not be directly subject to the same electoral pressures as members of congressional ethics committees. The IEC members would not be elected by the public with their partisan affiliation in mind, and members would not be subject to re-election. Second, their professional livelihoods would not be as closely bound to the fortunes of fellow legislators. Members of an IEC, although dependent upon legislators for an initial appointment, would not need to work collaboratively on other matters with legislators who are the subject of an ethics inquiry. Third, the fear of facing an ethics inquiry for similar conduct would be absent. Thus, to the extent that electoral and political pressures do in fact affect

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43. IEC proposals seek to address the concern over investigations being commenced for purely partisan, electoral purposes by prohibiting complaints from being filed, for example, within 30 days prior to a primary election for which the Member is a candidate or 60 days prior to general election. See Appendix.

44. See e.g., “Senator Scolded for Pressing Packwood Hearing,” *New York Times*, July 22, 1995 (detailing how a call for public hearings by Democrat Barbara Boxer in matter before Senate Ethics Committee was met with apparent threat by Republican Ethics Committee Chairman Mitch McConnell to open investigations into Democrats Tom Daschle and Edward Kennedy).

45. These potential benefits were discussed in congressional testimony offered to the 1993 Joint Committee on the Organization of Congress and in the Senate Debate, *supra* at 11.
the ethics process, the creation of an IEC could diminish the impact of such considerations. An IEC would thus offer a greater chance of truly non-partisan ethics enforcement.

C. Conserving Congressional Member Resources

In both congressional testimony offered in 1993 and in recent Senate debate, proponents of an IEC argued that an independent body would reduce the burden on members of congressional ethics committees. In the words of a former counsel to the Senate Ethics Committee, service on the committee is “extraordinarily time consuming” and, when disciplinary proceedings are conducted, Members may be “diverted” from more traditional legislative tasks such as budget deliberations or the markup of appropriations bills. The investigation phase, by definition, is often especially burdensome, involving the interviews of witnesses, scrutiny of documentary evidence and the synthesis of large amounts of information. Investigations can take years and may be conducted under unusually strong public and personal pressures.

Beyond the professional unpleasantness that may come with sitting as a judge of one’s peers, the sheer amount of time needed for effective ethics committee service has been noted as a disincentive for Members to serve in the first instance. Transferring many of the investigatory responsibilities to an IEC would diminish some of these burdens. Ethics committee members would of course have to review and scrutinize the investigations conducted by an IEC, but the investigatory burdens should be significantly lessened.

IV. OBJECTIONS TO THE CREATION OF A FEDERAL IEC

Opponents of the creation of a federal IEC have raised numerous objections to the proposed reform. Such objections include that an IEC (a) would violate the U.S. Constitution; (b) is largely unnecessary given the role played by regular elections and the criminal justice system in policing congressional misconduct; (c) would create the possibility of a

46. See “Enforcement of Ethical Standards in Congress,” supra n.8 (“[N]umerous witnesses said that using outsiders would solve the problem of Members not having sufficient time to serve on the Ethics Committee”).

47. Testimony of John D. Saxon, former counsel to U.S. Senate Select Committee on Ethics, Hearing Before the Joint Committee on the Organization of Congress (S. Hrg. 103-14), 103rd Congress, February 25, 1993, at 97 (noting demands of current ethics process and recommending creation of outside panel as part of bifurcated ethics process).
“runaway” investigation reminiscent of an independent counsel; and (d) would unnecessarily duplicate the work of existing ethics committees.

The discussion in this section focuses primarily on the constitutional objections that, while they have often been raised by opponents of an IEC, have not been the subject of extensive analysis. This Report concludes that an IEC can be created without running afoul of any constitutional safeguards. In addition, this Report addresses briefly the remaining objections listed above.48

A. Constitutional Objections to a Federal IEC

Opponents of the creation of a federal IEC have asserted that its creation would conflict with two provisions of the U.S. Constitution: Article I, § 5, Clause 2 and the so-called “Speech or Debate Clause,” Article I, § 6, Clause 1. These suggested constitutional conflicts were cited repeatedly during congressional debate of an IEC proposal in 2006.49 Although the constitutional objections are sometimes raised without much specificity, the discussion below considers some of the ways that an IEC could conceivably implicate the Constitution.

1. Article I, § 5, Clause 2

The above Clause of the Constitution provides: “Each House may determine the Rules of its Proceedings [and] punish its Members for disorderly behavior” (emphasis added). Objections on the basis of this provision to the creation of an IEC appear to rest on the notion that entrusting investigatory powers to an IEC and authorizing the IEC recommend sanctions undermines Congress’s exclusive authority to “punish” its Members. As an initial matter, the Clause does not speak in compulsory terms—the fact that Congress “may” determine rules and punishment does not, as some advocates would have it, mean that congressional Members “shall” be the only ones exercising such power.50

As discussed in Part II supra, none of the IEC proposals would alter the current system in which existing congressional ethics committee retain final authority to sanction or “punish” Members. Thus, it is not

48. Additional criticisms not considered here include the argument that an IEC (a) would insert greater partisanship into the ethics process, (b) would increase the filing of frivolous ethics complaints, (c) would create unproductive tension with existing ethics committees, and (d) would undermine a Senate ethics process that has proven effective.

49. See, e.g., Senate Debate at S2248.

readily apparent how an IEC would actually implicate this constitutional provision. Nothing in the IEC proposals appears to infringe upon Congress’s ability to make its own rules or punish its Members. Indeed, Congress’s plenary authority to make such rules is undisturbed. An IEC, if (properly) created, would exercise only the limited authority delegated to it by Congress for the express purpose of facilitating the investigation and ultimate disposition of potential ethics violations. In sum, a congressionally-created IEC would be no more than a vehicle by which Congress could effectively enforce the very ethical rules it has created.

2. Article I, § 6, Clause 1 (the “Speech or Debate Clause”)

The “Speech or Debate Clause” provides in relevant part:

The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place.

Opposition to an IEC based on the Speech or Debate Clause appears to be premised on the notion that an IEC’s operation will (a) invite Executive or Judicial interference with legislative immunities established under the Clause or (b) interfere with the protections afforded to Members for their “legislative” acts. However, analysis of the Supreme Court’s interpretation of the Speech or Debate Clause—which has been largely settled for over three decades—suggests that the concern that an IEC could conflict with the Clause is largely unfounded. Legislation that takes into account the jurisprudence summarized below could be tailored to avoid running afoul of any purported constitutional boundaries.

(a) Executive or Judicial Interference

Both the fundamental purpose of the Speech or Debate Clause, as interpreted by the Supreme Court, and its application to the conduct of legislators, strongly suggest that an IEC charged with investigating congressional ethics violations and effectuating the congressional discipline of Members would not undermine or interfere with the operation of the Clause. The purpose of the Clause is “to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.” Doe v. McMillan, 412 U.S. 306, 316 (1973) (emphasis added) quoting Gravel v.
United States, 408 U.S. 606, 617 (1972); citing also Powell v. McCormack, 395 U.S. 486, 502 (1969) and United States v. Johnson, 383 U.S. 169, 181 (1966). As the Supreme Court stated in United States v. Brewster, 408 U.S. 501, 508 (1972), “Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.”

The creation of an IEC would not grant the executive or judicial branches of government any additional authority. Rather, an IEC implicates only the work of Congress. Where an IEC provides investigation results and disciplinary recommendations directly to Congress, no potential Executive intimidation or judicial hostility is implicated. Of course, certain actions by an IEC, under some of the legislative proposals discussed herein, could culminate with the referral of potentially criminal matters to an Executive Branch office. An IEC’s power, however, would be limited to the power to “recommend” to a congressional ethics committee that such a referral be made. As with the present system, the congressional ethics committees would retain the exclusive authority to determine whether to refer a matter to another branch of government. Moreover, as discussed below, even under such circumstances, the Speech or Debate Clause would afford its usual protections to Members of Congress.

The Supreme Court’s decision in United States v. Johnson, 383 U.S. 169 (1966), is particularly illuminating. In Johnson, a former Congressman was convicted on several counts of violating a conflict of interest statute and one count of conspiring to defraud the United States. Johnson, 383 U.S. at 171. The conspiracy charge involved an alleged agreement by the Congressman and a colleague to attempt to influence the Justice Department to dismiss some pending federal indictments against a loan company and its savings and loan officers. Id. The Congressman allegedly accepted a bribe to, inter alia, read a speech favorable to independent savings and loans associations in the House. Id. at 172. The Supreme Court considered whether the conspiracy statute could be constitutionally applied to “an improperly motivated speech” in Congress. Id.

The Court found that the Speech or Debate Clause “clearly proscribes

51. The Supreme Court in Johnson, 383 U.S. at 177-183, discusses the history of the Speech or Debate Clause, and the relative scarcity of “judicial illumination” of the Clause, in part because the tradition of legislative immunity is well established.

52. See Appendix, “Sanctions of Members,” detailing IEC’s power to only “recommend” referral to, for example, the Department of Justice.
at least some of the evidence taken during trial,” specifically, questioning at trial relating to how much of the speech was written by the Congressman and how much was written by representatives of the loan company. Id. at 174-177. The Court concluded that “such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it.” Johnson, 383 U.S. at 177 (emphasis added).

After discussion of the underlying history and purpose of the Speech or Debate Clause, the Johnson Court concluded that “however reprehensible such conduct may be,” the essence of the conspiracy charge was “that the Congressman’s conduct was improperly motivated, and . . . that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.” Id. at 180 (emphasis added). The Court’s analysis in Johnson underscores that the Court’s concern (and the Speech or Debate Clause’s applicability) related to executive and judiciary branch influence on the legislative conduct of Members of Congress. In guarding against such concerns, the functions and operating procedures of an IEC can and should be tailored to take into account the possibility that certain IEC investigatory materials may not be properly provided to the Executive Branch (e.g., in the event an investigation is referred for criminal prosecution).53

Notably, the Johnson Court also suggested, without opining, that an open question remains regarding whether a criminal prosecution could, in fact, “entail[] inquiry into legislative acts or motivations, [if] founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.” Johnson, 383 U.S. at 185 (emphasis added). In other words, the Court, which was dealing with a criminal prosecution by the Executive Branch of a congressional Member, suggested the possibility that narrowly tailored legislation could authorize Executive Branch enforcement of Congress’s power to regulate its Members’ conduct. This statement, though not dispositive, implicitly supports the conclusion that a congressionally-created IEC would not violate the Constitution. The creation of an IEC with limited powers, that reports directly to Congress, does not go nearly as far as a delegation of power to

53. See, e.g., United States v. Helstoski, 442 U.S. 477, 487 (1979), affirming that evidence of past legislative acts of members of Congress may not be introduced as evidence by the government in a prosecution of the Member for allegedly accepting money for promising to introduce, or introducing, private bills that would suspend immigration laws to allow aliens to remain in the country.
the Executive Branch. Indeed, an IEC does not expand Executive Branch involvement, but merely creates a congressionally-authorized commission that would provide to Congress, effective tools to effectuate its own recognized authority to regulate the conduct of its Members.

(b) Protection for “Legislative” Acts.

The United States Supreme Court has made clear that the last sentence of the Clause—that Members may not be questioned in any other place for any speech or debate in either House—provides Members a “vital privilege.” See Gravel, 408 U.S. at 615. The practical effect of this privilege is to insulate from civil or criminal liability actions taken by Members of Congress that are within the “sphere of legitimate legislative activity.” See Doe, 421 U.S. at 311 citing Gravel, 408 U.S. at 624; see also Eastland v. United States Servicemen’s Fund, et al., 421 U.S. 491, 501 (1975). The Supreme Court in Brewster, however, noted that “[a] legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or Senate in the performance of official duties and into the motivation for those acts.” 408 U.S. at 512.

Further, the Supreme Court has also recognized that “everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause.” Doe, 412 U.S. at 313. For instance, “Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct, ‘though generally done, is not protected legislative activity.’” Id. quoting in part, Gravel, 408 U.S. at 625. Similarly, “[p]romises by a Member to perform an act in the future are not legislative acts.” Helstoski, 442 U.S. at 489.

It is accordingly plain that many congressional Member actions will not even fall within the ambit of the Speech or Debate Clause. An IEC’s investigation of those types of activities logically presents no constitutional issue under the Clause. In light of the broad range of activities that could involve an ethics violation but that would not qualify for “legislative activity” protection—including such unethical conduct as fundraising improprieties or the exercise of unethical influence in securing government contracts—much of the work of an IEC would not even potentially implicate the Speech or Debate Clause. Similarly, where Congress disciplines Members for activities that do not implicate civil or criminal liability (and many types of unethical conduct may not rise to the level of legal accountability), the role of an IEC in the disciplinary process
should not offend the Speech or Debate Clause. All of this suggests an IEC could be constructed to minimize or eliminate entirely any constitutional concerns.

B. Additional Objections to the Creation of a Federal IEC

1. Regular elections and the criminal justice system effectively police congressional ethics.

Critics of the creation of an IEC also assert that the regular electoral review of legislators, especially when coupled with the workings of the criminal justice system, already ensures that Members involved in ethical improprieties face consequences for their behavior. Indeed, many of the legislators involved in recent scandals have been forced to resign, have decided to forego reelection rather than face defeat as a result of negative public sentiment, or have been voted out of office. The role played by prosecutors and especially by the public at the voting booths in policing congressional ethics is no doubt a significant one. However, criticism of an IEC on these grounds somewhat begs the central question of whether an IEC, as opposed to congressional ethics committees operating alone, will improve Congress’s ability to enforce its own, independent system of ethics.

Congress itself, as discussed supra, has instituted a code of ethics and a system for potential sanctions for their violation despite the existence of the criminal justice system and regular elections as a means to police congressional ethics. Congress has thus already made the decision that a system of congressional ethics should exist independent of these other means even if the systems sometimes overlap (i.e., where the same behavior may subject a Member to congressional sanctions, criminal penalties, and defeat at the ballot box). Thus, criticism of an IEC based solely on the availability of other means to enforce congressional ethics cannot settle the debate over an IEC’s creation. Proponents view an IEC as an additional tool for ensuring that the system Congress has put into place is effectively carried out.

In the case of elections as a means of ethics enforcement, the following observation has been offered:

The trouble with this line of argument is that all of us, all

54. The inapplicability of the Speech or Debate Clause seems even clearer on this point given that the Clause is limited to Executive or Judicial inquiries rather than the type of congressional inquiry ultimately at issue with an IEC.

55. See “Enforcement of Ethical Standards” at 6 (discussing regular electoral review as a “significant factor in the theory and practice of congressional discipline”).
citizens, have an interest in the conduct of all members, not just the ones whom we can vote for, because we all have an interest in the effect and credibility of Congress as an institution. Yet when citizens vote for their own representative, they are generally more concerned about their own district or State than about the institution. So the electoral connection is not a very effective substitute for enforcing institutional standards . . . 56

The above concern was one reason that the 1993 congressional task force ultimately recommended the creation of a panel of private citizens to serve as the fact-finder to investigate complaints. 57

More fundamentally, it is plain from the public’s poor perception of Congress that criminal convictions and resignations have done little to improve the public’s overall trust in the institution, which is a major goal of ethics reform in the first place. In fact, it seems possible that a legislator’s criminal conviction in the absence of any discipline by his or her peers only reinforces the perception that Members are disinclined to police themselves or that electoral considerations trump meaningful ethics enforcement.

2. The IEC will create some of the same problems experienced previously with the work of independent counsels.

In recent Senate debate, Sen. Voinovich opposed the creation of an IEC, in part based on the argument that an IEC “would resurrect the independent counsel in the institution of the Senate.” 58 By this, Senator Voinovich was presumably raising the specter of Congress losing control of the investigatory process once an IEC is created and perhaps enduring fruitless and unfounded investigations that needlessly consume taxpayer dollars.

Bipartisan appointment procedures, which are a feature of all the recent IEC proposals, may provide some inherent protection against this concern, minimizing the likelihood of a purely partisan commission. More fundamentally, under several of the IEC proposals detailed in the Appendix, congressional ethics committees retain the power to, in effect, “check” the power of the IEC by exercising the right to halt an IEC’s work at three stages of the ethics process. 59 First, a two-thirds vote of committee mem-

56. See Testimony of Professor Dennis F. Thompson, Harvard University Professor, Hearing Before the Joint Committee on the Organization of Congress (S. Hrg. 103-14), 103rd Congress, February 25, 1993 at 29-30.
58. See Senate Debate at S2447.
59. As the Appendix indicates, Senate Bill 2259, if enacted, would not have provided for an
bers can override the decision to commence an investigation. Second, after an investigation, the ethics committee can override the finding that “probable cause” exists to believe that an ethics violation has occurred. Third, the ethics committee retains final authority on whether to recommend sanctions that are ultimately voted on by the entire legislative body.

As a result, the “runaway” IEC need not be an inevitable feature of its creation. However, it is possible that current proposals can be improved by additional procedural safeguards providing Congress with an “emergency shut-off” mechanism in the unlikely event that an IEC investigation proceeds unreasonably far afield of the underlying congressional ethics complaint.60 One method of providing Congress with a check against an overreaching ethics investigation would be for IEC legislation to maintain in the standing congressional ethics committees the power to terminate an ethics investigation at anytime with a two-thirds vote.

3. The IEC will duplicate the work of existing ethics committees.

Earlier, this Report noted that an IEC could diminish the burden on existing ethics committee members by, among other things, transferring investigatory responsibilities to an IEC. Critics of the IEC proposal, however, argue that the IEC’s work will not decrease the time demands of ethics committee members because a parallel or duplicate investigation will be required.61 Nothing in the IEC proposals actually requires such duplication of effort. The results of the investigation are presented to the congressional ethics committees, which appear to be free to determine the level of additional inquiry needed to assess an IEC’s recommendations. Presumably, a committee and its staff could, if it wished, conduct an entirely new investigation. More likely, committee members can thoroughly review the content and quality of the investigation before reaching any decisions, a task that should demand less time than a full-scale investigatory process. Simply put, it appears less burdensome for legisla-

60. Of course, some proposals already have safeguards that could be used to prevent a gross abuse of power. For example, SA 3176, the Collins Amendment for creation of an Office of Public Integrity discussed supra, provides for removal of the Director of the Office of Public Integrity by the President Pro Tempore of the Senate, upon the joint recommendation of the Senate majority and minority leaders, for inter alia, “neglect of duty” or “inefficiency,” both of which might be implicated in the event of an overbroad ethics investigation.

61. See Senate Debate at S2449.
tors to review and perhaps supplement a thorough investigation than to conduct an entirely duplicate one on their own.

V. LESSONS FROM STATE-LEVEL IECs: INDEPENDENCE IS KEY

Many of the features of an IEC discussed above or detailed in the Appendix have been incorporated into IECs at the State level. Indeed, dozens of states have adopted and implemented commissions to oversee, monitor, investigate and/or enforce ethics laws or codes of conduct. A review of the various state ethics commissions should inform Congress’s endeavors to create a federal IEC. While a complete review of the numerous State-level IECs is beyond the scope of this Report, a brief consideration of some of these IECs is presented below.

Not surprisingly, our review of State-level IECs suggests that the actual “independence” of any IEC may be determined at the outset by its structure and that structural independence may play an important role in an IEC’s effectiveness. The extent of an IEC’s actual independence is a crucial variable for another reason—as described above, a basic goal thought to be achieved by the creation of an IEC is greater insulation of the ethics process from institutional or partisan pressures. On this score, State IECs vary significantly.

A few of the key components that may determine the degree of independence that an IEC enjoys, as presented below, include: (i) the membership of the commission and the process by which members may be removed; (ii) the jurisdiction of the commission; (iii) the investigative powers of the commission; (iv) the enforcement powers of the commission; and (v) the funding of the commission.

A. Membership and Removal

Generally speaking, an “independent” commission means that sitting legislators are not permitted to sit on the commission. Beyond this prohibition, the limitations on membership vary from state to state. Many states prohibit state employees, public officials, elected officials (including their family members) and/or political party officials from serving on ethics commissions. 62 A few states forbid lobbyists from serving on ethics

62. Among the commissions that have such membership limitations are the Connecticut Office of State Ethics, the Florida Ethics Commission, the Louisiana Board of Ethics, the Maine Commission on Governmental Ethics and Election Practices, the Massachusetts State Ethics Commission, the Minnesota Campaign Finance and Public Disclosure Board, the Missouri Ethics Commission, the Nebraska Accountability and Disclosure Commission, the Nevada Commission on Ethics, the North Carolina State Ethics Commission, the Oklahoma Ethics Commission, the Oregon Ethics Commission, the Rhode Island Board of Ethics, the South Carolina Commission on Ethics, the Tennessee Ethics Commission, the Texas Ethics Commission, and the West Virginia Ethics Commission.
commissions. The West Virginia Ethics Commission requires that two of its twelve members be former members of the West Virginia state legislature and that the other member seats be filled by a certain number of former state employees, former county employees and officials and/or municipal employees or officials.

Typically, although legislators are not permitted to be members of independent commissions, IEC members (or some number of them) are often appointed by ranking officials of the state legislature; alternatively, IEC members (or some number of them) are appointed by the governor. In order to protect against partisanship, those who appoint members to the commission may have to appoint members from different political parties. In New York, for example, three of the five members of the ethics commission are appointed by the governor, and no more than two of these three appointees can be a member of the same political party.

Restrictive rules for the removal of commission members may provide another layer of independence to ethics commissions. In many states, commissioners may only be removed for cause, (i.e., gross misconduct, substantial neglect of duty, etc.). Members of the New York State Ethics Commission, for example, “may be removed by the governor for substantial neglect of duty, gross misconduct in office, inability to discharge the powers or duties of office or violation of this section, after written notice and opportunity for a reply.”

Commission, the Oregon Government Standards and Practices Commission, the Pennsylvania State Ethics Commission, the Rhode Island Ethics Commission, the Tennessee Ethics Commission, and the Wisconsin Ethics Board. The West Virginia Ethics Commission bars anyone covered by the state ethics law from serving on the commission. Public officials are not prohibited from serving on the New York State Ethics Commission; however, only one of the governor’s three appointees may be a public official. See Executive Law § 94, ¶ 2.

63. The Florida Ethics Commission and the New York State Ethics Commission prohibit lobbyists from serving on their commissions. The Kansas Governmental Ethics Commission has a five year ‘cooling off’ period before lobbyists may serve on the commission.

64. See West Virginia Code §6B-2-1(b).


66. Executive Law §94, ¶ 7. See also, Nevada Commission on Ethics, NRS § 281.1572, ¶ 3 (“A member of the Commission may be removed by the Governor before the expiration of his term for misconduct in office, incompetence or neglect of duty.”); Kentucky Legislative Ethics Commission, KRS Chapter 6.651(8) (members of the Commission can only be removed for cause). Members of the Missouri Ethics Commission may be removed for cause, but also may be removed from office “by concurrent resolution of the general assembly signed by the governor. If such resolution receives the vote of two-thirds or more of the membership of both houses of the general assembly, the signature of the governor shall not be necessary to effect removal.” See § 105.955(5) R.S. Mo.
B. Jurisdiction and Investigative/Enforcement Powers

Most independent state ethics commissions are granted jurisdiction to monitor compliance over state ethics laws and codes of conduct as they apply to state/public employees, elected officials and their staffs. In some cases there are exemptions to this jurisdiction. In New York State, for example, the ethics commission does not have jurisdiction over the legislature or local government officials (and thus cannot investigate wrongdoing by such officials). Further, although the New York State Ethics Commission has jurisdiction over the governor, attorney general, comptroller and lieutenant governor, critics point out that its effectiveness is limited because “it can do nothing more than report its findings to the Assembly and Senate, over which it has no jurisdiction.”

By contrast, the Kentucky Legislative Ethics Commission has jurisdiction over Kentucky’s General Assembly and the power to punish a legislator for ethical violations, including imposing a fine of up to $2000. Likewise, the Montana Commissioner of Political Practices has jurisdiction over state officers, legislators and state employees (except that it has no jurisdiction over the legislature if the complaint involves a legislative act) and may issue decisions and impose sanctions against those subject to its jurisdiction. The North Carolina Ethics Commission has jurisdiction over the legislators, legislative employees, judicial officers, judicial employees and public servants. Some states, like Florida and Missouri, have a bifurcated process that permits the commission to investigate complaints against legislators, but does not grant it power to impose penalty—if a finding of probable cause is made, the commission must submit its report to the legislature for final action.

Separate and apart from the jurisdiction and enforcement powers of state ethics commissions, another important component of a commission’s power is the ability of its members to commence an investigation in the first instance (regardless of who is being investigated). State ethics commissions with the broadest powers have the authority to launch investigations without permission or approval from the legislature or the exec-

68. See KRS Chapter 6.601—6.849; see also comments of Judge Anthony Wilhoit, Executive Director of the Kentucky Legislative Ethics Commission during Common Cause panel on independent ethics commissions (2006).
69. See M.C.A. § 2-2-136(1)(a); M.C.A. § 2-2-136(1)(c)(2).
70. See N.C.G.S. § 138A-10(a)(5).
71. See FS Ch. 34-5.006; § 105.955(14) R.S. Mo.
tive branch. However, generally these commissions can only act upon a sworn complaint by a member of the public (as opposed to acting on its own initiative). Notably, the Oregon Government Standards and Practices Commission may act on its own initiative or upon a complaint from the public. Further, although the members of the Kentucky Legislative Ethics Commission as a whole may not file a complaint, any individual member may file a complaint upon which the commission may act. In West Virginia, complaints are screened by the Probable Cause Review Board (a three member board appointed by the governor with the advice and consent of the state senate). The Review Board then determines whether to refer the case to the West Virginia Ethics Commission.

The North Carolina State Ethics Commission may upon its own motion initiate a complaint involving covered persons and conduct a preliminary inquiry. To the extent the Commission finds probable cause of a violation, in the case of public servants, the Commission may proceed to a hearing, but in the case of legislators, the matter is referred to the legislative ethics committee for further action and in the case of judicial officers, the matter is referred to the Judicial Standards Commission.

C. Funding

State ethics commissions whose budgets for enforcement are not wholly at the mercy of legislatures enjoy a greater degree of independence. Exemplars in that regard are Connecticut and North Carolina whose ethics commissions’ budgets are protected by statutory provisions which limit the legislature and governor from reducing their budget requests. The budget of the Nevada Commission on Ethics is similarly protected in that sixty percent of its budget comes from assessments on the state’s larger cities and counties.

72. States whose ethics commissions can act without approvals from the legislature or other outside body include Connecticut, Florida, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, Oklahoma, Pennsylvania, Rhode Island, Tennessee and Wisconsin.
73. See ORS 244.260 (1)(a).
74. See CSR, Title 158-16-3.
75. Id.
76. See N.C.G.S. § 138A-12(b).
77. See N.C.G.S. § 138A-12(h).
79. Id.
RECOMMENDATIONS

This Report recommends that Congress strongly consider implementation of an independent ethics commission. Although a perfect system of ethics enforcement is impossible, an IEC may offer Congress the best chance of remedying two major problems under the current system: the inherent tension that comes with entrusting Members of Congress alone to investigate and discipline their own colleagues and the public’s perception that a weak ethics process allows legislators to engage in misconduct with impunity. As explored within this Report, the public’s perception should not be chalked up to a reflexive distrust of politicians. The structure of the ethics process itself, which rests exclusively on the ability of legislators to root out corruption among their own peers despite personal and electoral pressures that may counsel against comprehensive enforcement, lends support to public skepticism.

To address most directly such structural impediments to effective enforcement and public skepticism of the current ethics process, this Report recommends that the initial decision of whether to investigate a claim should be entrusted to an IEC. Additionally, the commission should be granted the power and the tools needed to carry out the investigation itself. Only when an independent commission makes the initial decision of whether to commence an investigation and also carries out the investigation will there be a realistic expectation that barriers to comprehensive ethics enforcement will be diminished and the public’s perception of the process improved. These key features may offer the best chance for ensuring that worthy investigations are commenced and that partisan pressures are reduced.

Safeguards, however, can and should be included in the process to prevent the abuse of an IEC’s powers. This Report recommends that congressional ethics committees be provided the power, as discussed within, to “check” the IEC during each stage of the ethics process with a two-thirds vote of congressional ethics committee members, including after an investigation has been commenced but a report not yet completed. Although the independence of an IEC is a crucial element of its perceived and actual effectiveness, this safeguard may prove to be a reasonable compromise to avoid overbroad investigations or at least minimize concerns that such investigations are inevitable. Additional safeguards should include, but are not necessarily limited to, penalties for the filing of frivolous complaints and restrictions on how close to an election a commission may consider complaints. Experiments with ethics commissions at the state level may provide a roadmap for Congress in addressing some of these important concerns.
An IEC that balances the goal of achieving greater independence in the ethics process with the need to preserve constitutional principles is not beyond the reach of Congress. As detailed within, a commission can be created that assumes some of the functions of the congressional ethics committees without disturbing Congress's final authority to determine whether to discipline a Member and what form that discipline should take. Simply put, constitutional concerns alone do not appear to be a bar to the creation of an IEC.

Although the potential objections to an IEC are numerous, we believe those objections must be measured against the danger of the continuing erosion of public trust in the institution of Congress and the weaknesses of the current system. The structural reforms inherent in the creation of an IEC offer the best, if imperfect, means to both enhance the ethics process and public trust in government ethics.
### Independent Ethics Commission

<table>
<thead>
<tr>
<th>Key Features</th>
<th>S. 2259 (Obama)</th>
<th>SA 3176 (Collins/ McCain/ Lieberman/Obama)</th>
<th>H.R. 4799 (Shays/ Meehan)</th>
<th>S. Con. Res. 82 (Kerry)</th>
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<tbody>
<tr>
<td>Creation of independent ethics office</td>
<td>Establishes Office of Public Integrity and vests authority of office in a newly-created Congressional Ethics Enforcement Commission</td>
<td>Establishes Senate Office of Public Integrity to be headed by a Director</td>
<td>Establishes Office of Public Integrity to be headed by a Director</td>
<td>Yes—Congressional Ethics Office to be headed by Congressional Ethics Officer</td>
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<tr>
<td>Applies to both houses of Congress</td>
<td>Yes</td>
<td>No—applies to Senate only</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Appointment process</td>
<td>Commission consists of 9 members: 2 appointed by Senate Majority Leader; 2 appointed by Senate Minority Leader; 2 appointed by House Speaker; 2 appointed by House Minority Leader; and last member chosen by agreement of at least 3 of the leaders mentioned above</td>
<td>Director appointed by President Pro Tempore of Senate upon joint recommendation of Senate majority and minority leaders</td>
<td>Director appointed jointly by Speaker of House, majority leader of Senate and minority leaders of House &amp; Senate</td>
<td>Congressional Ethics Officer shall be nominated jointly by the Senate majority and minority leaders, House Speaker and House minority leader, the chairman and ranking member of the Committee on Standards of Official Conduct of the House and chairman and ranking member of the Select Committee on Ethics of the Senate; Congressional Ethics Officer shall be confirmed by both the Senate &amp; the House</td>
</tr>
<tr>
<td>Term of office (for Commission Member/ Director/Officer)</td>
<td>Initial 2-year term after act passage; 4-year terms thereafter; Chair and Vice Chair elected by majority of Commission to 1-year terms</td>
<td>5 years (may be reappointed)</td>
<td>5 years (may be reappointed)</td>
<td>2 years (may be reappointed for 2 additional terms)</td>
</tr>
<tr>
<td>Selection criteria for Director/ Commission members/Officer</td>
<td>Commission members must be U.S. citizens; out of the 8 members appointed by</td>
<td>Director must have training or experience in law enforcement, the judiciary, civil or</td>
<td>Director cannot be a former registered lobbyist within prior 5 years;</td>
<td>None</td>
</tr>
<tr>
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<tr>
<td>Senate &amp; House leaders without need for agreement, at least 1 member must be a former judge and 1 a former member of Congress.</td>
<td>Senate &amp; House leaders without need for agreement, at least 1 member must be a former judge and 1 a former member of Congress.</td>
<td>criminal litigation, or as a member of a Federal, State or local ethics enforcement agency</td>
<td>Director “may not have been” a Member of Congress</td>
<td>Request for Review by any person accompanied by a sworn statement</td>
</tr>
<tr>
<td>Initiation of investigation</td>
<td>Sworn complaint filed by any U.S. citizen (including Commission member)</td>
<td>Complaint by Member of Congress, “outside complainant” or by the Office on its own initiative</td>
<td>Complaint by Member of Congress, “outside complainant” or by the Office on its own initiative</td>
<td>Request for Review by any person accompanied by a sworn statement</td>
</tr>
<tr>
<td>Congressional check on power to investigate</td>
<td>No—Commission must conduct preliminary inquiry and has power to commence an adjudicatory proceeding to determine whether to “present case” to congressional ethics committee; bill explicitly takes away preliminary investigative authority from existing congressional ethics committees</td>
<td>Yes—whenever Director determines there are “sufficient grounds to conduct an investigation” Director must notify the Senate Ethics Committee and committee has power to overrule the Director’s determination upon (i) 2/3 roll-call vote of committee members; (ii) public report on the matter; and (iii) vote of each member listed in report.</td>
<td>Yes—whenever Director determines there are “sufficient grounds to conduct an investigation” Director must notify the congressional ethics committee and committee has power to overrule the Director’s determination upon (i) 2/3 roll-call vote of committee members; (ii) public report detailing reasoning; (iii) vote of each member listed in report; and (iv) dissenting members allowed to issue own report.</td>
<td>No—Congressional Ethics Officer may conduct full investigation; however, subpoena power (as detailed below) is limited</td>
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Note: Director may still publish report detailing grounds for his determination
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<tr>
<td>Investigatory</td>
<td>Administer oaths; issue subpoenas; compel attendance of witnesses, documents; take depositions.</td>
<td>May be exercised only if Director’s determination is not overruled by Senate Ethics Committee—then Director can administer oaths; issue subpoenas; compel attendance of witnesses, documents; take depositions.</td>
<td>May be exercised only if Director’s determination is not overruled by congressional ethics committee—then Director can administer oaths; issue subpoenas; compel attendance of witnesses, documents; take depositions.</td>
<td>Powers not listed—gives Congressional Ethics Officer power to conduct informal inquiry, and if Officer determines a full investigation is warranted, to conduct the investigation and provide full public report to Congressional Ethics Committee; Note: Subpoena power limited—Officer may bring a civil action to enforce a subpoena only when directed to do so by the adoption of a resolution by Senate or House</td>
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</table>
### Key Features

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<th>Congress</th>
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<tr>
<td><strong>Congressional check on determination that “probable cause” exists to believe that ethics violation has occurred</strong></td>
<td>No—if Commission (presumably, by majority vote) finds “probable cause” to believe that an ethics violation has occurred, Commission may either (a) due to mitigating circumstances (e.g., no economic gain to violator) confidentially reprimand violator in writing w/ copy to presiding officer of Senate or House or (b) initiate an adjudicatory proceeding to determine whether to present a case to existing ethics committees for ultimate determination</td>
<td>Yes—Senate Ethics Committee may overrule Director’s determination upon (a) 2/3 of call vote of committee members (b) committee issues a public report on matter; and (c) vote of each member listed in report. If Director’s determination not overruled, Director presents the case and evidence to Senate Ethics Committee</td>
<td>Yes—congressional ethics committee may overrule the Director’s determination upon (i) 2/3 roll-call vote of committee members; (ii) public report detailing reasoning; (iii) vote of each member listed in report; and (iv) dissenting members allowed to issue own report. If Director’s determination is not overruled, Director presents the case and evidence to congressional ethics committee. <strong>Note:</strong> After submission of the report, “no action may be taken in the Senate or the House of Representatives to impose a sanction on a person who was the subject of the Congressional Ethics Officer’s inquiries on the basis of any conduct that was alleged in the request for review and sworn statement.”</td>
<td>Yes—if, after making preliminary inquiries, Congressional Ethics Officer finds probable cause that violation of ethics rules has occurred, the Officer shall submit detailed report to members of Senate, members of House and DOJ</td>
</tr>
</tbody>
</table>

### Sanctions of members

<p>| Congressional ethics committees retain final authority; commission, upon majority vote of its members at the conclusion of an adjudicatory proceeding, can present case with evidence to congressional ethics committees; no mention of commission’s authority to make recommendations regarding sanctions | Congressional ethics committees retain final authority—but when Senate Ethics Committee finds that an ethics violation has occurred, Director “shall recommend appropriate sanctions to the committee and whether a matter should be referred to the DOJ for investigation.” | Congressional ethics committees retain final authority—but when congressional ethics committee finds that an ethics violation has occurred, Director “shall recommend appropriate sanctions to the committee and whether a matter should be referred to the DOJ for investigation.” | Congressional ethics committees retain final authority—see also “No Action” rule detailed above |</p>
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| **Responsibility for receiving, monitoring and auditing filings under the Lobbying Disclosure Act (“LDA”) of 1995** | Yes—Commission would assume various responsibilities relating to lobbying disclosures, lobbying restrictions and audits of LDA filings | No—responsibility remains with Clerk of the House and Secretary of the Senate | Yes—responsibility transferred to Office of Public Integrity  
*Note:* also transfers power with respect to Ethics in Government Act of 1978 and reforms internal congressional rules accordingly | No—responsibility remains with Clerk of the House and Secretary of the Senate |
| **Additional responsibilities** | Conduct research on governmental ethics and implement any educational programs it considers necessary to give effect to the Act; annual report to the congressional ethics committees summarizing Commission determinations and advisory opinions and any recommendations | Powers limited to ones outlined above except that Director, subject to review by Senate Ethics Committee, also has power to approve or deny privately-funded travel by Members and staff | Provide information and informal guidance to Members and staff; provide advisory opinions, conducts audits to ensure compliance with all laws and rules; provide informal guidance to registrants under LDA  
*Note:* This bill, with its explicit transfer of jurisdiction for ensuring compliance with the LDA and Ethics in Government Act of 1978, gives the Director significant oversight responsibilities | Periodically report to Congress any changes to ethics law and regulations that Officer determines will improve investigation & enforcement; annual report to Congress on number of ethics complaints and descriptions of ethics investigations undertaken |
<p>| <strong>Ban on filings prior to election</strong> | 30 days prior to primary election for which Member under investigation is a candidate; 60 days prior to general election for which Member is a candidate | Within 60 days of an election involving such Member under investigation | Within 60 days of an election involving a Member under investigation | 30 days prior to primary election for which Member under investigation is a candidate; 60 days prior to general election for which Member is a candidate |</p>
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<td>Penalties for frivolous complaints/ false statements</td>
<td>Up to $10,000 fine or costs of investigation, whichever is greater and up to 1-year in prison for knowingly filing false complaint or aiding another to do same; any person penalized for false complaint barred from filing future complaints</td>
<td>If Senate Ethics Committee determines complaint is frivolous (after referral by Director for that determination), committee may notify Director not to accept future filings from such person and person may be required to pay costs of investigation; Director may refer matter to DOJ</td>
<td>If Director determines complaint is frivolous, Director shall not accept future complaints from such person and person shall be required to pay costs for investigation and Director may refer matter to DOJ</td>
<td>Up to $10,000 fine or cost of preliminary review, whichever is greater, and up to 1-year in prison for knowingly filing false complaint or aiding another to do same; Congressional Ethics Officer can refer matter to Attorney General if he finds that any part of sworn statement was a false statement made willingly and knowingly; any person penalized for false complaint barred from filing future complaints</td>
</tr>
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Introduction

Maritime trade is vital to the U.S. economy. Thirty-five percent of the U.S. gross domestic product (GDP) is derived from trade. Ninety-five percent of American overseas trade passes through 361 ports. Approximately 9 million containers transit through U.S. ports every year. The amount of international container traffic will double over the next 20 years. Currently, according to the American Association of Port Authorities, $1.3 billion worth of U.S. goods moves in and out of U.S. ports every day.


4. "Port Security and Foreign-Owned Maritime Infrastructure" Statement of Dr. James Jay Carafano, Senior Research Fellow, The Heritage Foundation, before the House Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, March 9, 2006.

5. The American Association of Port Authorities (AAPA), is an "alliance of leading ports in the Western Hemisphere that protects and advances the common interests of its diverse members as they connect their communities with the global transportation system."
Maritime shippers increasingly concentrate their traffic through major cargo hubs because of their superior infrastructure. As a result, in the United States, fifty ports account for approximately 90 percent of all cargo tonnage. Their specialized equipment is essential for the loading and off-loading of container ships, which constitute a growing and profitable segment of maritime commerce. The rising use of container shipping and major cargo hubs has lowered costs and improved the reliability and cargo security of maritime commerce.

The important position that U.S. ports hold both as cargo hubs and as critical infrastructure to national security was highlighted in March of 2006 by the purchase by Dubai Ports World ("DP-World"), a United Arab Emirates ("U.A.E.") owned company, of the British-owned Peninsular and Oriental Steam Navigation Company (P&O). The purchase gave DP-World control over twenty-four terminals in six major U.S. ports in New York, New Jersey, Philadelphia, Miami, Baltimore and New Orleans. DP-World is already one of the largest firms in the international ports sector. Had the P&O deal been successful, it would have added two more terminals in Chinese ports, as well as terminals in Indonesia, Thailand and the Philippines, four Australian ports and berths in northern and southern Europe to the holdings of DP-World.

In January of 2006, the possibility of the U.A.E.-owned company managing U.S. ports produced strong opposition in the U.S. Congress, based on the fear that critical U.S. infrastructure was being sold off to an Arab government. As a result, legislation has been proposed to prevent such future bids for American port terminals. DP-World ultimately agreed, under political pressure, to sell its U.S. ports division. In 2005, a political

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7. Due to decreased costs and lower rates, customer demand, and increasingly cost-efficient processes, the use of containers for seaborne cargo has seen a steady increase since its introduction in the mid-1960’s. "Today, close to 95% of U.S. trade by volume is containerized, with the largest vessels capable of carrying over 8,500 TEUS." (Brendan McCahill, Piers COO), http://www.pierson.com/.

8. DP World was formed as the result of the merger between Dubai Ports Authority and DPI Terminals. In January 2005, DPI bought CSX World Terminals, an international port business of the CSX Corporation in the U.S. Through its acquisition of the ports division of CSX International of the U.S. in 2005, DP World gained facilities in several ports in China, as well as three terminals in Hong Kong.


10. “DP World will transfer fully the U.S. operations of P&O Ports North America, Inc. to a
backlash helped to quash a bid by China’s CNOC to acquire Unocal, a Los Angeles-based oil and gas producer.\textsuperscript{11} Now, in the wake of the DP-World purchase of P&O, the Senate and House have passed different port security bills; S.3549 and H.R. 5337, which would reform the process by which the Committee on Foreign Investments in the United States reviews acquisitions of American companies by foreign companies, with a focus on national security concerns. Clearly, the thrust of these bills is to deal with concerns about threats to national security exemplified in the outcry over port security and the DP-World acquisition.

In addressing those concerns, Congress should consider both the immediate and far-reaching consequences for foreign investment in the United States and provide a practical solution to foreign ownership of sensitive commercial facilities and infrastructure. In particular, the legislation must address the application of “National Treatment” of foreign companies. National Treatment is a principle embodied in all three of the principal World Trade Organization (“WTO”) agreements: the General Agreement on Tariffs and Trade (“GATT”, Article 3), General Agreement on Trade in Services (“GATS”, Article 17) and Trade-Related aspects of Intellectual Property Rights (“TRIPS”, Article 3). The principle of National Treatment is simply that signatories to the agreement must give other signatories (i.e. companies from that country) the same treatment as they give their own nationals.

In this paper, we examine the provisions that should be incorporated into any port security legislation and frame them in the context of the applicable WTO Agreements (GATT and GATS). We identify the potential consequences for foreign direct investment (FDI) and national security and urge Congress to consider these factors in enacting any port security legislation.

\textbf{The Bill Should Not Prohibit Foreign Government-Owned Entities From Owning or Leasing Real Property or Facilities at U.S. Ports}

Throughout the debate that followed DP-World’s bid for the British firm, a general misconception has persisted that the sale would place the security of container shipping traffic through the six U.S. ports in question solely in the hands of the United Arab Emirates.\textsuperscript{12} Politicians con-

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\textsuperscript{12} See: http://www.whitehouse.gov/news/releases/2006/02/20060225-1.html.
cerned with the bid cited the U.A.E.’s role as an operational and financial base for al-Qaeda. For example, in addressing DP-World’s bid, Senator Menendez (D-NJ) has said: “Ports are the front lines of the war on terrorism. We wouldn’t turn the Border Patrol or the Customs Service over to a foreign government, and we can’t afford to turn our ports over to one either.”

In fact, DP-World is not the first U.A.E. company to manage port facilities in the United States. Another company owned by the United Arab Emirates, Inchcape Shipping Services (ISS), services the U.S. Navy. ISS has had extensive interests in the U.S. for many years. ISS arranges pilots, tugs and dock workers for shipping companies and works with the U.S. customs at the ports of New York, New Jersey and San Francisco.

Port security legislation should address the status of shipping companies with close ties to foreign governments who are currently leasing U.S. port facilities. For example, companies such as COSCO (a Chinese holding company) and Port of Singapore Authority (“PSA”, wholly owned by the Singapore government’s investment arm, Temasek Holdings), Yang Ming Marine Transport Company (partially owned by the Chinese government), and Hutchison Port Holdings (20% of which is owned by PSA) could be affected. In banning future investments by foreign government-owned companies, but allowing those currently under contract to continue operating a bill sends an inconsistent message as to whether the goal of the law is to ban all investment by foreign governments or just investment by certain foreign governments.

The United States currently depends heavily on foreign public investment. The largest foreign public investor in the United States is the United Kingdom, followed by Japan, Germany, the Netherlands and France. By the end of 2004, total foreign assets in the United States had an estimated market value of $2.7 trillion. Middle Eastern entities, by con-

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18. Id. “Foreign Ownership of U.S. Infrastructure: http://www.cfr.org/publication/10092/#6. However only 2 percent of these holdings were owned by state-run companies.
trast account for 0.5 percent of foreign investment in the United States, but they consist of some high-profile holdings such as New York’s Plaza Hotel, Essex House, the Caribou Coffee Co. and the aircraft manufacturer Cirrus Industries, Inc.¹⁹ We should be cautious to avoid legislation that would precipitate a reduction in foreign investment by countries such as these.

**The Merchant Marine Act of 1920**

Legislation similar to some of the bills currently working through Congress has already worked to drive foreign investment away from the U.S. maritime market. For example, Section 27 of the Merchant Marine Act of 1920, otherwise known as the Jones Act, was enacted to protect barge operators on rivers, freighters on the Great Lakes and cargo carriers traveling to Hawaii, Alaska, Puerto Rico and Guam from competition from foreign ship owners in the U.S. domestic maritime market.²⁰ The Jones Act requires that all cargo transported between U.S. ports be carried on vessels built and owned by Americans and operated by American crews. In addition, the Jones Act was intended to ensure that a domestic fleet existed that could be commandeered by the Government in time of war. The justifications for this Act were similar to those currently being raised in favor of port security legislation.

The Jones Act no longer fulfills its purpose of providing a sizable domestic fleet for war-time use by the Government. Because of the costs associated with the requirements that the vessels be built, owned and operated by U.S. citizens, many owners of commercial shipping vessels have chosen to register their vessels overseas and simply exit the American market. As a result, the size of the domestic shipping fleet has dwindled. According to a recent U.S. International Trade Commission (USITC) report as of July 1999, the Jones Act fleet comprised 182 self-propelled vessels of 1,000 gross tons, 7 of which were tankers and 23 of which were container ships.²¹ The Merchant Marine Act of 1920 is outmoded for modern military needs. The domestic fleet of barges and freighters is too small to be of much use to the U.S. military today and the restriction on for-

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eign ownership of inland commercial vessels has made inland shipping expensive. The USITC has estimated that removing the Jones Act would result in a 22 percent reduction in the price of shipping and a welfare gain of approximately a $1.32 billion to the U.S. economy.

In addition, the 1947 General Agreements on Tariffs and Trade, to which the U.S. is a signatory, prohibits the main requirements of the Merchant Marine Act of 1920. In this respect Article V of GATT 1947 provides:

No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels, or of other means of transport. GATT, 1947, Art. V: Freedom of Transit (2).

Given the cost to the economy of maintaining the Jones Act, the size of the resulting fleet and the fact that law remains suspended following Hurricane Katrina, the requirements of the Jones Act should be reconsidered.

Maritime Transportation Security Act of 2002

The majority of port terminals across the country are foreign-owned. Similar to commercial airlines, shipping companies want to have their own terminals to ensure that their ships can quickly discharge and receive new cargo. However, while foreign and U.S. shipping companies are able to lease terminals in American ports, they cannot own the land the port is on—the land remains the property of the local Port Authority. Each company is responsible for moving ships and goods in and out of its terminals, and may even hire a private security firm, but the U.S. Customs and Border Patrol remains ultimately responsible for checking the

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22. “During the Persian Gulf War only one Jones Act ship actually went to war. In fact, President Bush suspended the Jones Act during the Gulf War because there were not enough Jones Act ships to transport oil supplies.” “The Hidden Cost of U.S. Shipping Laws” Institute Brief, Public Interest Institute, Volume 3, Number 16 October 1996.

23. USITC Report. Enforcement of the Jones Act was temporarily suspended during the Gulf War and again in the wake of hurricane Katrina.

24. The 1947 and 1994 GATT are congressional-executive agreements (ratified by normal legislative process) under U.S. law and are considered treaties. The U.S., as opposed to Europe, considers International Agreements to become a part of U.S. Federal law, which means that Congress can modify or repeal the treaties by subsequent legislative action (http://www.wikipedia.com).
cargo and the U.S. Coast Guard is charged with overseeing security. These responsibilities are mandated by the Maritime Transportation Security Act of 2002. An analogous relationship may be seen in U.S. airports, where foreign airlines may lease a terminal, but the U.S. Transportation Security Administration is responsible for security. These foreign companies have entered into leases with the Port Authority to operate a terminal in much the same way that foreign airlines lease terminals from the Port Authority in airports. For example, International Terminal 4 at New York’s John F. Kennedy International Airport is operated under a long term agreement between the Port Authority of New York and New Jersey and a group of companies which includes Amsterdam’s Schiphol Airport, a corporation run by the Dutch government.

Terminal operators do not “run” the port, they lease a terminal from the Port Authority. The stevedores or longshoremen, who are a separate, unionized group, load and unload the containers. Typically, if a foreign-owned company leases a terminal, there will only be a few senior foreign managers present at the leased terminal and they will not have any physical contact with the containers. The longshoremen are the ones who have contact with the containers. On the U.S. West Coast, the longshoremen are represented by the ILWU; the International Longshore and Warehouse Union. On the East Coast they are represented by the International Longshore Association.

Port security remains the responsibility of the Coast Guard and the Customs and Border Patrol. It is important that these agencies have sufficient funding and personnel to maintain security standards at the port, such as being able to check any suspicious containers at random.

Transparency

The language in the proposed bills that requires the President to provide Congress with a report listing each foreign government-owned shipping company currently operating facilities at a U.S. Port assumes that such entities will pose a threat to national security. However, this is not necessarily true in all cases. The United Arab Emirates, for example, is a member of U.S. Custom’s Container Security Initiative (“CSI”), which allows American customs officials to inspect cargo in foreign ports before it leaves for destinations in the U.S. In addition, DP-World’s employees will either be American or will be subject to American visa approval. Currently there are 44 member ports of CSI. Certain long-
standing trading partners, however, such as India and Thailand, are not members of CSI.26

There is already a process in place which allows the U.S. government to review foreign acquisitions in light of national security. The DP-World deal was approved by the Committee on Foreign Investment in the United States (“CFIUS”) which concluded that the deal did not pose a threat to national security. CFIUS is an agency of the U.S. Government that reviews the national security implications of foreign acquisitions of U.S. companies or operations.27 DP-World is a globally respected firm with an American chief operating officer (Ted Bilkey) which happens to be owned by the government of the U.A.E. As a multi-national business, DP-World would have no incentive to allow terrorists to infiltrate its operations.

A successful bill will need to provide a response to Congressional frustration that the deliberations of the CFIUS, which approved DP-World’s takeover in the minimum 30-day period required, were classified.28 As mentioned above, CFIUS is an interagency committee created by the Department of the Treasury and authorized under the Exon-Florio Amendment to review and potentially block foreign acquisitions of U.S. companies that the committee deems pose a threat to national security.29 Twelve de-

26. 44 foreign CSI ports are operational as of 3/29/06. They include: Halifax, Montreal, and Vancouver, Canada (03/02), Rotterdam, The Netherlands (09/02/02), Le Havre, France (12/02/02), Marseille, France (01/07/05), Bremerhaven, Germany (02/02/03), Hamburg, Germany (02/09/03), Antwerp, Belgium (02/23/03), Zeebrugge, Belgium (10/29/04), Singapore (03/10/03), Yokohama, Japan (03/24/03), Tokyo, Japan (05/21/04), Hong Kong, China (05/05/03), Gothenburg, Sweden (05/23/03), Felixstowe, United Kingdom (U.K.) (05/24/03), Liverpool, Thamesport, Tilbury, and Southampton, U.K. (11/01/04), Genoa, Italy (06/16/03), La Spezia, Italy (06/23/03), Livorno, Italy (12/30/04), Naples, Italy (09/30/04), Gioia Tauro, Italy (10/31/04), Pusan, Korea (08/04/03), Durban, South Africa (12/01/03), Port Klang, Malaysia (03/08/04), Tanjung Pelepas, Malaysia (8/16/04), Piraeus, Greece (07/27/04), Algeciras, Spain (07/30/04), Nagoya and Kobe, Japan (08/06/04), Laem Chabang, Thailand (8/13/04), Dubai, United Arab Emirates (U.A.E.) (03/26/05), Shanghai, China (04/28/05), Shenzhen, China (06/24/05), Kaohsiung, Republic of China (Taiwan) (07/25/05), Santos, Brazil (09/22/05), Colombo, Sri Lanka (09/29/05), Buenos Aires, Argentina (11/17/05), Lisbon, Portugal (12/14/05), Port Salalah, Oman (03/08/06), Puerto Cortes, Honduras (03/25/06). See: http://en.wikipedia.org/wiki/Container_Security_Initiative.


28. The Committee on Foreign Investment in the United States includes representatives from the Departments of Defense, State, Treasury, Commerce and, most important, Homeland Security.

partments and agencies are represented on the committee.\(^{30}\) In addition, CFIUS is provided with an independent assessment of the contracting parties by U.S. Intelligence. In evaluating any potential threat posed by the foreign acquisition, CFIUS determines whether there is credible evidence that the foreign government exercising control might take action that could threaten national security, and if so, whether there exist laws other than the Exon-Florio Amendment and International Economic Powers Act that address this threat.\(^{31}\) If there is no threat found, CFIUS issues a decision within 30 days, otherwise CFIUS investigates for another 45 days and delivers a report to the President. The President then has 15 days in which to make a decision on the transaction.\(^{32}\)

While companies are not required by law to file a notice of foreign acquisition with CFIUS in most cases, parties will choose to file voluntarily since the Exon-Florio Amendment allows the President to dissolve an acquisition at anytime (even after completion), if any parties have not filed with the CFIUS.\(^{33}\) However the Exon-Florio Amendment prohibits disclosure to the public of any document or information about a transaction that is provided to CFIUS or to the President during the course of the review process.\(^{34}\)

\(^{30}\) CFIUS includes the following 12 members: the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, Secretaries of Treasury (Chair), State, Defense, Homeland Security and Commerce, the Attorney General, the Director of the Office of Management and Budget, the U.S. Trade Representative, and the Chairman of the Council of Economic Advisers.


\(^{32}\) Section 3 requires the President to provide detailed information regarding the merger or acquisition to over 30 different groups and individuals: the majority leader and minority leader of the Senate, the speaker and minority leader of the House of Representatives, the Chairmen and Ranking Member of the Committee on Finance, the Committee on Homeland Security and Government Affairs, the Committee on Banking, Housing and Urban Affairs, the Committee on Armed Services, and the Select Committee on Intelligence of the Senate, the Chairmen and Ranking Members of the Committee on Ways and Means, the Committee on Homeland Security, the Committee on Financial Services, the Committee on Armed Services, and the Permanent Select Committee on Intelligence of the House of Representatives, and the Members of Congress representing the states and districts affected by the proposed transaction.

\(^{33}\) Id.

\(^{34}\) “CFIUS and the protection of the National Security in the Dubai Ports World Bid for Port Operations,” Feb. 24, 2006 Dept. of Treasury (http://www.treas.gov). This is intended to assure foreign companies that proprietary information they provide to the Committee will be protected and not used for competitive purposes. Such confidential treatment is essential in
Any potential port security bill must incorporate provisions for the protection of proprietary and business-sensitive matters. The information a foreign government-owned company under investigation can be required to divulge must be explicitly laid out and the committees to which such information will be provided must be identified. This will ensure that the bill will be consistent with U.S. obligations under two major WTO agreements. The first, the GATS Agreement which the U.S. signed in 1995, covers services. The second, GATT, addresses tariffs and has two versions one in 1945 and one in 1994 that largely served to supplement the 1945 agreement. The U.S. is a signatory to both versions. Article XVII of GATS defines a government-owned enterprise as one “which has been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.” The GATT, adopting the GATS definition, in Article XVII, requires any such government-owned enterprise to “act in a manner consistent with the general principles of non-discriminatory treatment prescribed” by the GATT and allows any trading partners of the state-owned enterprise to request the state in question to provide information about its operations.” Finally, the 1994 GATT further provides with respect to the information that can be requested by trading parties:

\[(d) \text{ The provisions of this paragraph shall not require any contracting party to disclose confidential information which...would prejudice the legitimate commercial interests of particular enterprises,}\ (GATS\ Art. XVII, (d)).\]

While it is inevitable in the post 9-11 climate that foreign companies will be asked to provide more detailed information to American authorities as to their organizational structure and financing, it is important that the bill provide a guarantee that any proprietary or business-sensitive information provided will remain confidential and not be used for competitive purposes. Foreign companies must know before the application process begins what information will be required and whom it will be disseminated to. A law that does not meet these requirements will likely

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35. GATS, Article XVII.
36. GATT 1945 Article XVII.
lead to a decline in foreign direct investment in U.S. port operations by foreign-owned companies.

**Balance Between Transparency and Efficiency**

Much of the public debate surrounding DP-World’s bid for ports in the U.S. centered on the extent to which the public should participate in the decision to approve or deny the purchase. There appeared to be general resentment towards the closed-door deliberations of CFIUS. Some of the proposed bills winding their way through Congress require the President to inform the public by publishing a description of the proposed merger, acquisition or takeover in the Federal Register within seven days of the beginning of his investigation of the merger. The public is then allowed an opportunity to comment on the proposed merger. These public comments would then be published in the Federal Register no later than ten days before the President completes his investigation.

Such a provision singles out bids made by foreign government-owned companies for public scrutiny and comment. Returning to the example of government-owned airlines, it is unclear why shipping companies that are government-owned would be subject to public commentary recorded in the Federal Register upon making a bid for a marine terminal, while airline companies that are government-owned are not subject to published public commentary when they lease an air terminal from the local Port Authority. The discrepancy between the level of scrutiny such a provision will require foreign owned port operators seeking to bid on U.S. port facilities in comparison to that currently required of foreign owned airlines seeking to lease airport terminals is not justified.

**The Proposed Legislation Cannot Apply Retroactively**

Any proposed legislation should apply prospectively to any merger, acquisition, or takeover bid considered or completed after the bill becomes law. This will ensure that the companies that are currently leasing terminals at U.S. ports understand that their existing contracts will not need to be renegotiated. This will avoid the creation of a backlog of investigations of state-owned foreign companies which have been operating for many years already. It will also allow CFIUS and Congress to focus on future acquisitions.

For example, currently, numerous terminals at the ports of Los Angeles and Seattle, New York, Long Beach, Philadelphia and Portland among others, are being leased by foreign companies that are owned in whole or in part by foreign governments. State-owned foreign companies have con-
trolled terminals at U.S. ports before. For example, Neptune Orient Line, which is 68 percent owned by the Singapore government, bought U.S.-based APL Limited in 1997 and now operates terminals in Los Angeles, Oakland, Seattle, and Alaska. In addition, Hutchison Whampoa, a Chinese company, signed a lease in 1999 giving it control over the U.S. shipping yards in the Panama Canal.37

There are fifteen main ports in the U.S. which have about one hundred terminals.38 Seven of those one hundred terminals are operated by SSA marine, an American shipping company, twelve are managed by city or state governments and the rest, which comprise eighty percent of U.S. ports, are operated by foreign entities, mainly shipping lines.39 Two Chinese companies, both with close ties to the Chinese government, manage terminals in New York and Long Beach, California. The government of Venezuela manages terminals at ports in Philadelphia and Portland.40

National Security Concerns

Critics of the DP-World purchase of P&O’s North American port terminals suggest that allowing companies owned by foreign governments to operate port terminals would create several scenarios:

First is what could be termed the Trojan horse scenario. The U.S. ports could be used as a conduit for terrorists or terrorists’ weapons. Shipping companies owned by foreign governments hostile to the U.S. could smuggle containers of terrorists into the United States through the terminals leased to these shipping companies. A similar concern is that shipping companies owned by foreign governments with terrorist links could be used to target or facilitate threats against the environment. This could take the form of a liquefied natural gas (LNG) tanker being ignited while in berth or the release of infectious diseases into the water of the port.

Second, there is a concern that allowing government-owned foreign shipping companies to lease port facilities would result in a growth in maritime criminal activity. Proponents of this scenario point to the discovery in April of this year of twenty-two Chinese stowaways who were found in the Port of Seattle, packed into a 40-foot shipping container.


39. Id.

40. Id.
However, the Port of Seattle had already flagged the container for inspection and the stowaways would have been discovered by an x-ray of the container.41 There is also a concern that shipping companies owned by foreign governments could facilitate smuggling or that terrorists might mimic or partner with existing criminal enterprises.42

With regard to the first two scenarios, the responsibility for securing ports continues to lie with the U.S. Coast Guard and the U.S. Customs and Border Patrol. These agencies have and will continue to be responsible for securing U.S. ports.43 Eliminating these safety fears will be determined by the ability of these agencies to secure additional funding and personnel power to search containers. Increased scanning of containers or requiring that suspect containers be searched would go far toward eliminating the possibility of unknowingly importing a container of terrorists or terrorist weapons. There are a number of new technologies being considered such as trace technology, which detects the presence of radiation and gamma ray technology which eventually may be used to determine the molecular components of a cargo. It is not perhaps even necessary to develop the capacity to search every container so long as the Customs and Border Patrol can search some thoroughly. Random searches have proven to be an effective deterrent. Strategic decisions will have to be made by these agencies as to how to allocate their resources.

Third, there is a fear that if shipping companies owned by foreign government have substantial holdings in large port terminals, they may attempt to hold these ports hostage as a means to coerce, deter or defeat the United States on an issue of foreign policy. However, such investments by foreign companies are vetted by the CFIUS for precisely this purpose. It would be unlikely therefore that a hostile foreign government would be able to build up significant holdings in such critical infrastructure as port facilities.

Finally, the domestic ports industry is very small and is not prepared to take over operation of all of the nation’s ports. This has resulted from the restrictions imposed by the Jones Act which make it is less expensive for shipping lines to register their cargo ships abroad. A possible result of

42. For example, the Fulton Fish Market was finally moved in order to break up Mafia control over the shipping and delivery of fish to New York City. See The New York Times “A Fish Story” August 17, 1997 Dilan Loeb McClain.
foisting management of all U.S. ports on this industry could be the bankruptcy of poorly managed U.S. ports.

Conclusion: A word of caution
An overly restrictive bill could have a detrimental effect on trade, specifically:

- DP-World could be unable to divest itself of its U.S. ports if potential foreign buyers are barred from bidding under this bill;
- Negotiations for the free trade agreement between U.S. and the U.A.E could be set back or killed;
- Foreign direct investment in the United States could be chilled at a time when the U.S. is more dependent than ever on Foreign Direct Investment to reduce its trade deficit.

The political backlash against the DP-World deal has had a detrimental effect on the trade relationship between the United States and the U.A.E.: Talks on a free-trade agreement between the two countries were called off in March as a result of the strong opposition from Congress to the DP-World acquisition. It seems unlikely that Congress would have mounted such resistance had the winning bid for P&O come from Temasek, a state controlled group from Singapore, rather than DP-World. Governments in the Middle East may reconsider investing in American ports and search for other countries in which to invest their petroleum revenues. This could be problematic for the United States which depends on large amounts of foreign investment in order to finance its trade deficit—which stood at $68.5 billion in January 2006. In addition, the U.S. may also find that legislation such as this will tarnish its credibility as an advocate of free trade at a time when it is trying to salvage the stalled Doha round of world trade negotiations. Lastly, during a time when the U.S. is trying to stabilize Iraq and fight Islamic terrorists, such legislation will damage the U.S.’s relationships with moderate Arab countries.

Unquestionably, security at United States ports needs to be improved, standards need to be put in place and increased funding needs to go to the agencies responsible for ensuring the security of the ports. We suggest several courses of action which, if followed, could result in an increase in security at America’s ports.

Increased budgets for port security operations

While the Government currently spends $3 billion on port security, more needs to be budgeted for personnel, training and scanning equipment, given the yearly increases in container traffic.\textsuperscript{46} Currently, a system called the Automated Targeting System ("ATS") is used to screen and assess cargo containers before the containers are loaded onto ships.\textsuperscript{47} If more detailed commercial data were submitted to the ATS, higher quality risk assessments of cargo would be facilitated before the containers even left the dock. In a related measure, security clearance procedures for port security officers could be enhanced by requiring officers to successfully complete a background check and qualify for a Transportation Worker Identification Credential (TWIC).

Instead of banning the leasing of port facilities by foreign government-owned companies, the U.S. Coast Guard could require a company to submit a security plan which the Coast Guard would approve as adequately addressing security concerns at the terminal. Once the acquisition has taken place, the Coast Guard could require regular evaluations of the company’s security plan to make sure it continues to adequately address security concerns.

To these ends, a bill was introduced in the U.S. Senate, entitled, “Real Security Act of 2006.” Division D “Transportation Security- Maritime Security” of the bill addresses enhancing basic security at U.S. ports, developing arrangements with foreign ports, requiring some prior notification of shipments (with confidentiality provisions) and the charging additional fees to cover some of the increased security costs. In response to the complaint that there is not sufficient coordination between government agencies the bill proposes “Operation Safe Commerce” a program intended to “create a data sharing network capable of transmitting data required by entities participating in the international supply chain from every intermodal transfer point to the national Targeting Center” and requires the Secretary of Homeland Security to submit an annual report detailing the results of Operation Safe Commerce to several Congressional Com-

\textsuperscript{46} Washington State Senator Patty Murray has proposed and obtained funding for such a plan. To date, Senator Murray has obtained $47 million for the Container Security Initiative, $2.4 million to enhance the Coast Guard’s Strike Teams, $20 million for incident training for ports, $12 million for Homeland Security Response Boats, and $6 million for Global Maritime Distress and Safety System (GMDSS) Defense Message System Implementation, and Commercial Satellite Communications. See: http://murray.senate.gov/portsecurity/port-work.cfm.

\textsuperscript{47} “Enhance the Government’s Security Targeting and Screening of Containerized Cargo Shipments” http://www.secureports.org/improving_security/factsheet_screening.html.
In focusing primarily on improving security at U.S. ports, the bill fails to confront the question of who should be allowed to operate U.S. ports, whether any company should be barred from bidding on such port operations by virtue of the national ties of its principal shareholder and who should get to make this decision.

**Improved international cooperation in port operations**

The government could work to improve international cooperation. The bill, the Real Security Act of 2006, touches on the need for international and cooperation in §3105 by proposing that the Secretary of Homeland Security, in consultation with the Secretary of Transportation, the Secretary of State, the Secretary of Energy, and the Commandant of the United States Coast Guard, “shall identify foreign assistance programs that could facilitate the implementation of port security antiterrorism measures in foreign countries.”

Ports are inherently international venues and good relations with trading partners are the most effective way to ensure that harmful items do not gain entry via the seaports. In addition to the political incentive that governments have to maintain cooperative relationships with trading partners, shipping companies also have a business incentive to keep their operations secure. Fundamentally, all companies in the shipping industry are involved in a commercial enterprise. These companies make money by successfully transporting goods between ports. It is not in the interest of any of the companies, whether foreign or domestic, to allow the security of their operations to be compromised.

It is certainly true that port security should be regulated by the federal government and that companies with close ties to foreign governments should be scrutinized; however, legislation or policies that would result in a ban on access to U.S. markets for foreign companies will ultimately be detrimental to the American economy, given the size and profitability of the shipping industry.

As an alternative, Congress could require foreign companies that are state controlled to commit to assist federal, state and local authorities in port-related law enforcement. This could include requiring such companies to (i) disclose information on the design, maintenance, or operation of their U.S. facilities or operations as they relate to law enforcement investigations; (ii) provide any relevant records situated in the U.S. office.

**Footnotes:**


of the company that relate to the foreign operations of the company; and (iii) commit to participation in the Customs–Trade Partnership Against Terrorism (C–TPAT). Penalties can be established for non-compliance with the above measures, which can be applied to any transfer of critical maritime infrastructure whether the receiving company is U.S. or foreign-based. In addition, Congress can require that major U.S. seaports share information and intelligence on container traffic.

Port facilities are just one of many features that should be considered in developing a comprehensive maritime security regime. The United States should approach cargo and port security from the perspective of a complex global system rather than attempting in isolation to make ports and containers impervious to terrorist threats. Ports are just one part of a system, designed to move people and things quickly in immense volumes. As such they are key components of our economy and are key to maintaining our prosperity in the global economy.

September 2006

Committee on International Trade

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EXECUTIVE SUMMARY

For the last century the New York Legislature has grappled with the issue of rules reform. Unfortunately, “[t]he only thing that ever changes in Albany are the faces. The system stays intact.”\(^1\) The problem is, the system of state governance is controlled by three people (the Governor, the Senate Majority Leader and Assembly Speaker), “each getting a piece of the pie, and that’s it.”\(^2\)

As a result, the Legislature is dominated by its two leaders and stripped of its ability to be a truly representative body. The negative effects are many, from the failure to enact or craft good public policy to a lack of accountability and transparency. Recently though, a wave of public discontent and newly found energy have created an opportunity to reform the system.

The Committee on State Affairs of the Association of the Bar of the City of New York (“Committee”) has recognized this opportunity and developed a package—“The Fundamentals”—of rules reform proposals that should be adopted by the Legislature, at the beginning of its next session in January of 2008. Specifically, the proposals address three fundamental areas that comprise the cornerstone of any meaningful reform and the foundation for future progress. They are, 1) Resource Allocation, 2) Committees and, 3) Member Items.

Under the current system, the leaders of the Assembly and Senate


2. Id.
exercise complete control over the distribution (or not) of \textit{resources} among their membership. In effect, silencing members—and by extension the public-at-large who they represent—from voicing any discontent with the current system. As such, the Committee recommends the following changes: 1) equal funding (i.e., “base amount”) for all members regardless of party affiliation or seniority, and 2) authorizing committee chairmen to hire their own professional staff.\textsuperscript{3}

By providing a “voice” to individual members and committee chairmen, the Legislature’s \textit{committees} can fulfill their proper role as the crucible in which good public policy is formed. To that end, the Committee recommends that: 1) all bills reported to the legislative floor be accompanied by a comprehensive committee report; 2) before bills are reported out of committee they are openly considered with an opportunity for amendment; 3) three or more members of a committee may petition for a hearing on a bill or for an agency oversight hearing and, 4) three or more members of a committee may petition for a vote on a bill pending before it.\textsuperscript{4}

Compounding the inertia of the current committee structure are two other legislative mechanisms—the \textit{discharge motion} and the \textit{conference committee}. Instead of fostering progress and resolution of legislative issues, they have been transformed into procedural impediments.

To restore their intended use and effectiveness, the Committee proposes that: 1) any member may petition for the discharge of a bill from committee without the sponsor’s prior approval; 2) discharge motions shall be allowed 20 days after a bill has been referred to a committee and five days before the end of the session; 3) there shall be no limit on the number of discharge motions within a legislative session and, 4) when bills addressing the same subject have been passed by both chambers, a conference committee shall be convened at the request of the prime sponsor from each chamber or the Speaker and Majority Leader.\textsuperscript{5}

Finally, \textit{member items} are a set of appropriations singled out by members and the leaders for local pet projects. Not unlike congressional “earmarks,” the funds are outside of the normal budgetary process and are used by the leadership to cement their control over the rank-and-file membership. To bring accountability and transparency to the system, the Committee proposes that all member items: 1) be disclosed in budget bills; 2)

\textsuperscript{3} See infra pp. 190-92.

\textsuperscript{4} See infra pp. 192-94.

\textsuperscript{5} See infra pp. 194-95.
include the name of the sponsor, recipient of the funds and amount of funding; 3) be disclosed on the Legislature's website; and, 4) be directed to public non-profit entities only.6

At the dawn of the 21st century New York State faces some of the most complex issues it has ever had to face before. To meet these challenges the Legislature must be able to deliberate and thoroughly consider the options and implications of its actions. These “Fundamentals” are an integral part of strengthening the Legislature and making it more representative and deliberative so that it can solve the issues such as, health care, education, security and the environment.

INTRODUCTION

For many in academia, government, the media and the public, the phrase “three men in a room” symbolizes all that is wrong with state government and the culture of Albany. It crystallizes the simple truth that the Governor, Assembly Speaker (“Speaker”) and Senate Majority Leader (“Majority Leader”) “largely control the state government.”7 Consolidating so much power among three individuals seriously undermines the fundamental principles of democracy and the purpose of representative government.

Many of New York State’s problems in achieving a truly representative government can be traced to the “dysfunctional legislature”8 and the rules that allow two individuals to control the entire legislative branch of government. Specifically, the strength of the Speaker and Majority Leader has been characterized as a “stranglehold’ on New York lawmaking, with members having ‘little more than cheerleading rights.’”9 The long-term deleterious effects of this system have even led the Legislature to admit

that it must seek ways to “increase accountability and help rebuild public confidence in New York State government.”

The negative effects of the current system are many and far-reaching, from the failure to craft good public policy to chronic delays in the passage of an annual budget. This system of governance and policymaking has had and continues to have a harmful effect upon legislation and public policy that puts the issue of “Rules Reform” squarely within the jurisdiction of the Committee on State Affairs (“Committee”)—i.e., legislative and public policy issues facing New York State together with enriching public debate and improving public governance.

As practitioners and representatives of a wide variety of members of the public before the courts and administrative agencies of the state, the Association of the Bar of the City of New York (“City Bar”) and its members have a vital interest in ensuring that government functions properly—upholding the fundamental cornerstones of separation of power and checks and balances—in order to keep that power functioning efficiently. In addition to their role as practitioners, members of the City Bar are individual citizens with a right to be heard on the important issues facing policymakers—such as, healthcare, education, taxation, security and mass transit.

To that end, the Committee has developed a package of reform proposals (“the Fundamentals”) centering on three specific areas:

- Resource Allocation,
- Committees, and
- Member Items.

These recommendations form a foundation upon which the larger macro issues of health care, education and the budget (to name a few) may be addressed and solved. Moreover, these “Fundamentals” are an initial step in reforming the legislative process and a basis for further refining the efficiency and productivity of public policy making and debate in New York State.

BACKGROUND

The Problem

For the last 100 years the New York Legislature has struggled with the issue of rules reform. By the dawn of this century the media had begun

characterizing the legislative leadership's control over New York lawmaking as a “stranglehold,” with members having “little more than cheerleading rights.” In effect, stifling legislators’ voices and discouraging active participation—fueling public skepticism and legislation that was all too often, unsound or poorly worded.

In 1918, State Senator George F. Thompson observed that, “[s]ix years of experience have taught me that in every case the reason for the failures of good legislation in the public interest and the passage of ineffective and abortive legislation can be traced directly to the rules.” In announcing his candidacy for President pro tem, of the Senate, he appealed for support on the platform of reforming the senate rules (emphasis added).

Senator Thompson understood that “[p]arliamentary law is the code of rules and ethics for working together in groups.” It is the “means of translating beliefs and ideas into effective group action. It is logic and common sense crystallized into law, and is as much a part of the body of law as is civil or criminal procedure.” Parliamentary procedure facilitates the transaction of business within a legislature. It ensures that all members have equal rights, privileges and objectives; protects the rights of the minority; and, provides for a full and free discussion of every proposition presented for discussion.

In July of 2004, the Brennan Center for Justice at New York University School of Law issued a report comparing the New York Legislature with those in the other 49 states and Congress. In short, the Brennan Center concluded that the New York Legislature was—“the most dysfunctional in the nation.” The report struck a nerve and by November 83 business, civic, good government, labor, religious and watchdog organizations, from around the state, coalesced to form the Albany Reform Coalition (“ARC”).

11. Shine the Light on Albany, NY Times, November 30, 2000, at A 34.
12. ABCNY Special Committee Report, supra note 9, at 1.
14. Id.
16. Id.
17. Id. at 7.
18. Crelan & Moulton, supra note 8, at 3.
19. The Coalition included the: Amherst Chamber of Commerce, Buffalo Niagara Partnership, Business and Professional Women/NY State, Business Council of Westchester, Center for an Urban Future, Center for Constitutional Rights, Center for Governmental Research,
With the issue of reform foremost in the voters’ minds, the Republican Senate majority created a Task Force on Government Reform to review the operation of state government, identify ways to improve the efficiency and quality of government services, increase accountability and help rebuild public confidence in New York State government.20

The Task Force found that, “twenty years of late state budgets [were] the most obvious symptom of the need to improve the operation of state government.”21 It went on to examine the Senate’s proposed rule changes for January of 2005 and concluded that they were “designed to make the Senate’s operation more efficient, reduce gridlock and logjams, and empower committee chairs and rank-and-file members.”22

21. Id. at 3.
22. Id. at 2.
Also hearing the public’s outcry, the Assembly sought to change the way it did business. In general, the “Stringer Resolution”\(^{23}\) sought equal funding and allocation of resources—including office space—among members, an end to the practice of empty-seat voting and an increase in the role of committees, including the use of conference committees to resolve differences in legislation between the two chambers.

Many of the reforms centered on the functioning (or not) of committees—in both the Senate and Assembly—particularly the failure to issue reports and hold hearings on major pieces of legislation. For example, the Senate Task Force noted that, “[e]ach year, thousands of pieces of legislation are considered and passed into law by the Senate”\(^{24}\) (emphasis added). Interestingly though, the Task Force admitted that, “[i]n addition to regularly scheduled committee meetings to discuss, examine and act on legislation, Senate Standing Committees routinely conduct public hearings on legislation and proposals dozens of times throughout the year” (emphasis added)\(^{25}\).

The Brennan Center found that, “[i]n the Senate, out of the 152 pieces of major legislation that were ultimately passed into law from 1997 through 2001 for which complete data were available, only one bill was the subject of a hearing devoted specifically to its consideration (i.e., 0.7%).”\(^{26}\) “[I]n the Assembly, out of the 202 pieces of major legislation that were ultimately passed into law from 1997 through 2001 for which complete data were available, only one bill was the subject of a committee hearing (i.e., 0.5%).”\(^{27}\) There were only nine instances where hearings were held on the general topic of a bill.\(^{28}\)

In light of these facts and the pressure exerted by the ARC\(^{29}\) the Senate and Assembly changed their rules for the legislative session beginning.

\(^{23}\) The proposed rule changes became known as the “Stringer Resolution,” named for its sponsor, Assemblyman Scott Stringer (67th AD—Manhattan). Many of the Stringer reforms mirrored those contained in the Brennan Center report, see also supra note 8. In November of 2005 Assemblyman Stringer was elected as the Borough President of Manhattan. Some political pundits have speculated that part of the reason why Stringer won the election was his push for rules reform in the Assembly.

\(^{24}\) State Senate Task Force on Gov’t. Reform, supra note 10, at 7.

\(^{25}\) Id. at 8.

\(^{26}\) Creelan & Moulton, supra note 8, at 7.

\(^{27}\) Id. at 8.

\(^{28}\) Id.

\(^{29}\) On January 6, 2005, ARC organized a “New Year—New Rules Rally” in which hundreds of people from around the state descended upon Albany to demand legislative rules reform.
in January 2005. The leaders in Albany were quick to hail their achieve-
ments as, “the most significant changes that have been made in half a
century.”30 Senate Majority Leader Joseph L. Bruno remarked that, “[i]t’s
important to point out that these reforms are the first step, not the last,
in our overall government reform effort (emphasis added).”31

Notwithstanding the leaders’ assertions that both chambers would
become more open and deliberative, it was observed that the “changes
[were] unlikely to fundamentally change the extreme power the leaders of
each house [would] wield over their members.” Specifically, the leaders
retained “control over everything from committee assignments to office
space and parking spots, and were still able to largely control which mea-
sures [would be] allowed to pass their houses.”32

In the aftermath of these changes the Legislature passed its first on-
time budget in 20 years. Despite the optimism that this legislative feat
created the underlying function of the Legislature remains unchanged.
The 2005 rules changes did nothing to change “the power relationship
within the chamber[s] or [limit the] leadership’s iron-clad control over
legislation and the ability of members to get bills to the chamber floor for
debate and vote.”33

Members of the Legislature admit that the function of “passing laws”
is still something at which they are least successful.34 Whether the prob-
lem lies in the electoral process or rules reform, there is agreement that “[r]eform
in Albany requires a credible, independent and active Legislature.”35

The Legislature and its leaders admit that reform is an ongoing issue
that must be addressed. This is supported by a recent poll that found 47%

30. Michael Cooper, In Radical Shift for Assembly, To Vote, They Must Show Up, NY Times,
January 7, 2005, at B7 (quoting Assembly Speaker Sheldon Silver).
32. Id.
33. Lawrence Norden, David E. Pozen & Bethany Foster, Brennan Center for Justice at New
York University School of Law, Unfinished Business: New York State Legislative Reform 2006
download_file_37893.pdf.
34. Assemblyman Richard L. Brodsky, The Legislature You Don’t Know, NY Times, March 4,
2007, City Section, at 11. Specifically Assemblyman Brodsky asserts that a successful legisla-
ture will do three things well: pass laws; provide ordinary people access to power and enable
them to influence decisions. He goes on to argue that the problem is “genuine institutional
failure” and that the Legislature has not reformed the electoral process—citing instances of
law-breaking and special interests that are “too powerful.”
35. Id.
of respondents citing legislative dysfunction and the Brennan Center reforms as their top priority. As such, legislative rules reform is an important and relevant issue that requires the attention of the effected parties—albeit individual citizens, members of the Legislature, the Governor, or legal practitioners and scholars.

**APPLICABILITY—“Relevance”**

Rules reform is not an end in and of itself. Rather, it is the crucial first step in enabling the Legislature to become a deliberative and policy making body that is capable of addressing and solving important policy issues facing New York State, that are “more complex than ever.” Rules reform is only one piece of a greater reform agenda that the public and newly elected Governor seek to achieve.

Following-up on the ARC “New Year—New Rules Rally,” approximately 90 groups—including good government, civic, business and activists—from across New York formed the Reform NY coalition. The Reform NY agenda

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36. The poll was conducted by the Daily Gotham—a local political blog focusing on issues related to New York City and New York State. Specifically, the question posed to readers was, “What’s your top New York political issue for 2007.” The poll was launched on February 27, 2007 and closed on April 3, 2007. The total number of respondents was 150 and was not adjusted for a margin of error—as it was not a scientific random poll. Coming in second was Election Reform with 14% or 21 out of a possible 150 votes, available at http://dailygotham.com/blog/bouldin/daily_gotham_reader_poll_results.


includes not only rules reform but also, redistricting, budget, ethics and campaign finance/election reform proposals. On May 3, 2005 and thereafter on May 6, 2006 and April 23, 2007, the Reform NY coalition staged a “Reform Day” event in Albany to heighten public awareness of these issues.

While each of the reform proposals seeks a different goal, they share one common element—each requires legislative action39 before they can be achieved. The Governor has recently sought to overhaul New York’s campaign laws. He “ha[s] made campaign finance reform one of the top priorities of his administration and ha[s] [been] negotiat[ing] the issue with legislative leaders for [the past few] months.”40 Predictably, “[h]is failure to sway the Legislature on campaign finance could be viewed as his latest lesson in the intractable way of doing business in Albany.”41

Reform proposals are not the only policy casualties of the “dysfunctional legislature.” A flawed legislative process too often means inaction on important issues, or the enactment of policies that are bad for New York. One issue is wetlands protection, which has languished in the Senate for the past few years. In 2005, 49 of 62 senators supported a measure to address the problem; yet, it was precluded from reaching the floor for

39. Specifically, the Reform NY coalition sought: a hearing before the Legislature voted on the Governor’s bill to create a Commission on Public Integrity; amendments to the current campaign finance laws and a system of voluntary public financing for political campaigns; a statute adopting a single statewide voting machine; and, the creation of an independent redistricting commission.


41. Id.
debate and a vote. While inaction plagues wetlands protection, change (i.e., action) to New York’s health care system, via the Berger Commission, has created other problems.

Specifically, in 2005 the Legislature decided to address the issue of New York’s health care capacity and resource problem. The Legislature enacted Chapter 63 (Part K) of the Laws of 2005, which created the Commission on Health Care Facilities in the 21st Century ("Berger Commission”—named for the Chairman Stephen Berger). On November 28, 2006 the Berger Commission issued its final recommendations, including the closure of nine hospitals and seven nursing homes, along with the restructuring of approximately 50 other health care facilities, throughout the state.

As a result of the Berger Commission’s findings and recommendations, no less than seven lawsuits have been filed seeking to enjoin and/or invalidate the commission and/or its recommendations. Indeed, the State Affairs Committee and the Health Law Committee of the Association of the Bar of the City of New York intend to file an Amicus Curiae

42. Norden, Pozen & Foster, supra note 33, at 18. The Brennan Center report outlines an entire “Case Study” on the issue of wetlands protection and the struggles of St. Senator Carl Marcellino (Syosset) and Assemblyman Thomas DiNapoli (Great Neck) to amend New York’s wetlands preservation laws. The reason given for inaction being the Senate Majority Leader’s refusal to place the bill on the “Active List.”


44. The suits include: St. Joseph Hospital of Cheektowaga; New York and Catholic Health System, Inc., (Plaintiffs) v. Antonia C. Novello, as New York State Health Commissioner; New York State Commission on Healthcare Facilities on the 21st Century, and George E. Pataki, as Governor of the State of New York, and the State of New York, (Defendants), Index No. 11568/06, Supreme Court County of Erie (seeking injunctive relief under 42 U.S.C. § 1983 to prevent implementation of the Berger Commission’s recommendations as to the closing of St. Joseph Hospital); William E. Scheuerman, Individually and as President of United University Professions; United University Professions, and Dr. Umeshandra Patel, (Plaintiffs) v. State of New York; Eliot Spitzer, as Governor of the State of New York; Department of Health of the State of New York; Dr. Richard Daines, Individually and as Commissioner of Department of Health of the State of New York; Maryanne Clinday, Individually and as Executive Director of the Dormitory Authority of the State of New York; Commission on Health Care Facilities in the Twenty-First Century, and Stephen Berger, as Chair of the Commission on Health Care in the Twenty-First Century, (Defendants) and State University of New York; John R. Ryan, as Chancellor of the State University of New York; The Board of Trustees of the State University of New York; Thomas F. Ogan, as Chairman of the Board of Trustees of the State University of New York; the State University of New York Health Science Center at Syracuse; Dr. David Smith, as President of the SUNY Health Science Center at Syracuse, and Crouse Hospital Inc., d/b/a Crouse Hospital, (Permissive Party Defendants), Index No. 2474/07, Supreme Court
LEGISLATIVE RULES REFORM

brief on behalf of plaintiffs in McKinney, et al. v. Commissioner, et al.45 Of particular note with respect to rules reform is the fact that the legislature
never attempted to address the underlying policy issue of health care capacity and resources, prior to enabling and creating the Berger Commission in 2005. Moreover, the Legislature never held any hearings with respect to the enabling legislation itself. Note that, health care spending in New York State affects billions of dollars a year.

Indeed, the triggering provision of the enabling legislation required the Governor or the Legislature to specifically negate the recommendations of the Berger Commission, in order to prevent them from taking effect on December 31, 2006. This is especially important as to the issue of rules reform because State Senator Jeffrey D. Klein and Assemblyman Peter M. Rivera have submitted affidavits complaining that they and their colleagues were never afforded an opportunity to vote on the Berger Commission recommendations.

Notwithstanding the outcome of the pending litigation, the point is clear—the legislative process in Albany is broken and in need of serious reform. As such, the following recommendations are put forth as a “fundamental” package upon which to build serious, credible and real reform for the Legislature and the way that Albany does business.

PROPOSED RULE CHANGES (“The Fundamentals”)—A Solution

The Committee has divided its “solution” into three equally important and fundamental areas that must be addressed, in order, to create real reform and sow the seeds for future change and progress. These areas are: Resource Allocation, Committees and Member Items.

RESOURCE ALLOCATION

The intractability of the problem is clear; it is not so much the goal(s)
(i.e., solution(s)) as it is where and how to begin. Any solution should begin with the issue of whether or not the Legislature (i.e., the individual members) is capable of effectuating change.

In short, do members (and more importantly, the people they represent) really have a voice when they arrive in Albany? Certainly members are allowed to vote on specific pieces of legislation, but do they really have the freedom to speak their minds and therefore, express the will of their constituents (i.e., the public’s voice)? Under the current system the answers would be a resounding—No.

The current rules give the Speaker and Majority Leader complete control over each member’s funding for staff and office operations. As such, the leaders exercise a latent ability to control individual member’s freedom to disagree with their wishes. In effect, “members are discouraged from challenging their leader’s approach to specific legislation or to procedural rules.”

Therefore, the members are prevented from advocating for any changes to procedural rules that could lessen the authority of the chamber’s Cooper, supra note 30, at B7. leader—lest they are punished for their disloyalty.

In 2000, Assemblyman Michael Bragman (D-Cicero) sought to unseat the Speaker. As a result he was stripped of his leadership post, “including the perks and an extra $34,500 a year that [went] with the position.” Other supporters were stripped of their committee chairmanships. In a floor speech Assemblyman Bragman asserted that, “[m]any, many more [supporters] would have come forward if they had not feared reprisals.”

An empirical analysis of the distribution of funds and their expenditure by individual members has found that the most senior (i.e., presumably most loyal) members are given the bulk of the resources in each chamber. Therefore, the rules should be changed to reflect those of the U.S. Congress—which allocates resources for office and staff equally among its members, regardless of party affiliation or seniority. To remedy the muzzling effect of the current rules, the following changes are offered.

1) All members shall receive equal funding (i.e., “base amount”) for the operating costs and staff of their individual offices, re-

51. Creelan & Moulton, supra note 8, at xiv.
52. Id.
54. Id.
gardless of the member’s party affiliation or seniority. Any additional resources provided for “extra” responsibilities shall be considerably less than the base amount and allocated using objective criteria, unrelated to party affiliation. 56
2) Each committee shall be authorized to hire its own professional staff. Adequate funding for professional staff, facilities and equipment shall be provided to each committee, and shall be allocated on a proportional majority-minority split. 57

By allocating resources—for constituent services, staff and committee operations—equally and creating an environment free from fear of reprisal and protecting the status quo, members can address their primary duties of enacting laws and making public policy. The crucible for this function lies in the Legislature’s committee structure.

COMMITTEES 58

A properly functioning legislature must have a healthy and active committee structure so that legislation is properly reviewed, revised and crafted in an efficient manner prior to enactment. Through hearings committees solicit public input, balance competing interests, debate the merits and draft thoughtful legislation. As noted above, New York’s legislative committees rarely hold hearings on any piece of legislation before it is enacted into law.

The core problem these proposals seek to address is the concentration of absolute power in the hands of two individuals. It is not the intent of these recommendations to eliminate or reduce legislative leadership. Indeed, informed and active committees support a strong leadership model, through which the legislature can effectively provide a meaningful check

56. Norden, Pozen & Foster, supra note 33, at 34.
57. ABCNY Special Committee Report, supra note 9, at 4. Together these two rule changes are meant to create an intramural system of resource allocation similar to that used by Congress.
58. For context, compare the number of committees in the New York Legislature with those of the U.S. Congress (whose jurisdiction is vastly larger than the State’s). The Assembly has 41 Committees, 23 Subcommittees, 14 Legislative Commissions and 15 Task Forces; available at http://assembly.state.ny.us/comm/. The State Senate has 31 Committees—available at http://public.leginfo.state.ny.us/statdoc/scomlist.html. The U.S. House of Representatives has 20 standing Committees, 3 Joint Committees, 1 Permanent Select Committee and 1 Select Committee—available at http://www.house.gov/house/CommitteeWWW.shtml. The U.S. Senate has 20 Standing Committees, 4 Joint Committees and 4 Special and/or Select Committees—available at http://www.senate.gov/pagelayout/committees/d_three_sections_with_teasers/committees_home.htm.
on executive power, and through which a legislative body may be effectively administered. Moreover, as any observer of the United States Congress can attest, the strengthening of a committee system need not, and does not, make the leadership toothless—quite the opposite.\(^\text{59}\)

In effective legislatures, public committee meetings and hearings are the locus of the real policy debate. The special requirements of bicameral state legislatures necessitate special rules to meet their specialized needs; including a majority for a forum and delegating their duties largely to committees.\(^\text{60}\) As such, committee reports constitute a very important guide to the purposes and meaning of legislation, for legislative, judicial and public use. In effective legislatures, committees also serve to counterbalance the power of the legislative leadership, and to offer a policy counterbalance to the political considerations that are often accorded undue weight in last-minute leadership decisions.\(^\text{61}\)

The fact is New York’s legislative committees are essentially moribund holding vehicles for legislation prior to a leadership determination of whether it should be considered.\(^\text{62}\) Of “the 308 major laws passed from 1997 through 2001, the median number of days between a bill’s introduction and its passage was 10 in the Assembly and 35 in the Senate.”\(^\text{63}\) In the Assembly 40.3\% (124 of 308 bills) were passed within five days or fewer of their introduction—in the Senate, 85 laws (27.6\%) were passed within five days or fewer.\(^\text{64}\)

To increase debate and to provide the public with an understanding of the purpose and basis for its laws, the following changes should be adopted.

1) All bills reported to the legislative floor must be accompanied by a public committee report that contains, at a minimum; purposes of the bill, change in previous law, estimated cost of the bill, if any, proposed source of revenue to cover such cost, section by section analysis, procedural history, committee or subcommittee votes, and any members’ views of the bill.\(^\text{65}\)

59. *ABCNY Special Committee Report*, supra note 9, at 4.
61. *ABCNY Special Committee Report*, supra note 9, at 3.
62. Id.
63. Creelan & Moulton, *supra* note 8, at 5.
64. Id.
65. It should be noted that under the current rules, a “memo” is attached to a bill when it is introduced. In usually no more than a few paragraphs, the sponsor summarizes the provisions and purpose of the bill. See also Creelan & Moulton, *supra* note 8, at 11.
2) Before being reported out of the committee, all bills must be openly presented and considered with an opportunity for amendment.

3) If three or more members of a committee petition for a hearing on a bill or an agency oversight hearing, such consideration or hearing shall take place unless the petition is rejected by a majority vote of the committee.

4) If three or more members of a committee petition for a vote on a bill, the chair shall schedule such vote as soon as practicable in the current legislative session and in any event no later than ten days before the end of the session.

**Discharge Motions**

In order to prevent a bill from simply languishing in committee, legislatures require committees to report all bills referred to them for consideration. In New York it is more difficult than anywhere else in the country for a bill to be discharged from committee. Committee chairman are granted the authority to determine whether a bill will be voted on by a committee and generally will not allow such a vote without certainty that it will receive unanimous support, creating an insurmountable barrier to any bill that does not have the chairperson’s support and, as such, the support of the Speaker or Majority Leader.

As such, the following changes are recommended to break the leadership’s “hammerlock” of control over important and broadly supported legislation.

1) Any elected member of the chamber shall be allowed to make a motion to discharge a bill from a committee and the sponsor’s agreement shall not be required.

2) Motions to discharge shall be allowed at any time after 20 days has passed since the bill was referred to the committee and until five (5) days before the end of the legislative session.

3) There shall be no limit on the number of motions to discharge within a legislative session.

**Conference Committees**

Conference committees are routinely and widely used by the U.S. Congress and state legislatures to reconcile differences between bills passed

66.Creelan & Moulton, supra note 8, at 14. Indeed, at least 21 out of 99 legislative chambers have such a requirement and approximately half of all legislative chambers impose a deadline for committee action.

67. Id.
by the two houses of a legislature to produce a single law that can be passed by both. 68 The Legislature in New York does not have any established automatic mechanism for conference committees. Thus, the only existing mechanism to resolve differences between the two chambers’ bills is a closed-door negotiation between the Speaker and Majority Leader. 69

As such, the people—through their representatives—are effectively prevented from having any voice or input into the final version of any law that is presented to the Governor for signing.

To solve this problem the following proposal is recommended.

When bills addressing the same subject have been passed by both chambers, a conference committee shall be convened at the request of the prime sponsor from each chamber or the Speaker and Majority Leader. Such committee shall convene for a “mark up” session within two weeks of such a request to reconcile the differences in the two chambers’ bills before final passage. These sessions shall be open to the public and shall be transcribed. 70

**MEMBER ITEMS**

By silencing members through their absolute control over resources and thwarting their ability to move legislation—either through committee or to the floor—the Speaker and Majority Leader ensure the continuation of their “stranglehold” over the system through “member items.” In short, member items are a set of appropriations specifically delineated by members and the leaders for local pet projects.

Just as office space, supplies, parking spots and other perks are handed out by the leaders to rank-and-file members, to curry favor or ensure compliance with their wishes—“member items” are distributed to members based on their loyalty and/or seniority in the Legislature.

In 2006 the Legislature set aside $200 million for individual projects known as “member items.” This money was divided between the Assembly, Senate and Governor, with the Legislature splitting $170 million and the Governor controlling the remaining $30 million. 71 Aside from being

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68. Creelan & Moulton, supra note 8, at 35.
69. Id.
70. Creelan & Moulton, supra note 8, at xiii; this rule was part of the “Stringer Resolution” in January 2005.
outside of the normal budgetary process and public review, these funds help facilitate the continuing culture of Albany.

“In state budgets, the legislature has authorized New York to direct public authorities to borrow hundreds of millions of dollars to pay for discretionary grants to be selected at a later date.” 72 From 1997 to 2004, the Governor, Majority Leader and Speaker controlled “more than $1 billion from discretionary grant programs, which have been called New York’s ‘secret government.’” 73

“The loose rules and lack of accountability in the grant programs allows the three leaders to reward allies and punish rivals.” 74 “[E]very member is petrified. If they don’t play ball, they’re not going to get any funds.” 75 If they do play ball, Democratic Assembly members and Republican senators win access to money, which they use to announce grants during election season. 76

It is axiomatic that members of the Legislature must deliver for their constituents—in order to justify their presence and return every two years. Indeed, many projects are worthy expenditures and warrant special attention. However, the Committee is troubled by the lack of transparency and accountability for these funds.

Of particular concern is the leaders’ influence in the expenditure of these funds. An analysis reveals that member items, from fiscal year ’04 through fiscal year ’07, totaled $537,490,128. During this period, the Speaker alone requested $30,396,200 and another $11,091,500 was requested or appropriated in conjunction with other members. The number is staggering and the temptation for abuse is clear.

Late last year, a New York state senator was indicted for allegedly using $400,000 in member item money—appropriated for charities in his district—for personal expenses and luxuries for himself and his family. 77 When he announced the charges, Michael J. Garcia, the United States attorney for Manhattan, noted that the “indictment pointed out the risk

73. Id.
74. Breidenbach & McAndrew, supra note 72.
75. Id., quoting Assemblyman Michael Bragman (D-Cicero).
76. Breidenbach & McAndrew, supra note 72.
of corruption inherent in the Legislature’s practice of setting aside a pot of money for member items, the pet projects of individual lawmakers in their districts.”

Whether they are called “member items” or “earmarks,” this system of dispensing public funds is corroding the legislative branch of government. Earlier this year a Congressman on the powerful House Appropriations Committee gave up his seat as a result of being linked to “three inquiries to accusations that committee members accepted bribes in exchange for earmarking federal money to certain projects.”

In 2007, $170 million of pet projects were divvied up between the Assembly and Senate. The Attorney General has set up new procedures for vetting these projects, yet there are no details identifying the sponsor of the particular spending item in the budget or what the item is being used for, even though each is identified by party and as coming from either the Senate or Assembly.

The $170 million figure has been widely reported; yet, an analysis by the Manhattan Institute’s Empire Center—of the four major budget bills for 2007-08—has “turned up only $101 million in individual appropriations listed under various subtotals for the ‘community Projects 007’ account, which traditionally is the funding source for legislative member items.” As usual, “there was no opportunity for public scrutiny of the member item list in advance of the budget vote.”

Recently for the first time, the state Assembly has issued an official list of 2007-08 ‘Legislative Initiatives’—a.k.a. member items—in a regular budget cycle. The list discloses the names of sponsors, a brief description

78. Hartocollis, supra note 77.
79. Neil A. Lewis, 2nd House Republican Yields Committee Post, NY Times, April 21, 2007, at A12. Indeed, the lobbying scandals that plagued Congress in 2005 and 2006 were often times directly linked to the system of “earmarking” legislation—i.e., tacking pork barrel projects for special state or local projects onto federal legislation. According to the Congressional Research Service, pork barrel spending rose from $29.11 billion in 1994 to $52.69 billion in 2004, during that same time the number of projects rose from 4,155 to 14,211.
81. Id.
83. Id.
of the purpose of each grant and the name of the project director for the agency receiving the money. 85

What remains unclear is whether all the grants were itemized. The Empire Center was only able to identify 2,412 items out of roughly 5,800 obvious member items in the four major budget bills—the Assembly list consisted of “3,791 pages, with each paged representing a separate item for both Majority (Democrat) and Minority (Republican) members.” 86

As these projects and allocations are granted for legitimate and deserving purposes, the Committee believes that they should be subjected to the light of the overall legislative process. As such the following rule change is proposed.

All Member Items must be:

a) Disclosed in budget bills and include the:
   i. name of the sponsor,
   ii. recipient of the funds and
   iii. amount of funding.
b) Disclosed on the chamber’s website.
c) Directed to public, non-profit entities only. 87

One of the most ubiquitous policy goals of Rules Reform is “increasing accountability and restoring public confidence in New York State government.” 88 By adopting this rule and the others contained in this package, the Committee believes that the goals of a functioning and accountable legislature will be furthered. Moreover, the Legislature will go a long way towards restoring the public’s confidence in its political and government institutions.

CONCLUSION

The New York Legislature long ago abandoned the ethical framework of parliamentary law in favor of a culture of omnipotent legislative leaders to whom other elected members are subservient. Such a culture is insidious and fundamentally undemocratic. Until the legislative culture

85. Empire Center for New York State Policy, supra note 84.
86. Id., see also supra note 82.
87. Senate Minority Reform Package, January 2007. Part of a Reform Package offered by the Senate Minority in January of 2007, prior to the adoption of the current rules for this legislative session.
88. State Senate Task Force on Gov’t. Reform, supra note 10, at 1.
changes, the people of the state of New York cannot hope for a legislature that truly represents their interests.

The continued use of “three men in a room” as the preferred approach for policymaking in New York will only prolong and imperil the state’s ability to address the vital issues that loom over the horizon of the dawning 21st century. “This is a rare reform moment—a once-a-generation opportunity to renew government and politics in New York.”89 The adoption of these “Fundamentals” will allow the Legislature to function more efficiently and address the pressing public policy issues before it.

Ultimately the goal is to move the Legislature towards a more representative, deliberative and accessible body whose members are accountable for their actions and who are able to perform their duties in an efficient manner. The Committee believes that these fundamental changes to the legislative rules will make the Legislature, stronger, more effective, and more democratic. We urge the Legislature’s leaders and the members of the Assembly and Senate to consider and ultimately adopt these changes in January of 2008—at the beginning of its next session.

May 2007

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89. Michael Waldman, Executive Director, Brennan Center for Justice at NYU School of Law, Preface, Norden, Pozen & Foster, supra note 33.
Gender-Based Violence Laws in Sub-Saharan Africa

Committee on African Affairs

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Gender-Based Violence Laws in Sub-Saharan Africa*

Committee on African Affairs

I. INTRODUCTION

"Gender-based violence includes acts of violence in the form of physical, psychological, or sexual violence against a person specifically because of his or her gender."1,2 It "constitutes one of the most widespread human rights abuses and public health problems in the world today," with devastating long term consequences for victims’ physical and mental health. Simultaneously, its broader social effects compromise the social development of children in the household, the unity of the family, the social fabric of affected communities, and the well-being of society as a whole.3 Governments are legally obligated to address the problem of gender-based violence through a range of measures, including legislation.

This Report documents examples of legislation in sub-Saharan Af-

* This Report was prepared for the Committee on African Affairs of the New York City Bar by the lawyers listed below in collaboration with Elizabeth Barad of the Center for Reproductive Rights, as part of a pro bono project coordinated by The Cyrus R. Vance Center for International Justice.

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1. All translations are by the authors unless otherwise noted.


Africa designed to combat gender-based violence and evaluates how law can effectively address the challenges associated with violence against women. Specifically, the Report looks at gender-based violence legislation with regard to rape, sexual assault, and domestic violence. It does not address the many other forms such violence may take, including female genital mutilation, trafficking in women, and forced prostitution. In addition, this Report is confined to gender-based violence against women; while it is recognized that men and boys are sometimes also subject to gender-based violence, the majority of victims are women and girls. In light of this, the terms “gender-based violence” and “violence against women” are used interchangeably in the Report.

We first provide an overview of the widespread prohibitions on gender-based violence in international and regional instruments, as well as of the recognition and application of these prohibitions by international tribunals in Part II of the Report. We then consider the pertinent constitutional provisions of selected sub-Saharan African States in Part III. Parts IV and V focus on the specific legislative provisions of selected sub-Saharan African States with regard to “rape,” “sexual assault” and “domestic violence” as forms of gender-based violence. Throughout Parts IV and V, the Report highlights general considerations to be taken into account in drafting and implementing such legislation. In addition, Part VI highlights particular good and best practices embraced by States—namely, training for public officials, providing services to victims, monitoring the effectiveness of legislation, and raising awareness—that are prerequisites to ensuring proper implementation of gender-based violence legislation. The final part of the Report is dedicated to a brief conclusion.

A. Objectives

This Report is intended for use by governmental and non-governmental organizations and agencies that (i) develop gender-based violence

legislation, (ii) ensure the implementation and enforcement of gender-based violence legislation and/or, (iii) provide related services. It aims to identify certain good and best practices in addressing gender-based violence, provides examples of model legislation, and briefly describes considerations to take into account when undertaking efforts to replicate these practices elsewhere. The authors are optimistic that this Report will serve as a guide for countries that have yet to pass legislation addressing violence against women, but are contemplating doing so.

While the Report provides a framework for developing effective prevention and response strategies, it does not offer an exhaustive set of approaches to fit every possible situation. Since preventing and responding to the complex problem of gender-based violence requires inter-agency, inter-disciplinary and multi-sectoral collaboration, this Report encourages reflection and cooperation between various organizations. It is intended for use only as a guideline, complementing rather than replacing any other useful material particular jurisdictions may have in relation to combating gender-based violence.

B. Political & Social Context

The legislative provisions and pending reforms discussed here represent a significant achievement in efforts to strengthen women’s rights. Researchers have documented their positive impact through a variety of measures, including an increase in the number of women who report gender-based violence cases to the police. However, the widespread failure to enforce existing laws remains a significant hurdle to further progress.

In addition, though legislative changes have occurred, for many residents of sub-Saharan African countries, laws, including those targeting gender-based violence, do not have the same practical impact as the authority and decisions of informal systems of justice exercised by village (or clan, tribe, etc.) elders and/or family mediation mechanisms. In this environment, despite the efforts of non-governmental organizations and civil society, few sub-Saharan African countries have succeeded in addressing gender-based violence comprehensively.

For example, Kenya has undertaken substantial efforts in the last decade to revise its civil and penal codes, and has implemented a nationwide system of “Victim Support Units” to address violence against women.


6. *Id.*
But progress has been extremely slow. One observer has noted the following barriers to successful implementation:

Women and children face serious social and cultural barriers to legal redress. Women are often reluctant to use legal remedies [for reasons such as:] they do not believe that they are entitled to protection ... they are afraid of additional violence from the perpetrator ... they are pressured to avoid bringing “shame” upon their family, or ... [where the perpetrator is a family member,] jailing the perpetrator [may] cut off the family’s economic support. Support for new laws has often been low among the police, the judiciary and the general public, especially when laws counter long-standing traditions of discrimination against women. Law enforcement institutions often simply refuse to enforce the laws.7

Finally, a significant number of sub-Saharan African countries do not have any legislation to address gender-based violence in the first place. Despite the challenges faced by sub-Saharan African States in enacting and implementing legislative reforms, however, there is now a widespread recognition that gender-based violence must be addressed. Although no consensus has emerged on the best way to confront such violence, public awareness will drive further efforts to target this injustice, which demonstrates a fundamental lack of respect for women.

C. General Legislative Recommendations

Specific recommendations are outlined in each section of this Report, but the following are general considerations that should underlie all drafting initiatives for gender-based violence legislation:

Definitions:

- Legal definitions should be broad to reflect the realities of gender-based violence in Africa. For example, marital rape and intimate partner violence are two categories of gender-based violence that should be incorporated into definitions of rape and domestic violence, respectively. By expanding the definitions and creating inclusive legislation, sub-Saharan African States can better protect their citizens.

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Legislation should clearly define key elements of gender-based violent crimes to reduce the potential for abuse of judicial discretion. Clear explanations of key concepts, like “consent” and “penetration,” are essential to the uniform application of laws against gender-based violence.

Procedures:
- Legislation should provide clear standards of proof to protect the rights of both the victim and the accused. Additionally, the potential for abuse of judicial discretion (in favor of either victims or assailants) requires that legislators include clear guidance on the administration of penalties in rape, sexual assault, and domestic violence cases.
- Crimes like rape and sexual assault should be prosecuted with equal force whether they occur inside or outside the home. Legislation against sexual assault and rape should specifically cover these crimes when committed by spouses and/or intimate partners. A clear expression of legislative intent will facilitate enforcement.

Support:
- State action should go beyond the establishment of legal recourse to include support services, response centers, and law enforcement training. Well-drafted gender-based violence legislation will only achieve the desired result when combined with the enforcement and support services that women need to exercise their rights.
- Culturally sensitive awareness campaigns directed at both men and women are an essential component of long-term solutions to violence against women. Local governments, national agencies, and NGOs should coordinate efforts to educate all community members about the definition and consequences of rape, sexual assault, and domestic violence. While cultural beliefs about the roles of men and women are not easily changed, national governments must adopt a long-range plan to stop the cycle of gender-based violence.

II. INTERNATIONAL FRAMEWORK

As a general matter, but with significant variations in the scope and type of protection afforded, gender crimes are covered by international humanitarian, criminal, and human rights law. Various international
and regional instruments and declarations have recognized violence against women as a “form of discrimination and a violation of women’s human rights.” The widespread inclusion of a prohibition of gender-based violence in international and regional treaties and declarations, its recognition and application by the international tribunals, as well as its prevalence in the national legislation of the majority of States indicates that this prohibition represents a consensus in the international community about the normative force of a prohibition on gender-based violence.

A. Treaties/Conventions

Treaty law is considered the most undisputable source of international law: when two or more sovereign States undertake an obligation, they are bound by it. A wide array of multilateral universal and regional treaties and conventions address the subject of gender-based violence. The most significant of these treaties and conventions are described below.

1. International Instruments

As pre-World War II international instruments proved ineffective to address the mass violence committed against civilians during World War II, the existing Geneva Conventions were amended in 1949. On the subject of violence against women, Article 27 of the Fourth Geneva Convention adopted in 1949 provides that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” Additional Protocols supplementing the 1949 Geneva Conventions adopted in 1977 also prohibit sexual violence. However, the language used by all of these articles generally

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12. “Article 76(1) of Protocol I states: ‘Women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution and any form of indecent assault.’” Askin, supra note 8, at 304 (quoting Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocols).
ally focuses on women’s “honour,” “dignity” and “special respect” instead of emphasizing the fundamentally violent nature of these crimes. Although the Geneva Conventions do not specifically list sexual violence as a form of the “grave breaches” prohibited by Article 147, the case law developed by the international tribunals and the Rome Statute of the International Criminal Court, as discussed below, interpret the notion of grave breach to encompass sexual violence. Moreover, it is widely accepted that the Geneva Conventions and the Additional Protocols are an inherent part of customary international law as “laws or customs of war.”

The International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR) contain provisions prohibiting discrimination on the basis of sex. Although these instruments do not explicitly refer to violence against women, sexual violence has been interpreted as falling under the prohibition against “inhuman or degrading treatment” in the ICCPR. Each instrument requires States parties to take affirmative action to give effect to the rights enumerated.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture broadly, including “pain or suffering is inflicted ... with the consent or acquiescence of a public
official or other person acting in an official capacity.”21 The former United Nations Special Rapporteur on Violence Against Women has interpreted this definition to include certain forms of violence against women22 and has stated that “the international human rights framework could be applied to address discriminatory laws or customs, like exceptions for marital rape or the defence of honour, which exempt perpetrators of domestic violence from sanctions and reflect the consent of the State.”23

The Convention on the Rights of the Child is a general instrument on the rights of the child, and requires that States parties “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”24

The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) does not explicitly prohibit violence against women, but rather “discrimination against women in all its forms.”25 Recommendations issued by the Committee on the Elimination of Discrimination Against Women, which oversees States’ compliance with the treaty, have clearly defined “discrimination” to include violence against women.26 The Committee’s General Recommendation No. 19 (1992) provides a broad definition of gender-based violence:

The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is

23. Id. ¶ 45.
a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.27

General Recommendation No. 19 also clarifies that gender-based violence can constitute a violation of States’ “obligations under general international human rights law and under other conventions” and that States may also “be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”28 CEDAW obligates States “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women.” 29

The Optional Protocol to CEDAW (1999) establishes the competence of the Committee on the Elimination of Discrimination against Women to receive and consider complaints from individuals or groups within its jurisdiction (communications procedure)30 and provides for an additional inquiry procedure (of which States may opt out). 31 The Committee has issued numerous decisions addressing gender-based violence. For example, one decision found that Hungary had violated its obligations under CEDAW because it did not provide “the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence.”32

2. Regional Instruments

Certain important regional treaties also address violence against women and place an affirmative duty on the States parties to take measures to protect women from violence.

27. Id. ¶ 6.

28. Id. ¶¶ 8-9.


31. Id. arts. 8-10.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994) (Convention of Belém do Para) has been described as “the only treaty directed solely at eliminating violence against women and has frequently been cited as a model for a binding treaty on violence against women.”\(^3^3\) This convention affirms that women have a right to be free from violence in both the public and private spheres and places affirmative obligations on the States parties to take measures to prevent, punish and eradicate violence against women, incorporating a due diligence standard.\(^3^4\) It also establishes a reporting mechanism and a complaints procedure open to individuals and organizations.\(^3^5\)

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa provides for strong protections against gender-based violence and incorporates its elimination under the scope of women’s rights to life, integrity and security of the person and the right to dignity.\(^3^6\) The African Charter on the Rights and Welfare of the Child includes protection from sexual abuse under the scope of “torture, inhuman or degrading treatment.”\(^3^7\) Each of these instruments places affirmative duties on the States parties to take affirmative action to eradicate violence, including by means of legislative, social and educational measures.

B. Declarations, Resolutions and Other Pronouncements by Various International Bodies

In addition to binding international and regional instruments, several declarations and programs of action on violence against women have been drafted by a variety of international actors. While these declarations do not bind States, they provide strong evidence of a solid international consensus supporting the notion of “emerging customary international law” with respect to prohibiting violence against women.\(^3^8\)

\(^3^3\) The Secretary-General, *supra* note 9, ¶ 248.


\(^3^5\) Id. arts. 10, 12.


\(^3^8\) See Stark, *supra* note 10, at 265.
The most significant of these declarations is the Declaration on the Elimination of Violence Against Women (1993). This declaration relies on the human rights foundation established by the international conventions discussed above as well as on the Universal Declaration of Human Rights. The declaration sets forth a broad definition of violence against women and calls for States to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.” Another significant step in advancing the international human rights framework to combat gender-based violence was the creation of the United Nations Special Rapporteur on Violence Against Women, providing a forum for collecting and analyzing information on violence against women throughout the world. Among other issues, the Special Rapporteur on Violence Against Women has analyzed the application of the due diligence standard, which appears in the Declaration on the Elimination of Violence Against Women, CEDAW General Recommendation No. 19, the 1995 Beijing Platform for Action, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, UN Resolution 1994/45 (appointing the Special Rapporteur on Violence Against Women), and concluded “On the basis of the practice

40. Article 1 of the Declaration on the Elimination of Violence Against Women defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” Id. art. 1. Article 2 of the Declaration also provides a non-exclusive list of actions that fall within this definition, including “physical, sexual and psychological violence occurring in the family...marital rape...other traditional practices harmful to women” and “physical, sexual and psychological violence occurring within the general community....” Id. art. 2.
41. Id. art. 4(c).
and opinio juris outlined above ... that there is a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence. 44 Other important declarations include the Vienna Conference on Human Rights (1993), the Programme of Action of the International Conference on Population and Development (1994), the Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women (1995), the Southern African Development Community’s Declaration on Gender and Development (1997) and the Addendum on the Eradication of All Forms of Violence Against Women and Children (1998), recognizing that violence against women can constitute a violation of human rights. 45 These declarations seek to provide momentum to the movement to eradicate violence against women and call for national and international action.

The adoption of binding instruments and the issuance of declarations calling for States to ensure the eradication of violence against women have not been sufficient to eliminate violence against women. As a result, the Special Rapporteur on Violence Against Women has considered “best practices” or “good practices” in fighting violence against women. These are practices that have “led to actual change, contributed to a policy environment more conducive to gender equality and/or have broken new ground in non-traditional areas for women.” 46 The development of such practices highlights the role played by international civil society networks, human rights non-governmental organizations, women’s rights activists on the international level and regional programs such as the UNDP Africa Regional Gender Programme in addressing gender-based violence. 47

In addition, the sizable body of resolutions and declarations issued by multilateral international bodies—the UN General Assembly and the Security Council—that forcefully condemn the mass sexual violence that took place in Rwanda, the former Yugoslavia, Sierra Leone, East Timor, Japan, Haiti, Myanmar (Burma), and Afghanistan should be mentioned. 48 Although non-binding, such condemnations provide valuable evidence of opinio juris as to the prohibition of sexual violence in international law.

44. Id. at 29.
45. See The Secretary-General, supra note 9, at 21, 25-26.
47. Id. ¶¶ 2148-2170.
48. See Mitchell, supra note 10, at 254.
C. Statutes and Jurisprudence of International Tribunals

Gender-based violence was not specifically adjudicated during the Nuremberg and Tokyo war crimes proceedings despite the high frequency of such crimes in the course of World War II. However, the years following the post-WWII period, and specifically the last decade following the establishment of the ad hoc international tribunals for Rwanda and the former Yugoslavia, saw a significant development in international jurisprudence relating to gender-based crimes. This progress—despite the difficulty of prosecuting such crimes in part because of the graphic nature of evidence and still-prevailing cultural sensitivities—is yet another confirmation of the international community’s increasing acceptance of a prohibition on gender-based violence as a fundamental principle of law.

1. International Criminal Tribunals for the former Yugoslavia and for Rwanda

Following the atrocities that took place in Yugoslavia and Rwanda, which included numerous egregious cases of sexual violence, the UN Security Council created two ad hoc tribunals to adjudicate the crimes committed. The Statutes of both tribunals authorize the prosecution of war crimes, genocide and crimes against humanity. In the course of adjudicating the cases brought before them, the tribunals have developed an important body of jurisprudence concerning gender-based violence.

In its 1998 decision, Prosecutor v. Akayesu, the Trial Chamber of the International Criminal Tribunal for Rwanda (the “ICTR”) convicted the accused of genocide and crimes against humanity for acts of sexual violence. This was a revolutionary decision in the area of gender-based violence in international law. In Akayesu, a local official was found guilty on the basis of his acts and omissions in relation to—but not on the basis of physically engaging in—mass rape, forced public nudity and sexual mutilation of Tutsi women perpetrated by Hutu men.

Another significant element of the Akayesu decision was the ICTR’s comprehensive definition of rape and sexual violence. The tribunal de-
The record defined rape as "a physical invasion of sexual nature, committed on a person under circumstances which are coercive." The Trial Chamber specifically noted that its definition of rape went beyond the traditional definition of rape in national jurisdictions: the Court defined rape as forced intercourse that may include "objects and/or the use of bodily orifices not considered to be intrinsically sexual." Sexual violence, as a concept larger than rape, was defined by the Court as "any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."

The decision cited forced nudity as an example of sexual violence that does not necessarily include physical contact.

In Prosecutor v. Delalic ("Celebici Judgment"), a group of individuals who worked in different capacities at the Celebici prison camp in Bosnia and Herzegovina were found guilty of, among other things, torture for acts or omissions that included rape and other forms of sexual violence. The International Criminal Tribunal for the former Yugoslavia (the "ICTY") found that "willfully causing great suffering or serious injury to body or health" amounted to a grave breach of the Geneva Conventions.

This decision is particularly significant in developing the notion of command responsibility in the area of sexual violence. The Court found that superiors may be held liable for failing to adequately supervise, monitor, prevent the misconduct of or punish their subordinates who commit sexual violence offenses. According to the standard used by the Court, actual knowledge of misconduct by subordinates is not necessary to give rise to criminal liability because knowledge may be inferred from the circumstances. In the context of mass violence, and specifically in situations where women prisoners are guarded by men representing the opposing

54. Id. ¶ 688.
55. Using an example from testimony offered before the Court, the Trial Chamber explained that "thrusting a piece of wood into the sexual organs of a woman as she lay dying—constitutes rape in the Tribunal’s view." Id. ¶ 686.
56. See Akayesu, ICTR-96-4-T, ¶ 688.
57. See Askin, supra note 8, at 319.
60. See Delalic, IT-96-21-T ¶ 866.
61. Id. ¶¶ 333, 386.
groups in a conflict, officials or commanders should be aware of the potential danger of sexual violence perpetrated against vulnerable groups.\textsuperscript{62}

\textit{Prosecutor v. Furundzija}\textsuperscript{63} involved multiple instances of rape of a single woman. The accused, who was the commanding officer present during certain acts of sexual violence and facilitated the commission of the crimes, was found guilty of the charges of “violation of the laws and customs of war (torture and outrages upon personal dignity, including rape).”\textsuperscript{64} The Court held that the humiliation accompanying sexual violence constituted torture.\textsuperscript{65} Moreover, the Court found that forcing somebody to witness the rape of another person amounted to torture.\textsuperscript{66} The Court also rejected a demand brought by the defense to disqualify the presiding judge for bias or an appearance of bias. (The presiding judge was a woman with an extensive background in gender advocacy, who had served on a UN commission that had strongly condemned wartime rape and had advocated for the vigorous prosecution of such crimes).\textsuperscript{67}

In \textit{Prosecutor v. Kunarac}, the ICTY found a group of persons guilty of crimes against humanity based on acts of rape and enslavement.\textsuperscript{68} An important contribution of this case to the international jurisprudence

\begin{itemize}
  \item \textsuperscript{62} In addition to finding that forced fellatio between two brothers constituted “inhuman treatment and cruel treatment” on the basis of command responsibility, for example, the Trial Chamber noted that the act “could constitute rape for which liability could have been found if pleaded in the appropriate manner.” See Askin, \textit{supra} note 8, at 325 (quoting Delalic,
  Indictment, Case No. IT-96-21-1, ¶ 1066 (Mar. 19, 1996).
  
  \item \textsuperscript{63} Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment (Dec. 10, 1998).
  
  \item \textsuperscript{64} See Askin, \textit{supra} note 59, at 111, 133.
  
  \item \textsuperscript{65} Id.
  
  \item \textsuperscript{66} Furundzija, IT-95-17/1 ¶ 267(ii).
  
  \item \textsuperscript{67} See Askin, \textit{supra} note 8, at 331-332. The \textit{Furundzija} decision was another significant step in the elaboration of gender-based crimes jurisprudence. However, the Court, having surveyed national legislations on rape, elaborated another international law definition of rape, which was largely viewed as more conservative than the one articulated by the ICTR in \textit{Akayesu}. The Trial Chamber defined rape in international law as consisting of:

  “(i) the sexual penetration, however slight:

  (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

  (b) of the mouth of the victim by the penis of the perpetrator;

  (ii) by coercion of force or threat of force against the victim or a third person.”

\end{itemize}
on gender-based violence was the clarification of the legal standard for the elements of sexual violence crimes. The Court rejected Furundzija’s difficult-to-prove requirement of “coercion or force or threat of force against the victim or a third person” as too restrictive. The Trial Chamber in Kunarac emphasized the victim’s sexual autonomy in determining whether the sexual act was unwanted, with the legal and factual inquiry focusing on whether the consent was “given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.”

While considering the nature of consent, the appeal judgment in the ICTR case of Prosecutor v. Gacumbitsi specifically clarified that “it is not necessary...for the Prosecution to introduce evidence concerning the words or conduct of the victim [or] evidence of force” and that the Trial Chamber can “infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim.” The same standard applied to the perpetrator’s knowledge of the victim’s lack of consent.

The Kvocka decision further expanded the scope of criminal superior liability relating to sexual crimes. Although only one of the five accused was charged with physically committing the rape crimes, all five accused were found guilty of perpetrating sexual violence in a detention camp, which amounted to the crime of persecution. The ICTY found that “[a]ny crimes that were natural or foreseeable consequences of the joint criminal enterprise...can be attributable to participants in the criminal enterprise if committed during the time he participated in the enterprise.” In the context of an armed conflict, where women and girls are detained by force and guarded by armed men, those in charge have the duty to take steps to protect the vulnerable groups if sexual violence is likely to occur: “[i]f a superior has prior knowledge that women detained by male guards in detention facilities are likely to be subjected to sexual violence, that would put him on sufficient notice that extra measures are demanded in

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70. The Court also looked to the common law definition of rape as an act perpetrated in the absence of the victim’s free will or genuine consent. Id. ¶ 460.
72. Id. ¶ 155.
73. Id. ¶ 157.
74. See Lehr-Lehnardt, supra note 68, at 335-336.
order to prevent such crimes. The Court also found that not only the actual act of rape, but also “[the] threat of rape or other forms of sexual violence which undoubtedly caused severe pain and suffering” satisfied the elements of the charge of torture.

2. Rome Statute of the International Criminal Court

Negotiations conducted in Rome in June-July of 1998 led to the adoption of the Rome Statute of the International Criminal Court (the “ICC”). Representatives from 160 countries, 17 intergovernmental organization and 15 UN agencies participated in the negotiations; over 200 NGOs were also present. The Rome Statute entered into force on July 1, 2002, once 60 States became parties. As of January 1, 2007, 104 States from different regions of the world have become parties. Even in the notable absence of some States’ ratification, this represents a sign of important support by the international community for the principles set forth in the Rome Statute. The Rome Statute lists and defines crimes, and sets forth the procedures and organization of the ICC.

The Rome Statute addresses gender-based violence crimes by establishing sexual violence as a crime and articulating procedures for investigating and prosecuting sexual violence offenses.

Sexual violence crimes specifically enumerated in the Rome Statute are classified both under war crimes and as crimes against humanity. This makes it possible to bring cases before the ICC for crimes that are not committed in wartime, allowing for some additional flexibility for the.

Mindful of the psychological trauma to victims and of fear of repris-

76. Id. ¶ 318.
77. See Kvocka, IT-98-30-T, ¶ 327 ¶ 561.
78. See Lehr-Lehnardt, supra note 68, at 336.
81. See Lehr-Lehnardt, supra note 68, at 340.
82. These include “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization” and other crimes of comparable gravity, as well as trafficking in women and children, with respect to crimes against humanity, and actions constituting grave breaches or serious violations of the Geneva Conventions with respect to war crimes. “Crimes against humanity” are defined as acts “committed as part of a widespread or systematic attack directed against any civilian population.” See Rome Statute of the International Criminal Court, supra note 15, arts. 7-8.
als, which may prevent victims and witnesses from participating in judicial proceedings, as well as, perhaps, learning from the difficulties encountered in prosecuting sexual violence in the ICTY and ICTR cases,\textsuperscript{83} the Rome Statute has designated special procedures to address the concerns of victims and witnesses\textsuperscript{84} and created a Victims and Witnesses Unit.\textsuperscript{85} Staff in this special unit must have “experience in trauma, including trauma related to crimes of sexual violence.”\textsuperscript{86} A provision requiring a “fair representation of female and male judges” on the court, in addition to the traditional requirement of geographical and legal system diversity, will hopefully also prove a step forward in the development of jurisprudence for violent crimes against women.\textsuperscript{87} As a practical matter, in the course of the conduct of the proceedings, women victims and witnesses are likely to feel more comfortable in an environment where women are present.

The Rome Statute mandates that the law applied by the ICC “must be consistent with internationally recognized human rights,”\textsuperscript{88} which may provide an argument for compelling the Court to apply principles derived from human rights instruments, including relevant non-binding declarations and resolution.

\textbf{D. Prohibition on Sexual Violence as an Established Norm of Customary International Law and an Emerging Jus Cogens Norm}

A clear consensus is emerging in the international community that the prohibition of sexual violence is a firm principle of customary international law\textsuperscript{89} and is perhaps reaching the level of a peremptory norm of \textit{jus cogens}. \textit{Jus cogens} stands for universal or higher law. A \textit{jus cogens} norm is

\textsuperscript{83} In \textit{Prosecutor v. Tadic}, one of the first sexual violence cases brought before the ICTY, all rape charges had to be dropped when the victim received threats and refused to testify. See Lehr-Lehnardt, \textit{supra} note 68, at 342.

\textsuperscript{84} See Rome Statute of the International Criminal Court, \textit{supra} note 15, art. 68.

\textsuperscript{85} \textit{Id.} art. 43(6).

\textsuperscript{86} \textit{Id.}

\textsuperscript{87} See Rome Statute of the International Criminal Court, \textit{supra} note 15, art. 36(8)(a)(iii).

\textsuperscript{88} \textit{Id.} art. 21(3).

\textsuperscript{89} See Askin, \textit{supra} note 8; Adams, \textit{supra} note 10; Mitchell, \textit{supra} note 10. But see Patricia Viseur Sellers, \textit{Sexual Violence and Peremptory Norms: The Legal Value of Rape}, 34 Case W. Res. J. Int’l L. 287, 303 (2002). “It is questionable whether a general norm of the prohibition of rape, in and of itself, in [sic] human rights law. It is likewise uncertain that the crime rape under humanitarian law has been considered, in and of itself, as imposing a non derogatory obligation on the community of States other than protection against its infliction. And quite frankly, rape has never been cited, heretofore, as a peremptory norm.”
a “norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Therefore, a *jus cogens* norm is superior to any treaty or customary international law. The deeper significance of *jus cogens* status in international law is that violations of such a superior norm supercede the highly revered notion of State sovereignty and give rise to universal jurisdiction.

The national legislation of nearly every State in the world in one form or another outlaws rape. Also, as the foregoing discussion has shown, the prohibition of violence against women, expressed through the multiplicity of international and regional instruments and developed through the jurisprudence of international tribunals, is recognized and accepted by the international community of States. In addition, although there is no unanimous consensus on what norms rise to the level of *jus cogens*, the list would “presumably include genocide, crimes against humanity, war crimes, torture, aggression, piracy, and slavery.” The ICTY and ICTR jurisprudence have established that sexual violence could constitute at least some of these crimes and thus may also be elevated to the ranks of a *jus cogens* norm.

Even in the absence of complete consensus on the exact status of norms banning gender-based crimes (and notably sexual violence), as well as a lack of full clarity on the exact elements constituting these crimes, it is clear that the international community strongly condemns such offenses. The elaboration of sound national legislation with adequate implementing safeguards is accordingly a moral and legal duty for every State member of the international community.

### III. CONSTITUTIONAL TREATMENT

Gender-based violence, whether committed by a State or a non-State actor, constitutes a violation of the individual’s rights and fundamental

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91. See Mitchell, supra note 10, at 228-229.
92. Sellers, supra note 89, at 301-302.
93. See Mitchell, supra note 10, at 232.
freedoms. In particular, the victim’s right to dignity, mental and physical integrity, liberty and security of the person, as well as his or her right to be free of inhuman or degrading treatment and torture, are breached. Gender-based violence also violates the individual’s right to health and, in some cases, life. In addition, gender-based violence constitutes “discrimination” as defined in art. 1 of the Convention on the Elimination of Discrimination Against Women (“CEDAW”). As former president Nelson Mandela of South Africa noted in his opening speech to the South African Parliament in 1994, “[t]he freedom cannot be achieved unless women have been emancipated from all forms of oppression.”

In light of the variety of fundamental rights encroached upon in any instance of gender-based violence, many constitutional provisions are relevant to a consideration of national legislation pertaining to such violence.

**Human dignity.** The most general provision of relevance, included in many constitutions, is a reference to the right to human dignity. For example, the Constitution of South Africa provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.” In a comparable manner, Nigeria’s Constitution proclaims that “[e]very individual is entitled to respect for the dignity of his person, and accordingly . . . no person shall be subject to torture or to inhuman or degrading treatment.”

**Right to life.** In situations where gender-based violence results in death—whether directly or indirectly through the transmission of life-threatening infections such as HIV—the victim’s right to life is contravened. Provisions guaranteeing the right to life are found in many constitutions.

**Prohibition of torture & inhuman or degrading treatment.** References to a prohibition on torture and inhuman or degrading treatment are also present in many constitutions. For example, the Constitution of Namibia guarantees protection from “inhuman or degrading treatment.” These constitutional provisions are particularly relevant in the context of gender-based violence committed by government actors, such as rape by members of the armed forces or by police officers while the victim is in detention.

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98. South Africa has the clearest formulation: “Everyone has the right to life.” S. Afr. Const. § 11. See also Constitution of the Republic of Rwanda art. 12 (2003).
Certain States go further and assume a duty to prevent violence by private actors. For example, the Constitution of South Africa assures the right “to be free from all forms of violence from either public or private sources.”

Right to security of the person or bodily integrity. Certain constitutions also provide a right to security and bodily integrity—a right clearly infringed upon in any instance of gender-based violence. For example, the Constitution of South Africa provides everyone with the right “to bodily and psychological integrity, which includes the right to security and control over their body.” The Constitution of Botswana provides for the protection of “life, liberty, security of the person and the protection of the law.” It is implicit from provisions of this kind that gender-based violence is an infringement of the individual’s fundamental right to security of the person. The Constitution of Rwanda succinctly articulates the duty of the State in this regard: “The human person is sacred and inviolable. The State and all public administration organs have the absolute obligation to respect, protect and defend him or her.”

Right to health. Considering the significant direct and indirect effects gender-based violence has on the physical and psychological health of victims, constitutional provisions that provide for a right to health may also be relevant in establishing the duty of States to prevent gender-based violence. Benin’s law to define principles and rights concerning reproductive health draws out this connection clearly: certain acts, including “all forms of sexual violence of which women and children are generally the victims” are considered detrimental to the sexual and reproductive health of individuals and accordingly punishable under criminal law.

Many States provide for a right to health in their constitutions, including the Democratic Republic of Congo (“DRC”), Benin, South Africa and Rwanda. In addition, a right to access information regarding fam-

100. S. Afr. Const. § 12(1)(c).
101. Id. § 12(2)(b).
103. Rwanda Const. art. 10 (“La personne humaine est sacrée et inviolable. L’Etat et tous les pouvoirs publics ont l’obligation absolue de la respecter, de la protéger et de la défendre.”).
108. Rwanda Const. art. 41.
ily planning and protection of maternal health in childbirth is guaran-
teed by the Constitution of Ethiopia.109

Right to equal treatment and non-discrimination. Gender-based or sexual
violence can be viewed as having patriarchal origins and can still be un-
derstood as an offence of power, domination and force, as the Constitu-
tional Court of South Africa recently showed.110 Since the vast majority of
victims of gender-based violence are women, provisions on equal treat-
ment and non-discrimination in all constitutions place a clear duty on
States to protect women from such violence. For example, the Constitu-
tion of Mauritius seeks to protect individuals from discrimination on the
basis of sex, prohibiting discriminatory treatment or creation of any law
that discriminates on the basis of sex.111 The Constitution of South Africa
seeks to protect individuals from being directly or indirectly discriminated
against on the basis of “sex, gender, pregnancy or marital status.”112

Certain constitutions take a further step by providing specific clauses
with respect to women. The Constitution of the DRC provides for the
elimination of “all forms of discrimination against women.”113 In par-
ticular, public authorities are mandated to “take measures to fight all forms
of violence done to women in public and private life.”114 The Constitu-
tion of Ethiopia guarantees that “[w]omen shall, in the enjoyment of
rights and protections provided for by this Constitution, have equal right
with men.”115 In particular, “[t]he State shall enforce the right of women
to eliminate the influences of harmful customs. Laws, customs and practices
that oppress or cause bodily or mental harm to women are prohibited.”116

110. Masiya v. Dir. of Pub. Prosecutions (Pretoria) and Others, Case No. CCT 54/06 (May 10,
2007).
forme de discrimination à l’égard de la femme et assurent la protection et la promotion de ses
droits.... Ils prennent des mesures pour lutter contre toute forme de violences faites à la
femme dans la vie publique et dans la vie privée.”).
114. Id. art. 14 (“Les pouvoirs publics veillent à l’élimination de toute forme de discrimina-
tion à l’égard de la femme et assurent la protection et la promotion de ses droits.... Ils
prennent des mesures pour lutter contre toute forme de violences faites à la femme dans la vie
publique et dans la vie privée.”).
115. Eth. Const. art. 35(1).
116. Id. art. 35(4).
The Ethiopian Constitution also establishes that women have equal rights as men with respect to marriage.117

The duty to combat sexual or domestic violence. Few constitutions mention sexual violence explicitly, and, to our knowledge, none address domestic violence. The DRC is one exception—Art. 15 of its Constitution provides that “public authorities ensure the elimination of sexual violence.”118 In addition, sexual violence against a person with the intention of destabilizing or dismantling a family and making an entire people disappear is considered a crime against humanity.119 The Constitution of Ethiopia also acknowledges the duty of the State to protect women from the influence of harmful customary practices, stating that all laws, stereotypes, ideas and customs which oppress women or otherwise adversely affect their physical and mental well-being are prohibited.120

IV. NATIONAL LEGISLATION ON SEXUAL VIOLENCE

A. Rape

As a form of sexual violence, rape is outlawed in the domestic law of the vast majority of States in the world. The universality of this prohibition demonstrates the existence of a shared understanding ingrained in the legal conscience of the international community to punish violations of a person’s bodily and sexual integrity. But this agreement does not translate directly into a shared understanding of what constitutes rape. The International Criminal Tribunal for Rwanda considered a range of national laws in the Furundzija decision before determining that “in spite of inevitable discrepancies, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.”121 While there is at least some consensus on the nature of the physical act involved then, the concept of rape remains contentious.

In many countries, the very definition of rape set out in law precludes its acknowledgement and punishment by the judiciary, leaving the

117. Id. art. 35(2).
119. Id.
120. Eth. Const. art. 35(4).
121. See Furundzija, IT-95-17/1 ¶ 185.
victims of the most egregious form of sexual violence without recourse to justice. For example, rape within marriage is often not taken account of in existing laws. In other States, victims face an uphill battle in establishing that all the elements of rape were, in fact, present in a particular instance of violence. In sub-Saharan Africa, as elsewhere, there is a generally accepted notion that rape is associated with force and an absence of consent to sexual intercourse, for example. Each country prohibits rape in a specific manner, as discussed below—some countries emphasize either compulsion or a lack of agreement, others weigh one to the exclusion of the other, and still others require proof of both, sometimes without clear provisions on what, exactly, must be proved.

1. Substantive Definitions

Item 1. “Rape”

Recommendations:

- National legislation on “rape” should be gender-neutral, and not limited solely to women.
- The legal definition of ‘rape’ should be as broad as possible and should encompass the elements of “penetration,” “lack of consent” and “force” / “violence” / “coercion.”
- “Compelled rape” should also be addressed.

Sub-Saharan African countries protect their citizens against rape through a variety of legislative and other measures. In Liberia, the criminal law on rape was overhauled in 2005 with the passage of the Rape Amendment Act, which amended the Liberian Penal Code. The newly amended provisions of the Liberian Penal Code provide that sexual intercourse consti-
tutes rape if the perpetrator “intentionally penetrates the vagina, anus, mouth or any other opening of another person (male or female) with his penis, without the victim’s consent” or “intentionally penetrates the vagina or anus of another person with a foreign object or with any other part of his body ... without the victim’s consent.”123 Sexual intercourse also constitutes rape if the victim is less than eighteen years old, provided that the actor is eighteen years of age or older.124

The relevant law of the DRC, amended in 2006, defines rape as the “use of violence or serious threat or force against a person” accompanied by the penetration “even superficially” of any bodily orifice by any part of the body or any object, by either a man or a woman, as well as the introduction of any body part or object into the bodily orifice of another.125 The new provisions of the DRC Penal Code also provide that “any person who has obliged a man or woman to penetrate, even superficially” any orifice of his or her body has committed rape.126 The “mere

125. Loi no. 06/018 modifiant et complétant le Code Pénal [Law no. 06/019 Modifying and Amending the Penal Code] (2006) art. 2 (C. Pén. arts. 170(a)-(c)) (Dem. Rep. Congo) (“Aura commis un viol ... [:]

a) tout homme, quel que soit son âge, qui aura introduit son organe sexuel, même superficiellement dans celui d’une femme ou toute femme, quel que soit son âge, qui aura obligé un homme à introduire même superficiellement son organe sexuel dans le sien;
b) tout homme qui aura pénétré, même superficiellement l’anus, la bouche ou tout autre orifice du corps d’une femme ou d’un homme par un organe sexuel, par toute autre partie du corps ou par un objet quelconque;
c) toute personne qui aura introduit, même superficiellement, toute autre partie du corps ou un objet quelconque dans le vagin;
d) toute personne qui aura obligé un homme ou une femme à pénétrer, même superficiellement son anus, sa bouche ou tout orifice de son corps par un organe sexuel, pour toute autre partie du corps ou par un objet quelconque.”).
126. Id. (C. Pén. art. 170(d)). This provision can be traced to Article 7(1)(g)(6)(3)(6) of the Elements of Crime identified by the Rome Statute of International Criminal Justice, which defines rape, amongst other elements, in the following manner: “[t]he accused committed an act of a sexual nature against one or more persons or caused such a person ... to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such
fact of physical contact between sexual organs” committed on persons aged less than eighteen years old also constitutes rape with the use of force.127

Kenya also passed the Sexual Offenses Act in 2006, which provides that a person commits rape if “he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; [and] the other person does not consent to the penetration; [or] the consent is obtained by force or by means of threats or intimidation of any kind.”128

An act is intentional and unlawful if it is committed (a) in any coercive circumstance, including the use of force and threat of harm, (b) under false pretenses or by fraudulent means, or (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

This includes a child or a person who is mentally impaired, asleep, unconscious, or under the influence of a substance.129 However, the statutory definition of “intentional and unlawful acts” states that it does not apply to persons who are lawfully married to each other, thereby excluding marital rape from the Act.130

In order to address sexual violence against women in South Africa, the legislature has introduced the Criminal Law (Sexual Offences and Related Matters) Amendment Bill, which at the time of this Report was submitted for deliberation during the second Parliamentary term of 2007. This Bill introduces gender-neutral provisions to protect the victims of sexual offences and provides that a person commits rape if he or she “unlawfully and intentionally commits an act of sexual penetration with another person … without the consent of [such other person].”131 The Bill also provides for the offence of “compelled rape” when a person “unlawfully and intentionally commits an act of sexual penetration with another person ... without the consent of [such other person].”131 The Bill also provides for the offence of “compelled rape” when a person “unlawfully and intentionally commits an act of sexual penetration with another person ... without the consent of [such other person].”131

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127. Id. (C. Pén. art. 170) (“Est reputé viol à l’aide de violences, le seul fait du rapprochement charnel de sexes commis sur les personnes [de moins de dix-huit ans].”).
fully and intentionally compels” a third party, without that third party’s consent, to commit an act of sexual penetration with a complainant, without the complainant’s consent.132

Botswana’s Penal Code already includes gender-neutral provisions for the protection of sexual violence victims; and provides that any person shall be guilty of rape if that person

Has unlawful carnal knowledge of another person, or who causes the penetration of a sexual organ or instrument, of whatever nature, into the person of another for the purposes of sexual gratification, or who causes the penetration of another person’s sexual organ into his or her person, without the consent of such other person, or with the such person’s consent if the consent is obtained by force or means of threats or intimidation of any kind, by fear of bodily harm, or by means of false pretenses as to the nature of the act, or, in the case of a married person, by [im]personating that person’s spouse ....133

The Penal Code in Botswana also provides for conviction for attempted rape.134

In Namibia, the Combating of Rape Act defines rape as the intentional commission of a sexual act under coercive circumstances. The definition of a “sexual act” includes, amongst others, the insertion of (i) the penis into the vagina of another person, to even the slightest degree, (ii) the penis into the mouth or anus of another person, (iii) any other part of the body into the vagina or anus, (iv) any part of the body of an animal into the vagina or anus, and (v) any object into the vagina or anus. The definition of coercive circumstances includes force, threats of force, and other situations that enable one person to take unfair advantage of another.135

Item 2. “Penetration” / “Sexual Intercourse”
Recommendation:

• The legal definition of “penetration” should be as broad as possible, encompassing penetration of any bodily orifice not only by the genital organs of one person but also by any foreign object.

132. Id. § 4.
133. Penal Code (1986) § 141 (Bots.).
134. Id. § 143.
Some statutes define rape to include only the “penetration” of another person’s bodily orifice by the penis of another person. For example, the Kenyan legislation defines “penetration” as “[t]he partial or complete insertion of the genital organs of a person into the genital organs of another person.”136 Similarly, Liberia defines “sexual intercourse” as “penetration, however slight, of the vagina, anus or mouth, or any other opening of another person by the penis.”137 This definition of penetration is insufficient because it fails to take into account the day to day reality of rape that do not involve a penetration by another person’s genital organs, but by other foreign objects. This Report recommends a broader definition.

South Africa’s Sexual Offences Bill provides a substantially more inclusive definition of penetration. Under the Bill, “sexual penetration” is defined to include

Any act which causes penetration to any extent whatsoever by (a) the genital organs of one person into or beyond the anus, mouth, or genital organs of another person; [or] (b) any object, including any part of the body of an animal, or other part of the body of one person, into or beyond the anus or genital organs of another person; or (c) the anus or genital organs of an animal ... into or beyond the mouth of another person.138

This definition provides for sufficient protection against rape in cases that do not involve the sexual organs of the perpetrator but rather a foreign object, including any part of the body of an animal.

Although the South African Sexual Offences Bill contains a more comprehensive definition of penetration, the common law, which still applies in South Africa until the Bill is passed, contains a narrower definition. However, the Constitutional Court in South Africa has interpreted the common law in such a way as to allow a broader definition of penetration.139

137. Act to Amend the New Penal Code (2005) § 2 (Pen. C. § 14.70.3(a)) (Liber.).
139. The question before this Court concerned, firstly, whether the common law definition of rape needs to be developed to include “anal penetration of a person” and whether the conviction of the accused for rape ought to be upheld. The Constitutional Court, in agreeing to extend the definition of rape to include non-consensual sexual intercourse or penetration of the penis into the anus of a female, held that “there is no reason why the definition of rape, as currently understood, is unconstitutional in so far as the conduct is clearly morally and socially unacceptable,” but found that the definition does fall short of the spirit, purport and object of the Bill of Rights. See Masiya v Dir. of Pub. Prosecution (Pretoria), (2006) 18, available at http://www.constitutionalcourt.org.za/Archimages/9889.PDF.
In Nigeria, although none of the codes\(^ {140} \) define “penetration,” the use of the terms “carnal knowledge” or “carnal connection” in the Criminal Code imply “that the offence, so far as regards that element of it, is complete upon penetration.”\(^ {141} \) This definition is somewhat broader than the definition provided in the Penal Code, which provides only for “sexual intercourse,”\(^ {142} \) since it may encompass penetration by a foreign object. A note of explanation to this section of the Penal Code and in the Shari’ah Code acknowledges that “mere penetration is sufficient to constitute the sexual intercourse necessary to the offense of rape.”\(^ {143} \)

Item 3. “Consent”
Recommendations:

- A clear definition of “consent” should be provided, to prevent ambiguity and subjective interpretations of the term.
- The burden of proving a lack of consent should not be placed on the complainant.
- Although both violence or coercion and lack consent are inherent to rape, legislation should not require that the victim demonstrate both of these elements in conjunction for the purposes of a legal definition.

An emphasis on lack of consent is important in defining rape, since this approach focuses on the deprivation of a person’s sexual freedom and on the denial of his or her individual autonomy. As will be more apparent from the discussion below, compulsion and lack of consent overlap and converge in acts of sexual violence, however. This Report recommends that both elements be taken into account in defining rape and that legislation provide a clear definition of “consent” to prevent ambiguity and subjective interpretations of the term.

Under Kenya’s law, a person “consents” if “he or she agrees by choice, and has the freedom and capacity to make that choice.”\(^ {144} \)


Liberia’s law also states that “a person consents if he or she agrees by choice and has freedom and capacity to make that choice.” Consent is presumed to be lacking when “any person, at the time of the relevant act or immediately before it began, was using violence ... against the victim or causing the victim to fear that immediate violence would be used against him or her” or “against another person.” In other words, there can be no valid consent when force or violence are utilized.

A presumed lack of consent also exists if the victim was detained at the time of the relevant act, or was asleep or otherwise unconscious, or when “because of the victim’s physical disability, he or she could not have been able ... to communicate to the perpetrator whether he or she consented” at the relevant time. Two further grounds for assuming a lack of consent are when the “victim had been administered or caused to take, without his or her consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling him or her to be stupefied or overwhelmed at the time of the relevant act,” and when “the defendant intentionally induced the victim to consent to the relevant act by impersonating a person known personally to the victim.”

South Africa, in turn, defines consent as “free agreement.” The Sexual Offences Bill also lists instances in respect of which a person (“B”) does not voluntarily or without coercion agree to an act of sexual penetration. These include, but are not limited to, (i) when B submits or is subjected to such a sexual act as a result of the use of force or intimidation by the accused against B or any other person or against their respective properties, or a threat of harm by the accused against B or any other person, or (ii) when there is an abuse of power or authority by the accused to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or (iii) when the sexual act is committed under false pretences or by fraudulent means, or (iv) when B is incapable in law of appreciating the nature of the sexual act. Clearly, any consent that is not freely given and informed cannot be considered valid.

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145. Act to Amend the New Penal Code (2005) § 2 (Pen. C. § 14.70.3(b)(i)) (Liber.).

146. Id. § 2 (Pen. C. §§ 14.70.3(b)(i)-(b)).

147. Id. § 2 (Pen. C. §§ 14.70.3(ii)-(d)).

148. Id. § 2 (Pen. C. § 14.70.3(ii)(e)).

149. Id. § 2 (Pen. C. §§ 14.70.3(ii)(f)-(g)).

150. Criminal Law (Sexual Offences) Amendment Bill (2006), Bill 50-2003 (GA) § 3(2) (S. Afr.).
No definition of consent is provided in the Criminal or Penal Codes of Nigeria, but the Shari’ah Law does define “invalid consent,” which is consent given “(a) by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or (b) by a person who, from unsoundness of mind or involuntary intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or (c) by a person who is under eighteen years of age or has not attained puberty.”

In providing for a definition of consent, this Report recommends that the burden of proving a lack of consent should not be placed on the complainant. An example of legislation that explicitly places emphasis on the actions of the assailant is preferable, as in Namibia’s Combating of Rape Act. It provides that “[a]ny person (in this Act referred to as the perpetrator) who intentionally under coercive circumstances—commits or continues to commit a sexual act with another person; or causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape.” In this situation, the use of coercion negates the possibility of consent. Proving the absence of a state of mind is notoriously difficult and may be an insurmountable obstacle to a complainant that has already been victimized. The definition of rape in Zimbabwe’s Criminal Law (Codification and Reform) Act is overly restrictive, for example: it not only requires a finding of lack of consent on the part of the complainant but also that the assailant knew that the complainant had not consented.


Recommendations:

- Legal definitions of “rape” should explicitly include situations that do not involve the use of actual force, but do involve threat, coercion, fraud or incapacity.
- Although both violence or coercion and lack consent are in-

152. Criminal Law (Codification and Reform) Act (2007) § 65 (Zimb.) (“If a male person knowingly has sexual intercourse or anal sexual intercourse with a female person and, at the time of the intercourse—the female person has not consented to it; and he knows that she has not consented to it or realises that there is a real risk or possibility that she may not have consented to it, he shall be guilty of rape ....”).
herent to rape, legislation should not require that the victim demonstrate both of these elements in conjunction for the purposes of a legal definition.

Although the use of force and violence often accompanies rape, threats of violence or coercion may also be used to compel a person to submit to sexual intercourse. It is therefore important to explicitly include situations that do not involve the use of actual force, but do involve threat, coercion, fraud and incapacity in any definition of rape. An example of such explicit inclusion can be found in South Africa, where the Sexual Offences Bill addresses lack of consent in situations in which “force or intimidation” is used, “threat of harm” against the person or property is expressed, “abuse of power or authority [takes place] to the extent that [the complainant] is inhibited from indicating his or her unwillingness or resistance to the sexual act,” “false pretences or fraudulent means” are used or in which the complainant is “incapable in law of appreciating the nature of the sexual act.”

Kenya’s Sexual Offences Bill takes a further step in allowing a judicial body to make “conclusive presumptions” that there was a lack of consent in situations where it was fraudulently induced.

However, the law in force in the DRC requires that rape involve the “use or threat of violence or serious harm or force against a person, directly or through an intermediary or third party, either by surprise, by psychological pressure or in the context of a coercive environment or by abusing a person who, because of an illness, the impairment of his or her faculties or any other accidental reason has lost the use of his or her faculties or has been deprived of them by tricks.” Similarly, the Transitional Penal Code for Eritrea requires the use of “force or violence,” which “may be implied where the woman is unconscious or incapable of resistance.” These elements do not take into account the use of threats, not only against the person but also against their property or other persons, nor of fraud.

156. Benninger-Budel, et. al., supra note 122, at 211.
The discussion above indicates that some countries emphasize either compulsion or lack of agreement as the basis for penalizing rape, others weigh one to the relative exclusion of the other, while still others permit one or the other alternately or simultaneously; 157 many require proof of both. 158 Conceptually, emphasis on the use of force in legal definitions of rape views rape fundamentally as a crime of inequality, whether on the basis of status, relation or other factor. While these may all be relevant determinants, a definition of this kind turns on proof of physical acts, surrounding context, or the exploitation of relative position—in other words, social, contextual, and collective considerations. As such, it may ignore additional factors in correlation with lack of consent. Accordingly, definitions that focus on “consent” tend to frame the same events as ones that involve individuals, engaged in atomistic one-at-a-time interactions. It is important for sexual violence legislation to address both of these elements, since lack of agreement and compulsion often overlap and converge in acts of sexual violence.

2. Aggravating Circumstances

Recommendations:

- Legislation may provide for aggravating circumstances, which should result in harsher sentences.
- Aggravating circumstances may include, but are not limited to, the age of the victim, the relationship of the perpetrator and the victim, the use or threat of violence, the presence of multiple perpetrators and grave physical or mental consequences of the attack on the victim.

Most countries’ laws recognize aggravating circumstances in the context of rape, the presence of which mandate higher sentences. Aggravating circumstances typically include i) the characteristics of the victim,
with special attention to capacity to issue consent to the acts involved, ii) the characteristics of the perpetrator, and iii) the circumstances of the offense. In circumstances when rape is found to have involved aggravating circumstances, harsher sentences are normally granted to the perpetrators. In the DRC, for example, the presence of aggravating circumstances results in a doubling of the sentences otherwise applied. In addition, any perpetrator with parental or legal guardianship of the victim will lose that authority. 159

Statutes that take into account the characteristics of the victim, especially those relevant for giving consent or for signaling to an alleged perpetrator that the victim is unable to consent to the act involved, identify the following as aggravating circumstances: minority under a specified age, the victim’s particular vulnerability due to their age, and illness, physical or mental deficiency. Most States take into account a particular age, and in some cases a sliding scale of age, as an aggravating circumstance. For example, Namibia recognizes harsher punishments for acts of rape with respect to first convictions committed where the complainant is under the age of thirteen or where the complainant is under the age of eighteen and the perpetrator is the complainant’s parent, guardian or caretaker. 160 Ethiopia’s Crimes Against Morals and the Family mandates a more severe sentence for sexual intercourse with a minor under the age of thirteen than for the commission of a crime against someone between the ages of thirteen and eighteen. A victim’s lack of capacity to understand the nature of the consequences of the act due to old age, physical or mental illness, depression or any other reason is also considered an aggravating circumstance under Ethiopian law. 161 The DRC considers a victim’s handicap as an aggravating circumstance as well. 162

Circumstances of the offense that are taken into consideration as aggravating circumstances include the relationship of the perpetrator and the victim, the use or threat of violence, the presence of multiple perpetrators and the grave physical consequences of the attack on the victim. The DRC considers whether the perpetrator is an ancestor or descendant of the victim and whether the perpetrator is in a position of authority over the victim. 163 The DRC also considers whether the perpetrator is an

160. Combating of Rape Act, No. 8 (2000) § 3(1)(a) (Namib.).
161. Amended Penal Code arts. 620(2), 627 (Eth.).
163. Id. (C. Pén. arts. 171 bis(1)-(2)).
instructor or paid servant of the victim, or a public agent or religious official who has abused his or her position to commit the attack, or medical or para-medical personnel, a social worker or traditional practitioner who has committed the attack against a person in his or her care, or a guard who has acted against persons in custody or captivity. The Sexual Offences Bill proposed to the Mauritius legislature in April 2007 considers the presence of a close blood relationship between the perpetrator and the victim an aggravating circumstance.

The use or threat of violence is commonly considered an aggravating circumstance. When the perpetrator renders a victim incapable of offering resistance,164 or engages in rape involving the threat of a firearm or other deadly weapon at the time or immediately before the relevant act,165 or when the rape is accompanied by the use or threat of a weapon,166 more severe punishment is envisaged. For example, Botswana recognizes harsher penalties for acts of rape attended by violence resulting in injury to the victim, with a minimum sentence of fifteen years. Namibia recognizes harsher punishment for acts of rape in respect of first convictions committed where the complainant has suffered grievous bodily or mental harm as a result.167

Liberia, Kenya, and the DRC also recognize gang rape or the assistance of others in the sexual offense committed as an aggravating circumstance.168

The physical and mental consequences of the act are also considered as aggravating circumstances. For example, the DRC considers whether the attack resulted in serious impairment of the victim’s health and/or has had serious physical and/or psychological consequences as aggravating circumstances.169 Liberia recognizes that serious bodily injury or permanent disability as a result of rape is an aggravating circumstance;170 and Ethiopia’s Criminal Code considers situations in which the victim becomes pregnant, or when the perpetrator transmits to the victim a ve-

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164. Amended Penal Code art. 622 (Eth.).
167. Combating of Rape Act, No. 8 (2000) § 3(1)(a) (Namib.).
nereal disease with which he knows himself to be infected, or when the victim is driven to suicide by distress, anxiety, shame or despair, to be aggravating circumstances.\textsuperscript{171} The record of the perpetrator is taken into account as well. In Namibia, for example, harsher sentences are handed down in cases of second or subsequent convictions for rape.\textsuperscript{172}

Penalties for engaging in acts with aggravating circumstances entail a variety of different elements. In addition to being convicted for sexual offences against children and/or persons who are mentally disabled, South Africa’s Sexual Offences Bill establishes a Register to maintain a record of persons who have been convicted of sexual offences against children and/or persons who are mentally disabled. The Bill also prohibits such persons from working with, or in any manner having access to children or persons with mental disabilities, either as an employer, an employee, a self-employed person, a foster parent, a kinship care-giver, a temporary safe care-giver, an adoptive parent or a curator of a person who is mentally disabled.\textsuperscript{173}

3. Defenses
Item 1. Marriage as a Defense to Rape
Recommendations:

- The defense of rape within marriage should be abolished.
- The abolishment of this defense should be clear on the face of the legislation.

Marital rape is a form of gender-based violence condemned in the United Nations Declaration on the Elimination of Violence Against Women.\textsuperscript{174} Nonetheless, many countries have until recently recognized a marital exception to the crime of rape: in other words, rape within the marriage was not considered unlawful. In the past twenty-five years, this exception has been abolished in a growing number of countries, with the recognition that rape is a crime regardless of the relationship of the parties involved. Marital rape may now be prosecuted in at least 104 countries; 32 of these countries have made marital rape a specific criminal of-

\textsuperscript{171}. Amended Penal Code arts. 628, 630 (Eth.).
\textsuperscript{172}. Combating of Rape Act, No. 8 (2000) § 3(1) (Namib.);
\textsuperscript{173}. Criminal Law (Sexual Offences) Amendment Bill (2006), Bill 50-2003 (GA) § 41 (S. Afr.).
fence, while the rest do not allow the defense of marriage in cases of rape.\textsuperscript{175} However, marital rape is still not a prosecutable offense in at least 53 countries.\textsuperscript{176}

Unfortunately, a number of sub-Saharan African countries are among those that still continue to recognize the defense of marriage in rape cases, including Kenya,\textsuperscript{177} Nigeria\textsuperscript{178} and the DRC. In fact, Kenya and the DRC considered and passed new legislation on sexual violence as recently as 2006, yet failed to abolish the marital rape defense.\textsuperscript{179}

This Report recommends that legislatures that have not already done so should explicitly abolish marriage as a defense in rape cases. For instance, South Africa’s Sexual Offences Bill explicitly states that “[a] marital or other relationship, previous or existing, shall not be a defense” to a charge of rape.\textsuperscript{180} Namibia’s Combating of Rape Act similarly provides that “no marriage or other relationship shall constitute a defense to a charge of rape.”\textsuperscript{181}

It is important for the abolishment of the defense to be clear on its face—any ambiguity may result in confusion in countries where the marital rape defense has long been part of the legal framework. For instance, in England, it was not until 1994, when parliament enacted the Criminal Justice and Public Order Act and eliminated spousal immunity explicitly, that uncertainty as to the criminalization of marital rape was finally set to rest.

The explicit revocation or invalidation of the marital rape defense is also important to avoid inconsistencies in law. For example, in Ghana, a provision in the new Domestic Violence Act passed in February 2007 that arguably eliminates the marital rape defense has created a conflict with an existing criminal provision that has been interpreted to support the defense. A section of Ghana’s criminal code from 1960 states that consent

\textsuperscript{175} The Secretary-General, \textit{supra} note 9, ¶ 89.
\textsuperscript{176} Id.
\textsuperscript{178} Under Nigerian law, “unlawful carnal knowledge” is defined as “carnal connection which takes place otherwise than between husband and wife.” Criminal Code Act (1990) § 6 (Nig.), http://www.nigeria-law.org/Criminal%20Code%20Act-Tables.htm.
\textsuperscript{180} Criminal Law (Sexual Offences) Amendment Bill (2006), Bill 50-2003 (GA) § 3(4) (S. Afr.).
\textsuperscript{181} Combating of Rape Act, No. 8 (2000) § 2(3) (Namib.).
cannot be rescinded in marriage, “thus preventing a wife from prosecut-
ing her husband for rape within marriage.” The 2007 Domestic Vio-
ence Act failed to overturn that criminal provision—in fact, a clause over-
turning the provision was removed from the bill prior to its passage—but
nonetheless contains a clause pertaining to consent in marriage, which
states that “the use of violence in the domestic setting is not justified on
the basis of consent.” The new law appears to undermine the marital rape
defense contained in the existing criminal provision; so that it is now up
to the courts in Ghana to determine how to resolve the conflict.

Likewise, the Rape Amendment Law in Liberia did not provide for an
explicit clause on marital rape, resulting in confusion among practitioners as
to whether marital rape may be prosecuted under the law. Similarly, the marital
rape exemption may be implicitly contained in the definition of rape in
Ethiopia because the Criminal Code does not clearly state that marriage is
not a defense—only sexual intercourse outside of wedlock can amount to
rape. In Tanzania’s Sexual Offences Special Provisions Act, the definition
of rape only provides for marital rape where the spouses are separated at
the time. Ambiguities of this kind certainly do not help in eliminating
sexual violence against women, and should be avoided.

Item 2. Marrying the Victim

Recommendations:

• The defense of marrying the victim should be abolished.

• The abolishment of this defense should be clear on the face
of the legislation.

Another possible defense to a charge of rape arises when the rapist mar-
ries the victim. Some penal provisions in Africa provide that if an assailant
agrees to marry the complainant, all charges will be dropped. For example,
Cameroon allows for exoneration of the perpetrator if he marries the rape
victim, so long as she is “over puberty at the time of the commission.”

182. Annabel Charnock, Confusion Over Marital Rape Following Passage of Domestic Vio-

183. Id.

184. See id. (“The legal basis for prosecuting marital rape is therefore likely to be determined
by initial landmark cases that will establish case law on the subject, which later prosecutions
will then be able to rely upon.”).

185. Benninger-Budel et. al., supra note 122, at 135.
This Report strongly recommends that the defense of marrying the victim be eliminated from rape laws. The defense may induce a rapist to marry the victim to escape the criminal consequences of his actions—and can even encourage rape to compel a marriage. In both instances, the victim is placed at risk of further sexual violence within the marriage. More broadly, the defense sends the erroneous message that sexual violence between spouses is tolerated. African countries should instead follow the example of Ethiopian legislation, which since 2005 no longer tolerates impunity for rape if the perpetrator marries the victim.186

4. Penalties

Item 1. Imprisonment

Recommendations:

- The introduction of guidelines for sentencing is recommended to reduce the possibility of abuse of judicial discretion.
- Especially onerous penalties, such as life imprisonment for a first time rape offence, may inadvertently lead to fewer convictions, and should be carefully evaluated.
- Corporal punishment, such as caning, should not be administered.

The crime of rape is serious enough to warrant a prison sentence; and in fact most sub-Saharan African countries impose a prison term as at least one form of penalty for the offense of rape. The use of guidelines providing a reasonable range of both a minimum and maximum term is recommended in this regard to reduce the possibility of abuse of judicial discretion. Most sub-Saharan African laws already mandate at least a five year minimum term for rape: the DRC provides for imprisonment of five to twenty years as well as a minimum of 100,000 CDF (approximately 180 U.S. dollars) in fines for any person found guilty of rape;187 and in Namibia, a person who commits rape is subject to a minimum sentence of five years and a maximum sentence of not less than fifteen years on first conviction. Ghana provides for a slightly higher minimum sentence of seven years and a maximum sentence of twenty-five years.188

186. The Secretary-General, supra note 9, ¶ 87.
188. Annabel Charnock, You Can Now Rape Your Wife: Parliamentary Stealth Makes Marital...
Some sub-Saharan African countries mandate a minimum imprisonment term of ten years or more for rape. In Kenya and Botswana, a person found guilty of rape faces a sentence of ten years to life imprisonment.189 Ethiopia’s Criminal Code provides for between five years and life imprisonment for rape, increased from previous maximum sentence of five years.190

As abhorrent as rape is, the penalties imposed for it must comply with human rights standards. For instance, in the southern part of Nigeria, a person who commits rape “is liable to imprisonment for life, with or without caning.”191 Tanzanian legislation subjects a person convicted of rape to a sentence of thirty years to life imprisonment, as well as corporal punishment and a fine for a first time rape conviction.192 Penalties of this kind, which may be deemed particularly harsh, are unlikely to be prescribed by tribunals in practice; rather, they may have the unintended effect of decreasing the rate of conviction. In addition, the use of corporal punishment, including caning, in sentencing is discouraged by this Report, since the practice contravenes human rights standards.

However, longer sentences and life imprisonment may be warranted for aggravated circumstances of rape, such as repeat offenses and the death of the victim. Thus, in Namibia, a second conviction for rape leads to a minimum sentence of ten years and a maximum sentence of forty-five years imprisonment. In the DRC, if rape causes the victim’s death, the perpetrator is sentenced to life imprisonment.193 Similarly, in Ethiopia, if rape causes grave physical or mental injury or death, the punishment is life imprisonment.194

Item 2. Compensation
Recommendation:

• Paying compensation to the victim may be an element of the penalty for rape, but should not be a substitute for imprisonment.

189. Sexual Offences Act (2006) Cap. 80 § 3(3) (Kenya); Penal Code (1986) § 142(1) (Bots.).
194. Criminal Code art. 620(3) (Eth.)
Informal compensation arrangements between the victim’s family and the assailant should not replace the criminal justice process.

Direct compensation by a rapist to the victim is another penalty that may be imposed in addition to imprisonment, and may constitute an additional remedy for the victim. To date, not many sub-Saharan African countries appear to utilize compensation as a penalty for rape. Although the DRC and Tanzania mandate a fine, that fine may be paid to the State rather than the victim. The United States provides an example of legislation that requires a rapist to pay direct compensation to the victim. In the United States, under the Violence Against Women Act (VAWA), the defendant must pay to the victim “the full amount of the victim’s losses,” which includes any costs incurred by the victim for “(a) medical services relating to physical, psychiatric, or psychological care; (b) physical and occupational therapy or rehabilitation; (c) necessary transportation, temporary housing, and child care expenses; (d) lost income; (e) attorneys’ fees, plus any costs incurred in obtaining a civil protection order; and (f) any other losses suffered by the victim as a proximate result of the offense.”

As a general observation, it can be noted that civil laws meet their goals if they deter rape and/or sexual violence, hold the appropriate parties accountable for the damage done by the crime, and provide adequate compensation to victims. In specific instances, questions in relation to (i) whether and how compensation should be made more readily available; (ii) the apportionment of damages in cases where the charge of rape also involves an element of another crime, for example, where the victim dies and the action is brought by third parties; and (iii) how to protect the victim’s privacy and confidentiality during the civil trial, also come to mind. Numerous issues thus remain open-ended in determining whether civil actions are appropriate in instances of rape. It is this Report’s recommendation, however, that the introduction of compensation to victims should not be used as a defense route to escape imprisonment. States should avoid adopting provisions that allow a man to escape imprisonment for violently attacking a woman so long as he pays a fine. In addition, informal compensation arrangements between the victim’s family and the rapist should not take the place of judicial penalties.

B. Sexual Assault

Unlike rape, which is increasingly comprehensively regulated as an offense in the criminal laws of sub-Saharan African States, the place of “sexual assault”—generally defined as sexual aggression that does not involve penetration—is ambiguous. The elements of the offense, as well as the penalties meted out differ considerably from State to State. Of the sub-Saharan African countries that do recognize some form of “sexual assault,” many do so indirectly, through ambiguous offenses such as “gross indecency” or “attack on modesty,” often with penalties that are problematic from a human rights perspective. Only one State, South Africa, provides a comprehensive substantive definition, as well as sound penalties, in relation to the offence.

1. Substantive Definitions

Item 1. “Sexual Assault”

Recommendations:

• Sexual assault should be recognized in law as an independent crime.

• Any definition of sexual assault should provide a clear distinction between “rape,” which involves penetration of any bodily orifice, and “assault,” which incorporates, *inter alia*, any unwanted “direct or indirect contact” and “masturbation.”

• Any definition should also be gender-neutral and provide that purposefully inspiring in a victim the belief that he or she will be sexually assaulted is punishable.

A number of States recognize forms of sexual violence apart from rape, but use varied designations and standards. For example, the DRC has retained the offense of “attack on modesty” (“l’attentat à la pudeur”) in its Penal Code despite far-reaching amendments introduced in 2006. The offense is defined somewhat vaguely as “any act contrary to morals carried out intentionally and directly against a person without his or her valid consent.”\(^{196}\) In effect, an “attack on modesty” encompasses all forms of sexual violence except for rape, from sexual harassment to sexual assault.

Nigeria, in turn, applies numerous standards for sexual assault, depending on the code used. None of the codes provide a usable definition

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of the offense, however. The Criminal Code states that any person “who unlawfully and indecently assaults a woman or girl is guilty of a misdemeanor, and is liable to imprisonment for two years,”197 but provides no guidance on what constitutes unlawful and indecent assault.

Additional provisions on sexual violence only add ambiguity. For example, Section 222 of the Criminal Code introduces the crime of “unlawfully or indecently deal[ing] with a girl under sixteen years of age.” Section 216 specifies that “the term ‘deal with’ includes doing any act which, if done without consent, would constitute an assault as hereinafter defined.” It would seem that this article provides for a statutory minimum age of sixteen for consent to any sexual activity, but it is still impossible to know what activity amounts to assault.

The Penal Code, in turn, recognizes the offense of sexual assault by men in positions of authority for children under the age of sixteen. Section 285 on “gross indecency” provides for seven years imprisonment and a fine, “provided that a consent given by a person below the age of sixteen years to such an act when done by his teacher, guardian or person entrusted with his care or education shall not be deemed to be a consent within the meaning of this section.”

Shari’ah Law also recognizes the crime of “gross indecency.” It notes that “whoever commits an act of gross indecency upon the person of another without his consent or by the use of force or threats compels a person to join with him in the commission of such act shall be punished with caning of forty lashes and shall also be liable to imprisonment for a term of one year and may also be liable to fine; provided that a consent given by a person below the age of fifteen years to such an act when done by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be a consent within the meaning of this section.”198 The same law also recognizes the crime of “assault or criminal force to women with intent to outrage modesty.” Article 226 of the Shari’ah Law determines that “whoever assaults or uses criminal force to any woman intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment for a term which may extend to one year and shall be liable to caning which may extend to forty lashes.”

The ambiguity of such provisions is unfortunate—an act “contrary

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to morals” or activity “likely” to “outrage” the modesty of a woman could include a wide array of actions, depending on the subjective judgment of the tribunal or the community. Rather, it is the perception of the victim—male or female—that should be the focus of any definition.

In Kenya, on the other hand, the definition of “sexual assault” recently included in the Sexual Offences Act suffers from undue restriction. A person is guilty of “sexual assault” in Kenya if he or she unlawfully “(a) penetrates the genital organs of another person with (i) any part of the body of another or that person; or (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes; (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ by any part of the other person’s body.”

Because the offense of “rape” under Kenyan law includes only penetration with the sexual organ, all other forms of penetration—and only these—are considered to constitute “sexual assault.” This approach leaves a wide array of unwanted conduct unaccounted for under law, leaving the victims of sexual violence that does not involve penetration without any legal remedy.

South Africa has adopted the most coherent provisions on sexual assault of the sub-Saharan African countries surveyed. A person is guilty of sexual assault in South Africa if that person unlawfully and intentionally sexually violates a complainant, without the complainant’s consent. A person who unlawfully and intentionally inspires the belief in a complainant that he or she will be sexually violated is also guilty of sexual assault.

“Sexual violation” is defined to exclude sexual penetration but to include any act that causes:

(a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(bb) the mouth of another person;
(cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—
(aaa) be used in an act of sexual penetration; or
(bbb) cause sexual arousal or stimulation; or
(ccc) be sexually aroused or stimulated thereby; or
(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(iii) the mouth of the complainant and the genital organs or anus of an animal;
(b) the masturbation of one person by another person; or
(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person.200

The definition of “sexual violation” adopted by South Africa has numerous advantages. In the first place, it is gender-neutral (like that of Kenya); it recognizes that victims, like perpetrators, may be both men and women. Second, it accepts that purposefully inspiring in a victim the belief that he or she will be sexually assaulted should also be punishable. Third, it provides for a comprehensive list of actions that, if taken without the consent of the individual, constitute assault. Fourth, it provides a clear-line distinction between “rape,” which involves penetration of any bodily orifice, and “assault,” which incorporates, inter alia, any unwanted “direct or indirect contact” and “masturbation.”201

One shortcoming can nonetheless be identified. The definition of “sexual assault” turns on the absence of consent, defined as “voluntary or uncoerced agreement.” As discussed above, it is important that definitions of sexual violence that appraise the victim’s lack of consent place emphasis on the actions of the assailant; this is something that seems to be missing from the South African law. “Sexual assault” is, by its nature, not consented to by the victim and accordingly unlawful. A better approach would note the existence of coercive circumstances, fraudulent means and false pretences and the possibility of victims incapable of ap-

201. Id.
preciating the nature of the act that constitutes the offense. The focus of the Kenyan law on exactly these factors—despite its excessive limitation on the kinds of actions considered offensive—can be considered an example in this regard.

By way of further example, a person in the United States commits “sexual assault” if he or she engages in sexual abuse, aggravated sexual abuse, sexual abuse of a minor or a ward, abusive sexual contact, and sexual abuse resulting in death. A man or woman commits “sexual abuse” if he or she knowingly (a) causes another person to engage in a sexual act by threatening or placing that other person in fear; or (b) engages in a sexual act with someone who is “incapable of appraising the nature of the conduct,” “physically incapable of declining participation” or “communicating unwillingness to engage in that sexual act.” Any attempt at engaging in any of these activities is also punishable. In addition, sexual assault explicitly includes both assault committed by offenders who are strangers to the victim and assault committed by offenders who are known or related by blood or marriage to the victim.

Item 2. “Compelled Sexual Assault”
Recommendation:

- Compelled sexual assault should be recognized in law as an independent crime.

Since coercive environments may in some circumstances compel individuals to commit aggression against others in fear of their own safety—or may force persons to act in a manner they would not otherwise do—compelled sexual assault should also be recognized by law. Without a provision of this kind, the initiator of a sexual assault may escape punish-


203. “Sexual act” is defined as (a) “[c]ontact between the penis and the vulva or the penis and the anus; (b) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (c) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (d) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” Sexual Abuse Act, 18 U.S.C. § 2246(2) (1996).

204. Id. § 2242(2).
ment. In fact, a number of sub-Saharan African countries already recognize some form of this offense, although designations vary.

South Africa recognizes the offense of “compelled sexual assault.” A person is guilty of this crime if he or she unlawfully and intentionally compels a third person, without his or her consent, to commit an act of sexual violation against a complainant, without the consent of the complainant. In addition, a person is guilty of “compelled self-sexual assault” if he or she intentionally and unlawfully compels a complainant, without the consent of the complainant, to (i) engage in masturbation, any form of arousal or stimulation of a sexual nature of the female breast, or sexually suggestive or lewd acts with the complainant himself or herself; (ii) engage in any act which has or may have the effect of sexually arousing or sexually degrading the complainant; or (iii) cause the complainant to penetrate in any manner whatsoever his or her own genital organs or anus. Kenya has also introduced the offense of “compelled or induced indecent acts,” which includes the intentional and unlawful compulsion, inducement or causation of “any contact between the genital organs of a person, his or her breasts and buttocks with that of another person.”

2. Penalties
Recommendations:

- The introduction of guidelines for sentencing is recommended to reduce the possibility of abuse of judicial discretion.
- Especially onerous penalties may inadvertently lead to fewer convictions, and should be carefully evaluated.
- Corporal punishment, such as caning, should not be administered.

Penalties for offenses that can be categorized as “sexual assault” vary considerably. In the DRC, any “attack on the modesty” of another person, committed with force, threat or ruse is punished by imprisonment of 6 months to five years; the same punishment applies for any “attack on modesty,” committed without force, if the victim or abettor is under eighteen years of age. If the victim or abettor of such an attack, committed with force, threat or ruse is under eighteen years of age, the punishment rises to imprisonment of between five and fifteen years; if the victim or abettor is under ten years of age, the punishment rises to between five

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and twenty years.\textsuperscript{207} Moreover, if any of the aggravating circumstances to sexual violence listed in Penal Code art. 171 bis are present in an “attack on modesty,” the sentences generally applied are doubled.\textsuperscript{208} In Kenya, a person found guilty of sexual assault faces a minimum sentence of ten years, “which may be enhanced to imprisonment for life.”\textsuperscript{209} This is exactly the same penalty as is applied in the context of “rape,” likely because of the close link between the two offences in this particular jurisdiction.

In Nigeria, the offense of unlawfully and indecently assaulting a girl under sixteen years of age results in “two years imprisonment, with or without caning”; in the case of victims under thirteen, the penalty rises to three years imprisonment, with or without caning.\textsuperscript{210} As the United Nations and many human rights groups have repeatedly noted, caning is a form of cruel, inhuman or degrading punishment, and may even amount to torture.\textsuperscript{211} Moreover, the unlawful and indecent assault of a male under fourteen years of age warrants seven years imprisonment pursuant to art. 216 of the Criminal Code. In other words, the same crime results in wildly different prison terms, depending on whether the victim is a female or a male. A comparable inequality can be found in other provisions on assault. While the unlawful and indecent assault of a woman or girl results in two years imprisonment (pursuant to art. 360 of the Criminal Code); the same crime merits three years if the victim is male (pursuant to art. 353). Such differences in sentencing, which are contingent only on the gender of the victim, contravene the constitutional and human right to both equal treatment and equality before the law. In setting different standards for the same crime, the legislature is effectively declaring that female victims are worth less than males.

\textsuperscript{207} Id. (C. Pén. art. 168).
\textsuperscript{208} Id. (C. Pén. art. 171 bis).
With regard to the wide divergence in the prison terms dispensed from country to country—between six months and life imprisonment—it is important to consider the correlation of the penalty with the gravity of the sexual violence crime in question. As already noted in the context of rape, penalties deemed particularly harsh are unlikely to be prescribed by tribunals in practice; and may have the unintended effect of decreasing the rate of conviction.

C. General Considerations & Good Practices

Considerable variation in the overall structure of legal systems, including the incorporation of customary or religious law, as well as social or cultural barriers and limited financial resources may present particular challenges to the effective protection of women from gender-based violence in Africa. Despite the distinct hurdles faced in specific regions of the world, responses to violence against women nonetheless share a number of common issues and concerns everywhere. Legal reform with respect to gender-based violence must take into account not only the creation of new or amended legislation, but also questions of implementation and procedure. With this need in mind, the following common issues and principles of good practice can be identified in all countries.

1. Evidentiary Procedures

Recommendations:

- Privacy and the protection of the victim should be paramount in procedural considerations.
- The judicial framework should accommodate the challenges of facing social pressure and stigma in setting evidentiary standards in rape and sexual assault cases.
- Rules as to collection and admissibility of testimony and evidence in rape and sexual assault cases should take into account the sensitive nature of the charges as well as the difficulty of collecting evidence in a timely manner.

Victims of sexual violence encounter a number of challenges when they testify about the crime perpetrated against them. As most victims of rape and sexual assault are women, gender bias and societal stigma may affect perceptions of credibility. The victim’s testimony may not be given proper weight by a judge or jury because it is assumed that she is motivated by improper reasons in bringing such a charge. In addition, it may
be considered that her past sexual behavior should be taken into account when dealing with the prosecution of the crime. To limit the effect of this kind of bias, certain mechanisms ought to be put in place to protect complainants in rape and sexual assault cases. These mechanisms include (i) in camera hearings and privacy precautions; (ii) standards for inferences that may be drawn from complainant’s testimony or lack of testimony; (iii) standards for consideration of evidence that may be submitted; (iv) rape shield laws that prevent the introduction of complainant’s sexual history into testimony; (v) procedural requirements related to timing in bringing a charge of sexual offense; and (vi) guarantees of timing in the context of the conduct of the trial. While few of these mechanisms are now used in sexual assault cases, they are increasingly applied in the context of rape. Specifically:

(i) Liberia requires in camera hearings for all hearings in rape cases.212 The DRC also provides for closed hearings in all infractions relating to sexual violence (i.e. rape and “attack on modesty”) and requires that authorities take all measures necessary to protect the identity (and address) of the victim, including the use of pseudonyms. In addition, any measure “necessary to safeguard the security, the physical and psychological well-being, dignity, and respect for the private life of the victim or any other persons involved” must be taken by the authorities involved.213

(ii) The DRC provides that no inference of consent may under any circumstance be drawn from the words or behavior of a victim if his or her ability freely to give valid consent has been distorted by the use of force, threat or constraint, or through a coercive environment.214 In addition, no such inference may be drawn if the victim is incapable of giving real consent.215 No inference may under any circumstance be drawn from the silence or lack of resistance of the presumed victim.216 South Africa’s

214. Id. (C. Proc. Pén. art. 14 ter(1)).
215. Id.
216. Id. (C. Proc. Pén. art. 14 ter(2)).
Sexual Offences Bill provides for the admissibility of evidence relating to previous consistent statements by a complainant involving the alleged commission of a sexual offence, provided that the court may not draw any inferences only from the absence of such previous consistent statements. In addition, courts are prohibited from drawing any inference only from the length of any delay between the alleged commission of a sexual offence and the reporting thereof. Similarly, courts are prohibited from treating the evidence of a complainant in proceedings involving the alleged commission of a sexual offence with caution, on account of the nature of that offence.217

(iii) “The fact that rape trials are conducted in accordance with the normal procedures under the CP & E Act, which requires corroboration of the victim’s allegations that he/she has been raped, and is subject to the normal criminal standard of proof beyond reasonable doubt, causes some problems. Rape offences are committed in private and there are usually no witnesses to provide direct evidence to corroborate the victim’s allegations. Courts therefore have to rely on circumstantial evidence such as medical reports, which show evidence of sexual intercourse, which is not always helpful because it means the victim should be examined immediately following the rape. Most women are not aware of these requirements and it is common for them to clean themselves thereby removing evidence (WAD 1998).”218 A person cannot be convicted of any of the sexual offences defined in section 218 or 221 of the Nigerian Criminal Code upon the uncorroborated testimony of one witness.219

(iv) In the DRC, the credibility, honor or sexual availability of a victim or witness may under no circumstances be inferred from their previous or later sexual behavior, and no proof regarding such behavior may be introduced to exonerate the accused.220 Kenya’s Sexual Offences Act also contains a rape shield provision, which states that “[n]o evidence as to any previous sexual

experience or conduct of any person against or in connection
with whom any offence of a sexual nature is alleged to have
been committed, other than evidence relating to sexual experi-
ence or conduct in respect of the offence which is being tried,
shall be adduced, and no question regarding such sexual con-
duct shall be put to such person, the accused or any other wit-
ness at the proceedings pending before a court” unless the court
has granted leave “to adduce such evidence or to put such ques-
tions.”221 The statute requires the court to grant such leave if
the evidence or questioning “(a) relates to a specific instance of
sexual activity relevant to a fact in issue; (b) is likely to rebut
evidence previously adduced by the prosecution; (c) is likely to
explain the presence of semen or the source of pregnancy or
disease or any injury to the complainant, where it is relevant to
a fact in issue; (d) is not substantially outweighed by its poten-
tial prejudice to the complainant’s personal dignity and right
to privacy; or (e) is fundamental to the accused’s defense.”222
Further, the federal evidentiary rules of the United States in-
clude a rape shield provision, which provides that evidence of-
ferred to prove “any alleged victim’s sexual predisposition” or to
prove “that any alleged victim engaged in other sexual behav-
ior” is “not admissible in any civil or criminal proceeding in-
volving alleged sexual misconduct.”223
(v) In Namibia, cautionary rules relating to offences of a sexual
or indecent nature have been abolished. In addition, no infer-
ence may be drawn only from the fact that no previous consis-
tent statements have been adduced by a complainant. Simi-
larly, the courts may not draw negative inferences only from
the length of delay between the commission of the sexual act
and the complaint. Furthermore, evidence as to any previous
sexual conduct or experience of a complainant may not be ad-
duced in the proceedings.224
(vi) Expedient progression of trials related to sexual offences
without delay or interruption are provided for under the Sexual
Offences Bill currently under consideration in the Mauritius

222. Id. § 34(3).
223. Fed. R. Evid. 412(a) (providing that “The following evidence is not admissible in any civil
or criminal proceedings involving alleged sexual misconduct (1) Evidence offered to prove
that any alleged victim engaged in other sexual behavior; (2) Evidence offered to prove any
alleged victim’s sexual predisposition.”).
224. Combatting of Rape Act, No. 8 (2000) §§ 5-7 (Namib.).
legislature, where it is provided that “notwithstanding any other enactment, the hearing of a trial for an offence filed under [the Sexual Offences Bill] shall take place from day to day until it is over, or it may be adjourned from time to time where it is necessary or expedient to do so.” The DRC Code of Penal Procedure goes further in setting a strict limit on the timing of a criminal action related to sexual violence, requiring that any matter relating to a claim of sexual violence must move through the criminal system within a period of three months.225

2. The Rights of Victims

Recommendations:

- Legislation should provide for prompt access to the quality medical care necessary after an incident of sexual assault or rape (such as emergency contraception and post-exposure prophylaxis for HIV).
- Policies and institutions should ensure easy and open access to the legislated legal process.
- National policy guidelines for medical professionals, police officers, prosecutorial staff, and welfare and correctional should be developed to help create uniform procedures for sexual violence cases.
- Barriers or disincentives to bringing claims of sexual violence should be removed.

Aside from a right to speedy resolution of claims (see Evidentiary Procedures at Part IV.C.1. above), legislation asserting and protecting the rights of victims varies from country to country. Much of the emphasis in considering the rights of victims relates to ensuring (i) the privacy, informational and medical needs of the victim, while minimizing the trauma of the judicial proceedings; and (ii) access to full legal process regardless of the status of the alleged perpetrator.

(i) In the DRC, the relevant public official or judge must request that a doctor and a psychologist examine the victim to determine appropriate care.226


One of the objectives of the Sexual Offences Act in South Africa is to afford the complainants of sexual offences a maximum of legal protection and to minimize the trauma of the judicial process. The National Policy Guidelines for Victims of Sexual Offences, adopted in 1998, play a significant role in this respect. The guidelines were developed for medical professionals, police officers, prosecutorial staff, and welfare and correctional services and are aimed at creating uniform procedures for sexual violence cases. Among others, they provide for a duty on prosecutors to inform victims that they have a choice between having their hearing heard in camera or in public.

Namibia’s Combating of Rape Act places special duties on prosecutors in rape cases to ensure that the complainant receives all relevant information pertaining to the case. Furthermore, the complainant has the right to attend at court personally, or to request that the prosecutor present the relevant information on her behalf if the accused has applied for bail. The Combating of Rape Act also places restrictions on publishing the identity of the complainant, so as to ensure that the complainant’s privacy is protected.

The Sexual Offences Bill under consideration in Mauritius restricts dissemination of information about the victim, declaring it an offence to “publish, diffuse, reproduce, broadcast or disclose, by any means, particulars which lead, or are likely to lead, members of the public to identify the person against whom the offence is alleged to have been committed.”

(ii) Claimants should be able to act to have charges brought against their alleged perpetrators regardless of the alleged perpetrator’s status in society. The DRC Code of Penal Procedure provides that perpetrators with an official capacity or jurisdictional privileges are not exempt from investigation and arrest for sexual crimes.

Many sub-Saharan African States, like Nigeria and Sierra Leone, fail...
to provide legal assistance to rape victims, so that the burden of provision for such services falls to civil society. According to Amnesty International, however, NGOs are hindered in their delivery of such services due to the lack of State support for their activities. Moreover, not only is publicly funded legal assistance unavailable in many African countries, but even access to the judicial system is difficult if not impossible to attain for women due to legal, structural and cultural limitations on access.

A major challenge to the protection of the rights of victims is the persistence of legislation criminalizing the false declaration of a sexual offence, which may serve as a disincentive for victims to bring legal claims of rape or sexual assault.

For instance, Nigeria’s Shari’ah Law recognizes the crime of qadhf, or falsely accusing another of ‘adultery or fornication’ (zina). In light of the often onerous evidentiary requirements in effect, women claiming that a rape or sexual assault has taken place may find it impossible to prove their claim; and may consequently find themselves accused of having, “by words either spoken or reproduced by mechanical means or intended to be read or by signs or by visible representations,” made a “false imputation of zina or sodomy concerning a chaste person (muhsin).” The punishment meted out for this crime is eighty lashes of the cane, as well as a presumption that the individual’s testimony is unreliable, unless she “repents before the court.” In addition, the victim herself may be accused of extramarital sexual relations (for example, if she is pregnant as a result of the rape), which is punished with a sentence of death by stoning.

The Shari’ah Law of Kano State in Nigeria, in turn, requires that any claim of rape in respect of a married person fulfill the following conditions: “(a) Islam; (b) maturity; (c) sanity; (d) liberty; (e) valid marriage; (f) consummation of marriage; (g) four witnesses; or (h) confession.” Although the law is unclear on how the strict conditions set out above can be met, if any have not been proved by the person alleging the of-
fense, the person “shall be imprisoned for one year and shall also be liable for caning which may extend to one hundred lashes.”

This barrier and disincentive to bringing claims of sexual violence exists in other laws too. The proposed Sexual Offences Bill of Mauritius, despite its progressive nature in addressing rape and sexual assault, contains a provision criminalizing the false declaration of a sexual offence. "Any person, whether of his own free will or in the course of an interview, who makes a false declaration to any public officer on duty that any person has committed an offence under the [Sexual Offences Bill] shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 10 years.”

Women seeking to bring claims of sexual violence face procedural, cultural and bureaucratic hurdles as well. For example, in Kenya, a woman must report the crime to the police and provide written details in the official police Occurrence Book for an investigation to be initiated. Police are rarely trained in handling sexual violence issues and often handle rape investigations as they would other private domestic matters. Once a claim is made, widespread corruption within the police system often delays the actual progression of the case and gives ample opportunity for the perpetrator, sometimes the husband of the claimant, to pay police to delay or drop the investigation.

In addition to bringing the claim directly to the police, a victim of rape in Kenya must also obtain a Medical Examination Report from the police before she can be examined by a doctor. The form must be completed both by the police and by a doctor. Here, again, is an example of system that could work, thwarted by the realities of implementation. Amnesty International has found that the required Medical Examination Report form, intended by law to be free, is often only available to those willing to pay a bribe to the police. Thus, the unique control exercised over the reporting system by members of the police, who are untrained in the nuances of dealing with sexual violence, actively discourages many victims of sexual violence from coming forward to record their experiences for the purpose of prosecution. As would be expected, such discouragement is

237. Id.

238. See Sexual Offences Bill (2007) § 23 (Mauritius). See also Sexual Offences Act (2006) Cap. 80 § 38 (Kenya) (“Any person who makes false allegations against another person to the effect that the person has committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that for the offence complained of.”).

even more intense in the event that the perpetrator is himself a member of the police force.\textsuperscript{240} South Africa similarly requires that a victim of rape report the incident to the police as a precondition to receiving healthcare.\textsuperscript{241}

The health of rape victims is also considered in many laws. Although abortion laws in African countries tend to be restrictive, many sub-Saharan African States explicitly provide for access to abortion in cases of rape, in accordance with the Women’s Rights Protocol.\textsuperscript{242} South Africa has permitted access to abortions when the pregnancy is a result of rape since 1975, under its 1975 Abortion and Sterilization Act. The Act provided that abortions may be performed lawfully when a pregnancy could seriously threaten a woman’s life or her physical or mental health; could cause severe handicap to the child; or was the result of rape (which had to be proved), incest or other unlawful intercourse, such as with a woman with a permanent mental handicap.\textsuperscript{243} South Africa’s more recently updated 1996 Choice on Termination of Pregnancy Act permits abortion on request until 12 weeks of gestation for any reason. Under this law, when a fetus is between 13 weeks and 20 weeks of gestation; abortion is permitted if the doctor is of the opinion that there is a risk to the woman’s mental or physical health; there is a substantial risk that the fetus would have a severe physical or mental abnormality; the pregnancy resulted from rape or incest; or the pregnancy would severely affect the social and economic status of the woman. After 20 weeks of gestation, South African law allows for termination only if the woman’s life is in danger or in case of severe malformation of the fetus.\textsuperscript{244}

Additionally, in December 2006, Togo legalized abortion if the pregnancy is a result of rape or an incestuous relationship.\textsuperscript{245}

Benin, Burkina Faso, Cameroon, Ethiopia, Zimbabwe, Botswana, Ghana, Liberia, Namibia and Swaziland also permit abortions in the event that

\textsuperscript{240}. See id. § 5.2.
\textsuperscript{243}. Abortion and Sterilization Act 2 of 1975 (1975) § 3 (S. Afr.).
\textsuperscript{244}. Choice on Termination of Pregnancy Act 92 of 1996 (1996) § 2(c)(i) (S. Afr.).
the pregnancy arose from rape. Although many of these countries have quite burdensome evidentiary standards, some, such as Ethiopia, require only an assertion by the woman that her pregnancy resulted from rape.

South Africa also allows for women to receive nevirapine, an antiretroviral drug that prevents the transmission of HIV from pregnant mothers to their babies. Although the availability of nevirapine was initially restricted to certain kinds of pregnancies, such as those resulting from rape, South Africa currently offers nevirapine to all women who have tested as HIV positive through the public hospital system.

Despite pressure on the government from international and local NGOs to provide emergency contraception and post-exposure prophylaxis (PEP) drugs as a public service to rape victims, laws and policies in many sub-Saharan African countries, including South Africa, do not explicitly obligate health care providers to provide rape victims with treatment for sexually transmitted diseases, emergency contraception to prevent possible pregnancy, or medical treatment for injuries sustained as a result of the rape.

Kenya and Zambia lead other sub-Saharan African countries in their policy developments in the realm of emergency contraception. The Kenyan Ministry of Health, for example, has issued National Guidelines on the Medical Management of Sexual Violence calling for the provision of both emergency contraception and PEP to victims of rape. Zambia has also started a pilot program with support from the Population Council, in which police, as the first institutional contact for victims of sexual assault, provide emergency contraception to rape victims.

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247. Criminal Code art. 551 (Eth.).


249. Emergency contraception prevents pregnancy after unprotected sex via a course of hormonal contraceptive pills taken in one- or two-dose regimens. It is most effective if taken within 24 hours after unprotected sex; however, it can be effective for up to five days.


3. Human Rights of the Accused and of Perpetrators

Recommendations:

- The punishment applied to crimes of sexual violence should not itself amount to a human rights violation.
- In particular, the death penalty and corporal punishment should not be administered.
- The constitutional rights of the accused to a fair and speedy trial, and to privacy should be respected.

States must comply with their duty to respect the human rights of all individuals in their jurisdiction, including those convicted of crimes.

For this reason, consideration should be given to ensuring that the punishment applied to crimes of sexual violence does not amount to a human rights violation itself. The most problematic applicable penalties are those that provide for a mandatory death penalty, or other forms of torture and cruel, inhuman or degrading punishment, such as stoning and caning. As discussed above, many sub-Saharan African States provide for these punishments in their legislation on sexual violence—and consequently contravene the provisions of numerous international human rights instruments of which they are signatories.253

As a practical matter, there is no conclusive evidence to suggest that these forms of punishment are more effective deterrents against sexual violence (and other crimes) than less severe penalties. Rather, law that provides for punishment proportionate to the gravity of the crime and the circumstances of the offender has the best chance of actually being applied. Especially harsh sentences—and particularly ones that provide for the death penalty or corporal punishment—may lead to fewer convictions for sexual violence, as the judiciary often proves reluctant to apply punishment deemed inappropriate.

In addition, any punishment provided for by law should only be imposed after the individual has been charged with an offense at a trial

253. See, e.g., Universal Declaration of Human Rights, supra note 19, art. 5; International Covenant on Civil and Political Rights, supra note 18, arts. 6(2), 7; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment G.A. Res. 3452 (XXX), U.N. Doc. A/RES/3452 (XXX) (Dec. 9, 1975); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 21, arts. 1-2; Convention on the Rights of the Child, supra note 24, art. 37(a); World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Programme of Action, ¶¶ 30, 54-61, U.N. Doc. A/CONF.157/23.
that meets generally accepted standards of fairness. Namibia’s example of protecting the constitutional rights of the accused to a fair and speedy trial in rape cases is laudable in this regard.

On the other hand, the provision in Botswana’s Penal Code that denies the possibility of bail for persons charged with rape may be dubious from a human rights point of view, since it violates the accused person’s constitutional right of being presumed innocent until proven guilty. Despite numerous claims of exactly this human rights violation, the courts of the country have thus far refused to accept this argument.

4. HIV and Sexual Violence

Recommendations:

- Governments should ensure prompt and easy access to PEP for victims of sexual violence, as part of a comprehensive package of services. Governments should also ensure access to antiretrovirals when necessary.
- Criminal legislation related to HIV should respect human rights standards, including principles related to informed consent for testing and the protection of confidentiality.
- Governments should ensure that laws criminalizing HIV transmission do not further stigmatize people living with HIV.

In light of growing concern in many sub-Saharan African States regarding the interaction of HIV/ Aids and sexual violence, some countries are introducing mandatory testing measures for suspects and enhancing penalties based on HIV transmission. A number of sub-Saharan African countries impose more severe penalties on persons who commit rape while knowing that they are infected with the HIV virus or another sexually transmitted disease.\footnote{254. Benin has a provision pertaining to HIV/AIDS, pursuant to which a person who knows that he or she is infected with the AIDS virus and who, “using violence, constraint or surprise,” has unprotected “sexual relations of any kind” with another person will be penalized with a prison term of 5 to 20 years and a fine of 3 to 10 million CFA. Law No. 2005-31of Apr. 5, 2006 (2006) art. 30 (Benin) (“Toute personne se sachant infectée par le virus du SIDA qui, usant de la violence, contrainte ou surprise, entretient des relations sexuelles non protégées de quelle que nature qu’elles soient avec une personne, sera punie de la réclusion criminelle à temps de cinq à vingt ans et d’une amende de trois millions de francs à dix millions de francs CFA.”). Moreover, even where there was no “violence, constraint or surprise,” an HIV positive person who is conscious of his or her status and has unprotected sexual relations with an uninformed person is subject to five to ten years imprisonment and a fine of one to five}
these types of measures achieve their desired result or comply with human rights standards. For example, Kenya's provision criminalizing transmission is so broadly drawn that a woman with HIV who has unwanted sexual intercourse with a man, but cannot prove rape, may be found guilty of the crime.

Issues around testing abound in the context of HIV and sexual violence. Criminal penalties for "knowingly" transmitting HIV can serve as a disincentive to testing, an unintended consequence that runs directly contrary to most governments objectives encouraging HIV testing. Laws that call for the mandatory HIV testing of persons suspected of commit-


256. In Kenya, a person is guilty of an offense if, "having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know (a) will infect another person with HIV or any other life threatening sexually transmitted disease; (b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease; (c) will infect another person with any other sexually transmitted disease." The penalty for this offense is a minimum sentence of 15 years (5 years more than the minimum term for standard rape) to a maximum of life imprisonment. Sexual Offences Act (2006) Cap. 80 § 26(1) (Kenya). This provision should also be noted for its level of detail and inclusiveness—for instance, it employs both subjective and objective standards of knowledge, as well as active ("does anything") and more passive ("permits the doing of anything") states of action.

257. For a detailed discussion of some of these issues, see UNAIDS, Criminal Law, Public Health and HIV Transmission: A Policy Options Paper, Geneva, Switzerland (June 2002).

258. Id. at 7.
ting sexual violence risk violating the human rights of the suspects and may be of little use to victims. As the UNAIDS publication, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*, outlines:

[T]esting a person for HIV without their consent, on the basis of a criminal accusation raises serious human rights concerns associated with liberty, security of the person and privacy. Most obviously and immediately, such a practice would violate bodily integrity to obtain information about a person’s health status—information that should, as a general rule, be subject to strict confidentiality. International law recognizes these rights as fundamental human rights.... Aside from these human rights concerns, imposing compulsory testing on persons accused of HIV transmission/exposure, after the acts that are alleged to have transmitted or risked transmitting the virus, will be of little benefit. Testing after the fact will not conclusively prove that the accused was HIV-positive at the time of the offence; it will only establish the accused’s HIV status at the time of the test.259

To minimize the risk of HIV transmission through sexual violence, governments should ensure that victims have prompt access to PEP. PEP is a course of antiretroviral drugs that can reduce the risk of contracting HIV/AIDS by as much as 80 percent if started within 72 hours of exposure.260 In South Africa, for instance, victims of sexual offence have access to PEP at State expense, but only if they report the sexual offence “within 72 hours after the alleged sexual offence took place.”261 One concern with making the victim’s access to PEP conditional upon her reporting of the offence, however, is that it may “either coerce ... women into laying charges or prevent ... them from accessing PEP altogether.”262 Furthermore, it is advisable that PEP be made available to victims along with other related support services, like counseling; the South African bill does not appear to require such additional services to be made available to victims along

259. Id. at 22.


262. See South Africa: New Sexual Offences Bill Fails to Protect Rape Survivors, IRIN, July 19, 2007, http://www.irinnews.org/report.aspx?reportid=58988 (“The bill now means you can’t walk into a health facility and say you’ve been raped and ask for PEP and just be assessed on a medical basis.”).
with PEP. The Kenyan Ministry of Health, on the other hand, has issued National Guidelines on the Medical Management of Sexual Violence that call on public hospitals to provide PEP to victims of rape without charge, along with emergency contraception and other necessary services.

V. NATIONAL LEGISLATION ON DOMESTIC VIOLENCE

Domestic violence is widely recognized as a worldwide problem that transcends cultural boundaries and mores. Studies examining domestic violence reveal that its effects outlive generations, creating a cyclical pattern of crime that has widespread social implications. This consensus is embodied in the framework for model legislation on domestic violence developed by the U.N. Special Rapporteur on Violence Against Women ("U.N. Model Framework" or "Framework"), which, among other objectives, charges domestic violence legislation to:

(i) Recognize that domestic violence is gender-specific violence directed against women, occurring within the family and within interpersonal relationships;

(ii) Recognize that domestic violence constitutes a serious crime against the individual and society which will not be excused or tolerated;

263. Id. ("PEP needs to be located within a package of care for survivors … protecting yourself from HIV is only one of the problems for rape survivors.").


(iii) Create a wide range of flexible and speedy remedies (including remedies under special domestic violence legislation, and penal and civil remedies) to discourage domestic violence and harassment of women within interpersonal relationships and within the family and protect women where such violence has taken place;

(iv) Expand the ability of law enforcement officers to assist victims and to enforce the law effectively in cases of domestic violence and to prevent further incidents of abuse;

(v) Train judges to be aware of the issues relating to child custody, economic support and security for the victims in cases of domestic violence by establishing guidelines for protection orders and sentencing guidelines which do not trivialize domestic violence;

(vi) Provide for and train counselors to support police, judges and the victims of domestic violence and to rehabilitate perpetrators of domestic violence;

(vii) Establish departments, programs, services, protocols and duties, including but not limited to shelters, counseling programs and job-training programs to aid victims of domestic violence;

(viii) Enumerate and provide by law comprehensive support services, including but not limited to:

(a) Emergency services for victims of abuse and their families;

(b) Support programs that meet the specific needs of victims of abuse and their families;

(c) Education, counseling and therapeutic programs for the abuser and the victim; and

(d) Programs to assist in raising public awareness and public education on the subject. 267,268

Even compared to sexual assault—and certainly compared to the widespread statutes against rape—domestic violence is the subject of little sub-Saharan African legislation. One survey of the legislation in force in 2002 found that only two States in the region—South Africa and Mauritius—

267. See id. ¶ 2.

268. While we recognize that domestic violence can occur when a woman abuses a man, or a person of the same sex abuses another, this Report follows the U.N. Special Rapporteur on Violence Against Women and focuses on the most prevalent form of abuse, in which a man abuses a woman. The terminology used in this Report is consistent with that focus.

There has been increasing legislative activity, however, as civil society and international organizations have called attention to domestic violence; in turn, governments have begun taking up the issue. In Namibia, the Combating of Domestic Violence Act came into force in 2003, granting extensive legal protections against domestic violence. In 2006, the legislature of Zimbabwe passed similar legislation after years of campaigns by NGOs and civil organizations. Most recently, in May 2007, Ghana enacted a new statute to supplement existing provisions under its criminal code, which failed to provide victims of domestic violence with an effective legal remedy.

269. Cynthia Grant Bowman, *Theories of Domestic Violence in the African Context*, 11 Am. U. J. Gender Soc. Pol’y & L. 847, 848 (2002-03). We note that domestic violence often overlaps with the criminal statutes concerning rape and sexual assault discussed above—e.g., a husband raping his wife could be addressed by a statute prohibiting rape. This portion of the Report focuses on legislation specific to domestic violence; the relationship of such legislation to the legal responses to rape and sexual assault is addressed in Section V.B.3 below. This is consistent with the U.N. recommendation that States “enact comprehensive domestic violence legislation which integrates criminal and civil remedies rather than making marginal amendments to existing penal and civil laws.” The U.N. Special Rapporteur on Violence Against Women, supra note 266, ¶ 4.


271. Protection from Domestic Violence Act, No. 6 (1997) (Mauritius). The statute was amended in 2004 to address, inter alia, the scope of the domestic relationship, application time limits, and penalties.

272. In addition to the legislation identified in the text, we are aware of secondary sources discussing legislation enacted by Lesotho (Sexual Offences Act of 2003) and Malawi (Prevention of Domestic Violence Act of 2006). However, we have been unable to obtain copies of this legislation. In addition, we are aware of a bill that was proposed in Kenya, Domestic Violence (Family Protection) Bill, in 2002, but to our knowledge that bill has not been enacted.


This Report focuses on the domestic violence legislation enacted by these five countries, together with the recommendations of the U.N. Model Framework and selected portions of legislation from outside Africa. Although these sources of law serve as a useful starting point, we expect that the landscape of laws in sub-Saharan Africa dealing specifically with domestic violence will change substantially as legislative activity continues to accelerate.

A. Domestic Violence
   1. Substantive Definitions

One of the most persistent challenges in crafting domestic violence legislation is settling on a substantive definition of what constitutes “domestic violence” in a “domestic relationship.” Domestic violence occurs in the most intimate of relationships, and “violence” often extends beyond physical acts, encompassing economic and social forms of abuse that may be less obvious than “stranger violence” to police officers, judges, social workers, or even family members and friends. The U.N. Model Framework responds to this challenge by recommending that States adopt the broadest possible definitions of both the acts of domestic violence and the types of relationships that are covered, at least in part to ensure the international uniformity of these laws. The Framework recommends that legislation clearly state that violence against women both in the family and within interpersonal relationships constitutes domestic violence, and that the language be clear and unambiguous in protecting female victims from gender-specific violence within the family and intimate relationships. Moreover, domestic violence should be distinguished from intra-family violence.

Item 1. “Domestic Violence”
Recommendations:

- The legal definition of domestic violence should be as broad
as possible, encompassing physical, psychological, economic, and social abuse.

- Attempted abuse should also be addressed.
- General “catchall” provisions may be useful to allow judicial discretion and provide protection for the largest pool of potential victims.

“Domestic violence” can encompass many forms of violence—not just physical violence—as part of a pattern of abusive or controlling behavior by one person toward another. The U.N. Model Framework recommends that “all acts of gender-based physical, psychological and sexual abuse” that are “within interpersonal relationships should be included.”

The Framework indicates that such violence includes each of the elements discussed below, as well as, inter alia, arson, marital rape, dowry or bride-price related violence, female genital mutilation, violence related to exploitation through prostitution, and violence against household workers. The Framework also specifies that attempts to commit any of these acts should be covered.

While the statutes reviewed here are not as comprehensive as the Framework, they generally cover the most significant types of domestic violence:

**Physical abuse.** The definitions of domestic violence in all of the statutes reviewed include physical abuse. Ghana, Mauritius, South Africa and Zimbabwe each generally define physical abuse as physical assault or force used against another person. Namibia’s definition of physical abuse is somewhat broader, incorporating forcibly confining or detaining the complainant or physically depriving the complainant of access to basic necessities.

**Sexual abuse.** The definitions of domestic violence in all of the statutes surveyed also include sexual abuse. Each country defines sexual abuse broadly to include any kind of sexual contact or conduct, but Mauritius’ definition of sexual abuse extends to compelling the victim to commit any act, including non-sexual acts, from which the victim has the right

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278. Id. ¶¶ 5, 11.


to abstain. Both Ghana and Mauritius focus on the requirement of some kind of force, while South Africa and Zimbabwe focus on the effect of the conduct on the victim (as opposed to whether or not it was forceful). Namibia defines sexual abuse to include both forceful conduct and conduct that has the effects described above; it also broadens the definition of sexual abuse to include exposing the victim to sexual material that humiliates or degrades the victim, and to engaging in sexual conduct with a person with whom the victim has emotional ties.

Emotional, verbal & psychological abuse. Ghana, Namibia, South Africa and Zimbabwe include emotional, verbal and psychological abuse in their definitions of domestic violence. Ghana defines such abuse as “any conduct that makes another person feel constantly unhappy, miserable, humiliated, ridiculed, afraid, jittery or depressed or to feel inadequate or worthless.” Namibia’s definition encompasses “any pattern of conduct which seriously degrades or humiliates the complainant, or a family member or dependent of the complainant, or deprives such person of privacy, liberty, integrity or security.” South Africa and Zimbabwe both define such abuse in similar terms, but give a list of behaviors that would constitute emotional abuse, focusing on repetitive conduct. Such behaviors include repeated insults, repeated threats to cause emotional pain, or repeated exhibition of obsessive possessiveness or jealousy that constitutes a serious invasion of the complainant’s privacy.

Economic abuse & damage to property. Ghana, South Africa, Zimbabwe, and Namibia each include economic abuse in their definitions of domestic violence. All four provisions focus on economic deprivation of property to which the complainant is entitled by law, and some include spe-
cific references to economic necessities. Some provisions explicitly include damage to property. Mauritius does not include economic abuse in its definition of domestic abuse, but addresses actual and attempted damage to property separately.

Intimidation & harassment. All of the legislation reviewed includes intimidation and harassment as “domestic violence”; while Ghana and Mauritius include them together, Namibia, South Africa and Zimbabwe define the two terms separately. Where definitions of these terms are provided, “intimidation” is defined to mean threats that induce fear, whereas “harassment” is defined to cover repetitive patterns of conduct.

Stalking. South Africa and Zimbabwe both include “stalking” in their definitions of domestic abuse, defined as repeatedly following, pursuing or accosting the complainant.

Threats & attempts. The reviewed statutes address threat and attempts of “domestic violence” in different ways. Namibia makes a blanket provision for “where applicable, threats or attempts to do any of the [defined] acts ...” By contrast, Mauritius specifically includes threats of all of the aforementioned forms of abuse, but includes attempts only in certain substantive provisions.

Patterns & isolated incidents. Namibia’s statute contains two provisions that recognize the unique nature of domestic violence. First, it allows


291. Protection from Domestic Violence Act, No. 6 (1997) § 2(g) (Mauritius).

292. Domestic Violence Act (2003) § 1(c) (Ghana); Protection from Domestic Violence Act, No. 6 (1997) § 2(c) (Mauritius).


that “any single act” can constitute “domestic violence,” with the exception of harassment and emotional, verbal or psychological abuse. Secondly, and perhaps more importantly, it notes that a “number of acts that form part of a pattern of behaviour may amount to domestic violence, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.” The Ghanaian law also deals explicitly with the pattern of abuse that characterizes domestic violence.

Additional forms of abuse. Each statute surveyed also includes various provisions that appear to be singular when compared to other laws. For example, Mauritius specifically includes harming a child of the spouse. South Africa, among others, includes entry into the complainant’s residence without consent (if the parties do not share that residence) as a form of abuse.

South Africa appears to approach the seemingly limitless varieties of abuse by using a catchall provision that covers “any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.” Other countries attempt an exhaustive catalogue. Zimbabwe, for example, includes deprivation of access to the complainant’s place of residence or to a reasonable share of the use of the facilities associated with it, abuse derived from discriminatory cultural or customary rites and practices (such as virginity testing, genital mutilation, pledging women and girls for the purpose of appeasing spirits, abduction while married, forced marriage, and forced wife inheritance), and abuse perpetrated by virtue of the complainant’s age, physical capacity or mental capacity if the perpetrator and complainant have some sort of legal status relationship.

**Item 2. “Domestic Relationship”**

Recommendations:

- National legislation should refer to “intimate partners” or use similar terminology that encompasses non-familial relationships.

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Same-sex relationships and romantic relationships outside of marriage should be explicitly included.

Domestic violence occurs in many contexts, requiring a comprehensive definition of the relationship between abuser and victim. Many recent studies have used the term “intimate partners” to define the relevant relationship. Such a characterization removes the implied requirement that domestic violence be “of or relating to the household or the family,” and emphasizes the intimate nature of the relationship instead. In order to encompass the spectrum of human relationships in which there is potential for abuse, the U.N. Model Framework takes a different, “list-based” approach and recommends that domestic violence legislation include the following types of relationships: wives, live-in partners, former wives or partners, girlfriends (including those not living with their boyfriends), female relatives (including sisters, daughters and mothers) and female household workers. Notably missing from the U.N. Model Framework is any explicit discussion of same-sex relationships, which should be a part of any domestic violence legislation.

Marriage. Each of the statutes surveyed includes marriage in its definition of a domestic relationship; former spouses are also included in this definition. Namibia and South Africa further specify that the term “marriage” includes all marriage according to any law, custom or religion. Mauritius also specifies that the definition of marriage includes any civil or religious marriage.


305. The U.N. Special Rapporteur on Violence Against Women, supra note 266, ¶ 7.

306. Id.

Cohabitation. Each of the reviewed statutes includes some form of cohabitation in its definition of domestic relationship, with varying degrees of broadness. With respect to same-sex relationships, South Africa is the only country that explicitly states that they are covered. Ghana and Zimbabwe do not specify whether parties living together may include both same sex and opposite sex couples, although Zimbabwe's definition includes “any person who is or has been living with the respondent.” Mauritius and Namibia explicitly exclude same-sex couples from their definitions. Failure to include same-sex couples in these categories is problematic, especially since some recent studies indicate that domestic violence among same-sex cohabitants may occur at a higher rate than between heterosexual cohabitants.

The countries surveyed also differ on whether the nature of the cohabitation must be romantic. Ghana's definition specifically includes parties living together as a married couple, as co-tenants or in a domestic servant relationship. Mauritius limits its definition to a man and woman who are living or have lived together as husband and wife. South Africa, Zimbabwe and Namibia include (i) parties living together in a relationship in the nature of marriage although they are not married, and (ii) parties who share or have recently shared a residence, seemingly without regard to the nature of their relationship. Additionally, Namibia includes parties who have some connection of a domestic nature, such as if one party is financially dependent on the other.

Parties who have children together. Each of the statutes reviewed appears to have a provision covering parties who have a biological child together. Namibia explicitly includes couples who have an adopted child and couples who are expecting a child, excluding children conceived as a result of rape or where parties contributed gametes for artificial insemina-
Zimbabwe does not have a provision that explicitly covers couples that have a child, but does include “any person who has or had an intimate relationship with respondent ... in a sexual or intimate relationship,” which would necessarily cover any couple with a biological child.\textsuperscript{315}

\textit{Family members.} Although the U.N. Model Framework recommends that domestic violence should be considered separate from intra-family violence,\textsuperscript{316} several countries have broadened their respective definitions to include children and other family members. Ghana, South Africa and Namibia each have a provision including family members in the definition of a domestic relationship, and Namibia has a separate provision including parties in a parent-child relationship.\textsuperscript{317} Zimbabwe has a provision including parties in parent-child relationships.\textsuperscript{318} Ghana’s provision simply includes “family members,” but gives no indication of how broadly this term is to be defined. South Africa limits its definition of family members to those related by consanguinity, affinity or adoption. Zimbabwe includes a biological, adopted or step child, born in and out of wedlock, but does not have a provision including other family members. Namibia’s definition of a family member includes parties who are related by sanguinity, affinity or adoption or who have such relationships through a foster relationship.

\textit{Other romantic relationships.} Ghana, Namibia, South Africa, and Zimbabwe have also included a provision that covers romantic relationships other than marriage or cohabitation.\textsuperscript{319} Each of these countries includes parties who are engaged or who are involved in an intimate or romantic relationship, and Ghana’s statute explicitly states that the relationship

\begin{itemize}
\item \textsuperscript{314} Combating of Domestic Violence Act, No. 4 (2003) § 3(1)(c) (Namib.).
\item \textsuperscript{315} The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 2 (Zimb.) (This provision would not cover adopted children, however.)
\item \textsuperscript{316} The U.N. Special Rapporteur on Violence Against Women, supra note 266, ¶ 6.
\item \textsuperscript{317} Domestic Violence Act (2003) § 2(1)(e) (Ghana); Combating of Domestic Violence Act, No. 4 (2003) § 3(1)(c)-(e) (Namib.); Domestic Violence Act 116 of 1998 (1998) § 1(vii)(d) (S. Afr.). Mauritius does not have a provision including family members other than those previously discussed.
\item \textsuperscript{318} The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 2 (Zimb.).
\end{itemize}
need not be sexual. Namibia and South Africa also specify that the relationship can be actual or perceived, and South Africa specifies that the relationship may be of any duration.

Other provisions. Distinct from the other reviewed statutes, Namibia’s definition of domestic relationship also includes a provision stating that any domestic relationship continues for two years after the dissolution of that relationship (dissolution of marriage or engagement, or cessation of cohabitation), unless a court rules that the two-year restriction should not apply or should be extended.320

2. Duties of Police & Enforcement Officers

Recommendations:

- States should provide training to police and security forces to assist in recognizing patterns of behavior associated with domestic violence.
- Police should inform victims of their rights to protection under the law.
- Police should be required to take all necessary measures to protect the victim (i.e. arrange for transportation, assist in obtaining a protective order, etc.).

Police officers face unique challenges responding to reports of domestic violence. On arriving at a scene, police often do not encounter an “ordinary” perpetrator/victim situation in which the aggressor is clear—it may look like “just a fight.” Indeed, some abusers may have been through a police call many times before, be skilled at deflecting attention, and may even be using the call to police to manipulate the abused. This problem is further complicated by the fact that the abused may not be forthright about what has happened. In fact, he or she may blame himself or herself about the altercation, and may question any decision to call the police.

These challenges require clear police procedures when responding to domestic violence calls. The U.N. Model Framework suggests that legislation require officers to respond to a call, inter alia, when the person reporting indicates violence is imminent, when a protective order is in effect and likely to be breached, or when domestic violence has occurred previously.321 The Framework then describes the specific steps an investiga-

321. The U.N. Special Rapporteur on Violence Against Women, supra note 266, ¶ 15.
tion must take, including interviewing parties and witnesses in separate rooms, recording the complaint in detail, advising the victim of his or her rights, filling out a domestic violence report, providing transportation to the nearest hospital if required, providing transportation for the victim and any children to a safe place or shelter, providing protection to the person who reported the violence, and arranging for the removal of the offender from the home, as well as for his or her arrest if necessary.\textsuperscript{322} The Framework is particularly detailed as to the police’s explanation of legal rights to the victim.\textsuperscript{323}

The legislation reviewed generally makes special provision for the investigation of domestic violence calls, but addresses the investigative stages and police duties described by the U.N. Model Framework in somewhat less detail.\textsuperscript{324} The Mauritius statute requires that an officer who reasonably suspects domestic violence investigate the matter as soon as possible; and also requires that records of domestic violence reports be kept and investigations be made into the matters recorded there.\textsuperscript{325} If the officer

\textsuperscript{322}Id. ¶ 17.

\textsuperscript{323}"The officer must provide the victim with a written statement of the legal procedures available to her, in a language that she understands. The statement must indicate that:

(i) The law provides that the victim may seek an \textit{ex parte} restraining court order and/or a court order prohibiting further abuse against the victim, her dependants, anyone in her household or anyone from whom she requests assistance and refuge;

(ii) The restraining order and/or court order shall protect the victim’s property or property held in common from destruction;

(iii) The restraining order may order the offender to vacate the family home;

(iv) In the event of the violence taking place during the night, at weekends or on public holidays, the victim must be informed of emergency relief measures to obtain a restraining order by calling the judge on duty;

(v) The victim need not hire a lawyer to get an \textit{ex parte} restraining order or court order;

(vi) The offices of the clerk of the court shall provide forms and non-legal assistance to persons seeking to proceed with \textit{ex parte} restraining orders or court orders. To obtain a court order, the victim must be advised to apply to the court in the prescribed district/jurisdiction;

(vii) The police shall serve the \textit{ex parte} restraining order on the offender." The U.N. Special Rapporteur on Violence Against Women, \textit{supra} note 266, ¶ 21(e).

\textsuperscript{324}Other countries make the task administratively. For example, the Namibian statute requires the Inspector-General to “issue directives on the duties of police officers in respect of matters pertaining to domestic violence” and provides general guidance as to the possible contents of such order. \textit{Combating of Domestic Violence Act}, No. 4 (2003) § 26 (Namib.).

\textsuperscript{325}Protection from Domestic Violence Act, No. 6 (1997) § 11 (Mauritius).
“reasonably believes that action should be taken to protect the victim of an act of domestic violence from any further violence,” the officer must:

(i) Explain to the victim his or her rights to protection against domestic violence;
(ii) Provide or arrange transportation for the victim to an alternative residence or a safe place of shelter;
(iii) Provide or arrange transportation for the victim to the nearest hospital or medical facility for the treatment of injuries;
(iv) Assist the victim in filing a complaint regarding the domestic violence;
(v) Accompany and assist the victim to his or her residence or previous residence for the collection of his or her personal belongings; and
(vi) File for a protective order on behalf of the victim with his or her consent.

The South African legislation takes an even more general approach, requiring the police to attend “at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported”: 326

(i) Render such assistance to the victim as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment;
(ii) If it is reasonably possible to do so, hand a notice containing information about his or her rights to the victim; and
(iii) If it is reasonably possible to do so, explain to the victim the content of such notice, including the remedies at his or her disposal and the right to lodge a criminal complaint, if applicable.

Zimbabwe also imposes a general duty of assistance and advice (including advice as to the right to apply for a protective order and lodge a criminal complaint), and includes a term that provides “where a complainant so desires, the statement on the nature of domestic violence shall be taken by a police officer of the same sex as that of the complainant.” 327

Both South Africa and Zimbabwe also allow officers to arrest, with-

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out a warrant, a person they reasonably suspect has committed or is threatening to commit an act of domestic violence, although the South African statute limits these arrests to the scene of the incident. The Zimbabwe statute also requires that all reasonable measures be taken to bring the suspected person before a magistrate within 48 hours.

3. Protective Orders
Recommendation:

- Third parties should be able to bring a complaint of domestic violence.
- Complaints should be handled expeditiously, with the aid of measures such as after-hours filing locations.
- A “balance of the probabilities” standard for issuing a protective order should be used by the court.
- Both complainant and respondent should have the opportunity to apply for a change or termination of a protective order, subject to a requirement that such applications be deemed voluntary by the court.

The protective order is the core of an immediate response to domestic violence in most jurisdictions. While the ultimate solution to an abusive relationship often lies in permanent measures (i.e., divorce, separation, custody order, etc.), protective orders are the mechanism by which the State attempts to stop further abuse immediately. The protective order is usually an action brought by a private “complainant” to stop the abusive actions of the “respondent” abuser. In many jurisdictions, the complainant may obtain a temporary order ex parte, pending a full hearing at which the respondent is present. If a protective order is deemed appropriate after such a hearing, the judge may then craft an order to protect the complainant from the abuser, generally with significant flexibility as to the actual terms.

Item 1. Initiation
Who may bring a complaint. In all the legislation reviewed, any com-

329. We note that this terminology differs across jurisdictions, but we use “complainant” and “respondent” for consistency. For similar reasons, the court official is termed a “judge.”
plaintant who has been the victim of domestic violence may file a complaint seeking a protective order. Differences arise, however, as to when an order may be brought on behalf of another. Most legislation allows complaints to be brought by parties other than the complainant, sometimes with and sometimes without the victim’s consent. Ghana, with perhaps the most lenient legislation, allows any person with information about domestic violence to file a complaint, seemingly with or without consent, and requires a social worker, probation officer or health care provider to file a complaint when doing so would be in the interest of a victim. Ghana also allows family members to file a complaint when the complainant is unable to do so, and allows certain parties to file on behalf of a deceased representative. Namibia, South Africa, and Zimbabwe also make broad provision for complaints filed on behalf of another, albeit in more limited circumstances than Ghana. All allow any person, such as a family member, police officer, social worker, health care provider, teacher, religious leader or employer, to file a complaint with the complainant’s consent. In addition, South Africa allows any person to file a complaint without consent where the complainant is a minor, mentally retarded, unconscious, or someone who the court is satisfied cannot give consent. Namibia makes similar provisions, and also allows complaints filed on behalf of those regularly under drug or alcohol influence or at risk of serious physical harm. Perhaps the narrowest legislation is that of Mauritius, which allows a complaint to be filed only by the complainant herself or by an enforcement officer with the complainant’s consent.

The U.N. Model Framework also recommends that domestic violence

330. Mauritius limits this to complainants who reasonably believe their spouses are likely to commit further acts of domestic violence. Protection from Domestic Violence Act, No. 6 (1997) § 3(1) (Mauritius). South Africa and Namibia specify that a minor is able to apply without the assistance of a parent, although Namibia limits this to situations in which the court is satisfied that the minor has sufficient understanding and when the alleged violence is of a serious nature. Combating of Domestic Violence Act, No. 4 (2003) § 4(5) (Namib.); Domestic Violence Act 116 of 1998 (1998) § 4(4) (S. Afr.).


332. Combating of Domestic Violence Act, No. 4 (2003) § 4 (Namib.); Domestic Violence Act 116 of 1998 (1998) § 4 (S. Afr.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 6 (Zimb.). In addition to allowing the complainant or a person with her consent to file, Zimbabwe also allows a person acting as the complainant’s representative, a person with care or custody of a minor complainant, or, with the court’s consent, a person acting as the complainant’s representative in his or her official capacity to file without the consent of the complainant.

legislation provide for victims, witnesses of domestic violence, family members, close associates, medical service providers, and domestic violence assistance centers to complain of incidents of domestic violence to the police, or to file a complaint in court. 334 As noted above, most of the statutes surveyed allow the victims, as well as family members or close associates to file complaints regarding domestic violence. However, none of the laws considered explicitly allows complaints to be filed by domestic violence assistance centers; and the consent requirements imposed by the reviewed statutes may significantly limit the protective orders that may have otherwise been sought. In addition, the U.N. Model Framework suggests that victims be allowed to file complaints with a private health care facility, which can then direct them to the police or a judicial division. In recognition of the intimidation that often affects victims of domestic violence, this Report concurs with the U.N. Model Framework and recommends that national legislation enable third parties to act on the victim’s behalf to ensure the most comprehensive prosecution of these crimes.

*When a complaint may be brought.* Although all of the legislation reviewed allows a complaint to be brought at any time, Mauritius limits complaints to situations where the complainant reasonably believes that his or her spouse is likely to commit a further act of domestic violence. 335 South Africa and Zimbabwe extend the times when a complaint may be brought to allow filings outside of normal court days and hours where the court is satisfied that the complainant may otherwise suffer undue hardship. 336

*Where a complaint may be brought.* With the exception of Ghana and Namibia, none of the laws reviewed explicitly places limits on where a complaint may be filed, but it is possible that jurisdictional rules in these countries may serve as a limitation. Ghana specifically limits where a complaint may be filed to the places where the offender resides, where the victim resides, where the domestic violence occurred, or where the victim is temporarily resident. 337 Namibia has a similar requirement, but notes that “no minimum period of residence is required.” 338

334. The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶12. *Cf. Id.* ¶ 33 (The same document, however, allows that the ambit may be narrower).

335. Protection from Domestic Violence Act, No. 6 (1997) § 3(1) (Mauritius).


What must be included in a complaint. Of the reviewed legislation, only Namibia’s statute incorporates a detailed list of what a complainant should include in a complaint, requiring that it be accompanied by an affidavit that states the facts on which the application is based, the nature of the order applied for, and the police station where any breach of the protective order is likely to be reported.339 Both Namibia and South Africa allow supporting affidavits from people with knowledge of the matter, while Zimbabwe requires such affidavits.340 In addition, Zimbabwe allows courts to call for evidence, including medical evidence, and to examine witnesses before the court to supplement the information included in the complaint.341

Duties of the clerk receiving a complaint. Several of the statutes reviewed impose certain duties on the court or officers of the court when complaints are filed. In Namibia, South Africa and Zimbabwe the court clerk must inform the complainant of certain specified information. In Namibia, the clerk must inform the complainant of the relief available and must assist in preparing the application.342 In South Africa, the clerk must inform the complainant of the relief available and the right to lodge an additional criminal complaint, but must do so only if the complainant is not represented by legal counsel.343 In Namibia and Zimbabwe, the clerk is statutorily required to submit the claim to the court as quickly as is reasonably possible; Zimbabwe further requires that the claim be filed within 48 hours.344

Item 2. Interim Procedures & Orders
Because a domestic abuse situation often threatens continued violence, many jurisdictions allow a victim to seek an ex parte order pending

339. Id. § 6(2).
343. Domestic Violence Act 116 of 1998 (1998) § 4(2) (S. Afr.). See also The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 6(4) (Zimb.) (if legal counsel does not represent the complainant, charging the clerk to inform the complainant of the relief available, the effect of any order that may be granted and the means provided for enforcement, the right to lodge a criminal complaint, and the right to compensation for any loss or injury suffered).
a hearing for a full protective order. In addition, “[a]n ex parte order may be issued on the application of a victim of violence in circumstances where the [respondent] chooses not to appear in court or cannot be summoned because he is in hiding. An ex parte order may contain a preliminary injunction against further violence and/or preventing the [respondent] from disturbing the victim/plaintiff’s use of essential property, including the common home.”

When an interim order may be issued. In South Africa and Zimbabwe, a court determining whether to issue a protective order considers both whether the respondent has committed or is committing an act of domestic violence and whether undue hardship will be suffered if a protection order is not issued immediately. Courts in Zimbabwe are also instructed to consider whether the respondent has threatened to commit an act of domestic violence. In these two countries, if the court finds prima facie evidence of each element, the court is required to issue an interim order. By contrast, in Mauritius the court need only satisfy itself that there is a serious risk of harm being caused to the applicant before the application may be heard, and need not necessarily find that domestic violence has been or is occurring. However, if a court in Mauritius finds that there is a serious risk of harm occurring the court may issue a protective order and provide the complainant with police protection; but is not required to do so. Under the Namibian statute, the court must issue an order “if it is satisfied that there is evidence that the respondent is committing, or has committed domestic violence.” This Report recommends that legislation require the automatic issuance of an interim order upon the satisfaction of a baseline evidentiary standard.

Procedural protection for the respondent. All of the reviewed statutes provide that notice must be given summoning the respondent to appear before the court on a fixed date for a hearing on whether a protective order should be issued or whether the interim order should be varied or discharged.

When the order is in force. In Mauritius and Zimbabwe, the domestic violence statutes specify that the interim order remains in force until the

345. The U.N. Special Rapporteur on Violence Against Women, supra note 266, ¶ 28.
346. Id. ¶ 26.
court makes a decision to grant the protective order or revokes the interim order. 351 The South African statute does not specify how long an interim order remains in force, but does state that an interim order does not enter into force until notice of the order is served on the respondent as described above. 352

**Item 3. Order Procedures**

**(a) Conversion of Interim Orders**

South Africa and Zimbabwe each provide a court with the ability to convert an interim order into a permanent order in particular circumstances, despite the fact that the respondent is not present. 353 In South Africa the court must be satisfied that proper service has been effected, while in Zimbabwe the court need only be sure that the defendant has been served or has otherwise had notice of the application. Likewise, in Namibia, the court must confirm the interim protective order if the respondent was served and does not appear. 354 In South Africa the court must, in addition, be satisfied that the application contains prima facie evidence that the respondent has committed or is committing an act of domestic violence.

**(b) Evidentiary Considerations & Standards**

The establishment of reasonable evidentiary standards is an important consideration when drafting and enforcing domestic violence legislation. Protective orders restrict an abuser’s freedom of movement, often removing him from his home and/or limiting contact with his children. Such remedies should not be imposed by a protective order without appropriate evidence.

*Standard for granting a protective order.* In South Africa and Zimbabwe, the court must satisfy itself that, on a balance of probabilities, the respondent has committed or is committing an act of domestic violence. 355 If the court finds that this standard is met, a South African court is re-

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351. Protection from Domestic Violence Act, No. 6 (1997) § 3(10) (Mauritius); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 8(8) (Zimb.). In Zimbabwe, whenever an interim protection order is issued the court is also required to issue an arrest warrant, which is attached to the order and suspended on the condition that the respondent complies.


353. Id. § 6(1); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 9(2) (Zimb.).


quired to issue a protective order, while a Zimbabwean court may choose to do so. In Namibia, the court need only be satisfied that there is “evidence that the respondent is committing, or has committed domestic violence.”

What the court considers when granting a protective order. In listing evidence the court may or must consider in deciding whether to grant a protective order, the reviewed statutes vary both with respect to specificity and to whether the court is required to consider it. Namibia and Mauritius provide very specific lists of things that courts are required to consider in deciding whether or not to grant an order. In Namibia, courts must consider the history of domestic violence between the parties, its nature, the existence of immediate danger to persons or property, the complainant’s perception of the seriousness of the respondent’s behavior, and the need to preserve the health, safety and well-being of the complainant and any child or person in his or her care. Under Mauritius’s statute, courts must consider the need to ensure protection for the complainant, the welfare of any child affected or likely to be affected, the accommodation needs of both the complainant and respondent and their respective children, any hardship the order may cause to the respondent or his children, and any other matter the court deems relevant.

South Africa and Zimbabwe, on the other hand, give courts much broader discretion in determining what evidence to consider. In South Africa the court must consider any evidence offered to support an application for an interim protective order, while courts in Zimbabwe may choose to consider this evidence. In both jurisdictions, courts may call for and consider further affidavits or oral evidence as they feel necessary.

Duration of protective order. There is also considerable variety in how long a protective order can last. South Africa specifies that a protective order remains in force until set aside, and is not automatically suspended upon the noting of an appeal. Namibia varies the duration of the protective order depending on its content. In Mauritius, a protective order may endure a maximum of 24 months.

357. Protection from Domestic Violence Act, No. 6 (1997) § 3(4) (Maurit); Combating of Domestic Violence Act, No. 4 (2003) § 7(4) (Namib.).
(c) Procedural Protections

A protective order hearing requires certain procedural protections to ensure that the cycle of violence outside the courtroom does not find its way inside. In addition, as with other forms of gender-based violence, protecting the identity of the complainant is necessary both to encourage complainants to come forward and to protect them from further violence.

Closed hearings. In Ghana, protective order proceedings “shall be heard in private in the presence of the parties, their lawyers and any other person permitted by the court to be present.”362 The South African statute lists the specific parties who may be present at a protective order hearing: officers of the court, the parties, any person bringing an application for an order on behalf of another, legal representatives, witnesses, up to three persons “for the purpose of providing support” for each party, and “any other person whom the court permits to be present.”363 Mauritius provides that any hearings for a protective order must be held in camera subject to certain constitutional protections.364

Most of the reviewed statutes also allow a court to exclude certain persons it deems to be a problem in the proceedings—even if such persons are ordinarily allowed in proceedings. In South Africa, “the court may, if it is satisfied that it is in the interests of justice, exclude any person from attending any part of the proceedings” and retains other powers “to hear proceedings in camera or to exclude any person from attending such proceedings.”365

Publication. In Ghana, “a person shall not publish any report of the [protective order] proceedings.”366 Namibia prohibits such information “which reveals or might reveal the identity of an applicant, a complainant or any child or other person involved in [protective order] proceedings.”367 While the law in South Africa contains a similar injunction, it also allows a court “if it is satisfied that it is in the interests of justice” to “direct that any further information relating to proceedings ... shall not be published.”368 Namibia and South Africa both require the physical address of the complainant to be omitted from the protective order.

(d) Prejudice in Other Proceedings

Another procedural concern in the context of the protective order is the possible prejudice such a proceeding might create in another action. While the issue will be more or less urgent depending on the legal system, most common law legislation provides that a protective order will not have any bearing on concurrent civil or criminal action. For example, the South African statute provides that a court may not refuse to issue a protective order or impose conditions on such an order “merely on the grounds that other legal remedies are available to the complainant.”369 Ghana provides that “a criminal charge arising from the acts of domestic violence shall be in addition to and shall not affect the rights of [a complainant] to seek a protection order .... Any [protective order] proceedings ... shall be in addition and shall not derogate from the right of a person to institute civil action for damages.”370

Item 4. Order Contents

The contents of an issued protective order depend on all the facts and circumstances of the abusive situation; and legislation should allow the judge issuing the order to tailor the order accordingly. Relief often extends beyond enjoining the respondent from further abuse of the complainant; for example, an order ejecting the respondent from a shared residence or granting custody of children to the complainant may be appropriate. Such flexibility is essential if an order is to adequately protect complainants in vastly different abusive situations.

Generally, protective order contents may be divided into: (i) “substantive” relief that prohibits the respondent from certain actions or grants the complainant certain rights; and (ii) “procedural” relief that links the protective order to further civil or criminal proceedings. As to the first, the U.N. Model Framework proposes that a protective order may contain “any or all” of nine separate forms of immediate substantive relief:371

(i) Restrain the respondent from causing further violence to the victim/plaintiff, his or her dependents, other relatives and persons who give him or her assistance from domestic abuse;
(ii) Instruct the respondent to vacate the family home, without in any way ruling on the ownership of such property;
(iii) Instruct the respondent to continue to pay the rent or mort-

369. Id. § 7(7).
371. The U.N. Special Rapporteur on Violence Against Women, supra note 266, ¶ 38(a)-(i).
gage and to pay maintenance to the plaintiff and their common dependents;

(iv) Instruct the respondent to hand over the use of an automobile and/or other essential personal effects to the plaintiff;

(v) Regulate the respondent’s access to dependent children;

(vi) Restrain the respondent from contacting the plaintiff at work or other places frequented by the plaintiff;

(vii) Upon finding that the respondent’s use or possession of a weapon may pose a serious threat of harm to the complainant, prohibit the respondent from purchasing, using or possessing a firearm or any such weapon specified by the court;

(viii) Instruct the respondent to pay the complainant’s medical bills, counseling fees or shelter fees; and

(ix) Prohibit the unilateral disposition of joint assets.

Most African domestic violence legislation includes substantially similar relief.

Protection from further violence. All the reviewed legislation restrains the respondent (or associates) from committing further acts of violence, usually through a general prohibition on further domestic violence by the respondent. South African orders may prohibit the respondent from “committing any act of domestic violence [or] enlisting the help of another person to commit any such act.” 372 Zimbabwean, Mauritian, and Ghanaian orders contain similar provisions. 373 Namibian orders must “include a provision restraining the respondent from subjecting the complainant to domestic violence.” 374 Consistent with the U.N. Model Framework, some legislation also makes provision for seizing firearms or other dangerous weapons as needed to prevent further violence. 375


373. The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 10(1)(a) (Zimb.); Protection from Domestic Violence Act, No. 6 (1997) § 3(1) (Mauritius); Domestic Violence Act (2003) § 14(1) (Ghana). The Ghanaian legislation makes further provision for specific prohibitions against “physically assaulting or using physical force against the applicant or any relation or friend of the applicant” or “forcibly confining or detaining the applicant or any relation or friend of the applicant,” as well as other prohibitions against forcible, abusive, humiliating, or degrading sexual contact with the complainant and against depriving the complainant of certain economic necessities. Id. §§ 14(2)(a)-(f).


Certain legislation also explicitly prohibits the respondent from damaging the complainant’s property. Ghana’s law is perhaps the broadest, allowing a protective order, *inter alia*, to prevent a respondent from “disposing of or threatening to dispose of moveable or immoveable property,” “destroying or damaging, or threatening to destroy or damage,” or “hiding or hindering the use of property” in which the complainant has a material interest.376

**No-contact provisions.** Each of the reviewed legislative provisions contains “no contact” provisions designed to keep the respondent away from the complainant, primarily through prohibiting the respondent from entering certain locations. Some legislation enhances the location-based prohibitions by allowing a judge to enjoin the respondent from certain communications with the complainant. The Namibian legislation demonstrates a broad implementation of “no contact” rules; under its terms, a protective order may:

(i) forbid the respondent to be, except under conditions specified in the order, at or near specified places frequented by the complainant or by any child or other person in the care of the complainant, including but not limited to:

(aa) the residence, workplace or educational institution of the complainant, or any child or other person in the care of the complainant;

(bb) a shelter or other residence where the complainant is temporarily living; or

(cc) the residences of specified family members;

(ii) forbid the respondent from making, except under conditions specified in the order, any communication to the complainant, any child or other person in the care of the complainant or specified members of the complainant’s family, including direct or indirect personal, written, telephonc or electronic contact, but a “no-contact” provision may be extended to a person other than the complainant or any child or other person in the care of the complainant, only where consent has been given by that person, and in the case of any other child,

376. Domestic Violence Act (2003) §§ 14(2)(i)-(k) (Ghana). See also Protection from Domestic Violence Act, No. 6 (1997) § 3(5)(e) (Mauritius); Combating of Domestic Violence Act, No. 4 (2003) § 14(2)(g) (Namib.). While the South African and Zimbabwean laws do not contain such explicit terms, the general provisions discussed below, together with the broad definitions of “domestic violence” mean that an order could probably contain such items.
only where consent has been given by a parent of that child or by a person under whose care that child is. 377

Similarly, other legislation contains provisions that focus on prohibiting the respondent from locations the complainant (i) resides at, (ii) works at, and (iii) frequents. 378 Notably, most laws enable a protective order to eject the respondent from a shared residence, but require him or her to continue paying rent or making mortgage payments as economic means permit. 379 While only the Ghanaian and Mauritian legislation contain explicit terms allowing a protective order to prohibit communications as in the Namibian legislation, 380 the general provisions of the Zimbabwean and South African legislation discussed below could allow orders in these countries to contain similar terms.

Temporary custody of children. Most of the legislation reviewed allows the protective order to prohibit contact between the respondent and any children, effectively awarding temporary custody to the complainant. For example, in South Africa, if the court is satisfied that it is in the best interests of any child it may “refuse the respondent contact with such child” or “order contact with such child on such conditions as it may consider appropriate.” 381 Zimbabwe and Namibia have similar legislation,
but without the explicit prerequisite “best interests” determination. Generally, such provisions are limited until the court issuing the order or another tribunal makes a more enduring order. Indeed, the Ghanaian legislation provides that “[w]here there is a need for special protection for a child,” a court may refer temporary custody matters to a Family Tribunal constituted under the 1998 Children’s Act.

Emergency economic relief. In most domestic violence situations, the female victim is dependent upon the male abuser for food, shelter, and the provision of goods for the family. Therefore, domestic violence legislation should provide for emergency economic relief in some form. In South Africa, the court may order the respondent “to pay emergency monetary relief having regard to the financial needs and resources of the complainant and the respondent.” In Zimbabwe, an order may be made “in respect of the complainant’s needs or that of any child or dependent of the respondent including household necessaries, medical expenses, school fees or mortgage bond or rent payment.” Ghanaian law allows a court to order the respondent to “relinquish property” to the complainant or “pay for medical expenses incurred by the [complainant] as a result of the domestic violence.” In Namibia, a court may order numerous forms of relief, including maintenance for dependents and the disposal of personal property. As noted above, under most legislation an order can include provisions requiring the respondent to continue rent or mortgage payments on a residence, even if the order prohibits the respondent from living there.

Additional powers of the court. Almost all of the legislation contains a
general term allowing a court to include in a protective order other terms as it sees fit. For example, an order in Zimbabwe can “[g]enerally direct the respondent to do or omit to do any act or thing which the court considers necessary or desirable for the well being of the complainant or any child or dependent of the complainant.” 390 South African, Namibian, and Ghanaian legislation make similar provisions. 391

In addition to this “substantive” relief, the U.N. Model Framework recommends that a protective order provide certain “procedural” relief that links the order to further civil or criminal proceedings. In particular, the Framework suggests the order may:

(i) Inform the complainant and the respondent that, if the respondent violates the restraining order, he or she may be arrested with or without a warrant and criminal charges brought against him or her;

(ii) Inform the complainant that, notwithstanding the protective order under domestic violence legislation, he or she can request the prosecutor to file a criminal complaint against the respondent; and

(iii) Inform the complainant that, notwithstanding the protective order under domestic violence legislation, he or she can activate the civil process and sue for divorce, separation, damages or compensation. 392

The legislation reviewed is less consistent in explicitly addressing such relief, but in many cases it could be deemed within the court’s ordinary discretion.

**Item 5. Order Termination**

This Report recommends that legislation grant some recourse to a respondent against whom a protective order has been issued. In fact, the majority of the legislation surveyed mirrors that of Mauritius, which states that “either party may apply to the court for a variation or revocation” of a protective order. 393 Due to the nature of abusive relationships, there is
always some concern that a complainant seeking a variation or revocation may not be acting freely. Some of the reviewed statutes account for this concern by making a proviso “that the court shall not grant such an application to the complainant unless it is satisfied that the application is made freely and voluntarily.”

4. Penalties
Recommendations:

- National legislation should mandate that crimes committed in the context of domestic violence or in violation of a protective order be prosecuted to the full extent of the law.
- Domestic violence statutes should clearly provide for civil remedies without significant limitations on the types of damages that can be awarded.

**Item 1. Violation of Protective Order**

“Violation of a protection order is a crime. Non-compliance shall result in a fine, contempt of court proceedings and imprisonment.”

The reviewed statutes universally subscribe to this recommendation of the U.N. Model Framework. For example, in Mauritius, any person “who willfully fails to comply with any interim or permanent [protective order] shall, on conviction, be liable to a fine not exceeding 25,000 rupees and imprisonment for a period not exceeding 2 years.” In Zimbabwe, any person “who fails to comply with the terms and conditions of an interim protection order or a protection order shall be guilty of an offence and liable to a fine ... or imprisonment for a period not exceeding five years or both such fine and such imprisonment.” The Zimbabwean statute also considers it “an aggravating factor for any person to continuously breach a valid protection order whether or not such person has been prosecuted under the protection order.”

395. The U.N. Special Rapporteur on Violence Against Women, supra note 266, ¶ 41.
396. Protection from Domestic Violence Act, No. 6 (1997) § 13 (Mauritius). The fine was increased from 10,000 rupees in the 2004 amendment.
The practical enforcement of a protective order is heavily dependent on the nature of the national legal system. However, the South African statute is illustrative of one approach that enables automatic enforcement of protective orders by providing for “hanging” arrest warrants when such an order is issued. Upon issuing a protective order, the South African court must make another order:

(i) Authorizing the issue of a warrant for the arrest of the respondent; and
(ii) Suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order of the protective order.\(^\text{399}\)

If there is a violation of the protective order, the complainant may hand the warrant of arrest together with an affidavit stating that the respondent contravened a prohibition, condition, obligation or order contained in the protective order, to any member of the South African Police Service.\(^\text{400}\) The member of the police service then “must forthwith”:

(i) Arrest the respondent if it appears that there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent by reference to:

(a) The risk to the safety, health or wellbeing of the complainant;
(b) The seriousness of the conduct comprising an alleged breach of the protective order; and
(c) The length of time since the alleged breach occurred.

(ii) If he or she is of the opinion that there are insufficient grounds for arresting the respondent immediately under (i), hand a written notice to the respondent calling the respondent to appear in court,

(iii) In any case, inform the complainant of his or her right to simultaneously lay a criminal charge against the respondent, if applicable, and explain to the complainant how to lay such a charge.

\(^{400}\) Id. § 8(4)(a).
South Africa’s legislation also contains a section providing that “[n]o prosecutor shall refuse to institute a prosecution [or] withdraw a charge, in respect of a [violation of a protective order].”401 Like provisions requiring the police to respond to domestic violence calls, this language appears to be aimed at encouraging prosecutors to treat domestic abuse with a seriousness comparable to crimes like rape by a stranger.

**Item 2. Separate Criminal Action**

While criminal action may be taken to enforce a protective order, it is important that legislation also reinforce the essentially criminal nature of most domestic abuse. Accordingly, while specific domestic violence legislation centers on the issuance of protective orders and other civil remedies, these solutions cannot substitute for State action. The only reviewed statute that appears to explicitly state that an act of domestic violence is also a criminal offense is Zimbabwe’s. That legislation provides that where an “act of domestic violence constitutes a criminal offence, the respondent shall be dealt with under the relevant law providing for such criminal offence.”402

The U.N. Model Framework provides considerably more detail, stating, *inter alia*, that the “prosecuting attorney or attorney-general shall develop, adopt and put into effect written procedures for officials prosecuting crimes of domestic violence.”403 The Framework also recommends several safeguards in proceedings comparable to those recommended for rape and sexual assault trials. For example, it suggests “the victim’s testimony shall be sufficient for prosecution” and that a complaint shall not be dismissed “solely on the grounds of uncorroborated evidence.”404 Nor should the “issue of a restraining order or protection order … be introduced as a material fact in subsequent criminal proceedings.”405 Moreover, “[e]nhanced penalties are recommended in cases of domestic violence involving repeat offences, aggravated assault and the use of weapons.”406

**Item 3. Separate Civil Action**

In addition to the emergency monetary relief that may be provided

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401. *Id.* § 18(1).


403. The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶ 44.

404. *Id.* ¶ 47.

405. *Id.* ¶ 50.

406. *Id.* ¶ 53.
by a protective order, some domestic violence statutes provide a cause of action for civil damages to the victims of domestic violence. For example, under Section 26 of the Ghanaian Domestic Violence Act:

any proceedings under this Act shall be in addition and shall not derogate from the right of a person to institute civil action for damages.407

Other reviewed statutes do not provide an explicit civil cause of action for damages, but the statutes do not preclude such an action. We believe that legislatures can best serve the interests of the abused by providing an explicit civil cause of action that is clear and not open to an interpretation that the protective order precludes such action. This Report recommends that:

• The statute should clearly and unambiguously provide civil remedies for victims.
• The statute should be explicit as to the types of damages a victim can seek (e.g., pain and suffering, compensation, etc.). The list should not be exhaustive, but function as a starting point permitting judges to provide for additional types of damages.

B. General Considerations & Good Practices
Recommendations:

• Victims of domestic violence should be permitted and encouraged to seek redress based upon general concepts of constitutional and human rights.
• Rehabilitation and behavior modification initiatives should be incorporated into treatment programs for abusers, but should not substitute for criminal penalties.

1. Survivor Rights
In addition to the rights a victim is afforded by statute against an abuser, legislatures may also create certain rights against the State. Several sets of rights may apply. First, the human rights protections that should be afforded the accused and the victim in rape or sexual assault situations are often applicable in domestic violence settings as well.408 Second, many

408. See Askin, supra note 59.
of the constitutional rights discussed above—and perhaps rights afforded by other legislation—may already grant victims some rights vis-à-vis the State for seeking redress when the State fails to properly enforce domestic violence legislation.\footnote{One example is the invocation of general constitutional rights in the United States to enforce certain domestic violence legislation. In one case, a plaintiff brought a civil suit against a municipality, arguing that the failure of the municipality’s police officers to respond to her repeated reports over several hours that her estranged husband had taken their three children in violation of her protective order against him violated her constitutional rights. Ultimately, the husband murdered the children. See Gonzalez v. Castle Rock, 366 F.3d 1093, 1095 (10th Cir. 2004) (en banc). In another case, a plaintiff sued a city because police officers repeatedly ignored her complaints about violence by her estranged husband and even stood by and watched as he savagely beat her. See Thurman v. City of Torrington, 595 F. Supp. 1521, 1524-1526 (D. Conn. 1984).}

Third, domestic violence legislation itself may grant victims rights against the State. For example, Ghana’s statute creates an entitlement to free medical treatment for victims of domestic violence.\footnote{Domestic Violence Act (2003) § 7(3) (Ghana).}

2. Rehabilitation

Some of the more controversial responses to domestic violence have been efforts focused on the rehabilitation of abusers. Proponents of such programs argue that domestic violence is a function of dependencies that result in part from the dysfunctional behavior of the abuser. They say that protective orders and support services such as shelters are of limited use in solving the source of violence that is, by its nature, systemic. One example of this approach is the Austrian Protection Against Violence Bill, which provides for anti-violence training for men upon order by the court. Abusers are integrated into a system of interventions that includes the support of the partner and is carried out in weekly group sessions supervised by a team of two trainers, a woman and a man, for at least 32 weeks.

Rehabilitation of abusers is also contemplated by certain elements of the U.N. Model Framework. One of the “non-emergency” services it suggests States supply is a service to assist in the “long-term rehabilitation of abusers through counselling.”\footnote{See The U.N. Special Rapporteur on Violence Against Women, supra note 266, ¶ 61(b).} With respect to criminal proceedings, depending on the offense and where the respondent is criminally “charged for the first time with a minor domestic violence offence and pleads guilty, [the Framework also calls for] a deferred sentence and counseling ..., along with a protection order, provided that the consent of the victim is obtained.”\footnote{Id. ¶ 51.}
The Framework also provides several principles for establishing abuser rehabilitation programs:

(i) The law shall mandate counseling programs for perpetrators as a supplement to and not as an alternative to the criminal justice system;
(ii) Counseling programs must be designed to (a) help the perpetrator take responsibility for his violence and make a commitment not to inflict further violence and (b) educate the perpetrator on the illegality of violence; and
(iii) Funding for counseling and perpetrator programs should not be taken from resources assigned to victims of violence.

3. Relationship to Rape & Sexual Assault

Although this Report addresses domestic violence, rape, and sexual assault separately, it is important to note that the crimes of rape and sexual assault can constitute some of the most severe acts of domestic violence. These transgressions have often been treated more leniently by the criminal justice system when committed within the domestic sphere, however. Far from being mutually exclusive, domestic violence and sexual assault are closely linked, rendering any legislative regime that focuses solely on one or the other incomplete.

Statistics demonstrate the pervasiveness of rape by spouses and intimate partners. For example, in a recent study of Tanzanian women, over 90% of rape victims interviewed identified their attackers as non-stranglers, and 46% were attacked by their “intimate partner.” Complicating matters is the tendency to under report crimes (such as rape) committed within the home because of a widespread perception that such problems are a private matter. Once reported, rape and sexual assault incidents committed by a spouse are often ignored because of cultural beliefs about

413. Id. ¶¶ 70-72.
414. Similar statistics have also been reported in Mozambique, where 33% of surveyed victims reported that they were raped by their husbands. Eunice M. Lipinge & Debie Lebeau, University of Namibia and Southern African Research and Documentation Centre, Beyond Inequalities 2005: Women in Namibia 11, (Windhoek and Harare) (2005).
416. Lipinge et. al., supra note 414.
a man’s need to control his household and its members.\footnote{417} This problem exists in many countries. For example, four years after Namibia’s passage of comprehensive and progressive domestic violence legislation in 2003, many Namibian citizens still report confusion and conflicting opinions about whether it is legal for a man to force his wife to have intercourse.\footnote{418} Some scholars also suggest that rape and sexual assault within the home may have a more serious effect on victims than when the same crimes are committed by strangers because of the betrayal and repetitive nature of abuse.\footnote{419}

In light of these observations, this Report recommends that lawmakers employ far-reaching and culturally sensitive education campaigns to change the attitudes of both citizens and enforcement bodies concerning acceptable spousal behavior. The codification of legal rights alone will not bring about social change if such rights are not enforced both inside and outside the domestic environment.

\section*{VI. IMPLEMENTATION AND RAISING AWARENESS}

Addressing the failure of a legal system to effectively investigate, prosecute and charge claims for gender-based violence—whether rape, sexual assault, domestic violence, or in another form—requires action on numerous fronts. Introducing legislation that appears good on paper will not suffice to bring about a change of approach without political and social initiatives designed to implement that legislation.\footnote{420} Thus, while the good practices described in this Report are necessary components of a comprehensive program to end gender-based violence, they are not sufficient in and of themselves. Legislation to improve education and employment opportunities, general AIDS-awareness campaigns, and property rights reform are also essential for women to take full advantage of their rights and for States to break the vicious cycle of gender-based violence.

\footnote{417}{\textit{Id.}}
\footnote{418}{The problem is worse in rural areas; the majority of rural women reported that they did not think marital rape was possible. \textit{Id.} at 12.}
\footnote{419}{Muganyizi et al., \textit{supra} note 415, at 144.}
\footnote{420}{However, legislation can often be the best place to begin such efforts. For example, Zimbabwe’s domestic violence statute established a minister-level committee with the goal of monitoring the domestic violence problem, raising awareness, promoting relevant research and services (including safe houses), and encouraging enforcement of the statute. It also created the position of Domestic Violence Counselor to carry out the directions of the committee. The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 14-15 (Zimb.).}
A. Training Public Officials

Recommendation:

- National governments should incorporate standardized training of police, judges, prosecutors, and health-care workers to improve their ability to recognize and treat victims of sexual and domestic violence.

Measures must be taken to familiarize relevant public officials—police officers, judges, lawyers, health care workers, etc.—with the content of legislation and policies pertaining to gender-based violence. In the United States, for example, a training curriculum on rape and sexual assault has been prepared for judges, prosecutors and other legal personnel by the National Judicial Education Program to Promote Equality for Women and Men in Courts. The Council of Europe has produced a self-training manual for police officers (the VIP Guide), which is used in over forty countries. Since victims of sexual violence generally require assistance from additional State agencies, most often health services, specialist training for workers in sectors outside the judicial is also vital. For example, South Africa’s National Policy Guidelines, discussed above, are aimed at providing uniform rules for medical professionals, police officers, prosecutorial staff and welfare and correctional services officials in dealing with victims of sexual violence.

Other countries, including South Africa, have introduced sexual offenses courts, which deal exclusively with crimes of sexual violence. Giving priority to sexual offenses within the court system not only raises the profile of the issue, but also allows for better consideration of the needs of victims. Sexual offenses courts are generally viewed as highly effective, as reflected in higher conviction rates.

In countries where members of the armed or police forces regularly


engage in acts of sexual violence, training and awareness-raising must be specially tailored to convey the message that the State will not condone such acts. The laws of some sub-Saharan African States, like the DRC, have taken a first step in this regard by specifying that no official capacity exempts a perpetrator from punishment.

Training is also important for police officers and judges dealing with domestic violence. The U.N. Model Framework recommends that police departments establish a training program for officers to “acquaint them” with, *inter alia*: the nature, extent, causes and consequences of domestic violence; the legal rights and remedies available to victims of domestic violence; and the legal duties of police officers to make arrests and to offer protection and assistance. Training and guidance on proper investigation and reporting of domestic violence incidents is particularly important for police officers. Ghana has developed a comprehensive list of investigation steps, as has the U.N. Model Framework (both of which are included in the Annex). Training programs should also be introduced for judges handling domestic violence cases and may include guidelines on: the issuance of *ex parte* protective orders and protective orders, and the guidance to be given to victims on available legal remedies.

**B. Provision of Services to Victims**

Recommendation:

- National legislation and funding should include victim support services that address short- and long-term medical, psychological, and practical needs.

States have a duty to provide adequate support measures for victims of gender-based violence, including access to medical and psychological support. In addition, coordination and integration of services provided by different sectors and stakeholders in society is crucial to any plan to combat gender-based violence.

A number of States, including Canada, Malaysia and South Africa have established sexual violence centers—often called “one stop” centers—to provide comprehensive care for anyone who has experienced sexual assault or rape. These centers often attend to immediate medical, psy-

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426. *Id.* ¶ 66.
chological and social needs, and also function as referral centers. Whatever constellation of service provision is put in place, services for victims of sexual violence should have as their fundamental goals to address practical needs and to provide a safe and supportive environment in which individuals can begin to rebuild their lives. The principles of accessibility, confidentiality, respect and self-determination should guide service providers and State agencies. In addition, service providers play an especially important role in underlining the fact that victims are never responsible for the violence they have endured.

Incorporating many of the same principles, it is important for States to provide domestic violence victims with a service infrastructure that addresses the unique challenges of such violence. Many States have enacted legislation to offer victims support. For example, “Finland, Sweden, and Switzerland have enacted ‘victim support laws’ that aim to counteract the weak position of victims ...” and entitle victims to free legal advice and representation, in addition to access to other forms of advocacy and support. In Namibia, the Ministry of Safety and Security has created women and child protection units to promote successful implementation of the domestic violence statute. Such services are also addressed in detail by the U.N. Model Framework, which divides services to domestic violence victims into “emergency” and “non-emergency” obligations. As to the former, the Framework recommends that States provide services such as:

(i) Seventy-two hour crisis intervention services;
(ii) Constant access and intake to services;
(iii) Immediate transportation from the victim’s home to a medical center, shelter or safe haven;
(iv) Immediate medical attention;
(v) Emergency legal counseling and referrals;
(vi) Crisis counseling to provide support and assurance of safety; and
(vii) Confidential handling of all contacts with victims of domestic violence and their families.


430. The U.N. Special Rapporteur on Violence Against Women, supra note 266, ¶ 60.
The Framework is more general with respect to recommendations for “non-emergency” services, suggesting that States deliver, \textit{inter alia}, “services to assist in the long-term rehabilitation of victims of domestic violence through counseling, job training and referrals” and “programs for domestic violence ... administered independently of welfare assistance programs.”\footnote{\textit{Id.} \S 61.}

\textbf{C. Monitoring Effectiveness}
Recommendation:

- States should monitor the effectiveness of existing laws and measures to ensure effective implementation and facilitate any necessary reform.

Ongoing efforts are required to monitor the effectiveness of existing legislation, to ensure its implementation and to assist in identifying areas in which further reform is needed. For example, most States collect data on at least some forms of gender-based violence. In order to ensure ongoing and independent institutional mechanisms for oversight, a number of States also provide for special monitoring bodies. Zimbabwe and Mozambique, for example, have established Women’s Rights Commissions to perform this function; other States provide for a national rapporteur or ombudsperson.

\textbf{D. Raising Awareness}
Recommendation:

- Awareness programs should be gender- and age-inclusive to mobilize entire communities against gender-based violence.

Raising awareness is crucial in eliminating gender-based violence. In fact, measures aimed at modifying harmful social and cultural practices are required by a number of international conventions, so that they rise to the level of a State duty.\footnote{\textit{See Convention on the Elimination of All Forms of Discrimination Against Women, supra note 25, arts. 2(h), 5(a); Protocol to the African Charter on the Rights of Women in Africa, supra note 36, arts. 2(2), 5.}} Most countries have recognized the importance of raising awareness and have responded with a variety of methods. Particularly innovative strategies have emerged from co-operative efforts between governments, international organizations and NGOs.

An ongoing campaign against gender-based violence in Liberia brings
together an international NGO (Oxfam), the Forum for African Women Educationalists and schools in several parts of the country to raise awareness about the new law against sexual violence. A range of effective approaches also rely on public media, including television, radio and newspapers. For example, recent campaigns in Bolivia and India have relied on pop songs and music videos.

Community mobilization and local activism is also known to be effective. In Uganda, the Center for Domestic Violence Prevention works with a group of volunteers who attend training sessions and organize violence prevention activities, including door-to-door visits, participatory theater, impromptu discussions and booklet clubs, in their communities.

A number of States, including Egypt, have seen significant progress from so-called social contracts and public collective commitments, whereby particular groups of people (e.g., entire villages) commit to ending particular practices. This approach has had particularly high rates of success in the context of eliminating female genital mutilation.

Recent analyses have drawn particular attention to the importance of involving men in awareness-raising efforts. The most famous example of a campaign focused on men is the White Ribbon Campaign, started in Canada: men who participate in educational workshops, fund-raising and general awareness-raising wear a white ribbon as a personal pledge never to commit, condone or remain silent about violence against women. The rationale behind such heightened interest is the fact that men commit the vast majority of sexual violence, and are thus in a powerful position to generate change. Involvement of this kind is especially important in societies where sexual and domestic violence by men against their wives is viewed as acceptable.

VII. CONCLUSIONS

In spite of the challenges faced by African States in enacting and implementing reforms to combat gender-based violence, the continent has made significant progress in recent years. Today, both governmental and non-governmental entities have identified gender-based violence as an issue deserving immediate legislative attention and general public aware-

435. Id. at 34.
ness. In the twelve years since the 1995 Beijing Declaration and Platform for Action, grass-roots efforts, such as the “All Against Violence” campaign in Zimbabwe and the passage of the 2005 Act amending the Penal Code in Liberia, have put combating gender-based violence on the political and social agenda.\(^{437}\) Unfortunately, many legislatures in sub-Saharan Africa have yet to pass laws against gender-based violence; in other States, such as Namibia, progress made in the legislative sphere has not yet translated into tangible gains for women. In time, however, legislatures must realize that their failure to pass laws addressing gender-based violence not only furthers injustice and inequity in society, but also shows a lack of respect for women no matter their age, class or color.

Moreover, there must be clear commitment on the part of the State for any new legislation or other measure addressing gender-based violence to be effective. If a State lacks the political will to protect women from violence or to provide institutional support for such protection, all measures, no matter how good they look on paper, are likely to fail.

States must mobilize to improve the institutional response to gender-based violence by developing training programs, implementing sexual harassment policies, sponsoring antiviolence awareness campaigns, and fostering cooperation among government agencies, private parties, and NGOs to end violence against women.

VIII. ANNEX OF PROCEDURAL GUIDANCE


September 2007

Committee on African Affairs

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