



DREW FINDLING
President

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Mark Schickman, Esq.
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Via Email Only
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Dear Mr. Schickman:

We have reviewed the current proposal from the Commission on Domestic and Sexual Violence for an ABA resolution concerning abolition of the earnest resistance doctrine that remains law in a few jurisdictions. NACDL agrees that earnest resistance requirements should not be included in sexual assault statutes. Requiring resistance either to establish force or to demonstrate a lack of consent serves only to further endanger one who is a victim of sexual assault. We would like to support an ABA resolution that addresses this issue directly but that also maintains that the burden of proving force and/or lack of consent beyond a reasonable doubt remains with the prosecution. If both concepts are considered together, the resolution makes a strong statement about the importance of doing away with a resistance requirement while assuring that the resolution is not intended to reduce the constitutionally mandated burden of persuasion in sexual assault cases (which we do not believe the Commission intended). Along these lines we believe the following language is balanced and legally correct:

The ABA urges state legislatures to abandon notions of earnest resistance and pass legislation providing that a jury is not required to infer consent from the absence of verbal or physical resistance by the complainant. While physical or verbal resistance, in and of itself, is not necessary to prove lack of consent, the absence of physical or verbal resistance may be considered by the jury in the context of all the facts and circumstances to determine whether the prosecution has proven lack of consent beyond a reasonable doubt.

Our proposal directly addresses the earnest resistance problem and avoids defining the concept of consent. Recent history demonstrates that attempts to statutorily define consent are divisive within the bar and result in significant debate. The elimination of the



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earnest resistance doctrine however is something we can all support, and we understand it was the driving force behind the resolution.

Our ABA Delegate, Cynthia Orr and the Co-Chair of the NACDL Sex Offense Committee, Mike Iacopino, have discussed this proposal with ABA CJS leadership. The Section Chair, Lucian Dervan and the Section Delegate, Stephen Saltzburg were persuaded that a better balanced resolution is an improvement, but suggested that we speak directly to the Commission to see if it also can be persuaded that the resolution can be improved.. We believe that Lucian and Steve became convinced that there is no reason to refrain from clearly stating in the black letter not only that consent must be evaluated by looking at the totality of the circumstances but also that when taking this look the trier of fact should be aware that the prosecution must prove lack of consent beyond a reasonable doubt. In discussing the Commission's language, we were concerned that it could be interpreted as easing the prosecution's burden of persuasion. We know that this was not the Commission's intent but believe that a balanced resolution can make this clear.

We are happy to discuss this issue with you in greater detail. Do not hesitate to contact us to schedule a meeting or teleconference. We look forward to advancing this issue to the House of Delegates in a cooperative manner and working together to avoid having a motion to amend the resolution and a divisive floor discussion. We think that reasonable minds can agree on language that is balanced and drives nails in the coffin of a resistance requirement.

Sincerely,

Drew Findling

cc Lucian Dervan, Esq.
Cynthia Orr, Esq
Stephen Saltzburg, Esq.
Kevin Scruggs, Esq.