COMMENTS OF THE DRS ARBITRATION COMMITTEE

ON THE PROPOSED RESOLUTION OF THE SECTION OF CIVIL RIGHTS

AND SOCIAL JUSTICE

The Section of Civil Rights and Social Justice (CRSJ) proposal related to arbitration of discrimination, harassment and retaliation claims was submitted to the Arbitration Committee of the Dispute Resolution Section for comment. The proposed resolution was circulated to the Committee and a subcommittee was formed to review and comment. No written comments were received in support of the proposal. Rather, all comments opposed the proposal. At the subcommittee's December 3, 2018 meeting, the subcommittee unanimously recommended that the proposed resolution be rejected. As a result, the Arbitration Committee urges the Dispute Resolution Section to reject the proposal. Below is a summary of the concerns, both procedural and substantive, raised by the proposed resolution.

1. As a general proposition, the ABA should think long and hard before passing resolutions that interfere with the contractual freedom of parties and should do so only in the most extreme circumstances. Those circumstances are not present here.

2. The clear message sent by the proposed resolution is that arbitration is bad or somehow ill equipped to deal with discrimination, harassment and retaliation claims. That message is wrong and should not be supported by the Dispute Resolution Section or the ABA. Arbitrators, unlike judges, are selected by the parties, and parties to cases involving employment discrimination, harassment and retaliation law often select arbitrators who are experts in those laws and, therefor, better equipped than many judges to handle their claims. Such expertise is a basic benefit of the arbitration process long-recognized by courts. Victims of discrimination, harassment and/or retaliation are already amply protected by Resolution 302, which "[u]rges employers in the legal profession to adopt and enforce policies that prohibit, prevent and redress harassment and retaliation based on sex, gender, gender identity, sexual orientation and the intersectionality of sex, race and/or ethnicity."

3. While the Committee realizes that this is entirely anecdotal, we have seen countless victims come forward as part of the #MeToo Movement and otherwise and we applaud them for their courage in doing so. We have yet to see a single victim say that they previously remained silent because they would have had to arbitrate their claim rather than bring the claim in court. The Committee is unaware of any empirical evidence that arbitration keeps victims from pursuing their claims.

4. The proposed resolution is based on Resolution 300 and broadly extends its scope. However, the justifications for Resolution 300 were flawed. Those flaws are addressed here because they are the underpinning for the proposed resolution to extend the reach of Resolution 300. The first rationale for Resolution 300 was that arbitration is implicitly or explicitly confidential and

sweeps claims under the rug. *See* Resolution 300 Report at 4-5. This rationale ignores the fact that, absent an agreement to the contrary, the parties to an arbitration proceeding have no obligation to keep arbitration proceedings and/or results confidential. (In contrast to arbitrators who must keep the proceedings confidential.) When an award is issued, any party who has not agreed to keep it confidential may lawfully take it to the media, social media, or any outlet they choose. And, of course, every arbitration award can be made part of the public record by simply filing the award in a confirmation proceeding in court.

5. Arbitration proceedings provide significant protection for victims. Arbitration procedures provide ample due process and in some instances greater process than what is found in court proceedings, where summary judgment motions can end the alleged victim's ability to tell his or her story. While dispositive motions are sometimes permitted in arbitrations, they are permitted and granted less frequently than a summary judgment motion in court. The very same laws that are applied in court trials are applied in arbitrations.

6. Private proceedings encourage rather than discourage reporting of personal conduct such as discrimination, harassment or retaliation. There is no proof offered to show that private proceedings silence victims. In fact, logic and common sense tells us that the opposite is true. Discrimination, harassment and retaliation claims put the conduct of both the alleged perpetrator and the alleged victim at issue. Offering victims a private venue to pursue those claims can only increase reporting of claims. As a society, we have gone to great lengths to keep the identities of many victims private. The proposed resolution would have the opposite effect: often requiring discrimination, harassment and retaliation victims to bring a public proceeding.

7. If there is a power imbalance between employer and employee, that imbalance is even greater in court litigation than in arbitration. The Rules of Evidence in court are likely to exclude past instances of misconduct of the defendant (unless they amount to "habit") and so prior bad conduct never sees the light of day in a courtroom. The exact opposite is likely to happen in an arbitration where, absent application of court rules of evidence, typically everything relevant and material is admitted into evidence, so long as it is not cumulative or privileged. In terms of proving their case, victims of discrimination, harassment and/or retaliation are typically better off in arbitration, where the Rules of Evidence seldom apply.

8. The use of the term "mandatory" arbitration in the proposed resolution creates more ambiguity than clarity. "Mandatory" and "forced" arbitration are pejorative terms and the ABA should never pass a resolution that uses those terms. When employers and employees agree to arbitration clauses, it is voluntary. Even when it is presented as "take it or leave it", it's still voluntary, not forced. Pre-dispute agreements are extremely valuable because reaching an agreement concerning a dispute venue becomes much more difficult after the dispute arises, where one side typically perceives and advantage or disadvantage associated with proceeding in court or in arbitration. Eliminating pre-dispute arbitration agreements will inevitably lead to more cases having to be brought in public court proceedings where victim's privacy rights are less protected.

9. From a procedural standpoint, the submission of this proposal for review and comment by the Committee on a short timeframe is inappropriate. This seems to be becoming a trend, based on the history of Resolution 300. That resolution was submitted to the Arbitration Committee for comment on July 22, 2018 with a July 30, 2018 deadline for comments. The Arbitration Committee recommended that Resolution 300 be rejected on grounds described in written comments. As a result of the comments of the Committee, WIDR and others, the resolution and accompanying report were amended. The Arbitration Committee would have opposed the amended resolution, but there was insufficient time to give its position before the Annual Meeting which commenced on July 27, 2018. As a result of "fast-tracking" the Resolution, the Committee's opposition to the amended resolution was not given full consideration.

A similar scenario is playing out here. On November 16, 2018, the proposed resolution was submitted to the Arbitration Committee for comment by December 7, 2018 (including the long 4-day Thanksgiving weekend). A vote on the proposed resolution is being sought at the Midyear Meeting commencing January 23, 2019. This "fast-tracking" of an important arbitration issue is not consistent with due process. More time should be allowed for all stakeholders to have their voices heard and the issues thoroughly deliberated.

For the above reasons the Arbitration Committee urges the Dispute Resolution Section to oppose the proposed CRSJ resolution and not extend the reach of flawed Resolution 300.

Respectfully submitted,

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