

CONFERENCE OF CHIEF JUSTICES

Resolution 1

In Support of Preserving the Courts' Authority to Regulate and Oversee Lawyers Engaged in Litigation and Opposing Federal Agency Regulation of Lawyers' Litigation Activities

WHEREAS, the Conference of Chief Justices, in fulfilling its leadership role for state judicial systems, has traditionally taken positions to defend against proposed policies that threaten principles of federalism or that seek to preempt proper state court authority; and

WHEREAS, the Conference has long committed itself to protect and strengthen independent state judicial authority and proceedings as a central part of the federal system of American government; and

WHEREAS, the Conference has also taken positions to defend against proposed policies that threaten to undermine separation of powers; and

WHEREAS, for centuries, lawyers engaged in the practice of law have been regulated and disciplined primarily by the highest court of the state in which a lawyer is licensed or admitted to practice, along with lawyer disciplinary agencies overseen by those courts, and other state and federal courts of competent jurisdiction; and

WHEREAS, the state courts have developed extensive and effective regulations governing all aspects of the practice of law, including admission requirements, rules of professional conduct, disciplinary rules, and procedural rules for litigation, while federal courts have adopted local rules governing the conduct of lawyers appearing before them; and

WHEREAS, as a result of these judicial rules and regulations, state and federal courts have extensive authority and tools to address lawyer misconduct that occurs during the course of litigation before them, including monetary sanctions, striking offending pleadings or other papers, or referring a matter to disciplinary authorities, which could lead to a reprimand, censure, license suspension, disbarment, or other available sanctions; and

WHEREAS, consistent with the longstanding principle of judicial regulation and oversight of lawyers and the legal profession, many federal agencies have included broad practice-of-law exclusions in major rules, including the Federal Trade

Commission's "Mortgage Assistance Relief Services" rule issued in November 2010 and the Department of Housing and Urban Development's "Secure and Fair Enforcement for Mortgage Licensing Act" rule issued in June 2011; and

WHEREAS, also consistent with this principle, Congress has incorporated broad practice-of-law exclusions into certain federal statutes, including Section 1027(e) of the "Consumer Financial Protection Act of 2010" that excludes most lawyers engaged in the practice of law from Consumer Financial Protection Bureau (CFPB) regulatory and enforcement authority, and language in the Fair Debt Collection Practices Act of 1977 (FDCPA) that completely exempted all lawyers engaged in the practice of law before the exemption was removed by Congress in 1986 based in part on its belief that the revised Act would only apply to lawyers' non-litigation activities; and

WHEREAS, the Conference of Chief Justices adopted Resolution 1 on January 26, 2011, which affirmed that primary regulation and oversight of lawyers and the legal profession should continue to be vested in the state courts, not federal agencies or Congress; expressed support for Congress and federal agencies' decisions to include broad practice of law exclusions in certain key federal statutes and agency rules; and opposed federal legislation or rules intended to establish or expand federal regulatory jurisdiction over lawyers engaged in the practice of law; and

WHEREAS, in recent years, certain federal agencies have undermined the courts' proper role by imposing special litigation rules and standards on certain types of lawyers that go beyond and often conflict with well-established court rules applicable to all litigation lawyers, including the special due diligence standards and procedural rules that the CFPB has sought to impose solely on creditor lawyers; and

WHEREAS, the President of the American Bar Association submitted detailed comments to the CFPB on September 18, 2019 urging it to withdraw that portion of its proposed Debt Collection Practices Rule that would effectively codify the flawed "meaningful attorney involvement" concept that imposes special due diligence standards and procedural rules solely on creditor litigation lawyers, and also urging the CFPB to recognize the courts' authority to regulate, oversee, and sanction all lawyers engaged in litigation, regardless of the lawyer's legal specialty or the type of case filed with the court; and

WHEREAS, these recent actions by federal agencies have undermined the courts' primary and inherent authority to regulate and oversee lawyers engaged in the practice of law by creating multiple conflicting sets of litigation rules and standards for lawyers, resulting in unfair lawsuits against lawyers pursuing valid legal claims for clients in court, increased lawyer malpractice insurance rates,

difficulty in obtaining legal representation, reduced access to justice, and interference with core aspects of the confidential attorney-client relationship including the attorney-client privilege;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices supports legislation that would clarify that (1) lawyers engaged in litigation should be regulated and disciplined exclusively by state supreme courts, their lawyer disciplinary agencies, and other state and federal courts of competent jurisdiction; (2) federal agencies shall have no regulatory authority over litigation activities of lawyers or law firms; and (3) no party in a legal action shall have a federal private right of action against the opposing lawyer for the lawyer's litigation activities.

Adopted as proposed by the CCJ Professionalism and Competence of the Bar Committee at the Conference of Chief Justices Midyear Meeting on February 5, 2020.