

## **Statement of Neal Sonnett, Member of the ABA Criminal Justice Section, to the House of Delegates, August 12, 2019**

We agreed to work with the Commission [on Domestic and Sexual Violence] on this Resolution, and that goes back to [Resolution] 115 at the mid-year meeting. And Mark Schickman and some others appeared at the Spring meeting in Nashville. It was late and things were getting rushed and they brought the recommendation to us. While there was dissent on our Council, the Council did vote to approve and vote to co-sponsor.

As we got closer to this meeting, we realized that we hadn't paid enough attention to far-reaching implications of this new Resolution. After it was submitted, we realized that the intent of the drafters was to adopt a new paradigm. Let me repeat that: *A new paradigm*. This changes the law entirely with respect to sexual behavior.

The report made it clear that the drafters were seeking an "affirmative consent" standard. The report always referred to work on this issue by ALI [American Law Institute], although the citations to ALI were back in 2014. No mention of 2015 or 2016. What it didn't mention is that after two years of struggling with this new paradigm, at the annual ALI meeting in May of 2016, a formal vote was taken and the affirmative consent approach was rejected.

Now we received – and I think it may have gone to the House – a letter from 100 ALI members. It's not an ALI letter, but it was signed by 100 ALI members who worked on these issues. And they said -- I want to quote from parts of it:

"For reasons that have not been explained to us, the ABA 'Report' in support of Resolution 114 reveals no part of this history" – that is, the rejection in 2016. "Instead, the Report cites no ALI materials after 2014, and as a result, is highly misleading."

"This is very troubling. The ABA should not consider moving forward with an important matter with a 'Report' purporting to justify the action that is so obviously deficient. This a matter of the essential integrity of the ABA. A vote based upon the current Report is not defensible because the 'Report' absolutely excludes all relevant information about ALI's actual position while repeatedly claiming support from ALI."

They said, in short, the report is based on "bad history and bad science," and they respectfully suggested that it not be passed at this time by the House of Delegates.

There are some serious implications to that. I had one judge who heard about it remarked that if the contents of the report – what was left out of that report – had been submitted to a Court in a brief, it not only would have been stricken, but the attorneys might well have been sanctioned.

So the Executive Committee decided that we needed to review it and revisit it, and we did. The Executive Committee of the Criminal Justice Section voted *unanimously* to recommend to the full Criminal Justice Section Council that we withdraw our co-sponsorship and move to postpone it indefinitely, so we could revisit these issues more carefully and more thoroughly. We didn't make those recommendations lightly.

Then it went to the full Council, and the full Council voted unanimously to pull our support, and instructed us to file this motion before you now.

That unanimous Council vote is important because it's not a bunch of defense lawyers – and we heard of a lot of that, you know, the NACDL – the Criminal Justice Section is the unified voice of criminal justice. We've got it balanced. We've got a third who are prosecutors, a third who are defense lawyers, and a third are academics and judges. And all of them voted to withdraw our support and to instruct us to file this motion. So a unanimous vote from the Criminal Justice Section, I believe, is important because of the way the Criminal Justice Section is composed.

So we ask you to please vote to postpone it indefinitely, Resolution 114.