

**AMERICAN BAR ASSOCIATION**

**ADOPTED BY THE HOUSE OF DELEGATES  
AUGUST 5-6, 2024**

**RESOLUTION**

RESOLVED, That the American Bar Association “(ABA)” urges lawyers and law firms to avoid causing or contributing to adverse human rights impacts in representing business clients, including by:

- 1) counseling clients on applicable principles, standards, and practical actions concerning respect for human rights and protection of the environment;
- 2) advising clients on human rights and environmental due diligence in their value chains, stakeholder engagement, and remedies for adverse impacts;
- 3) counseling clients to uphold fundamental rights and principles at workplaces, including the right to freedom of association in labor relations (including collective bargaining) and a safe and healthy work environment, and preventing and eliminating forced labor and labor trafficking; and
- 4) abstaining from engaging in strategic lawsuits against public participation; and

FURTHER RESOLVED, That nothing in this Resolution alters or impacts lawyers’ obligations under the ABA Model Rules of Professional Conduct.



## REPORT

### I. Introduction

Since the emergence of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011, legislators, regulators, and policymakers have taken a growing interest in corporate responsibility and accountability in all sectors, including the defense industry. Mandatory human rights due diligence laws have begun being enacted at national and regional levels. Businesses, however, continue to engage in activities that could cause or contribute to adverse human rights impacts. This violates their responsibility to respect human rights under the UNGPs and exposes gaps in their implementation of these laws and policies. Lawyers and law firms play a pivotal role in ensuring businesses uphold the UNGPs and comply with emerging mandatory due diligence legislation. It follows that an updated ABA policy on this issue is warranted.

This Resolution supplements existing ABA policies by emphasizing specific actions lawyers and law firms can take, consistent with the UNGPs and other relevant instruments, to avoid adverse impacts to human rights and the environment.

### II. ABA Policies and the Role of Lawyers in Fulfilling Obligations under the UNGPs

The ABA has adopted numerous policies on respecting human rights and the environment. Beginning in February 2012 the ABA endorsed the UNGPs and the human rights provisions of the OECD Guidelines for Multinational Enterprises (2011) (“OECD Guidelines”).<sup>1</sup> That policy underscores the UNGPs’ relevance to the legal community and calls upon lawyers and law firms to integrate the UNGPs into their operations and practices. In 2014, the ABA further encouraged respect for human rights and the implementation of due diligence processes in line with the UNGPs and relevant OECD Guidelines through business and supplier policies to eliminate and remediate labor trafficking and child labor,<sup>2</sup> and, through contractual clauses, to enable responsible purchasing practices when assisting businesses in relation to their supply chains.<sup>3</sup> The ABA also has also adopted policy endorsing the enactment of anti-SLAPP (strategic

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<sup>1</sup> 12M109. The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct were revised in 2023. Its Employment and Industrial Relations chapter (chapter V) addresses fundamental principles and rights at work and contractual relations between enterprises.

<sup>2</sup> 14M102B.

<sup>3</sup> ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor (Feb. 2014).

lawsuits against public participation) legislation<sup>4</sup> and legal ethics rules that establish a duty to avoid fraud<sup>5</sup> and not to abuse legal procedure.<sup>6</sup>

Most recently, in 2023, the ABA further affirmed the duty of lawyers to avoid causing or contributing to wrongdoing in the form of crime or fraud.<sup>7</sup> In 2021, the ABA endorsed the anti-SLAPP model law, the “Uniform Public Expression Protection Act,” promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate measure for states seeking to adopt the specific substantive law suggested therein.<sup>8</sup> The 2021 anti-SLAPP policy also reflects the commentary to ABA Model Rule 3.1. on “Meritorious Claims and Contentions,” which states that “[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure... However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.”<sup>9</sup> This Resolution is not inconsistent with Model Rule 2.1, which sets forth that “[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”<sup>10</sup>

### III. The Evolving Legal Landscape

The UNGPs describe states' obligations to protect human rights and businesses' responsibility to respect human rights related to business conduct.<sup>11</sup> At the national level, several states have enacted legislation and action plans to regulate business practices in line with the UNGPs. For example, in 2017 France adopted a duty of vigilance law that places a duty of due diligence on French companies to establish effective measures to identify risks and prevent severe impacts on human rights and the environment resulting from the company's own activities, the activities of its subsidiaries, and the related

<sup>4</sup> 21M108B; 12A115.

<sup>5</sup> See ABA Model Rules of Professional Conduct, Rule 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”); ABA Model Rules of Professional Conduct, Rule 8.4(c) (It is professional misconduct for a lawyer to:... engage in conduct involving dishonesty, fraud, deceit or misrepresentation”); ABA Model Rules of Professional Conduct, Rule 4.1(b) (“In the course of representing a client a lawyer shall not knowingly:... fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”).

<sup>6</sup> ABA Model Rules of Professional Conduct, Rule 3.1 Meritorious Claims and Contentions, Comment 1.

<sup>7</sup> 23A100.

<sup>8</sup> 21M108B.

<sup>9</sup> ABA Model Rules of Professional Conduct, Rule 3.1 Meritorious Claims and Contentions, Comment 1.

<sup>10</sup> ABA Model Rules of Professional Conduct, Rule 2.1 Advisor.

<sup>11</sup> U.N. OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. HR/PUB/11/04 (2011), <https://digitallibrary.un.org/record/720245?ln=en&v=pdf> [Hereinafter UNGPs]

activities of its subcontractors and suppliers.<sup>12</sup> Under this law, failure to comply with vigilance obligations can result in a court order to comply, as well as opens companies up to civil liability for individuals harmed as a result of a company's failure to comply with its vigilance obligations.<sup>13</sup> Germany has adopted a similar law, the Supply Chain Act, regarding which the ABA Center for Human Rights has been working with banana worker unions in Ecuador to engage with supermarkets in Germany to establish their responsibility to mitigate violations of freedom of association and poor working conditions by their suppliers.<sup>14</sup>

Regionally, the European Union (EU) adopted the Corporate Sustainability Due Diligence Directive ("CSDDD"), which establishes a corporate due diligence standard on sustainability issues for large businesses operating in the EU.<sup>15</sup> The CSDDD requires such businesses to conduct human rights and environmental due diligence within both their own operations and their global value chain, and enforces this duty through administrative supervision and civil liability.<sup>16</sup> The objective of the CSDDD is to alleviate adverse impacts that business activities have on human rights and the environment, including forced labor, child labor, working conditions, pollution, and the destruction of natural heritage.<sup>17</sup>

Recognizing this evolving legal landscape, other bar associations have issued guidance on the role and responsibility of lawyers in upholding the UNGPs in their practices. In 2016, the International Bar Association (IBA) issued a "Practical Guide on Business and Human Rights for Business Lawyers" that detailed the implications of the

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<sup>12</sup> Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1) [Law 2017-399 of March 27, 2017 relating to the duty of vigilance of parent companies and ordering companies (1)], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 27, 2017, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/> [Hereinafter [France Duty of Vigilance Law](#)].

<sup>13</sup> *Id.* See also *France's Duty of Vigilance Law*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, <https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/frances-duty-of-vigilance-law/>.

<sup>14</sup> Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten [Law on corporate due diligence in supply chains], July 22, 2021, Elektronischer Bundesanzeiger [eBAAnz] at 2959 (Ger.), [https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&jumpTo=bgbl121s2959.pdf#\\_bgbl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl121s2959.pdf%27%5D\\_1714486513239](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s2959.pdf#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D_1714486513239).

<sup>15</sup> European Council of the EU, Corporate sustainability due diligence: Council gives its final approval (May 24, 2024), <https://www.consilium.europa.eu/en/press/press-releases/2024/05/24/corporate-sustainability-due-diligence-council-gives-its-final-approval/>. Of note, the Directive Para.43 stipulates, "[t]his Directive should be without prejudice to the rules on professional secrecy applicable to lawyers or to other certified professionals who are authori[z]ed to represent their clients in judicial proceedings, in accordance with Union and national law." See adopted texts: [https://www.europarl.europa.eu/doceo/document/TA-9-2024-0329\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2024-0329_EN.html)

<sup>16</sup> European Commission, *Corporate sustainability due diligence*, [https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence\\_en](https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en).

<sup>17</sup> European Parliament, *First green light to new bill on firms' impact on human rights and environment* (Mar. 19, 2024), <https://www.europarl.europa.eu/news/en/press-room/20240318IPR19415/first-green-light-to-new-bill-on-firms-impact-on-human-rights-and-environment>.

UNGPs on the legal profession.<sup>18</sup> Building on this guidance, in March 2023 the IBA issued an updated “Guidance Note on Business and Human Rights.”<sup>19</sup> The updated guidance provides an overview of the evolving legislative and judicial framework surrounding the implementation of the UNGPs and outlines how the changes in the landscape impact the role of lawyers. The guidance specifies that neither the UNGPs nor the IBA guidance are intended to override or add to professional standards of any jurisdiction; the UNGPs and the IBA guidance are, however, highly relevant to the advice and services lawyers render to their clients.<sup>20</sup> The guidance states that, as companies increasingly see human rights risk identification as a strategic goal, they will expect their lawyers to identify and advise on human rights impacts based on both hard and soft law.<sup>21</sup>

Further, inasmuch as business and human rights concerns emerge in a wide variety of legal practice areas and contexts, including environmental law, contracts, and labor and employment matters,<sup>22</sup> the IBA guidance emphasizes that the duty to act in the client’s best interest includes advising businesses on identifying and addressing the potential human rights and environmental impacts of clients’ business activities, and that lawyers and law firms have their own responsibilities under the UNGPs to respect human rights in their operations as well.<sup>23</sup> The guidance also highlights how law firms face the risk of enabling human rights abuses by their clients, referencing recent criticisms by the UN High Commissioner for Human Rights (OHCHR) on companies’ growing use of SLAPPs against human rights defenders and journalists.<sup>24</sup> Even if the conduct is lawful in a jurisdiction, the guidance states that, under the UNGPs, lawyers and law firms should honor the principles of internationally recognized human rights.<sup>25</sup>

With this legal landscape, many businesses have established human rights policies and set up human rights due diligence programs to assess, mitigate, and remediate adverse human rights impacts. However, civil society organizations continue to report on business practices that contribute to and/or cause human rights violations and demonstrate gaps in the implementation of these policies. In light of such scrutiny, the relevance of the UNGPs to lawyers and law firms also has rapidly increased.<sup>26</sup>

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<sup>18</sup> International Bar Association (IBA), Practical Guide on Business and Human Rights for Business Lawyers (May 28, 2016), <https://www.ibanet.org/MediaHandler?id=d6306c84-e2f8-4c82-a86f-93940d6736c4> [hereinafter IBA Guidance].

<sup>19</sup> International Bar Association (IBA), Updated IBA Guidance Note on Business and Human Rights: The role of lawyers in the changing landscape (Mar. 5, 2024), <https://www.ibanet.org/document?id=English-Updated-IBA-Guidance-Note-on-Business-and-Human-Rights-role-of-lawyers-apr-23> [hereinafter IBA Updated Guidance].

<sup>20</sup> IBA Guidance, at 29.

<sup>21</sup> IBA Updated Guidance, at para. 25.

<sup>22</sup> *Id.* at paras. 27-28.

<sup>23</sup> *Id.* at paras. 32-33.

<sup>24</sup> *Id.* at para. 35.

<sup>25</sup> *Id.* at para. 37.

<sup>26</sup> IBA Updated Guidance, *id.* at para. 2.

#### IV. Business Impacts on Human Rights (selected examples)

##### i. Human Rights and the Environment

In a 2022 resolution, the UN General Assembly, observing that environmental degradation, climate change, and unsustainable development are among the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights, recognized formally the human rights to a clean, healthy, and sustainable environment.<sup>27</sup> Although the UNGPs do not explicitly mention the environment, they do establish that businesses should respect internationally recognized human rights, which now includes the right to a clean, healthy, and sustainable environment. Acknowledging the implications that environmental harms have on the exercise of human rights, the UN Development Programme and the UN Working Group on Business and Human Rights are also in the process of drafting guidance for businesses on due diligence on human rights and the environment.<sup>28</sup>

Meaningful consultation with potentially affected groups and relevant stakeholders, moreover, forms part of a business client's human rights due diligence responsibility under the UNGPs,<sup>29</sup> in addition to which there are multiple other international legal instruments that inform that responsibility. These instruments include the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), which protects every person's right to live in an environment adequate to his or her health and well-being by affording rights to access environmental information and participate in environmental decision making, and provides for access to justice in connection to the exercise of these rights.<sup>30</sup> Principles of free, prior, informed consent (FPIC) are also set forth under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which the ABA supports per 2021 Midyear Resolution 107D,<sup>31</sup> and the ILO Indigenous and Tribal Peoples Convention (No. 169).<sup>32</sup>

<sup>27</sup> UNGA, The human right to a clean, healthy and sustainable environment, U.N. Doc. A/76/L.75 (July 26, 2022), <https://digitallibrary.un.org/record/3982508?ln=en&v=pdf>.

<sup>28</sup> UNDP, Human Rights Due Diligence and the Environment: A Guide for Businesses (Draft) (Nov. 10, 2023), [https://www.undp.org/sites/g/files/zskgke326/files/2023-12/undp-unwg\\_hrdde\\_guide\\_draft.pdf](https://www.undp.org/sites/g/files/zskgke326/files/2023-12/undp-unwg_hrdde_guide_draft.pdf).

<sup>29</sup> UNGPs, Principle 18.

<sup>30</sup> UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), June 25, 1998, 2161 U.N.T.S. 447, <https://unece.org/DAM/env/pp/documents/cep43e.pdf>; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Convention), Mar. 4, 2018, 3397 U.N.T.S. C.N.196.2018.TREATIES-XXVII.18, <https://treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf>.

<sup>31</sup> 21M107D.

<sup>32</sup> ILO, Indigenous and Tribal Peoples Convention, 1989 (No. 169), [https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55\\_TYPE,P55\\_LANG,P55\\_DOCUMENT,P55\\_NODE:REV,en,C169,/Document](https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document).

Yet the exercise of human rights in relation to the environment continues to be threatened in many ways. Business development projects have been linked to such serious environmental concerns as deforestation<sup>33</sup> and pollution of waterways.<sup>34</sup> Defenders of the environment, including indigenous leaders, minority communities, and journalists, are being killed, attacked, threatened, and criminalized for exercising their rights in defending the environment and have faced denials of their FPIC rights and consultation in the development of many business projects.<sup>35</sup>

## ii. Value Chain

Under the UNGPs, businesses of all sectors, including the arms sector,<sup>36</sup> have a responsibility to respect internationally recognized human rights and to avoid causing or contributing to adverse human rights impacts that occur within their own activities as well as to prevent or mitigate adverse human rights impacts directly linked to their operations, products, services, or relationships.<sup>37</sup> Additionally, the EU CSDDD and the recently enacted state-level due diligence laws discussed earlier in this report also extend due diligence obligations to a businesses' direct and indirect relationships that make up their value chain.<sup>38</sup>

Adverse human rights impacts can occur at any level of a supply chain, and in an increasingly globalized economy, businesses across all economic sectors use complex chains of suppliers and relationships throughout their operations.<sup>39</sup> There is ample reporting on human rights abuses, including forced labor, child labor, unsafe working conditions, and environmental harm, that occurs throughout supply chains in various industries.<sup>40</sup> The ABA Center for Human Rights is actively engaged on several issues

<sup>33</sup> *Forests*, GLOBAL WITNESS, <https://www.globalwitness.org/en/campaigns/forests/>.

<sup>34</sup> EARTHRIGHTS, FRONTLINES OF CLIMATE JUSTICE: DEFENDING COMMUNITY RESISTANCE TO CLIMATE DESTRUCTION (Oct. 2021), <https://earthrights.org/wp-content/uploads/Frontlines-of-Climate-Justice-Framing-Document.pdf>.

<sup>35</sup> See UN Human Rights Council, Eleventh session of the Forum on Business and Human Rights: Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/HRC/53/55 (May 23, 2023), <https://www.ohchr.org/en/documents/thematic-reports/ahrc5355-eleventh-session-forum-business-and-human-rights>.

<sup>36</sup> UN Working Group on Business and Human Rights, Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights (2022), <https://www.ohchr.org/sites/default/files/2022-08/BHR-Arms-sector-info-note.pdf>.

<sup>37</sup> UNGPs, Principle 13.

<sup>38</sup> See European Commission, *Corporate sustainability due diligence*, [https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence\\_en](https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en); France *Duty of Vigilance Law*, *supra* note 10.

<sup>39</sup> *Human Rights in Supply Chains: A Call for a Binding Global Standard on Due Diligence*, HUMAN RIGHTS WATCH (May 30, 2016), <https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence>.

<sup>40</sup> Recent reporting on human rights in supply chains include: Megha Rajagopalan and Qadri Inzamam, *The Brutality of Sugar: Debt, Child Marriage and Hysterectomies*, NY TIMES (Mar. 24, 2024), <https://www.nytimes.com/2024/03/24/world/asia/india-sugar-cane-fields-child-labor-hysterectomies.html>;



concerning human rights abuses in global value chains, including, for example, in Ecuador, where the Center’s Labor Rights Initiative has been working with banana worker unions to engage with supermarkets in Germany to meet their responsibility to mitigate violations of freedom of association and poor working conditions occurring within the supermarkets’ value chain. The Center for Human Rights has also issued a report outlining extensive human rights abuses occurring in the sandstone industry in the Indian state of Rajasthan that forms part of US company supply chains.<sup>41</sup> Further, under its Proxy Warfare Project, the Center published a guidance for the arms and defense industry in fulfilling due diligence responsibilities independently of States’ abilities and/or willingness to fulfill their own human rights obligations.<sup>42</sup>

As noted previously, lawyers and law firms are part of their business client’s value chain, and, as such, should identify and address human rights risks that may be linked to their legal services.<sup>43</sup> Lawyers and law firms also play a pivotal role in advising business clients on due diligence obligations within their value chains. The IBA guidance therefore advises that, at a fundamental level, lawyers and law firms should be prepared to consider questions about whether the services and advice they render throughout a client relationship is likely to cause or contribute to human rights abuse by their client in its operations or value chain.<sup>44</sup>

### iii. Labor Rights

Respect for labor rights is one of the foundational principles under the UNGPs, and businesses have a responsibility to respect, at minimum, the fundamental rights set out in the International Labour Organization’s (ILO) Declaration on Fundamental Principles and Rights at Work.<sup>45</sup> The ILO Declaration includes rights to freedom of association and collective bargaining, the elimination of all forms of forced labor and child labor, elimination of discrimination in employment, and the right to a safe and healthy working environment.<sup>46</sup> The ABA has also been active in addressing labor rights in its adoption of the Model Business and Supplier Policies on Labor Trafficking and Child Labor in February 2014.<sup>47</sup>

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CORPORATE ACCOUNTABILITY LAB, HIDDEN HARVEST: HUMAN RIGHTS AND ENVIRONMENTAL ABUSES IN INDIA’S SHRIMP INDUSTRY (Mar. 2024), <https://corpaccountabilitylab.org/hidden-harvest>.

<sup>41</sup> ABA CENTER FOR HUMAN RIGHTS, INDIA: TAINTED STONES: BONDED LABOR AND CHILD LABOR IN THE INDIA-U.S. SANDSTONE SUPPLY CHAIN (Aug. 2020), [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/justice-defenders/tainted-stones-rajasthan-2020.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/justice-defenders/tainted-stones-rajasthan-2020.pdf)

<sup>42</sup> ABA CENTER FOR HUMAN RIGHTS, DEFENSE INDUSTRY HUMAN RIGHTS DUE DILIGENCE GUIDANCE (July 2022), [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/justice-defenders/chr-due-diligence-guidance-2022.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/justice-defenders/chr-due-diligence-guidance-2022.pdf).

<sup>43</sup> IBA Updated Guidance, at para. 34.

<sup>44</sup> IBA Updated Guidance, *id.* at para. 38.

<sup>45</sup> UNGPs, Principle 12.

<sup>46</sup> ILO, ILO Declaration on Fundamental Principles and Rights at Work and its Followup (1998), [https://www-preview.ilo.org/sites/default/files/2024-04/ILO\\_1998\\_Declaration\\_EN.pdf](https://www-preview.ilo.org/sites/default/files/2024-04/ILO_1998_Declaration_EN.pdf).

<sup>47</sup> ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor (Feb. 2014).

Workers today continue to face a range of labor rights violations, including forced labor and trafficking, child labor, unsafe working conditions, and infringements on their abilities to organize trade unions and to engage in collective bargaining. The Labor Rights Initiative of the ABA Center for Human Rights has been actively engaging with workers, worker unions, and worker rights organizations to help realize their labor rights.

#### iv. Reprisal and Retaliation: SLAPPs

As outlined in the report to ABA Resolution 115 (2012), strategic lawsuits against public participation (“SLAPPs”) are brought to “harass and intimidate, and to divert attention and resources from the underlying civic issue” and result in a serious chilling effect on free speech.<sup>48</sup> SLAPPs are generally filed by corporations against individuals or NGOs with the aim to shut down their critical speech and drain their resources. SLAPPs use a range of tactics to exhaust resources and capacity, including the use of onerous legal processes and exorbitant damage claims and allegations designed to smear and harass individuals and NGOs.<sup>49</sup> The use of SLAPPs has increased worldwide and severely impacts the exercise of human rights, including the rights to freedom of expression, assembly, and association.<sup>50</sup>

Lawyers and law firms play an essential role in the filing of SLAPPs.<sup>51</sup> Recognizing that role, in March 2022 the United Kingdom (“UK”) Solicitors Regulation Authority (“SRA”) issued a guidance to clarify lawyers’ and law firms’ ethical obligations concerning conduct in disputes. The guidance explains that lawyers’ duties to their business clients do not override wider public interest obligations and duties to the court.<sup>52</sup> In November 2022, the SRA issued a warning notice to provide clear expectations for lawyers to address SLAPPs, including identifying proposed courses of action that could be defined as SLAPPs, taking reasonable steps to satisfy that a claim is properly arguable before bringing it forward, and ensuring that correspondence does not mislead recipients. The warning notice also identified several abusive tactics commonly associated with SLAPPs that lawyers should refrain from engaging in, including:<sup>53</sup>

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<sup>48</sup> 12A115.

<sup>49</sup> Annalisa Ciampi, U.N. Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, SLAPPs and FoAA Rights, <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx>.

<sup>50</sup> *Id.*

<sup>51</sup> Laura Lee Prather, *SLAPP Suits: An Encroachment on Human Rights of a Global Proportion and What Can Be Done About It*, 22 Nw. J. Hum. Rts. 49, 80 (2023), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1256&context=njihr>.

<sup>52</sup> Solicitors Regulation Authority, *Guidance: Conduct in Disputes* (Mar. 4, 2022), <https://www.sra.org.uk/solicitors/guidance/conduct-disputes/>.

<sup>53</sup> Solicitors Regulation Authority, *Warning Notice: Strategic Lawsuits Against Public Participation (SLAPPs)* (Nov. 28, 2022), <https://www.sra.org.uk/solicitors/guidance/slapps-warning-notice>.

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1. Seeking to threaten or advance meritless claims, including in pre-action correspondence, and including claims where it should be clear that a defense to that type of claim will be successful based on what is known.
2. Claiming remedies to which the client would not be entitled on the facts, such as imprisonment upon a civil claim, or specific or exaggerated cost consequences.
3. Making unduly aggressive and intimidating threats, such as those intended to intimidate recipients into not seeking their own legal advice.
4. Sending an excessive number of letters that are disproportionate to the issues in dispute and the responses received.
5. Sending correspondence with restrictive labels that are intimidating but inaccurate.
6. Pursuing unnecessary and onerous procedural applications intended to waste time or increase costs, such as for excessive disclosure.

The above tactics identified by the SRA provide guidance for the legal profession on the types of activities that constitute a SLAPP.

## Conclusion

To address these pressing impacts on human rights as outlined above, lawyers in conducting their legal work and in advising their clients should, as guided by the UNGPs, assess their and their clients' conduct and the risks of involvement in adverse human rights impacts. Taking reference from the IBA guidance and the SRA warning notice on SLAPPs, lawyers should ask the following threshold questions throughout their operations and client relationships:

1. Will the services and advice rendered likely cause or contribute to infringements on fundamental rights and freedoms by the client in its operations or in its value chain?
2. Who are the stakeholders who will be affected?
3. What is the severity of the harm from the perspective of the stakeholder?
4. What is the likelihood of potential human rights impacts based on the context of the client's operations, value chain, management system and business model?
5. What is the connection between the nature of the lawyer's advice and services and the likely harm (ie, will the advice or services cause, contribute, or merely be linked to the harm), and similarly, what is the connection between the client's conduct and the likely harm?
6. What steps can reasonably be taken to prevent or mitigate such harm?
7. Is the likely harm so egregious and persistent that the lawyer or law firm should consider not undertaking the representation?

8. In affirmative litigation, especially when the lawsuit is brought against a watchdog organization or individual, assess whether the lawsuit would vindicate a legitimate legal right or would it instead put an undue burden on those who are speaking up on the matter of public concern. Assess whether any litigation tactics used amount to those outlined by the SRA above

The legal profession plays a vital role in upholding the rule of law and respect for human rights in business activities. This Resolution updates ABA policy on business and human rights to ensure the Association remains current on best practices in light of emerging laws and norms in the field, thereby promoting the purposes of ABA Goal IV: Advance the Rule of Law and its related objectives.

Respectfully submitted,

Roula Allouch, Chair  
Center for Human Rights

August 2024

## GENERAL INFORMATION FORM

Submitting Entity: Center for Human Rights (CHR)

Submitted By: Roula Allouch, Chair

1. Summary of the Resolution(s).

Building on prior related ABA policy, this Resolution urges lawyers and law firms that represent business clients to do so in a manner consistent with the United Nations Guiding Principles (“UNGP”s), endorsed by the ABA in February 2012, and cites common examples as approaches to be undertaken or avoided.

2. Indicate which of the ABA’s Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

The Resolution advances the rule of law (Goal 4) by advocating specific actions by lawyers and law firms consistent with previously endorsed international standards of business conduct in relation to human rights laws and norms.

3. Approval by Submitting Entity.

The CHR Board approved the Resolution and report on May 6, 2024.

4. Has this or a similar resolution been submitted to the House or Board previously?

As noted, this Resolution is distinct but builds on others previously adopted beginning in February 2012.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

12M109  
12A115  
14M102B  
21M107D  
21M108B  
23A100

6. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not applicable.

7. Status of Legislation. (If applicable)

No specific US legislation currently known; the European Union is now considering relevant legislation, referenced in the Report, that is not the subject of this Resolution.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

CHR and cooperating entities will advocate for the Resolution's implementation as appropriate in various legal and policy fora (domestic and international).

9. Cost to the Association. (Both direct and indirect costs)

None.

10. Disclosure of Interest. (If applicable)

None.

11. Referrals. (List ABA entities and use proper names. For a list of all entities click [here.](#))

Business Law Section  
 Coordinating Council for the Center for Professional Responsibility  
 Civil Rights and Social Justice Section  
 International Law Section  
 Rule of Law Initiative  
 ABA Representatives and Observers to the United Nations Committee  
 Labor and Employment Law Section  
 Section of Environment, Energy and Resources  
 Tort Trial and Insurance Practice Section  
 Solo, Small Firm and General Practice Division  
 Young Lawyers Division  
 Senior Lawyers Division  
 Law Practice Division  
 Section of Real Property, Trust and Estate Law

12. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

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13. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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## EXECUTIVE SUMMARY

1. Summary of the Resolution.

Building on prior related ABA policy, this Resolution urges lawyers and law firms that represent business clients (and as business entities themselves) to do so in a manner consistent with the United Nations Guiding Principles on Business and Human Rights (UNGPs), endorsed by the ABA in February 2012, and cites common examples as approaches to be undertaken or avoided to that end.

2. Summary of the issue that the Resolution addresses.

The UNGPs state that governments have a responsibility to protect human rights; businesses have a responsibility to respect human rights; and both have a responsibility to provide an effective remedy for business-related harms to human rights. Since their emergence in 2011, the UNGPs have become the globally recognized standard for business conduct in relation to human rights, and much experience has been gained regarding implementation, including performance gaps that, if addressed, will maximize the UNGPs' effectiveness.

3. Please explain how the proposed policy position will address the issue.

This Resolution reflects the global experience gained in implementing the UNGPs, updating current ABA policy to highlight approaches lawyers and law firms should undertake in representing business clients (and operating as businesses themselves) to better reflect the UNGPs and related global standards.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

None.