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## CONFIDENTIAL LEGAL MAIL FACSIMILE TRANSMISSION COVER SHEET 2 February 2007

PLEASE DELIVER TO: Professor Lynn S. Branham  
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**COMMENT:**

Comment on the CJS Resolution & Report Regarding the PLRA

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2 February, 2007

Professor Lynn S. Branham  
Thomas M. Cooley Law School  
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Re: Report to ABA House of Delegates  
From the Criminal Justice Section Council  
Regarding the "Prison Litigation Reform Act"

Dear Professor Branham:

I write to urge the ABA's House of Delegates to adopt the Resolution & Report of the Criminal Justice Section which calls for Congress to re-examine and repeal certain provisions of the Prison Litigation Reform Act (PLRA), Pub.L. No. 104-134, Stat. 1321 §§ 801-810 (April 24, 1996), amended, Pub. L. No. 105-119, 111 Stat. 240 (November 26, 1997).

I have served the ABA as co-chair of the Corrections & Sentencing Committee and, for 8 years, as liaison to the American Correctional Association (serving for 6 years Standards Committee and 8 years on the Commission on Accreditation for Corrections). Having been involved in prisoner litigation for more than 20 years, I have worked for the last 10 as the executive director of North Carolina Prisoner Legal Services ([www.ncpls.org](http://www.ncpls.org)). In addition, I presently serve as a member of the ABA's Criminal Justice Section Council.

At the Council's December 2006 meeting in New Orleans, we were presented with a proposed Resolution & Report regarding the Prison Litigation Reform Act (PLRA). The thrust of that Resolution reaffirms the ABA's long-standing commitment to "Equal Justice Under Law" by calling upon the U.S. Congress to re-examine the PLRA. Since the enactment of the PLRA in 1997, I have had the opportunity to observe the pernicious affects of the Act and the obstacles to justice it raises. For instance, the Act imposes restrictions upon the ability of the court to remedy proven violations of the Constitution, including a limitation upon the duration of injunctions, and thereafter, the requirement that prisoner-plaintiffs "re-prove" their claims to preserve equitable relief. Absent a showing of physical injury, compensation is denied for proven instances of illegal conduct and resultant mental or emotional harm. Restrictions on fees that may be awarded to a prevailing party under 42 U.S.C. § 1988 are so onerous as to virtually preclude the assistance of private counsel. Exhaustion of all available administrative remedies is a prerequisite to the institution of a federal lawsuit. 42 U.S.C. § 1997(e)(a); *Porter v. Nussle*, 534 U.S. 516 (2002). (While exhaustion of a grievance procedure seems useful and appropriate, the

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hyper-technical compliance requirements engrafted onto the exhaustion requirement by the courts simply bars access to justice in many meritorious cases.) In *Woodford v. Ngo*, 548 U.S. \_\_\_, 126 S.Ct. 2378 (2006), the Supreme Court held that the failure of a prisoner to file a grievance within the timelines set by prison officials amounted to a failure to exhaust administrative remedies and barred the plaintiff from bringing suit. This view of the PLRA imposed a "procedural default" gloss on the statute, though in practical effect, such a gloss may shorten the statute of limitation to a matter of days or weeks. (In its amicus brief, the ABA opposed that view of the Act.)

But perhaps the most egregious and troubling impact of the PLRA is the creation of a class of plaintiffs who are treated differently from all other citizens, simply by virtue of their status. For example, though all other indigent people may be excused from paying filing fees so that they may prosecute a lawsuit, prisoners are required to pay the filing fee in its entirety. 28 U.S.C. § 1915. The filing fee in the Federal District Court for the Eastern District of North Carolina is now \$350.00, and the fee to file Notice of Appeal in the Fourth Circuit is \$455.00. Obviously, these are sums far beyond the means of the typical prisoner, and often, the prisoner's family.

Those who initially urged the adoption of the PLRA bemoaned the avalanche of "frivolous prisoner litigation" and the burden of defending challenges to procedures, operations, and conditions within correctional facilities. Of course, courts have always been empowered to deal summarily (and punitively) with frivolous litigation, and the burden of defense in such cases is trifling or non-existent. On the other hand, it is usually inconvenient and a nuisance to defend substantive allegations of illegal conduct. Yet, it is axiomatic that the courthouse doors must be open so that citizens (including prisoners) will be free to "petition the government for the redress of grievances."

The inequity of the PLRA and its insidious encroachments upon fundamental principles of American justice are clear and in violation of constitutional law and long established ABA policy. So clear was that to the Criminal Justice Section Council that all but one member voted affirmatively to forward the Resolution and Report to the House of Delegates with its endorsement.

I appreciate the opportunity to emphasize my support for the adoption of the Resolution. Thank you for your attention to this matter, and for your service to the ABA and our profession. With all best wishes, I am,

Hope this helps!  
-M

Sincerely yours,

  
Michael S. Hamden

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