

# Resolutions with Reports to the House of Delegates

AMERICAN BAR ASSOCIATION



2019 MIDYEAR MEETING • LAS VEGAS, NEVADA • JANUARY 28, 2019

American Bar Association  
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# **Resolutions with Reports to the House of Delegates**

**AMERICAN BAR ASSOCIATION**

**2019 MIDYEAR MEETING  
LAS VEGAS, NEVADA • JANUARY 28, 2019**

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# RESOLUTIONS WITH REPORTS TO THE HOUSE OF DELEGATES

Caesars Palace Las Vegas  
Augustus Ballroom, Emperors Level  
Las Vegas, Nevada

January 28, 2019

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Resolutions with Reports numbered 100 through 116 can be found in this book. Additional Resolutions with Reports submitted by state and/or local bar associations will be numbered in the "10" series and late Resolutions with Reports submitted will be numbered in the "300" series. These reports will be distributed at the opening session of the House of Delegates meeting. Informational Reports can be found on the ABA's website at [https://www.americanbar.org/groups/leadership/house\\_of\\_delegates/2019-las-vegas-midyear-meeting.html](https://www.americanbar.org/groups/leadership/house_of_delegates/2019-las-vegas-midyear-meeting.html) (click on Informational Reports).

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**PRELIMINARY CALENDAR  
of the  
HOUSE OF DELEGATES  
of the  
AMERICAN BAR ASSOCIATION**

**Caesars Palace Las Vegas  
Augustus Ballroom, Emperors Level  
Las Vegas, Nevada**

**January 28, 2019**

All sessions of the House of Delegates will be held on Monday, January 28, 2019, at the Caesars Palace Las Vegas Hotel, Augustus Ballroom, Emperors Level, in Las Vegas, Nevada. It is anticipated that the House meeting will begin at 9:00 a.m., and will adjourn no later than 5:30 p.m., when the House has completed its agenda.

The Final Calendar of the House of Delegates meeting will be placed on House members' desks at the opening session on Monday morning, January 28. Sections, committees, delegates, affiliated organizations and bar associations, which have submitted Resolutions with Reports, oral information or late reports authorized by the Committee on Rules and Calendar, will be calendared.

The index, which appears at the end of this book, will assist House members in finding reports received by the November 14, 2018 filing deadline. Resolutions with Reports numbered 100 through 200 appear in this book. Informational Reports can be found on the ABA's website at [https://www.americanbar.org/groups/leadership/house\\_of\\_delegates/2019-las-vegas-midyear-meeting.html](https://www.americanbar.org/groups/leadership/house_of_delegates/2019-las-vegas-midyear-meeting.html) (*click on Informational Reports*).

Any late Resolutions with Reports, those received after November 14, 2018, will be considered by the House if the Committee on Rules and Calendar recommends a waiver of the time requirement and the recommendation is approved by a two-thirds vote of the delegates voting. Late Resolutions with Reports will be distributed at the opening session of the House, along with any additional Resolutions with Reports submitted by state or local bar associations.

The preliminary calendar of the House of Delegates meeting is as follows:

**The Chair of the House of Delegates,  
William R. Bay, Presiding**

Presentation of Colors

Invocation

1. Report of the Committee on Credentials and Admissions  
Eileen M. Letts, Illinois

Approval of the Roster

2. Report of the Committee on Rules and Calendar  
Christina Plum, Wisconsin

Approval of the Final Calendar

3. Report of the Secretary  
Mary L. Smith, Illinois

Approval of the Summary of Action

4. Statement by the Chair of the House of Delegates  
William R. Bay, Missouri

5. Statement by the President  
Robert M. Carlson, Montana

6. Statement by the Treasurer  
Michelle A. Behnke, Wisconsin

7. Statement by the Executive Director  
Jack L. Rives, Illinois

8. Presentation of Resolutions with Reports which any State or Local Bar  
Association wishes to bring before the House of Delegates

9. Presentation of Resolutions with Reports of Sections, Committees and Other  
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  - 10A Bar Association Resolutions
  - 100-200 Resolutions with Reports
  - 300 Late Resolutions with Reports

ADJOURNMENT

**AMERICAN BAR ASSOCIATION  
2018-2019  
BOARD OF GOVERNORS**

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President	Robert M. Carlson, Butte, MT
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**BOARD OF GOVERNORS**

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Second District	2020	W. Anthony Jenkins, Detroit, MI
Third District	2021	Lynn Fontaine Newsome, Florham Park, NJ
Fourth District	2020	Allen C. Goolsby, Richmond, VA
Fifth District	2021	Charles 'Buzz' English, Jr.,
Sixth District	2020	Lee A. DeHihns III, Marietta, GA
Seventh District	2019	J. Timothy Eaton, Chicago, IL
Eighth District	2019	Andrew Joshua Markus, Miami, FL
Ninth District	2021	Susan M. Holden, Minneapolis, MN
Tenth District	2019	David S. Houghton, Omaha, NE
Eleventh District	2019	Hon. Leslie Miller, Tucson, AZ
Twelfth District	2020	Randall D. Noel, Memphis, TN
Thirteenth District	2019	Maryann Elizabeth Foley, Anchorage, AK
Fourteenth District	2021	Andrew J. Demetriou, Los Angeles, CA
Fifteenth District	2021	Mark H. Alcott, New York, NY
Sixteenth District	2021	David W. Clark, Jackson, MS
Seventeenth District	2021	Rew R. Goodenow, Reno, NV
Eighteenth District	2019	Paula E. Boggs, Sammamish, WA
Nineteenth District	2020	David L. Brown, Des Moines, IA

## BOARD OF GOVERNORS (cont.)

Goal III Disability Member-at-Large	2019	Scott C. LaBarre, Denver, CO
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Goal III Women Members-at-Large	2019	Lorelie S. Masters, Washington, DC
	2020	Eileen A. Kato, Seattle, WA
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**REPORT OF THE  
ABA PRESIDENT  
TO THE  
HOUSE OF DELEGATES**

The report of the President will be presented at the time of the Midyear Meeting of the House of Delegates.



**REPORT OF THE TREASURER  
TO THE  
HOUSE OF DELEGATES**

To permit the presentation of current financial data, the written report of the Treasurer will be distributed at the time of the Midyear Meeting of the House of Delegates.



**REPORT OF THE EXECUTIVE DIRECTOR  
to the  
HOUSE OF DELEGATES**

(Submitted December 10, 2018)

This report highlights American Bar Association activities from May 1, 2018 to December 10, 2018 not covered in previous reports.

**Introduction**

Next year will mark the 50<sup>th</sup> anniversary of a seminal moment in the history of humankind. Over the course of an eight-day mission, the Apollo 11 spacecraft and its three astronauts traveled some 240,000 miles to the moon, successfully landed two humans on its surface, and returned safely to the earth.

That wasn't an achievement that happened easily or quickly. Prior to the Apollo Program, America lacked the technological expertise to launch individuals beyond earth's orbit, and many experts believed even attempting a mission to the moon was little more than a very risky waste of resources. Years of dedicated research, testing, and funding were needed to make what had been thought impossible a reality.

Today, the American Bar Association is similarly attempting to execute a historic and unparalleled mission. At our Annual Meeting last August, the House of Delegates overwhelmingly approved sensible price points for a new membership model for the Association. As with the "Moon Shot" of the late 1960s, the new model didn't just happen overnight. For more than two years, the ABA's staff and volunteer leaders, assisted by prominent outside marketing experts, conducted meticulous research and testing to develop a model that would position us for growth and success in the years ahead.

The new model has several key objectives. First, we want to drive our membership growth, particularly among young attorneys who will practice law in coming decades. Second, we want to improve revenue growth through all channels and reverse the slide in dues-paying attorney members. We need to develop and articulate a clear and compelling value proposition that demonstrates why membership is essential for lawyers' professional success and development. We need an engaging brand personality that helps the Association connect more effectively with the legal community. Finally, we want to grow awareness of the great impact the ABA has both inside and outside the legal profession.

From the beginning, research and data drove this complex process forward. We were informed by interviews and focus groups, and by extensive surveys conducted over the past 10 years with attorneys across the country -- both members and non-members of the Association. Two recurring themes highlighted concerns about the affordability of ABA dues and a lack of value for membership.

### 3

Such concerns are not surprising, given the economic pressures facing today's attorneys. From the rise of technology and online legal services, to increased competition within the profession, lawyers face tremendous financial challenges. This widespread price sensitivity makes it all the more critical for the ABA to show unquestionable value for legal professionals. As we developed the new model, our efforts were focused on those two core concerns. We simply must attract and retain more dues-paying lawyer members.

The new membership model fundamentally reshapes and enhances how the ABA connects with our members. In response to the articulated concerns, we have streamlined dues rate categories, reducing dues for most members and slashing the number of dues price points from 157 to five. As of FY 2020, our dues structure will be sensible and supportable:

- \$75 for those admitted to the bar four years and less (including new bar admittees);
- \$150 for those admitted to the bar five to nine years, solo practitioners, small firm members, judges, retirees, and public service/government lawyers;
- \$250 for those admitted to the bar 10 to 14 years and international (non-U.S. licensed) attorneys;
- \$350 for those admitted to the bar 15 to 19 years; and
- \$450 for those admitted to the bar 20 years and more

Enhancing (and explaining) ABA benefits so they are clearly recognized is a major facet of the new model. We want to demonstrate the ABA is an indispensable resource for lawyers, as membership helps to boost professional success at every stage of a career in law.

One new program for members under the model will be the opportunity to opt-in and join the Law Practice (LP) Division and/or the Solo, Small Firm and General Practice (GPSolo) Division at no additional cost. All members will have access to the content generated by both divisions, along with a wide-range of information and programs from the Center for Professional Development (CPR).

Content curation will be an important aspect of the new member experience. Membership in the ABA provides access to a tremendous amount of invaluable resources. In the future, materials such as articles, digests, checklists, slide decks, video, audio, and much more will be targeted to our members based on their preferences, particular interests, and fields of law. The content we push to members will be more tailored (curated) to their interests, and it will be delivered through the communications channels they prefer, including the ABA website, email, and social media.

The new model will expand upon one of the most popular benefits we currently provide, our vast selection of premier CLE programs. We are developing a robust CLE marketplace, similar to Amazon Prime, that will connect members to educational programs at a centralized location on our website. Members will have access to a CLE Library with over 650 titles, available to them at no additional cost. In addition to

enhanced CLE, we are also working on a special Career Development Tool for members, along with exceptional programs aimed at young attorneys and solo practitioners to help them achieve professional success.

We are actively developing a new strategy to regulate who can access ABA content. For many years, much of ABA's information was available on our website to anyone with an internet connection. We're changing that so only our members will have access to exclusive ABA content. While some information will remain accessible to the public, such as much of the online ABA Journal and Association news updates of interest to the public and media, the vast majority of content will be placed behind a paywall on the Association's website and limited to dues-paying members. Our new paywall strategy will restrict non-members' access to valuable content and encourage them to join the ABA. While section members will continue to have access to their entity's content, other ABA members will have only a limited ability to examine content designated for section members only. These limited views of section member only materials will help non-section members understand the benefits of joining a particular section, division, or forum.

The foregoing basics were approved by the Board of Governors and House of Delegates at the 2018 Annual Meeting, and the new membership model will thus feature sensible pricing, increased member benefits, curated materials, an expanded CLE marketplace, and a new paywall strategy. A tremendous amount of research and discussion led to the basic design of the new membership model. We are now moving forward with the extraordinary range of details involved in the implementation phase.

We have a core team of 17 staff members to oversee all steps necessary to assure launch of the new model next spring. I appointed our Deputy Executive Director, Jim Dimos, to lead the efforts. The group will ensure that critical aspects of the model are ready for public release on May 1, 2019, the date we will begin to send dues statements for Fiscal Year 2020. The group will then turn to ensuring non-critical features of the model are in place by the beginning of the new fiscal year on September 1, 2019.

To make certain the new model is executed in a timely, efficient, and effective manner, the implementation group has been organized into five principle workstreams that operate in tandem and close collaboration: **Membership Operations; Content; Marketing Operations; Go-To-Market Strategy; and Communications and Member Experience.** ABA member leaders are of course meaningfully involved in the implementation process. For example, the Chairs of the Standing Committee on Membership (SCOM) and Section Officers Conference (SOC) designated members to receive regular updates and provide advice and insights on implementation of the new membership model. As appropriate, we will also utilize expert outside advisors.

Implementation is an extremely complex and detailed undertaking. We established 26 small groups within the five workstreams to help provide focus on our more in-depth efforts. Here's a look at the groups as currently aligned with the workstreams on which they are focused:

### 3

- *Membership Operations*: Anniversary Billing; Membership Rates, Benefits, and Types; Group Membership Management; Law Practice Division Integration; GP Solo Integration; and CPR Integration
- *Content*: CLE Marketplace; Content Curation; and Paywall
- *Marketing Operations*: Website Design and Flow; Marketing Automation; Email; Personify (the ABA's member management and engagement platform); Data Analytics; and Data Hygiene (removing "bad data" from the website; i.e., data that is inaccurate, incomplete, outdated, or duplicated)
- *Go-To-Market Strategy*: Brand Assessment; Member Communications Strategy; Media Communications Strategy; Law Students and Young Lawyers Go-To-Market Strategy; Solo and Small Firm Go-To-Market Strategy; Remaining Segments Go-To-Market Strategy; and Full Firm Go-To-Market Strategy
- *Communications and Member Experience*: Social Media
- *General Work Groups*: Budget Allocation and Reporting; Member Engagement; and overall Workstream Team Leaders

In order for us to meet the May 1 goal with a comprehensive, first-class program in place, we must have the right staff available to manage and lead our efforts. In recent months, we have added several key professionals to our staff, and they are already providing valuable services.

The most recent addition to our senior staff joined us on November 19. Joe Brownlee serves in the newly created position of Director, Center for Member Operations. In that role, Joe supervises Membership operations, ABA Publishing, ABACLE, and Member Advantage. His responsibilities are focused on adding new dues-paying attorney members, increasing renewal rates, and reducing churn.

Joe is a very experienced public and charitable sector leader with more than 20 years in management and executive roles in membership and charitable organizations, including Rotary International, Feeding America, and The Children's Heart Foundation. Joe joined the ABA directly from The Children's Heart Foundation, where he served as interim Executive Director.

Joe has proven skills in such areas as strategy development and execution, new membership models, project management, process improvement, financial analyses, and customer service centers. While at Rotary International, he worked on new membership and fundraising models, and achieved goals for member recruitment and retention (a net 3 percent increase) and fundraising (an increase of \$300 million, about 20 percent, in gross revenue from 2016 to 2017).

The Director of our new Digital Content program is Jim Walsh. Jim came to the ABA from Atlantic 57, the Atlantic magazine's creative and consulting division, where he served as the Editorial Director. In that capacity, he developed integrated content strategies and organizational growth plans from a journalistic perspective. He previously was News Editor at the Chicago Tribune's Red Eye publication. In his new position at the ABA, Jim will be responsible for building a content team that will deliver a personalized

digital experience for our members.

Karen Alexander has been hard at work as our Chief Marketing Officer (CMO) since August 27. She has exceptional marketing experience and came to us from the Muscular Dystrophy Association (MDA), where she served as Executive Vice President and Chief Revenue Officer.

At the MDA, Karen oversaw all revenue-generating activities for the organization, managed an annual budget of \$40 million, and directed a nationwide team of 375 marketing professionals. As our CMO, she leads efforts to communicate our value proposition as she promotes ABA programs and services.

In July, we released a request for proposals for an outside marketing firm to help us implement the new model, improve the ABA brand image, and showcase our new offerings and the enhanced value of membership. After analyzing responses from 14 firms, in October we firmed up our contract with Finn Partners. Finn Partners is a marketing industry leader, and their senior talent has more than 40 years' experience with top law firms. Their familiarity with the challenges facing America's lawyers will be invaluable as we develop plans and programs to market our new membership model.

Finn Partners has been conducting detailed research on the ABA and has learned much about the ABA's structure, history, and goals. They have interviewed dozens of ABA volunteer leaders, including officers, Board members, and section chairs. They are keenly aware of the challenges that face organizations that decide to undertake enormous, historically significant changes. They understand the need to overcome the silos within our Association, which have limited the sharing of information, priorities, tools, and communications. While the staff reorganization earlier this year streamlined our structure and made the Association more efficient and effective, breaking down silos and achieving more effective cooperation among our entities continues to be a major priority.

To ensure silos don't hamper the implementation of the new membership model, leaders of our five workstreams have worked in very close collaboration and are making meaningful progress. Among recent examples:

- **Finalization of the new anniversary billing process.** Effective May 1, 2019, the traditional ABA membership year of September 1 for all members will be replaced with an anniversary membership term in which future members will have a personal anniversary date based on when the member joined the ABA.
- **Baseline analysis of ABA's current digital content landscape.** The analysis includes the ABA website, social channels, periodicals, and entity pages. The objective is to identify opportunities and challenges arising from our current approach and to establish a quantitative starting point from which we can measure future results.

### 3

- **Developing the Free CLE Library.** We're devoting a substantial effort to assure a successful user experience for the new CLE marketplace. Our goal is to maintain a user-friendly collection of high-quality content that emphasizes ease of navigation and registration, consistency in look and feel, streamlined communications, and simplified certificate fulfillment and tracking. ABA entities have been meeting with ABACLE staff on the project and have begun to deliver content.
- **Tagging All Digital Content.** Tagging is essential to the new website and will be an instrumental facet of the personalized experience members seek. Staff responsible for online content are being trained on best practices to ensure members can easily locate and use the resources they need.
- **Improving the ABA's email system.** The Communications and Member Experience workstream has focused efforts to improve ABA email practices, providing an improved "myABA experience," along with enhancing the ABA email preference center.
- **Stronger brand voice.** We are developing a new brand identity for the Association to improve our image among America's lawyers. More details on our branding concepts will be provided at the Midyear Meeting.

These are exciting times for our Association. The new membership model represents our best hope to reverse the membership and financial challenges facing the Association. While in many respects our work is just beginning, significant progress has been made. We have past the model's "planning phase" and are currently refining and implementing our plans. We will continue to push in the weeks and months ahead to achieve our goals.

#### Membership

At the end of FY 2018, the ABA's membership stood at 411,490, just 0.2 percent lower than the 412,499 members at the end of FY 2017. While we enjoyed continued success growing our law student membership, which increased to a record 112,201, attracting and retaining dues-paying lawyer members remains an ongoing challenge. In FY 2017, the ABA had 194,448 dues-paying attorney members; at the end of FY 2018 that decreased 4 percent to 186,563. This of course impacts our dues revenues, which declined by 2.3 percent to about \$55.1 million in FY 2017, down from \$56.6 million collected the previous year.

When examined over a 10-year period, the decline in dues-paying lawyer members and its impact on dues revenue underscores the need for the new membership model. We must improve our ability to attract and retain lawyers. Between FY 2009 and FY 2018, the number of dues-paying lawyer members decreased by 22 percent; during that same period, dues revenue declined by just over 19 percent. Our overall market share also dropped over the past decade. While America's lawyer population grew from

1.1 million in FY 2009 to 1.3 million in FY 2018, our market share went from 29.4 percent to 21.2 percent. Unquestionably, these trends must be reversed, or the Association will lose its status as the country's leading professional organization for attorneys. Those are essential aspects of our new membership model.

Through November 23 Full Firm membership stood at 25,064 members, a decrease of only 364 members from the same time last year. Full Firm dues revenue is at \$4,639,573, an increase of 6.5 percent since last year. Overall Group membership is at 68,016 members, down 3.6 percent since the same time last year, while Group dues revenue stood at \$16,989,163, a decrease of 2.1 percent from this time a year ago.

The ABA's involvement with the recent Supreme Court nomination of Judge Brett Kavanaugh attracted much attention. Nearly 6,000 calls and emails were received in September and October regarding now-Justice Kavanaugh's nomination and subsequent appointment. That timeframe also included a dramatic increase in the number of people who engaged with the ABA on social media. In September and October, followers of the ABA's Facebook page grew from 61,866 to 68,726, an increase of 11 percent, and our Twitter followers went from 76,091 to 94,957 -- a rise of 25 percent. On LinkedIn, the ABA's followers increased by 31 percent, from 56,752 to 74,416.

### **New Website**

As most are aware, the new ABA website has experienced challenges since its formal launch on October 9. Some basic functions -- such as the ability to login, register for meetings, and purchase products -- have been unsatisfactory and even unavailable for periods of time for too many members. Those issues are absolutely unacceptable, and resolving them has been a very high priority. The ABA's Information Technology and Digital Engagement staffs, working with our website partner Code & Theory, have launched comprehensive sets of fixes intended to resolve these problems and stabilize the site. As of the date of this report, we expect the problems to be largely resolved in December.

The ABA Service Center staff fielded an extraordinarily large volume of calls as they worked behind the scenes to assist members complete online tasks. The Service Center team is truly the ABA's "front line" when it comes to helping our members and addressing their concerns, and they performed incredibly well in this situation.

Many members have complimented the website's design and ease of use on mobile devices. Once fully functional, the new site will provide an improved user experience, including a new personalized news feed with custom-curated content, enhanced website searches, and a simplified shopping (ecommerce) experience. Over the coming months, additional functionality and content will be added, and remaining site glitches will be resolved.

### **Governmental Affairs Office (GAO)**

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On October 1, ABA President Bob Carlson forwarded the results of grant research and [comments](#) from the Center on Children and the Law to the U.S. Department of Health and Human Services Children's Bureau regarding the proposed National Model Family Foster Home Licensing Standards as required under the Family First Prevention Services Act of 2018. The research and comments expressed in the memo from the Center derive from approved grant research on model foster home standards and do not represent formal ABA policy.

GAO arranged for Senator Sheldon Whitehouse (D-RI) to speak at the ABA Business Law Section's annual [LLC Institute](#) on October 11 in Washington, D.C. During the panel event, Senator Whitehouse urged the section attendees to support his anti-money laundering legislation, S. 1454, which would require small businesses and their attorneys to report detailed "beneficial ownership" information regarding new companies they create to the government and would also subject those attorneys to the anti-money laundering and suspicious activity reporting requirements of the Bank Secrecy Act. Several panelists representing the ABA Gatekeeper Task Force explained the Association's concerns over the proposal and described other proactive steps the ABA is taking to fight money laundering in ways that would not undermine the attorney-client privilege and relationship. GAO then met briefly with Senator Whitehouse and his staff to discuss how we could work more closely together on the issue going forward.

On October 15, GAO and representatives of the National Creditors Bar Association met with a senior counsel for Senator Pat Toomey (R-PA) and urged the lawmaker to reintroduce a new Senate companion bill to H.R. 5082, the "Practice of Law Technical Clarification Act." The ABA-supported legislation would help restore traditional state court regulation and oversight of the legal profession by exempting creditor attorneys engaged in litigation from liability under the Fair Debt Collection Practices Act and from burdensome Consumer Financial Protection Bureau regulations. On October 24, GAO also sent an [ABA Legislative Action Alert](#) to all state and local bar associations urging them to send letters to their U.S. Representatives expressing support for the legislation.

On September 7, Standing Committee on the Federal Judiciary (SCFJ) Chair Paul T. Moxley and John R. Tarpley, the SCFJ's principal evaluator for the Supreme Court nomination of Judge Kavanaugh, testified before the Senate Judiciary Committee. Chair Moxley's [statement](#) highlights the evaluation process and the Standing Committee's evaluation of Judge Kavanaugh's professional qualifications.

On September 26, U.S. District Court for the District of Columbia Judge Timothy Kelly heard motions for summary judgment and for preliminary injunction in the law suit filed by the ABA over the U.S. Department of Education's (ED) regulations regarding the Public Service Loan Forgiveness (PSLF) program. The judge's questioning focused on whether ED's actions amounted to final agency action under the two-pronged *Bennett v. Spear*, 520 U.S. 154 (1997) the case should be cited test established for the Administrative Procedure Act. The judge recognized that the U.S. Supreme Court has directed consideration of the practical implications of agency actions and consequent hardships on plaintiffs. The government

argued that any hardships on plaintiffs were the result of contractor mistakes in preliminary certifications of annual qualification determinations for PSLF eligibility and they did not amount to final agency actions. Chong Park, attorney for the law firm Ropes & Gray handling the case pro bono for the ABA, maintained that ED's actions bore the hallmarks of final agency action.

On September 4, the Section of Intellectual Property Law filed a [brief](#) with the U.S. Supreme Court in the *Fourth Estate Public Benefit Corporation v. Wall-Street.com* copyright law case, arguing that copyright owners are entitled to seek recourse against infringers in court after sending in their copyright application into the Copyright Office and do not have to wait until the Copyright Office acts upon that application.

On September 8, the American Civil Trial Bar Roundtable met in Washington, D.C. The Roundtable brings together representatives of the most significant law or bar-related organizations and trial practitioners representing diverse viewpoints in the civil trial bar to gain their expert assessment of the state of the civil trial system and make recommendations for improvements. President Carlson gave a report to the group highlighting the ABA's efforts to train new attorneys. He also introduced a resolution calling for measures to preserve and enhance the independence of administrative law judges. GAO provided a legislative update to the members of the roundtable.

On August 7, the ABA submitted [comments](#) to the United States Sentencing Commission regarding its proposed priorities for the amendment cycle ending May 1, 2019. The ABA supports the Commission's proposals to address mandatory minimum sentences and compassionate release. The commission approved those priorities in its list of final 2018-2019 priorities on August 23, and the list was published in the August 28 *Federal Register*.

On August 4, GAO briefed the Council of the ABA Dispute Resolution Section on the status of significant alternative dispute resolution (ADR) proposals being considered by Congress and various federal agencies, including numerous bills and proposed regulations involving arbitration, mediation, consent decrees, and federal agency ombudsmen. GAO's [Federal Legislative Update Memorandum](#) covering these ADR proposals and GAO's updated [Summary of the ABA's ADR Policies](#) are available on the section's website.

## **Media Relations and Strategic Communications (MR)**

In response to White House statements criticizing the Ninth Circuit following its ruling against a White House immigration policy on asylum, MR issued a November 21 [media statement](#) on behalf of ABA President Carlson that expressed firm support for an independent judiciary. "Disagreeing with a court's decision is everyone's right, but when government officials question a court's motives, mock its legitimacy or threaten retaliation due to an unfavorable ruling, they intend to erode the court's standing and hinder the courts from performing their constitutional duties," said Carlson in [Newsweek](#). Other reporting news outlets included [The Hill](#), [Washington Times](#), [Newsmax](#), [NPR](#), [Huffington Post](#), [Hollywood Reporter](#).

On September 27, ABA President Carlson sent a [letter](#) to leaders of the Senate Judiciary Committee, urging delay to the confirmation vote of Supreme Court nominee Brett Kavanaugh until an FBI investigation into misconduct allegations could be conducted. MR distributed a [link](#) to the letter in a September 28 news release. On September 28, SCFJ Chair Moxley sent a [letter](#) to the Chairman and Ranking Member of the Senate Judiciary Committee stating that the Standing Committee acts independently of the rest of the ABA and its rating is not affected by President Carlson's September 27 letter. MR thereafter managed more than 200 calls from media outlets inquiring about the letters -- broadcast outlets such as [CNN](#), [Fox News](#), [CBS](#), [ABC](#), [NBC](#), [NPR](#), and others; major dailies including [USA Today](#), [Washington Post](#), [New York Times](#), [Guardian](#), and [Chicago Tribune](#); and specialty news outlets such as the [Huffington Post](#), [Jezebel](#), [New York Magazine](#), [Politico](#), [Daily Beast](#), [U.S. News and World Report](#).

The confirmation of Justice Kavanaugh continued to put the ABA in the news. On October 5, the ABA SCFJ announced it was reevaluating its well-qualified rating of Kavanaugh. MR shared the news in a [news release](#) distributed to nearly 600 reporters at 379 news outlets nationwide. The Committee's letter was picked up by both mainstream and legal media -- including the [Washington Post](#), [Daily Mail](#), [Bloomberg](#), [Fortune](#), [Daily Wire](#), [Rolling Stone](#), [Weekly Standard](#), [Law360](#), [Voice of America](#), [PBS News Hour](#), and [New York Post](#), among dozens of others. The day after the Committee announced its reevaluation, Kavanaugh was confirmed by the Senate, and the possibility of any further review was mooted. The SCFJ policy is to conclude the ratings process once a nominee is confirmed, as reported in the [National Law Journal](#), [CNN](#), [The Hill](#), [Daily Wire](#), and other outlets.

On other matters related to the High Court, an op-ed bylined by President Carlson on the use of cameras in the Supreme Court was published on October 2 by [Inside Sources](#), a content syndicator to more than 300 of the nation's top newspapers. "It is time for the Supreme Court to let citizens see how the judiciary works -- not from fictional courtroom dramas but from the real-life give and take between lawyers and justices," Carlson wrote, as reported in the [Las Vegas Sun](#).

Managing and promoting [ABA Legal Fact Check](#) continues to be a MR priority. In November, MR published two timely entries: [one](#) on birthright citizenship and [another](#) on reporter access to the White House. The latter post was published by MR immediately following the suspension of CNN reporter Jim Acosta's White House press pass, attracting notable attention from several news outlets, such as [NBC News](#), [Telemundo](#), [USA Today](#), [Law & Crime](#), [The Week in Fact Checking](#), and the [Chicago Daily Law Bulletin](#), among them.

MR was also active with ABA Legal Fact Check in October. The [first post](#) on October 5 explores the question of whether it matters from a legal standpoint if Deputy Attorney General Rod Rosenstein resigns or is fired by the President. And the [second one](#), from October 4, looks at how the U.S. Supreme Court has determined when deadly force by police is permissible and when it is not.

Working with CMO Karen Alexander and Digital Engagement, MR has taken responsibility for providing two homepage stories each week for the new ABA website. One focuses on the top legal story of the week and the other covers ABA programs or content. MR developed an internal style guide to ensure consistency in story production and presentation. Since initiating this effort in late September, the Division has prepared 15 posts: Legal news on [then-Supreme Court nominee Brett Kavanaugh](#), [the Supreme Court's new term](#), [growth of women-owned law firms](#), [voter ID laws](#), and [Justice Elena Kagan](#); and ABA news on [disaster assistance](#), [American Bar Foundation staffer's MacArthur Genius grant](#), [Hispanic Heritage Month](#), [disability awareness](#), [Mediation Week](#), [Hurricane Michael assistance](#), [new advance directive guide](#), [Formal Opinion 483](#), and [ABA Legal Fact Check](#).

As recent [studies](#) confirm high rates of substance abuse and mental health issues among U.S. attorneys, the ABA launched a campaign asking law firms to take a pledge to improve the well-being of lawyers, as announced in a MR-issued [news release](#) on September 10. Several business and legal publications reported on the campaign, which has already received support from at least nine major law firms. Coverage of the pledge appeared in the [National Law Journal](#), [Law360](#), [Legal Intelligencer](#), [Global Legal Post](#), Los Angeles Daily Journal, [Philadelphia Business Journal](#), and others. "Many lawyers have struggled with alcohol, other substance-use or mental health disorders, and many more of us have watched friends wrestle with them," President Carlson said in [Above the Law](#). "This pledge campaign will give these issues the attention they deserve by raising awareness throughout the profession and making help available to lawyers in need."

When Hurricane Florence threatened extensive damage to the Carolinas, MR worked with the Young Lawyers Division (YLD), the Office of the President, and other ABA entities to develop a September 13 [news release](#) that shared the Association's preparation of legal resources to aid in the aftermath, as reported by [North Carolina Lawyers Weekly](#) and other publications.

As soon as FEMA and the YLD's Disaster Legal Services Program established legal hotlines for storm survivors, MR issued follow-up news releases for [North Carolina](#) (September 20) and [South Carolina](#) (September 26) with details on accessing legal assistance, generating coverage from [South Carolina Lawyers Weekly](#), [Virginia Lawyers Weekly](#), and [ABC-TV](#), among others. On September 12, MR also distributed a nationwide [news release](#) that offered reporters available ABA experts to discuss the legal aspects of damage from Florence.

MR continues to keep a targeted group of reporters abreast of the ABA's ongoing lawsuit against the U.S. Department of Education over eligibility for the department's PSLF program. Regular one-on-one outreach has generated stories in [The Washington Post](#), [Slate](#), Texas Lawyer, and [Daily Record](#), while also laying groundwork on future coverage with outlets such as the New York Times, CNBC, and the National Law Journal.

Three new major MR-led projects designed to proactively strengthen the ABA brand and address top Association priorities continue to move forward. MR is working

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with the Fund for Justice and Education (FJE) to identify and apply for appropriate grant funding for the projects.

The first is a Profile of the Legal Profession, which will showcase statistics on the legal profession that will include such diverse topics as pro bono work, salaries, diversity, legal education, well-being, and discipline. An internal team has identified and narrowed the topics and data sources and MR is on track to debut the report at the 2019 Annual Meeting in August.

A second project will measure Americans' knowledge of civics, the courts, and the rule of law through a national survey. An MR work group partnered with the ABA Division for Public Education to develop survey questions. The group is currently working with FJE to identify and apply for grant funding. We're pleased to report the Anne and Ronald Abramson Family Foundation has committed to provide \$52,500 in funding over three years to help fund the Civics Knowledge Survey. This survey will be released annually in conjunction with Law Day beginning in 2019.

A third project seeks to measure access to justice in the United States. Drawn from existing data on factors impeding access to justice, as well as from MR-initiated surveys of ABA members and others, the index will be designed as a tool to identify roadblocks related to accessing the civil and criminal justice. An MR work group has initiated the project's design and preliminary budget. The group is now working with FJE to secure outside funding through grants and private foundations.

A new study on race and gender issues in the legal profession released on September 6 by the ABA Commission on Women in the Profession and other organizations drew significant media attention. Following distribution of a [news release](#), the study, which confirms that widespread gender and racial bias permeate the hiring, promotion, assignments, and compensation in the legal industry, was the subject of articles in such publications as the [New York Times](#) and [Bloomberg](#). In the New York Times story, President Carlson was quoted to note that the remedies suggested in the study "will lead the way to better employment practices and greater diversity."

President Carlson returned to the Rio Grande Valley at the end of August to continue to assess the unmet legal needs of families separated at the US-Mexico border and reaffirm the Association's commitment to help resolve them. He discussed the trip during several MR-organized media interviews with reporters from national news outlets, such as the Associated Press and Time Magazine, and local media including the Rio Grande Guardian.

President Bass traveled to the Rio Grande Valley June 25 to 26 to assess the legal needs of these youth and their parents at the southern U.S. border, as shared in a MR-drafted media advisory to nearly 3,000 reporters nationwide. Through aggressive one-on-one outreach by MR staff, more than a dozen national and local media outlets covered Bass' two-day trip, during which she described her emotional meeting with mothers desperate to get their children back, along with due-process concerns. Outlets reporting

on the trip included networks and television-affiliates such as MSNBC, CNN, Univision (at 2:00), CBS-TV, and NBC-TV; radio stations like ABC Radio and KOMO-AM; print publications and syndicators such as the National Law Journal, Reuters, and Associated Press; the Washington Post; and many in local media.

In addition to informing media of the issues resulting from the White House's immigration policies, MR outreach also highlighted the important work of the South Texas Pro Bono Asylum Representation Project (ProBAR) program, an effort established by the ABA and its partners that has been providing free legal services to families separated at the border. The Division's media statement on June 20 highlighted a MR-created resources webpage that provides links to ABA advocacy efforts as well as to donation and volunteer opportunities at organizations like ProBAR. An MR-issued news advisory two days later provided further detail on ProBAR, bolstered by tweets that MR helped to create, which linked to a donation webpage for ProBAR. As a result, media outlets nationwide gained awareness of ProBAR, leading to calls for volunteers and donations from national news outlets, such as NBC-TV's Today Show, CNBC, Newsweek, the Daily Beast, Law.com, Marie Claire, Harper's Bazaar, the Guardian and Elle, as well as in local news coverage, such as the San Antonio Current, Fort Worth Star-Telegram, the Brownsville (Texas) Herald, the Texas Tribune, and Valley Morning Star, among many others.

MR continues to focus on the Association's lobbying efforts on behalf of legal aid. In response to President Bass' written testimony to the Senate on May 24 on the need to increase funding for the Legal Services Corporation (LSC) to help low-income Americans, MR distributed her remarks to reporters. "The federal government has a definite role in promoting equal justice and justice for all," [her written testimony](#) says. "The federal role in promoting equal civil justice *is* funding the Legal Services Corporation.

### **Governance and Public Services Groups**

The Commission on Lawyer Assistance Programs (CoLAP) launched the test phase of its Judicial Stress and Resiliency Survey. The survey is designed to capture data from full-time, sitting judges in the U.S. on their experiences with judicial stress and ability to overcome life and career challenges. CoLAP and Professor David Swenson through the College of St. Scholastica in Duluth, Minnesota developed the survey in consultation with representatives from the National Judicial College, the National Center for State Courts, the Institute for the Advancement of the American Legal System, and the ABA Judicial Division. The Idaho State Judiciary and the Indiana Marion Superior Court judges are serving as the test group for the survey before it is more widely distributed.

The Center for Innovation's work to develop data for the Miranda project is continuing. The Miranda project involves the development of an app for use by law enforcement to inform people with limited English proficiency of their constitutional rights. The Harvard's Access to Justice Lab and the Illinois Institute of Technology's School of

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Design are developing data collection tools for both the police and the public, to help assess the success of the project.

The Standing Committee on Law and National Security held the 28th Annual Review of the Field of National Security Law Conference, November 1 and 2. This is the Committee's largest annual event, and it is the only unclassified national security law CLE event. Hundreds of attorneys, law students, and national security professionals attend annually. This year offered 10 panels and three keynote speeches on current topics in national security law, including surveillance, social media, and global trade. Former Secretary of Homeland Security Michael Chertoff addressed the conference dinner, and U.S. Senator Mark Warner, Vice Chairman of the Senate Select Committee delivered closing conference remarks.

The Commission on Lawyer Assistance Programs collaborated with the ABA Law Student Division to support [Law School Mental Health Day](#) on October 10. On and around this day, law schools were encouraged to sponsor educational programs and events that teach and foster breaking the stigma associated with severe depression and anxiety among law students and lawyers. Also in October, the American University Washington College of Law hosted a [YouTube Live event](#) featuring Laurie Besden, Executive Director of Pennsylvania Lawyers Concerned for Lawyers.

The Standing Committee on Legal Assistance for Military Personnel co-sponsored the Veterans Legal Career Fair on September 21 in Washington, D.C. ABA GAO Executive Director Holly Cook represented the Association as a panelist to examine opportunities for military attorneys seeking civilian employment. The ABA Military Pro Bono Project has worked with Human Resources to hire a grant-funded staff attorney to work as the Military Pro Bono Coordinator to manage the daily efforts of the program.

On May 1, approximately six dozen students participated in the Law Day Dialogue program, which engages young people in a discussion of fundamental American legal principles and civic traditions. This year's Dialogue, which focused on the Law Day theme ("Separation of Powers: Framework for Freedom") was led by President Bass, President-elect Carlson, National Law Day Chair Jacqueline Becerra, and Standing Committee on Public Education Chair Ruthe Ashley. It was a remarkable program -- in addition to the fact that the conversation was engaging and informative, the students took the opportunity before and after the program to talk with the bar leaders about their passion for the subject matter and their desire to pursue legal careers.

#### **Global Programs**

In December, the ABA announced it will join the Clooney Foundation for Justice (CFJ) and Columbia Law School to collaborate on CFJ's TrialWatch® initiative. Set to launch in 2019, TrialWatch® will monitor trials around the world that pose a high risk of human rights violations, including trials that could oppress vulnerable groups, silence speech or target political opponents.

The Center for Human Rights will lead ABA efforts with the TrialWatch® initiative, which will train a global cadre of trial monitors, including non-lawyers, to report on legal proceedings using specialized technology. A team of legal experts will then analyze the information collected by monitors and grade trials according to their compliance with international fair trial standards. TrialWatch® will also conduct advocacy where appropriate, including to marshal support for and awareness of defendants whose rights have been violated. Ultimately, the initiative expects to develop a “Justice Index” that ranks countries’ performances.

On November 22, ROLI conducted a roundtable in Kazakhstan for 89 participants from the government, arbitration courts, judges of the Supreme Court, and all 17 regional courts. The topic of the roundtable was: “Interaction between courts and arbitration in commercial disputes resolution”

From November 5 to 9, ROLI conducted an oral litigation workshop focused on gender-based violence in the Superior Court of Piura, Peru. Forty-five judges, prosecutors, public defenders, and special police (20 men and 25 women) participated in this training,

Thanks to funding from USAID, ROLI is preparing to launch the first-ever Global Perceptions of Gender and Online Violence survey. This will be the first research project of its kind to gauge public perceptions and knowledge of issues related to gender-based violence on a global level. It will bring together people’s views from countries around the world. The survey is currently in development and it is expected to be released soon.

In October, ABA President Carlson issued a statement calling on the government of Poland to refrain from the politically motivated removal of judges pending a decision of the European Court of Justice. The Court subsequently ordered the reinstatement of members of the Polish Supreme Court.

From October 22 to 23, ROLI held a training in Kiffa, Mauritania for community-based paralegals who support victims of slavery and other marginalized populations there. The training covered relevant laws relating to key rights issues for slaves and marginalized groups, particularly the anti-slavery law and access to legal identity documents, as well as advocacy skills and how to use relevant paralegal tools, including client intake forms, model mediation agreements, referral form, and case management spreadsheets.

In October, ROLI continued support for Bahraini implementation of a new program on alternatives to detention included the first workshop on this topic for lawyers in Bahrain (44 participants) and a training session for 21 judges and prosecutors.

ABA Associate Executive Director for Global Programs Alberto Mora and ROLI staff visited Tunisia from October 15 to 19, meeting with key donors, including the U.S. Ambassador to Tunisia, the USAID heads for both Tunisia and Libya, the U.S. Charge to Libya, representatives of the European Union, and the Tunisian Ministry of Justice Chief of Staff. The visit significantly raised the profile of ROLI in Tunisia and Libya,

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strengthened ties with local partners, and promoted ROLI with potential new donors and partners.

ABA President Carlson traveled to Tashkent and Samarkand in Uzbekistan for high level meetings from October 14 to 22 as part of a goodwill trip to renew positive relations between the ABA and the Government of Uzbekistan. Meetings were held between the ABA and the Minister of Justice, the Chairman of the Supreme Court, and the Chairman of the national bar association, among others. Throughout the week, Carlson participated in a number of events outside of official meetings: he held a brief lecture and Q&A with approximately 100 law students and professors on the role of the ABA and importance of legal education in ensuring a just and fair society; he was interviewed by the Ministry of Justice press service; and he served on a panel for an international conference on the democratization of legislation and law enforcement practice, discussing modern challenges to the American criminal justice system. Carlson also met with the Charge d'Affaires of the U.S. Embassy in Tashkent, Alan Meltzer. The trip served as an opportunity to establish a positive working relationship with in-country partners and to identify additional areas of cooperation as the government seeks far-reaching justice sector reforms.

On October 1, ROLI facilitated the successful launch of an eCourt going live in the Philippines' Pasay City Hall of Justice. The Offices of the Clerk of Court in both the first-level and second-level courts began processing newly filed cases using eCourt features, such as the automatic assessment of fees and raffle of cases. As of October 8, all court branches began using eCourt to manage their cases. ROLI trained a total of 27 judges, 156 court staff, and 35 staff from the Offices of the Clerk of Court on eCourt use.

On September 14, the Center for Human Rights (CHR) hosted its inaugural Eleanor Roosevelt Prize for Global Human Rights Advancement, honoring former Nuremberg War Crimes prosecutor Benjamin B. Ferencz and former Secretary of State Hillary Rodham Clinton, at Roosevelt House in New York City. Approximately 70 ABA leaders and CHR supporters and staff attended the gathering, which was co-chaired by former CHR Chair Walter White and Tracy Roosevelt, great-granddaughter of Eleanor Roosevelt and a young lawyer at Foley Hoag law firm in Washington, D.C. The Center established the Roosevelt Prize to recognize people and organizations having a global impact in advancing the principles set forth in the Universal Declaration of Human Rights, which Eleanor Roosevelt championed.

CHR's Justice Defenders Program issued a [report](#) concerning efforts in Guatemala to end the work of a UN anti-corruption commission. The report called for a continuation of the work of the commission, which protects local judges and prosecutors who have been threatened and bribed to prevent accountability in grand corruption cases. The Justice Defenders Program also sent observers to two trials in Cambodia of lawyers who faced frivolous charges in an effort to prevent them from serving as election commissioners.

In September, ROLI trained police officers in the Central African Republic on investigative skills with a focus on sexual and gender-based (SGBV) crimes and conducted outreach activities to engage men to help combat SGBV. ROLI also trained Central African Bar Association attorneys on supporting investigations of crimes committed during the recent civil conflict. Many cases that are brought to the legal aid clinics require advanced skills, particularly when they are going to be referred to the criminal sessions, and attorneys are required to play a key role in the process. This training focused on supporting the process of prosecuting these crimes.

In late September, ROLI held a CLE workshop in Beirut for Syrian women lawyers on international corporate law, arbitration, and law practice management. The event was organized in partnership with the Arab Women's Legal Network and hosted Syrian women from Syria and Lebanon.

In August, ROLI hosted an event entitled, Youth for Integrity, to teach approximately 100 Sri Lankan students and young professionals about integrity and anti-corruption, and prepare them to participate in a large forum on anti-corruption held by the Youth Services Council, with approximately 300 youth, government officials, and private sector representatives.

In August, ROLI held two cybercrime workshops in Egypt. Led by Egyptian trainers, 70 judges from different judicial entities such as Economic Courts, Appeal Courts and the Cassation Court explored topics such as protection of personal data; terrorism and cyber-crimes; the relationship between cyber-crimes and other crimes such as human trafficking; and cyber-crimes related to capital markets and the stock exchange.

In August, ROLI held two awareness sessions in Jordan on trafficking in persons (TIP) for a total of 40 juvenile officers and shelter staff. It was led by local TIP experts, including the director of Jordan's shelter for TIP victims and a detective and a nurse from a special TIP investigation unit.

### **ABA Finances**

Fiscal Year 2019 Financial results are available through October 31 as of the date of this report. They show the Association generated consolidated operating revenues of \$30.8 million and incurred operating expenses of \$29.3 million, which resulted in a surplus of \$1.5 million. The \$2.1 million operating revenue shortfall to budget is offset by a \$6.3 million favorable expense variance, leaving a \$4.2 million favorable net variance to budget.

Total consolidated operating revenue is short of budget by \$2.1 million, mainly as a result of timing issues. Grant segment revenue is \$2.8 million unfavorable to budget, but our grant staff expects to achieve the full year budget. General Operations revenue is \$0.6 million favorable to budget, but this favorable variance is partially offset by lower Designated Reserves for Operations revenue (\$0.3 million) caused by the timing of new membership model activity (revenue is only recorded when associated expenses occur).

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There are also unfavorable variances in Gifts, Contributions, and Sponsorships revenue (\$0.1 million), Meeting Fees revenue (\$0.1 million), and Dues revenue (\$0.1 million). At this time, full year General Operations dues are forecast at \$52 million, about \$2 million below the FY19 budget.

Total consolidated operating expense is favorable to budget by \$6.3 million. Section expense is \$3.5 million favorable to budget due primarily to timing of expenses across nearly all reporting line items and multiple entities, most notably Meetings and Travel (\$1.8 million). Grant segment expense is \$2.2 million favorable to budget, but staff attributes the slow start to timing, and expects expenses to reach budgeted amounts by fiscal year end. General Operations expense is \$0.8 million favorable to budget, driven by Fringe Benefits and Payroll Taxes (lower-than-budgeted medical claims), as well as lower facilities expense. General operations expense was down from the prior year driven by compensation, fringe benefits and payroll taxes, mainly due to lower headcount.

The Treasurer's Report (which has not been submitted as of the date this report was filed) will cover the entire first quarter of FY 2019. It provides a comprehensive analysis of the Association's finances.

#### **Center for Member Practice Groups**

On October 17, the Criminal Justice Section's Women in White Collar Subcommittee, together with PricewaterhouseCoopers, and Foley & Lardner LLP hosted the Detroit White Collar Crime Breakfast Briefing in Detroit, Michigan. There were 45 people present and full program details can be found [here](#).

The Senior Lawyers Division was selected for the Outstanding Collaboration Award at the Section Officers Conference's (SOC) Fall Leadership Meeting in September for its summit on addressing the opioid epidemic held in May 2018. The summit's report was published and distributed during ABA Annual Meeting in Chicago and can be found here: [www.ambar.org/opioid](http://www.ambar.org/opioid).

The Section of Antitrust Law's Janet D. Steiger Fellowship Project was the winner of the 2018 Meritorious Service Award at the September SOC Leadership Meeting. The Steiger Fellowship Project provides law students the extraordinary opportunity to work in the consumer protection departments of state and territorial Offices of Attorneys General throughout the United States.

In September, the Section of Intellectual Property Law held its Sixth Annual Trademark Day at the headquarters of the U.S. Patent and Trademark Office (USPTO). U.S. Commissioner for Trademarks Mary Boney Denison, Trademark Trial and Appeal Board Chief Judge Honorable Gerard F. Rogers, and other top USPTO officials were among the presenters. The presentations included an overview of the U.S. Patent and Trademark Office, and discussions on Trademark Trial and Appeal Board practice, ethical issues in trademark practice, random audits, and other best practices in working with the Trademark Office. The program was very successful, with 120 participants attending.

The Law Student Division has been partnering closely with the YLD, Litigation Section, and Legal Career Center on a series of webinars covering topics especially relevant and timely for law students. In August, this collaboration produced a webinar to help students prepare for on campus interviews (OCI). Over 500 students registered for the event. A webinar on September 25 aimed at helping students who were unsuccessful in OCI had about 200 registrants.

At the 2018 Annual Meeting in Chicago, the Board of Governors approved the request of the Health Law Section to create a new award entitled, “ABA Health Law Section Emerging Young Lawyers in Healthcare” that honors Health Law Section young lawyer members who exemplify a broad range of achievement, vision, leadership, and legal and community service in health law. The award will be presented at the Section’s Emerging Issues in Healthcare Conference next year.

In other Annual Meeting developments, the House of Delegates adopted two Criminal Justice Section-sponsored resolutions:

- 100A: Urges bar associations, law schools, and other stakeholders to develop and increase curricular offerings where law students can provide pro bono representation of incarcerated individuals and those reentering society
- 100B: Urges Louisiana and Oregon to require unanimous juries to determine guilt in felony criminal cases and reject the use of non-unanimous juries where currently allowed in felony cases

The Section of Civil Rights and Social Justice sponsored three resolutions on issues related to gender, family and sexual orientation that passed the House of Delegates at the Annual Meeting:

- Resolution 104C supported an interpretation of the Affordable Care Act that would include discrimination on the basis of sexual orientation and gender identity in the definition of sex discrimination
- Resolution 104D called on jurisdictions to pass job-guaranteed paid sick days and job-guaranteed family and medical leave laws
- Resolution 104E called on jurisdictions to adopt rules preventing and addressing gender-based workplace violence, including sexual harassment, pregnancy discrimination, discrimination on the basis of sexual orientation or gender identity, and discrimination on the basis of domestic violence victimhood. It also asked employers to adopt robust policies against workplace gender violence

On August 4, the Section of Civil Rights and Social Justice’s annual Thurgood Marshall Award Dinner honored former U.S. Attorney General Eric Holder and was keynoted by NAACP Legal Defense and Education Fund Counsel Sherrilyn Ifill, and introduced by Illinois Attorney General Lisa Madigan. The event included many Association leaders; former ABA Presidents; current and sitting judges; politicians, civil rights heroes; and international dignitaries. More than 380 people attended the dinner.

### 3

The Section of Antitrust Law sponsored its biennial Antitrust in Asia conference in Seoul, South Korea from May 31 to June 1. Attendees included 141 advance registrants from 13 countries, with gross revenue of approximately \$65,000. The long-term goal of this conference is to promote/enhance the Section of the Antitrust Law brand in Asia; increase ABA/Section of Antitrust Law Associate membership; and generate additional non-dues revenue from publication sales and attendance at other Section of Antitrust Law conferences.

The Health Law Section's Breast Cancer Initiatives Interest Group coordinated with the CPD and ABA Publishing to offer an ABA Free CLE Series webinar on October 15, entitled, "Cancer Rights: An Overview of Relevant Legal Issues" which attracted 954 participants. The program focused on legal issues facing cancer patients and covered a variety of topics impacting cancer patients and survivors, including labor and employment issues, employee benefits law, and insurance coverage issues.

The Health Law Section's Physicians Legal Issues Conference was held in June at the Hotel Intercontinental in Chicago, and had 165 attendees. The conference was co-sponsored by the Chicago Medical Society. Attendees included members from both organizations. Keynote speakers included Centers for Medicare & Medicaid Services Deputy Administrator & Director for Program Integrity Alec Alexander, and Dr. Bertha Madras of the White House's Drug Addiction Commission. Dr. Madras addressed the opioid crisis.

#### **Center on Public Interest Law**

Amy Horton-Newell was selected as the first Director of the ABA's Center for Public Interest Law and began serving in that capacity on July 23. Amy had served as the Director of the ABA Commission on Homelessness & Poverty since 2001. In that role, she developed and leads the ABA Homeless Youth Legal Network, a national effort that provides technical assistance and fosters collaboration to address existing gaps in legal services and improve outcomes for homeless youth and young adults -- including those transitioning from the child welfare system and exiting the juvenile justice system. Amy co-launched and staffed the ABA Coordinating Committee on Veterans Benefits & Services, and has supported larger ABA efforts to increase legal services for veterans. Amy also staffed the ABA Standing Committee on the Law Library of Congress from 2001 to 2013.

The Standing Committee on Pro Bono and Public Service's [National Celebration of Pro Bono](#) was held October 21 to 27, 2018. Over 1,360 events took place around the country, 89 of which followed this year's theme of disaster legal services. On October 24, the Committee hosted an event with Supreme Court Justice and honorary chair of the 2018 Celebration, Elena Kagan and ABA President Bob Carlson at Georgetown School of Law. The event was held to honor the 10<sup>th</sup> anniversary of the Celebration and was attended by over 300 supporters of pro bono legal services, including ABA President-

elect Judy Perry Martinez and representatives of the National Legal Aid and Defender Association, past Pro Bono Publico Award recipients, as well as members of law firms, law students, and the pro bono community.

The Center on Children and the Law was awarded a grant from the Health Resources and Services Administration within the U.S. Department of Health and Human Services. ZERO TO THREE, an organization dedicated to protecting children, is the primary grantee on this grant, which focuses on improving court processes for child welfare cases that involve infants and toddlers. As a sub-grantee, the Center will provide technical assistance around best practices for quality legal representation for infants and toddlers, parents, and child welfare agencies and will offer strategies for reducing children's time in foster care. Our FY 2019 support on the grant will be \$50,000.

On September 19, the Center on Children and the Law was selected for a \$400,000 three-year grant by the Office of Planning, Research and Evaluation at the U.S. Department of Health and Human Services, Administration for Children and Families. The focus of the grant is: Understanding Judicial Decision-Making and Hearing Quality in Child Welfare. James Bell and Associates (JBA) will be the lead organization, and the Center will be the primary partner working with JBA and take the lead on legal and judicial engagement in the children's law field.

The Death Penalty Representation Project held its annual [Volunteer Recognition & Awards Dinner](#) in September. The event brought together approximately 100 attorneys and supporters of the Project, including federal public defenders, law professors, and pro bono attorneys from several top law firms. The event is a major fundraiser for the Project, and this year it brought in almost \$90,000 from law firm sponsorships and ticket sales.

As of December 5, over 53,800 client questions have been submitted to ABA [Free Legal Answers](#) nationwide, an increase of 27 percent since July of this year. Currently, 42 states and the U.S. Virgin Islands are committed to participate in the site, with 39 states active in various stages of access by clients, pro bono attorneys and/or state administrators. More than 5,500 pro bono attorneys are registered to respond to civil legal questions on Free Legal Answers.

The Center on Children and the Law released a new guide, "Immigration Issues in the Child Welfare System: Case Studies." The document provides guidance to child welfare and immigration practitioners on how to navigate seven different scenarios in which children and their families may benefit from support services but face intersecting immigration and child welfare legal challenges. We estimate that based on this outreach, tens of thousands of people received the resource in its first week of distribution. The feedback about the material has been very positive: child welfare direct service providers and immigration advocates have incorporated it into their trainings with families and U.S. Immigration and Customs Enforcement (ICE) indicated that they will include the Case Studies resource in their training efforts within the Parental Interests Office.

## Conclusion

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Following approvals of the new membership model at last summer's Annual Meeting, ABA staff began to implement it in a strategic and methodical manner. As with the Apollo 11 spacecraft that blasted off from earth nearly five decades ago, the new model has launched and there's no turning back -- on May 1, the new model will be in place as a dynamic new system to showcase the ABA's value proposition.

Once the model is put into effect, the ABA will be better positioned to serve our members and our profession. We will see growth in dues-paying, highly-energized members who are proud to be ABA members. We will have a more important impact on the legal profession and the public we serve.

For the model to succeed, we must work together. As President Kennedy said about the Apollo Program, "It will not be one man going to the moon...it will be an entire nation. For all of us must work to put him there."

My thanks to the members of the House of Delegates for your support as we work to implement the new model. This effort represents our best opportunity to reverse the membership and fiscal challenges of recent years. Your leadership and support were critical to the creation of this historic initiative and will be essential for our efforts to achieve dynamic results in the years ahead.

Please do not hesitate to contact me with any concerns or questions you may have. I look forward to meeting with you in Las Vegas.

Respectfully submitted,

Jack L. Rives  
Executive Director

**AMERICAN BAR ASSOCIATION**  
**COMMITTEE ON SCOPE AND CORRELATION OF WORK**  
**INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES**

Below is a report on the Committee on Scope and Correlation of Work's activities since its last report to the House of Delegates at the American Bar Association's August 2018 Annual Meeting. Scope has continued to fulfill its constitutional mandate as a Committee of the House of Delegates, and the only one elected by it. It has carried forward its review of the structure, function and activities of Association committees and commissions to evaluate the effectiveness of their functioning and determine if overlapping functions exist.

Scope held its last meeting on Saturday, November 17, 2018 in Chicago. Scope will meet again in conjunction with the ABA's Midyear Meeting on Saturday, January 26, 2019, in Las Vegas.

**Center for Innovation**

Scope concluded that the Center for Innovation (CFI) is doing good work: while its work is somewhat duplicative of work done by other ABA entities, the innovation focus is unique and valuable and the existence of the Center may serve to support innovation throughout the ABA. The CFI maintains that it has been able to raise sufficient funds from external sources to support its work without general revenue support, but that needs to be verified. There is a need for better understanding of the finances of the CFI and ongoing monitoring to determine whether there is sufficient ability to generate revenue to support its activities. The CFI should assure that it has a sufficient structural framework to allow for coordination between all legal services entities within the Center for Access to Justice and the Profession, as well as other Association entities in this space, to minimize overlap of activities and to maximize resources. Scope commends the Center for Innovation for becoming a leader in legal services innovation.

**Coordinating Council for the Center for Professional Responsibility**

Scope concluded that the Coordinating Council's structure is working effectively and productively, and that the Coordinating Council is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. The Center is working well in doing more with less. It appears that the Center's sustainability and the Center's ability to maintain its leadership role in developing the profession's standards may be at a critical juncture. Staff and volunteer leaders should endeavor to gain a thorough understanding of the Center's finances, and particularly the sources of non-dues revenue that support the Center, both overall and on an entity by entity basis. In particular, CPR should evaluate the extent to which the new membership model (which requires that

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Center entities produce 12 CLEs a year available for free to all ABA members) will have a negative financial impact. While the Center is being allowed to keep the revenue from Center membership dues, it is not clear how the new membership model will ultimately affect Center membership since the availability of extensive CLEs could lessen the incentive to join the Center. Further, the need to produce free CLE programs could result in spreading the already reduced number of Center staff too thin, adversely impacting the component entities within the Center (including new entities recently added to the Center.) The Center should be watchful for the potential dilution of the quality and quantity of the Center's work, particularly in light of the need for the ABA to have subject matter experts on staff in this area.

Scope also suggests that the Coordinating Council identify those activities that consist of services provided to other groups (e.g., services to state and local bars) for an overall assessment of revenue generating opportunities. This could be part of long-range planning for the Center. The loss of institutional memory within CPR resulting from staff voluntary retirements and staff reductions puts a premium on ensuring that there is a pipeline of both staff and volunteer leaders to maintain CPR's expertise in providing national leadership in the important areas within the Center. Scope is concerned that the same group of members is recirculated among the various CPR entities and that succession planning to bring in new blood may be critical. Scope also encourages CPR to explore opportunities to market its excellent products and services beyond a core group of specialists. The increased awareness and use of products and services from CPR and its components could add perceived value of ABA membership to non-specialists. Scope finds the information sharing among the committees of the Center to be helpful, but urges that the Coordinating Council be the focus of such information sharing, and that it be minimized among the committees except as necessary for each committee's work, and not be duplicated in each committee. Scope recognizes that the Coordinating Council, along with all CPR entities, play an important role in maintaining professionalism.

### **Standing Committee on Professionalism**

Scope concluded that the Standing Committee is doing good work on a topic of importance to the profession. In the face of increasing incivility in our society and, sadly, in our profession, and a lack of focus by lawyers on their own wellbeing, the Committee's development of professionalism policy initiatives advances the highest ideals of the legal profession within the entire legal community. Committee members and liaisons regularly take speaking engagements to promote civility and professionalism, teach professionalism and ethics courses, and promote professionalism in various bar association programs throughout the country. In the past four years, the Professionalism Committee has developed two widely read, and well-received books: (i) *Essential Qualities of the Professional Lawyer* (2013); and (ii) *The Relevant Lawyer - Reimagining the Future of the Legal Profession* (2015), and regularly contributes to ABA periodicals, *The Professional Lawyer*, *Journal of the Professional Lawyer* and the ABA Journal "Ethics" column.

Scope also concludes that the Committee is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. Scope commends volunteers and staff for doing good work with fewer resources.

### **Standing Committee on Public Protection in the Provision of Legal Services**

Scope concluded that the Standing Committee is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. With the recent name change from the “Standing Committee on Client Protection” to the “Standing Committee on Public Protection in the Provision of Legal Services,” special attention should be given to maintaining the visibility of the important work done in the area of client protection. Scope recommends monitoring the quality of work in light of recent staff reductions, and measured maximization of the fee structure for services the Standing Committee provides to state and local bar associations to allow continuation of its important work.

### **Standing Committee on Professional Regulation**

Scope concluded that the Standing Committee is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. Scope encourages the Committee to engage in a strategic planning process, identifying and prioritizing its work in professional regulation and discipline, having each member have a full understanding thereof, and integrating their strategic planning process with the strategic planning process of the Center for Professional Responsibility. Scope commends the Standing Committee for its thought leadership on issues relating to professional regulation and for its work in the international arena.

### **Standing Committee on Ethics and Professional Responsibility**

Scope concluded that the Standing Committee is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. Scope commends the Standing Committee for undertaking a tremendous amount of work, ensuring that the ABA continues to be the go-to source on ethics in the legal profession. Reduced budgets necessitate fewer face-to-face meetings, which were particularly helpful to the committee in the past. As a better alternative to telephone conference calls, Scope recommends that the Standing Committee consider using inexpensive Zoom video conferencing technology to allow members to see each other during deliberations. Scope recognizes that the ethics opinions issued by the Standing Committee are an essential part of upholding the high ethical standards of the legal profession.

### **Editorial Board -- ABA/BNA Lawyers' Manual on Professional Conduct**

Scope concluded that the Editorial Board is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. Scope recognizes that through the work of the Editorial Board and the Association's relationship

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with BNA, the ABA is able to provide a publication outlet for much of its essential work in professional responsibility, provide a service to members and nonmembers as well, and generate revenue for the Association's work.

## **Commission on Lawyer Assistance Programs**

Although the Commission on Lawyer Assistance Programs (COLAP) was recently reviewed in December 2017, Scope reviewed the Commission again as part of its review of the Center for Professional Responsibility since the Commission now falls under the Center. Scope reiterates its December 2017 evaluation, which concluded that the Commission is active and not engaging in a function that unnecessarily overlaps with or duplicates the activities of other ABA entities, and which called upon COLAP to consider whether the ABA should continue to be in this business since most state bar associations now have lawyer assistance programs. Scope also recommends that they amend their jurisdictional statement to encompass wellness in addition to impairment so it won't be necessary for the Task Force on Lawyer Wellbeing to continue indefinitely.

## **Standing Committee on Lawyers' Professional Liability**

Scope concluded that the Standing Committee is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. In light of reduced funding, Scope encourages the Standing Committee to focus on sustainability so that the important work of the committee can continue. Now that the Standing Committee is housed under the Center for Professional Responsibility, it should consider working with the Standing Committee on Professional Regulation on development of practice-based approaches to assist lawyers with self-examination of risk factors for potential disciplinary action.

## **Commission on IOLTA**

Scope decided to defer its evaluation of the Commission on IOLTA until it has more information about how the Commission sees its role moving forward. Thanks to the tremendous work of the Commission over the years, today every state, along with the District of Columbia and the Virgin Islands, operates an IOLTA program. The question now is whether, in a time of extreme budget cuts, the Commission on IOLTA continues to play an essential role in light of state engagement. The Commission will be asked to provide a written explanation of how it sees its current and future role, and they will be invited to appear at the Scope meeting during the ABA Midyear Meeting in Las Vegas to present their views before Scope completes its evaluation and makes any recommendations. Scope recognizes that the budget from the Commission has declined from \$326,376 from prior to the Board Realignment to \$8,600 in 2019. Scope further recognizes that the Commission does generate some non-dues revenue and that if revenue streams are maximized that *may* justify the Commission's continuance if no general revenue is used.

### **Task Force on Building Public Trust in the American Justice System**

Scope completed an informal review of the Task Force, which was created by President Brown, continued under President Bass, and is continuing under President Carlson. Scope will continue to monitor the operation of the Task Force.

### **Scope's 2019 Midyear Meeting agenda will include:**

The following Center for Public Interest Law entities will be reviewed during the 2019 Midyear Meeting:

- Standing Committee on Gun Violence
- Commission on Homelessness and Poverty
- Commission on Domestic and Sexual Violence
- Commission on Law and Aging
- Commission on Youth at Risk
- Center for Human Rights
- Center for Children and the Law
- National Conference of Lawyers and CPA's
- Standing Committee on Disaster Response and Preparedness

Respectfully submitted,



Amelia Helen Boss, Chair  
 W. Andrew Gowder, Jr.  
 Jose C. Feliciano, Sr.  
 Thomas M. Fitzpatrick  
 Linda L. Randell  
 Michael G. Bergmann, Chair, SOC  
 Kevin L. Shepherd, *ex-officio*  
 Darcee S. Siegel, *ex-officio*



AMERICAN BAR ASSOCIATION  
JUDICIAL DIVISION  
NATIONAL CONFERENCE OF FEDERAL TRIAL JUDGES  
NATIONAL CONFERENCE OF STATE TRIAL JUDGES  
STANDING COMMITTEE ON THE AMERICAN JUDICIAL SYSTEM  
BUSINESS LAW SECTION  
SECTION OF LITIGATION  
SECTION OF DISPUTE RESOLUTION  
SECTION OF INTELLECTUAL PROPERTY LAW  
TORT TRIAL AND INSURANCE PRACTICE SECTION  
SECTION OF ANTITRUST LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association adopts the *ABA Guidelines for the*  
2 *Appointment and Use of Special Masters in Federal and State Civil Litigation*, dated  
3 January 2019; and
- 4 FURTHER RESOLVED, That Bankruptcy Rule 9031 should be amended to permit courts  
5 responsible for cases under the Bankruptcy Code to use special masters in the same way  
6 as they are used in other federal cases.



ABA Guidelines for the Appointment and Use of Special Masters in Federal and State  
Civil Litigation

Consistent with the Federal Rules of Civil Procedure or applicable state court rules:

- (1) It should be an accepted part of judicial administration in complex litigation (and in other cases that create particular needs that a special master might satisfy), for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation.
- (2) In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.
- (3) In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated cost of the special master's services, in order to make the special master's work efficient and cost effective.
- (4) Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist them. Among the functions special masters have performed are:
  - a. discovery oversight and management, and coordination of cases in multiple jurisdictions;
  - b. facilitating resolution of disputes between or among co-parties;
  - c. pretrial case management;
  - d. advice and assistance requiring technical expertise;
  - e. conducting or reviewing auditing or accounting;
  - f. conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;
  - g. conducting trials or mini-trials upon the consent of the parties;
  - h. settlement administration;
  - i. claims administration; and
  - j. receivership and real property inspection.In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.
- (5) Courts should develop local rules and practices for selecting, training, and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.
- (6) Courts should choose special masters with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the selection process by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.

- 43 (7) The referral order appointing the special master should describe the scope of  
44 the engagement, including, but not limited to, the special master's duties and  
45 powers, the roles the special master may serve, the rates and manner in which  
46 the special master will be compensated, power to conduct hearings or to  
47 facilitate settlement, requirements for issuing decisions and reporting to the  
48 court, and the extent of permissible ex parte contact with the court and the  
49 parties. Any changes to the scope of the referral should be made by a  
50 modification to the referral order.
- 51 (8) Courts and the bar should develop educational programs to increase  
52 awareness of the role of special masters and to promote the acquisition and  
53 dissemination of information concerning the effectiveness of special masters.
- 54 (9) Courts and, where applicable, legislatures should make whatever modifications  
55 to laws, rules, or practices that are necessary to effectuate these ends.

## REPORT

### Introduction

The American Bar Association (“ABA”) has long advanced the use of dispute resolution tools to promote efficiency in the administration of justice. Thirty years ago, the ABA was a leading voice in favor of various forms of alternative dispute resolution (“ADR”). Today, there is an underutilized dispute resolution tool that could aid in the “just, speedy and inexpensive” resolution of cases: appointment of special masters.

In 2016, the Lawyers Conference of the ABA Judicial Division formed a Committee on Special Masters to promote research and education concerning special masters and to make proposals concerning their use.<sup>1</sup> This Committee concluded that one of the difficulties faced by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters.<sup>2</sup>

To address this lack of standardization and to urge greater use of this valuable resource, the Committee brought together stakeholders from diverse segments of the ABA to propose best practices in using special masters. The ABA formed a Working Group in the fall of 2017 and included representatives of the Judicial Division (including three of its conferences – the National Conference of Federal Trial Judges, the National Conference of State Trial Judges and the Lawyers Conference), the ABA Standing Committee on the American Judicial System, and the ABA’s Section of Litigation, Business Law Section, Section of Dispute Resolution, Section of Intellectual Property Law, Tort Trial and Insurance Practice Section, and Section of Antitrust. The membership

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<sup>1</sup> Currently, 49 states have rules or statutes that provide for the appointment of court adjuncts to assist courts in the administration of justice. See Lynn Jokela and David F. Herr “Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool,” WILLIAM MITCHELL LAW REVIEW, Vol. 31, No. 3, Art. (2005) “In fact, Illinois is the only state that does not have any mechanism governing appointment of special masters.” *Id.* Courts have also recognized their inherent power to appoint special masters to assist judges in case management. See *id.* at 1302 n. 18. See also n.30, *infra*.

<sup>2</sup> Even the name for these judicial adjuncts is a source of confusion. These Guidelines use the term employed by Rule 53 of the Federal Rules of Civil Procedure – “special master” – to refer to any adjunct a court determines to be necessary and appropriate to appoint to serve any case-management function or to manage or supervise some aspect of a case. The term applies to persons appointed by any court to serve any of a wide variety of functions, regardless of whether statute, rules or practice have described these persons with other titles, such as “master,” “discovery master,” “settlement master,” “trial master,” “referee,” “monitor,” “technical advisor,” “auditor,” “administrator.” Even states whose rules mirror the Federal Rules, use different titles to describe the court adjunct’s officers. For example, a Rule 53 adjunct in Maine is a “referee.” See Maine R. Civ. P. 53. States using the pre-2003 version of the Federal Rules often refer to a “master” as “any person, however designated, who is appointed by the court to hear evidence in connection with any action and report facts,” suggesting more of a trial function than a pretrial role. See e.g., Mass. R. Civ. P. 53. See also 2006 Kan. Code § 60-253 (“[a]s used in this chapter the word ‘master’ includes a referee, an auditor, a commissioner and an examiner.” These titles may suggest a more limited function.

included current and former federal and state judges, ADR professionals and academics, and litigators who represent plaintiffs, defendants, or both in numerous fields.<sup>3</sup>

The Working Group also obtained information from other interested and knowledgeable agencies, organizations, and individuals, including the Federal Judicial Center (“FJC”), federal and state judges, court ADR program administrators, private dispute resolution professionals, representatives of a number of state bar associations, the academic community, professional groups (including the Academy of Court Appointed Masters (“ACAM”)), litigators, and in-house counsel. The Group has also benefitted from discussions among judges and stakeholders organized by the Emory Law School Institute for Complex Litigation and Mass Claims, which has worked with the FJC to explore ways of improving the administration of multidistrict and class action litigation.

Based upon the recommendation of federal and state judges both within and outside the Judicial Division and the Working Group’s analysis, and consistent with the best practices described below, the ABA encourages courts to make greater and more systematic use of special masters to assist in civil litigation in accordance with these Guidelines.

### **Discussion and Rationale for the Guidelines**

Courts and parties have long recognized that, in far too many cases, civil litigation takes too long and costs too much. Since 1938, Rule 1 of the Federal Rules of Civil Procedure has declared (in a principle echoed in many state rules) that the Rules are intended to deliver “a just, speedy, and inexpensive determination of every action and proceeding.” Since December 1, 2015, the Rules have declared that they are to be “employed by the court and the parties to secure” that end. Indeed, virtually every amendment to the Federal Rules over the past thirty-five years has been intended, at least in part, to address concerns regarding the expense and duration of civil litigation.<sup>4</sup>

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<sup>3</sup> The Working Group comprises representatives from the Judicial Division (Hon. J. Michelle Childs; Hon. David Thomson; Merril Hirsh (Convener); Cary Ichter (Reporter); Christopher G. Browning; David Ferleger and Mark O’Halloran); the ABA Standing Committee on the American Judicial System (Hon. Shira A. Scheindlin (ret.)); the Business Law Section (William Johnston (convener, policy subgroup); Hon. Clifton Newman; Richard L. Renck; Hon. Henry duPont Ridgely (ret.); Hon. J. Stephen Schuster; and Hon. Joseph R. Slight III); the Section of Litigation (Mazda Antia, John M. Barkett, David W. Clark, Koji Fukumura and Lorelie S. Masters); the Section of Dispute Resolution (Hon. Bruce Meyerson (ret.); Prof. Nancy Welsh); the Section of Intellectual Property Law (David L. Newman; Scott Partridge; Gale R. (“Pete”) Peterson); the Section of Antitrust Law (Howard Feller, James A. Wilson) and the Tort Trial and Insurance Practice Section (Sarah E. Worley). The members also wish to thank Hon. Frank J. Bailey and his staff, and ABA Staff members Amanda Banninga, Denise Cardman, Julianna Peacock, and Tori Wible for their assistance.

<sup>4</sup> See, e.g., Fed. R. Civ. P. 26 Advisory Committee Note: “There has been widespread criticism of abuse of discovery”; 1983: the “first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information”; Rule 26(g) “provides a deterrent to both excessive discovery and evasion”; 1993: “A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner

All too often, however, modifications to procedural rules intended to make the litigation process more efficient have merely changed the subject of the dispute: for example, limiting the number of interrogatories can lead to conflict over how to count interrogatories and subparts.<sup>5</sup> Unfortunately, the Rules are not self-executing.

Ensuring that parties will not gain an advantage by unreasonable conduct or delay requires a proportionate level of judicial case management. This case management is possible only where adequate resources are available to implement strategies designed to minimize the likelihood of unnecessary disputes, to facilitate the resolution of disputes that do arise, and to focus the parties on fairly resolving the issues in controversy.<sup>6</sup>

Judges, including magistrate judges, must dedicate the time needed to manage the pretrial process, and it is important to use their time most effectively. When warranted, appointment of a special master to manage the pretrial process can relieve courts of the burden of reviewing voluminous discovery materials or information withheld as privileged or proprietary, or addressing other disputes, allowing courts to focus on merits-based resolution of issues on a concise record. Where a case warrants this type of assistance, special masters have time that courts do not. The goal of these guidelines is not to detract in any way from the role of judges, including magistrate judges. It is to assist them.<sup>7</sup>

Courts at all levels face three particularly significant obstacles to effective case management. First, courts often lack sufficient resources to manage certain cases—particularly complex commercial cases or the practical ability to increase resources when

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to achieve those objectives”; 2006: Rule 26(b)(2) is amended to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information and to regulate discovery from sources “that are accessible only by incurring substantial burdens or costs.” 2015: Amendments that, among other things, expressly limit discovery to be “proportional to the needs of the case”; clarify when sanctions are appropriate for failure to preserve e-discovery; and specify that the rules not only be “construed,” but also “administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”

<sup>5</sup> See Merril Hirsh, James M. Rhodes and Karl Bayer, “Special Masters: A Different Answer to a Perennial Problem, JUDGES JOURNAL, v. 55, No. 2 at 28 (Spring 2016).

<sup>6</sup> See *id.* at 29-31; Merril Hirsh, “Special Masters: How to Help Judges Extend Their Reach ... And Exceed Their Grasp,” ALTERNATIVES (June 2017), available at <http://altnewsletter.com/sample-articles/special-masters--how-to-help-judges--extend-their-reach--and-exceed-their-grasp.aspx>

<sup>7</sup> Appointed masters are also used in other settings. Courts have appointed special masters in criminal cases, for example, to consider *Brady* obligations, see, e.g., *United States v. McDonnell Douglas*, 99-CR-353 (D.D.C.), or to shield investigators from privileged documents that might be obtained through warrants executed at attorney offices, see, e.g., *United States v. Stewart*, No. 02 CR. 396 JGK, 2002 WL 1300059 (S.D.N.Y. June 11, 2002); United States Attorneys Manual § 9–13.420, at § F, available at <https://famguardian.org/Publications/USAttyManual/title9/13mcrm.htm#9-13.420>. Masters are also appointed in non-judicial contexts (for example, by legislation, such as the appointment to administer the September 11 Victims Compensation Fund; by private entities to administer settlement funds designed to compensate injured parties in mass disasters, such as the BP Deep Water Horizon fund; and by government agencies to investigate and make recommendations, as with the special master appointed to investigate the student loan crisis). Many agencies and entities also use ombuds to serve numerous functions, including avoiding and resolving disputes and facilitating communication among stakeholders. These roles illustrate the utility and flexibility of using neutrals as a tool. A thorough discussion of appointments outside the civil litigation context, however, is beyond the scope of these Guidelines.

such a case is filed. In the federal system and in some state courts, magistrate judges are available; in others they are not. In some courts, a few complex cases, or a single, particularly complex case, can strain a docket. Resources allocated to one case can consume resources that would otherwise be available for other cases. Special masters can offer the time and attention complex cases require without diverting judicial time and attention from other cases.

Second, some cases benefit from specialized expertise. This is particularly true in federal multidistrict litigation (“MDL”), which accounts for nearly forty percent of the federal case load, excluding prisoner and social security cases.<sup>8</sup> Managing those cases oftentimes requires a diverse set of skills (e.g., managing discovery, reviewing materials withheld as privileged or proprietary, facilitating settlement of pretrial issues or the entire case, addressing issues related to expert qualifications and opinions, resolving internecine disputes among plaintiff and/or defense counsel, allocating settlement funds or awards, evaluating fee petitions, or providing other needed expertise).

Judges in MDLs and other large, complex cases are called upon to bring to bear knowledge of many fields, including, for example, science, medicine, accounting, insurance, management information systems, business, economics, engineering, epidemiology, operations management, statistics, cybersecurity, sociology, and psychology. No one person can be an expert in all these fields. Special masters who have specialized expertise in relevant fields can provide a practical resource to courts in cases that would benefit from subject-matter expertise.

Third, the judicial role limits the involvement judges can have in some aspects of the litigation process. Judicial ethics limit the ability of judges to facilitate informal resolutions of issues and cases, particularly if the process requires *ex parte* meetings with parties or proposing resolutions of issues on which the court may eventually need to rule.<sup>9</sup>

Federal Rule 16(c)(2)(H) and certain state rules provide that “[a]t any pretrial conference, the court may consider and take appropriate action on...referring matters to a magistrate judge or a master....” As previously noted,<sup>10</sup> however, the experience of the Working Group suggests that it is rare for courts to make use of this provision, especially when compared to the use made of other settlement procedures described in Rule 16(c)(2)(I).<sup>11</sup> Few courts have a practice of regularly considering the appointment of a

<sup>8</sup> Andrew D. Bratt, “The Long Arm of Multidistrict Litigation,” 59 WM. & MARY L. REV. 1, 2 (2017); Elizabeth Chamblee Burch, “Monopolies in Multidistrict Litigation,” 70 VAND. L. REV. 67, 72 (2017). The Judicial Panel on Multidistrict litigations reports that, as of April 16, 2018, 123,293 cases were part of pending MDL actions. [http://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MD\\_L\\_Dockets\\_By\\_District-April-16-2018.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_District-April-16-2018.pdf)

<sup>9</sup> See Ellen E. Deason, *Beyond “Managerial Judges”: Appropriate Roles in Settlement*, 78 Ohio St. L. J. 73, 105-127 (2018) (describing the ethical, due process and decision-making difficulties that arise when a judge plays both an adjudicative and settlement role in a case); Nancy A. Welsh, *Magistrate Judges, Settlement and Procedural Justice*, 16 Nev. L. J. 983, 1004-1014, 1018-1023, 1028-35 (2016).

<sup>10</sup> See *supra* nn.5-6 and accompanying text.

<sup>11</sup> Rule 16(c)(2)(I) provides as follow: “At any pretrial conference, the court may consider and take appropriate action on... settling the case and using specialized procedures to assist in resolving the dispute when authorized by statute or local rule.”

special master when they are preparing a scheduling order.<sup>12</sup>

Despite the considerable assistance special masters can offer, appointing special masters has historically been viewed as an extraordinary measure to be employed only on rare occasions.<sup>13</sup> This view appears to have stemmed from concerns regarding delegation of judicial authority and the costs that the parties will incur. But neither concern justifies limiting consideration of using masters to “rare occasions.”

The Supreme Court has long used special masters in original jurisdiction cases and has vested in those individuals extraordinarily broad powers, including the responsibility to conduct trials on the merits. Thus, at least at the federal level, if the use of special masters were an improper delegation of judicial power, courts would be barred from using them, and obviously they are not.<sup>14</sup>

Moreover, as a matter of logic, a concern about delegating authority should apply only to situations where the special master is asked to perform an adjudicative role. And, unless the parties agree otherwise, a special master’s “adjudication” is merely a report and recommendation that can be appealed to the trial court as a matter of right. The ultimate decision-making authority continues to reside with the court.

Cost concerns actually animate these Guidelines. Effective special masters reduce costs by dealing with issues before they evolve into disputes and by swiftly and efficiently disposing of disputes that do arise. Although no scientific study has empirically established that special masters reduce the cost of litigation, there is broad consensus that anticipating and preventing disputes before they arise or resolving them quickly as they emerge significantly improves the effectiveness and efficiency of dispute resolution.<sup>15</sup> Special masters can also inculcate a culture of compliance with procedural

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<sup>12</sup> There are exceptions. See *infra* n.25.

<sup>13</sup> See, e.g., 2003 Advisory Committee Note to Fed. R. Civ. P. 53 (noting, even as it revised the rule “extensively to reflect changing practices in using masters” for a broader array of functions that “[t]he core of the original [1938] Rule 53 remains, including its prescription that appointment of a master must be the exception not the rule”); Manual for Complex Litigation 4th, §10.14 at 14 (2004) (“Referral of pretrial management to a special master (not a magistrate judge) is not advisable for several reasons. Rule 53(a)(1) permits referrals for trial proceedings only in nonjury cases involving “some exceptional conditions” or in an accounting or difficult computation of damages. Because pretrial management calls for the exercise of judicial authority, its exercise by someone other than a district or magistrate judge is particularly inappropriate. The additional expense imposed on parties also militates strongly against such appointment. Appointment of a special master (or of an expert under Federal Rule of Evidence 706) for limited purposes requiring special expertise may sometimes be appropriate (e.g., when a complex program for settlement needs to be devised”).

<sup>14</sup> See n.30 *infra* (discussing inherent authority of courts to appoint special masters to assist their judicial administration). See also *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015) (“The entitlement to an Article III adjudicator is ‘a personal right’ and thus ordinarily ‘subject to waiver.’ ... But allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process”).

<sup>15</sup> See Thomas D. Barton and James P. Groton, “The Votes Are In: Focus on Preventing and Limiting Conflicts,” *DISPUTE RESOLUTION*, v. 24 n.3, 9, 10 (Spring 2018). Barton and Groton report that a Global Pound Conference survey of more than 2,000 business leaders, in-house counsel, outside counsel or advisors,

rules by strictly monitoring the parties' compliance with the rules and ensuring that parties do not gain leverage or time from non-compliance.

Special masters may be particularly helpful in assisting parties to implement the December 2015 Amendments to the Federal Rules of Civil Procedure. Those amendments were designed to make litigation more efficient by, among other things, requiring discovery to be "proportional to the needs of the case"<sup>16</sup> and requiring objections to "state whether any responsive materials are being withheld on the basis of that objection."<sup>17</sup> Having a special master work with the parties in appropriate cases to apply these requirements as they propound or respond to discovery requests should promote cooperation and efficiency. Those benefits from using special masters do not detract from judicial administration; they enhance it.

A significant purpose of the 2015 Amendments was to use more proactive case management to prevent problems from arising or solving problems before they become needlessly expensive and time-consuming. Where warranted, if parties are unable to resolve disputes that have the potential to multiply, having a special master assist in the resolution helps to fulfill that goal and frees judicial resources for substantive decision-making and case resolution.

Hence, in all appropriate cases, the court should assess whether appointment of a special master will contribute to a fair and efficient outcome. Special masters can make those contributions by:

- Enabling faster and more efficient resolution of disputes.
- Relieving burdens on limited judicial resources.
- Allowing for specialized expertise in any field that assists judicial administration.
- Allowing for creative and adaptable problem solving.
- Serving in roles that judges are not, or may not be, in a position to perform.
- Facilitating the development of a diverse and experienced pool of neutrals by introducing an expanded universe of practitioners to work as neutrals.
- Helping courts to monitor implementation of orders and decrees.

It is unclear whether the failure to use masters arises from hostility toward the concept or the unfamiliarity borne of under-utilization, or both. Indeed, the use of (or even consideration of using) special masters is so rare that the very idea is alien to many judges and lawyers. Other barriers to use include:

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academics, members of the judiciary and government and dispute resolution providers concluded that, by far, the step that should be prioritized to achieve effective dispute resolution is to employ processes to resolve matters pre-dispute or pre-escalation. Although the survey focused on preventing disputes before litigation begins, there is no reason why the same principle would not apply to preventing disputes within litigation before they start or escalate. See also <http://globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf> at 42

<sup>16</sup> Fed. R. Civ. P. 26(b)(1) (2015).

<sup>17</sup> Fed. R. Civ. P. 34(b)(2)(C) (2015).

- A general lack of awareness among courts, counsel and parties about special masters and the ways in which they can be used.
- A concern among parties and their counsel of losing control of the litigation.
- A lack in many courts of structures and procedures for vetting, selecting, employing, and evaluating special masters (either as a matter of court administration or as a practice of individual judges).
- Increased cost and delay.
- The introduction of another layer between the court and counsel.

Regardless of the reason, the failure to consider using special masters in appropriate cases may disserve the goal of securing “a just, speedy, and inexpensive determination.” This failure has also led to appointments being made without systems or structures to support selection, appointment, or use of special masters and, frequently, after cases have already experienced management problems. Although anecdotal evidence indicates that courts and parties are satisfied with their experiences with special masters,<sup>18</sup> the *ad hoc* nature of appointments can lead to inconsistent results and perceptions that undercut the legitimacy of appointees. Moreover, because special masters are rarely used, courts and academicians have not thoroughly addressed such basic issues as what qualifications special masters should possess, how those qualifications should vary based upon the role the special master is performing, what the best practices for special masters should be, and what ethical rules should govern the conduct of special masters. Adopting standards for the appointment of special masters and making their use more common will allow for more research into ways to make the process more predictable and the work of special masters more effective.

### **Highlights of Specific Recommendations**

- (1) It should be an accepted part of judicial administration in complex litigation and in other cases that create particular needs that a special master might satisfy, for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation.**

Because courts do not typically consider appointing a special master at the outset of cases, special masters are most frequently appointed after case-management issues have emerged. Although special masters can be of use in these situations, this timing prevents courts and stakeholders from obtaining early case management that often eliminates the need for dispute resolution.

A special master can, for example, address discovery issues and privilege issues before discovery responses are due, thereby preventing disputes before they arise. While conferences that deal with discovery issues before the parties resort to costly motion

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<sup>18</sup> Barbara Meierhoefer, “Special Master Case Studies” (2018) available at [https://www.americanbar.org/content/dam/aba/publications/judicial\\_division/2018lc-specialmasterscasestudy.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/judicial_division/2018lc-specialmasterscasestudy.authcheckdam.pdf)

practice are useful, intervening before parties serve responses would be even more efficient and could reduce conflicts among counsel and costs to the parties.

- (2) In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.**

The suggestions offered here on how special masters might be used to assist in civil litigation are meant to be illustrative, not exhaustive. Indeed, it is not possible to list every conceivable role a special master can play. Courts, counsel, and parties are encouraged to consider creative approaches to integrating special masters into case management for the benefit of all participants.

Moreover, there are often different ways to serve the judicial process. For example, a special master charged with assisting in resolving discovery disputes could adjudicate issues relating to pending discovery motions or could assist counsel in working through discovery needs and obligations without motion practice, or both.

Special masters can address motions dealing with the admissibility of opinion testimony based upon the qualifications of a proposed expert or the soundness of the opinion expressed or methodology employed in reaching it. Special masters can also perform an advisory function, providing information and guidance to the court or the parties in areas that require technical expertise.

Special masters can also provide information to the court. For example, a special master could conduct a privilege review,<sup>19</sup> analyze damages calculations, or summarize and report on the content of voluminous records to prepare the court for a hearing or trial. Special masters can perform these functions in different ways from a court-appointed expert (for example, providing adjudication and not merely an opinion), using different procedures (for example, in a process that does not contemplate party-appointed experts or depositions of the independent adjunct). Rather than the parties and the court bearing the expense associated with several experts, there would be only one special master and challenges would be made by objection to the special master's rulings.

Special masters can productively serve as a flexible resource to address a range of problems. The order of appointment should describe the issues the master is to address and the powers afforded the master to do so. Once the court finds a need, the only practical limit that should constrain the decision to use special masters is whether the appointment of a master would impose a cost that outweighs the benefit.

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<sup>19</sup> See, e.g., *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E. D. La. 2007).

- (3) In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated cost of the special master's services, and with the view of making the special master's work efficient and cost effective.**

The appointment of a special master must justify the cost. In most instances, the potential for disputes is a function of the amount of money at stake, the number of parties involved, the number of issues and their factual or legal complexity, the number of lawyers representing the parties, and the level of contentiousness between or among the parties or counsel. In many, if not most, of those cases, the cost of procedural skirmishes vastly outstrips the costs of paying a special master to deter, settle, or quickly dispose of issues when they arise.

The benefits of a special master cannot always be measured entirely in dollars. The value of special masters to courts and stakeholders lies in the extraordinary flexibility their use offers to import resources, expertise, and processes that can be flexibly adapted to the needs of each case. In some cases, particularly those involving non-financial concerns, using a special master may be justified if the master adds a resource, expertise, or process that enhances the effective administration of justice. Determining whether that value outweighs the cost requires a case-by-case assessment.

- (4) Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist it. Among the functions special masters have performed are:**
- a. discovery oversight and management, coordination of cases in multiple jurisdictions;**
  - b. facilitating resolution of disputes between or among co-parties;**
  - c. pretrial case management;**
  - d. advice and assistance requiring technical expertise;**
  - e. conducting or reviewing auditing or accounting;**
  - f. conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;**
  - g. conducting trials or mini-trials upon the consent of the parties;**
  - h. settlement administration;**
  - i. claims administration; and**
  - j. receivership and real property inspection.**
- In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.**

Special masters can be used creatively and thoughtfully in a wide array of situations. It is not possible to identify all the ways in which special masters could be used, however, the functions that special masters have performed include:

- Discovery oversight and management.
- Coordinating cases in multiple jurisdictions or between state and federal courts.
- Facilitating resolution of disputes between co-parties and/or their counsel in multi-plaintiff and/or multi-defendant settings.
- Providing technical advice and assistance for example in managing patent claim construction disputes in patent infringement litigation.
- Auditing/Accounting.
- Serving as a firewall that allows the benefit of neutral involvement while avoiding exchanges of information or *ex parte* contacts between the judge and stakeholders in a way that might otherwise be perceived as unfair.
- Addressing class action administration and related issues.
- Real property inspections.
- Mediating or facilitating settlement.
- Trial administration.<sup>20</sup>
- Monitoring and claims administration.
- Receivership.

Depending upon the function(s) the special master is performing, the special master may serve in different types of roles, including:

- Adjudicative.
- Facilitative.
- Advisory.
- Informatory.
- Liaison.<sup>21</sup>

The role a special master performs in a case is subject to ethical and legal constraints, the court's control, and, in some instances, the consent of the parties. For example, a special master serving as a mediator may be subject to mediation-specific statutory or ethical obligations, such as confidentiality or a mediation privilege, and these mediation-specific obligations could be inconsistent with other roles the special master is required to play, particularly adjudicative or informatory roles.<sup>22</sup>

These Guidelines do not direct any particular use of special masters or identify all the legal or ethical obligations that might apply to their activities. Rather, they seek to help courts and parties by increasing awareness of the potential for using special masters creatively and effectively, while highlighting some of the legal or ethical obligations that

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<sup>20</sup> In some jurisdictions, if the parties consent, special masters are empowered to oversee trials, or to conduct "mini-trials" of specific, perhaps technical, issues. These proceedings differ from arbitrations in a number of ways and often, for example, are subject to review in ways that arbitrations usually are not.

<sup>21</sup> "Liaison" refers to situations in which a special master is being used as go-between to provide information to the court while insulating it from matters such as settlement discussions or privileged information.

<sup>22</sup> See n.9 *supra*. Fed. R. Civ. P. 53(a)(2), and accompanying Advisory Committee Notes (2003). The considerations may be different in the discovery context. As the parties sort through discovery issues with the special master acting as an adjudicator, opportunities often arise for the parties and the master to discuss and explore together voluntary solutions to discovery disputes.

might apply. As discussed under Point 8 below, one advantage of a greater acceptance of special masters is that experience will foster creativity and promote understanding of the appropriate legal and ethical obligations that apply to special masters.

- (5) Courts should choose special masters with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the process and the choice by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.**

The choice of who is to serve as a special master, like the issue of what function and role the special master is to perform, requires careful consideration. Courts need to ensure that the selection and use of special masters is fair.

Courts should afford parties the opportunity to propose acceptable special master candidates.<sup>23</sup> As discussed below, see Point 7, by maintaining rosters, courts can assist the parties and identify a pool of candidates who bring a diverse range of experience. Courts should always give serious consideration to any candidate identified by the parties, although the court should also always vet candidates to ensure that they have the time, qualifications, and independence to discharge their special-master duties. Involving the parties in the selection process should minimize the parties' perception that a candidate was forced upon them by the court and should eliminate any possible concern of bias.

- (6) The referral order appointing the special master should describe the scope of the engagement, including, but not limited to, the special master's duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible *ex parte* contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.**

Federal Rule of Civil Procedure 53(b)(2) and similar state rules require that the appointing order "direct the master to proceed with all reasonable diligence" and state:

- (A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);
- (B) the circumstances, if any, in which the master may communicate *ex parte* with the court or a party;
- (C) the nature of the materials to be preserved and filed as the record of the master's activities;
- (D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

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<sup>23</sup> See Fed. R. Civ. P. 53(b)(1) ("Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment").

- (E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

The Court should consider adapting these terms (or adding others) consistent with the special master's role in the case. For example, the Court is empowered to align the incentives with the process, for example, by making compensation in a particular case hourly, fixed or a mixture of both and providing for review of billing afterwards.<sup>24</sup>

**(7) Courts should develop local rules and practices for selecting, training and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.**

Few courts have adopted a system for the selection, vetting, or training of special masters. As a consequence, court decisions and available relevant literature do not extensively examine special masters' qualifications or how those qualifications should vary depending upon the role the special master is performing.<sup>25</sup>

Depending on the appointing court's circumstances, local custom, and preferences, courts may wish to consider and adapt the following processes:

- Develop a list of the roles special masters will be expected to perform.
- Adopt and notify the bar of the considerations for selection of special masters, including a commitment to diversity and inclusivity.
- Sponsor interactive discussions on the use of special masters.
- Adopt a method to ensure confidentiality during the appointment process.
- Develop a public (or, if the court prefers, an internal) database/list of qualified, screened individuals who meet basic criteria for consideration as special masters.
- Create an application and confidential vetting process that recognizes the needed functions and ensures that a diverse spectrum of qualified candidates (including first-time special master candidates) may be included.
- Designate administrators to be responsible for implementing the program and assisting judges and/or parties in identifying matches for particular cases.
- Develop methods for evaluation, feedback and discipline.<sup>26</sup>

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<sup>24</sup> The website of the Academy of Court Appointed Masters includes a Bench Book with guidance and examples of form orders that address additional issues raised by the appointment of special masters. See <http://www.courtappointedmasters.org/resource-center/appointing-masters-handbook>. See also Advisory Committee Notes to Fed. R. Civ. P. 53(b) (discussing ethical issues in appointing special masters).

<sup>25</sup> The Indiana Commercial Courts Pilot Project and the Western District of Pennsylvania E-Discovery Special Masters Pilot Program are exceptions that offer guidance on developing rules. The United States District Court for the District of Delaware has a standing order under which special masters serve 4-year terms at the pleasure of the judges of the Court. The Court notifies the Bar when it is considering appointing new Panel members, allowing bar members to submit background information. <http://www.ded.uscourts.gov/sites/default/files/forms/SpecialMastersOrder2014.pdf> See also <https://www.discoverypilot.com/> (Seventh Circuit ediscovery pilot program incorporating neutral mediation).

<sup>26</sup> For a discussion of how state and federal courts have enabled feedback, see Nancy A. Welsh, Magistrate

While exploring the different systems and structures for appointing and training special masters is beyond the scope of these Guidelines, some suggestions include: inviting applicants to self-nominate; creating and implementing qualifications criteria; establishing a diverse roster of approved masters; establishing a performance review component; and adopting training programs for masters.

Developing rosters of special master candidates could facilitate vetting, qualifying, and training candidates to help ensure quality and confidence in the legitimacy of the choice. Vetting could also recognize and assist in implementing existing ABA guidance on increasing diversity among those who serve as special masters.<sup>27</sup>

Whether in designing a roster system or in making individual selections, some factors the court should consider include:

- Developing a diverse pool of persons who qualify for appointment.
- Ensuring the process is properly calibrated to the functions and roles special masters perform.
- Ensuring candidates make appropriate disclosures and have no conflicts of interest with the parties or issues being addressed.
- Ensuring the process properly assesses candidates' talents and experience.
- Determining whether subject matter expertise is necessary.
- Ensuring the ability of the prospective master to be fair and impartial and to engage with the parties and others with courtesy and civility.

**(8) Courts and the bar should develop educational programs to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness and appropriate use of special masters.**

Because special masters are appointed infrequently, many counsel have had no experience working with a special master.<sup>28</sup> Promulgating local rules and procedures to systematize the consideration and use of special masters would assist in familiarizing practitioners with the appointment process and how masters are used. When parties are aware that courts intend to make more effective use of special masters, the parties will be more likely to inform themselves about the selection process, potential candidates, and the role the special masters will play in the process. It is also important that the legal community develop educational programs available to both bench and bar on the use of special masters. Greater use of special masters will also assist the advancement of

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Judges, Settlement and Procedural Justice, 16 NEVADA LAW JOURNAL 983 (2016) and Nancy A. Welsh, Donna Stienstra & Bobbi McAdoo, *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, in THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin and Archie Zariski, eds., 2013).

<sup>27</sup> See American Bar Association Resolution 17M (urging the United States Supreme Court to consider racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the process for selecting *amicus curiae*, special masters, and other counsel).

<sup>28</sup> See, e.g., David R. Cohen, "The Judge, the Special Master, and You," LITIGATION v. 20, No. 1 (2015).

appropriate professional standards for the multiple roles they perform.

Courts should have regular mechanisms to monitor the quality of special masters' work. An appointing court could require that the master make periodic progress reports on issues that have been addressed and resolved, the procedural posture of the case, and when the case will be trial ready. Courts should also identify mechanisms that allow the parties to provide feedback and, if applicable, raise concerns regarding their experience with, and the performance of, the special master.<sup>29</sup>

Monitoring special master performance and stakeholder satisfaction will allow courts to identify and correct problems. If a special master proves inappropriate, the court can replace the special master with a more suitable candidate. If tasks are too much for one special master to handle, the court can consider dividing tasks among more than one master. If the process is ineffective, the court could consider vacating the appointment.

When cases conclude, it should be a regular practice for participants to complete a brief confidential survey concerning the special master's work. These surveys would provide, for the first time, a source of data researchers can use to assess the use of special masters and make recommendations for improvement.

- (9) Courts and, where applicable, legislatures should make whatever modifications to laws, rules or practices that are necessary to effectuate these ends, including amending Bankruptcy Rule 9031 to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.**

Federal Rule 53 and many state rules and authority on inherent judicial power, appear sufficiently flexible to allow for more effective use of special masters. However, depending on the jurisdiction, rule or statutory changes may be necessary or desirable.

In addition, where the rules of civil procedure permit, courts should consider whether it is appropriate to adopt local procedures calling for more extensive, flexible, and systematic vetting, selection, use and evaluation of special masters. Rule-making bodies should also consider whether particular aspects of existing rules, including terms used, should be modified to promote uniformity and the effective use of special masters.

**Bankruptcy Rule 9031 should be amended to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.**

Bankruptcy Rule 9031 states that Federal Rule of Civil Procedure 53 “does not apply in cases under the [Bankruptcy] Code.” This rule is confusing. The 1983 Advisory Committee comments state that Bankruptcy Rule 9031 “precludes the appointment of masters in cases and proceedings under the Code,” the rule purports to instead preclude

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<sup>29</sup> See *supra* n.26, *supra* for methods of feedback.

application of Federal Rule of Civil Procedure 53. Rule 53 is the sole or ultimate source of authority for appointing special masters; it addresses the manner in which courts exercise their *inherent* power to appoint special masters as a part of case management.<sup>30</sup>

Moreover, if Rule 9031 actually precluded the use of special masters for cases “under the Code,” it would not be limited to bankruptcy judges. It would operate on the inherent authority of Article III judges when they decide cases under the Bankruptcy Code, as opposed to any other statute.<sup>31</sup> However, the only other published official explanation for Rule 9031 says otherwise. The Advisory Committee on Bankruptcy Rules’ preface to the then proposed Rules of Bankruptcy Procedure states that “[t]here does not appear to be any need for the appointment of special masters in bankruptcy cases *by bankruptcy judges*.” (Emphasis added)<sup>32</sup>

In any event, there is no justification today for a rule that assumes that bankruptcy judges can never make effective use of special masters. Bankruptcy dockets include many especially complex cases in which special masters could be of great utility. Depriving court of equity of the ability to use special masters, disserves the goal of achieving a “just, speedy and inexpensive determination of every case and proceeding,” which is the mandate of Bankruptcy Rule 1001, just as it is the mandate of Federal Rule 1.<sup>33</sup> Amending Rule 9031 to eliminate this confusing limitation serves this end.

### Conclusion

Courts should make more effective and systematic use of special masters to assist in civil litigation. The ABA is available to assist courts in implementing these recommendations.

Respectfully submitted,

Hon. Toni E. Clarke (ret.)  
Chair, Judicial Division  
January 2019

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<sup>30</sup> It “is well-settled that” federal “courts have inherent authority to appoint Special Masters to assist in managing litigation.” *United States v. Black*, No. 16-20032-JAR, 2016 WL 6967120, at \*3 (D. Kan. Nov. 29, 2016) (citing *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) (quoting *In re: Peterson*, 253 U.S. 300, 311 (1920)); see also, e.g., *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint “expert advisors or consultants” derives from either Rule 53 or the Court’s inherent power); *Regents of the Univ. of Cal. v. Micro Therapeutics, Inc.*, No. C 03-05669 JW, 2006 WL 1469698, at \*1 (N.D. Cal. May 26, 2006) (to similar effect). Courts have relied on this authority, for example, to appoint special masters in criminal cases even though the Federal Rules of Criminal Procedure have no analog to Rule 53. Indeed, the power to appoint special masters has existed long before the Federal Rules (from at least eighteenth century in the United States and perhaps even in Roman law). Paulette J. Delk, “Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031,” 67 MO. L. REV. 29, 30-31 (Winter 2002).

<sup>31</sup> See Paulette J. Delk, *supra* n.30, 67 MO. L. REV. at 40-41 & nn.60-62.

<sup>32</sup> See Paulette J. Delk, *supra* n.30, 67 MO. L. REV. at 41-42 & nn.64-65.

<sup>33</sup> See Paulette J. Delk, *supra* n.30, 67 MO. L. REV. at 41-42 & nn.65-68.

## General Information Form

### 1. Summary of Resolution.

This Resolution adopts the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation and Recommends that Bankruptcy Rule 9031 be amended to permit courts responsible for matters under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

### 2. Approval by Submitting Entity.

The Judicial Division (JD) Council voted to co-sponsor this Resolution by electronic vote on August 30, 2018. Pursuant to the JD Bylaws, a majority of the voting members of the JD Council participated, making this a binding action.

### 3. Has this or a similar Resolution been submitted to the House or Board previously?

No.

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

The ABA has long advanced the use of dispute resolution tools to promote efficiency in the administration of justice in state and federal courts. This resolution would enhance the ABA's current policy, summarized below:

Support in principle the proposed Dispute Resolution Act, which would provide federal funds to states to create or improve small claims courts and other means of dispute resolution such as mediation and arbitration. (enacted in 1980 but not funded) Also support the increased use of alternative means of dispute resolution by federal administrative agencies consistent with several specified principles. 88A103A

Support continued use of and experimentation with certain alternative dispute resolution techniques, both before and after suit is filed, as necessary and welcome components of the justice system in the United States. All alternative dispute resolution techniques should assure that every disputant's constitutional and other legal rights and remedies are protected. 89A114

Recommend that the Council of the Commission for Environmental Cooperation consider the Model Rules of Procedure for Dispute Resolution under the North American Agreement on Environmental Cooperation dated February 1995, with a view to their adoption. 95M117C

Support legislation and programs that authorize any federal, state, territorial or tribal court, including Courts of Indian Offenses, in its discretion, to utilize systems of alternative

dispute resolution such as early neutral evaluation, mediation, settlement conferences and voluntary, but not mandatory, arbitration. 97M112

Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship. Approved. 97M101.

Urges the Supreme Court of the United States to consider racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the selection process for appointment of amicus curiae, special masters, and other counsel. 17M10A

**5. If this is a late Report, what urgency exists which requires action at this meeting of the House?**

N/A.

**6. Status of Legislation (if applicable).**

N/A.

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

The Judicial Division, through the Lawyers Conference Special Masters Committee and representatives of the Working Group that drafted the Guidelines will commence several projects to disseminate the guidelines and encourage state and local bars to promote the guidelines and encourage state and federal courts to implement them. Initiatives in discussion and planning area as follows:

(1) Conducting outreach through programs and publications to educate state and local bars, courts, staff and stakeholders in the guidelines and to work with courts around the country to adapt the guidelines to the needs of local courts;

(2) Working to develop model criteria that courts could use to select a diverse group of qualified candidates to rosters of special masters, and a survey instrument that courts could use on a consistent to evaluate the work of special masters, to improve their performance in future cases, and to create data that would be available to researchers to evaluate the effectiveness of special masters and the differing approaches and methods they employ;

(3) Encouraging the appropriate ABA Standing Committees, Commissions, Sections, Divisions and forums to develop a Code of Ethics for Special Masters;

(4) Working with interested parties to develop model rules, particularly for state courts, interested in making more effective and regular use of special masters; and

(5) Urging the amendment of Bankruptcy Rule 9031 to eliminate confusing impediments to using special masters in Bankruptcy proceedings.

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## **8. Cost to the Association (both indirect and direct costs).**

None.

## **9. Disclosure of Interest.**

None.

## **10. Referrals.**

Business Law Section  
Lawyers Conference  
National Conference of Federal Trial Judges  
National Conference of State Trial Judges  
Standing Committee on the American Judicial System  
Section of Antitrust Law  
Section of Dispute Resolution  
Section of Intellectual Property Law  
Section of Litigation  
Solo, Small Firm and General Practice Division  
Tort Trial and Insurance Practice Section

## **11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)**

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**12. Contact Name and Address 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 Resolution.**

This Resolution adopts the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation and Recommends that Bankruptcy Rule 9031 be amended to permit courts responsible for matters under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

### **2. Summary of the issue which the Resolution addresses.**

While the ABA has been a leading voice in favor of various forms of ADR, the appointment of special masters is an underutilized dispute resolution tool that could aid in the “just, speedy and inexpensive” resolution of cases. In 2016, the Lawyers Conference of the ABA Judicial Division (JD) formed a Committee on Special Masters to promote research and education concerning special masters and to make proposals concerning using their use. This Committee concluded that one of the difficulties faced by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters.

To solve this problem, the Committee constituted a Working Group across ABA sections, divisions and forums to develop consensus guidelines for the use of special masters. The Working Group was formed in August 2017, included members of the Judicial Division (including the National Conference of Federal Trial Judges, the National Conference of State Trial Judges and the Lawyers Conference), the Business Law Section, the Standing Committee on the American Judicial System, Section of Antitrust Law, the Section of Dispute Resolution, the Section of Intellectual Property Law, the Section of Litigation and the Tort Trial and Insurance Practice Section, who collectively worked well over 1,000 hours to create these consensus guidelines.

### **3. An explanation of how the proposed policy position will address the issue.**

The best practices described in this Resolution encourage courts to make greater and more systematic use of special masters to assist in civil litigation. These Guidelines provide recommendations concerning the use, selection, administration, and evaluation of special masters.

### **4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified.**

There is no known opposition to this Resolution.

**AMERICAN BAR ASSOCIATION**

**YOUNG LAWYERS DIVISION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1       RESOLVED, That the American Bar Association encourages federal, state, local,  
2 territorial, and tribal legislatures and court systems, in conjunction with state and  
3 local bar associations, to support and assist with the establishment and  
4 maintenance of lactation areas in courthouses. The lactation areas should be  
5 available to members of the public, including lawyers, jurors, litigants, witnesses,  
6 and observers. The lactation areas should: (1) be shielded from view and free from  
7 intrusion from the public; (2) have a door that can be locked; (3) include a place to  
8 sit, a table or other flat surface, and an electrical outlet, (4) be readily accessible  
9 to and usable by individuals with disabilities; and (5) not be located in a restroom.



## REPORT

### **I. Why Do We Need This Change?**

In 2018, a young female litigator, nine months postpartum, tried a civil jury case in a courthouse she visited regularly. Still a nursing mother, she asked for a private space where she could pump, or express, breast milk at regular intervals throughout the day.<sup>1</sup> She was provided with a “rickety old witness room with no lock on the door.” On two separate occasions, she was interrupted by court security, who walked into the room without knocking and who were visibly shocked to see her hooked up to a breast pump in her suit. Extraordinarily embarrassed, she returned to court after these encounters and she continues to face uneasiness with these court security personnel, whom she sees frequently.<sup>2</sup>

Another female litigator first-chaired a jury trial one month after returning to work after having given birth to her first child. Instead of pumping in her car, as was her usual practice for quick court appearances, she did not have enough time to run back and forth to her car during the trial, so she had to search for a clean, private space in the courthouse. The judge would not provide for frequent breaks during the trial, so this litigator’s only chance to express breast milk was during the lunch recess. Because the courthouse had no private lactation space, and because jurors were always in the public restroom on breaks, she found herself in an empty attorney conference room down the hall. The door had a window that someone could presumably look into and there was no lock. So the litigator sat in the far corner of the room, pushed a chair against the door, and crossed her fingers. Unfortunately, this was to no avail. On her first day in this unfortunate setup, the bailiff walked in on her while she was already hooked up to her breast pump and subjected her to questions about what she was doing and why she was there before he permitted her to stay.<sup>3</sup>

There are many more stories to tell; including that of the prosecutor who worked in an old courthouse and was provided with the only room with a door she was allowed—by courthouse rule—to close: a jail holding cell in the basement. Then there is the story of the appellate litigator who had no option but to pump between oral arguments in the women’s public bathroom, while sitting on the toilet—the only seat in the room. Or the attorney who, in an effort to plan ahead, contacted the judge’s chambers before her trial, only to arrive and discover that the “private space” set aside for her was the “private” courtroom bathroom.<sup>4</sup>

Sadly, these attorneys’ experiences are not unique, nor are they exceptions to the rule. While there have been notable strides in laws around the country expanding the protections for breastfeeding mothers—indeed, all 50 states plus the District of Columbia,

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<sup>1</sup> See *infra* Section II.

<sup>2</sup> These personal anecdotes were submitted to the authors of this report in October 2018 through the Facebook group, *MothersEsquire (National)*—a private group limited to attorneys who are also mothers—by attorneys wishing to remain anonymous. The authors and sponsors of this resolution have respected this wish.

<sup>3</sup> See *supra* note 2.

<sup>4</sup> See *supra* note 2.

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Puerto Rico, and the U.S. Virgin Islands now have laws that specifically allow women to breastfeed in any public or private location<sup>5</sup>—breastfeeding mothers still face significant barriers, harassment, or are subjected to intense questioning, when breastfeeding in public. Moreover, breastfeeding mothers who are away from their babies face additional challenges in public places in finding a clean, accessible, comfortable, and private space to pump. Many of these mothers are protected in their places of employment,<sup>6</sup> but if their employment requires travel to outside locations—such as a courthouse—the protections do not carry over.<sup>7</sup>

In addition to serving lawyers, dedicated lactation areas in courthouses also serve to benefit members of the public, jurors, litigants, witnesses, and observers. Imagine a new mother who receives her summons to jury duty, a witness, or an alleged victim of a crime trying to navigate an already stressful environment with added pressures of not knowing if she will be able to have access to a clean, accessible, comfortable, and private space to express milk or nurse her child. Providing these areas eliminates a barrier to women actively and more fully participating in, and accessing our justice system.

It is therefore crucial that courthouses provide dedicated lactation areas for members of the public, including lawyers, jurors, litigants, witnesses, and observers. It is helpful to define what a lactation area is. While there is no federal law on point, Congress did recently pass the Friendly Airport for Mothers Act.<sup>8</sup> This act, sponsored and championed by Senator Tammy Duckworth, signed by President Trump, and enacted on October 5, 2018<sup>9</sup> makes certain grant application funds for airports available only if the airport maintains a lactation area at each passenger terminal building of the airport behind the

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<sup>5</sup> See *Breastfeeding State Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, July 9, 2018, at <http://www.ncsl.org/research/health/breastfeeding-state-laws.aspx> (last visited Oct. 19, 2018).

<sup>6</sup> The Fair Labor Standards Act requires employers of 50 or more employees to provide reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth each time such employee has need to express the milk. 29 U.S.C.A. § 207 (r) (1) (A). Employers are also required to provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk. 29 U.S.C.A. § 207 (r) (1) (B). The employer is not required to compensate the employee receiving reasonable break time to express breast milk under this statute. 29 U.S.C.A. § 207 (r) (2).

Moreover, 29 states (Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wyoming), the District of Columbia, and Puerto Rico have laws related to breastfeeding in the workplace. See *Breastfeeding State Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 5.

<sup>7</sup> This is as opposed to the nursing mothers who are actually employed by the judicial system in the courthouses, who would presumably be covered by the aforementioned federal and state laws.

<sup>8</sup> 2018 Ill. Legis. Serv. P.A. 100-947 (S.B. 3503) (amending 55 I.L.C.S. § 5/5-1106) (effective Jan. 1, 2019).

<sup>9</sup> See, e.g., *Nursing rooms for breastfeeding moms now required at all major airports*, Jennifer McClellan, USA Today, Oct. 12, 2018, at <https://www.usatoday.com/story/life/allthemoms/2018/10/12/nursing-rooms-breastfeeding-moms-now-required-major-airports/1613690002/> (last visited on Oct. 19, 2018).

airport security screening area.<sup>10</sup> The definition of a “Lactation Area” in this act is also entirely appropriate for courthouses. The Act defines a lactation area to mean:

a room or other location in a commercial service airport for members of the public to express breast milk that:

- Is shielded from view and free from intrusion from the public;
- Has a door that can be locked;
- Includes a place to sit, a table or other flat surface, and an electrical outlet;
- Is readily accessible to and usable by individuals with disabilities; and
- Is not located in a restroom.<sup>11</sup>

The American Academy of Pediatrics recommends that infants be exclusively breastfed for the first six months of their lives with continued breastfeeding alongside introduction of complementary foods for at least one year.<sup>12</sup> The adage, “Breast is Best!” is one most new mothers hear time and time again in prenatal education classes, at the hospital for delivery, and at postpartum doctor’s visits.<sup>13</sup> While there is a recent movement to better educate new mothers on *all* feeding choices,<sup>14</sup> the benefits of feeding a baby breast milk are hard to deny. Even the United States Surgeon General has issued a long-standing “Call to Action to Support Breastfeeding.”<sup>15</sup> According to the Center for Disease Control and Prevention, among infants born in 2015 in the United States, four out of five (83.2%) started to breastfeed at birth, over half (57.6%) were breastfeeding at six months, and over one-third (35.9%) were breastfeeding at twelve months.<sup>16</sup> These high rates demonstrate that mothers in the United States are getting the message, they want to breastfeed, and they start out doing so.<sup>17</sup> Supporting a woman’s choice to breastfeed means supporting where and how women breastfeed as their babies grow.

A clean, accessible, comfortable, and private space where a nursing woman may express breast milk is thus critical to supporting working mothers who choose to breastfeed. This is especially so in the legal profession. The United States Census Bureau recently reported that nationwide there are 400,000 women lawyers, which makes

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<sup>10</sup> S. Res. 1110, 115th Cong. (2017-2018) (enacted), at <https://www.congress.gov/115/bills/s/1110/BILLS-115s1110is.pdf> (last visited Oct. 19, 2018).

<sup>11</sup> S. Res. 1110, 115th Cong. (2017-2018) (enacted), see *infra* note 32.

<sup>12</sup> *Breastfeeding Report Card: United States, 2018*, CENTER FOR DISEASE CONTROL & PREVENTION, at <https://www.cdc.gov/breastfeeding/pdf/2018breastfeedingreportcard.pdf> (last accessed Oct. 19, 2018).

<sup>13</sup> See, e.g., *Breastfeeding is Best*, MARCH OF DIMES, April 2016, at <https://www.marchofdimes.org/baby/breastfeeding-is-best.aspx> (last visited Oct. 19, 2018).

<sup>14</sup> See *The ‘breast is best’ policy backlash*, Elissa Strauss, CNN, July 11, 2018, at <https://www.cnn.com/2018/07/11/health/breastfeeding-parenting-strauss/index.html> (last visited Oct. 19, 2018).

<sup>15</sup> *Executive Summary: The Surgeon General’s Call to Action to Support Breastfeeding*, U.S. DEPT. OF HEALTH & HUMAN SERVICES, Jan. 20, 2011, at <https://www.surgeongeneral.gov/library/calls/breastfeeding/executivesummary.pdf> (last visited Oct. 19, 2018).

<sup>16</sup> See *Breastfeeding Report Card: United States, 2018*, *supra* note 8.

<sup>17</sup> See *Breastfeeding Report Card: United States, 2018*, *supra* note 8.

up approximately one in every three attorneys (38%).<sup>18</sup> While it is unclear how many of these attorneys are nursing mothers, what is clear is that women attorneys are leaving the practice of law in droves during their childbearing years.<sup>19</sup>

The National Association of Women Lawyers reported in 2018, for example, that while approximately 50% of law students nationwide are women, and while law firms have recruited women as entry-level associates roughly in proportion to their representation among law school graduates, these women are *not* reflected in the numbers of non-equity or equity partners in those same law firms.<sup>20</sup> While women are 47% of all law firm associates, they are only 30% of all non-equity or income partners, and only 20% of all equity partners.<sup>21</sup> Why? The answer to this question is undoubtedly varied and complicated, but one thing is for sure: for nursing mother-attorneys, practicing law while successfully breastfeeding is *not* easy. The absence of clean, accessible and private lactation areas in courthouses for the public—including especially the attorneys that frequent these courtrooms—presents an unnecessary yet entirely avoidable challenge for breastfeeding mother-attorneys in our profession.

The American Bar Association has the power and influence to take the lead in surmounting this challenge and in doing so it can make a long-lasting positive change in the legal profession. As Secretary Hillary Rodham Clinton wrote when she was Chair of the ABA Commission on Women in the Profession in 1988, the ABA has a “commitment to the principle that women are entitled to participate as equals in all aspects of the profession.”<sup>22</sup> This commitment is consistent with Goal III of the Association, which is to “[p]romote full and equal participation in the association, our profession, and the justice system by all persons.”<sup>23</sup>

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<sup>18</sup> *More Than 1 in 3 Lawyers Are Women*, Jennifer Cheeseman Day, UNITED STATES CENSUS BUREAU, May 8, 2018, at <https://www.census.gov/library/stories/2018/05/women-lawyers.html> (last accessed Oct. 19, 2018).

<sup>19</sup> As one author put it, because of the accelerating drop in female fertility between the ages of 31-35, the fact that the average age of a law school graduate is 27 years old, and the fact that the average path from associate to partner in a private firm setting is 10 years, “women are biologically encouraged to bear children at the same time that their careers require the most commitment of time and energy.” *The Horrible Conflict Between Biology and Women Attorneys*, Anusia Gillepsie, JD, MBA, ABA CAREER CENTER, April 5, 2017, at <http://www.abalcc.org/2017/04/05/the-horrible-conflict-between-biology-and-women-attorneys/> (last visited Oct. 19, 2018).

The desire to maintain a work/life balance as well as avoid the feeling of constantly playing “catch-up” to male counterparts who did not take an extended parental leave when starting a family often contribute to these mother-attorneys leaving their jobs. *Id.* The American Bar Association’s Commission on Women in the Profession, at the direction of ABA President Hilarie Bass, looked closely during the 2017-2018 bar year at the question of why women—and not just mother-attorneys—leave the legal profession; its report and findings on this troubling issue is forthcoming.

<sup>20</sup> *Report of the 2018 NAWL Survey on Retention and Promotion of Women in Law Firms*, Destiny Peery, JD/PhD, NAWL, at 2, at [www.nawl.org/page/2017](http://www.nawl.org/page/2017) (last visited Oct. 25, 2018).

<sup>21</sup> See Peery, *supra* note 9, at 3, 10, 11.

<sup>22</sup> ABA Resolution 88A121, at 2 (Sponsored by Commission on Women in the Profession).

<sup>23</sup> ABA Mission and Goals, June 11, 2018, at <https://www.americanbar.org/about-the-aba/aba-mission-goals/> (last visited Oct. 19, 2018).

Without a clean, accessible, comfortable, and private lactation space in all appropriate courthouses, breastfeeding attorneys face the choice of having to express breast milk in an unsanitary or public place, of not expressing milk, which will most certainly negatively affect their breast milk supply, or of simply not going to court and asking someone else to perform their job for them. Breastfeeding attorneys should not have to choose between practicing law and feeding their children. This resolution will go a long way in making sure that many more attorneys can do both.

## II. The Physiological Need for a Lactation Area

Understanding why nursing mothers need a clean, accessible, comfortable, and private lactation area in courthouses requires understanding why nursing mothers need to express breast milk at regular intervals throughout the day (and why they cannot simply skip pumping sessions or wait until the end of the work day to pump). The answer is actually quite simple. “For the most part, milk production is a ‘use it or lose it’ process. The more often and effectively your baby nurses, the more milk you will make.”<sup>24</sup> Conversely, the less often your baby nurses, the less milk you will make. KELLYMOM.COM, one of the most well-respected and frequently consulted lactation consultant resources available, explains the process as follows:

Milk is being produced at all times, with speed of production depending upon how empty the breast is. Milk collects in mom’s breasts between feedings, so the amount of milk stored in the breast between feedings is greater when more time has passed since the last feed. The more milk in the breast, the slower the speed of milk production.

To speed milk synthesis and increase daily milk production, the key is to remove more milk from the breast and to do this quickly and frequently, so that less milk accumulates in the breast between feedings.<sup>25</sup>

What this means is that the less frequently a mother’s breast is emptied, the less milk she will make.<sup>26</sup>

The supply-and-demand nature of breastfeeding requires that nursing mothers empty their breasts often—at least as often as their baby eats each day. When a nursing mother is not physically with her baby, her need to empty her breasts and express her breast milk does not subside. Rather, she must express milk, generally using a pump, with the same frequency as if her baby were there with her, nursing. This would mean that a working staff member, juror, courthouse attendee, attorney, or judge who nurses her child might need to pump between three to five times in a working day to maintain the adequate supply to sustain her child(ren). The nature of breastfeeding therefore *demands* that nursing mothers pump regularly and consistently. The absence of clean, accessible,

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<sup>24</sup> *How Does Milk Production Work?*, Kelly Bonyata, BS, IBCLC, KELLYMOM.COM, at <https://kellymom.com/hot-topics/milkproduction/> (last visited Oct. 19, 2018).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

comfortable, and private lactation areas in courthouses for breastfeeding attorneys poses a significant challenge to this demand.

The inability to express milk on a regular schedule or the inability to fully empty milk from the breast can also cause health issues for a mother. When a woman cannot express milk when her breasts are full, she likely will experience intense pain or engorgement, or she can develop a plugged duct.<sup>27</sup> Failure to express milk can also result in a painful infection called Mastitis.<sup>28</sup> Mastitis causes swelling, fever, chills, localized engorgement in the breast, and sore, cracked, or bleeding nipples. This infection can be detrimental to a nursing mother's health and her ability to provide breast milk for her child.<sup>29</sup>

Where time for breaks and court recesses is often both capped and extremely short, the absence of a dedicated lactation area makes it unnecessarily difficult to pump quickly and efficiently. Where the only private space to pump is frequently the restroom, it becomes nearly impossible to express, handle and store breast milk in a sanitary environment. It is important to note that asking someone to pump or nurse in a restroom is unsanitary, demeaning, extremely difficult, and not practical to anyone. Finally, the absence of a dedicated lactation area exposes nursing attorneys to, at the very least, potential professional and personal embarrassment and awkwardness, which most certainly hampers an attorney's ability to best represent her clients and herself. Therefore, in order to support nursing attorneys, we must facilitate their need to pump in a clean, accessible, and private place throughout the day.

### III. Where Are We Now: Current Laws That Protect Nursing Mothers in Courthouses

As noted above, quite a few protections for nursing mothers already exist. All 50 states, plus the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, have laws that specifically allow women to breastfeed in any public or private location.<sup>30</sup> Thirty states,<sup>31</sup> the District of Columbia, Puerto Rico, and the U.S. Virgin Islands exempt breastfeeding from public indecency laws.<sup>32</sup> Twenty-nine states,<sup>33</sup> the District of

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<sup>27</sup> *Plugged Ducts and Mastitis*, Kelly Bonyata, BS, IBCLC, KELLYMOM.COM, at <https://kellymom.com/bf/concerns/mother/mastitis/> (last visited Oct. 22, 2018).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See *Breastfeeding State Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 5.

<sup>31</sup> Alaska, Arizona, Arkansas, Florida, Idaho, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin and Wyoming.

<sup>32</sup> See *Breastfeeding State Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 5.

<sup>33</sup> Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wyoming.

Columbia and Puerto Rico have laws related to breastfeeding in the workplace.<sup>34</sup> There are very few, if any, laws or court rules that pertain to the provision of dedicated lactation areas for the public in government-owned buildings such as courthouses, however.

Puerto Rico requires shopping malls, airports, public service government centers and other select locations to have accessible areas designed for breastfeeding and diaper changing that are not bathrooms.<sup>35</sup> Louisiana requires certain state buildings to provide suitable areas for breastfeeding and pumping; it provides that such areas are “in the form of a room, other than a toilet stall” and that they “shall have, at minimum, all of the following features: (1) A lockable door; (2) A work surface and chair; (3) Storage for cleaning supplies; [and] (4) Conveniently placed electrical outlets.”<sup>36</sup> The statute clarifies that it is intended to protect both state government employees domiciled in the buildings and the public.<sup>37</sup>

In August 2018, Illinois passed a law, effective January 1, 2019, that is directly on point. It provides that:

On or before June 1, 2019, every facility that houses a circuit court room shall include at least one lactation room or area for members of the public to express breast milk in private that is located outside the confines of a restroom and includes, at minimum, a chair, a table, and an electrical outlet, as well as a sink with running water where possible.<sup>38</sup>

The statute further requests that the Illinois Supreme Court create minimum standards for the appropriate training of courthouse staff as well as requirements for posting of notice to the public regarding location and access to the rooms.<sup>39</sup>

As previously referenced, Congress recently passed the Friendly Airports for Mothers Act of 2017.<sup>40</sup> If it were applicable to courthouses, this bill would accomplish the goals set out in this resolution.

Finally, a few bar associations across the country have begun work on this important mission. The Women Lawyers Association of Michigan is working on a Courthouse Lactations Rooms initiative with various courthouses across the state of Michigan to provide accommodations for nursing mothers to express milk while at court.<sup>41</sup> Additionally, the Florida Association for Women Lawyers put together a thorough “Courthouse Lactation Room Handbook” that offers, among other things, best practices

<sup>34</sup> See *Breastfeeding State Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 5.

<sup>35</sup> 23 L.P.R.A. § 43-1 (2018).

<sup>36</sup> La. Stat. Ann. § 49:148.4.1 (2018).

<sup>37</sup> La. Stat. Ann. § 49:148.4.1 (C) (2) (2018).

<sup>38</sup> 2018 Ill. Legis. Serv. P.A. 100-947 (S.B. 3503) (amending 55 I.L.C.S. § 5/5-1106) (effective Jan. 1, 2019).

<sup>39</sup> 2018 Ill. Legis. Serv. P.A. 100-947 (S.B. 3503), *supra* note 30.

<sup>40</sup> See, e.g., *Nursing rooms for breastfeeding moms now required at all major airports*, Jennifer McClellan, USA Today, Oct. 12, 2018, at <https://www.usatoday.com/story/life/allthemoms/2018/10/12/nursing-rooms-breastfeeding-moms-now-required-major-airports/1613690002/> (last visited on Oct. 19, 2018).

<sup>41</sup> “Courthouse Lactation Rooms,” WOMEN LAWYERS ASSOCIATION OF MICHIGAN, at <https://www.womenlawyers.org/courthouse-lactation-rooms/> (last visited Oct. 19, 2018).

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for establishing and maintaining lactation rooms in courthouses.<sup>42</sup> It even includes suggested amenities, best practices for room access and room naming, and an inventory checklist.<sup>43</sup> This Handbook would be an excellent resource for other bar associations to use in working with courthouses to create and maintain the lactation areas encouraged in this resolution.

Thus, although some laws furthering the goals in this Resolution and Report do exist, there is clearly a need for more protections for nursing attorneys across the country.

## IV. Conclusion

Breastfeeding mothers should not have to choose between doing their job and feeding their children. The current state of many courthouses—which includes the absence of any lactation areas for nursing attorneys—facilitates this choice instead of eliminating it. While some states are moving in the right direction of providing adequate protection for nursing attorneys in courthouses, encouragement is needed to keep this trend going. With the enactment of The Friendly Airports for Mothers Act of 2017, there is momentum. The time is now for this Association to step up and exercise its voice in support of nursing mothers, especially nursing attorneys.

Respectfully submitted,

Tommy D. Preston, Jr.  
Chair, Young Lawyers Division  
January 2019

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<sup>42</sup> *Courthouse Lactation Room Handbook*, FLORIDA ASSOCIATION FOR WOMEN LAWYERS, October 2018, at <https://www.fawl.org/lactation-room-task-force> (last visited on Oct. 23, 2018).

<sup>43</sup> In a section entitled, “Best Practices for Room Naming,” for example, the Handbook suggests that the courthouse consider a name that is easily identifiable to promote room accessibility for nursing mothers, such as “Lactation Room, Nursing Lounge, Nursing Room [or] Mother’s Room.” *Courthouse Lactation Room Handbook*, see *supra* note 40, at 11. The “must haves”—which are based on best practices and not legal requirements—for a lactation room include, among other things, “[a] comfortable chair (ideally, a rocking chair); [a]ccess to electrical outlet (for breast pumps without battery function); [a] light source; [a] small table next to chair to hold a breast pump and pumping supplies (at least 24’ x 24’); [h]and sanitizer (if no water source is available in the room); [p]aper towels; [and a] [t]rash can.” *Id.* at 15.

## GENERAL INFORMATION FORM

### **1. Summary of Resolution**

This resolution encourages federal, state, local, territorial, and tribal legislatures and court systems, in conjunction with state and local bar associations, to support and assist with the establishment and maintenance of lactation areas in courthouses. The lactation areas should be available to members of the public, including lawyers, jurors, litigants, witnesses, and observers. The lactation areas should: (1) be shielded from view and free from view and free from intrusion from the public; (2) have a door that can be locked; (3) include a place to sit, a table or other flat surface, and an electrical outlet, (4) be readily accessible to and usable by individuals with disabilities; and (5) not be located in a restroom.

### **2. Approval by Submitting Body**

The ABA Young Lawyers Division (“YLD”) Council approved this resolution unanimously on November 2, 2018.

### **3. Has this or a similar Resolution been submitted to the House or Board previously?**

No.

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

In 1988, the ABA passed Resolution 88A121, which recognized the barriers that exist that deny women the opportunity to achieve full integration and equal participation in the legal profession, affirmed the principle that there is no place in this profession for those barriers, and called upon members of the profession to eliminate those barriers.

In 1996, the ABA passed Resolution 96A112, which encouraged state, local and territorial governing bodies and court systems, in conjunction with bar associations, to support and assist in the organization and implementation of waiting rooms for children in every appropriate courthouse.

In 2002, the ABA passed Resolution 02A112, which urged all federal, state, territorial, and municipal courts to help ensure equal access to justice by making courthouses and court proceedings accessible to individuals with disabilities, including lawyers, judges, jurors, litigants, court employees, witnesses, and observers.

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This Resolution is a natural extension of the policy adopted in 88A121, and aims to accomplish a goal similar in scope and spirit to those highlighted in 96A112 and 02A112. This Resolution would not otherwise affect any of these policies.

**5. If this is a late Report, what urgency exists which requires action at this meeting of the House?**

N/A.

**6. Status of Legislation (if applicable).**

N/A.

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

After adoption, the Young Lawyers Division will work with the Governmental Affairs Office to determine the most effective way to advocate for this Resolution. The Young Lawyers Division will also plan on presenting this Resolution to the Conference of Chief Justices at its Late Winter / Spring 2019 meeting.

**8. Cost to the Association (both indirect and direct costs).**

None.

**9. Disclosure of Interest.**

None.

**10. Referrals**

Center on Children and the Law  
Criminal Justice Section  
Government and Public Sector Lawyers Division  
Judicial Division  
Law Student Division  
Section of Civil Rights and Social Justice  
Section of Family Law  
Section of Litigation  
Standing Committee on Gun Violence  
Tort, Trial, and Insurance Practice Section  
Conference of Chief Justices

**11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)**

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ABA YLD Member Resources Director  
Office of Career & Professional Development, Associate Director  
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ABA YLD Representative to the ABA House of Delegates  
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**12. Contact Name and Address Information. (Who will present the Resolution with Report to the House?)**

Dana M. Hrelc  
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## **EXECUTIVE SUMMARY**

### **1. Summary of Resolution.**

This resolution encourages federal, state, local, territorial, and tribal legislatures and court systems, in conjunction with state and local bar associations, to support and assist with the establishment and maintenance of lactation areas in courthouses. The lactation areas should be available to members of the public, including lawyers, jurors, litigants, witnesses, and observers. The lactation areas should: (1) be shielded from view and free from view and free from intrusion from the public; (2) have a door that can be locked; (3) include a place to sit, a table or other flat surface, and an electrical outlet, (4) be readily accessible to and usable by individuals with disabilities; and (5) not be located in a restroom.

### **2. Summary of the Issue which the Resolution addresses.**

This Resolution aims to provide members of the public, especially attorneys who are nursing mothers, with a clean, accessible, comfortable, and private space within which to express milk while in court. New mothers physiologically must stick to a strict feeding and expressing schedule in order to make enough breast milk to feed their child(ren), and the absence of any clean, accessible, comfortable, and private lactation areas in courthouses often precludes them from doing so. A working, nursing mother should not have to choose between going to work and feeding her child. This Resolution is a step in the direction of providing working, nursing mothers with the protection they need to never have to make this choice in the first place.

### **3. An explanation of how the proposed policy position will address the issue.**

The policy will encourage legislatures, court systems, and bar associations across the country to work together to offer clean, accessible, comfortable, and private lactation areas in courthouses across the country.

### **4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified.**

No minority or opposing views have been identified.

**AMERICAN BAR ASSOCIATION  
YOUNG LAWYERS DIVISION  
REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges the enactment of a rule by all  
2 state, local, territorial, and tribal legislative bodies or their highest courts charged with the  
3 regulation of the legal profession, as well as by all federal courts, providing that a motion  
4 for continuance based on parental leave of either the lead attorney or another integrally  
5 involved attorney in the matter shall be granted if made within a reasonable time after  
6 learning the basis for the continuance unless: (1) substantial prejudice to another party  
7 is shown; or (2) the criminal defendant's speedy trial rights are prejudiced.



## REPORT

### I. Why Do We Need This Rule?

This Resolution addresses the absence of a rule of practice providing for a rebuttable presumption that a continuance should be granted in a matter where the primary or secondary attorney is on parental leave following the birth or adoption of a new child at home. Parental leave,<sup>1</sup> which refers to time away from work for the specific and significant purpose of providing care to a newly-arrived child, is undeniably important to the health of new and growing families. For both mothers and fathers, “time at home during the first precious months after birth or adoption is critical to getting to know their babies.”<sup>2</sup> Parental leave provides long-term benefits that improve a child’s brain development, social development, and overall well-being.<sup>3</sup> It “results in better prenatal and postnatal care and more intense parental bonding over a child’s life.”<sup>4</sup> And it “improves the chance that a child will be immunized; as a result, it is associated with lower death rates for infants.”<sup>5</sup>

New parents therefore often find themselves in a situation where they are left to choose between caring for their new child and doing their job. The fairly recent case of a young female attorney from Georgia serves as an illustration. As an expectant new mother, a young litigator moved for a continuance of an immigration hearing one month before it was scheduled to occur on the basis of her pregnancy and the fact that the hearing fell within the six-week leave that her treating physician had recommended she take off from work following her due date.<sup>6</sup> She was a solo practitioner and did not have anyone in her office who could assist her, so her request was seemingly reasonable.<sup>7</sup> One week before the hearing—after her child had already been born—the judge denied her motion, specifically finding “[n]o good cause. Hearing set prior to counsel accepting representation.”<sup>8</sup>

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<sup>1</sup> Parental leave is a type of family leave, which is leave from work used to care for a family member. It includes both maternity and paternity leave.

<sup>2</sup> “Expecting Better: A State-by-State Analysis of Parental Leave Programs,” Jodi Grant, Taylor Hatcher & Nirali Patel, NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, at 3 (2005), at [https://www.leg.state.nv.us/App/NELIS/REL/79th2017/ExhibitDocument/OpenExhibitDocument?exhibitId=29512&fileDownloadName=0330ab266\\_ParentalLeaveReportMay05.pdf](https://www.leg.state.nv.us/App/NELIS/REL/79th2017/ExhibitDocument/OpenExhibitDocument?exhibitId=29512&fileDownloadName=0330ab266_ParentalLeaveReportMay05.pdf) (last visited Oct. 29, 2018).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Staci Zaretsky, *Judge Refuses To Postpone Hearing Because Maternity Leave Isn’t A Good Enough Excuse*, ABOVE THE LAW Blog (Oct. 15, 2014), at <https://abovethelaw.com/2014/10/judge-refuses-to-postpone-hearing-because-maternity-leave-isnt-a-good-enough-excuse/?rf=1> (last visited Oct. 29, 2018).

<sup>7</sup> She filed her motion less than one week before her due date and indicated that she would only be taking six weeks off before returning to work, both feats that deserve recognition in and of themselves.

<sup>8</sup> See Zaretsky, *supra* note 11 (quoting the court’s decision).

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Left with the choice of either abandoning her client or abandoning her child, the attorney made the only reasonable decision she could think of: she attended the hearing with her newborn baby.<sup>9</sup> After that hearing, the attorney filed a formal complaint against the judge, noting that when he saw her with her child in court:

He was outraged. He scolded [her] for being inappropriate for bringing [the baby]. He questioned the fact that day care centers do not accept infants less than 6 weeks of age. He then questioned [her] mothering skills as he commented how [her] pediatrician must be appalled that [she is] exposing [her] daughter to so many germs in court. He humiliated [her] in open court.<sup>10</sup>

What happened to this attorney is unfortunately not uncommon. Less than a month after giving birth, this attorney was still physically recovering from the traumatic experience of giving birth, and she was taking care of a newborn baby with around-the-clock needs.<sup>11</sup> She was a solo practitioner without family nearby to care for her child for her.<sup>12</sup> Yet she was forced to attend the hearing because the judge found that the birth of her child did not constitute good cause for continuing the hearing date.

Put simply, it is not reasonable to expect parents—including new mothers—to stop practicing law when they become pregnant or give birth. A rule that protects new parents from having to make the choice between caring for their new child or practicing law is imperative. Where a parent who is lead counsel, or is otherwise integrally involved in a matter moves to continue a court date or deadline on the basis of her or his parental leave, there should be a presumption in her or his favor that the continuance will be granted. It is only where substantial prejudice to the opposing party, or where a client's speedy trial rights—if any—are prejudiced that this presumption should be rebutted.<sup>13</sup>

The proposed resolution recognizes that continuances may be necessary not only for a lead attorney's parental leave, but also for the leave of another attorney who is integrally involved in the matter. This recognizes that many new parents may be young partners who do not qualify for leave under the FMLA,<sup>14</sup> junior associates, or other young lawyers who are neither first-chairing a trial nor primarily responsible for the matter but who nevertheless are necessary to the successful representation of the client. For example, where a partner serves as the lead trial counsel in a complex matter but a junior associate is the repository of the facts concerning the case, the junior associate would need to be present to assist at trial. Absent this extension of the rule, an attorney in this position could face unnecessary and overwhelming internal pressure to continue working

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<sup>9</sup> See Zaretsky, *supra* note 11.

<sup>10</sup> See Zaretsky, *supra* note 11 (quoting the subject complaint).

<sup>11</sup> The U.S. Department of Health & Human Services advises that it takes approximately six weeks for a woman's body to recover physically after giving birth vaginally. See *Recovering From Birth*, OFFICE OF WOMEN'S HEALTH, U.S. DEPT. OF HEALTH & HUMAN SERVICES (June 6, 2018), at <https://www.womenshealth.gov/pregnancy/childbirth-and-beyond/recovering-birth> (last visited Oct. 29, 2018).

<sup>12</sup> See Zaretsky, *supra* note 12.

<sup>13</sup> Allowing such a rebuttal permits consideration by the court of the reasonable expectation that litigation can move forward in a timely manner, and that justice will be efficiently served.

<sup>14</sup> See *supra* note 6.

despite the need for parental leave simply because a continuance under this rule would not be available. This result is contradictory to the resolution's purpose.

The absence of a parental leave rule affects both men and women, but women are disproportionately affected. One of the reasons for the disparate effect on women is that women are more likely to take parental leave than men.<sup>15</sup> Hence, there is a higher likelihood that not having a rule allowing for a parental leave continuance will affect women. In addition to being more likely to take leave, women also take more time on leave.<sup>16</sup> This is because the leave that men are offered is typically more limited than it is for women.<sup>17</sup> A 2007 study reveals that 89% of U.S. fathers in opposite sex two-parent households took some parental leave after the birth or adoption of a new child.<sup>18</sup> A 2014 survey of "highly paid professional U.S. fathers" revealed that only about 5% took no paternity leave, but over 80% took two weeks of leave or less.<sup>19</sup> Additionally, women who give birth must recover from the physical stresses put on their bodies during pregnancy and delivery, and time off from work allows them to do so. Moreover, the lack of such a rule adds to the list of obstacles that women lawyers face. These include unequal pay, low-quality work assignments, lack of access to mentoring and networking opportunities, and harassment.<sup>20</sup> The lack of a parental leave rule can exacerbate the negative ramifications women lawyers already face in the legal workplace.

Despite the profound effects the absence of a parental leave rule has on women, men also are negatively affected. Parental leave for men is of critical importance to fathers. There are social, familial, and health benefits to having parental leave for fathers, which include improved cognitive and mental health outcomes for the children.<sup>21</sup> Moreover, the taking of paternity leave by men increases the female labor force participation and wages. Parental leave for men helps allow parents are working professionals, and need to split the time away from work in a manner that maximizes time with family and minimizes impact on work and career.<sup>22</sup>

The enactment of this type of rule is consistent with Goal III of the Association, which is to "[p]romote full and equal participation in the association, our profession, and

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<sup>15</sup> Jacob Alex Klerma, et al. 2012. *Family and Medical Leave in 2012: Technical Report*. (Prepared for U.S. Department of Labor.) Cambridge: Abt Associates, at <https://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf>.

<sup>16</sup> See generally *Paternity Leave: Why Parental Leave For Fathers Is So Important For Working Families*, DOL Policy Brief, U.S. DEPT. OF LABOR, at <https://www.dol.gov/asp/policy-development/paternitybrief.pdf> (last visited Oct. 30, 2018).

<sup>17</sup> See *id.*

<sup>18</sup> *Id.* at 5 n.3.

<sup>19</sup> *Id.* at 5 n.3.

<sup>20</sup> See Joan C. Williams et al., *You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession* (Am. Bar Ass'n Commission on Women & Minority Corp. Counsel Ass'n, 2018), at [http://www.abajournal.com/files/Bias\\_interrupters\\_report-compressed.pdf](http://www.abajournal.com/files/Bias_interrupters_report-compressed.pdf).

<sup>21</sup> See *supra* note 21.

<sup>22</sup> Brad Harrington, et al., *The New Dad: Take Your Leave*, Boston College Ctr. for Work & Family, at [http://www.thenewdad.org/yahoo\\_site\\_admin/assets/docs/BCCWF\\_The\\_New\\_Dad\\_2014\\_FINAL.157170735.pdf](http://www.thenewdad.org/yahoo_site_admin/assets/docs/BCCWF_The_New_Dad_2014_FINAL.157170735.pdf)

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the justice system by all persons.”<sup>23</sup> The risk of having to threat of having to hand off a case after months or even years of preparation may discourage attorneys from seeking parental leave at all, or discourage female attorneys from working on significant cases.<sup>24</sup>

Parental leave in the United States is, as noted above, neither widely protected nor widely offered. The enactment of this type of rule will help ensure that at the very least, when it is offered, it remains widely used—by *all* new parents, regardless of their gender, regardless of the type of law that they practice, and regardless of the length of parental leave that they take. Urging the enactment of a rule that facilitates the equal participation in the legal profession of *all* new parents after the birth or adoption of a new child at home, regardless of how long those parents take leave, falls precisely within the scope of Goal III’s directive. The support of the Association for this rule is thus both timely and critical.

## II. Current Legal Framework

There is anecdotal evidence from across the country concerning incidents where continuances are denied for pregnancy or birth-related issues.<sup>25</sup> This is likely because most, if not all, rules of practice regarding continuances are generally left to the court’s broad discretion with no direction to the court to expressly consider as a factor in exercising that discretion the pregnancy, adoption, or parental leave of the involved attorneys.<sup>26</sup> No jurisdiction in the country has yet to adopt a rule such as the one proposed in this resolution—which in and of itself demonstrates the need for one. At the forefront of this issue is Florida, where such a rule is currently under consideration by their Supreme Court. The Florida Bar Board of Governors and its Young Lawyers Division counterpart have been shepherding through the approval process a new Rule of Judicial Administration codifying a model parental leave rule.<sup>27</sup> That rule will be considered by the

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<sup>23</sup> See ABA Mission and Goals, AMERICAN BAR ASSOCIATION, at <https://www.americanbar.org/about-the-aba/aba-mission-goals/> (last visited Oct. 30, 2018).

<sup>24</sup> Barbara Busharis. *The Rules of the Game*, 36 No. 1 Trial Advoc. Q. 4 (Winter 2017).

<sup>25</sup> This is in addition to the circumstances described above. See, e.g., *Survey Results: Parental Leave Continuation Rule*, Anonymous, NEW HAMPSHIRE WOMEN’S BAR ASSOCIATION (Sept. 11, 2018), at <https://nhwba.org/page-8689/6664848> (last visited Oct. 31, 2018) (noting experiences of women lawyers in New Hampshire).

<sup>26</sup> Most state rules regarding continuances provide that the trial court may grant one upon motion and for good cause shown or as justice may require. See, e.g., ARK. R. CIV. P. 40 (Arkansas); KANS. STAT. § 60-240 (b) (Kansas); MD. R. CIV. PROC. 2-508 (a) (Maryland); MASS. R. CIV. PROC. 40 (Massachusetts); MO. R. CIV. PROC. 9.1 (c) (Missouri); N.M. R. MUN. CT. PROC. 8-506 (2) (New Mexico); OR. R. CIV. P. 52 (Oregon). The same is true for federal court, although the language is typically a bit stronger. See, e.g., D. CONN. R. 16 (“A trial ready date will not be postponed at the request of a party except to prevent manifest injustice.”).

<sup>27</sup> See *In re Amendments to the Florida Rules of Judicial Administration—Parental Leave*, Case No. SC 18-1554, Docket available at <http://onlinedocketssc.flcourts.org/DocketResults/CaseByYear?CaseNumber=1554&CaseYear=2018> (last visited Oct. 31, 2018). The docket contains links to the subject petition for amendment to the rules, as well as the official comments submitted to the Court for consideration.

Florida Supreme Court in late 2018 or early 2019.<sup>28</sup> The Florida Bar is presently in the process of soliciting comments from all interested persons on the subject of the proposed parental-leave rule.<sup>29</sup> The proposed rule, Rule 2.570, provides:

Unless substantial prejudice is demonstrated by another party, a motion for continuance based on the parental leave of a lead attorney in a case must be granted if made within a reasonable time after the later of:

- a. the movant learning of the basis for the continuance; or
- b. the setting of the proceeding for which the continuance is sought.

Three months is the presumptive maximum length of a parental leave continuance absent a showing of good cause that a longer time is appropriate. If the motion for continuance is challenged by another party that makes a prima facie demonstration of substantial prejudice, the burden shifts to the movant to demonstrate that the prejudice caused by denying the continuance exceeds the burden that would be caused to the objecting party if the continuance were to be granted. The court shall enter a written order setting forth its ruling on the motion and, if the court denies the requested continuance, the specific grounds for denial shall be set forth in the order.

Again, this proposed rule has not yet been adopted, although it is clearly leading the way for similar rules elsewhere.

This is no more apparent than in the adoption of a standing order by Judge Ravi K. Sandill of the 127th Civil District Court in Harris County, Texas, who was directly inspired to issue such an order after learning of Florida's proposed parental-leave rule.<sup>30</sup> Judge Sandill's *Standing Order on Continuances Based on the Birth or Adoption of a Child* provides:

The Court recognizes the value and importance of working parents spending time with their families, particularly following the birth or adoption of a child.

Thus, any lead counsel who has been actively engaged in the litigation of a matter may seek an automatic continuance of a trial setting for up to 120 days for the birth or adoption of a child.<sup>31</sup>

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<sup>28</sup> See *id.*

<sup>29</sup> *Proposed Parental-Leave Continuance Rule*, The Florida Bar News, FLORIDA BAR (Oct. 15, 2018), at <https://www.floridabar.org/news/tfb-news/?durl=%2Fdivcom%2Fjn%2Fjnnews01.nsf%2F8c9f13012b96736985256aa900624829%2F2885d1289ecc2d885258314004af6de> (last visited Oct. 31, 2018).

<sup>30</sup> *Trial Date v. Due Date: Courts Make Rule For Parental Leave*, Bloomberg Law (July 31, 2018), at <https://news.bloomberglaw.com/daily-labor-report/trial-date-v-due-date-courts-make-room-for-parental-leave> (last visited Oct. 31, 2018).

<sup>31</sup> See *Standing Order on Continuances Based on the Birth or Adoption of a Child*, <https://www.justex.net/JustexDocuments/7/STANDING%20ORDER%20ON%20CONTINUANCE%20BASED%20ON%20THE%20BIRTH%20OR%20ADOPTION%20OF%20A%20CHILD.pdf> (July 26, 2018).

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Unless and until the proposed Florida rule is adopted, this standing order is the only authority the drafters are aware of nation-wide concerning this issue.<sup>32</sup>

None of the federal district courts have a local rule specifically addressing continuances based on parental leave. However, many federal courts have local rules that allow continuances for “good cause,” with certain conditions, such as having the motion for continuance filed as soon as counsel learns that a continuance will be needed, filing an accompanying affidavit with the motion that sets forth the facts on which the continuance request is based, or that the motion for a continuance be supported by a medical certificate.

The instances of attorneys being denied continuances based on the need for parental leave following the birth or adoption of a child shows that the ABA’s voice and opinion is necessary to lead the way on this matter. Here, the proposed rule both protects clients’ unfettered rights to counsel of their choice<sup>33</sup> and helps give effect to the FMLA and the policies behind parental leave. It also balances courts’ and litigants’ shared interest in the efficient resolution of legal matters. There is no reason why these considerations need to be mutually exclusive.

### III. Conclusion

This resolution, if adopted, will remind stakeholders of the importance of accommodating parental leave needs, and erase the stigma associated with asking for a continuance because of such circumstances.

Respectfully submitted,

Tommy D. Preston, Jr.  
Chair, Young Lawyers Division  
January 2019

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<sup>32</sup> For the reasons laid out in Section I, the FMLA does not provide the necessary protections that the rule proposed by this Resolution does.

<sup>33</sup> See, e.g., *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (“Deprivation of the [Sixth Amendment] right is ‘complete’ when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.”).

**GENERAL INFORMATION FORM****1. Summary of Resolution**

This Resolution urges the enactment of a rule by all state, local, territorial, and tribal legislative bodies or their highest courts charged with the regulation of the legal profession, as well as by all federal courts, providing that a motion for continuance based on parental leave of either the lead attorney or another integrally involved attorney in the matter shall be granted if made within a reasonable time after learning the basis for the continuance unless: (1) substantial prejudice to another party is shown; or (2) the criminal defendant's speedy trial rights are prejudiced.

**2. Approval by Submitting Body**

The ABA Young Lawyers Division ("YLD") Council approved this resolution unanimously on November 9, 2018.

**3. Has this or a similar Resolution been submitted to the House or Board previously?**

No.

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

In 1988, the ABA passed Resolution 88A121, which recognized the barriers that exist that deny women the opportunity to achieve full integration and equal participation in the legal profession, affirmed the principle that there is no place in this profession for those barriers, and called upon members of the profession to eliminate those barriers. This Resolution is a natural extension of the policy adopted in 88A121.

**5. If this is a late Report, what urgency exists which requires action at this meeting of the House?**

N/A.

**6. Status of Legislation (if applicable).**

N/A.

# 101B

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

After adoption, the Young Lawyers Division will work with the Governmental Affairs Office to determine the most effective way to advocate for this Resolution

**8. Cost to the Association (both indirect and direct costs).**

None.

**9. Disclosure of Interest.**

None.

**10. Referrals**

Conference of Chief Justices  
Center on Children and the Law  
Criminal Justice Section  
Government and Public Sector Lawyers Division  
Judicial Division  
Law Student Division  
Section of Civil Rights and Social Justice  
Section of Family Law  
Section of Litigation  
Standing Committee on Gun Violence  
Tort, Trial, and Insurance Practice Section

**11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)**

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**12. Contact Name and Address Information. (Who will present the Resolution with Report to the House?)**

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## EXECUTIVE SUMMARY

### 1. **Summary of Resolution.**

This Resolution urges the enactment of a rule by all state, local, territorial, and tribal legislative bodies or their highest courts charged with the regulation of the legal profession, as well as by all federal courts, providing that a motion for continuance based on parental leave of either the lead attorney or another integrally involved attorney in the matter shall be granted if made within a reasonable time after learning the basis for the continuance unless: (1) substantial prejudice to another party is shown; or (2) the criminal defendant's speedy trial rights are prejudiced.

### 2. **Summary of the Issue which the Resolution addresses.**

This Resolution addresses the absence of a rule of practice providing for a rebuttable presumption that a continuance should be granted in a matter where the primary or secondary attorney is on parental leave following the birth or adoption of a new child at home.

### 3. **An explanation of how the proposed policy position will address the issue.**

The policy will encourage the bodies charged with regulating the legal profession to enact a rule providing that a motion for continuance based on parental leave of the primary or secondary attorney in the matter shall be granted if made within a reasonable time after learning the basis for the continuance with limited exceptions.

### 4. **A summary of any minority views or opposition internal and/or external to the ABA which have been identified.**

No minority or opposing views have been identified.

**AMERICAN BAR ASSOCIATION  
STANDING COMMITTEE ON SPECIALIZATION  
REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1   RESOLVED, That the American Bar Association reaccredits for an additional five-year  
2   term the DUI Defense program of the National College for DUI Defense; and  
3  
4   FURTHER RESOLVED, That the American Bar Association extends the accreditation  
5   period of the Family Trial Law and Criminal Trial Law programs of the National Board of  
6   Trial Advocacy until the adjournment of the next meeting of the American Bar  
7   Association's House of Delegates in August, 2019.



## **REPORT**

### **Background and Synopsis of the Recommendations**

At the 1993 Midyear Meeting, the House adopted Standards for Accreditation of Specialty Certification Programs For Lawyers and delegated to the Standing Committee on Specialization the task of evaluating programs sponsored by organizations that apply to the ABA for accreditation, and making recommendations to the House of Delegates about the periodic renewal of accreditation. 1993 MY 105. (The relevant portions of those accreditation requirements are set out in an endnote to this Report.<sup>1</sup>)

The adoption of the Standards in February, 1993, followed an August, 1992, House resolution requesting that the Association develop standards for accrediting private organizations that certify lawyers as specialists, and that the Association establish and maintain a mechanism to accredit organizations that meet those standards. 1992 AM 128. The 1992 resolution affirmed that a national accreditation mechanism administered by the Association according to uniform standards would be an efficient and effective means of dealing with a multiplicity of organizations that are offering, or planning to offer, certification programs.

Sections 5.01 and 5.02 of the Standards require that “a certifying organization shall be required to apply for re-accreditation prior to the end of the fifth year of its initial accreditation period and every five years thereafter,” and that re-accreditation “shall be granted” if the certifying organization shows that the program continues to comply with the Standards’ detailed accreditation requirements.

The Standing Committee on Specialization currently has pending applications for reaccreditation from three programs, the DUI Defense program of the National College for DUI Defense (“NCDD”), and the Criminal Trial Law and Family Trial Law programs of the National Board of Trial Advocacy (“NBTA”).

The Standing Committee has reviewed the applications for these three programs and recommends the reaccreditation of the DUI Defense program of the NCDD.

The Standing Committee cannot recommend reaccreditation of the NBTA programs at this time because it has not received adequate evidence of those programs’ compliance with the Standards’ requirements for certification application reviewers’ expertise. But the Standing Committee continues to communicate with the NBTA regarding administration of those programs and anticipates being able to make a recommendation regarding reaccreditation within the next few months. The Standing Committee thus recommends extending the existing period of accreditation for those NBTA programs until the 2019 Annual Meeting at which time the Standing Committee will make a final recommendation.

### **Description of Applicants**

The National College for DUI Defense is a professional, non-profit corporation dedicated to the improvement of the criminal defense bar—and particularly those who defend clients charged with DUI—and to the dissemination of information to the public about DUI Defense Law as a specialty area of law practice. NCDD members represent the most experienced DUI defense attorneys in the country. Since its founding, the NCDD has continued to recognize, as Sustaining Members, defense lawyers who have demonstrated the skill and experience of the original Founding Members, as well as the generosity to financially sustain the growth of the NCDD. General Members are the backbone of the NCDD—capable, experienced attorneys who dedicate a portion of their practice to the defense of DUI cases throughout the country.

The National Board of Trial Advocacy is the oldest and largest private organization certifying American lawyers as specialists. It is dedicated to achieving and maintaining a high standard of practice and to leveling the playing field for clients is shared by those who obtain NBTAA certification. Certificate holders undergo a thorough screening of their credentials, including documentation of experience, judicial and peer references, and written examination. They must report all disciplinary matters brought before any official body, whether public or private, for scrutiny by the NBTAA Standards Committee.

## **Reaccreditation and Evaluation Procedures**

In evaluating the applications, the Standing Committee followed the Governing Rules it adopted on March 2, 1993, as amended from time to time since. All of the applications currently pending were filed in the summer of 2018. The applications were accompanied by payment of a reaccreditation fee for the specialty certification programs for which the applicants sought reaccreditation.

In order to ensure that each of the programs continues to comply with ABA Standards, the Standing Committee requires that the following accompany all applications:

- i. Current versions of the applicant's governing documents, including articles of incorporation, bylaws, and resolutions of the governing bodies of the applicant or any parent organization, which resolutions relate to the standards, procedures, guidelines or practices of the applicant's certification programs;
- ii. Biographical summaries of members of the governing board, senior staff and members of advisory panels, certification committees, examination boards and like entities involved with the certification process, including specific information concerning the degree of involvement in the specialty area of persons who review and pass upon applications for certification;
- iii. All materials furnished to lawyers seeking certification, including application forms, booklets or pamphlets describing the certification program, peer reference forms, rules and procedures, evaluation guides and any other

information furnished to the public or the media regarding the certification process;

- iv. A copy of the recent examinations given to applicants for specialty certification, along with a description of how the exam was developed, conducted and reviewed; a description of the grading standards; and the names of persons responsible for determining pass/fail standards.

Furthermore, as to the applications of the NBTA programs, in addition to passage of the examinations it administers itself, the NBTA accepts applicants' passage of examinations administered by the New Jersey Supreme Court's Board on Attorney Certification, the Texas Board of Legal Specialty Certification, and the Florida State Bar's Board of Legal Specialization and Education. Recent examinations from all of these programs were made available, on a confidential basis, for review by examination reviewers appointed by the Standing Committee to review the NBTA programs. The volume of exams to be reviewed for these programs has required extra time for the Standing Committee's application review for this program, and the Committee also continues to communicate with NBTA officers regarding the procedures for its application review, specifically regarding the expertise of its appointed reviewers of certification applications.

#### **National College for DUI Defense application:**

The professionals who reviewed the application materials for the DUI Defense program that the Specialization Committee recommends to be reaccredited are:

**Steven Lesser** (Fort Lauderdale, Florida), **Chair of National College for DUI Defense Review Panel.** Mr. Lesser is a partner in the Fort Lauderdale office of the firm Becker Poliakoff, and is a member of the Standing Committee on Specialization. He is certified by the Florida State Bar as a specialist in Construction Law.

**Samuel Edmunds** (Mendota Heights, Minnesota), **National College for DUI Defense Review Panel.** Mr. Edmunds is a founding partner of Sieben Edmunds, and is a member of the Standing Committee on Specialization. He is a certified Criminal Law Specialist by the Minnesota Bar Association.

**Daniel Trujillo** (Denver, Colorado), **National College for DUI Defense Review Panel.** Mr. Trujillo is the Certification Director for the National Association of Counsel for Children, an organization that administers an ABA-accredited specialist certification program in Juvenile Law.

The examination reviewer for the NCDD examinations was **Kathie Perry**, a partner in the firm of Baldwin Kyle Perry & Kamish, P.C., in Franklin, Indiana, where she practices criminal law defense, including DUI defense.

## **Pending Application of the National Board of Trial Advocacy programs in Family Trial Law and Criminal Trial Law and Need for Extension.**

The NBTA timely submitted its application for re-accreditation of its Family Trial Law and Criminal Trial Law programs under Section 5 of the Standards in the summer of 2018. The Standing Committee has not yet completed its review and assessment of the NBTA's full complement of examinations, however, and continues to communicate with the NBTA regarding its certification application review procedures.

The five-year anniversary of the last re-accreditation of these NBTA programs occurs in February, 2019, however. So, in order to avoid a formal lapse in that accreditation under the Standing Committee's Governing Rules, the Standing Committee recommends to the House of Delegates that the period of accreditation be extended until the end of the Association's next general meeting, the Annual Meeting in August, 2019, before which meeting the Standing Committee will have arrived at a formal recommendation whether or not to reaccredit these two programs.

Respectfully submitted,

Barbara J. Howard  
Chair, Standing Committee on Specialization  
January 2019

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<sup>i</sup> The accreditation requirements appear in Sections 4 and 5 of the Standards and are as follows:

4.01 Purpose of Organization -- The Applicant shall demonstrate that the organization is dedicated to the identification of lawyers who possess an enhanced level of skill and expertise, and to the development and improvement of the professional competence of lawyers.

4.02 Organizational Capabilities -- The Applicant shall demonstrate that it possesses the organizational and financial resources to carry out its certification program on a continuing basis, and that key personnel have by experience, education and professional background the ability to direct and carry out such programs in a manner consistent with these Standards.

4.03 Decision Makers -- A majority of the body within an Applicant organization reviewing applications for certification of lawyers as specialists in a particular area of law shall consist of lawyers who have substantial involvement in the specialty area.

4.04 Uniform Applicability of Certification Requirements and Nondiscrimination

(A) The Applicant's requirements for certifying lawyers shall not be arbitrary and shall be clearly understood and easily applied. The organization may only certify those lawyers who have demonstrably met each standard. The requirements shall be uniform in all jurisdictions in which the Applicant certifies lawyers, except to the extent state or local law or regulation imposes a higher requirement.

(B) Membership in any organization or completion of educational programs offered by any specific organization shall not be required for certification, except that this paragraph shall not apply to requirements relating to the practice of law which are set out in statutes, rules and regulations promulgated by the government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

(C) Applicants shall not discriminate against any lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age. This paragraph does not prohibit an Applicant from imposing reasonable experience requirements on lawyers seeking certification or re-certification.

4.05 Definition and Number of Specialties-- An Applicant shall specifically define the specialty area or areas in which it proposes to certify lawyers as specialists.

(A) Each specialty area in which certification is offered must be an area in which significant numbers of lawyers regularly practice. Specialty areas shall be named and described in terms which are understandable to the potential users of such legal services, and in terms which will not lead to confusion with other specialty areas.

(B) An Applicant may seek accreditation to certify lawyers in more than one specialty area, but in such event, the organization shall be evaluated separately with respect to each specialty program.

4.06 Certification Requirements -- An Applicant shall require for certification of lawyers as specialists, at a minimum, the following:

(A) Substantial Involvement -- Substantial involvement in the specialty area throughout the three-year period immediately preceding application to the certifying organization.

Substantial involvement is measured by the type and number of cases or matters handled and the amount of time spent practicing in the specialty area, and require that the time spent in practicing the specialty be no less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice.

(B) Peer Review -- A minimum of five references, a majority of which are from attorneys or judges who are knowledgeable regarding the practice area and are familiar with the competence of the lawyer, and none of which are from persons related to or engaged in legal practice with the lawyer.

(1) Type of References -- The certification requirements shall allow lawyers seeking certification to list persons to whom reference forms could be sent, but shall also provide that the Applicant organization send out all reference forms. In addition, the organization may seek and consider reference forms from persons of the organization's own choosing.

(2) Content of Reference Forms -- The reference forms shall inquire into the respondent's areas of practice, the respondent's familiarity with both the specialty area and with the lawyer seeking certification, and the length of time that the respondent has been practicing law and has known the applicant. The form shall inquire about the qualifications of the lawyer seeking certification in various aspects of the practice and, as appropriate, the lawyer's dealings with judges and opposing counsel.

(C) Written Examination -- An evaluation of the lawyer's knowledge of the substantive and procedural law in the specialty area, determined by written examination of suitable length and complexity. The examination shall include professional responsibility and ethics as it relates to the particular specialty.

(D) Educational Experience -- A minimum of 36 hours of participation in continuing legal education in the specialty area in the three-year period preceding the lawyer's application for certification. This requirement may be met through any of the following means:

(1) Attending programs of continuing legal education or courses offered by Association accredited law schools in the specialty area;

(2) Teaching courses or seminars in the specialty area;

(3) Participating as panelist, speaker or workshop leader at educational or professional conferences covering the specialty area; or

(4) Writing published books or articles concerning the specialty area.

(E) Good Standing -- A lawyer seeking certification is admitted to practice and is a member in good standing in one or more states or territories of the United States or the District of Columbia.

(F) Affirmation of Compliance -- A lawyer seeking certification shall affirm in a manner satisfactory to Applicant that the lawyer's practice in the specialty area is consistent with the lawyer's status as a certified specialist.

4.07 Impartial Review -- The Applicant shall maintain a formal policy providing lawyers who are denied certification an opportunity for review by an impartial decision maker.

4.08 Requirements for Re - Certification -- The period of certification shall be set by the Applicant, but shall be no longer than five years, after which time lawyers who have been certified must apply for re-certification. Re-certification shall require similar evidence of competence as that required for initial certification in substantial involvement, peer review, educational experience evidence of good standing, and affirmation of compliance.

4.09 Revocation of Certification -- The Applicant shall maintain a procedure for revocation of certification. The procedures shall require a certified lawyer to report his or her disbarment or suspension from the practice of law in any jurisdiction to the certifying organization.

## **SECTION 5: ACCREDITATION PERIOD AND RE-ACCREDITATION**

5.01 Initial accreditation by the Association of any Applicant shall be granted for five years.

5.02 To retain Association accreditation, a certifying organization shall be required to apply for re-accreditation prior to the end of the fifth year of its initial accreditation period and every five years thereafter. The organization shall be granted re-accreditation upon a showing of continued compliance with these Standards.

**GENERAL INFORMATION FORM**

Submitting Entity: American Bar Association Standing Committee on Specialization

Submitted By: Barbara J. Howard, Chair

1. Summary of Recommendations

The recommendation requests that the American Bar Association grant reaccreditation to the DUI Defense law program of the National College for DUI Defense, and extend the existing accreditation periods of the Family Trial Law and Criminal Trial Law programs of the National Board of Trial Advocacy until August 2019. These programs have been reviewed under procedures adopted by the Standing Committee on Specialization in accordance with the Standards for such programs adopted and authorized by the House of Delegates in February 1993.

2. Approval by Submitting Entity

At a telephonic meeting on September 25, 2018, the Standing Committee on Specialization voted unanimously that it submit this recommendation to the House of Delegates for consideration at the 2019 Midyear Meeting.

3. Has this or a similar recommendation been submitted to the House of Board previously?

Yes. The DUI Defense specialist certification program was last reaccredited at the 2014 Mid-Year Meeting. The Family Trial Law and Criminal Trial Law programs were also last reaccredited in 2014.

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

At its August 1992 meeting, acting upon a recommendation proposed by 16 state and local bar associations, the House of Delegates passed a resolution calling for the Association to establish standards for accrediting private organizations that certify lawyers as specialists and to establish and maintain a mechanism to accredit such organizations that meet those standards. 1992 AM 128. In February 1993, the House of Delegates adopted the Standards for Accreditation of Specialty Certification Programs for Lawyers, and delegated to the Standing Committee the task of evaluating organizations that apply to the Association for accreditation. 1993 MY 105.

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

Not applicable.

6. Status of Legislation

Not applicable

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

Implementation will be self-executing if the programs are reaccredited or extended by the House of Delegates.

8. Cost to the Association

There are no unreimbursed costs associated with the reaccreditation of specialty certification programs as proposed in the recommendation. The costs associated with the reaccreditation process are defrayed by fees charged to the organizations seeking reaccreditation.

9. Disclosure of Interest

None

10. Referrals

None.

11. Contact Person (Prior to the Meeting)

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The Resolution asks for reaccreditation of the DUI Defense specialist certification program of the National College for DUI Defense, and extension of the accreditation period of the Family Trial Law and Criminal Trial Law programs of the National Board of Trial Advocacy until August 2019.

### 2. Summary of the Issue that the Resolution Addresses

Accreditation by the Association is a formal requirement for certified lawyers to claim certification in approximately two dozen states, and the ABA Standards for Accreditation of Specialist Certification Programs for Lawyers requires periodic reaccreditation of all such programs.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

Passage of the Resolution will allow continuation of the accreditation of these programs by the Association. Accreditation by the Association is a formal requirement for certified lawyers to claim certification in approximately two dozen states.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None identified.



**AMERICAN BAR ASSOCIATION**  
**STANDING COMMITTEE ON PARALEGALS**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association approves the following paralegal  
2 education programs: Irvine Valley College, Paralegal Studies Program, Irvine, CA; Baton  
3 Rouge Community College, Paralegal Studies Program, Baton Rouge, LA; and Molloy  
4 College, Paralegal Studies Program, Rockville Centre, NY;

5  
6 FURTHER RESOLVED, That the American Bar Association reapproves the following  
7 paralegal education programs: Los Angeles City College, Paralegal Studies Program, Los  
8 Angeles, CA; University of New Haven, Legal Studies Program, West Haven, CT; St.  
9 Petersburg College, Legal Studies Program, Clearwater, FL; Georgia Piedmont Technical  
10 College, Paralegal Studies Program, Covington, GA; Herzing University, Legal Studies  
11 Program, Atlanta, GA; Wilbur Wright College, Paralegal Program, Chicago, IL; Des Moines  
12 Area Community College, Legal Assistant Program, Des Moines, IA; Finger Lakes  
13 Community College, Paralegal Program, Canandaigua, NY; Monroe Community College,  
14 Paralegal Studies Program, Rochester, NY; SUNY Rockland Community College,  
15 Paralegal Studies Program, Suffern, NY; South University, Paralegal and Legal Studies  
16 Program, Columbia, SC; Brightwood College, Paralegal Studies Program, Nashville, TN;  
17 and Pioneer Pacific College, Legal Assistant/Paralegal Program, Wilsonville, OR;

18  
19 FURTHER RESOLVED, That the American Bar Association withdraws the approval of the  
20 following paralegal education programs: Baker College of Jackson, Paralegal Program,  
21 Jackson, MI; and Gannon University, Legal Studies Program, Erie, PA, at the request of  
22 the institutions; and  
23

24 FURTHER RESOLVED, That the American Bar Association extends the terms of approval  
25 until the August 2019 Annual Meeting of the House of Delegates for the following paralegal  
26 education programs: Faulkner University, Legal Studies Program, Montgomery, AL;  
27 South University, Paralegal Studies and Legal Studies Program, Montgomery, AL;  
28 California State University, Paralegal Studies Program, Los Angeles, CA; West Los  
29 Angeles College, Paralegal Studies Program, Culver City, CA; University of San Diego,  
30 Paralegal Program, San Diego, CA; Community College of Aurora, Paralegal Program,  
31 Denver, CO; Miami Dade College, Paralegal Studies Program, Miami, FL; Kapi'olani  
32 Community College, Paralegal Program, Honolulu, HI; Midstate

33 College, Paralegal Studies Program, Peoria, IL; Ball State University, Legal Studies,  
 34 Muncie, IN; Anne Arundel Community College, Paralegal Studies Program, Arnold, MD;  
 35 Bay Path University, Legal Studies, Longmeadow, MA; Macomb Community College,  
 36 Legal Assistant Program, Warren, MI; Winona State University, Paralegal Program,  
 37 Winona, MN; New Hampshire Technical Institute, Paralegal Studies Program, Concord,  
 38 NH; Atlantic Cape Community College, Paralegal Studies Program, Mays Landing, NJ;  
 39 Rowan College at Burlington County, Paralegal Program, Pemberton, NJ; Union County  
 40 College, Paralegal Studies Program, Cranford, NJ; Hofstra University, Paralegal Studies  
 41 Program, Hempstead, NY; Schenectady County Community College, Paralegal Studies,  
 42 Schenectady, NY; Westchester Community College (SUNY), Paralegal Studies Program,  
 43 Valhalla, NY; Methodist University, Legal Studies Program, Fayetteville, NC; South  
 44 College, Asheville, Legal/Paralegal Studies Program, Asheville, NC; Fayetteville  
 45 Technical College, Paralegal Technology Program, Fayetteville, NC; National American  
 46 University, Paralegal Studies Program, Sioux Falls, SD; University of Tennessee  
 47 Chattanooga, Legal Assistant Studies Program, Chattanooga, TN; Chattanooga State  
 48 Community College, Paralegal Studies Program, Chattanooga, TN; Southwest  
 49 Tennessee Community College, Paralegal Studies, Memphis, TN; Texas A&M University  
 50 Commerce, Paralegal Studies Program, Commerce, TX; Milwaukee Area Technical  
 51 College, Paralegal Program, Milwaukee, WI; and American National University, Paralegal  
 52 Program, Salem, VA.

## REPORT

In August, 1973, the House of Delegates of the American Bar Association adopted the Guidelines for the Approval of Legal Assistant Education Programs as recommended by the Special Committee on Legal Assistants, now known as the Standing Committee on Paralegals

([https://www.americanbar.org/content/dam/aba/administrative/paralegals/ls\\_prigs\\_2018\\_paralegal\\_guidelines.pdf](https://www.americanbar.org/content/dam/aba/administrative/paralegals/ls_prigs_2018_paralegal_guidelines.pdf)). The Committee subsequently developed supporting evaluative criteria and procedures for seeking American Bar Association approval. Applications for approval were accepted formally beginning in the fall of 1974.

Programs applying for approval are required to submit a self-evaluation report which provides a comprehensive description of the program, including but not limited to the following areas: organization and administration, financial support, curriculum, faculty, admissions, student services, advisory committee, library, and physical plant. An on-site visit to the program is conducted by representatives of the Association if the contents of the self-evaluation report indicate compliance with the ABA Guidelines.

For an initial approval, the inspection team is chaired by a member of the Approval Commission of the Standing Committee on Paralegals, or a specially designated past commissioner, and consists of a lawyer, an experienced paralegal or a director of another institution's program. On a reapproval visit, the team, which is again chaired by a member of the Approval Commission, or a specially designated past commissioner, includes two of the previously mentioned groups. The purpose of the on-site visit is to verify the information provided in the self-evaluation report and to acquire supplementary information helpful to making an evaluation and which can only be obtained through the person-to-person contact and the observation the visit affords. The visit is conducted over a one and one-half day period and consists of a series of meetings with the advisory committee, students, faculty and other individuals involved to a lesser extent and in some aspect of the program, such as the registrar, financial officer, placement coordinator and admissions and counseling staff. The team also observes legal specialty classes in session and may inspect various program data, such as detailed curriculum materials, admission and placement records, student evaluations of faculty members, and courses.

Following the on-site visit a written report is prepared by team members. The Approval Commission reviews the evaluation report and makes its recommendations to the Standing Committee on Paralegals, which in turn, submits its recommendation to the American Bar Association House of Delegates for final action.

The Standing Committee on Paralegals has completed review of the programs identified below and found them to be operating in compliance with the Guidelines for the Approval of Paralegal Education Programs and is, therefore, recommending that approval be granted.

Irvine Valley College, Paralegal Studies Program, Irvine, CA

# 103

Irvine Valley College is a community college accredited by the Western Association of Schools and Colleges. The College offers an Associate of Science Degree and a Certificate of Achievement in Paralegal Studies.

Baton Rouge Community College, Paralegal Studies Program, Baton Rouge, LA

Baton Rouge Community College is a community college accredited by the Southern Association of Colleges and Schools. The College offers an Associate of Applied Science Degree in Paralegal Studies.

Molloy College, Paralegal Studies Program, Rockville Centre, NY

Molloy College is a four-year college accredited by the Middle States Association of Colleges and Schools. The College offers a Certificate in Paralegals Studies and a Paralegal Studies Minor.

The following schools were recently evaluated for reapproval. Having demonstrated compliance with the Guidelines for the Approval of Paralegal Education Programs, the Standing Committee on Paralegals recommends that reapproval be granted to the following paralegal education programs:

Los Angeles City College, Paralegal Studies Program, Los Angeles, CA

Los Angeles City College is a community college accredited by the Western Association of Schools and Colleges. The College offers an Associate of Arts Degree in Paralegal Studies.

University of New Haven, Legal Studies Program, West Haven, CT

University of New Haven is a four-year university accredited by the New England Association of Schools and Colleges. The University offers a Bachelor of Science Degree in Legal Studies: Paralegal Concentration, an Associate of Science Degree in Legal Studies and a Certificate in Paralegal Studies.

St. Petersburg College, Legal Studies Program, Clearwater, FL

St. Petersburg College is a four-year college accredited by the Southern Association of Colleges and Schools. The College offers an Associate of Science Degree in Paralegal Studies, a Bachelor of Science Degree in Paralegal Studies and a Post-Baccalaureate Certificate in Paralegal Studies.

Georgia Piedmont Technical College, Paralegal Studies Program, Covington, GA

Georgia Piedmont Technical College is a two-year technical college accredited by the Southern Association of Colleges and Schools. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Post-Baccalaureate Certificate in Paralegal Studies.

Herzing University, Legal Studies Program, Atlanta, GA

Herzing University is a four-year university accredited by the Higher Learning Commission. The University offers a Bachelor of Science Degree in Legal Studies and an Associate of Science Degree in Legal Assisting/Paralegal Studies.

Wilbur Wright College, Paralegal Program, Chicago, IL

Wilbur Wright College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies.

Des Moines Area Community College, Legal Assistant Program, Des Moines, IA

Des Moines Area Community College is a community college accredited by the Higher Learning Commission. The College offers a Paralegal Associate of Applied Science Degree and a Paralegal Certificate.

Finger Lakes Community College, Paralegal Program, Canandaigua, NY

Finger Lakes Community College is a community college accredited by Middle States Association of Colleges and Schools. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Certificate in Paralegal Studies.

Monroe Community College, Paralegal Studies Program, Rochester, NY

Monroe Community College is a community college accredited by Middle States Association of Colleges and Schools. The College offers a Certificate in Paralegal Studies.

SUNY Rockland Community College, Paralegal Studies Program, Suffern, NY

SUNY Rockland Community College is a community college accredited by Middle States Association of Colleges and Schools. The College offers an Associate of Applied Science in Paralegal Studies and a Post-Associate Certificate in Paralegal Studies.

South University, Paralegal and Legal Studies Program, Columbia, SC

South University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor of Science Degree in Legal Studies and an Associate of Science Degree in Paralegal Studies.

Brightwood College, Paralegal Studies Program, Nashville, TN

Brightwood College is a Business College accredited by the Accrediting Council for Independent Colleges and Schools. The College offers an Associate of Applied Science in Paralegal Studies and a General Practice Paralegal Certificate.

Pioneer Pacific College, Legal Assistant/Paralegal Program, Wilsonville, OR

Pioneer Pacific College is a Business College accredited by the Accrediting Council for Independent Colleges and Schools. The College offers an Associate of Applied Science Degree in Paralegal/Legal Assistant.

The following paralegal education programs are recommended for withdrawal of ABA approval, at the request of the institutions:

Baker College, Paralegal Program, Jackson, MI

Baker College is a four-year college accredited by the Higher Learning Commission. The College offered a Paralegal Associate of Applied Science Degree.

## Gannon University, Legal Studies Program, Erie, PA

Gannon University is a four-year university accredited by Middle States Association of Colleges and Schools. The University offers a Bachelor of Arts Degree in Legal Studies, an Associate of Arts Degree in Legal Studies and a Certificate in Legal Studies.

Applications for reapproval have been filed by the following schools and are currently being evaluated. Until the evaluation process has been completed, the Committee recommends that the term of approval for each program be extended until the 2019 Annual Meeting of the American Bar Association House of Delegates.

Faulkner University, Legal Studies Program, Montgomery, AL;  
 South University, Paralegal Studies and Legal Studies Program, Montgomery, AL  
 California State University, Paralegal Studies Program, Los Angeles, CA;  
 West Los Angeles College, Paralegal Studies Program, Culver City, CA;  
 University of San Diego, Paralegal Program, San Diego, CA;  
 Community College of Aurora, Paralegal Program, Denver, CO;  
 Miami Dade College, Paralegal Studies Program, Miami, FL;  
 Kapi'olani Community College, Paralegal Program, Honolulu, HI;  
 Midstate College, Paralegal Studies Program, Peoria, IL;  
 Ball State University, Legal Studies, Muncie, IN;  
 Anne Arundel Community College, Paralegal Studies Program, Arnold, MD;  
 Bay Path University, Legal Studies, Longmeadow, MA;  
 Macomb Community College, Legal Assistant Program, Warren, MI;  
 Winona State University, Paralegal Program, Winona, MN;  
 New Hampshire Technical Institute, Paralegal Studies Program, Concord, NH;  
 Atlantic Cape Community College, Paralegal Studies Program, Mays Landing, NJ;  
 Rowan College at Burlington County, Paralegal Program, Pemberton, NJ;  
 Union County College, Paralegal Studies Program, Cranford, NJ;  
 Hofstra University, Paralegal Studies Program, Hempstead, NY;  
 Schenectady County Community College, Paralegal Studies, Schenectady, NY;  
 Westchester Community College (SUNY), Paralegal Studies Program, Valhalla, NY;  
 Methodist University, Legal Studies Program, Fayetteville, NC;  
 South College, Asheville, Legal/Paralegal Studies Program, Asheville, NC;  
 Fayetteville Technical College, Paralegal Technology Program, Fayetteville, NC;  
 National American University, Paralegal Studies Program, Sioux Falls, SD;  
 University of Tennessee Chattanooga, Legal Assistant Studies Program, Chattanooga, TN;  
 Chattanooga State Community College, Paralegal Studies Program, Chattanooga, TN;  
 Southwest Tennessee Community College, Paralegal Studies, Memphis, TN;  
 Texas A&M University Commerce, Paralegal Studies Program, Commerce, TX;  
 American National University, Paralegal Program, Salem, VA;  
 Milwaukee Area Technical College, Paralegal Program, Milwaukee, WI.

Respectfully submitted,

Chris S. Jennison  
Chair, Standing Committee on Paralegals  
January 2019

## GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Paralegals

Submitted By: Chris S. Jennison, Chair

1. Summary of Resolution(s).

This Resolution recommends that the House of Delegates grants approval to three programs, grants reapproval to thirteen paralegal education programs, withdraws the approval of two programs at the requests of the institutions, and extends the term of approval to 31 paralegal education programs.

2. Approval by Submitting Entity.

This resolution was approved by the Standing Committee on Paralegals in October 2018.

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

This resolution has not been previously submitted.

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

This resolution supports the Guidelines for the Approval of Paralegal Education Programs, as adopted by the House of Delegates.

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

N/A

6. Status of Legislation. (If applicable.)

N/A

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

Approved programs are notified of the action of the House of Delegates by the Standing Committee on Paralegals. The programs are monitored for

compliance during the approval term by the Standing Committee.

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

None

9. Disclosure of Interest. (If applicable.)

N/A

10. Referrals.

None

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

Jessica Watson  
Manager, Paralegal Programs  
Standing Committee on  
Paralegals  
American Bar Association  
321 North Clark Street  
Chicago, IL 60654  
(312) 988-5757  
E-Mail: [Jessica.Watson@americanbar.org](mailto:Jessica.Watson@americanbar.org)

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Chris S. Jennison  
2808 Village Lane  
Silver Spring, MD 20906  
(301) 538-5705  
E-Mail: [chris.s.jennison@gmail.com](mailto:chris.s.jennison@gmail.com)

## EXECUTIVE SUMMARY

Submitting Entity: Standing Committee on Paralegals

Submitted By: Chris S. Jennison, Chair

1. Summary of the Resolution

This Resolution recommends that the House of Delegates grants approval to three programs, grants reapproval to thirteen paralegal education programs, withdraws the approval of two programs at the requests of the institutions, and extends the term of approval to 31 paralegal education programs.

2. Summary of the issue which the Resolution Addresses

The programs recommended for approval and reapproval in the enclosed report meet the Guidelines for the Approval of Paralegal Education Programs. The programs recommended for withdrawal of approval in the enclosed report have requested that approval be withdrawn.

3. Please Explain How the Proposed Policy Position will address the issue

The programs recommended for approval, reapproval, and withdrawal of approval in this report have followed the procedures required by the Association and are in compliance with the Guidelines for the Approval of Paralegal Education Programs.

4. Summary of Minority Views

No other positions on this resolution have been taken by other Association entities, affiliated organizations or other interested group.

**AMERICAN BAR ASSOCIATION**  
**SECTION OF INTELLECTUAL PROPERTY LAW**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association supports the principle that the doctrine  
2 of “fair use” should be applied in a manner consistent with the constitutional goal of  
3 copyright, which is “to Promote the Progress of Science and useful Arts” by giving authors  
4 exclusive rights in their works for limited times (see U.S. Const., Art. I, §8, cl.8); and

5 FURTHER RESOLVED, That the American Bar Association supports the principle that  
6 when a user of copyrighted works merely repackages the copyrighted material and  
7 delivers it to the copyright owner’s actual or potential market, that use should not in and  
8 of itself be deemed a transformative use that would weigh in favor of fair use, regardless  
9 of whether the user can deliver that copyrighted material more efficiently than the  
10 copyright owner or its current licensees; and

11 FURTHER RESOLVED, That the American Bar Association supports the principle that  
12 the copyright owner’s actual or potential market includes those markets that are  
13 traditional, reasonable or likely to be developed, regardless of whether the copyright  
14 owner has already entered a particular market or has plans to do so.



## REPORT

### **I. Introduction**

This Resolution addresses the appropriate interpretation and application of the fair use doctrine in copyright law. Specifically, it addresses (i) whether a user who develops a more efficient means of delivering copyrighted content is making a transformative use of that content that would weigh in favor of fair use, and (ii) whether, in evaluating the “effect on plaintiff’s actual or potential market,” one should consider all traditional, reasonable or likely to be developed markets, even if the copyright owner has not yet entered a particular market or made plans to do so.

Fair use is a defense to copyright infringement that provides an opportunity, in appropriate circumstances, to use copyrighted works for free without obtaining a license or permission from the copyright owner. Fair use is an essential part of copyright law, and provides a means of balancing the rights of owners and users “to fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts.’” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994), citing U.S. Const., Art. I, §8, cl. 8. To achieve this purpose, the Copyright Clause of the Constitution empowers Congress to grant to authors “for limited times. . . the exclusive right to their . . . Writings.” U.S. Const., Art. I, §8, cl. 8.

It has been more than 24 years since the Supreme Court provided guidance on fair use in *Campbell v. Acuff-Rose*, 510 U.S. 569. During that time, advances in digital technology and communications have made possible previously unknown means of creating, delivering and enjoying copyrighted works. The lower courts, however, have applied the principles of fair use inconsistently. These inconsistencies have caused practical difficulties for lawyers and uncertainty for clients across the spectrum – from individual users and large corporate service providers to individual authors and corporate copyright owners in every field of endeavor, whether nonprofit, educational or private sector.<sup>1</sup>

The ABA has an important role to play in this area. It is familiar with a wide range of interests and concerned with the difficulties of counseling clients who want to know whether particular activities will qualify as fair use, particularly when new means of creating and exploiting copyrighted works are involved. The diversity of interests in the ABA means that the ABA usually has a broader perspective than the parties to any particular dispute. This Resolution calls for the ABA to provide guidance on fair use and the application of the four factor test in the context of the digital environment, in order to provide greater clarity to attorneys practicing in the copyright field by making recommendations that balance the interests of the various stakeholders and further the constitutional goals of copyright.

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<sup>1</sup> See, e.g., *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1658 (2016); *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018), *cert. denied*; *UMG Recordings, Inc. v. MP3.com*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

Uncertainty as to the proper application of fair use is reflected in recent fair use cases, as well as those currently working their way through the federal courts, e.g., *Fox News Network, LLC v TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018), *cert. denied* (discussed below); *Brammer v. Violent Hues Prods., LLC*, 2018 U.S. Dist. LEXIS 98003 (E.D. Va. June 11, 2018) (discussed below); and *Graham v. Prince*.<sup>2</sup> This resolution is intended to put the ABA in position to file an amicus brief in an appropriate case.

## (a) The Fair Use Provision in Copyright Law

Originally a judge-made doctrine, fair use was first codified in the Copyright Act of 1976 as section 107. 17 U.S.C. §107 provides as follows:

### **107. Limitations on exclusive rights: Fair use**

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The uses listed in the introductory paragraph to section 107 are merely examples of the types of works that may qualify as fair use. They do not automatically qualify as fair use, nor are other uses excluded from fair use. In every case, all four factors must be considered and weighed to determine whether, when taken together, the alleged infringer has made a case for a fair use defense to copyright infringement.

Factor one examines the purpose and character of the use, including whether the use is of a commercial nature or for nonprofit educational purposes. In *Campbell v. Acuff-Rose*, which involved a parody of the song “Oh Pretty Woman” by the band 2 Live Crew, the Supreme Court explained how courts should analyze fair use, particularly the first factor. According to the Court, the purpose of the investigation under factor one is to see

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<sup>2</sup> *Graham v. Prince*, 265 F. Supp.3d 366 (S.D.N.Y. 2017) (denying defendant’s motion to dismiss based on his fair use defense; discovery deemed necessary to assess defendant’s claim that creation of artwork from plaintiff’s photo posted to Instagram was a fair use).

if the new work merely supersedes the objects of the original creation, or “instead adds something new with a further purpose or different character, altering the first with new expression, meaning or message.” *Id.* at 579. This factor “asks, in other words, whether and to what extent the new work is transformative.” *Id.*, citing Pierre Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990). Transformative use is not required for a finding of fair use, but the goal of copyright is generally furthered by the creation of transformative works. 510 U.S. at 579.

The second fair use factor – the nature of the copyrighted work -- generally embraces two considerations: first, whether the work at issue is unpublished (in which case it is usually less susceptible to fair use) and second, whether the work is factual or fanciful. Copyright is sometimes said to protect fanciful works more strongly than it does factual works, although the Second Circuit, in *Authors Guild v. Google*, found no rationale for granting authors of factual works less protection than authors of fanciful works. In any event, courts often accord little weight to factor two. *Authors Guild v. Google, Inc.*, 804 F.3d at 220.

The third fair use factor asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole is reasonable, considering the purpose of the copying. Even a relatively small taking can weigh against fair use if the material taken is very important. See *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 564-65 (1985). On the other hand, in a number of transformative use cases, the courts have allowed use of entire works, having concluded that such use is necessary for the transformative purpose. *E.g.*, *Authors Guild v. Google*, 804 F.3d at 221 and n.24.

Factor four requires an evaluation of the effect of the use on the potential market for or value of the copyrighted work. The court must consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original [work].” *Campbell v. Acuff-Rose*, 510 U.S. at 590, *citing* 3 M. Nimmer and D. Nimmer, *Nimmer on Copyright*, §13.05[A][4], p. 13–102.61 (1993). The court must take into account not only the harm to the original, but also the harm to the market for derivative works. *Campbell*, 510 U.S. at 590, *citing Harper & Row*, 471 U.S. at 568. The markets to be considered are those that are “traditional, reasonable or likely to be developed.” *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 (2d Cir. 1994). When a parody is involved, courts usually do not recognize any adverse effect on the copyright owner’s market, since the parody is unlikely to substitute for the original. But in *Campbell*, the Court recognized that 2 Live Crew’s rap parody could have an adverse effect on plaintiff’s market for derivatives of its song, specifically, non-parody rap versions. The Court remanded to the lower court for findings on this issue, demonstrating that it did not regard transformativeness as dispositive of factor four. In other words, a transformative work could still affect the right holder’s market.

*Campbell v. Acuff-Rose* is the Supreme Court’s most recent substantive review of a case involving the fair use doctrine in copyright. Since *Campbell* was decided, many

lower courts have grappled with numerous questions concerning transformative use and fair use, including whether a particular use is transformative, and the effect of the use on plaintiff's actual or potential market. The inconsistent perspectives of the courts have made it difficult for attorneys practicing in the field of copyright to provide sound advice to their clients.

This Report addresses two issues that have become problematic in advising clients on fair use: First, if the user is exploiting the copyright owner's content through a new means of distribution or in a new format that can provide access to content more efficiently, is that in itself transformative? And, second, does the copyright owner's absence from a particular market justify concluding that the user's exploitation of the copyright owner's content in that market cannot cause an adverse market effect?

(b) The Effect of New Means of Distribution on the Fair Use Calculus

Whether the use of a copyrighted work is transformative is not the only consideration in determining if a use qualifies as fair use, but transformativeness is influential and sometimes determinative in a fair use analysis. Most courts have agreed that making a copyright owner's content publicly available through a new mode of distribution is not itself transformative, even if the new means of distribution is more efficient or convenient. For example, in *UMG Recordings, Inc. v. MP3.com*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000), MP3.com operated a service whereby anyone who demonstrated possession of a particular recording could access that recording on the Internet. To implement its service, it copied tens of thousands of popular music CDs containing sound recordings that plaintiffs owned into its database. MP3.com argued that its copying qualified as fair use, since its service merely allowed its users to access over the Internet recordings that they already owned. Analyzing factor one, the court rejected defendant's claim that its use was transformative. According to the court,

[A]lthough defendant recites that [it] provides a transformative "space shift" by which subscribers can enjoy the sound recordings contained on their CDs without lugging around the physical discs themselves, this is simply another way of saying that the unauthorized copies are being retransmitted in another medium -- an insufficient basis for any legitimate claim of transformation. *Id.* at 351. (citations omitted).

The court observed that defendant "adds no new aesthetics, new insights or understandings" to the original music recordings it copies; while MP3.com's services "may be innovative, they are not transformative." *Id.* (citing *Castle Rock Entm't, Inc. v. Carol Publ'g Group*, 150 F.3d 132,142 (2d Cir. 1998)). The court rejected MP3.com's fair use defense, and found its unauthorized copying infringed the copyrights in plaintiffs' sound recordings.

*A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd* in part, *rev'd* in part, 239 F.3d 1004 (9th Cir. 2001), also involved a claim of fair use of copyrighted content in the context of new technology. Napster developed and managed

software that allowed users to access the Internet to find and copy music they wanted. By means of a centralized database, Napster's software would match a person who wanted a copy of a recording with one or more people who already had a copy, providing a quick and virtually seamless way to acquire recordings by making free unauthorized copies. Napster was sued for secondary infringement, but argued its users were making a fair use, and with no primary liability, there could be no secondary liability. The court concluded that the users were not making a transformative use because providing or downloading sound recordings in the form of MP3 files does not transform the copyrighted music. 114 F. Supp. 3d at 912.

Napster argued its users were merely "space shifting" – that is, using the technology to listen to CDs at a place of their choosing, without having to cart around the CDs – and that such space shifting was authorized by the Supreme Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). The *Napster* court rejected the analogy to the *Sony* case, which involved time shifting of free television programs for later in-home viewing, and not "space shifting" of CDs available for purchase in an environment that facilitated widespread copying of the CDs. It ultimately found that users were not making a fair use of the copyrighted sound recordings. 114 F. Supp. 2d at 915-16.

*Authors Guild v. Google, Inc.*, 804 F.3d 202, was a case that the Second Circuit Court of Appeals described as "test[ing] the boundaries of fair use." *Id.* at 206. Google digitally scanned over 20 million books from libraries (with their cooperation) and created a database containing the digitized books. *Id.* at 208. Users, through the Google Books Service (GBS), could search the database free of charge. In response to a user's search inquiry, the GBS identifies books that contain the search term and includes a few snippets (each approximately one-eighth of a page of text) so that the user could see the context in which the term is used to determine whether to get the book.<sup>3</sup> The court deemed Google's full text copying of the books to create the GBS database to be highly transformative, and necessary to create a full-text searchable database.

The *Authors Guild v. Google* court also concluded that the snippet function added to the transformative nature of the GBS, since it assisted users in determining whether the book identified will be of interest to the user. The result of the search inquiry was said to be different in purpose, character, expression, meaning, and message from the work from which it was drawn. *Id.* at 217. The search inquiries provided information *about* the books sought, not the text of the books themselves. The court found that copying each book in its entirety was necessary to the search function, and the controls Google placed on the number and content of snippets displayed prevented the GBS from becoming a substitute for all or a substantial portion of the books. *Id.* at 221-22.

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<sup>3</sup> The GBS supplies more than a snippet when it has a license to do so from the publisher, or where the work is in the public domain. In cases involving reference works such as dictionaries, where a small snippet will obviate the necessity for the user to seek out the book, the GBS does not provide a snippet. 804 F.3d at 222.

So the *Authors Guild v. Google* court concluded that the transformative nature of Google's search function justified copying the full text of the books for Google's internal use, as well as the distribution of a small portion of text to further assist the searcher. But the court took pains to explain that the snippets constituted no more than 16% of a book, in the aggregate, and were unlikely to substitute for purchase of the book. *Id.* at 224-25. It is clear from the court's decision that the "highly transformative" nature of Google's search service justified distribution of snippets to users, but it would not extend to distribution of full text.

*Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, provides another perspective on transformative use. In that case, the Second Circuit reversed a district court decision that would have significantly expanded the fair use doctrine. The Second Circuit declined to hold that TVEyes was making a fair use of Fox News' copyrighted programming.

TVEyes is a commercial service that records news from more than 1400 channels, 24 hours a day. It enters these news programs in a database, together with text-searchable transcripts of the news programs created primarily by using the closed-captioned text that accompanies each news program. Search queries by TVEyes' clients (who pay \$500/month for the service) yield a list of videoclips that contain the search term. By clicking on an item in the list, a customer can play a videoclip of up to ten minutes long. 883 F.3d at 175. Initially a customer could play an unlimited number of clips, but after Fox brought suit, TVEyes employed a mechanism to prevent customers from viewing subsequent segments – although the efficacy of this mechanism was disputed by the parties. The TVEyes service also allowed customers to archive search results on TVEyes' server (otherwise they are deleted after 32 days); download the results to users' own computers; and email the clips (or link to them) so that others, including non-TVEyes clients, may view them. *Id.*

The district court concluded that some of TVEyes' activities were fair use (creation of the database, the search function, archiving), while others (e.g., downloading the videoclips, emailing the clips to others), were not. *Id.* at 174. On appeal, the Second Circuit distinguished the "Search function," which allowed customers to identify videos that contained their search terms, from the "Watch function" which allowed TVEyes customers to view ten minute videoclips.<sup>4</sup> Fox did not challenge the district court's decision concerning the Search function, so the Second Circuit focused its decision on the Watch function.

Concerning factor one, the court concluded that TVEyes' Watch function was "at least somewhat transformative," since it enhanced efficiency by enabling users to identify programs of interest and provided "nearly instant access" to the identified material "that would otherwise be irretrievable, or else retrievable only through prohibitively inconvenient or inefficient means." *Id.* at 177. But because it delivered the content to

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<sup>4</sup> *Id.* at 176. As the court found that the Watch function was not fair use, it deemed it unnecessary to analyze other functions that TVEyes permitted, such as downloading or emailing videoclips. *Id.*

clients without alteration, the court ultimately concluded that the Watch function had “only a modest transformative character.” *Id.* at 178. The court analogized to *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), which permitted in-home time-shifting of free television programs, because TVEyes’ service allowed customers to view Fox’s programming when it was convenient to them. 883 F.2d 3d at 177-78. Judge Kaplan, in his concurrence, argued that even if TVEyes’ service enhances the efficiency of delivering content, that does not make it transformative, because the service merely repackages and delivers the original, but does not provide “new insights or understandings.” *Id.* at 185-86.<sup>5</sup> He pointed out that in *Authors Guild v. Google* there were safeguards against Google’s service supplanting the books in the database that were not present in *Fox v. TVEyes*. *Id.* at 187. He also found nothing within *Sony* to support the idea that “efficiency-enhancing technology is transformative.” *Id.* at 188.

As the cases discussed above illustrate, courts differ in their determinations as to whether distribution of a copyrighted work in a new medium or with a new technology is itself transformative. While many have decided that changing the technological means of delivery is not itself transformative of the copyrighted work, this is not a consistently-held view. Practitioners, copyright owners and users would all benefit if the courts were more consistent in the way they analyze this issue in evaluating fair use.

(c) The Significance of the Copyright Owner’s Absence from a Particular Market that the Putative Fair User Seeks to Exploit

Not every potential harm to the copyright owner is cognizable under the fourth fair use factor. Instead, courts look to “traditional, reasonable or likely to be developed” markets. *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 & n. 17 (2d Cir.), *cert. dismissed*, 516 U.S. 1005 (1995). Can the user claim that there is no market harm if it is operating in a market that the copyright owner is not exploiting? In many cases, the courts have resisted such claims, on the theory that if the market is within the copyright owner’s right to exploit, the owner’s decision not to exploit remains within his rights.<sup>6</sup> The concept of “use it or lose it” generally does not govern copyright rights.

There may be many reasons why a copyright owner chooses not to enter a market. For example, she may feel that exploiting one market could “cannibalize” sales in another market; she may be waiting to see which of two or more delivery technologies will take

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<sup>5</sup> Judge Kaplan (a federal district judge sitting by designation) contended in a concurring opinion that it was unnecessary to address whether TVEyes’ use was transformative, since the majority stated that even if it were transformative, overall it was still not fair use. 883 F.3d at 183.

<sup>6</sup> *E.g.*, *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 145-46 (2d Cir. 1998) (finding the fourth factor weighed in favor of plaintiffs, who still maintained a right to create derivative works even if it had chosen not to enter the market); *Salinger v. Colting*, 607 F.3d 68, 74 (2d Cir. 2010) (upholding the District Court’s determination that despite the fact that defendant’s work was unlikely to impact the sales of plaintiff’s work, an unauthorized sequel might undermine the potential market for an authorized version even where author publicly disclaimed intent to authorize a sequel). *But see Katz v. Chevaldina*, No. 12 Civ. 22211, 2014 U.S. Dist. Lexis 88085, at \*26-\*27 (S.D. Fla. June 17, 2014) (finding no harm to the potential market for the plaintiff’s work where the plaintiff expressed no interest in selling or profiting from his photograph); *Katz v. Chevaldina*, No. 12 Civ. 22211, 2014 U.S. Dist. Lexis 126446 (S.D. Fla. Sept. 4, 2014) (adopting Magistrate’s recommendation and granting summary judgment to defendant).

hold in the marketplace; she may choose to refrain from selling for a period of time to build up demand; or she may just not want to enter the market. If the user can claim that because plaintiff is not delivering content by means of a particular new and efficient technology and thereby establish the user's exploitation of that market creates no harm to the copyright owner, then as each new technology is introduced there will be a race to exploit it. If the copyright owner does not move quickly enough, it will lose its right to exploit the new market using its own content to a party who claims fair use.

In *UMG Recordings*, discussed above, defendants claimed that there was no actual or potential effect on plaintiffs' market because plaintiffs were not currently licensing their recordings to be copied in order to provide access over the Internet, and that market is not one that is "traditional, reasonable or likely to be developed." *Id.* at 352, citing *American Geophysical Union v. Texaco*, 60 F.3d at 930 & n. 17. The court held that defendants were not free to usurp a market that "directly derives from reproduction of plaintiffs' copyrighted works" even if plaintiffs had not yet entered that market. *Id.*

*Infinity Broadcasting Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), also addressed the copyright owner's absence from a market in the context of the fourth fair use factor. Infinity owns a large network of radio broadcasters as well as the copyrights in programs broadcast on its stations. Kirkwood owned Dial-Up, a service that allows its customers to listen to radio broadcasts in cities around the country, for purposes such as making sure their commercials are aired. (There was, however, no limit to the amount of a broadcast customers could listen to.) Infinity sued Kirkwood when his service retransmitted some of its broadcasts. The district court upheld Kirkwood's fair use defense. *Id.* at 107. Concerning the fourth factor, it concluded that Kirkwood's transmission to its specialized audience was not likely to have a material effect on Infinity's revenue.<sup>7</sup> The district court was also persuaded that there was no adverse market effect because Infinity did not offer commercial listen lines, or authorize retransmission of its programs. The Second Circuit, however, found that although Infinity did not operate commercial listen lines, it did provide them in a package offered to some of its advertisers. Even though Infinity did not directly charge for listen lines, it still derived benefit from them, and Dial-up's activities would disrupt this market.

As discussed above, Fox News sued TVEyes for copying and distributing its news programming, and TVEyes asserted a fair use defense. The court observed that TVEyes makes available "virtually the entirety of Fox content that TVEyes users want to see and hear," particularly considering the brevity of most news segments. 883 F.3d at 179. TVEyes' service diminishes Fox's ability to license searchable access to its copyrighted content. According to the court, TVEyes' success indicates that there is a "plausibly exploitable" market that allows searching and viewing of copyrightable television content, and TVEyes was depriving Fox of potential licensing revenue. *Id.* at 180.<sup>8</sup>

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<sup>7</sup> The district court considered only the effect on the market of Kirkwood's use, and not the effect if the use should become widespread.

<sup>8</sup> As to whether TVEyes was exploiting a market that Fox did not, Fox established in the district court that it was already making available digital downloads of its news content. However, it made available downloads

Finally, *Brammer v. Violent Hues Prods.*, 2018 U.S. Dist. LEXIS 98003, is a recent case in which a photographer sued when his photograph was copied from the Internet and used in promotional material for a film festival in the Washington D.C. area. Brammer testified that although he had sold reproductions of the photo in the past, he “currently makes no effort to market the photo.” *Id.* at \*7. This statement helped persuade the court that there was no market effect from Violent Hues’ use, because the existing market was very small. Citing the fact that Brammer had a couple sales after the alleged infringement began, the court concluded that Violent Hues had not “provid[ed] a market substitute for the photo” and there was no adverse market effect under factor four.<sup>9</sup> *Id.*

A copyright owner’s decision not to enter or remain in a particular market should not be read to cede that market to another. Nevertheless, some courts have held that where the copyright owner is not participating in a market, or is doing so only in a minimal way, one who uses the copyright owner’s content in that market creates no market harm. It is apparent that practitioners are unable to provide advice on this issue with any certainty, to their detriment and that of their clients. The uncertainty and potential cost are barriers to entry for users and innovators looking to utilize certain advances in digital technology and communications, with the downside cost acting as a more significant barrier for individuals and smaller businesses.

## **II. Conclusion**

As this Report illustrates, the combination of advances in digital technology and inconsistent application by courts of the fair use doctrine has led to uncertainty affecting a diverse range of users and innovative businesses. It is difficult to responsibly advise such clients on important considerations in an analysis of whether particular activities constitute fair use or risk infringement. This Resolution calls for a consistent approach to fair use in which (i) distribution of a copyright owner’s work in whole or in substantial part, using an efficient new technology or new means of distribution, is not deemed a “transformative” act in support of a fair use determination, and (ii) a copyright owner’s absence from a particular market is not determinative of whether the copyright owner can be harmed if his content is exploited in that market.

Respectfully submitted,

Mark K. Dickson  
Chair, Section of Intellectual Property Law  
January 2019

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of only some of its programs, under a license that restricted the use of the videoclips. *Fox News Network v. TVEyes*, 124 F. Supp. 3d 325, 329 (E.D.N.Y. 2015) *cert. denied*.

<sup>9</sup> The court considered only whether Violent Hughes’ use had an adverse effect on plaintiffs’ market; it did not consider the effect if the use were to become widespread.

## GENERAL INFORMATION FORM

Submitting Entity: ABA Section of Intellectual Property Law

Submitted By: Mark K. Dickson, Section Chair

1. Summary of Resolution

This Resolution addresses interpretation and application of the fair use doctrine in copyright law by calling for a consistent approach to fair use that furthers the constitutional purpose of copyrights and balances the interests of various stakeholders, with particular attention to application of fair use in the context of the digital environment and with respect to repackaging copyrighted material. If a user of copyrighted works merely repackages the copyrighted material and delivers it to the copyright owner's actual or potential market, that use does not qualify as a transformative use that would weigh in favor of fair use, and a copyright owner's actual or potential market includes markets that are traditional, reasonable or likely to be developed. This approach to fair use will reduce uncertainty for a spectrum of users and innovative businesses and provide greater clarity for the attorneys advising them.

2. Approval by Submitting Entity:

This Resolution was approved on November 13, 2018 by the Council of the Section of Intellectual Property Law.

3. Has this or a similar Resolution been submitted to the House of Delegates or Board of Governors previously?

No.

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

None

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

N/A

6. Status of Legislation. None

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

The policy would provide the basis for an Association amicus curiae brief to a court considering the proper approach to interpretation and application of the fair use doctrine in copyrights law.

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

Member and GAO staff time

9. Disclosure of Interest. (If applicable)

None

10. Referrals.

An earlier version of the Resolution and Report was referred to the Section of Science and Technology. In December, the final version was distributed to that section and each of the other Sections, Divisions, Forums, and Standing Committees of the Association.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address):

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[S.Montgomery@northeastern.edu](mailto:S.Montgomery@northeastern.edu)

12. Contact Name and Address Information. (Who will present the Report to the House?)

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This Resolution addresses interpretation and application of the fair use doctrine in copyright law by calling for a consistent approach to fair use that furthers the constitutional purpose of copyrights and balances the interests of various stakeholders, with particular attention to application of fair use in the context of the digital environment and with respect to repackaging copyrighted material. If a user of copyrighted works merely repackages the copyrighted material and delivers it to the copyright owner's actual or potential market, that use does not qualify as a transformative use that would weigh in favor of fair use, and a copyright owner's actual or potential market includes markets that are traditional, reasonable or likely to be developed. This approach to fair use will reduce uncertainty for a spectrum of users and innovative businesses and provide greater clarity for the attorneys advising them.

### 2. Summary of the Issue that the Resolution Addresses

During the 24 years since the Supreme Court last provided guidance on interpretation and application of fair use doctrine, advances in digital technology and communications have made possible previously unknown means of creating, delivering and enjoying copyrighted works, while inconsistent interpretation and application of fair use by the courts has led to practical difficulties for lawyers and burdensome uncertainty for a diverse range of users and innovative businesses looking to utilize those advances.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

The Resolution calls for a consistent approach to fair use in accordance with the constitutional purpose of copyrights, including an interpretation and application of statutory fair use factors in which (1) distribution of a copyright owner's work in whole or in substantial part, using an efficient new technology or new means of distribution, should not in itself be deemed a "transformative" act in support of a fair use determination, and (ii) a copyright owner's absence from a particular market is not determinative of whether the copyright owner can be harmed if his content is exploited in that market.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

No known opposition.

AMERICAN BAR ASSOCIATION  
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR  
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association House of Delegates concurs in the
- 2 action of the Council of the Section of Legal Education and Admissions to the Bar in
- 3 making amendments dated January 2019 to Standard 316 (Bar Passage) of the *ABA*
- 4 *Standards and Rules of Procedure for Approval of Law Schools*.



American Bar Association  
Section of Legal Education and Admissions to the Bar  
Revised Standards for Approval of Law Schools  
January 2019

**Standard 316. BAR PASSAGE**

At least 75 percent of a law school's graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.

~~(a) A law school's bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests:~~

~~(1) That for students who graduated from the law school within the five most recently completed calendar years:~~

~~(i) 75 percent or more of these graduates who sat for the bar passed a bar examination; or~~

~~(ii) In at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.~~

~~In demonstrating compliance under sections (1)(i) and (ii), the school must report bar passage results from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency.~~

~~(2) That in three or more of the five most recently completed calendar years, the school's annual first time bar passage rate in the jurisdictions reported by the school is no more than 15 points below the average first time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions.~~

~~In demonstrating compliance under section (2), the school must report first time bar passage data from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. When more than one jurisdiction is reported, the weighted average of the results in each of the reported jurisdictions shall be used to determine compliance.~~

~~(b) A school shall be out of compliance with this Standard if it is unable to demonstrate that it meets the requirements of paragraph (a)(1) or (2).~~

~~(c) A school found out of compliance under paragraph (b) and that has not been able to come into compliance within the two year period specified in Rule 13(b) of the Rules of Procedure for Approval of Law Schools, may seek to demonstrate good cause for extending the period the law school has to demonstrate compliance by submitting evidence of:~~

- (1) The law school's trend in bar passage rates for both first time and subsequent takers: a clear trend of improvement will be considered in the school's favor, a declining or flat trend against it.
- (2) The length of time the law school's bar passage rates have been below the first time and ultimate rates established in paragraph A: a shorter time period will be considered in the school's favor, a longer period against it.
- (3) Actions by the law school to address bar passage, particularly the law school's academic rigor and the demonstrated value and effectiveness of its academic support and bar preparation programs; value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the law school's favor; ineffective or only marginally effective programs or limited action by the law school against it.
- (4) Efforts by the law school to facilitate bar passage for its graduates who did not pass the bar on prior attempts: effective and sustained efforts by the law school will be considered in the school's favor; ineffective or limited efforts by the law school against it.
- (5) Efforts by the law school to provide broader access to legal education while maintaining academic rigor; sustained meaningful efforts will be viewed in the law school's favor intermittent or limited efforts by the law school against it.
- (6) The demonstrated likelihood that the law school's students who transfer to other ABA-approved schools will pass the bar examination: transfers by students with a strong likelihood of passing the bar will be considered in the school's favor, providing the law school has undertaken counseling and other appropriate efforts to retain its well performing students.
- (7) Temporary circumstances beyond the control of the law school, but which the law school is addressing: for example, a natural disaster that disrupts operations or a significant increase in the standard for passing the relevant bar examination(s).
- (8) Other factors, consistent with a law school's demonstrated and sustained mission, which the school considers relevant in explaining its deficient bar passage results and in explaining the school's efforts to improve them.

## REPORT

The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence the attached changes to Standard 316 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*<sup>1</sup>.

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the Council of the Section of Legal Education and Admissions to the Bar files a resolution to the HOD seeking concurrence of the HOD in any actions of the Council to adopt, revise, or repeal the *ABA Standards and Rules of Procedures for Approval of Law Schools*. The HOD may either concur with the Council's decision or refer the decision back to the Council for further consideration. A decision by the Council is subject to a maximum of two referrals back to the Council by the HOD. The decision of the Council following the second referral shall be final.

The amendments were approved by the Council for Notice and Comment during its meetings held on March 11-12, 2016, and June 3-4, 2016. A public hearing was held on August 6, 2016. The Council approved the amendments at its meeting on October 20-22, 2016. The changes were submitted to the HOD at the 2017 Midyear meeting in Miami. The HOD did not concur in the changes and referred the matter back to the Council. After review, gathering of data, and discussion, the Council reaffirmed its approval at its meeting on September 13-15, 2018.

The revised Standard 316 on bar exam outcomes provides a clear and straightforward statement of the bar passage rate required of a law school for the purposes of accreditation. It is clear, simple, and appropriate. It provides an ultimate pass rate for each graduating class of a law school over the two-year period following that class' graduation. First-time pass rates are important information that will continue to be disclosed under Standard 509 (Required Disclosures). However, for purposes of assessing whether a law school is operating a sound program of legal education, the revision provides that the most appropriate measure of a law school's performance is the ultimate pass rate and that a two-year period is the optimal period over which to measure that performance for accreditation purposes.

The revised Standard does not place a limit on the number of times that an individual may sit for a bar exam. The Standard never has. That is a matter for each state to determine as part of its lawyer licensing process. The Standard speaks only to the ultimate bar passage rate required of a law school for accreditation purposes.

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<sup>1</sup> "2018-2019 ABA Standards and Rules of Procedure for Approval of Law Schools," [http://www.americanbar.org/groups/legal\\_education/resources/standards.html](http://www.americanbar.org/groups/legal_education/resources/standards.html).

## **Features of the revised Standard:**

1. The requirement of an ultimate passage rate of 75 percent remains unchanged from the requirement of current Standard 316(a)(1).
2. The period of time within which a law school must show that it has achieved a 75 percent passage rate is reduced from five calendar years to two years from the date of graduation.
3. The ability of a law school to report its ultimate pass rate based on only 70 percent of its graduates is eliminated.
4. The opportunity for a law school to satisfy its obligations under Standard 316 on the basis of its bar pass rate for first-time takers is eliminated.
5. Rule 13(c) provides for an extension for good cause shown. Current Standard 316(c) is, therefore, unnecessary and redundant.

## ***Analysis of the revisions:***

The revisions adopted by the Council do not change the basic requirement in current Standard 316(a)(1) that a law school must achieve at least a 75 percent ultimate bar pass rate. This standard is an appropriate independent accreditation requirement; it is also an important component of a set of outcomes, which are connected and relevant to the fundamental question of whether a law school's program is sound.<sup>2</sup> The other relevant and related outcomes are admissions (Standard 501), attrition (Interpretation 501-3), and academic support and program of legal education (Standards 309 and 301). There is an obvious continuum inherent in these provisions from admissions, through law school, the licensing exam.

While the ultimate passage rate (75 percent) remains unchanged in the revised Standard, the revisions do make important changes to measuring law school graduate success on the bar exam for purposes of law school accreditation:

- a. The period for demonstrating compliance is shortened from five years to two. The National Conference of Bar Examiners (NCBE) data supports this change. It shows only a small fraction of takers who fail the exam persist and retake the exam more than twice. The data that the Section has collected also supports this change, with law schools in the aggregate reporting for the year 2015 that 97 percent of graduates had taken a bar exam within two years of graduating. In the development of these revisions, some suggested that the Standard should focus on "attempts" for each graduate, rather than a pass rate over a period of time. That

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<sup>2</sup> Standard 301(a) – Objectives of Program of Legal Education provides: "A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar ...."

is also a sensible approach, but there are practical problems<sup>3</sup> with requiring a law school to track graduates by attempts. The data gathered by the Section and the NCBE demonstrate that a two-year period captures almost all graduates and assesses their success on the bar exam. It is a fair and appropriate piece of a revised bar passage standard.

- b. The revision strikes the previous requirement that a law school needed to report on only 70 percent of its graduating class. That requirement, in large part, reflected the difficulty that many law schools reported in gathering bar exam outcomes. The data that the Section collected from law schools for 2015 graduates shows that law schools, in the aggregate, had information for 97.5 percent of graduates.<sup>4</sup> The data collected show that the revision is a reasonable expectation. Full reporting is appropriate and certainly presents a more accurate picture of how a law school's graduates are doing on the bar exam.
- c. A significant change in the revised Standard is the elimination of current Standard 316(a)(2), which allows a law school to comply on the basis of first-time outcomes by showing that the law school's first-time pass rate is within 15 percentage points of the pass rate in the jurisdiction(s) where its graduates took the bar exam<sup>5</sup> for three of the preceding five years. For example, if a state bar pass rate for a particular year is 75 percent, then a law school would comply for that year if its first-time pass rate was 60 percent. This change was subject to notice and comment and generated considerable discussion. The reasons for this change were discussed in depth when the Council adopted the revised Standard. While the Council appreciated and understood the concerns of those who opposed this change, after considering the arguments on both sides and in the exercise of its informed judgment, the Council concluded that this change was not only appropriate, but also was necessary. First-time pass rates will continue to be collected and reported as consumer information. Compliance with the revised Standard, however, will be based exclusively on the ultimate pass rate for a law school's graduates who sat for the bar exam.

In part, and as was true with the 70 percent reporting requirement, the “first-time taker” option was provided at the time the Standard was first put in place because of difficulties law schools reported in collecting ultimate bar pass data. First-time rates were more easily collected because they were more regularly reported by

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<sup>3</sup> E.g., continuing to track graduates over longer periods of time, coordination of data across jurisdictions.

<sup>4</sup> Considered on a school-by-school basis, just eight of the 203 ABA-approved law schools reported not locating more than 10 percent of that cohort. On the other hand, more than 160 law schools reported locating at least 97 percent of their 2015 graduates. In practice, the revised Standard will require a law school to make reasonable efforts to find and report on all its graduates; law schools making reasonable efforts will not be non-complaint because a small number of graduates could not be tracked.

<sup>5</sup> A weighted average is computed for a law school based on the number of graduates sitting in a jurisdiction and that jurisdiction's outcomes.

bar examiner offices to law schools. In effect, first-time pass rates served as a proxy for the eventual, overall success of a law school's graduates on the bar exam, which was the primary focus of the Standard. Recent experience confirms, however, that ultimate passage data, at least for the two-year period that is part of the revised Standard, can be gathered with reasonable efforts by law schools.

A different, more substantive reason suggested by Standard 316(a)(2) is that a relative performance standard that measured a law school's outcomes against the outcomes of other law schools on the same exam was necessary to avoid penalizing law schools located in jurisdictions with "more difficult" bar exams or where the passing (or "cut" score) on the exam was higher than the passing score on the same exam in other jurisdictions. The rise of the NCBE's Uniform Bar Exam (UBE) has exacerbated this concern, but at present it is not possible to have a bar passage standard that is based on bar exam cut scores. Further, so long as jurisdictions have the authority to determine their passing scores, graduates must obtain a score that meets whatever passing score is required in the jurisdiction where they want to practice.

Finally, the option provided by current Standard 316(a)(2) is not acceptable in some specific situations. For example, in states with one law school where the majority of bar takers are that law school's graduates, it is almost impossible for the law school's outcomes to be more than 15 percentage points below the overall state first-time bar pass rate, regardless of how low the law school's first-time pass rate might be. An appropriate standard does not simply evaluate one institution against others, it sets an acceptable minimal level of performance that a law school must meet to be approved. The revised Standard accepts that level of performance as the 75 percent passage rate that has been in the Standards for many years.

***Concerns the Council heard from the HOD and others during the concurrence process on the revised Standard in February 2017:***

- a. There was a concern that more information about how the revised Standard would impact particular law schools, specifically those in California, where the passing score (cut score) is comparatively high, and those law schools that are designated minority-serving institutions, particularly historically black colleges and universities (HBCU).
- b. There was a concern that the revised Standard could have a disproportionate impact on minority students and a desire for information on that topic.
- c. There was a concern law schools in California retain a "relative" standard, in light of the high cut score in California and the California Supreme Court's unwillingness to lower it.
- d. There was a concern expressed by a few law schools about a perceived burden of gathering data under the revised Standard.

- e. There were concerns that the case for changing the Standard had not been made.

***Responses to the concerns:***

Since, as discussed above, the Council collected substantial data following the prior HOD's consideration of this matter, responses to some of the concerns related to the data are discussed in the analysis of the data below. Several general points, however, can be made:

1. While some additional work is required for law schools to collect additional data, the effort is reasonable given the significance of the information. If anything, perhaps more data – more complete and more “micro” in nature – should be collected and reported as consumer information. Additionally, bar examiner offices and the NCBE are working to improve the delivery of bar exam outcomes to law schools in ways that will continue to ease the burden of the data-gathering effort.
2. The Standard aims to protect students and the public. It is consistent with the Council's overall responsibilities. The Standard neither aims to protect law schools nor to drive them from the market.
3. Bar passage is a fundamental outcome of a legal education program. While an acceptable bar passage rate is not sufficient, standing alone, to support the accreditation of a law school, an acceptable bar passage rate should be a necessary condition for accreditation.
4. While acknowledging that some law schools have special missions that are important, no law school can be exempted from reasonable outcomes-based requirements that aim to protect students and the public.
5. It may be difficult to establish what is a minimally “acceptable” bar exam outcome standard, but that determination must be made. The Council – comprised of lawyers, judges, academics, a student, and public members – is an appropriate body with appropriate experience and professional judgment to, after study and public comment, make the decision about what an acceptable minimum pass rate should be.
6. There is no evidence to support a conclusion that law schools would use a bar pass standard as a basis for diminishing their commitment to diversity. Standards 205 and 206 remain in place to provide the Council with the opportunity and responsibility to ensure that law schools are operating in a non-discriminatory, open, and inclusive manner.

7. Available data provide no support for a concern that the revisions to Standard 316 will disproportionately impact minority students or applicants to law school. The Standards, taken together, provide significant space for law schools to admit applicants, including minority applicants, that they believe deserve an opportunity for law study. Revised Standard 316 will work in concert with Standard 501 and Interpretation 501-3 to provide this space. Interpretation 501-3 allows a law school to have up to 20 percent non-transfer attrition without concerns about violating the Standards. Revised Standard 316 requires a law school to have at least a 75 percent ultimate pass rate. The combination of these two standards creates considerable room for a law school to provide opportunity to applicants, including minority applicants, who the law school believes are deserving of that opportunity. If there are concerns that the bar examination or the scoring of the bar examination have adverse impacts on minority graduates and on diversity in the profession, those concerns are appropriately addressed to the state supreme courts and bar admissions community. One cannot be a lawyer without passing a bar exam and the Council's responsibility as an accreditor is to ensure that students/graduates complete the J.D. program and pass the bar examination in sufficient numbers to ensure applicants, the public, and the profession that law schools are not taking undue advantage of students.
  
8. Rule 13(b) of the ABA Rules of Procedure for the Approval of Law Schools provides a period of up to two years for a law school to take steps to cure its non-compliance with a Standard,<sup>6</sup> including Standard 316. Rule 13(c) gives the Council authority to extend that period upon request of a law school and for good cause shown. Consequently, the Council determined that the provisions in current Standard 316(c), providing for an extension of time to come into compliance, were duplicative and unnecessary.

***Collection of information about ultimate bar pass rates for 2013, 2014, and 2015 graduates:***

Following the HOD's non-concurrence, the Council directed the Managing Director's Office to gather data that would inform the Council and address concerns that the Council had not gathered enough data to ensure there were no unintended, adverse impacts that might cause the Council to change its mind about how any revisions should be crafted.

This was done in two steps. First, following the June 2017 Council meeting, the Managing Director's Office distributed to all ABA-approved law schools a brief, voluntary ultimate bar pass survey for 2013 and 2014 graduates based on the revised Standard. The Council received a report on that survey at its October 2017 meeting.

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<sup>6</sup> The two-year period is a function of the requirements of the U.S. Department of Education's recognition rules for accrediting authorities, with which the Council must comply.

Second, based in part on the success of the voluntary survey, the Council approved the gathering of consumer information on bar exam outcomes under Standard 509 in the data gathering process for the 2017-2018 year that also provides data relevant to the revisions to Standard 316. That data consisted of ultimate bar pass data for the class of 2015 (bar passage outcomes for 2015 graduates over the next two years) and first-time bar pass outcomes for the 2016 and 2017 graduating classes.

Some analysis of these data is reported below. Subsequent to the collection and publication of this data, the Council and the Managing Director's Office have widely disseminated the outcomes in order to make others aware of the data. Those educational efforts and conversations will continue up to the HOD meeting.

### **Responses to the Voluntary Survey**

Ninety-two (92) law schools responded to the voluntary survey, which is approximately 45 percent of all law schools. They reported on 19,000+ graduates for 2013 and 17,000+ graduates for 2014, which was more than 40 percent of the total number of graduates for each of those years. The aggregate data and a list of law schools who provided data was made public, but the specific law school data was not released. A range of law schools participated – from large to small, east to west, public and private, and ranging from among the most to the least selective.

Eighty-nine (89) of the 92 participating law schools had ultimate pass rates for both 2013 and 2014 graduating classes greater than the 75 percent required by revised Standard 316. One law school did not have a 75 percent ultimate pass rate for either 2013 or 2014. Two other law schools did not achieve a 75 percent pass rate for one of the two years.

The aggregate ultimate pass rate for those who sat for a bar exam was 92 percent for 2013 graduates and 89 percent for 2014 graduates. Looking at California and HBCU law schools, which were the focus of discussion during the HOD discussion in February 2017, three of the six HBCU law schools participated. Two of them had ultimate pass rates above 75 percent and one did not achieve that outcome for one of the two years covered by the survey. Eleven (11) of the 21 ABA-approved law schools in California participated, and none reported ultimate pass rates for 2013 and 2014 graduates below 75 percent.

### **Ultimate Bar Passage Outcomes for the Graduating Class of 2015**

In January 2018, law schools reported on ultimate bar pass outcomes for 2015 graduates for the two years after graduation. Law schools reported on as many of their 2015 graduates as they could find with reasonable efforts. In the aggregate, they reported on 97.5 percent of all graduates. In the aggregate, 97 percent of all those graduates had sat for a bar exam within the two-year period. Of that group, 88.3 percent had passed a bar examination.

Looking at the individual law school reports, 183 of the 202 law schools reported an ultimate pass rate of 75 percent or higher. Of the 19 law schools below that threshold,

one had an ultimate pass rate of 59.75 percent and seven more law schools had rates between 60 and 69 percent. The other 10 law schools that did not reach 75 percent had ultimate pass rates in the 70-74.9 percent range. Of the six HBCU law schools, four reported ultimate pass rates of 75 percent or higher and two reported ultimate pass rates below 75 percent. Of the 21 ABA-approved law schools in California, 19 reported ultimate pass rates of 75 percent or above, and two reported ultimate pass rates below 75 percent.

## **First-time Bar Passage Outcomes for the Graduating Classes of 2016 and 2017**

Law schools have also reported first-time bar passage outcomes for 2016 and 2017 graduates. The first-time data is an important piece of consumer information, apart from the accreditation standard on bar passage, but it also provides data on how a law school is progressing toward meeting the 75 percent threshold.

For 2016, 106 of 202 law schools met the 75 percent threshold in the first year following graduation. For the other 96 law schools, the majority had first-time pass rates in the 65-74 percent range. The 2015 ultimate pass rate data supports the position that law schools will have sufficient repeat-takers who pass or graduates who passed and had not sat for the exam in the first year following graduation to meet or exceed the 75 percent threshold after two years. There are, however, some concerning outcomes. Twenty-one (21) law schools had first-time rates for 2016 graduates below 50 percent. Of those, one is an HBCU and six are California law schools.

For 2017, the overall picture is marginally better. One hundred twenty-two (122) of 203 law schools had first-time pass rates at or above 75 percent after one year. However, there continue to be a number of law schools (15 for 2017) with first-time pass rates below 50 percent. (See <http://www.abarequireddisclosures.org/>.)

There are 11 law schools with sub-50 percent first-time pass rates for both 2016 and 2017. One is an HBCU and 4 are California law schools.

This bar passage data is publicly available on the Section's website in the Statistics section. (See <http://www.abarequireddisclosures.org/>.)

## ***Summary and Conclusion:***

Bar passage is an essential component of the accreditation requirements for law schools. The Council has identified several fundamental problems with the existing Standard: lack of full reporting of outcomes, an unnecessarily long review period, and an ineffective first-time bar pass compliance option. The revised Standard addresses these problems. Going forward, law schools will have the burden of demonstrating that their programs achieve the modest outcomes required by the revised Standard. The revised Standard appropriately protects students and the public. If bar passage rates decline, the solution is not to adapt a reasonable standard to make it more likely that law schools will comply or to continue a standard that, as it is written, allows law schools with very low pass rates to avoid the concerns of the Council and the accreditation process. Rather, the solution

is for law schools, state supreme courts, the bar examiner community, and the Council to work together to determine the cause(s) of the decline and take steps to address them.

Respectfully submitted,

Jeffrey E. Lewis

Chair, Council of the Section of Legal Education and Admissions to the Bar  
January 2019

GENERAL INFORMATION FORM

Submitting Entity: American Bar Association  
Section of Legal Education and Admissions to the Bar

Submitted By: Jeffrey E. Lewis, Chair

1. Summary of Resolution(s).

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated January 2019 to Standard 316 (Bar Passage) of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

2. Approval by Submitting Entity.

Yes. The amendments were approved by the Council for Notice and Comment during its meetings held on March 11-12, 2016, and June 3-4, 2016. A public hearing was held on August 6, 2016. The Council approved the amendments at its meeting on October 20-22, 2016. The Council reaffirmed its approval at the September 13-15, 2018 meeting.

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

Yes. This resolution was submitted to the House of Delegates at its February 2017 meeting. The House of Delegates did not concur.

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

The amendments modify the existing *ABA Standards and Rules of Procedure for Approval of Law Schools*.

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

Not applicable.

6. Status of Legislation. (If applicable)

Not applicable.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the

House of Delegates.

The Council will notify ABA-approved law schools and other interested entities of the approved changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*. The Council and the Managing Director's Office will prepare guidance memoranda and training materials regarding the revised Standards.

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

Not applicable.

9. Disclosure of Interest. (If applicable)

Not applicable.

10. Referrals.

ABA Diversity and Inclusion Center (and related groups)

ABA Law Student Division

ABA Section Directors and Delegates

ABA Standing and Special Committees, Task Forces, and Commission Chairs

ABA Young Lawyers Division

AccessLex Institute

American Association of Law Libraries

Association of American Law Schools

Association of Legal Writing Directors

Clinical Legal Education Association

Conference of Chief Justices

Conference of State Delegates

Deans and Associate Deans of Law Schools

Law School Admission Council

Minority Caucus

National Association for Law Placement

National Association of Bar Executives

National Caucus of State Bar Associations

National Conference of Bar Examiners

National Conference of Bar Presidents

SBA Presidents

Society of American Law Teachers

University Presidents

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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The Honorable Solomon Oliver, Jr.  
Judge  
U.S. District Court for the Northern District of Ohio  
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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated January 2019 to Standard 316 (Bar Passage) of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

### 2. Summary of the Issue that the Resolution Addresses

The resolution addresses Standard 316 (Bar Passage) of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. In accordance with Internal Operating Practice 8, the Council engages in an ongoing review of the Standards.

### 3. Please Explain How the Proposed Policy Position will address the issue

The proposals amend the 2018-2019 *ABA Standards and Rules of Procedure for Approval of Law Schools*.

### 4. Summary of Minority Views

At the time of this submission, the Council has not been notified by any ABA or other entity that it is opposed to this resolution. That said, and as indicated in the Report, opposition to the change to Standard 316 when it was first considered, centered principally on the following concerns: the lack of studies on how the proposed change would affect diversity and law school curricula; the lack of data on how law schools in states with low bar passage rates would be impacted; the lack of data that two years is sufficient for graduates to take a bar exam in that there is anecdotal evidence that graduates do not take the bar in consecutive administrations; and the lack of data on how the Uniform Bar Exam will affect law schools' bar passage rates.



**AMERICAN BAR ASSOCIATION**  
**STANDING COMMITTEE ON GUN VIOLENCE**  
**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE**  
**CRIMINAL JUSTICE SECTION**  
**COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association opposes laws and policies that would  
2 authorize teachers, principals or other non-security school personnel to possess a firearm  
3 in, or on the grounds of, a pre-K through grade 12 public, parochial, or private school; and
- 4 FURTHER RESOLVED, That the American Bar Association opposes the use of  
5 government or public funds to provide firearms training to teachers, principals, or other  
6 non-security school personnel, or to purchase firearms for those individuals.



## REPORT

### I. Introduction

Since the 1999 Columbine High School massacre, more than 215,000 students experienced gun violence at 217 schools in the United States. At least 141 children, educators and others have been killed and another 287 have been injured.<sup>1</sup> The February 14, 2018 shooting at Marjory Stoneman Douglas High School in Parkland, Florida in which 17 students and staff were fatally shot and 17 others were wounded but survived, sparked renewed debate over how to prevent such tragedies.<sup>2</sup> At a February 21 “listening session” with survivors and parents of victims of school shootings, President of the United States Donald Trump said he was open to all ideas on improving school safety, but spoke about only one at length—allowing teachers to carry concealed weapons.<sup>3</sup> The following day the President embraced the National Rifle Association position that the solution to school shootings is to arm teachers.<sup>4</sup> On August 31, 2018, United States Secretary of Education DeVos wrote that the Department of Education will not provide guidance as to whether federal Student Support and Academic Enrichment grants may be used by the states to provide firearms training or to purchase firearms for teachers. She stated it is up to the states to determine the use of such grants signaling the federal government will not oppose such use.<sup>5</sup>

### II. Background

With significant exceptions,<sup>6</sup> the Gun-Free School Zones Act of 1990, as amended by the Omnibus Consolidated Appropriations Act in 1997,<sup>7</sup> prohibits possession of a firearm “that has moved in or otherwise affects interstate or foreign commerce”<sup>8</sup> in a

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<sup>1</sup> John Woodrow Cox, *et al*, *More than 215,000 students have experience gun violence at school since Columbine*, The Washington Post (updated Jul. 30, 2018), [https://www.washingtonpost.com/graphics/2018/local/school-shootings-database/?utm\\_term=.b1b3c93cedae](https://www.washingtonpost.com/graphics/2018/local/school-shootings-database/?utm_term=.b1b3c93cedae)

<sup>2</sup> Mark Berman, *The Parkland massacre sparked a renewed debate over gun control. Here's what happens next*, The Washington Post (Feb. 20, 2018), [https://www.washingtonpost.com/news/post-nation/wp/2018/02/20/after-parkland-massacre-renewed-debate-over-gun-control-puts-spotlight-on-students-public-officials/?utm\\_term=.62772f110fc4](https://www.washingtonpost.com/news/post-nation/wp/2018/02/20/after-parkland-massacre-renewed-debate-over-gun-control-puts-spotlight-on-students-public-officials/?utm_term=.62772f110fc4)

<sup>3</sup> Major Garrett, *I'm never gonna see my kid again: Parents, victims urge Trump for changes after shootings*, CBS News (Feb. 21, 2018), <https://www.cbsnews.com/news/donald-trump-listening-session-gun-violence-white-house-today-2018-02-21/>

<sup>4</sup> Julie Hirschfeld Davis, *Trump Suggests Teachers get a 'Bit of a Bonus' to Carry Guns*, The New York Times (Feb. 22, 2018), <https://www.nytimes.com/2018/02/22/us/politics/trump-guns-school-shootings.html>

<sup>5</sup> Laura Meckler and Moriah Balingit, *DeVos leaving it to states whether to use federal money to buy guns for schools*, The Washington Post (August 31, 2018), [https://www.washingtonpost.com/local/education/devos-leaving-it-to-states-whether-to-use-federal-money-to-buy-guns-for-schools/2018/08/31/947ec06c-ad46-11e8-8a0c-70b618c98d3c\\_story.html?utm\\_term=.4bde7b28aa6f](https://www.washingtonpost.com/local/education/devos-leaving-it-to-states-whether-to-use-federal-money-to-buy-guns-for-schools/2018/08/31/947ec06c-ad46-11e8-8a0c-70b618c98d3c_story.html?utm_term=.4bde7b28aa6f)

<sup>6</sup> The exceptions are set out in 18 U.S.C. §922(q)(2)(B).

<sup>7</sup> 18 U.S.C §922(q)(2)(A)

<sup>8</sup> The original enactment did not contain the quoted language. It was struck down as an unconstitutional exercise of Congress's power under the Commerce Clause. *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L Ed.2d 626 (1995)

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school zone.<sup>9</sup> The “public, parochial or private school” language of this Resolution is taken from the statute. One exception under the statute is for those who are licensed to conceal carry by the state in which the school is located. Because of the exceptions under federal law, prohibition of guns in school zones has largely been by the states. Almost all states have legislation that prohibits guns in school zones. Forty of those states and the District of Columbia extend the prohibition to include those who have a concealed carry permit. Two additional states allow individual schools to decide whether to extend the prohibition to include those who have a concealed carry permit.<sup>10</sup>

## III. Opposition to Arming Teachers

The President’s proposal to repeal or amend gun-free school zone laws to allow teachers to be armed was roundly condemned by education professionals and others. The suggestion to arm teachers met with immediate, strong opposition from the National Education Association,<sup>11</sup> the American Federation of Teachers,<sup>12</sup> the National Association of School Resource Officers,<sup>13</sup> the National Association of Secondary School Principals,<sup>14</sup> and the National Association of School Psychologists.<sup>15</sup> The National Association of Elementary School Principals and the National Association of Secondary School Principals have strongly opposed arming teachers and principals since that suggestion was made following the Sandy Hook massacre in 2012.<sup>16</sup> Following Sandy Hook, The School Superintendents Association adopted a position paper that advocates a comprehensive solution to school shootings and states, “We oppose efforts to bring

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<sup>9</sup> A school zone is defined as within 1,000 feet of the grounds of a public, parochial or private school. 18 U.S.C §921(a)(25).

<sup>10</sup> *Summary of State Law*, Guns in Schools, Giffords Law Center to Prevent Gun Violence (retrieved Jul. 22, 2018), <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/guns-in-schools/>

<sup>11</sup> Press Release, *NEA: Parents, educators ‘overwhelmingly reject’ idea of arming school staff*, National Education Association (Feb. 21, 2018), <http://www.nea.org/home/72835.htm>; Press Release, *Educators are alarmed at White House’s dangerous proposal to arm teachers*, National Education Association (Mar. 12, 2018), <http://www.nea.org/home/72953.htm>; Press Release, *New NEA national survey: educators overwhelmingly reject proposals to arm teachers*, National Education Association (March 13, 2018), <http://www.nea.org/home/72972.htm>.

<sup>12</sup> Press Release, *AFT Executive Council Condemns Gun Violence*, American Federation of Teachers (Feb. 21, 2018), <https://www.aft.org/press-release/aft-executive-council-condemns-gun-violence>; Press Release, *AFT President Randi Weingarten on President Trump’s Comments About Arming Teachers*, American Federation of Teachers (Feb. 22, 2018), <https://www.aft.org/press-release/aft-president-randi-weingarten-president-trumps-comments-about-arming>.

<sup>13</sup> Press Release, *NASRO opposes arming teachers*, National Association of School Resource Officers (Feb. 22, 2018), <https://nasro.org/news/press-releases/nasro-opposes-arming-teachers/>; Press Release, *NASRO expands upon recommendation on arming teachers*, National Association of School Resource Officers (Mar. 1, 2018), <https://nasro.org/news/press-releases/nasro-expands-upon-recommendation-arming-teachers/>

<sup>14</sup> Greg Waples, *Advocating for School Safety*, National Association of Secondary School Principals, Blog (Feb. 27, 2018), <http://blog.nassp.org/2018/02/27/advocating-for-school-safety/>

<sup>15</sup> Press Release, *NASP Opposes Arming Teachers*, National Association of School Psychologists (Feb. 22, 2018), <http://www.nasponline.org/about-school-psychology/media-room/press-releases/nasp-opposes-arming-teachers>

<sup>16</sup> Press Release, *National Principals Groups Oppose Proposals to Arm School Officials*, National Association of Elementary School Principals (Dec. 19, 2012), <https://www.naesp.org/national-principals-groups-oppose-proposals-arm-school-officials>

more guns into our schools by teachers and administrators.”<sup>17</sup> Following the Marjory Stoneman Douglas shooting, the Superintendents Association sent a letter to Congressional leaders regarding an appropriations bill that noted, “We applaud the language to prohibit the use of federal funding for purchasing firearms or for firearm training of teachers.”<sup>18</sup>

When it became known on August 22, 2018 that Secretary DeVos was considering allowing federal Student Support and Academic Enrichment grants to be used by states to arm teachers,<sup>19</sup> the National Education Association,<sup>20</sup> the American Federation of Teachers,<sup>21</sup> the National Association of School Psychologists,<sup>22</sup> the National Association of Secondary School Principals,<sup>23</sup> and the National Association of Elementary School Principals<sup>24</sup> each immediately expressed strong opposition.

#### IV. Prior ABA Policies on Gun Violence

For the past 50 years, the ABA has weighed in on gun violence policy. Recognizing there is no simple solution, and consistent with a public health approach to address this national crisis, these policies cover a range of topics including research, education, prevention, enforcement, and regulation.<sup>25</sup>

In 2015, the ABA issued a white paper that concludes the U.S. Supreme Court and lower courts have made clear the Second Amendment is consistent with and does not

<sup>17</sup> *AASA Position Paper on School Safety – A Response to the Tragedy at Sandy Hook Elementary*, The School Superintendents Association (Jul. 11, 2013), [http://www.aasa.org/uploadedFiles/NCE/The\\_Conference\\_Daily\\_Online/2013\\_Conference\\_Daily\\_Online/2013\\_Conference\\_Daily\\_Online\\_-\\_DAY\\_1/Adopted-AASA-Position-Paper-on-School-Safety.pdf](http://www.aasa.org/uploadedFiles/NCE/The_Conference_Daily_Online/2013_Conference_Daily_Online/2013_Conference_Daily_Online_-_DAY_1/Adopted-AASA-Position-Paper-on-School-Safety.pdf)

<sup>18</sup> Letter from Noelle Ellerson Ng, Associate Executive Director, The School Superintendents Association to Senator Mitch McConnell, Majority Leader, Senator Charles Schumer, Minority Leader, United States Senate, Representative Paul Ryan, Speaker, Representative Nancy Pelosi, Minority Leader, United States House of Representatives (Mar. 22, 2018), [http://aasa.org/uploadedFiles/AASA\\_Blog\(1\)/AASAFY18OmniLetter032218.pdf](http://aasa.org/uploadedFiles/AASA_Blog(1)/AASAFY18OmniLetter032218.pdf)

<sup>19</sup> Erica L. Green, *Education Secretary Considers Using Federal Funds to Arm Schools*, The New York Times (August 22, 2018), <https://www.nytimes.com/2018/08/22/us/politics/betsy-devos-guns.html>

<sup>20</sup> Press Release, *NEA opposes guidelines being considered by the Department of Education*, National Education Association (August 23, 2018), <http://www.nea.org/home/73911.htm>

<sup>21</sup> Press Release, *AFT President Randi Weingarten on Betsy DeVos' Plan to Purchase Guns to Arm Educators*, American Federation of Teachers (August 23, 2018), <https://www.aft.org/press-release/aft-president-randi-weingarten-betsy-devos-plan-purchase-guns-arm-educators>

<sup>22</sup> Press Release, *NASP Opposes Federal Funds to Support Arming Teachers*, National Association of School Psychologists (August 23, 2018), <http://www.nasponline.org/about-school-psychology/media-room/press-releases/nasp-opposes-federal-funds-to-support-arming-teachers>

<sup>23</sup> Press Release, *NASSP Condemns Proposal to Use Federal Funds for Guns in Schools*, National Association of Secondary School Principals (August 23, 2018), <https://www.nassp.org/2018/08/23/nassp-condemns-proposal-to-use-federal-funds-for-guns-in-schools/>

<sup>24</sup> Press Release, *Use Title IV Funds for Academic Enrichment and Mental Health Services, Not Guns*, National Association of Elementary School Principals (August 23, 2018), <https://www.naesp.org/content/use-title-iv-funds-academic-enrichment-and-mental-health-services-not-guns>

<sup>25</sup> Policy, American Bar Association (retrieved Jul. 25, 2018), [https://www.americanbar.org/groups/committees/gun\\_violence/policy.html](https://www.americanbar.org/groups/committees/gun_violence/policy.html)

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bar a broad array of sensible laws to reduce gun violence. Our nation's courts have repeatedly found that the types of laws supported by the ABA and introduced by legislators across America do not run afoul of the Constitution.<sup>26</sup>

Also in 2015, the ABA joined with eight physician organizations in issuing a call to action.<sup>27</sup> The call to action contains recommendations aimed at reducing the health and public health consequences of firearms. There are now 52 signatories to the call to action.<sup>28</sup>

## V. An Evidence-Based, Comprehensive Solution is Required

The day following the massacre at Marjory Stoneman Douglas High School, the American Medical Association issued a press release that states in part, "Gun violence in America today is a public health crisis, one that requires a comprehensive and far-reaching solution."<sup>29</sup> Shortly thereafter, on behalf of the American Bar Association, then President Hilarie Bass wrote to the Senate Judiciary Committee urging it "to take swift, evidence-informed steps to curb the scourge of gun violence."<sup>30</sup> The letter made specific legislative recommendations. The calls by the ABA and AMA for an evidence-based, comprehensive solution is supported by recognized experts in the field of gun violence and school security.

In a thorough book edited by Daniel W. Webster, Sc.D. MPH and Jon S. Vernick, JD, MPH, both with the Center for Gun Policy and Research, Johns Hopkins Bloomberg School of Public Health, numerous recommendations are made to reduce gun violence in America.<sup>31</sup> Arming school personnel is not one of the them. A press release issued by the T.H. Chan School of Public Health, Harvard University, quotes Dariush Mozaffarian, associate professor in the Department of Epidemiology and lead author of a study published in the Journal of the American Medical Association, as stating, "Gun violence is a public health crisis, and addressing this will require a comprehensive, multi-

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<sup>26</sup> *Gun Violence Laws and the Second Amendment: A Report of the American Bar Association*, (Feb. 6, 2015),

[https://www.americanbar.org/content/dam/aba/images/abanews/GunViolenceWhitePaper\\_020615.pdf](https://www.americanbar.org/content/dam/aba/images/abanews/GunViolenceWhitePaper_020615.pdf)

<sup>27</sup> *Firearm-Related Injury and Death in the United States: A Call to Action From 8 Health Professional Organizations and the ABA* (Feb. 27, 2015)

<sup>28</sup> *Firearm-Related Injury and Death in the United States: A Call to Action from Over 50 Supportive Organizations and the American Bar Association* (retrieved Dec. 6, 2018),

[https://www.acponline.org/system/files/documents/advocacy/where\\_we\\_stand/assets/firearms-policy-endorsing-organizations-11-4-15.pdf](https://www.acponline.org/system/files/documents/advocacy/where_we_stand/assets/firearms-policy-endorsing-organizations-11-4-15.pdf)

<sup>29</sup> David O. Barbe, President, American Medical Association, *Action to address gun violence is long overdue* (Feb. 15, 2018), <https://wire.ama-assn.org/ama-news/action-address-gun-violence-long-overdue>

<sup>30</sup> Letter from Hilarie Bass, President, American Bar Association, to The Honorable Chuck Grassley, Chairman and The Honorable Dianne Feinstein, Ranking Member, Committee on the Judiciary, United States Senate, Support for Legislative Steps to Reduce Gun Violence (Mar. 6, 2018), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/March72018SenateJudiciarygunviolence.authcheckdam.pdf>

<sup>31</sup> Daniel W. Webster & Jon S. Vernick, ed., *Updated Evidence and Policy Developments on Reducing Gun Violence in America* (2014)

dimensional public health strategy.”<sup>32</sup> Arming school personnel is not part of that strategy. The Prevention Institute itemizes a comprehensive strategy to reduce gun violence.<sup>33</sup> Arming teachers is not part of that strategy. In testimony before the a subcommittee of the House Judiciary Committee, Kristin Harper, Director of Policy Development, Child Trends, a research institute known for rigorous and objective research over four decades, makes many specific recommendations for improving school security.<sup>34</sup> None of the recommendations involve arming school personnel.

In the wake of the Parkland massacre, 75 national medical, health, public health, and research organizations sent a letter to House and Senate lawmakers urging them “to find a bipartisan path forward to comprehensive legislative solutions to firearm-related injuries and fatalities.”<sup>35</sup> They did not recommend arming school personnel. Four days later an interdisciplinary group of experts issued a call to action to prevent gun violence.<sup>36</sup> The call to action recommended a comprehensive solution citing specific actions to be taken, none of which was to arm school personnel. It was endorsed by 84 national organizations, 165 state and local organizations, and over 4,400 individuals. The National PTA has adopted a position statement with numerous itemized recommendations to reduce gun violence at schools.<sup>37</sup> It does not recommend arming school personnel.

The U.S. Departments of Education, Health and Human Services, Homeland Security, and Justice, together with the Federal Bureau of Investigation and Federal Emergency Management Agency, jointly prepared a guide for school emergency operations plans.<sup>38</sup> The guide makes numerous recommendations. It does not recommend arming teachers.

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<sup>32</sup> Press Release, *Comprehensive public health approach urged to curb gun violence in the U.S.*, T. H. Chan School of Public Health, Harvard University (Jan. 7, 2013), <https://www.hsph.harvard.edu/news/press-releases/gun-violence-public-health-approach/>

<sup>33</sup> *Gun Violence Must Stop. Here's What We can Do to Prevent More Deaths*, Prevention Institute (retrieved Jul. 23, 2018), <https://www.preventioninstitute.org/focus-areas/preventing-violence-and-reducing-injury/preventing-violence-advocacy#Full%20Recommendations>

<sup>34</sup> Testimony of Kristen Harper, Director of Policy Development, Child Trends, *Preventable Violence in America: An Examination of Law Enforcement Information Sharing and Misguided Public Policy*, before Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, Committee on the Judiciary, U.S. House of Representatives (Mar. 20, 2018), <https://judiciary.house.gov/wp-content/uploads/2018/03/Kristen-Harper-Written-Testimony-for-House-Judiciary-Committee-Parkland-2018-FINAL.pdf>

<sup>35</sup> U.S. Senate Letter from 75 Health and Research Organizations (Feb. 22, 2018), <https://www.aamc.org/download/486584/data/groupletterurgingsenatelawmakerstofindbipartisansolutions.tif>

<sup>36</sup> Interdisciplinary Group on Preventing School and Community Violence, *Call for Action to Prevent Gun Violence in the United States of America* (Feb. 28, 2018), <https://curry.virginia.edu/sites/default/files/images/YVP/Call%20for%20Action%20FINAL%20for%20DISSMINATION%205-18-18.pdf>

<sup>37</sup> *Position Statement – Gun Safety and Violence Prevention*, National Congress of Parents and Teachers (Adopted 1999, Amended 2013, 2016), <https://www.pta.org/home/advocacy/pta's-positions/Individual-Position-Statements/Position-Statement-Gun-Safety-and-Violence-Prevention>

<sup>38</sup> *Guide for Developing High-Quality School Emergency Operations Plans*, U.S. Department of Education, U.S. Department Health and Human Services, U.S. Department of Homeland Security, U.S. Department of Justice, Federal Bureau of Investigation, Federal Emergency Management Agency (2013), [https://rems.ed.gov/docs/REMS\\_k-12\\_Guide\\_508.pdf](https://rems.ed.gov/docs/REMS_k-12_Guide_508.pdf)

In July 2018 the U.S. Secret Service Threat Assessment Center issued a publication with recommendations for preventing targeted school violence.<sup>39</sup> It recommends specific actions for schools to take. The U.S. Secret Service does not recommend arming school personnel.<sup>40</sup>

## VI. Arming School Personnel is Not an Evidence-Based Solution

Available data suggests that arming teachers will increase the risk of students being shot, not reduce it. As part of research for a working paper, a diverse group of law enforcement practitioners serving the Mid-Atlantic region participated in two round-table discussion sessions held at the Division of Public Safety Leadership, School of Education, Johns Hopkins University. The law enforcement professionals concluded that a large portion of the population and policy-makers who support arming teachers make incorrect assumptions about how effective armed teachers would be in an active shooter situation. The round-table participants identified 22 factors that an armed teacher would have to assess quickly and act upon in an active shooter situation. It was noted that evidence supporting the value of arming teachers and school officials is nonexistent. They concluded that the chance of a teacher or other school official using a gun to end an active shooter situation is “remote,” and that allowing teachers to carry guns in school creates an undue risk to students and creates the potential for teachers to use a gun in situations that do not warrant lethal force.<sup>41</sup> Other research has found that in 160 active

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<sup>39</sup> Lina Alathari, *et al.*, *Enhancing School Safety Using a Threat Assessment Model – An Operational Guide for Preventing Targeted School Violence*, National Threat Assessment Center, United States Secret Service, U.S. Department of Homeland Security (Jul. 2018), [https://www.secretservice.gov/data/protection/ntac/USSS\\_NTAC\\_Enhancing\\_School\\_Safety\\_Guide\\_7.11\\_18.pdf](https://www.secretservice.gov/data/protection/ntac/USSS_NTAC_Enhancing_School_Safety_Guide_7.11_18.pdf)

<sup>40</sup> The NRA and other gun rights organizations assert a contrary view. In April 2013 the NRA released a report that supports arming teachers and recommends a model state law to allow armed school personnel. Asa Hutchinson, Director, *The National School Shield* (Apr. 2, 2013). Former Arkansas Governor Asa Hutchinson headed the effort and claimed the authors were independent of the NRA. That assertion was widely disbelieved, even in his home state. Max Brantley, *Asa! Distances himself from the NRA; not easy – Asa Hutchison has gotta be kidding*, Arkansas Blog, Arkansas Times (Apr. 3, 2013). It is undisputed the NRA funded the report. It is undisputed there were no education professionals among the authors. It is undisputed the major conclusions of the report were announced by the NRA before the authors began preparing the report. Eric Lichtblau & Motoko Rich, *N.R.A Envisions ‘a Good guy With a Gun’ in Every School*, New York Times (Dec. 21, 2012). The report has been severely criticized both for its false assumptions and incorrect conclusions. *E.g.* Gordon A. Crews, *et al.*, *The Only Thing That Stops a Guy with a Bad Policy is a Guy with a Good Policy: An Examination of the NRA’s ‘National School Shield’ Proposal*, Am. J. of Criminal Justice, 38(2):183-199 (Jun. 2013). Arming teachers is an extension of the assertion that guns carried in public reduce crime. That assertion has also been discredited. *E.g.* Dan A. Black & Daniel S. Nagin, 27 J. of Legal Studies 209 (Jan. 1998); Ian Ayres & John J. Donohue III, *Shooting Down the More Guns, Less Crime Hypothesis*, 55 Stan. L. Rev. 1193 (Jan. 1, 2003). As early as 1999, the U.S. Department of Justice issued a report that recommends developing a comprehensive strategy and makes specific recommendations to reduce gun violence in America. Shay Bilchik, Administrator, Office of Juvenile Justice and Delinquency Prevention, *Promising Strategies to Reduce Gun Violence* (Feb. 1999). Arming citizens is not one of those strategies.

<sup>41</sup> Sheldon Greenberg, *Arming teachers to mitigate school shootings: Evidence, assumptions, policy implications, and comparison to law enforcement officers involved in encounters with armed assailants* (2018) (available through Office of Communications, Johns Hopkins University).

shooter incidents in other locations, there was only one successful armed civilian intervention—and the civilian in that incident was a highly trained U.S. Marine.<sup>42</sup> Using a gun in self-defense is no more likely to reduce the chance of being injured during a crime than various other forms of protective action.<sup>43</sup>

Among the significant risks in arming teachers, there is the risk of bystander injury being increased. Law enforcement officers are trained not only to know how to shoot, but significantly are also trained to assess quickly a situation while under stress and to know when to withhold fire.<sup>44</sup> With shots being fired from two or more directions, the risk of a bystander being shot is increased. Despite their training, a comprehensive study of the New York City Police Department found that in a gunfight, NYPD officers hit their intended target only 18% of the time. It also found that they engaged in “reflexive shooting” or “contagious shooting,” without assessing the need to use deadly force, upon hearing certain cues, such as the words “he’s got a gun” or upon hearing the sound of gunfire.<sup>45</sup> Other research of police firearm discharge data confirms that in high stress situations the vast majority of shots miss the intended target.<sup>46</sup> A recent example of bystander death is when a fugitive entered a Trader Joe’s store in the Los Angeles area. The store manager was shot and killed, not by the fugitive, but unintentionally by a police officer.<sup>47</sup> There is no data to suggest teachers would perform any better.<sup>48</sup>

<sup>42</sup> J. Pete Blair and Katherine W. Schweit, *A Study of Active Shooter Incidents in the United States Between 2000 and 2013*, Texas State University and U.S. Department of Justice, Federal Bureau of Investigation, U.S. Department of Justice (2014), <https://www.fbi.gov/file-repository/active-shooter-study-2000-2013-1.pdf/view>

<sup>43</sup> David Hemenway, *Private Guns, Public Health* 78 (2004).

<sup>44</sup> Matthew Santoni, *Arming teachers: Pros and Cons*, Tribune-Review (Feb. 23, 2018), <https://triblive.com/usworld/world/13340177-74/arming-teachers-pros-and-cons>

<sup>45</sup> Bernard D. Rostker, et al., *Evaluation of the New York City Police Department Firearm Training and Firearm-Discharge Review Process*, RAND Center on Quality Policing (2008).

<sup>46</sup> Michael D. White, *Hitting the target (or not): Comparing characteristics of fatal, injurious, and non-injurious police shootings*, *Police Quarterly*, 2006;9(3):303-330; A. Nieuwenhuys and R. Oudejans, *Effects of anxiety on handgun shooting behavior of police officers: A pilot study*, *National Institutes of Health*, 2010;23(2):225-33.

<sup>47</sup> Joseph Serna and Richard Winton, *LAPD officer fired bullet that killed Trader Joe’s employee during weekend standoff, chief says*, *Los Angeles Times* (Jul. 24, 2018) <http://www.latimes.com/local/lanow/la-me-trader-joe-shooting-20180724-story.html>

<sup>48</sup> Despite the data showing that in high stress situations even highly trained police officers miss the intended target the vast majority of the time creating substantial risk of bystander injury or death, the National Association of School Resource Officers estimates there are between 14,000 and 20,000 School Resource Officers employed in the United States. NASRO *Frequently Asked Questions*, <https://nasro.org/frequently-asked-questions/> (retrieved Nov. 6, 2018). A School Resource Officer is a career law enforcement officer with sworn authority who is deployed by an employing police department or agency in a community-oriented policing assignment to work in collaboration with one or more schools. They are usually armed. *Id.* The use of police officers in schools has negative consequences and is less effective at reducing school shootings than other means. See e.g. Amanda Petteruti, *Education Under Arrest: The Case Against Police in Schools*, Justice Policy Institute (Nov. 2011), <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=264688>; Marilyn Elias, *The School-to-Prison Pipeline*, Teaching Tolerance (Spring 2013), <https://www.tolerance.org/magazine/spring-2013/the-school-to-prison-pipeline>. “Put an armed guard in a school and you might prevent one shooting in one building. Put a counselor or psychologist in a school and you have the potential to help prevent shootings in any building anywhere in your community.” Testimony of Dewey Cornell, *The Prevention of Gun Violence in Schools and Communities*, before House Committee on Education and the Workforce (Mar. 2018)

There is also the risk of law enforcement mistaking an armed teacher for the shooter. During a 2016 demonstration where dozens of open carry activists were present, five Dallas police officers were shot and killed, and nine more were shot and wounded. Two civilian bystanders were also shot and injured. Following the shootings, Dallas police chief David Brown commented that open carry laws can complicate telling the difference between the “good guy with a gun” and the criminal.<sup>49</sup> When a man shot and killed three people at a Walmart in Thornton, Colorado, law enforcement noted that shoppers drawing weapons in self-defense “absolutely” slowed the process of identifying the suspect.<sup>50</sup> When Congresswoman Gabrielle Giffords was shot and injured in Tucson, Arizona, an armed civilian came very close to firing at the unarmed civilian who subdued the shooter.<sup>51</sup> A recent example is when on July 31, 2018 an Aurora, Colorado policeman responding to a call of a home invasion mistakenly shot and killed the home owner who had just shot and killed the intruder.<sup>52</sup> Police described it as a “very chaotic and violent scene.” There is no reason to think a school shooting with many more people and more guns present would be any less chaotic and violent.

There is the risk that a student intent on committing a mass shooting would not need to bring a gun into the school, but would know how to access a teacher’s gun. A recent study shows that the majority of children are aware of where their parents store their guns, and that more than one-third reported handling their parents guns—40 percent of them doing so without the knowledge of their parents.<sup>53</sup> Another study of 37 school shootings in 26 states found that in nearly two-thirds of the incidents, the attacker got the gun from his or her own home or that of a relative.<sup>54</sup> Major findings of a study by the

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<https://curry.virginia.edu/sites/default/files/images/YVP/Cornell%20Hearing%20Statement%203-20-18.pdf>

The evidence-based data cited in the body of this report including that of the United States Secret Service Threat Assessment Center, nn.38 & 71, and by Dr. Cornell shows that focusing on prevention of school shootings by identifying troubled students in advance is more effective at reducing school shootings than is armed security. It also does not have the attendant risk of bystander injury or death that armed security does. It also reduces the risk of a student or anyone else being shot at a different location and thus provides more encompassing security and better protection of the entire community. Nevertheless, this Resolution is neutral on the use of armed security personnel in schools. It does not support or oppose the use of School Resource Officers or seek to delineate those who might be excluded from the term “non-security” as used in this Resolution.

<sup>49</sup> Jonathan Silver, *After Dallas Ambush, Texas Police to Push for Open Carry Changes, Funding*, The Texas Tribune (Jul. 23, 2016), <https://www.texastribune.org/2016/07/23/texas-law-enforcement-groups-brace-gun-funding-leg/>

<sup>50</sup> Kevin Simpson, *Shoppers pulled guns in responses to Thornton Walmart shooting, but police say that slowed investigation*, The Denver Post (Nov. 2, 2017), <https://www.denverpost.com/2017/11/02/shoppers-pulled-weapons-walmart-shooting/>

<sup>51</sup> William Saletan, *Armed Giffords hero nearly shot wrong man*, Slate.com on NBC News.com (updated Jan. 11, 2011), [http://www.nbcnews.com/id/41018893/ns/slate\\_com/tt/armed-giffords-hero-nearly-shot-wrong-man/#.W2YVwFVKhph](http://www.nbcnews.com/id/41018893/ns/slate_com/tt/armed-giffords-hero-nearly-shot-wrong-man/#.W2YVwFVKhph)

<sup>52</sup> Noelle Phillips, *Aurora police shooting of armed homeowner raises questions as to how law enforcement reacts when encountering law-abiding gun owners*, The Denver Post (Aug. 4, 2018), <https://www.denverpost.com/2018/08/04/aurora-police-shooting-armed-homeowner-gun-owners/>

<sup>53</sup> Frances Baxley & Matthew Miller, *Parental misperceptions about children and firearms*, Archives of Pediatrics & Adolescent Medicine, 2006,160(5),542-547.

<sup>54</sup> Bryan Vossekuil, Marisa Reddy & Robert Fein, Co-Directors, *Safe School Initiative – An Interim Report on the Prevention of Targeted Violence in Schools*, U.S. Secret Service National Threat Assessment Center

Centers for Disease Control conclude that nearly 50% of homicide perpetrators gave some type of warning signal, such as making a threat or leaving a note, prior to the event; and that firearms used in school-associated homicides and suicides came primarily from the perpetrator's home or from friends or relatives.<sup>55</sup>

There is the risk of an accidental discharge of a teacher's gun endangering students. Dennis Alexander, a California teacher, was showing the students a gun during his advanced public safety class when the gun accidentally discharged. Mr. Alexander was pointing his gun at the ceiling when it fired causing pieces of the ceiling to fall to the floor. One student was injured when a bullet fragment hit his neck. Two other students were injured by falling debris.<sup>56</sup> A Chicago criminal justice instructor accidentally discharged his gun during class striking a file cabinet and wall.<sup>57</sup> A Utah teacher was injured when her gun accidentally discharged in a staff restroom striking the toilet bowl.<sup>58</sup> An NRA gun safety instructor teaching a class for a concealed carry permit accidentally shot a student in the foot.<sup>59</sup> Five people were accidentally shot and injured in 2013 at the first ever "Gun Appreciation Day."<sup>60</sup> The list could go on.

Gun violence in schools is horrific and gets media attention, but it occurs with much less frequency than do shootings of youth elsewhere. That does not minimize the important need to address school shootings, but it should inform the discussion of what would constitute a viable solution. A report issued by the U.S. Departments of Education and Justice found that between 1992 and 2006, at least 50-times as many murders of young people ages 5–18 occurred away from school than at school.<sup>61</sup> During the 2010–11 school year, about one homicide or suicide of a school-age youth at school per 3.5 million enrolled students occurred.<sup>62</sup> Only approximately one percent of all homicides

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in collaboration with the U.S. Department of Education with support from the National Institute of Justice (Oct. 2000), [http://www.popcenter.org/problems/bullying/PDFs/ntac\\_ssi\\_report.pdf](http://www.popcenter.org/problems/bullying/PDFs/ntac_ssi_report.pdf)

<sup>55</sup> *School-Associated Violent Death Study*, Centers for Disease Control and Prevention (Updated May 11, 2016), <https://www.cdc.gov/violenceprevention/youthviolence/schoolviolence/SAVD.html>

<sup>56</sup> Christina Coron, *Teacher's Gun Is Accidentally Fired During Public Safety Class, Injuring 3*, The New York Times (Mar. 14, 2018), <https://www.nytimes.com/2018/03/14/us/teacher-gun-accidental-discharge.html>

<sup>57</sup> *Chicago-Area Teacher Suspended After Accidental Gun Discharge*, WTAX News Radio (2014), <http://wtax.com/news/101101-chicago-area-teacher-suspended-after-accidental-gun-discharge/>

<sup>58</sup> *Utah teacher wounded when gun discharges in toilet*, BBC News (Sept. 12, 2014), <https://www.bbc.com/news/world-us-canada-29168777>

<sup>59</sup> Eloisa Ruano Gonzales, *NRA gun instructor shoots student by accident*, Orlando Sentinel (Feb. 21, 2010), [http://articles.orlandosentinel.com/2010-02-21/news/os-nra-gun-instructor-shoots-student-022020100220\\_1\\_gun-safety-nra-church-s-communications-director](http://articles.orlandosentinel.com/2010-02-21/news/os-nra-gun-instructor-shoots-student-022020100220_1_gun-safety-nra-church-s-communications-director)

<sup>60</sup> *Five shot at 'Gun Appreciation Day' events*, MSNBC (updated Aug. 22, 2013), <http://www.msnbc.com/rachel-maddow-show/five-shot-gun-appreciation-day-even>

<sup>61</sup> Rachel Dinkes, *et al.*, *Indicators of School Crime and Safety: 2008*, National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education, and Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice (Apr. 2009), [https://nces.ed.gov/pubs2009/2009022REV\\_1.pdf](https://nces.ed.gov/pubs2009/2009022REV_1.pdf)

<sup>62</sup> Simone Robers, *et al.*, *Indicators of School Crime and Safety: 2012*, National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education, and Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice (2012), <https://nces.ed.gov/pubs2013/2013036.pdf>

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among school-age children happen on school grounds, during school events, or on the way to and from school.<sup>63</sup> Other studies concur.<sup>64</sup>

But we are not always rational beings. Our emotions cloud our judgment and fear can dominate our thinking. Research on the psychology of risk has found that few risks worry us more than threats to our children.<sup>65</sup> More than a third of parents irrationally think their local high school is “highly likely” to be the site of gun violence within three years.<sup>66</sup> Such false heuristic risk assessments should not inform public policy.

There are two principal assertions in favor of arming teachers. One is that doing so will serve as a deterrent to mass shootings because a “gun-free zone” invites gunmen to enter. The second argument is that an armed teacher can respond more rapidly than law enforcement, particularly in rural communities that do not have school resource officers.<sup>67</sup> The first argument is flawed because it falsely assumes the person who exhibits the high risk behavior of entering the school armed is instead acting with a rational, risk-avoidance mindset. Both arguments are flawed because they assume without supporting data that arming teachers will reduce the risk of students being shot, rather than increase it. Both arguments are also flawed because they incorrectly assume there are no other strategies available.

The assertion that gun-free zones invite mass shootings has been discredited by research showing that nearly 90% of all high-fatality gun massacres since 1966 have occurred wholly or partly in locations where civilian guns were allowed or where there was armed security or law enforcement present.<sup>68</sup> That research also shows that when rampage shootings do occur, very rarely are they stopped by armed civilians.” A committee of the National Academies of Science, Engineering and Medicine concluded in 2005 that data does not support the proposition that right-to-carry laws reduce crime.<sup>69</sup>

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<sup>63</sup> *School-Associated Student Homicides – United States, 1992-2006*, Centers for Disease Control & Prevention, Morbidity & Mortality Weekly Report (Jan. 18, 2008), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5702a1.htm>

<sup>64</sup> Mark Anderson, *et al. School-Associated Violent Deaths in the United States, 1994-1999*, 286 J. Am. Med. Assoc. 2695, 2697-2699 (Dec. 5, 2001).

<sup>65</sup> David Ropeik, *School shootings are extraordinarily rare. Why is fear of them driving policy*, The Washington Post (Mar. 8, 2018), [https://www.washingtonpost.com/outlook/school-shootings-are-extraordinarily-rare-why-is-fear-of-them-driving-policy/2018/03/08/f4ead9f2-2247-11e8-94da-ebf9d112159c\\_story.html?utm\\_term=.2dd21a343866](https://www.washingtonpost.com/outlook/school-shootings-are-extraordinarily-rare-why-is-fear-of-them-driving-policy/2018/03/08/f4ead9f2-2247-11e8-94da-ebf9d112159c_story.html?utm_term=.2dd21a343866)

<sup>66</sup> Lois M. Collins, *Study: Parents fearful of school shootings know little about safety measures being taken*, Deseret News (Updated Aug. 18, 2017). Based upon a national random sample survey of 600 parents who had at least one child enrolled in a public secondary school. <https://www.deseretnews.com/article/900001201/study-parents-fearful-of-school-shootings-know-little-about-safety-measures-being-taken.html>

<sup>67</sup> Matthew Santoni, *Arming teachers: Pros and Cons*, *supra* n.44.

<sup>68</sup> Daniel W. Webster, *et al. Firearms on College Campuses: Research Evidence and Policy Implications*, Johns Hopkins Bloomberg School of Public Health (Oct. 15, 2016), <https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/pdfs/GunsOnCampus.pdf>

<sup>69</sup> Charles F. Wellford, John V. Pepper and Carol V. Petrie, ed., *Firearms and Violence – A Critical Review*, 120-151, Committee on Law and Justice, Division of Behavioral and Social Sciences and Education, National Research Council, National Academies Press (2005). The committee reviewed the work of

## VII. Evidence-Based Solutions Are Available

Reducing the number of school shootings should focus on preventing such shootings, rather than reacting to them. The first recommendation of Kristen Harper, Director of Policy Development, Child Trends, in her testimony previously noted before a subcommittee of the House Judiciary Committee is that the strategy to reduce gun violence in schools should be anchored with knowledge of trends in school safety over the last two decades. Her second recommendation is to prioritize approaches that will help schools prevent school shootings, not merely defend against them.<sup>70</sup> The fact that the majority of guns used in school shootings come from the perpetrator's home or that of a friend suggests that the issue of safe storage in the home should be addressed as a means to reduce the number of school shootings.<sup>71</sup> Data-driven solutions to prevent such shootings are what all the experts noted previously recommend.

For example, the Secret Service recommends that schools

- establish a multidisciplinary threat assessment team,
- define prohibited and concerning behaviors,
- create a central reporting mechanism,
- determine a threshold for law enforcement intervention,
- establish assessment procedures,
- develop risk management options,
- create and promote safe school climates, and
- conduct training for all stakeholders.<sup>72</sup>

The focus is to have an organized and systematic way to identify troubled students who exhibit threatening behavior and to intervene before a shooting occurs. Other experts also recommend legislative action that has supporting data.

Repealing gun-free school zone laws and arming teachers has no supporting data upon which to ground such a policy change. Instead, legislative bodies should focus on adopting laws to prevent school shootings that do have supporting data. In her letter to the Senate Judiciary Committee, then ABA President Hilarie Bass articulated the evidence-based rationale for the following legislative actions supported by previously adopted ABA policy:

- universal background checks,

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economist John Lott, a prolific gun rights advocate. The committee found the estimated effects of right-to-carry laws on crime were very sensitive to the data set chosen for review and that available data does not support Lott's conclusion that right-to-carry laws reduced crime rates.

<sup>70</sup> Harper, *supra* n.34.

<sup>71</sup> Baxley, *et al*, *supra* n.53; Vossekui, *et al.*, *supra* n.54; *School-Associated Violent Death Study*, *supra* n.55.

<sup>72</sup> Alathari, *et al.*, *supra* n.39.

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- requiring timely and complete information reporting to the National Instant Criminal Background Check System (NICS),
- restricting access to semi-automatic rifles such as the AR-15,
- funding research on gun violence,
- providing for civil remedies and greater administrative enforcement such as by repealing the Protection of Lawful Commerce of Firearms Act of 2005 that grants broad immunity from negligence actions against gun dealers, manufacturers and their lobbyists, and
- state enactment of legislation authorizing gun violence protective orders (sometimes called “extreme risk protective orders”).

President Bass noted in her letter there are also other legislative actions supported by ABA policy positions.<sup>73</sup>

## VIII. Summary and Conclusion

There are many known, evidence-based means to address the complex issue of school shootings. Arming teachers is not one of them. Available data suggests that arming teachers will increase the risk of students being shot, not reduce it. The ABA should continue its support for evidence-based gun violence policies and its opposition to proposals that lack it. The ABA should stand with the numerous other organizations that have publicly and forcefully opposed the suggestion that teachers be armed. We recommend adoption of this Resolution.

Respectfully submitted,

Joshua Harris  
Chair, Standing Committee on Gun Violence  
January 2019

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<sup>73</sup> Letter from Hilarie Bass, President, *supra* n.30.

**GENERAL INFORMATION FORM**

Submitting Entity: Standing Committee on Gun Violence

Submitted By: Joshu Harris, Chair

1. Summary of Resolution(s).

This resolution opposes laws and policies that would authorize teachers, principals or other non-security school personnel to possess a firearm in, or on the grounds of, a pre-K through grade 12 public, parochial, or private school. It also opposes the use of government or public funds to provide firearms training to teachers, principals, or other non-security school personnel, or to purchase firearms for those individuals.

2. Approval by Submitting Entity. Approved by the Standing Committee on Gun Violence by conference call on October 10, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously? No.

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

The ABA has approved a number of policies regarding state and federal regulation of firearms. These include: Gun Violence Restraining Orders (17A118B), a comprehensive approach to address gun violence at schools by children that includes preventative peer-mediation, firearms education, increased enforcement of laws to prevent unauthorized access to firearms by minors, and enactment of additional firearms laws (98A10E), and also policy expressly supporting the right of employers and private property owners to exclude firearms from their places of business or other private property (7M107).

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

6. Status of Legislation. (If applicable) NA

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

If adopted this policy can be the basis of advocacy at the federal and state level and possible amicus brief applications. It will also be incorporated into trainings that the Gun Violence Committee offers.

8. Cost to the Association. (Both direct and indirect costs) None

9. Disclosure of Interest. (If applicable) none

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## 10. Referrals.

This resolution will be circulated to all sections and interested committees and commissions, such as the Section of Civil Rights and Social Justice, Commission on Domestic and Sexual Violence, Section of Family Law, the Criminal Justice Section, and the Center on Children and the Law's Commission on Youth at Risk.

## 11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Joshu Harris, Chair  
1239 Crease St  
Philadelphia, PA 19125-3901  
(646) 621-4164

## 12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Monte Frank  
Pullman & Comley LLC  
850 Main Street  
Bridgeport, CT 06604  
203.330.2262  
mfrank@pullcom.com

**EXECUTIVE SUMMARY****1. Summary of the Resolution**

With significant exceptions, the Gun-Free Schools Zones Act of 1990, as amended, prohibits firearms in, or within 1,000 feet of the grounds of a public, parochial or private school. Virtually all states also have laws that prohibit firearms in a school zone. President Trump and certain interest groups have suggested the solution to school shootings is to arm teachers. This resolution opposes laws that would authorize teachers, principals or other non-security school personnel to possess a firearm in, or on the grounds of, a public, parochial, or private school. It also opposes the use of government or public funds to provide firearms training to teachers, principals, or other non-security school personnel, or to purchase firearms for those individuals. This Resolution excludes and does not take a position on the advisability of having armed security personnel in schools.

**2. Summary of the Issue that the Resolution Addresses**

President Trump and certain interest groups advocate the solution to school shootings is to arm teachers.

**3. Please Explain How the Proposed Policy Position Will Address the Issue**

The proposed policy opposes arming teachers because available data suggests doing so will likely increase the risk to students rather than reduce it, and because other comprehensive, evidence-based solutions are available.

**4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**

None



**AMERICAN BAR ASSOCIATION**

**STANDING COMMITTEE ON GUN VIOLENCE**

**COMMISSION ON DISABILITY RIGHTS**

**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE**

**CRIMINAL JUSTICE SECTION**

**COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE**

**COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and  
2 tribal governments to reduce potential harm that individuals may inflict on themselves or  
3 others by enacting statutes, rules, or regulations allowing individuals to temporarily  
4 prevent themselves from purchasing firearms. Such measures should include, at  
5 minimum, the following provisions that:

- 6 1. any person may voluntarily and confidentially request that their own name be  
7 added to the Index of the National Instant Criminal Background Check System, an  
8 equivalent state background system, or to both, to prevent future firearms  
9 purchases;
- 10 2. the statute, rule, or regulation provide a procedure with appropriate safeguards  
11 whereby the person may have their name removed and such record deleted from  
12 the System; and
- 13 3. the statute, rule, or regulation provide appropriate safeguards to reasonably  
14 ensure that persons who request inclusion or removal from the System do not  
15 face stigma, discrimination, or any adverse action, and are entitled to  
16 confidentiality so that the fact that the person prohibited from purchasing a  
17 firearm is only disclosed when a valid background check is done.



## REPORT

### I. Introduction

Suicide is a public health crisis. It is a leading cause of death in the United States.<sup>1</sup> In 2016, nearly 45,000 lives were lost to suicide.<sup>2</sup> That year, suicide was the second leading cause of death among individuals aged 10 to 34, and the fourth leading cause among those aged 35 to 54.<sup>3</sup> From 1999 to 2016, suicide rates rose in almost every state, up more than 30 percent in half the states and highest in the western states.<sup>4</sup>

Although mental health conditions are often perceived as the cause of suicide, in 2016, 54 percent of people who died by suicide did not have a known mental health condition.<sup>5</sup> In fact, 84 percent of men and 16 percent women with no known mental health conditions committed suicide,<sup>6</sup> compared to 69 percent of men and 31 percent of women with known mental health conditions.<sup>7</sup> Among both individuals with and without known mental health conditions, many factors contribute to suicide. These include relationship problems (42%), crises in the past or upcoming two weeks (29%), problematic substance use (28%), physical health problems (22%), job/financial problems (16%), criminal legal problems (9%), and loss of housing (4%).<sup>8</sup>

Suicides comprise nearly two-thirds of all firearm deaths in the United States, with firearm suicides outnumbering firearm homicides two to one.<sup>9</sup> In 2016, 51 percent of all suicides (2,348 of 4,575 deaths) for males aged 15 to 24 involved firearms. For males aged 25 and over, the percentage of suicides involving firearms increased with age, from 48 percent among those aged 25 to 44 (5,362 of 11,181 deaths), to 55 percent among those aged 45 to 64 (6,579 of 11,943 deaths), to 74 percent among those aged 65 to 74 (2,574 of 3,463 deaths), and to 81 percent among those aged 75 and over (2,656 of 3,291 deaths).<sup>10</sup>

Nearly three-quarters of all suicides among females aged 15 to 24 involved either suffocation (509 of 1,148 deaths or 44%) or firearms (335 deaths or 29%). Among females aged 25 to 44, 32 percent (1,035 of 3,215 deaths) involved firearms, 31 percent suffocation (1,004 deaths), and 28 percent poisoning (887 deaths). Firearms were the second most frequent means of suicide—poisoning first—among females aged 45 and

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<sup>1</sup> Suicide rising across the US, CDC VITAL SIGNS, June 2018,

<https://www.cdc.gov/vitalsigns/suicide/index.html>.

<sup>2</sup> *Id.*

<sup>3</sup> Centers for Disease Control and Prevention, WISQARS, “Ten leading causes of death,” United States, <http://webappa.cdc.gov/sasweb/ncipc/leadcause.html>, Atlanta, GA 2017.

<sup>4</sup> CDC VITAL SIGNS, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> BRADY CENTER TO PREVENT GUN VIOLENCE, THE TRUTH ABOUT SUICIDE & GUNS 2 (2016), <http://www.bradycampaign.org/sites/default/files/Brady-Guns-Suicide-Report-2016.pdf>.

<sup>10</sup> Holly Hedegaard, Sally C. Curtin & Margaret Warner, *Suicide Rates in the United States Continue to Increase*, NCHS DATA BRIEF, No. 309, June 2018, at 5 (National Center for Health Statistics, Hyattsville, MD), <https://www.cdc.gov/nchs/data/databriefs/db309.pdf>.

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over, accounting for 32 percent of suicides among those aged 45 to 64 (1,361 of 4,253 deaths), 38 percent among those aged 65 to 74 (358 of 940 deaths), and 33 percent among those aged 75 and over (168 of 510 deaths).<sup>11</sup>

Firearms are a particularly lethal means of attempting suicide, with 85 to 90 percent of firearm suicide attempts ending in death,<sup>12</sup> compared to less than 10 percent across all attempts not involving a firearm.<sup>13</sup> Thus, a persuasive argument can be made that because individuals who attempt suicide with a gun rarely get a chance to reconsider their decisions, when guns are less available, fewer suicide attempts will result in fatality, more people will have the chance to reconsider their decisions, and suicide rates will decline.<sup>14</sup>

## II. Need for Resolution

Giving individuals who believe they might be at risk for firearm suicide—whether they are struggling with life events, have a mental illness, or experience suicidal ideation—the opportunity to voluntarily put themselves on a no-gun registry may save lives.<sup>15</sup> This conclusion is based on three well-established clinical and epidemiologic observations. First, many suicides are impulsive. Seventy percent of people who made near-lethal suicide attempts took less than one hour between the decision to kill themselves and the actual attempt.<sup>16</sup> Second, suicidal crises are often precipitated by an immediate stressor (e.g., breakup of a romantic relationship, loss or job), so that as the acute phase of the crisis passes often so does the urge to attempt suicide.<sup>17</sup> Third, the great majority of individuals who survive a suicide attempt do not go on to later die by suicide.<sup>18</sup>

Similarly, giving individuals who believe they might be at risk for harming others the opportunity to voluntarily put themselves on a no-gun registry—may save lives as well. One recent study found that firearm waiting periods reduce homicide as well as suicide.<sup>19</sup>

This resolution urges “federal, state, local, territorial, and tribal governments to reduce potential harm that individuals may inflict on themselves or others by enacting statutes, rules, or regulations allowing individuals to temporarily prevent themselves from purchasing firearms.” Any person would be able to voluntarily and confidentially request that their own name be added to the Index of the National Instant Criminal Background

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<sup>11</sup> *Id.* at 4.

<sup>12</sup> Matthew Miller, Deborah Azrael & Catherine Barber, *Suicide Mortality in the United States: The Importance of Attending to Method in Understanding Population-Level Disparities in the Burden of Suicide*, 33 ANN. REV. OF PUBLIC HEALTH. 393-408 (2012).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Fredrick E. Vars, *Self-Defense Against Gun Suicide*, 56 Boston College Law Review 1465 (2015).

<sup>16</sup> Thomas R. Simon et al., Characteristics of Impulsive Suicide Attempts and Attempters, 32:1 SUICIDE & LIFE THREATENING BEHAVIOR 49-59 (2011), <https://onlinelibrary.wiley.com/doi/pdf/10.1521/suli.32.1.5.49.24212>.

<sup>17</sup> Miller et al., *supra* note 12.

<sup>18</sup> *Id.*

<sup>19</sup> Michael Luca, Deepak Malhotra, & Christopher Poliquin, *Handgun Waiting Periods Reduce Gun Deaths*, PNAS, <http://www.pnas.org/content/pnas/early/2017/10/11/1619896114.full.pdf>. See also Griffin Edwards et al., *Looking Down the Barrel of a Loaded Gun: The Effect of Mandatory Handgun Purchase Delays on Homicide and Suicide*, ECON. J. (2017), <https://doi.org/10.1111/eoj.12567>.

Check System (NICS), an equivalent state background system, or to both, to prevent future firearms purchases. The idea behind the no-gun registry is to allow these individuals to prepare for potential crises before they occur.

This option would appeal to individuals who have suicidal ideations, whether due to relationship, substance abuse, physical or mental health, job or financial, criminal legal, or anger management problems, among other reasons. Among 200 people surveyed who were seeking inpatient and outpatient psychiatric care at an academic medical center, nearly half (46%) said they would sign up for the proposal.<sup>20</sup> Further, in an on-line survey with 262 respondents, 29 percent said they would sign up for the proposal with a seven-day delay removal option.<sup>21</sup> Some of these individuals may be at high risk for suicide (for all the reasons outlined above or for other reasons), but others may not be.

### III. Do-Not-Sell List

The essential attributes of a do-not-sell list are a voluntary and confidential way to suspend one's ability to purchase firearms. The second element is a mechanism, with adequate safeguards, for changing one's mind and regaining the ability to purchase firearms.

The list could work as follows. An individual 18 years of age or older would request that their name be added to NICS, an equivalent (also secure) state background system, or to both, to prevent future firearms purchases from a licensed dealer. The signup process—whether by mail or email—would be voluntary and confidential and require identity verification. Implementation could vary, but examples of identity verification include notarization or electronic notarization. The interface would explain in plain language that the registrant may be temporarily waiving Second Amendment rights. The registrant could later request that their name be removed from the index and/or system. Three weeks after the request for removal, their name would be removed and all records of the transaction deleted. The 21-day delay period is to allow for adequate deliberation.

Note that *only* an individual can put himself or herself on a list. A person who has legal authority to make decisions for the individual, whether through a guardianship, durable power of attorney, or other means, cannot put the individual on the list.

At the time of registration, registrants would have the option of communicating their waiver of gun rights to others by providing their email addresses. The registry would then alert addressees that the registrant has waived their Second Amendment rights, as well as if the registrant later rescinds their waiver.

Registration prevents purchase only. Registrants who are later found to be in possession of a firearm would not be subject to criminal prosecution. The Do-Not-Sell List is designed

<sup>20</sup> Fredrick E. Vars et al., *Willingness of Mentally Ill Individuals to Sign Up for a Novel Proposal To Prevent Firearm Suicide*, 47 SUICIDE & LIFE-THREATENING BEHAV. 483 (2016), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/sltb.12302>.

<sup>21</sup> Ian Ayres & Fredrick E. Vars (Feb. 2016), *Amazon Mechanical Turk/Qualtrics survey data*. [Data on file with authors]. Fifteen percent of the sample reported being “diagnosed with a mental disorder.”

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to prevent impulsive gun suicide and violence toward others, not to be a broader gun control measure. The List is prophylactic, not punitive. If an individual signed up but later obtained a firearm without a background check, that individual would not be criminally liable. Limiting easy access to firearms is the goal, not punishing individuals who, perhaps in a suicidal crisis, manage to get their hands on guns from other sources.

## IV. Support for the Voluntary Do-Not-Sell List

Washington became the first state in the nation to enact legislation that creates a registry allowing individuals to voluntarily waive their right to purchase firearms.<sup>22</sup> Washington citizens can add their names to a do-not-sell list, suspending their ability to buy guns from licensed dealers. Registrants may provide an alternate person to be contacted if they revoke the voluntary waiver. Registrants who do so need only make the request and wait seven days. The law requires in-person registration and withdrawal. Participants have the option of designating a third-party contact to be notified “if a voluntary waiver of firearm rights is revoked.” The law has confidentiality protections, including a prohibition on discrimination based on one’s participation in the program.

Legislators in Alabama, California, Massachusetts, Tennessee, and Wisconsin have introduced similar bills. The Alabama bill<sup>23</sup> would allow individuals to voluntarily be added to the Voluntary Alabama Firearms Do Not Sell List via a secure Internet-based platform. Upon registering, receipt of a firearm by that person is unlawful. The registering individual’s information is reflected in the NICS Index Denied Persons File for Alabama. A registrant can submit email addresses of personal contacts to notify and advise that the registrant has added their name to the list or seeks to rescind their registration.

Registrants can request that their name be removed from the list at any time, and removal would take place automatically 21 days after the request. Upon removal, all records of the registration, associated transactions, and the request for removal are destroyed. The bill makes it unlawful for any person to inquire as to whether an individual is on the list or has requested to be added to or removed from the list for purposes of employment, education, housing, insurance, governmental benefits, or contracting. It is also unlawful to take any adverse action associated with those purposes or health care purposes based on an individual’s registration with the list. Violations give rise to a private civil action.

The California bill<sup>24</sup> directs the state’s department of justice to “study options for allowing a person to register himself or herself on a list or database that prohibits the person from being able to purchase a firearm. The department shall recommend an approach to allow a person to prohibit himself or herself from purchasing a firearm.”

The Tennessee bill<sup>25</sup> would require the Tennessee Bureau of Investigation (TBI) to develop and launch a secure internet-based platform that allows any person in the United

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<sup>22</sup> WA SB 5553 (Jan. 24, 2018).

<sup>23</sup> AL SB376 (introduced Mar. 8, 2018).

<sup>24</sup> CA AB No. 1927 (introduced Jan. 24, 2018).

<sup>25</sup> Tenn. SB 671.

States to register to add their own name to the Tennessee Do Not Sell List. This information is reflected in the NICS Index and conveyed to any other state that adopts an analogous “Do Not Sell List.” A person can subsequently request that their name be removed from the registry and wait 21 days for removal. Following removal from the registry, TBI must notify any other participating state registries to and purge all records related to the registration process. Whether a person is on the list or has requested removal is confidential with respect to matters involving employment, education, housing, insurance, government benefits, and contracting, and registrants can bring a private civil action for breaches of confidentiality.

The Massachusetts and Wisconsin bills would also allow voluntary suspension of gun purchase ability. However, those two bills differ from the Do Not Sell List model in several significant respects, including more onerous removal provisions.

## V. ABA Policy

The American Bar Association (ABA) has a longstanding tradition of being at the forefront of policymaking to curb gun deaths. For instance, in 2017 the ABA passed policy urging “state, local, territorial, and tribal governments to enact statutes, rules, or regulations authorizing courts to issue gun violence restraining orders, including ex parte orders,” that include a provision that “a petitioner with documented evidence that a respondent poses a serious threat to himself or herself or others may petition a court for an order temporarily suspending the respondent’s possession of a firearm or ammunition.”<sup>26</sup> California, Connecticut, Indiana, and Washington have enacted laws whereby a law enforcement officer or a family member may seek a court order for the temporary removal of guns from a potentially dangerous persons pending a full hearing.<sup>27</sup> In fact, a 2016 study of the Connecticut Gun Violence Restraining Order statute estimates that it has prevented up to 100 suicides.<sup>28</sup>

Also, in 2012 the ABA adopted policy opposing “governmental actions and policies that limit the rights of physicians and other health care providers to inquire of their patients whether they possess guns and how they are secured in the home or to counsel their patients about the dangers of guns in the home and safe practices to avoid those dangers.”<sup>29</sup> Health care practitioners play a key role in counseling patients about the risks of injuries and best practices to minimize those risks as part of the practice of preventive care.<sup>30</sup> The Centers for Disease Control and Prevention (CDC) highlight the important role health care systems can play in providing high-quality, ongoing care focused on

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<sup>26</sup> ABA Resolution 17A118B,

[https://www.americanbar.org/content/dam/aba/images/gun\\_violence/118B.pdf](https://www.americanbar.org/content/dam/aba/images/gun_violence/118B.pdf).

<sup>27</sup> Cal. Penal Code §18150 et seq.; Conn. Gen. Stat. § 29-38c; Ind. Code § 35-47-14-5 – 35-47-14-9; Rev. Code Wash. (ARCW) § 7.94 (Added by 2016 Initiative Measure No. 1491).

<sup>28</sup> Dan Friedman, “Laws That Allow for Temporarily Removing Guns from High-Risk People Linked to a Reduction in Suicides,” *The Trace*, Sept. 8, 2016, <https://www.thetrace.org/2016/09/gun-violence-restraining-order-suicide-reduction-connecticut/>.

<sup>29</sup> ABA Resolution 11A10a,

[https://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_10a.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_10a.authcheckdam.pdf).

<sup>30</sup> *Id.*

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patient safety and suicide prevention.<sup>31</sup> There is widespread agreement that good medical care includes conversations about the safe storage of firearms, as responsible storage can prevent suicide by children and teens. A majority of adults in the United States, including gun owners, believe it is appropriate for physicians to talk to their patients about firearms.<sup>32</sup> Gun owners who receive counseling are more likely to store their guns responsibly.<sup>33</sup>

Further, in 2011 the ABA enacted policy urging “applicable governmental entities to take all appropriate measures to ensure that the National Criminal Instant Background Check System (NICS) is as complete and accurate as possible, so that all persons properly categorized as prohibited persons under 18 U.S.C. § 922(g), are included in the NICS system.”<sup>34</sup> In states that go beyond federal law and require background checks on all handgun sales, including guns sold by unlicensed sellers, there are 47 percent fewer gun suicides.<sup>35</sup> For example, Connecticut’s background check law led to an estimated 15 percent reduction in the state’s gun suicide rate.<sup>36</sup>

This proposed resolution builds on the current policies, seeking to curb firearm suicide deaths by allowing individuals to voluntarily restrict their own access to firearms.

## VI. Low-Cost Implementation

The cost-per-life-saved of this proposal would be very low. The federal background check system (NICS) has been granted its requested appropriation and is operational. All licensed gun dealers are already required to check the confidential federal database before selling a firearm. All that is needed to implement the proposal at the federal level is a mechanism for securely adding and subtracting names. After an initial start-up investment, the process could be more or less automated.

Implementation at the state level would also be cost-effective. The federal background check system allows states to add to the federal database the names of individuals who are barred from purchasing a firearm by state law but not federal law. Each state could implement the proposal by creating its own sign-up mechanism for its own residents, then sending those names to the federal system.<sup>37</sup> Each state has control over its own state disqualifier database in NICS, so states could implement the proposal without relying on

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<sup>31</sup> CDC, *supra* note 1.

<sup>32</sup> Betz, Public opinion regarding whether speaking with patients about firearms is appropriate, *Ann IM*. 2016; 165:543-550.

<sup>33</sup> Albright TL, Burge SK, Improving firearm storage habits: impact of brief office counseling by family physicians, *J Am Board Fam Pract*. 2003; 16(1); 40-46.

<sup>34</sup> ABA Resolution 11A10a, at

[https://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_10a.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_10a.authcheckdam.pdf)

<sup>35</sup> Background Checks Reduce Gun Violence and Save Lives (EverytownResearch.org. 2017), <http://every.tw/2wUF5E2>.

<sup>36</sup> CK Crifasi et al., *Effects of changes in permit-to-purchase handgun laws in Connecticut and Missouri on suicide rates*, 79 *PREVENTIVE MED*. 43-49 (October 2015).

<sup>37</sup> Registrants of an enacting state would be precluded from purchasing a weapon from a gun dealer anywhere in the country. However, because one state’s law only applies to its residents, each state would need its own registry system. That would be more expensive than a single federal system.

FBI processes or formal NICS appeal procedures.

Of course, people must know about the program in order to take advantage of it. For example, the bill introduced and passed out of committee in Alabama provides for “publicity and advertising campaign . . . that at a minimum provides the public with information about the list, how an individual may register to be added to the list, and contacts for additional information regarding the list.”

## VII. The Proposal Would Not Violate the Second Amendment

The Second Amendment case closest on the facts to the proposal is *Silvester v. Harris*.<sup>38</sup> Plaintiffs in *Silvester* argued that California’s 10-day waiting period to purchase a firearm violated the Second Amendment. The Ninth Circuit rejected that argument, ruling that the waiting period imposed a burden on Second Amendment rights, but not so great a burden as to justify more than intermediate scrutiny.<sup>39</sup> The court held that the waiting period passed intermediate scrutiny because it provided a cooling-off period to deter violence and suicide.<sup>40</sup>

Based on *Silvester*, one can persuasively argue that restricting an individual’s own ability to purchase a firearm with an automatic, but delayed revocation option is functionally equivalent to a self-imposed waiting period. If a mandatory waiting period does not violate the Second Amendment, as *Silvester* squarely holds, then neither does a less restrictive, optional waiting period.

The next closest line of cases involves firearm restrictions based on dangerousness. Restrictions of this kind have been upheld time and time again.<sup>41</sup> An optional and temporary measure is less restrictive than a mandatory restriction premised on someone else’s judgment that the restricted party is “dangerous.” In other words, the proposal’s constitutionality follows *a fortiori* from the constitutionality of waiting periods and dangerousness restrictions.

A third argument in favor of constitutionality rests on the proposition that “the Second Amendment’s guarantee of an individual right to keep or bear arms in self-defense should include the freedom not to keep or bear them at all.”<sup>42</sup> Firearm self-restriction would

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<sup>38</sup> 843 F.3d 816, 821 (9th Cir. 2016).

<sup>39</sup> *Id.* at 827.

<sup>40</sup> *Id.* at 827-29.

<sup>41</sup> See, e.g., *Baer v. Lynch*, 636 Fed. Appx. 695, 698 (7th Cir. 2016) (“As to violent felons, the statute does survive intermediate scrutiny, we have concluded, because the prohibition on gun possession is substantially related to the government’s interest in keeping those most likely to misuse firearms from obtaining them.”) (citations omitted); *United States v. Chovan*, 735 F.3d 1127, 1139-41 (9th Cir. 2013) (persons convicted of domestic violence misdemeanors); *United States v. Stegmeier*, 701 F.3d 574 (8th Cir. 2012) (fugitive felon); *United States v. Carter*, 669 F.3d 411 (4th Cir. 2012) (unlawful user of a controlled substance); *Hope v. State*, 163 Conn. App. 36, 43 (2016) (the challenged statute “does not implicate the Second Amendment, as it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes. It restricts for up to one year the rights of only those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others after affording due process protection to challenge the seizure of the firearms.”).

<sup>42</sup> Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 Stanford Law Review 1, 4 (2012).

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provide a tool to strengthen this right not to bear arms—by binding oneself against impulsively buying arms in the future. The animating principle of the Second Amendment is self-defense.<sup>43</sup> One ought to be able to defend oneself against suicide.<sup>44</sup>

Finally, an individual who restricts their own ability to purchase firearms generally waives their Second Amendment rights. Waivers of constitutional rights “not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”<sup>45</sup> Sign-up systems should include clear and prominent explanations that the individual is waiving such rights.

## VIII. Conclusion

This resolution will further existing ABA policy aimed at curbing firearm deaths by focusing on suicide, which comprises nearly two-thirds of all firearm deaths in the United States. Giving individuals who are at risk of suicide the opportunity to voluntarily prohibit themselves from buying a firearm is a modest and inexpensive approach that could save lives. The ABA should advocate strongly for this legal step to combat this public health crisis.

Respectfully submitted,

Joshua Harris  
Chair, Standing Committee on Gun Violence  
January 2019

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<sup>43</sup> See *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (explaining that “individual self-defense is ‘the central component’ of the Second Amendment right”).

<sup>44</sup> Vars, *supra* note 1.

<sup>45</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970).

**GENERAL INFORMATION FORM**

Submitting Entity: Standing Committee on Gun Violence

Submitted By: Joshu Harris, Chair

1. Summary of Resolution(s). To reduce the risk of suicides and other deadly incidents, this resolution urges that individuals be allowed to: 1) voluntarily submit their names into databases used for gun background checks, and 2) remove themselves from those systems.
2. Approval by Submitting Entity. Approved by Committee at its November 13, 2018 business conference call.
3. Has this or a similar resolution been submitted to the House or Board previously? The Resolution was submitted to the House for the 2018 Annual meeting, but was subsequently withdrawn to address concerns raised by the Commission on Disability Rights. Those concerns have been addressed and the Commission is now a co-sponsor.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? Numerous policies relate to categories of persons who should mandatorily be included in background check systems for firearm purchases, such as felons, fugitives, persons under indictment, persons adjudicated mentally incompetent, and minors (1965 and reaffirmed since), as well as felons and persons convicted of violent misdemeanors, spousal or child abuse, and persons subject to a protective order. 94A10E. Additionally, the ABA supports full implementation of the National Criminal Instant Background Check System so that it is accurate and complete. 11A10A. Most recently, the ABA endorsed gun violence restraining orders, whereby someone may petition a court to have a person deemed dangerous to oneself or others temporarily be barred from possessing a firearm and having the restraining order entered into federal and state background check systems. 17A118B. The proposed policy does not conflict with, but complements, these existing policies. Indeed, it is unique because of its voluntary nature.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? NA
6. Status of Legislation. (If applicable) None pending on the federal level. Washington State recently enacted such a law. California has a bill to study the idea that passed its Assembly (AB-1927), but was subsequently vetoed. The governor explained that

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the idea could be studied without new statutory authorization.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Implementation will be done through training, sharing of this and related information with civil society groups that address gun violence, and advocacy through the Government Affairs Office where opportunities (e.g. related proposed legislation introduced) arise.

8. Cost to the Association. (Both direct and indirect costs) None

9. Disclosure of Interest. (If applicable) NA

10. Referrals.

Commission on Disability Rights: co-sponsored  
Commission on Domestic & Sexual Violence: co-sponsored  
Commission on Law and Aging  
Commission on Sexual Orientation and Gender Identity: co-sponsored  
Commission on Youth at Risk: supported  
Criminal Justice Section: co-sponsored  
Government & Public-Sector Lawyers Division  
Health Law Section  
Judicial Division  
Section of Civil Rights and Social Justice: co-sponsored  
Section of Family Law  
Section of Litigation  
Section of State and Local Government Law  
Senior Lawyers Division  
Solo, Small Firm and General Practice Division  
Tort Trial & Insurance Practice Section  
Young Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Joshua Harris, Chair  
1239 Crease St  
Philadelphia, PA 19125-3901  
(646) 621-4164

12. Contact Name and Address 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.*)

Monte Frank  
Pullman & Comley LLC  
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Bridgeport, CT 06604  
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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

To reduce the risk of suicides and other deadly incidents, this resolution urges that individuals be allowed to: 1) voluntarily submit their names into databases used for gun background checks, and 2) remove themselves from those systems.

### 2. Summary of the Issue that the Resolution Addresses

Roughly two thirds of gun related deaths are suicides. Most suicides are impulsive acts and most successful suicides involve a firearm. This resolution allows persons who self-identify as being at risk of harming themselves (or in many cases others) to take proactive steps to lessen this likelihood.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

This resolution sets general standards, and provides wide latitude to states to enact laws to help a portion of an at-risk population insulate themselves against further harm.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None identified.

**AMERICAN BAR ASSOCIATION**  
**STANDING COMMITTEE ON GUN VIOLENCE**  
**CRIMINAL JUSTICE SECTION**  
**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE**  
**COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE**  
**REPORT TO THE HOUSE OF DELEGATES**  
**RESOLUTION**

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and  
2 tribal courts and legislatures to develop policies and protocols as to who may carry  
3 firearms in courthouses, courtrooms, and judicial centers that allow only those persons  
4 necessary to ensure security have weapons in the courthouse, courtroom, or judicial  
5 center, including common areas within the buildings as well as the grounds immediately  
6 adjacent to the justice complex, and that require training for those who are permitted to  
7 carry firearms.



## REPORT

Throughout the United States of America, the courthouses and justice centers are symbols of our constitutional system of justice. As a nation of laws the public expects to be able to safely seek redress from wrongs and resolve disputes within the court system.

Courtroom proceedings may sometimes become contentious and emotional, creating concerns for the safety of the litigants, as well as judges, lawyers, support staff, and law enforcement. Increasingly there have been occurrences where violence has erupted and firearms are used inside and outside of the courtroom. When the litigants and the court personnel “believe their courthouses and court facilities are not safe integrity of the entire judicial process is compromised and undermined.”<sup>1</sup> “Beyond mere access [to courthouses], people require a safe and secure environment free from fear or intimidation. Judges, employees, and members of the general public need to feel safe if they are to conduct themselves impartially and decorously.”<sup>2</sup>

In 2012, Timm Fautsko, Principal Staff, National Center for State Courts wrote:

The number of threats and violent incidents targeting the judiciary has increased dramatically in recent years. At the federal level, the U.S. Marshals Service’s Center for Judicial Security reports the number of judicial threat investigations has increased from 592 cases in fiscal year 2003 to 1,258 cases by the end of fiscal year 2011. At the state and local levels, the most informative data about state courts comes from studies conducted by the Center for Judicial and Executive Security (CJES). Their data shows that the numbers of violent incidents in state courthouses has gone up every decade since 1970.

It is a central tenet of each state’s constitution to provide for the safety and wellbeing of its people. All three branches of our governments should work together to promulgate, promote, and provide for responsible firearm regulations in courthouses, judicial centers, and court facilities.<sup>3</sup>

There is no uniformity among the state laws as to who may carry a firearm in a courtroom or a courthouse, nor to what extent or areas a judge may exercise discretion in limiting the possession of firearms. The National Center for State Courts did an exhaustive survey that examined the laws of all the states.<sup>4</sup> While the majority of the states restrict firearm possession in the courtroom, only a small number restrict firearms in the courthouse. Additionally, most states allow so many exemptions as to make any ban of firearms useless.

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<sup>1</sup> In the Iowa Supreme Court, In the Matter of Courthouse Security, Supervisory Order. June 19, 2017.

<sup>2</sup> Don Hardenbergh, Protecting America’s Courthouses, 44 No. 3 Judges’ J. 14 (Summer 2005).

<sup>3</sup> Trends in State Courts: Courthouse Security Incidents Trending Upward: The Challenges Facing State Courts Today.

<sup>4</sup> [https://www.ncsc.org/Topics/Courthouse-Facilities/Court-Security/State-Links.aspx?cat\\_](https://www.ncsc.org/Topics/Courthouse-Facilities/Court-Security/State-Links.aspx?cat_)

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William Rafferty of the National Center for State Courts notes that interest in allowing guns in the courtroom is nothing new.

“The recent uptick in interest can be traced back to two items: the U.S. Supreme Court decision in *Heller*,<sup>5</sup> holding that the Second Amendment included an individual right to keep and bear arms, coupled with several high-profile courthouse shootings. These events have prompted efforts to redefine who can carry a firearm in a courthouse and where firearm bans may be imposed. For the most part, such efforts have been designed to expand the ability of individuals to carry guns into courthouses and, in some instances, directly into courtrooms.”<sup>6</sup>

In *Heller*, the Supreme Court held the Second Amendment protects “an individual right to keep and bear arms,” 554 U.S. at 595, but not a right “to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,” *id.* at 626. More specifically, the Court held unconstitutional the District’s “ban on handgun possession **in the home**,” as well as its “prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense,” *id.* at 635 (emphasis added), noting “the inherent right of self-defense [is] central to the Second Amendment right,” *id.* at 628.

In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the second amendment right recognized in *Heller* is fully applicable to the states through the due process clause of the Fourteenth Amendment. In so holding, the Court reiterated that “the Second Amendment protects the right to keep and bear arms for the purpose of self-defense,” *id.* at 750, and that “individual self-defense is ‘the central component’ of the Second Amendment right,” *id.* at 767.

Thus, neither *Heller* nor *McDonald* would prohibit restrictions on carrying firearms in to buildings which house court facilities or the grounds immediately surrounding the courtroom facilities. Additionally, it is not especially surprising that research data indicates that more liberal rules regarding gun possession, such as right-to-carry (RTC) laws, do not reduce crime. “Supporters of the idea that such an effect occurs assume that the laws reduce crime because prospective criminal offenders are deterred by a greater perception of risk of confronting an armed victim, which supposedly results from either the enactment of RTC laws or the issuance of large numbers of carry permits to potential crime victims.”<sup>7</sup>

Unfortunately, some state legislatures seek to expand the class which would be permitted to carry firearms not only in to the courthouse, but the courtroom as well. In April 2014, the Georgia legislature enacted, and the governor, signed The Safe Carry Protection Act, a new gun law that, among other things, will allow Georgians to legally

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<sup>5</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>6</sup> *Judicature Magazine*, Vol. 101, No. 2 (Summer 2017).

<sup>7</sup> “Gun Control after *Heller* and *McDonald*: What Cannot Be Done and What Ought to Be Done,” *Fordham Urban Law Journal*, Vol. 39 (March 2016).

carry firearms into churches, schools, airport common areas, bars, courtrooms, and government buildings.

When Iowa Chief Justice Mark Cady issued on June 19, 2017, a supervisory order directing "all weapons are prohibited from courtrooms, court-controlled spaces and public areas of courthouses," the county supervisors, claimed that was an "over-reach" by the court and conflicted with the new gun law. A new supervisory order by the Iowa Supreme Court, issued on December 19, 2017, will enable individual counties to seek to allow weapons in public areas of floors of a courthouse that are not totally occupied by the court system.

On July 1, 2011, a Mississippi law that enhanced concealed carry permit holders "shall also be authorized to carry weapons in courthouses except in courtrooms during a judicial proceeding [.]" Miss. Code Ann. § 97-37-7(2) (Rev. 2014). On November 28, 2011, the chancellors of the Fourteenth District issued an order prohibiting those permit holders from carrying weapons within 200 feet of any door to any courtroom. On June 7, 2018 the Mississippi Supreme Court in a divided opinion<sup>8</sup> ruled that local judges can't restrict conceal carrying at courthouses.

The chancellors may have good and noble intentions, and their concerns are well founded. However, their personal fears and opinions do not trump, and cannot negate, constitutional guarantees. The ultimate outcome of today's issue is reserved for the Legislature, not to be commandeered by unilateral local judicial proclamations. Courts must give more than lip service to the rule of law; they must insist upon its lawful application. Judges cannot allow their sense of superior knowledge, perceptions, or understandings to justify open defiance of the very laws that they are called upon to uphold. Indeed, we have held repeatedly that courts are guardians of the Constitution, not guardians of the courthouse. Without question, the orders defy existing law and seek to exercise a power that plainly is reserved for the other branches of government. The orders contain no authority to suggest otherwise. The law of Mississippi is clear: enhanced-carry licensees are permitted to possess a firearm in courthouses. No matter how well-intentioned, judges are without the power to limit enhanced concealed-carry licensees' right to carry a firearm beyond courtrooms in the State of Mississippi. The orders are vacated.

In a well-reasoned dissent, Justice Leslie D. King noted,

The judiciary, and access thereto, implicates numerous constitutional rights. The safety of those compelled to be at the courthouse is necessary for the fair administration of justice; keeping safe and free from threat those people necessary to the judicial process, such as parties, criminal defendants, witnesses, and jurors, is crucial for the administration of justice, the integrity

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<sup>8</sup> NO. 2016-M-01072-SCT RICKY W. WARD v. DOROTHY WINSTON COLOM

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of the judicial system, and the preservation of the constitutional rights implicated at the courthouse.

While most statutes and court decisions recognize the right of judges to restrict who may carry a firearm into the courtroom the reality is that the firearms in the courthouse and the immediate areas surrounding the court facility pose the greatest danger.<sup>9</sup> Trained courtroom security provide protection for the court personnel and litigants while inside the courtroom. However, once in the hallways or elevators or parking lots, those who were constrained within the courtroom now are free to act out their hostilities.<sup>10</sup> And if one is prohibited from carrying a firearm into the courtroom, the weapon must be stored somewhere in a safe place. If courthouse security does not include gun boxes, the owner is likely to give the weapon to another family member or friend who is not as well trained or security conscious as the owner.

The American Bar Association should urge state legislatures to follow the example of the federal government, which prohibits the possession of firearms or dangerous weapons by any person in either a federal facility or federal court facility except those engaged in “the lawful performance of official duties by an officer, agent, or employee of the United States, a State, or a political subdivision thereof, who is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of law.”<sup>11</sup> The term “Federal facility” is defined as “a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties.” The term “Federal court facility” means the courtroom, judges’ chambers, witness rooms, jury deliberation rooms, attorney conference rooms, prisoner holding cells, offices of the court clerks, the United States attorney, and the United States marshal, probation and parole offices, and adjoining corridors of any court of the United States.

In a society that has become increasing volatile and where civility has diminished, the time has come for firearms to be banned from the courtroom, courthouses and court facilities except for those persons properly trained and charged with providing security at these locations.<sup>12</sup> Where permitted, only a limited number of exemptions should be allowed. The judges and the law enforcement agency charged with providing security in the courthouse or judicial center should collaborate and decide who should be permitted to carry a firearm.

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<sup>9</sup> Many courts are housed within buildings with multiple functions. For example, many court buildings also house non-judicial government offices, including law enforcement offices. In such multi-function buildings, judges and other building occupants are encouraged to collaborate to develop firearm policies and gun safety protocols that appropriately reflect the unique circumstances of the building as a whole, including its security needs.

<sup>10</sup> Gunman in Courthouse Shooting That Injured 4 Was Scheduled For Assault Hearing. ABC News September 19, 2018.

Shooter Kills Man Outside Mississippi Courthouse. USA Today August 3, 2015  
Man Given Life Term for Shooting Lawyer. Los Angeles Times, March 18, 2006

<sup>11</sup> 18 U.S. Code § 930 - Possession of Firearms and Dangerous Weapons in Federal Facilities.

<sup>12</sup> 1 Deputy Dead, 1 Critical After Being Shot Outside County Courthouse. Oklahoma’s News 4, June 15, 2018

Respectfully submitted,

Joshu Harris  
Chair, Standing Committee on Gun Violence  
January 2019

## GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Gun Violence

Submitted By: Joshu Harris, Chair

1. Summary of Resolution(s).

Urges that the possession of firearms in and around courthouses be limited to persons with an official role in security. Also urges that such persons be required to complete annual training in firearm safety.

2. Approval by Submitting Entity. Approved by the Standing Committee on Gun Violence by conference call on September 11, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously? No.

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

The ABA has approved a number of policies regarding state and federal regulation of firearms. These include: Gun Violence Restraining Orders (17A118B), Court adoption of protocols, guidelines, and policies to protect the safety of domestic violence victims and court employees (96A120). The ABA also has policy expressly supporting the right of employers and private property owners to exclude firearms from their places of business or other private property (7M107).

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

6. Status of Legislation. (If applicable) NA

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

If adopted this policy can be the basis of advocacy at the federal and state level and possible amicus brief applications. It will also be incorporated into trainings and educational materials that the Gun Violence Committee offers.

8. Cost to the Association. (Both direct and indirect costs) None

9. Disclosure of Interest. (If applicable) None

Referrals.

Commission on Domestic & Sexual Violence: co-sponsored  
Commission on Youth at Risk: supported  
Criminal Justice Section: co-sponsored  
Government & Public-Sector Lawyers Division  
Health Law Section  
Judicial Division  
Section of Civil Rights and Social Justice: co-sponsored  
Section of Family Law  
Section of Litigation  
Section of State and Local Government Law  
Standing Committee on Pro Bono and Public Service  
Tort Trial & Insurance Practice Section  
Young Lawyers Division

10. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Joshua Harris, Chair  
1239 Crease St  
Philadelphia, PA 19125-3901  
(646) 621-4164

11. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Monte Frank  
Pullman & Comley LLC  
850 Main Street  
Bridgeport, CT 06604  
203.330.2262  
mfrank@pullcom.com

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

Urges that the possession of firearms in and around courthouses be limited to persons with an official role in security. Also urges that such persons be required to complete annual training in firearm safety.

### 2. Summary of the Issue that the Resolution Addresses

Increasingly, there have been occurrences where violence has erupted and firearms are used inside and outside of the courtroom as well as areas in the surrounding justice complex. When parties and court personnel believe court facilities are not safe, the integrity of the entire judicial process is compromised. Courtrooms and the judicial complex should be perceived as safe and secure environments.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

Limiting firearm possession in and around courthouses to personnel with an official security role will reduce the likelihood that interpersonal conflicts in courthouses, where criminal and civil complaints are adjudicated, would escalate into an armed confrontation. Moreover, it will reduce the likelihood of suicide or accidental death or injury.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None at this time.

**AMERICAN BAR ASSOCIATION**  
**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE**  
**CRIMINAL JUSTICE SECTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges the federal judiciary to recognize  
2 the substantial privacy and confidentiality interests implicated by searches and seizures  
3 of electronic devices at the border; and  
4

5 FURTHER RESOLVED, That the American Bar Association urges Congress to enact  
6 legislation and, until legislation is enacted, urges the U.S. Department of Homeland  
7 Security to adopt policy, that would:  
8

- 9 (1) require a warrant based on probable cause for seizures (other than  
10 temporary seizures for the purpose of obtaining a warrant) and searches of  
11 electronic devices carried by individuals at the border;  
12 (2) prohibit any government entity from denying a lawful permanent resident  
13 entry or exit based on the person's failure to disclose an access credential  
14 or provide access to an electronic device for a search;  
15 (3) implement policies and procedures to preserve the attorney-client privilege,  
16 the work product doctrine, and the lawyer's ethical obligation to maintain  
17 confidential information during border crossings; and  
18 (4) require the government to record each instance in which it conducts a  
19 search of an electronic device seized at the border and issue an annual  
20 report summarizing such searches.



## REPORT

### Summary

This resolution calls on the federal judiciary, Congress, and the Department of Homeland Security to protect the privacy of millions of individuals who cross our nation's borders each year.

### Introduction

Over the last ten years, the Supreme Court has twice affirmed that the digital records we each create, store, and transport every day are entitled to protection under the Fourth Amendment. First, the Court in *Riley v. California* rejected decades of precedent and held that a search of a cell phone requires a warrant even when that search is incident to arrest, because of the quantity, quality, and uniquely sensitive nature of the personal data stored on those devices.<sup>1</sup> Then the Court in *Carpenter v. United States* found that cell phone location data, even data held by third party service providers, is also protected and cannot be obtained without a warrant based on probable cause.<sup>2</sup> Meanwhile, millions of individuals cross into and out of the United States each year, and neither the Supreme Court nor Congress has addressed the proper degree of protection needed for searches of electronic devices at the border.

The traditional Fourth Amendment rule permitted warrantless searches at the border.<sup>3</sup> But, even before the Supreme Court issued its decision in *Riley*, federal appellate courts recognized that searches of electronic devices implicate significant privacy interests that justify greater protection.<sup>4</sup> Since then, the problem has become more acute as the use of smartphones has proliferated. Today, individuals rely on their phones and other electronic devices to engage in personal, professional, educational, political, and spiritual pursuits; nearly every activity—from the most mundane to the most significant and private—can and is being done through or with the use of an electronic device. Searches of these devices, as the Supreme Court has explained, implicate the most intimate details of our lives and should be appropriately limited.

Over the last forty years, the ABA has adopted policies supporting greater privacy protection and urging Congress and the courts to protect individual rights.<sup>5</sup> The ABA has identified and on numerous occasions urged Congress to address new privacy risks

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<sup>1</sup> *Riley v. California*, 134 S. Ct. 2473 (2013); see also Alan Butler, *Get A Warrant: The Supreme Court's New Course for Digital Privacy Rights After Riley v. California*, 10 Duke J. Const. L. & Pub. Pol'y 83 (2014).

<sup>2</sup> *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

<sup>3</sup> See *United States v. Ramsey*, 431 U.S. 606 (1977) (finding that border searches fall within a “historically recognized exception to the Fourth Amendment’s general principle that a warrant be obtained”).

<sup>4</sup> See, e.g., *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013), cert. denied 561 U.S. 1156 (2014).

<sup>5</sup> See ABA Section of Civil Rights and Social Justice, Privacy and Information Protection Commission, *ABA Policies Relating to Privacy and Information Protection* (Sept. 25, 2018), <http://apps.americanbar.org/webupload/commupload/IR511000/relatedresources/ABA-Privacy-Policies-CRSJ-PIP-09252018.pdf>.

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posed by emerging technologies. Specifically, the ABA advocated for important privacy law updates including enactment of the Electronic Communications Privacy Act (ECPA),<sup>6</sup> amendments to the Privacy Act,<sup>7</sup> enactment of legislation protecting the privacy of medical records,<sup>8</sup> and updates to ECPA reflecting technological and societal changes.<sup>9</sup> The ABA has also underscored the significant threat that unchecked searches of electronic devices can have on the confidentiality of attorney-client communications and work product. Specifically, last year the ABA President wrote to the Secretary of Homeland Security to express concerns over standards for searches of electronic devices without reasonable suspicion, and how those searches impact lawyers' confidential records.<sup>10</sup>

This resolution establishes that the American Bar Association supports the rights of individuals to be free from warrantless searches and seizures<sup>11</sup> of their electronic devices at the border,<sup>12</sup> and urges the Federal Judiciary, Congress, and the Department of Homeland Security to recognize the important privacy interests at stake and to establish necessary legal protections. Specifically, the resolution establishes that the American Bar Association supports a warrant based on probable cause standard for certain searches and seizures of electronic devices carried by individuals at the border. As this report recognizes, the traditional warrant standard is subject to a number of exceptions depending on the context of the search; the purpose of this resolution is to establish that the traditional exception to the warrant requirement for searches conducted at the border should not apply to searches of electronic devices carried by individuals. We recognize that other exceptions may still apply depending on the exact circumstances of a particular search. This report and resolution does not address such other circumstances.

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<sup>6</sup> ABA Report and Recommendation 86A114B,

<https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/aug-86-wiretap-law.authcheckdam.pdf>.

<sup>7</sup> ABA Report and Recommendation 86A114C,

<https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/aug-86-electronic-communication-on-privacy.authcheckdam.pdf>.

<sup>8</sup> ABA Report and Resolution 96M106,

[https://www.americanbar.org/content/dam/aba/directories/policy/1996\\_my\\_106.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/1996_my_106.authcheckdam.pdf); ABA Report and Resolution 99M109A,

[http://www.americanbar.org/content/dam/aba/directories/policy/1999\\_my\\_109a.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/1999_my_109a.authcheckdam.pdf).

<sup>9</sup> ABA Report and Resolution 13A114,

<https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/aug-13-electronic-communication-act.authcheckdam.pdf>.

<sup>10</sup> Letter from Linda Klein, President, Am. Bar Ass'n, to Gen. John F. Kelly, USMC (Ret.), Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec. (May 5, 2017),

[https://www.americanbar.org/content/dam/aba/images/government\\_affairs\\_office/attyclientprivissue\(bordersearchesofattorneydevices\\_abalettertodhs\\_finalversion\\_may5\\_2017\).pdf](https://www.americanbar.org/content/dam/aba/images/government_affairs_office/attyclientprivissue(bordersearchesofattorneydevices_abalettertodhs_finalversion_may5_2017).pdf).

<sup>11</sup> The term "seizure" in the resolution does not include temporary seizures conducted as part of a physical inspection of a device at the border or temporary seizures necessary to obtain a warrant.

<sup>12</sup> The term "forensic search" was explained by the Ninth Circuit in *United States v. Cotterman*, 709 F.3d 952, 968 (9th Cir. 2013) (en banc) and has been defined more specifically in the Leahy-Daines bill now being considered by the U.S. Senate, S. 2462, 115th Cong. §1 (2018). This resolution does not track the forensic / non-forensic search distinction drawn in these cases. Instead, it distinguishes between searches of electronic devices vs. physical inspections or temporary seizures of those devices under the standard explained by the Court in *Riley*.

## **Fourth Amendment Protections for Electronic Devices**

The Fourth Amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>13</sup>

The Supreme Court has established that “in the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.”<sup>14</sup> For example, the Court has long recognized an exception to the warrant requirement in a range of exigent circumstances and emergencies.<sup>15</sup> The Court has also recognized a narrow exception for warrantless searches at the border. Specifically, the Court has held that because the “Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border,”<sup>16</sup> searches are typically found to be “reasonable simply by virtue of the fact that they occur at the border.”<sup>17</sup> But even at the border, the Court has held, the Fourth Amendment is not a dead letter; individual privacy rights are to be “[b]alanced against the sovereign’s interests.”<sup>18</sup> The Supreme Court has never had occasion to consider the balance of interests at stake during the search of an individual’s electronic devices at the border.

The Supreme Court has recently considered the privacy interests implicated by searches of electronic devices in other contexts, and has twice held that such searches must be strictly limited. First, in *Riley v. California*, 134 S. Ct. 2473 (2013), the Court held that the long-standing exception permitting warrantless searches incident to arrest did not apply to a search of a cell phone seized during an arrest. Chief Justice Roberts, writing for a unanimous Court, found that the traditional exception did not apply to searches of cell phones, which “place vast quantities of personal information literally in the hands of individuals,” and found that searches of these devices “bear[] little resemblance to the type of brief physical search considered” in prior cases.<sup>19</sup> The Court found that cell phones

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<sup>13</sup> U.S. Const. amend. IV.

<sup>14</sup> *Carpenter*, 138 S. Ct. at 2221.

<sup>15</sup> See *Missouri v. McNeely*, 569 U.S. 141, 149 (2013) (discussing the traditionally recognized exigency exceptions). The Supreme Court has so far not resolved whether there is a “foreign intelligence exception” to the warrant requirement, but lower courts have recognized a limited exception in some circumstances. See *United States v. United States District Court (Keith)*, 407 U.S. 297, 321–23 (1972) (refusing to recognize a general domestic security exception to the warrant requirement, without expressing an “opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.”); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 172 (2d Cir. 2008) (discussing cases that have recognized a limited exception to the warrant requirement for foreign intelligence searches).

<sup>16</sup> *United States v. Flores-Montano*, 541 U.S. 149 (2004).

<sup>17</sup> *Ramsay*, 431 U.S. at 616.

<sup>18</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 539 (1985).

<sup>19</sup> 134 S. Ct. at 2484.

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“differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person.”<sup>20</sup> Quoting *Learned Hand*, the Court emphasized “that it is ‘a totally different thing to search a man’s pockets and use against him what they contain, from ransacking his house for everything which may incriminate him’” but noted that is no longer true “[i]f his pockets contain a cell phone.”<sup>21</sup> Searching a cell phone “would typically expose to the government far *more* than the most exhaustive search of a house . . . [a phone] contains a broad array of private information never found in a home in any form—unless the phone is.”<sup>22</sup> The Court noted that “[l]aw enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case.”<sup>23</sup>

More recently, in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the Court held that the “third party doctrine”—under which courts had held that certain records held by service providers, banks, and other third parties were not entitled to Fourth Amendment protection—does not apply to cell phone location data. Specifically, the Court held that historical cell phone location records held by a wireless carrier were protected under the Fourth Amendment and the Government could not obtain them without a warrant. The Court found that cell phone location records were “qualitatively different” from the “telephone numbers and bank records” that the Court held could be obtained without a warrant in *Smith* and *Miller*.<sup>24</sup> The Court noted that “few could have imagined” in the 1970s “a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person’s movements.”<sup>25</sup> As in *Riley*, the Court emphasized the “novel circumstances” regarding searches of electronic devices due to the sheer quantity and unique quality of the data that can be obtained. The Court also indicated that its decision “does not consider other collection techniques involving foreign affairs or national security.”<sup>26</sup>

## **Fourth Amendment Border Search Cases Prior to *Riley* and *Carpenter***

Even before the Supreme Court imposed special limitations on searches of cell phones, lower courts had recognized the need to limit certain searches of electronic devices at the border. Though courts have traditionally permitted suspicionless searches and seizures at the border, the U.S. Court of Appeals for the Ninth Circuit held in *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc), that a “forensic examination” of an individual’s laptop seized at the border was not permissible under the Fourth Amendment

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<sup>20</sup> *Id.* at 2489.

<sup>21</sup> *Id.* at 2490–91 (quoting *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926)).

<sup>22</sup> *Id.* at 2491 (emphasis in original).

<sup>23</sup> *Id.* at 2485.

<sup>24</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018); see *Smith v. Maryland*, 442 U.S. 735 (1979) (holding that an individual did not have a reasonable expectation of privacy in records of telephone numbers that they conveyed to the phone company when they dialed); *Miller v. United States*, 425 U.S. 435 (1976) (holding that an individual did not have a reasonable expectation of privacy in financial records held by a bank).

<sup>25</sup> *Carpenter*, 138 S. Ct. at 2217.

<sup>26</sup> *Id.* at 2220.

unless the Government had reasonable suspicion to support the search.<sup>27</sup> The court did not specifically define the term forensic examination, but noted the search involved the use of “forensic software to copy the hard drive and then analyze it in its entirety, including data that ostensibly had been deleted.”<sup>28</sup> The court also noted that the software “exhibited the distinctive features of computer forensic examination” because it “copied, analyzed, and preserved the data stored on the hard drive and gave the examiner access to far more data, including password-protected, hidden or encrypted, and deleted files, than a manual user could access.”<sup>29</sup>

The Ninth Circuit in *Cotterman* found that although “[i]nternational travelers certainly expect that their property will be searched at the border,” they do not expect “that, absent some particularized suspicion, agents will mine every last piece of data on their devices or deprive them of their most personal property for days (or perhaps weeks or even months, depending on how long the search takes).”<sup>30</sup> The court explained that this standard was necessary given the “substantial personal privacy interests” at stake because “the private information individuals store on digital devices—their personal ‘papers’ in the words of the Constitution—stands in stark contrast to the generic and impersonal contents” of other containers that the Government has authority to search.<sup>31</sup> The court further emphasized the vast quantity and unique qualities of personal information stored on these devices.<sup>32</sup>

Prior to the Ninth Circuit’s decision in *Cotterman*, courts had already required reasonable suspicion for “extended border searches” of any property.<sup>33</sup> But the standard for searching traditional physical property was flexible to reflect the “myriad difficulties facing customs and immigration officials who are charged with the enforcement of smuggling and immigration laws.”<sup>34</sup> The Ninth Circuit had accordingly defined an extended border search as any “search away from the border where entry is not apparent.”<sup>35</sup> These searches occur “after the actual entry has been effected and intrude more on an individual’s normal expectation of privacy,” which is why courts have required that the government first establish reasonable suspicion “that the subject of the search was involved in criminal activity.”<sup>36</sup> The Ninth Circuit’s decision in *Cotterman* recognized that some searches of electronic devices require reasonable suspicion even if they do not qualify as an “extended border search.”<sup>37</sup>

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<sup>27</sup> *United States v. Cotterman*, 709 F.3d 952, 968 (9th Cir. 2013) (en banc).

<sup>28</sup> *Id.* at 962.

<sup>29</sup> *Id.* at 963 n.9.

<sup>30</sup> *Id.* at 967.

<sup>31</sup> *Id.* at 964.

<sup>32</sup> *Id.*

<sup>33</sup> See *United States v. Stewart*, 715 F. Supp. 2d 750, 753–54 (E.D. Mich. 2010) (discussing earlier cases on the “extended border search” standard); *United States v. Guzman-Padilla*, 573 F.3d 865, 877–87 (9th Cir. 2009); *United States v. Niver*, 689 F.2d 520, 526 (5th Cir. 1982).

<sup>34</sup> *Guzman-Padilla*, 573 F.3d at 878 (quoting *United States v. Richards*, 638 F.3d 765, 771 (1981)).

<sup>35</sup> *Id.* at 878 (quoting *United States v. Corral-Villavicencio*, 753 F.2d 785, 788 (9th Cir. 1985)).

<sup>36</sup> *Id.* at 877–78.

<sup>37</sup> *Cotterman*, 709 F.3d at 961.

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In the five years since *Cotterman*, many more federal district and appellate courts have grappled with forensic examinations of electronic devices at the border.<sup>38</sup> Several Courts of Appeals have weighed in and come down on different sides. Following recent decisions, there is now a clear split among federal circuits that should justify intervention by the U.S. Supreme Court. The Fourth Circuit held in *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018), that the *Cotterman* standard applies and reasonable suspicion is required to conduct a forensic examination of a cell phone seized at the border. The Eleventh Circuit disagreed in *United States v. Tousef*, 890 F.3d 1227 (11th Cir. 2018), holding that the Fourth Amendment does not require any suspicion for forensic searches of electronic devices at the border. Several other decisions have touched on this issue, but those cases did not provide the best active vehicle for the Court's consideration.<sup>39</sup> Given the circumstances, there is a significant possibility that the Court will weigh in on this issue soon (if not in *Tousef*, then in another similar case).

The Supreme Court established in *Riley* and *Carpenter* that electronic devices (cell phones, in particular) contain large volumes of uniquely sensitive personal information. Due to the “seismic shifts in digital technology” that have occurred over the last two decades, the Court has found that certain traditional Fourth Amendment exceptions do not adequately protect reasonable expectations of privacy when applied to these electronic devices. The same logic applies to extended seizures and forensic searches of electronic devices at the border. Even before *Riley* and *Carpenter*, courts had begun to recognize that suspicionless forensic searches of electronic devices at the border were not reasonable and thus violated the Fourth Amendment. Now, after *Riley* and *Carpenter*, the Court should make clear that extended seizures and forensic searches of cell phones and other electronic devices at the border are not reasonable absent probable cause that the subject was involved in criminal activity.<sup>40</sup> Congress should also take action to impose

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<sup>38</sup> See, e.g., *Alasaad v. Nielsen*, 2018 WL 2170323, No. 17-11720 (D. Mass. May 9, 2018) (denying the Government's motion to suppress a civil rights suit challenging searches and seizures of electronic devices at the border); *United States v. Kim*, 103 F. Supp. 3d 32 (D.D.C. 2015) (granting a motion to suppress evidence gathered during a warrantless search of a laptop by border patrol agents following seizure at a U.S. airport); *United States v. Saboonchi*, 990 F. Supp. 2d 536 (D. Md. 2014) (imposing a reasonable suspicion standard for the search of a laptop); *United States v. Hassanshah*, 75 F. Supp. 3d 101 (D.D.C. 2014) (same); *Abidor v. Napolitano*, 990 F. Supp. 2d 260 (E.D.N.Y. 2013) (rejecting challenge to forensic searches of electronic devices where the court found that the government had reasonable suspicion).

<sup>39</sup> The Court recently denied a Petition for a Writ of Certiorari in *United States v. Vergara*, 884 F.3d 1309 (11th Cir. 2018), *cert. denied* \_\_\_ S. Ct. \_\_\_, 2018 WL 1993728 (Mem) (No. 17-8639) (Oct. 1, 2018), which involved a similar question but may not have been an ideal vehicle for the Court's consideration. The Sixth Circuit ruled against a defendant's challenge to a laptop search in *United States v. Stewart*, 729 F.3d 517 (6th Cir. 2013), based on a finding that border agents only subjected his computer to a “routine” and “non-forensic examination.” *Id.* at 525. The Fifth Circuit more recently ruled against a Defendant in *United States v. Molina-Isidoro*, 884 F.3d 287 (5th Cir. 2018), based on a finding that agents had probable cause to conduct a forensic search of her cell phone. *Id.* at 291. The defendant in *Kolsuz* was unsuccessful in obtaining a suppression remedy, despite the favorable ruling on the Fourth Amendment standard, and appears to have decided not to file a Petition for Writ of Certiorari. It appears that the defendant in *Tousef* has also chosen not to file a Petition for Writ of Certiorari.

<sup>40</sup> The difficulties involved in border enforcement may justify properly predicated searches conducted without first obtaining a judicially-authorized warrant under the Federal Rules of Criminal Procedure.

more specific restrictions and guidelines concerning searches of electronic devices at the border.

### **Legislative Interest in the Border Search Issue**

Court consideration of the appropriate Fourth Amendment standard for forensic searches of electronic devices at the border is necessarily limited. Judicial review typically only arises following a criminal indictment via a motion to suppress evidence gathered during the search, and possibly as an issue in an appeal following conviction. Many searches conducted do not lead to a criminal indictment or even any evidence of a potential crime. But the individuals subjected to these searches are nevertheless deprived of the use of their devices and are subjected to the arbitrary search of their “papers” by Government agents. Recent reports show that U.S. Customs agents are increasingly scrutinizing personal devices, with a 60% increase in fiscal year 2017.<sup>41</sup> Other countries have taken even more draconian approaches, including a new customs rule in New Zealand that subjects travelers to a \$5,000 NZD fine if they refuse to turn over passwords or other information enabling access to their electronic devices.<sup>42</sup>

Against the backdrop of this expansion of border searches, members of Congress have called for legislative action. In the spring of 2017, Senator Ron Wyden (D-OR) introduced the “Protecting Data at the Border Act,” which was co-sponsored by Senator Rand Paul (R-KY), Senator Edward Markey (D-MA), and Senator Jeff Merkley (D-OR).<sup>43</sup> The Wyden-Paul bill would prohibit a government entity from accessing “the digital contents of any electronic equipment belonging to or in the possession of a United States person at the border without a valid warrant supported by probable cause,” and from denying “entry into or exit from the United States by a United States person based on refusal” to “disclose an access credential” or provide “access to the digital contents of electronic equipment” or to “online account information.”<sup>44</sup> The bill would provide for an emergency and “public safety and health” exception to the warrant standard, limit retention of digital contents accessed, impose recordkeeping and audit requirements for electronic device searches at the border, limit seizure of devices, and restrict use of unlawfully obtained evidence.<sup>45</sup>

More recently, Senator Leahy (D-VT) introduced a bill “to place restrictions on searches and seizures of electronic devices at the border,” which was co-sponsored by Senator

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<sup>41</sup> Nick Miroff, *U.S. Customs Agents Are Searching More Cellphones—including Those Belonging to Americans*, Wash. Post. (Jan. 5, 2018), [https://www.washingtonpost.com/world/national-security/us-customs-agents-are-searching-more-cellphones--including-those-belonging-to-americans/2018/01/05/0a236202-f247-11e7-b3bf-ab90a706e175\\_story.html](https://www.washingtonpost.com/world/national-security/us-customs-agents-are-searching-more-cellphones--including-those-belonging-to-americans/2018/01/05/0a236202-f247-11e7-b3bf-ab90a706e175_story.html).

<sup>42</sup> Isaac Stanley-Becker, *New Zealand’s ‘Digital Strip Searches’: Give Border Agents Your Passwords or Risk a \$5,000 Fine*, Wash. Post. (Oct. 2, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/10/02/new-zealands-digital-strip-searches-give-border-agents-your-device-passwords-or-risk-a-5000-fine/>.

<sup>43</sup> S. 823, 115th Cong. (2017).

<sup>44</sup> *Id.* § 5.

<sup>45</sup> *Id.* §§ 5–8.

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Daines (R-MT).<sup>46</sup> The Leahy-Daines bill would impose strict limits on the ability of Department of Homeland Security officials to “search or seize an electronic device transported by a United States person at the international border.”<sup>47</sup> The bill would distinguish between “manual searches,” “seizures,” and “forensic searches,” and impose different restrictions on each category.

The bill would limit any “manual search” of an electronic device by requiring reasonable suspicion that the individual transporting the device “is carrying contraband or is otherwise transporting goods or persons in violation of the laws enforced by the Department of Homeland Security” or is “inadmissible or otherwise not entitled to enter the United States under such laws” and that the device “contains information or evidence relevant to” the violation at issue.<sup>48</sup> The bill defines “manual search” as any examination of an electronic device “conducted manually without (A) the assistance of any other electronic device, electronic equipment, or software, including the use of special search programs; or (B) the entry of any password, passcode, fingerprint, account information, or other biometric identifier that permits access to data otherwise protected by technological means.”<sup>49</sup> The bill would also limit seizures of electronic devices by requiring probable cause to believe the same facts about the individual and device described above (or that the individual has violated “any Federal or State law punishable by more than 1 year”).<sup>50</sup>

The Leahy-Daines bill would only permit forensic searches of electronic devices pursuant to a warrant issued under the Federal Rules of Criminal Procedure. A “forensic search” is defined in the bill as any examination of an electronic devices that “(A) is conducted for longer than 4 hours; (B) is conducted with the assistance of any other electronic device, electronic equipment, or software, including software enabling the searching, scanning, or indexing of the contents of the device; (C) involves the copying or documentation of the data stored on the device; or (D) is conducted in any other manner that would not fall within the definition of a manual search or [a search subject to another established Fourth Amendment exception].”<sup>51</sup> The bill would also prohibit introduction of unlawfully obtained evidence, provide detailed procedures governing searches and seizures of devices at the border, and impose reporting requirements.<sup>52</sup>

Both bills have been referred to the Senate Committee on Homeland Security and Governmental Affairs. There has not yet been a markup or further consideration of the proposals.

## **Recent Statement by the ABA President on Border Searches**

The ABA has already spoken out about the increasingly frequent searches of electronic devices at the border. Although there is no existing ABA policy on the broad Fourth

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<sup>46</sup> S. 2462, 115th Cong. (2018).

<sup>47</sup> *Id.* § 2.

<sup>48</sup> *Id.* § 2(b).

<sup>49</sup> *Id.* § 1(2).

<sup>50</sup> *Id.* § 2(c).

<sup>51</sup> *Id.* § 1(1).

<sup>52</sup> *Id.* § 2–4.

Amendment questions, these searches can implicate the confidentiality of attorney-client communications and work product. In 2017, then ABA President Linda Klein wrote to the Secretary and Acting General Counsel of the Department of Homeland Security expressing “serious concerns regarding the standards that permit U.S. Customs and Border Protection (‘CBP’) and Immigration and Customs Enforcement (‘ICE’) officers to search and review the contents of lawyers’ laptop computers, cell phones, and other electronic devices at U.S. border crossings without any showing of reasonable suspicion.”<sup>53</sup>

President Klein relayed and underscored concerns from ABA members about “maintaining the confidentiality of client information contained in lawyers’ electronic devices when re-entering the United States,” and called on the agency to “ensure that the proper policies and procedures are in place” at DHS, CBP, and ICE to “preserve the attorney-client privilege, the work product doctrine, and the confidentiality of lawyer and client communications during border crossings and to prevent the erosion of these important legal principles.”<sup>54</sup> President Klein emphasized that the confidentiality of the lawyer-client relationship is a “cornerstone of our legal system” and is enshrined in ABA Model Rule of Professional Conduct 1.6(a), which states that “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . .”<sup>55</sup> President Klein also noted that the ABA has on multiple occasions “fought to preserve” these interests in response to Government surveillance, including in communications to the “then-Director and General Counsel of the National Security Agency” in 2014 concerning “‘minimization procedures’ [to] protect the confidentiality and attorney-client privileged status of lawyer-client communications intercepted or otherwise received by the NSA or other agencies.”<sup>56</sup>

President Klein’s letter focused specifically on key provisions in the CBP and ICE policies governing searches of lawyers’ and other travelers’ electronic devices at the U.S. border. Section 5.2 of CBP Directive No. 3340-049 (“Border Search of Electronic Devices Containing Information”) and Sections 6.1 and 8.6 of ICE Directive No. 7-61 (“Border Searches of Electronic Devices”). She noted that both directives “have resulted in” agents “exercising sweeping powers to search electronic devices at the border, with or without reasonable suspicion of any wrongdoing.”<sup>57</sup> She also noted that while other provisions may require “special review and handling of privileged or sensitive materials,” the concern

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<sup>53</sup> Letter from Linda Klein, President, Am. Bar Ass’n, to Gen. John F. Kelly, USMC (Ret.), Sec’y of Homeland Sec., and Joseph B. Maher, Acting Gen. Counsel, Dep’t of Homeland Sec. (May 5, 2017), available at [https://www.americanbar.org/content/dam/aba/images/government\\_affairs\\_office/attyclientprivissue\(bordersearchesofattorneydevices\\_abalettertodhs\\_finalversion\\_may5\\_2017\).pdf](https://www.americanbar.org/content/dam/aba/images/government_affairs_office/attyclientprivissue(bordersearchesofattorneydevices_abalettertodhs_finalversion_may5_2017).pdf).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 2 (citing the ABA’s February 2014 letter to the NSA, available at [https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014feb20\\_nsainterceptionofprivilege\\_dinfo\\_1.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014feb20_nsainterceptionofprivilege_dinfo_1.authcheckdam.pdf)).

<sup>57</sup> *Id.* at 2.

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is these other provisions “are not sufficiently clear or comprehensive enough to protect these fundamental legal rights.”<sup>58</sup>

President Klein urged the Department to “modify and clarify” the CBP and ICE directives “to emphasize and protect these fundamental legal rights and to provide your front line agents and officers with explicit guidance as to the importance of these principles.”<sup>59</sup> She further urged the Department to “revise these Directives to clarify the specific standards and procedures that CBP and ICE agents must follow before the contents of a lawyer’s electronic device can be searched or seized at the border.”<sup>60</sup>

In response to President Klein’s letter, senior officials at the Department of Homeland Security met with the ABA and subsequently issued a revised directive for CBP, which addressed how border officials should respond to assertions that material is privileged.<sup>61</sup> This included specific procedures for approval of such searches, segregation and subsequent disposal of privileged material, and other general limitations on electronic device searches at the border. The revised CBP directive adopts the *Cotterman* standard that an “advanced search” can only be performed if there is reasonable suspicion of unlawful activity or national security concerns.<sup>62</sup> In 2018, ABA President Hilarie Bass stated that the “ABA will continue to urge DHS, CPB (sic), and other agencies to further improve their policies by requiring border officers to obtain a subpoena based on reasonable suspicion or a warrant supported by probable cause before searching the contents of lawyer electronic devices.”<sup>63</sup>

## Conclusion

Searches of electronic devices at the border implicate significant privacy interests and should be limited both by the Fourth Amendment and by statute. The American Bar Association has previously fought to protect individuals from arbitrary searches of their electronic devices at the border out of concern for the risk to lawyer-client confidentiality, the attorney-client privilege, and the work product doctrine. But more is needed to ensure that the fundamental privacy rights of individuals are protected.

Accordingly, the American Bar Association urges the federal judiciary to recognize the substantial privacy interests implicated by searches of electronic devices at the border. The American Bar Association also urges Congress to enact legislation—and in the meantime for the Department of Homeland Security to adopt policies—that would protect

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<sup>58</sup> *Id.* at 3.

<sup>59</sup> *Id.* at 4.

<sup>60</sup> *Id.*

<sup>61</sup> Lee Rawles, *Traveling Lawyers Get New Protections in Device Searches at Border*, ABA Journal (Jan. 25, 2018), [http://www.abajournal.com/news/article/new\\_guidelines\\_for\\_electronic\\_device\\_searches\\_at\\_us\\_borders\\_will\\_impact\\_att](http://www.abajournal.com/news/article/new_guidelines_for_electronic_device_searches_at_us_borders_will_impact_att).

<sup>62</sup> See U.S. Customs and Border Protection, CBP Directive No. 3340-049A (Jan. 4, 2018), *available at* <https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf>.

<sup>63</sup> Rawles, *supra*.

these substantial privacy interests by imposing a probable cause warrant standard for searches and seizures of electronic devices at the border, protecting against improper denial of entry to gain access to electronic devices, setting standards to protect the attorney-client privilege, the work product doctrine, and the confidentiality of the lawyer-client relationship, and requiring recordkeeping and auditing of border searches.

Respectfully submitted,

Wilson Adam Schooley  
Chair, Section of Civil Rights and Social Justice  
January 2019

## GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Wilson A. Schooley, Chair, Section of Civil Rights and Social Justice

1. Summary of Resolution(s). This resolution calls on the federal judiciary, Congress, and the Department of Homeland Security to protect the privacy of millions of individuals who cross our nation's borders each year.
2. Approval by Submitting Entity. The Council of the Section of Civil Rights and Social Justice approved sponsorship of the Resolution during its Fall Meeting on Friday, October 12, 2018. The Council of the Criminal Justice Section approved co-sponsorship of the Resolution during its Fall Meeting on Saturday, November 3, 2018.
3. Has this or a similar resolution been submitted to the House or Board previously? No.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? Over the last forty years, the ABA has adopted policies supporting greater privacy protection and urging Congress and the courts to protect individual rights.<sup>64</sup> The ABA has identified and on numerous occasions urged Congress to address new privacy risks posed by emerging technologies. Specifically, the ABA advocated for important privacy law updates including enactment of the Electronic Communications Privacy Act (ECPA),<sup>65</sup> amendments to the Privacy Act,<sup>66</sup> enactment of legislation protecting the privacy of medical records,<sup>67</sup> and updates to ECPA reflecting technological and societal changes.<sup>68</sup> The ABA has also underscored the significant threat that unchecked searches of electronic devices can have on the confidentiality of attorney-client communications and work product.

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<sup>64</sup> See ABA Section of Civil Rights and Social Justice, Privacy and Information Protection Commission, *ABA Policies Relating to Privacy and Information Protection* (Sept. 25, 2018), <http://apps.americanbar.org/webupload/commupload/IR511000/relatedresources/ABA-Privacy-Policies-CRSJ-PIP-09252018.pdf>.

<sup>65</sup> ABA Report and Recommendation 86A114B, <https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/aug-86-wiretap-law.authcheckdam.pdf>.

<sup>66</sup> ABA Report and Recommendation 86A114C, <https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/aug-86-electronic-communication-on-privacy.authcheckdam.pdf>.

<sup>67</sup> ABA Report and Resolution 96M106, [https://www.americanbar.org/content/dam/aba/directories/policy/1996\\_my\\_106.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/1996_my_106.authcheckdam.pdf); ABA Report and Resolution 99M109A, [http://www.americanbar.org/content/dam/aba/directories/policy/1999\\_my\\_109a.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/1999_my_109a.authcheckdam.pdf).

<sup>68</sup> ABA Report and Resolution 13A114, <https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/aug-13-electronic-communication-act.authcheckdam.pdf>.

Specifically, the ABA President in 2017 wrote to the Secretary of Homeland Security to express concerns over standards for searches of electronic devices without reasonable suspicion and how those searches impact lawyers' confidential records.<sup>69</sup> The American Bar Association has a long tradition of advocating for the protection of personal privacy and constitutional rights, and has also fought to protect the confidentiality of the lawyer-client relationship, which is a "cornerstone of our legal system" and is enshrined in ABA Model Rule of Professional Conduct 1.6(a).

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. In the 115<sup>th</sup> Congress, two bipartisan bills were introduced in the Senate on this issue—S. 823 (Wyden-Paul) and S. 2462 (Leahy-Daines). Both bills were referred to the Senate Committee on Homeland Security and Governmental Affairs. There has not yet been a markup or further consideration of the proposals.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. We will work with the ABA Amicus Committee to draft and file an amicus brief in cases involving Fourth Amendment challenges to suspicionless searches of electronic devices at the border. In particular, we will work to file a brief in the *Touset* case (either at the Certiorari stage if time permits, or at the merits stage if the Court grants Certiorari). We will also work with the legislative affairs office to lobby Congress in support of legislation that is consistent with this policy (including both bills currently pending in the Senate).
8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.
9. Disclosure of Interest. (If applicable) There are no known conflicts of interest.
10. Referrals. The Report with Recommendation will be referred to the following entities in the month of October:

Criminal Justice Section  
 Science & Technology Law  
 Standing Committee on Law and National Security  
 General Practice, Solo and Small Firm Section  
 Section of International Law

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<sup>69</sup> Letter from Linda Klein, President, Am. Bar Ass'n, to Gen. John F. Kelly, USMC (Ret.), Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec. (May 5, 2017), [https://www.americanbar.org/content/dam/aba/images/government\\_affairs\\_office/attyclientprivissue\(bordersearchesofattorneydevices,abalettertodhs.finalversion,may5,2017\).pdf](https://www.americanbar.org/content/dam/aba/images/government_affairs_office/attyclientprivissue(bordersearchesofattorneydevices,abalettertodhs.finalversion,may5,2017).pdf).

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Judicial Division  
Law Student Division  
Senior Lawyers Division  
Young Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This resolution calls on the federal judiciary, Congress, and the Department of Homeland Security to protect the privacy of millions of individuals who cross our nation's borders each year.

### 2. Summary of the Issue that the Resolution Addresses

The right to be free from unreasonable searches and seizures is fundamental to the American constitutional structure. The widespread adoption of modern communications technologies has made it possible to travel with constant access to personal and professional contacts, and to maintain constant access to vast quantities of information—from the most sensitive and confidential communications to the more mundane and routine records. The proliferation of cell phones and other electronic devices that enable individuals to carry personal information with them, wherever they go, has significant implications for privacy law. In particular, old rules governing searches of persons and property do not take into account these recent technological changes.

Searches conducted at the international border now implicate significant privacy interests given the volume and sensitivity of records stored on and accessible via electronic devices. Given the Supreme Court's recent rulings expanding the scope of Fourth Amendment protections for cell phone data in other contexts, it is necessary for the courts, Congress, and the Department of Homeland Security to impose limits on searches of electronic devices at the border (which had traditionally been exempt from Fourth Amendment limitations).

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

This policy will reaffirm the ABA's commitment to personal privacy and the protection of communications and other personal data. By adopting this Resolution, the ABA can assist the work of privacy advocates, lawmakers and litigators that are working to ensure that important Fourth Amendment and privacy law protections are not eroded due to technological changes.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

The Standing Committee on Law and National Security has reviewed the resolution and opposes it in the current form.



**AMERICAN BAR ASSOCIATION**

**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE  
COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE**

**COMMISSION ON DISABILITY RIGHTS**

**COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION**

**COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY**

**COMMISSION ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES**

**COMMISSION ON WOMEN IN THE PROFESSION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association urges legal employers not to require pre-
- 2 dispute mandatory arbitration of claims of unlawful discrimination, harassment or
- 3 retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual
- 4 orientation, gender identity or expression, marital status, or status as a victim of domestic
- 5 or sexual violence.



## REPORT

### Introduction

In August 2018, this House of Delegates passed Resolution and Report 300 (“Resolution 300”), urging legal employers not to require mandatory arbitration of sexual harassment claims.<sup>1</sup> The report detailed the perception among employees that mandatory pre-dispute agreements to arbitrate sexual harassment claims contribute to the perpetuation of an atmosphere of fear and isolation in the workplace.

Resolution 300 tracks the trend among many legal employers, including Munger, Tolles & Olson; Orrick, Herrington & Sutcliffe; and Skadden Arps Slate Meagher & Flom, to eliminate mandatory pre-dispute arbitration agreements. Its report details the many times that this House of Delegates has voted to limit mandatory pre-dispute arbitration in a variety of contexts.

However, Resolution 300 is limited both in the wrongs that it covers and who it protects. First, while it covers sexual harassment, it does not cover discrimination or retaliation, the two other wrongs encompassed within Title VII of the Civil Rights Act of 1964,<sup>2</sup> and parallel state statutes.<sup>3</sup> This proposed resolution covers all three basic wrongs in this area: discrimination, harassment and retaliation. Though different in proof and legal theory, these serious categories of misconduct often, though not always, occur together. Accordingly, all three should be subject to the same arbitration rule as matter of policy and practicality.

Secondly, while Resolution 300 covers illegal harassment on the basis of sex, it does not cover the other categories encompassed within the major Federal Statutes (Title VII, Age Discrimination in Employment Act of 1967 (ADEA),<sup>4</sup> Americans with Disabilities Act (ADA) of 1990,<sup>5</sup> Violence Against Women Act of 1994 (VAWA)<sup>6</sup>) and/or in parallel state statutes: race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status and status as a victim of domestic or sexual violence.

Therefore, this proposed resolution begins with the text of Resolution 300 regarding sexual harassment and broadens it to cover illegal discrimination, harassment or retaliation, on the basis of the above-referenced categories that are already protected by law.

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<sup>1</sup> ABA Resolution, 18A300, <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/300.pdf>.

<sup>2</sup> 42 U.S.C. § 2000e *et seq.*, available at <https://www.eeoc.gov/laws/statutes/titlevii.cfm>.

<sup>3</sup> Cf. California Fair Employment and Housing Act (“FEHA”), CAL. GOV’T CODE §§ 12940 *et seq.*

<sup>4</sup> 29 U.S.C. §§ 621-634 (1967).

<sup>5</sup> 42 U.S.C. §§ 12101 *et seq.* (1990).

<sup>6</sup> 42 U.S.C. §§ 13701-14040.

# 107B

## Victims of Unlawful Employment Discrimination Deserve the Same Access to Justice As Victims of Harassment<sup>Z</sup>

The last two years have seen an increased focus on sexual harassment, and rightfully so. However, discrimination is the wrong at which these employment statutes first took aim and remains a serious issue today.

Unlawful discrimination is often defined as a

refusal to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment because of a category protected by law.<sup>8</sup>

Different from harassment, employment discrimination is unequal job opportunity, compensation, assignment and the like, because one is female, or a person of color, or has a disability or is otherwise in a legally protected class.

One of the greatest legislative achievements of the modern civil rights era, Title VII was devised to outlaw discrimination in the workplace on the basis of race, color, religion, sex and national origin.<sup>9</sup> Arguing the need for Title VII, President Kennedy stressed that “the relief of [African American] unemployment required ... eliminating racial discrimination in employment.”<sup>10</sup> This was central to the objectives of Title VII, but the legislative history emphasized that discrimination in employment needed to be eradicated on all grounds.

The wage gap by which women make 82 percent of the wages of men, and women of color make far less,<sup>11</sup> constitutes discrimination. According to the Equal Employment Opportunity Commission (EEOC), “[d]espite longstanding prohibitions against compensation discrimination under the federal EEOC laws, pay disparities persist between workers in various demographic groups. Other studies find that, women earn, on average, about 75 cents for every dollar that men earn.”<sup>12</sup> The President’s Council of

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<sup>Z</sup> This Resolution does not expand the scope of substantive legal protections as it only covers *unlawful* discrimination, harassment or retaliation. If there is no substantive wrong, there is nothing to arbitrate.

<sup>8</sup> California fair Employment and Housing Act (“FEHA”), Govt. Code §§ 12940(a),

<sup>9</sup> 42 U.S.C. § 2000e *et seq.*, available at <https://www.eeoc.gov/laws/statutes/titlevii.cfm>.

<sup>10</sup> Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L.Rev. 432(1966), available at <http://lawdigitalcommons.bc.edu/bclr/vol7/iss3/3>.

<sup>11</sup> Pew Research Center, Nikki Graf et al., *The narrowing, but persistent, gender gap in pay*, available at <http://www.pewresearch.org/fact-tank/2018/04/09/gender-pay-gap-facts/>.

<sup>12</sup> EEOC, QUESTIONS AND ANSWERS: COMPLIANCE MANUAL SECTION ON COMPENSATION DISCRIMINATION, <https://www.eeoc.gov/policy/docs/qanda-compensation.html>.

Economic Advisors found that after taking factors like education, family responsibilities and experience into consideration, the pay gap between men and women is still disproportionate and could be the result of discrimination.<sup>13</sup>

The ABA Diversity and Inclusion Center, in its own research, found that “[w]omen lawyers of color were eight times more likely than white men to report that they had been mistaken for janitorial staff, administrative staff, or court personnel.”<sup>14</sup> As ABA President Hilarie Bass wrote last year, “Women have to work just a little harder than their male colleagues to get recognition for their achievements . . . [and] when it comes to becoming an equity partner or managing partner — the highest levels of law firm leadership — it’s still much less common for women to reach that level of success.”<sup>15</sup> These are examples of employment discrimination.

Discrimination charges are statistically more common than harassment charges. In 2017, the EEOC received 6,696 charges of employment harassment and obtained \$46.3 million in relief. That same year 84,254 workplace discrimination claims were filed with the agency, which secured \$398 million in relief for the charging parties.<sup>16</sup>

As *The New Yorker* reported on November 20, 2017, women make up only a quarter of employees and eleven percent of executives in the technology industry.<sup>17</sup> In a survey of 200 senior level women in Silicon Valley, eighty-four percent of the participants reported that they had been told they were “too aggressive” in the office, sixty-six percent said that they had been excluded from important events because of their “gender.”

For the past five years, Google has responded to reports that it hires few women and fewer people of color, especially in leadership and engineering roles. After five years of progress, Google reported in June 2018 that the U.S. workforce is 2.5 percent African American and 3.6 percent Latino; globally, black women comprise barely one percent of the workforce, and Latina women less than two percent.

In FY 2017, the EEOC received approximately 84,000 total charges for any type of discrimination. Of those, approximately 29,000 were race-based charges; 27,000, disability-based charges; and 26,000, sex-based charges. From FY 1997 to FY 2017,

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<sup>13</sup> Council of Economic Advisers Issue Brief, April 2015, Gender Pay Gap: Recent Trends and Explanations, available at [https://obamawhitehouse.archives.gov/sites/default/files/docs/equal\\_pay\\_issue\\_brief\\_final.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/equal_pay_issue_brief_final.pdf).

<sup>14</sup> American Bar Association, *Bias Interrupters*, available at [https://www.americanbar.org/groups/diversity/women/initiatives\\_awards/bias-interrupters/](https://www.americanbar.org/groups/diversity/women/initiatives_awards/bias-interrupters/).

<sup>15</sup> Media Planet, The Future of Business and Tech, “How we can Reverse the Trend of Women Leaning Out of Law,” available at <http://www.futureofbusinessandtech.com/business-solutions/how-we-can-reverse-the-trend-of-women-leaning-out-of-law>.

<sup>16</sup> <https://www.eeoc.gov/eeoc/newsroom/release/1-25-18.cfm>.

<sup>17</sup> Sheelah Kolhatkar, “The Tech Industry’s Gender-Discrimination Problem,” *The New Yorker*, Nov. 20, 2017, available at <https://www.newyorker.com/magazine/2017/11/20/the-tech-industrys-gender-discrimination-problem>.

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charges of discrimination based on retaliation (all statutes) and retaliation (Title VII only) have increased.<sup>18</sup>

The failure to assign clients and cases to people of color, the reality that they must outperform their colleagues in order to get an equal shot at success, and the failure to be treated equally in partnership evaluation and decisions are all examples of unlawful discrimination.<sup>19</sup>

On February 12, 2018, the National Association of Attorneys General wrote to Congressional leadership noting that “access to the judicial system ... is a fundamental right of all Americans”, but that mandatory arbitration imposes relief from decision makers who are not trained as judges, are not qualified to act as courts of law” and a “veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief.” In the words of the Attorneys General, ending mandatory pre-dispute arbitration of these important claims “would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.” Just as the House found that sexual harassment ought to be removed from the shadows and given the light of day, that is no less true of unlawful categorical discrimination.

## **Claims of Unlawful Retaliation Deserve the Same Public Airing As Claims of Unlawful Discrimination or Harassment**

Unlawful retaliation provides the fertile ground required for unlawful employment discrimination and harassment to flourish. Much of what has been labeled sexual harassment is actually unlawful retaliation. The implicit or explicit threat that rejection of a sexual overture would be a career ending act is retaliation, rather than pure harassment.

Retaliation occurs when an employer unlawfully takes action against an individual in punishment for exercising rights protected by any of the EEO laws. The EEO anti-retaliation provisions apply to ensure that individuals are free to raise complaints of potential EEO violations or engage in other EEO activity without retribution or punishment.<sup>20</sup>

The fear of retaliation prevents victims from complaining and coworkers from speaking out. As *The New Yorker* wrote on October 23, 2017, “Multiple sources said that [Harvey] Weinstein frequently bragged about planting items in media outlets about those who

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<sup>18</sup> EEOC, CHARGE STATISTICS (Charges filed with EEOC), FY 1997 - FY 2017, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

<sup>19</sup> American Bar Association, Bias Interrupters, *supra* note 14; EEOC, DISCRIMINATION BY TYPE, <https://www.eeoc.gov/laws/types/>.

<sup>20</sup> EEOC 2016 ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES, No. 915.004, Aug. 25, 2016, <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>.

spoke against him; these sources feared similar retribution.”<sup>21</sup> Without that fear of retaliation, unlawful discrimination and harassment would be far easier to eliminate.

While retaliation is often closely connected with unlawful discrimination and harassment, it is often a separate act, which must be addressed separately. A supervisor who warns a victim not to file a complaint of harassment to protect a powerful superior, or who fires her for having done so, engages in retaliation, rather than harassment. Indeed, serious instances of retaliation often occur in the absence of actionable harassment, for example, when a vindicated supervisor punishes an employee for raising a good faith complaint.

The EEOC tracks the total number of retaliation charges filed and resolved under all statutes alleging retaliation-based discrimination, and retaliation claims have increased significantly from FY 1997 to FY 2017; it is the most frequently alleged basis for a federal employment law charge, followed by race and disability.<sup>22</sup> In FY 1997, there were 18,198 new charges received, and \$41.7 million dollars paid in monetary benefits. In FY 2017, there were 41,097 new charges received, and \$192 million paid in monetary benefits.<sup>23</sup>

In a retaliatory atmosphere, discrimination and harassment run rampant. In some ways, retaliation may be the most serious unlawful employment practice of all, as it is an intentional misuse of power designed to chill and prevent the exercise of important legal rights. It is no less deserving of access to the courts than is harassment itself.

## **The Same Protections Should Extend to All Protected Categories Covered by ABA Model Rule 8.4**<sup>24</sup>

In August 2018, the ABA House of Delegates wisely recommended that law firms should not require, as a condition of employment or continued employment, that sexual harassment claims be forced into arbitration. The same protections should extend to the other groups protected by the major federal civil rights in employment acts, and in the general scope of Model Rule of Professional Conduct 8.4: Misconduct<sup>25</sup> —race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, and marital status. Some jurisdictions prohibit discrimination, harassment or retaliation on the basis of status as a victim of domestic or sexual violence (e.g., Cal. Lab. Code § 230) and

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<sup>21</sup> Ronan Farrow, “From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories,” *The New Yorker*, Oct. 23, 2017, available at <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

<sup>22</sup> EEOC, FACTS ABOUT RETALIATION, available at <https://www.eeoc.gov/laws/types/retaliation.cfm>.

<sup>23</sup> EEOC, RETALIATION-BASED CHARGES (Charges filed with EEOC), FY 1997 - FY 2017, available at <https://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm> (noting that the monetary benefits in millions does not include benefits obtained through litigation).

<sup>24</sup> This Resolution does not expand the scope of substantive legal protections as it only covers *unlawful* discrimination, harassment or retaliation. If there is no substantive wrong, there is nothing to arbitrate.

<sup>25</sup> Model R. Prof. Conduct 8.4 (ABA 2018), available at [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_8\\_4\\_misconduct/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/).

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House Resolution urges those protections as a matter of ABA policy.<sup>26</sup> They are each subject to venal harassment, discrimination, and retaliation.

## **This Proposal Covers Only Pre-Dispute Arbitration**

This proposal recognizes the value of voluntary arbitration of disputes. In many instances, two parties to a dispute will want to arbitrate it for a variety of good reasons. This Resolution does not address any such post-dispute agreement to arbitrate. It addresses only mandatory **pre-dispute** agreements to arbitrate claims of unlawful categorical discrimination, harassment or retaliation. Such agreements are often required as a condition of employment.<sup>27</sup> The report to Resolution 300, pp. 8-9, catalogues the House's concern with agreements to arbitrate in several contexts, including "a condition of initial or continued employment." The proposed resolution is consistent with current House policy, and is supportive of informed post-dispute agreements to arbitrate.

## **This Proposal Calls Only for Voluntary Compliance**

The proposed resolution does not propose new laws or legal obligations, but rather urges all legal employers to forego mandatory pre-dispute agreements to arbitrate claims of unlawful categorical discrimination, harassment or retaliation. Compliance is fully voluntary, with the only enforcement mechanism being the competition of the legal marketplace and the respect of one's peers. The ABA is urging, not mandating, legal employers not to require such pre-dispute arbitration agreements.

## **Conclusion**

This resolution represents the logical extension of Resolution 300 urging legal employers not to require arbitration of sexual harassment claims; it broadens the same protection to discrimination and retaliation claims, and to legally protected classes other than sex. This resolution is in furtherance of the ABA's goal of ensuring justice for all. We are committed to eliminating illegal employment discrimination, harassment or retaliation based upon legally protected characteristics—because of who an employee is, not what he or she does—in our profession and in our society. Following Justice Louis Brandeis' maxim that "Sunlight is ... the best of disinfectants; ... light the most efficient policeman,"<sup>28</sup>

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<sup>26</sup> ABA Resolution, 14A112A, [https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/2014\\_hod\\_annual\\_112a.aut\\_hcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/2014_hod_annual_112a.aut_hcheckdam.pdf)

<sup>27</sup> ".... [I]n the case of pre-employment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Ramos v. Superior Court* (Cal. Ct. App., First Dist., Div.1) Slip Opinion, p.0 14 (Nov. 2, 2018) (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 115 (Cal. 2000)).

<sup>28</sup> Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (1914).

claims of those unlawful job actions should not be forced unilaterally out of the courts and into the privacy of arbitration.

Respectfully submitted,

Wilson Adam Schooley  
Chair, Section of Civil Rights and Social Justice  
January 2019

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## GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Wilson Adam Schooley, Chair, Section of Civil Rights and Social Justice

1. Summary of Resolution(s).

This resolution urges legal employers not to require pre-dispute mandatory arbitration of claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status or status as a victim of domestic or sexual violence.

2. Approval by Submitting Entity.

Approved by Section of Civil Rights and Social Justice on October 13, 2018.

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

This builds upon Resolution 300 passed by the House in August 2018, which prohibited mandatory arbitration in sexual harassment cases.

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

In 2018, the ABA passed a resolution urging legal employers not to require mandatory arbitration of claims of sexual harassment. ABA Resolution, 18A300, <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/300.pdf>.

This proposed resolution represents the logical extension of Resolution 300 urging legal employers not to require arbitration of sexual harassment claims; it broadens the same protection to discrimination and retaliation claims, and to legally protected classes other than sex: race, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status and status as a victim of domestic or sexual violence.

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

6. Status of Legislation. None at this time.

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

8. Cost to the Association. (Both direct and indirect costs) None

9. Disclosure of Interest. (If applicable) None

10. Referrals.

- Commission on Domestic and Sexual Violence

- Commission on Disability Rights
- Commission on Homelessness and Poverty
- Commission on Sexual Orientation and Gender Identity
- Commission on Hispanic Rights and Responsibilities
- Commission on Racial and Ethnic Diversity in the Profession
- Section of State and Local Government Law
- Entities that Comprise the Center for Public Interest Law
- Section of Alternative Dispute Resolution
- Commission on Women in the Profession
- Tort Trial & Insurance Practice Section
- Section of Litigation
- Solo, Small Firm and General Practice Division
- Section of Labor and Employment Law

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. 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

This resolution urges legal employers not to require pre-dispute mandatory arbitration of claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status or status as a victim of domestic or sexual violence.

### 2. Summary of the Issue that the Resolution Addresses

The legal community is currently discussing the propriety of mandatory pre-dispute, agreements to arbitrate employment disputes in general, and disputes over statutory protections in particular. Many law students and recruiting offices are requesting that requirement to be dropped, and many law firms are considering that change. This policy urges that, with respect to unlawful categorical discrimination, harassment and retaliation, an applicant or employee should not be forced to give up the right to a jury trial as a condition of employment.”

### 3. Please Explain How the Proposed Policy Position will address the issue

Adoption of this policy will allow the ABA to oppose mandatory pre-dispute arbitration agreements as a condition of employment in the legal profession. It will apply to claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status, or status as a victim of domestic or sexual violence. It does not bear on voluntary agreements to arbitrate after the dispute arises.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None as of this writing.

**AMERICAN BAR ASSOCIATION****SENIOR LAWYERS DIVISION****COMMISSION ON LAW AND AGING****COMMISSION ON LAWYER ASSISTANCE PROGRAMS****SECTION OF STATE AND LOCAL GOVERNMENT LAW****SOLO, SMALL FIRM AND GENERAL PRACTICE DIVISION****STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS****NATIONAL CONFERENCE OF THE ADMINISTRATIVE LAW JUDICIARY****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

1 RESOLVED, That the American Bar Association adopts the recommendations and  
2 action points in the report, *Experienced Lawyers, American Families, and the Opioid*  
3 *Crisis—Report of the Opioid Summit May 2018*; and  
4

5 FURTHER RESOLVED, That the American Bar Association urges all federal, state,  
6 local, territorial, and tribal courts, governmental entities, bar associations, public health  
7 agencies, lawyer assistance programs, lawyer regulatory entities, institutions of legal  
8 education, and law firms to implement the recommendations and action points in the  
9 report, *Experienced Lawyers, American Families, and the Opioid Crisis—Report of the*  
10 *Opioid Summit May 2018*.



## REPORT

### I. INTRODUCTION

The opioid crisis is the deadliest epidemic in U.S. history. It touches communities and families throughout America. It does not discriminate among income levels. More than one in ten people have a relative or close friend who has died as result of a drug overdose according to the Associated Press-NORC Center for Public Affairs Research. The epidemic is shortening American life expectancy, impacting local government budgets, straining family resources and relationships, and challenging all of us to find solutions. It affects all of us.

The opioid crisis is steeped in a long cultural history of moralism about the nature of addiction, the century old legal separation of treatment of addiction from the rest of medicine, and the state sanctioned stigmatization of addiction through the criminalization of possession. The impact of the crisis implicates society's approach to the treatment of addiction, pain, and often co-occurring serious mental illnesses. It also implicates the approach to drug marketing, distribution, and the public approach to active drug users. It challenges us to discard the understanding of substance use disorders as moral maladies and embrace them as chronic, complex medical diseases with biological, psychological, and social dimensions.

On May 4, 2018 the ABA Senior Lawyers Division held an Opioid Summit in an effort to confront three aspects of the crisis: (1) the effects on the family, including intergenerational stress in confronting those of its members who have fallen victim; (2) differences in addressing treatment of what the National Institute on Drug Abuses terms a long-term, treatable brain disease, and; (3) the necessary changes to laws and policies surrounding those directly, and indirectly, affected. Gaps in treatment alone demonstrate the distance that must be traveled to provide adequate health care coverage and erase the social stigmatization of the disease and its treatment. The recommendations and action items from the Summit are summarized in the report, *Experienced Lawyers, American Families, and the Opioid Crisis—Report of the Opioid Summit May 2018* found at <http://ambar.org/opioid>.

With this Resolution, the ABA adopts the recommendations and action points in the report and urges all federal, state, local, territorial, and tribal courts, governmental entities, bar associations, public health agencies, lawyer assistance programs, lawyer regulatory entities, institutions of legal education, and law firms to implement those recommendations and action points.

### II. ADDRESSING THE OPIOID CRISIS: BACKGROUND AND OVERVIEW

Now in its 20<sup>th</sup> year, the opioid epidemic continues to devastate families, weaken communities, and overwhelm public service agencies. Described as the largest human-caused public health emergency in history, the opioid epidemic has claimed more than 360,000 lives since 1999. The severity of the epidemic is reflected by its grim statistics:

life expectancy in the United States is declining, opioid overdose deaths now outnumber firearm and automobile-related deaths, opioid-related incarceration rates have surged, labor force participation among men is declining, and in many states, foster care systems are overwhelmed, with more than half of all children in some states requiring services due to opioid misuse in the home. Despite broad coverage of the size and scope of the epidemic, recent estimates indicate that overdoses related to opioids continue to increase each year, with more than 42,249 overdose deaths recorded in 2016 alone.<sup>1</sup> The complexity and magnitude of the problem requires a broad, multiagency and multidisciplinary approach, informed by medical, social-behavioral, and public health disciplines and research, supported by federal, state, and local policies and laws, that enable greater access and sustained commitment to education, prevention, and treatment targeting both individuals and families. Although the scope of the problem exceeds the resources and capacity of any single entity, the wide-ranging calls to action highlight the urgency in building a comprehensive framework for responding to the crisis.

The legal profession is a critical partner in addressing this issue, uniquely positioned to support, inform, and advocate for effective policies and laws, while current statistics underscore the present exigency of doing so. For example, recent estimates from the CDC indicate that as many as 5 million adults struggle with opioid use disorders, and some additional 11.5 million adults misuse opioids on a regular basis, with research suggesting that roughly 8% to 12% will eventually develop drug dependence.<sup>2</sup> Early focus on prescription opioid misuse alone has had an unintended but predictable consequence of increasing illicit opioid (*e.g.*, heroin and fentanyl) initiation and misuse.<sup>3</sup> Estimates suggest that in 2016, 170,000 adults began using heroin for the first time, adding to the roughly 948,000 individuals with long-term heroin use histories.<sup>4</sup> This is particularly concerning given the disproportionate dangers of illicit opioids such as heroin and fentanyl.

Despite efforts to curtail opioid prescribing, overall use rates in the United States remain high, with roughly one-third of adults in 2015 reporting use of an opioid-based pain reliever at some point in the previous year.<sup>5</sup> Most of these were short term, post injury or procedure prescriptions, with chronic use mostly limited to the elderly and disabled populations. Among those that misuse opioids, the vast majority continue to obtain them from a friend, relative, or drug dealer—the common narrative of prescriber to patient to addiction is not supported by the evidence. Moreover, the majority of those misusing opioids identify untreated physical pain as the reason for misuse. These findings

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<sup>1</sup> Seth, P., Scholl, L., Rudd, R. A., and Bacon S. Overdose deaths involving opioids, cocaine, and psychostimulants—United States, 2015–2016. *MMWR Morbidity and Mortality Weekly Report*, 67(2):349–358. DOI: <http://dx.doi.org/10.15585/mmwr.mm6712a1>

<sup>2</sup> Centers for Disease Control and Prevention (CDC) (2018). Accessed from: <http://www.cdc.gov/drugoverdose/epidemic/index.html>

<sup>3</sup> Theodore Cicero, et al., Increased use of heroin as an initiating opioid of abuse, *Addictive Behaviors*, 2017

<sup>4</sup> Health and Human Services (HHS) (2018). <https://www.hhs.gov/opioids/>

<sup>5</sup> Han, B., Compton, W. M., Blanco, C., Crane, E., Lee, J., & Jones, C. M. (2017). Prescription opioid use, misuse, and use disorders in US adults: 2015 National Survey on Drug Use and Health. *Annals of internal medicine*, 167(5), 293-301.

underscore the need to focus prescribing policy efforts at drastically reducing the number of left-over opioids available for diversion as well as societal efforts to comprehensively address pain treatment.<sup>6</sup>

Although often construed as an epidemic limited to middle-aged, rurally-located, white men, the opioid epidemic has reached across all regions and demographics of society. Current estimates indicate that among young adults aged 12 to 17 years, nearly 122,000 youths are dependent on prescription opioids, while an additional 21,000 admit to using heroin. Similarly, opioid use among women has increased steeply as well, with death rates climbing more steeply among this population than among men (400% vs. 239%) between 1999 and 2009, perhaps reflecting women's higher rates of chronic pain and subsequently, disproportionate use of opioid based pain relievers. The steep increase in opioid misuse among women has led to an increase in births complicated by opioids, with a baby born withdrawing from opioids every 25 minutes.<sup>7</sup> This has also caused a drastic increase in the rate of incarceration of women and has had a huge impact on families.<sup>8</sup> Although rarely the focus of concern, older adults represent the fastest growing group with diagnosed opioid misuse, affecting 6 out of every 1,000 older adults.<sup>9</sup> In addition, the black and Latino communities have been adversely affected as well, with strong evidence suggesting that the rise in use of synthetic opioids and heroin is spilling into urban centers, leading to increases in drug-related mortality rates.<sup>10</sup>

Curbing opioid misuse has been challenging in part because of the many ways in which opioids have flooded into communities. Sources of opioids include (1) valid prescriptions provided to a patient, (2) opioid prescriptions intended for one person, but shared with someone else, usually a family member or friend, (3) the illicit sale of opioid prescriptions on the street, (4) fraudulent prescriptions distributed through pill mills, and (5) illicit use of heroin and other opioid-based substances.<sup>11</sup> Importantly, the source and type of opioid used may change over time. For example, research suggests that more than 80% of new heroin users, began only after misusing prescription opioids, with the majority of these individuals receiving prescriptions either directly from physicians or through prescription sharing from a family member or friend.<sup>12</sup>

Early efforts to address the opioid epidemic sought to decrease the availability of opioid prescriptions and opioid-based medications on the streets. These first steps

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<sup>6</sup> (Cicero, *supra*).

<sup>7</sup> National Institute on Drug Abuse (NIDA) (2018). Accessed from: <https://www.drugabuse.gov/drugs-abuse/opioids>

<sup>8</sup> [https://www.prisonpolicy.org/reports/women\\_overtime.html](https://www.prisonpolicy.org/reports/women_overtime.html); A shared sentence—The Annie E. Casey Foundation.

<sup>9</sup> Administration for Community Living (ACL) (2018). Accessed from: <https://www.acl.gov> and [www.drugabuse.gov](http://www.drugabuse.gov)

<sup>10</sup> Alexander, M. J., Kiang, M. V., & Barbieri, M. (2018). Trends in Black and White Opioid Mortality in the United States, 1979–2015. *Epidemiology*.

<sup>11</sup> Minnesota State Government (2018). Minnesota's Opioid Action Plan. Available from: [http://mn.gov/gov-stat/pdf/2018\\_02\\_14\\_Minnesota\\_Opioid\\_Action\\_Plan.pdf](http://mn.gov/gov-stat/pdf/2018_02_14_Minnesota_Opioid_Action_Plan.pdf)

<sup>12</sup> NIH/NIDA (2018). Prescription Opioids and Heroin. Available from: <https://www.drugabuse.gov/publications/research-reports/relationship-between-prescription-drug-heroin-abuse/prescription-opioid-use-risk-factor-heroin-use>

initiated an important trend towards revised prescribing guidelines, better tracking systems of prescription medications, and eventually, decreased the number of drugs available for misuse. However, during the same period, new, cheaper, and more potent sources of heroin began flooding into markets, creating a ready substitute for individuals already dependent on prescription opioids encountering increasing difficulty in obtaining prescription opioids, fueling a resurgence in new heroin users, and consequently, more overdose related deaths.<sup>13</sup> Moreover, the increase in heroin drug use led to other, public health challenges, including: increase in other types of substance misuse; Hepatitis, HIV, and other disease outbreaks; complex comorbidities among users,<sup>14</sup> increased demand on first-responders, hospital and emergency department services,<sup>15</sup> and child welfare and other social service agencies.<sup>16</sup> Consequences also include shortages of available pain medications for hospitalized patients, including cancer patients, raising concern about the heavy-handed responses to opioid misuse that fail to consider the broader implications of narrowly-focused efforts.<sup>17</sup>

Both the success in initially lowering the flood of prescription opioids and the unintended consequence of fueling a broader market for heroin while limiting the availability of necessary pain medications underscores the complexity of the opioid crisis and the necessity of carefully crafting and enacting policies and laws that consider the wider problems associated with opioid misuse and support broader public health efforts to reduce drug use and drug-overdose deaths. To do so, requires awareness of the underlying risk factors driving the opioid epidemic, eradicating barriers to treatment, and working towards programs that support rehabilitation and recovery through the availability of a continuum of services over time.

Additionally, in the wake of the crisis, local, state, and federal entities rushed to respond by issuing new laws and regulations aimed at ensuring access to the prescription drug, naloxone—used to prevent opioid overdose and death.<sup>18</sup> Despite specific legislation allowing for more flexibility in pharmacist dispensing, including without a prescription in some states, these efforts have fallen short of program goals. Pharmacists report, in part, that requirements for training before dispensing, lack of insurance coverage for the drug, fear of harming business and/or contributing to opioid misuse, and uncertainty about

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<sup>13</sup> NIH/NIDA (2018). Heroin use is driven by its low cost and high availability. Available from: <https://www.drugabuse.gov/publications/research-reports/relationship-between-prescription-drug-abuse-heroin-use/heroin-use-driven-by-its-low-cost-high-availability>

<sup>14</sup> Jiang, R., Lee, I., Lee, T. A., & Pickard, A. S. (2017). The societal cost of heroin use disorder in the United States. *PloS one*, 12(5), e0177323.

<sup>15</sup> Ronan, M. V., & Herzig, S. J. (2016). Hospitalizations related to opioid abuse/dependence and associated serious infections increased sharply, 2002–12. *Health Affairs*, 35(5), 832-837; Unick, G. J., Rosenblum, D., Mars, S., & Ciccarone, D. (2013). Intertwined epidemics: national demographic trends in hospitalizations for heroin-and opioid-related overdoses, 1993–2009. *PloS one*, 8(2), e54496.

<sup>16</sup> National Advisory Committee on Rural Health and Human Services. (2016). Families in Crisis: The Human Service Implications of Rural Opioid Misuse. A policy Brief, July 2016. Available from: <https://www.hrsa.gov/advisorycommittees/rural/publications/opioidabuse.pdf>

<sup>17</sup> STATNews (2018). Hospitals are confronting a new opioid crisis: an alarming shortage of pain meds. Available from: <https://www.statnews.com/2018/03/15/hospitals-opioid-shortage/>

<sup>18</sup> Davis, C., & Carr, D. (2017). State legal innovations to encourage naloxone dispensing. *Journal of the American Pharmacists Association*, 57(2), S180-S184.

demand for naloxone, as well as concerns regarding its impact on the overall public health and reluctance to embrace the value of these policies, represent stubborn obstacles to ensuring drug access.<sup>19</sup> In response, a chorus of stakeholders has urged broader implementation of these laws, yet without continued, collaborative effort to educate on this issue, the reach of these policies will continue to be limited.<sup>20</sup> At this critical juncture, efforts to clarify responses to the opioid crisis in legal and public policy terms that support action, ensure health, advance effective strategies and programs, and safeguard individual and family rights, are sorely needed.

### III. RECOMMENDATIONS AND ACTION POINTS

#### FOCUS AREA 1: EXPAND ACCESS TO TREATMENT, EDUCATION, AND ADVOCACY EFFORTS

**Recommendation 1: Invest in multidisciplinary education and training opportunities for individuals, families, vulnerable populations, professionals, and community stakeholders.**

The magnitude of the opioid crisis requires broad-scale educational efforts targeting individuals, families, high-risk groups, professionals, and community stakeholders.<sup>21</sup> The legal profession is in a unique position to guide such educational efforts by advancing policies and laws that address the need for education while providing transparency and insight in terms of current limitations in policy and law and highlighting areas for change.

Currently, rates of substance misuse continue to climb, with opioids representing one of the most frequently misused substances.<sup>22</sup> Research has identified several factors associated with increased opioid misuse, including: receiving multiple prescriptions, taking higher dosages and receiving prescriptions for longer lengths of time, prior history of substance abuse, and living in socially and economically under resourced and ruraly located regions. Targeted educational efforts addressing these risk factors represent a first line approach in prevention strategies focused on reducing the number of new opioid users.<sup>23</sup>

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<sup>19</sup> Bakhireva, L. N., Bautista, A., Cano, S., Shrestha, S., Bachyrycz, A. M., & Cruz, T. H. (2017). Barriers and facilitators to dispensing of intranasal naloxone by pharmacists. *Substance abuse*, 1-11.

<sup>20</sup> Adams, J. M. (2018). Increasing Naloxone Awareness and Use: The Role of Health Care Practitioners. *JAMA*, 319(20), 2073-2074.

<sup>21</sup> SAMSHA (2018). Opioid Overdose Prevention Toolkit, available at: <https://www.samhsa.gov/capt/tools-learning-resources/opioid-overdose-prevention-toolkit> ; SAMSHA (2018). Substance Abuse Treatment and Family Therapy. Available at: <https://www.ncbi.nlm.nih.gov/books/NBK64269/> ; AHA (2018) Stem the Tide: Addressing the Opioid Epidemic. Available at: <https://www.aha.org/system/files/content/17/opioid-toolkit.pdf>

<sup>22</sup> Han, B., Compton, W. M., Blanco, C., Crane, E., Lee, J., & Jones, C. M. (2017). Prescription opioid use, misuse, and use disorders in US adults: 2015 National Survey on Drug Use and Health. *Annals of Internal Medicine*, 167(5), 293-301.

<sup>23</sup> CDC (2018). Prescription opioids: Risk factors for prescription opioid misuse and overdose. Available at: <https://www.cdc.gov/drugoverdose/opioids/prescribed.html>

Although several risk factors have been identified, the effect of any one risk factor will vary with other factors, such as age, availability of social support, education and income levels, and broader socio-structural factors in the community. Thus, for education programs to be successful at reducing the impact of the opioid crisis, programs must be tailored to individual needs that reflect differences in age, gender, ethnicity, culture, and environment.<sup>24</sup> In response, the following key recommendations for action are advanced:

- 1.1 Develop education and awareness programs targeting prevention, treatment, and advocacy, both within and across stakeholder groups, and for both opioid and other substance misuse disorders.
- 1.2 Ensure educational efforts provide targeted immediate next steps for those with acute opioid and other substance misuse disorders.
- 1.3 Require continuing education for all professionals (e.g., CLE, CME, CEU) to keep abreast of policy, best practices, and treatment options.
- 1.4 Actively collaborate with professional organizations (e.g., AMA, APHA, NASW, ANA, SAMHSA) to build multidisciplinary capacity and engagement across key stakeholders.
- 1.5 Disseminate educational and advocacy materials broadly, through professional organizations, civic organizations, faith-based communities, service and provider networks, etc. regarding opioid and substance misuse disorders.

**Recommendation 2: Expand access to treatment and recovery for individuals with opioid and substance misuse disorders and aggressively address stigmatism.**

Multiple obstacles to treatment exist, ranging from stigma associated with seeking help, poor access to services reflecting under-resourced communities, insurance barriers, and exorbitant out-of-pocket costs, inadequate and inappropriate treatment programs, poor understanding of treatment modalities and effectiveness, lack of emphasis on long-term recovery and support services, lack of access to medication-assisted treatment programs, and poor coordination between available services and individual needs for treatment. Stigma is particularly insidious in that it not only dissuades users from seeking treatment, but it also undermines public empathy and support for the type of broad scale changes in treatment programing and public policy that are necessary to address the opioid crisis.<sup>25</sup>

Ensuring access to the right treatment at the right time is fundamental to addressing opioid misuse and preventing drug overdose deaths. Expanding insurance—both in terms

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<sup>24</sup> SAMSHA (2018). Preventing prescription drug misuse: Programs and Strategies. Available from: <https://www.samhsa.gov/capt/sites/default/files/resources/preventing-prescription-drug-misuse-strategies.pdf>

<sup>25</sup> Nicholson, T., Duncan, D. F., White, J., & Watkins, C. (2012). Focusing on abuse, not use: A proposed new direction for US drug policy. *Drugs: education, prevention and policy*, 19(4), 303-308.

of recognizing the chronicity of substance misuse disorders as well as removing barriers to proven treatment strategies, such as medication-assisted treatment, are paramount to increasing successful outcomes.<sup>26</sup> Additional barriers to treatment reflect gaps in services for large regions of the United States,<sup>27</sup> as well as lack of parity in mental health services, poor coordination of treatment support and services, and a lack of effective programming.<sup>28</sup> In response, the following key recommendations for action are advanced:

- 2.1 Invest in research focused on best-practices in treatment and long-term recovery and support; employ evaluation and outcome methods of treatment modalities to identify best-practices.
- 2.2 Engage individuals directly in decision-making about treatment options.
- 2.3 Expand access to treatment for opioid and substance misuse disorders, including removing insurance barriers and increasing access to medication assisted treatment.
- 2.4 Create a continuum of services that support individuals and families in and across all stages of substance misuse, including: immediate crisis, withdrawal, and long-term recovery.
- 2.5 Incorporate services and supports for socio-behavioral challenges that often co-exist with opioid and substance misuse disorders.

**Recommendation 3: Establish comprehensive treatment and outreach efforts tailored to the diverse needs of individuals and families struggling with opioid and substance misuse disorders.**

Fewer than 10% of those struggling with opioid misuse disorder are receiving treatment,<sup>29</sup> and of those receiving some form of treatment, most have limited access to the full range of services and supports necessary to reach and sustain recovery. Best-practices in treatment require a continuum of services ranging from intervention to recovery, with individually tailored services and supports that meet individual needs. Over time, treatment must be dynamic, varying the intensity and frequency of in-patient and out-patient services, with counseling and medication as needed for well-being. Best practice

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<sup>26</sup> Becker, W. C., Fiellin, D. A., Merrill, J. O., Schulman, B., Finkelstein, R., Olsen, Y., & Busch, S. H. (2008). Opioid use disorder in the United States: insurance status and treatment access. *Drug and Alcohol Dependence*, 94(1), 207-213.

<sup>27</sup> Kneebone, E. & Allard, S. W. (2018). A nation in overdose peril: Pinpointing the most impacted communities and the local gaps in care. A Brookings Institute Report. Available from: <https://www.brookings.edu/research/pinpointing-opioid-in-most-impacted-communities/>

<sup>28</sup> Stoller, K. B., Stephens, M. C., & Schorr, A. (2016). Integrated service delivery models for opioid treatment programs in an era of increasing opioid addiction, health reform, and parity. Baltimore, MD: American Association for the Treatment of Opioid Dependence.

<sup>29</sup> SAMHSA (3028). SAMHSA Shares Latest Behavioral Health Data, Including Opioid Misuse. Available from: <https://newsletter.samhsa.gov/2017/10/12/samhsa-new-data-mental-health-substance-use-including-opioids/>

consists of seamless transition across these treatment modalities, aided by wrap-around services tailored to the individual.<sup>30</sup>

Timing is equally important to successful treatment. Because current demand far exceeds system capacity, individuals requesting treatment are often placed on waiting lists, forced to make do with a set of services currently available but not necessarily matched to need, or given an inappropriate set of services given the individual's current needs. For example, in some rural communities, treatment is limited, often singularly focused on initial withdrawal and detoxification, and may involve significant travel requirements.<sup>31</sup>

These barriers to effective treatment are further compromised by policies and regulations that limit access to treatment, such as insurance policies that prohibit reimbursing for certain medications used to treat substance misuse disorders at stand-alone clinics, rigid criteria for treatment approval, lack of coverage for certain medications, and time-limits that undermine treatment success.<sup>32</sup> In addition to insurance barriers, individuals with opioid use disorders struggle to find the correct entry point to services, ensuring safe, confidential referral to services. Several communities have developed variations on the “single point of entry” model to treatment referral. Single point of entry models strives to connect individuals to the continuum of available services and supports regardless of entry point in the system, to ensure the right combination of services are available at the right time. Efforts to achieve single points of entry require building partnerships across providers through community education, as well as the use of case management to ensure coordination and integration of treatments, supported by wrap-around services targeting physical, mental health, and social support needs.<sup>33</sup> In response, the following key recommendations for action are advanced:

- 3.1 Address social and environmental inequities placing individuals at risk for opioid and substance misuse disorders.
- 3.2 Develop comprehensive treatment and recovery programs tailored to meet individual needs, including programs sensitive to age, gender, race/ethnicity, family/social networks, and socioeconomic differences.

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<sup>30</sup> Stoller, K. B., Stephens, M. A. C., & Schorr, A. (2016). Integrated Service Models for Opioid Treatment Programs in an Era of Increasing Opioid Addiction, Health Reform, and Parity. A final report submitted to American Association for the Treatment of Opioid Dependence (Contract No. #HHSP233201400268P).

<sup>31</sup> National Advisory Committee on Rural Health and Human Services. (2016). Families in Crisis: The Human Service Implications of Rural Opioid Misuse. A policy Brief, July 2016. Available from: <https://www.hrsa.gov/advisorycommittees/rural/publications/opioidabuse.pdf>

<sup>32</sup> Feder, K. A., Mojtabai, R., Krawczyk, N., Young, A. S., Kealhofer, M., Tormohlen, K. N., & Crum, R. M. (2017). Trends in insurance coverage and treatment among persons with opioid use disorders following the Affordable Care Act. Drug and alcohol dependence, 179, 271-274.

<sup>33</sup> Stoller, K. B., Stephens, M. A. C., & Schorr, A. (2016). Integrated Service Models for Opioid Treatment Programs in an Era of Increasing Opioid Addiction, Health Reform, and Parity. A final report submitted to American Association for the Treatment of Opioid Dependence (Contract No. #HHSP233201400268P).

- 3.3 Remove barriers to treatment and recovery programs by addressing legal and policy limitations that prevent access to effective, affordable, and best-practice evidence-based treatments and supports.
- 3.4 Harness federal and state resources while working with community stakeholders to create comprehensive, targeted strategies for addressing local needs in responding to opioid and substance misuse disorders.
- 3.5 Harness social media platforms and grassroots advocacy to destigmatize the disease and recovery for opioid and substance misuse disorders.

## **FOCUS AREA 2: STRENGTHEN AND SUPPORT FAMILIES STRUGGLING WITH OPIOID AND SUBSTANCE MISUSE DISORDERS**

**Recommendation 4: Increase the legal profession’s capacity to respond to and meet individual and family needs through partnerships, collaboration, and dissemination of information and resources in support of individual and family needs.**

The challenge for the legal profession in mounting a response to the crisis is twofold. First, the legal profession must embark on a wide-scale effort to educate its members, both in terms of working with clients and their families and communities to address the crisis, but also in terms of recognizing the risk of opioid misuse among colleagues and friends in the profession. The first step in this process is outlining key areas and curricula that provide in-depth knowledge of the background and nature of the problem, including risk factors for opioid dependence; instruction on best-practices in developing and accessing a continuum of services for both clients and their families; details key legal and ethical issues related to practice and advocacy, including both individual- and community-level factors; and mobilizes professional agency in outlining next-steps in taking action.

Second, information and resources aimed at connecting individuals and families with services and supports, as well as best-practice guidelines for working with clients, must be collected, prioritized, organized, and disseminated in order to be readily available and easily accessible. Collaboration with key stakeholders and other professionals is necessary to build a community-level response that is both effective (*i.e.* found and accessed quickly during a crisis) and broad enough to meet the breadth of challenges affecting individuals and families.<sup>34</sup> In response, the following key recommendations for action are advanced:

- 4.1 Require CLE completion of learning modules focused on opioid and substance misuse disorders; infuse law school curriculums with training on opioid and substance misuse disorders.

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<sup>34</sup> Murphy, K., Becker, M., Locke, J., Kelleher, C., McLeod, J., & Isasi, F. (2016). Finding solutions to the prescription opioid and heroin crisis: A road map for states. Washington, DC: National Governors Association Center for Best Practices.

- 4.2 Create and disseminate an inventory of resources including educational references about the breadth and scope of the problem, agencies and services available to support families in crisis, treatment and recovery programs, and practice guidelines for working with clients.
- 4.3 Build partnerships with key stakeholders (e.g., AMA, APHA) focused on education and advocacy leadership in support of families.
- 4.4 Build partnerships across government agencies and private sector service providers to improve crisis and long-term services and supports for families struggling with opioid and substance misuse disorders.
- 4.5 Foster community-wide education and discussion; compile a list of expert speakers on topics related to family, law, and the opioid crisis.

**Recommendation 5: Promote policies and laws that support families and caregivers struggling with opioid and substance misuse disorders.**

The U.S. policy of criminalizing drug abuse has not worked to deter the crisis. Medical and health policy experts have argued for decades that substance misuse is best understood as a chronic condition, like diabetes, that requires ongoing treatment and support at not only the individual level, but at the population level as well.<sup>35</sup> Importantly, a public health model stresses evidenced based solutions that address the multifaceted nature of the problem.

In light of the failure of the war on drugs, several promising approaches supported by policy and implemented at the population level have demonstrated positive results, including: shorter sentencing, removing felony charges for non-violent offenders, a focus on harm reduction, increasing access to treatment, and embracing policies that expand a seamless continuum of services and supports. Importantly, this includes strengthening the user's social network, including the family, as well as investment in the broader community. Communities must engage in outreach efforts aimed at destigmatizing treatment and increasing safe and confidential locations for those seeking treatment, as well as lend protection to those in a position to render life-saving aid. In response, the following key recommendations for action are advanced:

- 5.1 Adopt a public health model of intervention, including efforts focused on prevention, strengthening coordination of services and treatment, and supportive of long-term recovery.
- 5.2 Engage in advocacy, policy, and outreach efforts that seek to destigmatize treatment and keep families together.

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<sup>35</sup> Kolodny, A., Courtwright, D. T., Hwang, C. S., Kreiner, P., Eadie, J. L., Clark, T. W., & Alexander, G. C. (2015). The prescription opioid and heroin crisis: a public health approach to an epidemic of addiction. *Annual review of public health*, 36, 559-574.

- 5.3 Develop policies and laws that support the legal needs of caregivers, including kinship care, foster care, and grandparents raising grandchildren.
- 5.4 Increase awareness and support for individuals struggling with opioid and substance misuse disorders, with unique needs, including children, older adults, and pregnant women, populations living with chronic pain and disability, and those incarcerated or recently incarcerated.
- 5.5 Extend education and protection to those in a position to intervene during crisis by broadening protection under Good Samaritan Laws, increasing access to naloxone by family members, and educating family members on effective ways to intervene.

**Recommendation 6: Support policies and laws that support families in crisis and strengthen the family unit.**

Estimates suggest that the United States has spent more than one trillion dollars related to the opioid epidemic since 2001.<sup>36</sup> Reports of families exhausting their resources in the face of multiple urgent medical crises, followed by a revolving door of barriers to treatment and relapse, disrupted families and work, underscore the impact of addiction on the many lives connected to the individual struggling with drug use.<sup>37</sup> Estimates suggest that perhaps as much as 20% of the rising increase in unemployment among men between the ages of 25 and 55 is due to opioid misuse.<sup>38</sup> Moreover, the increase in opioid use among women of child bearing age has led to more than a three-fold rise in opioid-addicted births, which are associated with considerable medical complications, including withdrawal, birth defects, and developmental delays.<sup>39</sup> The opioid epidemic has impacted caregiving across generations as well, with a steep increase in the number of older adults raising grandchildren, as well as interrupting elder care, spousal support, and other kinship care. The disruption to families has led to increasing strain on the foster care system, which in turn, is struggling to provide services and supports.<sup>40</sup> The complexity and long-term consequences of these effects on family require that policies and programs be framed to address the intersecting needs of not just the user, but of all members of the family.<sup>41</sup> In response, the following key recommendations for action are advanced:

<sup>36</sup> Altarum (2018). Economic Toll Of Opioid Crisis In U.S. Exceeded \$1 Trillion Since 2001. Available from: <https://altarum.org/about/news-and-events/economic-toll-of-opioid-crisis-in-u-s-exceeded-1-trillion-since-2001>

<sup>37</sup> WSJ (2018). After Addiction Comes Families' Second Blow: The Crushing Cost of Rehab. Available from: <https://www.wsj.com/articles/after-addiction-comes-families-second-blow-crushing-cost-of-rehab-1520528850>

<sup>38</sup> Hollingsworth, A. Ruhm, C. J., & Simon, K. (2017). Macroeconomic Conditions and Opioid Abuse. NBER Working Paper No. 23192. Available from: <http://www.nber.org/papers/w23192>

<sup>39</sup> Ko, J. Y. (2016). Incidence of neonatal abstinence syndrome—28 states, 1999–2013. MMWR. Morbidity and mortality weekly report, 65.

<sup>40</sup> NYT (2017). The Opioid Plague's Youngest Victims: Children in Foster Care. Available from: [https://www.nytimes.com/2017/12/28/opinion/opioid-crisis-children-foster-care.html?\\_r=0](https://www.nytimes.com/2017/12/28/opinion/opioid-crisis-children-foster-care.html?_r=0)

<sup>41</sup> Smith, L (2018). The Opioid Epidemic and its Effect on Young Children. A report to the Bipartisan Policy Center. Available from: <https://bipartisanpolicy.org/blog/the-opioid-epidemic-and-its-effect-on-young-children/>

- 6.1 Decriminalize non-violent and low risk drug-related crimes in favor of alternative programs that increase access to treatment, remove obstacles to employment, enable reentry into work and family, and mitigate other risk factors for drug misuse.
- 6.2 Expand access to non-profit community-based treatment programs, particularly in rurally located communities. Target programs to meet individual and family needs, e.g., family and residential treatment programs, teen programs, older adult programs, and transitional programs; clear obstacles to receiving the right treatment at the right time.
- 6.3 Ensure drug courts and family courts have up-to-date information for programs and services offering medication assisted treatment; consider mandating medically assisted treatment for non-violent/low-risk drug offenders.
- 6.4 Expand referral to drug and family courts for cases involving drug-related offenses; recognize that criminal prosecution is ineffective in combating opioid and substance misuse.
- 6.5 Expand access to medically assisted treatment and recovery for incarcerated populations.

## **FOCUS AREA 3: ENACT LEGAL AND POLICY REFORMS THAT INCREASE ACCESS TO TREATMENT AND RECOVERY, AND LIMIT UNWARRANTED PRESCRIBING AND DRUG MISUSE**

**Recommendation 7: Identify state laws and initiatives that have been shown to decrease opioid and substance misuse while ensuring access to pain medications for those with chronic pain.**

Curbing opioid misuse has been challenging in part because of the many ways in which opioids have flooded into communities.<sup>42</sup> The early success in initially lowering the flood of prescription opioids and the unintended consequence of fueling a broader market for heroin while limiting the availability of necessary pain medications underscores the complexity of the opioid crisis and the necessity of carefully crafting and enacting policies and laws that consider the wider problems associated with opioid misuse and support broader public health efforts to reduce drug use and drug-overdose deaths. To do so, requires awareness of the underlying risk factors driving the opioid epidemic, eradicating barriers to treatment, and working towards programs that support rehabilitation and recovery through the availability of a continuum of services over time.

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<sup>42</sup> STATNews (2018). Hospitals are confronting a new opioid crisis: an alarming shortage of pain meds. Available from: <https://www.statnews.com/2018/03/15/hospitals-opioid-shortage/>

Building flexible, effective policies requires access to accurate, substantive, and timely data that informs family members, stakeholders, and all of those engaged in addressing the opioid crisis at the family and community level. Although improvements in data compilation and sharing have occurred, additional progress is needed to continue to address the problem. For example, interagency collecting and sharing of data can help to identify potential hotspots of drug activity, doctor shopping, and fraudulent dispensing of prescriptions,<sup>43</sup> as well as comprehensive toolkits for sharing promising programs.<sup>44</sup>

Most importantly, for these policies to work, individuals affected by the opioid crisis must feel safe in taking action. For example, policies that seek to strengthen Good Samaritan Laws or enact Angel Policies assure bystanders that efforts to intervene in the midst of an overdose does not result in personal harm.<sup>45</sup> Removing limitations in how the lifesaving drug, naloxone, is dispensed, including allowing family members to administer the drug, is another approach to retooling today's state and federal laws to more readily address the crisis.<sup>46</sup> In response, the following key recommendations for action are advanced:

- 7.1 Remove barriers to seeking treatment for fear of prosecution.
- 7.2 Extend options for disposing of unused drugs and seeking treatment.
- 7.3 Revise minimum sentencing laws for non-violent/low risk drug offenders; allow those incarcerated under minimum sentencing laws to appeal their sentencing.
- 7.4 Enact best-practice prescribing and drug monitoring laws; create data sharing capabilities across state lines.
- 7.5 Support interagency data collection and analytics to identify opioid and drug misuse hot spots to better direct resources and interventions.

**Recommendation 8: Expand research and understanding of litigation and policy issues with the aim of addressing the sometimes indirect yet complex issues affected by the opioid crisis.**

The potential to harness existing policies and laws in combating the opioid crisis has been underutilized. Effort to leverage existing policy while enacting new policy holds promise

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<sup>43</sup> SAMHSA (2018). Preventing Opioid Misuse and Overdose: Data Sources and Tools to Inform Assessment and Planning Efforts. Available at: <https://www.samhsa.gov/capt/sites/default/files/resources/national-data-sources-opioids-related-needs-assessment.pdf>

<sup>44</sup> SAMHSA (2018). Opioid Overdose Prevention Toolkit. Available from: <https://www.samhsa.gov/capt/tools-learning-resources/opioid-overdose-prevention-toolkit>

<sup>45</sup> NCSL (2018). Drug overdose immunity and good Samaritan laws. Available from: <http://www.ncsl.org/research/civil-and-criminal-justice/drug-overdose-immunity-good-samaritan-laws.aspx>

<sup>46</sup> SAMHSA (2018). Naloxone. Available from: <https://www.samhsa.gov/medication-assisted-treatment/treatment/naloxone>

for addressing some of the foundational problems associated with drug misuse, such as unemployment, limited access to treatment, and housing instability. For example, the Family Medical Leave Act (FMLA),<sup>47</sup> and the American with Disabilities Act (ADA) provide standards applicable to treatment. Nonetheless, employees encounter work disruptions when admitting substance misuse and/or attempting to return to work after prolonged absence for treatment, and evidence suggests that the failure for these laws to protect workers may disproportionately affect those communities of workers struggling the most with opioid misuse.<sup>48</sup> Finally, requesting leave requires admission of substance misuse, a behavior that is heavily stigmatized, and which may lead to individuals' attempt to avoid seeking treatment for fear of being viewed as incompetent. In response, the following recommendations for action are advanced:

- 8.1 Recognize that opioid and substance misuse affects those dependent on the user, including parents, grandparents, and children. Develop partnerships with agencies that serve these populations.
- 8.2 Leverage existing policies and regulations that offer protection for individuals and families struggling with opioid and substance misuse disorder, *e.g.*, ADA and Fair Housing Act as well as parity laws in mental health treatment.
- 8.3 Ensure treatment houses provide safe, effective environments for those seeking treatment and recovery. Require quality outcomes reporting for all treatment providers.
- 8.4 Require all correctional facilities to develop collaborative relationships with community supports and providers and engage in transition planning to ensure treatment is uninterrupted.
- 8.5 Expand harm reduction policies and strategies and decriminalize misdemeanor drug offenses.

**Recommendation 9: Recognize the inconsistent response and action to the opioid crisis versus other forms of substance misuse and advocate for policies that address underlying health and socioeconomic disparities.**

The opioid epidemic has laid bare a history of policies and laws that have disproportionately criminalized African-American and minority populations through efforts to “control crime” and restore “public order” that stands in stark contrast to current calls to broaden public health efforts and ensure access to treatment. Although efforts to equip states with the resources necessary to address the consequences of the opioid epidemic are to be applauded and reflect increasing awareness that substance abuse is a treatable

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<sup>47</sup> United States Department of Labor (2018). Family and Medical Leave Act Advisor: Wage and Hour Division (WHD). Available from: <https://www.dol.gov/WHd/opinion/FMLA/prior2002/FMLA-69.htm>

<sup>48</sup> Hill, S. A. (2006). The ADA's Failure to Protect Drug Addicted Employees Who Want to Seek Help and Rehabilitation. U. Pa. J. Lab. & Emp. L., 9, 973.

disease rather than a personal weakness or moral failing, policies that would extend the gentler war on drugs approach to those who misuse other types of drugs, have been slow to develop.<sup>49</sup> Given the amount of focus on the current opioid epidemic, and the shifting sentiment about the nature of substance use disorders as a treatable disease, considerable opportunity exists to extend the efforts in fighting the opioid crisis to other types of substance misuse, while revisiting prior policies that resulted in mass incarceration and the devastating consequences associated with these policies. Simply, it is time to extend the public health call to address the opioid crisis to substance use disorders of all types and for all communities. In response, the following recommendations for action are advanced:

- 9.1 Increase state and federal funding to provide treatment for uninsured or underinsured individuals struggling with opioid and substance use disorders.
- 9.2 Increase access to family court and drug courts; link treatment and recovery programs to courts.
- 9.3 Require education of first-responders and other medical personal on substance misuse and mental health.
- 9.4 Mandate all survivors of drug overdoses be referred for treatment before discharging care.
- 9.5 Allow greater flexibility in minimum sentencing laws for all non-violent/low risk drug offenses; require all correctional facilities to follow best-practices in treating opioid and substance misuse.

#### IV. CONCLUSION

These nine recommendations and 45 action points are a significant step by the Association in confronting the opioid crisis. The recommendations and action points build on the broader understanding that addressing the opioid crisis requires reframing our understanding of drug use and abuse from a moral failing to a chronic disease, and that the effort to do so requires leadership within and across professional organizations, as well as a commitment to reshaping policy and regulations to better support individuals, families, and communities.

Respectfully submitted,

Marvin S.C. Dang  
Chair, ABA Senior Lawyers Division  
January, 2019

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<sup>49</sup> Wall Street Journal (2018). Opioid vs. Crack: Congress Reconsiders Its Approach to Drug Epidemic. Available from: <https://www.wsj.com/articles/opioid-v-crack-congress-reconsiders-its-approach-to-drug-epidemic-1525518000>

**GENERAL INFORMATION FORM**

Submitting Entity: Senior Lawyers Division

Submitted By: Marvin S.C. Dang, Chair, Senior Lawyers Division

1. Summary of Resolution(s).

The Resolution urges the American Bar Association to adopt and urges all federal, state, local, territorial, and tribal courts, governmental entities, bar associations, public health agencies, lawyer assistance programs, lawyer regulatory entities, institutions of legal education, and law firms to implement the recommendations and action points in the report, *Experienced Lawyers, American Families, and the Opioid Crisis—Report of the Opioid Summit May 2018* found at <http://ambar.org/opioid>.

2. Approval by Submitting Entity.

The Resolution was approved by ABA Senior Lawyers Division's Council on August 4, 2018, during the Annual Meeting in Chicago.

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

No.

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

The ABA has policies regarding substance misuse, treatment, and decriminalization:

18M105:

[https://www.americanbar.org/content/dam/aba/administrative/lawyer\\_assistance/s\\_colap\\_2018\\_hod\\_midyear\\_105.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/s_colap_2018_hod_midyear_105.authcheckdam.pdf)

13A101:

[https://www.americanbar.org/content/dam/aba/directories/policy/2013\\_hod\\_annual\\_meeting\\_101.authcheckdam.docx](https://www.americanbar.org/content/dam/aba/directories/policy/2013_hod_annual_meeting_101.authcheckdam.docx)

12M101F:

[https://www.americanbar.org/content/dam/aba/directories/policy/2012\\_hod\\_midyear\\_meeting\\_101f.authcheckdam.doc](https://www.americanbar.org/content/dam/aba/directories/policy/2012_hod_midyear_meeting_101f.authcheckdam.doc)

10M105A:

[https://www.americanbar.org/content/dam/aba/directories/policy/2010\\_my\\_105a.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2010_my_105a.authcheckdam.pdf)

10M102C:

[https://www.americanbar.org/content/dam/aba/directories/policy/2010\\_my\\_102c\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2010_my_102c_authcheckdam.pdf)

However, those policies are not focused on the opioid crisis like this Resolution. This Resolution addresses the multifaceted and complex nature of the opioid crisis and contributes specific, meaningful, practical, and flexible solutions.

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

N/A.

6. Status of Legislation. (If applicable)

On October 24, 2018, the President signed the Support for Patients and Communities Act which provides funding for treatment and other support for opioid victims. More efforts will be necessary to fully address the opioid crisis.

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

After the May 4, 2018 Opioid Summit, the ABA Senior Lawyers Division created an Opioid Initiative Task Force to, in part, advance the recommendations and action points from the Summit. The Task Force consists of representatives from various collaborating entities that participated in the Summit. Efforts to implement this policy will come from those collaborating entities and the Opioid Initiative Task Force.

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

None.

9. Disclosure of Interest. (If applicable)

N/A.

10. Referrals.

Prior to filing, the Resolution was referred to the Opioid Initiative Task Force. The Resolution was also referred to all ABA Sections, Divisions, and Forums, and in particular, the following ABA entities that collaborated with the Senior Lawyers Division on the Opioid Summit (which produced the Report that is the basis for the Resolution) were asked to co-sponsor the Resolution:

Center for Professional Responsibility  
Center on Children and the Law

Commission on Disability Rights  
 Commission on Law and Aging  
 Commission on Lawyer Assistance Programs  
 Criminal Justice Section  
 Government and Public Sector Lawyers Division  
 Health Law Section  
 Law Student Division  
 Section of Intellectual Property Law  
 Section of Labor & Employment Law  
 Section of State and Local Government Law  
 Solo, Small Firm and General Practice Division  
 Standing Committee on Bar Activities and Services  
 Standing Committee on Legal Aid and Indigent Defendants

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

John Hardin Young  
 4 Ellender Ct.  
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 Director, ABA Senior Lawyers Division and ABA Career Center  
 321 N. Clark Street  
 Chicago, IL 60654  
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12. Contact Name and Address 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.*)

Seth Rosner  
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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The Resolution urges the American Bar Association to adopt and urges all federal, state, local, territorial, and tribal courts, governmental entities, bar associations, public health agencies, lawyer assistance programs, lawyer regulatory entities, institutions of legal education, and law firms to implement the recommendations and action points in the report, *Experienced Lawyers, American Families, and the Opioid Crisis—Report of the Opioid Summit May 2018* found at <http://ambar.org/opioid>.

### 2. Summary of the Issue that the Resolution Addresses

The nine recommendations and 45 action points in the report, *Experienced Lawyers, American Families, and the Opioid Crisis—Report of the Opioid Summit May 2018*, by the ABA Senior Lawyers Division represent a significant step by the ABA to confront the opioid crisis—the deadliest epidemic in U.S. history.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

The recommendations and action points in the Opioid Summit Report are directed toward a full range of stakeholders and resulted from the May 4, 2018 Opioid Summit held in collaboration with twenty ABA entities and non-ABA organizations.

If implemented, these recommendations and action points will build on the broader understanding that addressing the opioid crisis requires reframing our understanding of drug use and abuse from a moral failing to a chronic disease. Additionally, the effort to do so requires leadership within and across professional organizations, as well as a commitment to reshaping policy and regulations to better support individuals, families, and communities.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None have been identified.



**AMERICAN BAR ASSOCIATION**

**CRIMINAL JUSTICE SECTION  
COMMISSION ON IMMIGRATION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges the United States Attorney  
2 General to rescind the policy of prosecuting all individuals who enter the United States  
3 without authorization at the southern border for the misdemeanor offense of illegal entry  
4 pursuant to 8 U.S.C. §1325, end the practice of expedited mass prosecution of  
5 immigrants, and allow for an individualized determination in deciding whether to file  
6 criminal charges;

7  
8 FURTHER RESOLVED, That the American Bar Association urges the federal judiciary to  
9 take appropriate measures to ensure that every defendant charged with the misdemeanor  
10 offense of illegal entry is represented by counsel who has had an adequate opportunity  
11 to consult with the defendant, and that any guilty plea is knowing, intelligent, and  
12 voluntary;

13  
14 FURTHER RESOLVED, That the American Bar Association urges Congress to provide  
15 sufficient funding for the judiciary to enable it to take the above measures and sufficient  
16 funding to ensure that each defendant receives effective assistance of counsel; and  
17

18 FURTHER RESOLVED, That the American Bar Association urges the United States  
19 Attorney General to exercise prosecutorial discretion and refrain from prosecuting  
20 asylum seekers for the offense of illegal entry.



**REPORT**

On April 6, 2018, the Attorney General of the United States adopted a zero-tolerance prosecution policy, which mandates the prosecution for illegal entry of everyone apprehended at the southern border between ports of entry, including asylum seekers.<sup>1</sup> The “Zero Tolerance” policy mandates the prosecution under 8 U.S.C. §1325, a misdemeanor offense with a maximum penalty of six months, for all first offenders -- including asylum seekers -- who enter the United States at the southern border without authorization (those individuals who have prior convictions for improper entry are to be prosecuted for illegal re-entry under 8 U.S.C. §1326, a felony).<sup>2</sup>

**Several Former United States Attorneys Have Concluded That Devoting Prosecution Resources to the Mandatory Prosecution of Misdemeanor Improper Entry Cases Actually Detracts from Public Safety**

The mandatory prosecution of misdemeanor “improper entry” prosecutions, along with another executive directive issued by the Attorney General on January 26, 2017, calling for the Department of Justice to make criminal prosecution of immigration offenses a “high priority,”<sup>3</sup> has led to a dramatic *decrease* in prosecutions of other, serious crimes by federal prosecutors along the southwest border.<sup>4</sup> A recent report from a non-partisan, non-profit data research center concludes that federal prosecutions for serious crimes such as drugs and weapons smuggling, human trafficking, environmental crimes, etc. are being neglected, due to the tremendous resources being spent on misdemeanor illegal entry cases since the inception of the Zero Tolerance policy.<sup>5</sup> By June 2018, in the five federal districts along the southwest border, only 6% of prosecutions —one in seventeen cases — were for anything other than immigration offenses.<sup>6</sup> A bipartisan group of former United States Attorneys summarized the problem, in a letter to the Attorney General:

It is a simple matter of fact that the time a Department attorney spends prosecuting misdemeanor illegal entry cases, may be time he or she does not spend investigating more significant crimes like a terrorist plot, a child human trafficking organization, an international drug cartel or a corrupt public official. Under your Zero Tolerance policy, firearms cases, violent crime cases, financial fraud cases, and cases involving public safety on Indian reservations all take a back seat to these lesser, weaker misdemeanor cases. In fact, requiring U.S. Attorneys to bring these

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<sup>1</sup> <https://www.justice.gov/opa/press-release/file/1049751/download>; <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>

<sup>2</sup> <https://www.justice.gov/opa/press-release/file/1049751/download>.

<sup>3</sup> <https://www.justice.gov/opa/press-release/file/956841/download>.

<sup>4</sup> A recent report shows that only 6% of federal criminal prosecutions in June 2018 along the southwest border were for non-immigration offenses, <http://trac.syr.edu/immigration/reports/524/>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

misdeemeanor cases in every instance detracts from your own stated priority to fight gangs and violent crime by groups such as MS-13.<sup>7</sup>

## **“Operation Streamline” Presents Significant Due Process Concerns**

The prosecution of large numbers of southern border crossers under a program called “Operation Streamline” first began as a pilot program in the Del Rio border sector (El Paso, Texas area) in 2005 and continued sporadically until 2018.<sup>8</sup> The Zero Tolerance policy expanded Operation Streamline across the southern border of the U.S.<sup>9</sup> The stated purpose of the program is to deter individuals from entering the United States without authorization, although there is no evidence that criminal prosecution deters migration and no evidence that Operation Streamline has deterred unlawful entry.<sup>10</sup> A recent study concluded that the mass criminal prosecution and incarceration of immigrants provides only “the illusion of reducing unauthorized immigration, but statistical analysis provides no evidence of any deterrent effect.”<sup>11</sup>

Operation Streamline created a criminal process that one respected commentator has called “unlike anything anyone has ever seen in a U.S. courtroom.”<sup>12</sup> *En masse* hearings combine the initial appearance, preliminary hearing, plea, and sentencing into one single proceeding that can last less than one minute per defendant.<sup>13</sup> An article describing the incomprehensible courtroom scenarios engendered by Operation Streamline was published in May 2018, along with an audio recording of a portion of the group plea proceedings from one day in a federal courtroom in Brownsville, Texas; on this day 40 individuals charged with illegal entry were questioned by the court together as a group.<sup>14</sup> Federal public defenders were given only a few minutes to meet, interview and prepare each client prior to the court proceedings, at which the individuals were arraigned and expected to plead guilty to illegal entry in exchange for sentences of time served.<sup>15</sup> Questioning by the judge predominantly was done *en masse*. Spanish interpreters were present; however, many Central American migrants who are prosecuted for improper

<sup>7</sup> Open letter to Attorney General Jefferson B. Sessions, June 18, 2018, available at:

<https://medium.com/@formerusattorneys/bipartisan-group-of-former-united-states-attorneys-call-on-sessions-to-end-child-detention-e129ae0df0cf>

<sup>8</sup> See Lydgate, Joanna, *Assembly Line Justice: A Review of Operation Streamline*, Berkeley Law School Police Brief, June 2010, [https://www.law.berkeley.edu/files/Operation\\_Streamline\\_Policy\\_Brief.pdf](https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf).

<sup>9</sup> In FY2016, Operation Streamline evidently was renamed the Criminal Consequence Initiative (CCI). See Report, *Punishing Refugees and Migrants*, Human Rights First (January 2018) p.8 & fn.5, at <https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf>

<sup>10</sup> An analysis of Operation Streamline published by the Vera Institute of Justice in June 2018 finds that the criminal prosecution of persons entering the U.S. without authorization is not an effective deterrent.

[https://storage.googleapis.com/vera-web-assets/downloads/Publications/operation-streamline/legacy\\_downloads/operation\\_streamline-report.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/operation-streamline/legacy_downloads/operation_streamline-report.pdf)

<sup>11</sup> *Id.* at p.8.

<sup>12</sup> “Responding to Operation Streamline,” *The Champion*, (April 2008), p.51.

<sup>13</sup> *Punishing Refugees and Migrants*, Human Rights First (January 2018) p.18, available at <https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf>

<sup>14</sup> *Hidden Horrors of “Zero Tolerance” – Mass Trials and Children Taken From Their Parents*, Nathan, Debbie, *The Intercept* (May 29, 2018), <https://theintercept.com/2018/05/29/zero-tolerance-border-policy-immigration-mass-trials-children/>. See also fn.23, *infra*.

<sup>15</sup> *Id.*

entry speak only one of many indigenous languages and may not understand Spanish.<sup>16</sup> Shortcomings in the process are apparent in this audio recording. The judge asked the entire group whether they were satisfied with the assistance of their attorneys and whether they had been threatened or coerced into pleading guilty.<sup>17</sup> A number of individuals, evidently not understanding the nature of the proceeding or the significance of the mass colloquy, or otherwise preoccupied with the separation from their children, later asked the judge whether they would be reunited with their children prior to deportation, suggesting that they were conflating their civil immigration proceeding and criminal prosecution.<sup>18</sup>

The Zero Tolerance illegal entry prosecution policy immediately changed the practice of Customs and Border Protection (CBP) with respect to its handling of families traveling together, due to its referral of all adults for criminal prosecution, and quickly resulted in the separation of several thousand parents and children who had entered the United States together.<sup>19</sup> The policy of separating children from parents in this way was intended to advance the administration's stated goal of deterrence<sup>20</sup> and the need to separate was based on the rationale that parents who were being criminally prosecuted were required to be detained in the custody of the U.S. Marshals Service, which could not house children.<sup>21</sup> In response to widespread public outcry over the inhumanity of this policy, the administration issued an executive order ending the family separation policy on June 20, 2018.<sup>22</sup> Since then, most adults traveling with children entering the U.S. along the southern border are not being prosecuted for illegal entry; however, the Zero Tolerance policy continues in full force for all other adults.<sup>23</sup>

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<sup>16</sup> See <https://qz.com/1312256/many-migrant-children-arriving-in-the-us-dont-speak-spanish/>, referencing a 2015 study suggesting that 30-40% of families entering the U.S. at the Southern border from Central American countries speak only indigenous languages.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See Report of the Office of the Inspector General, September 27, 2018, OIG-18-84, at pp.2-3, available at: <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

<sup>20</sup> See, e.g., *The Hill*, June 19, 2018, "HHS Official Says Family Separation Policy Will Have 'Deterrence Effect'" available at <https://thehill.com/latino/393000-hhs-official-says-family-separation-policy-will-have-deterrence-effect>.

<sup>21</sup> However, because the majority of parents prosecuted for illegal entry were brought to the federal courthouse directly from CBP custody, were arraigned and received time served upon pleading guilty at their first court appearance, and then were returned to immigration custody the same day, they were never in the custody of the U.S. Marshals Service.

<sup>22</sup> <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>.

<sup>23</sup> On August 30, 2018, several ABA leaders, including current ABA President Robert Carlson, observed a group prosecution session pursuant to the Zero Tolerance/Operation Streamline policies before a Federal Magistrate in McAllen, TX. Approximately 80 individuals were arraigned and pleaded guilty *en masse* during that session. An Assistant Federal Public Defender reported to the ABA observers that this number of prosecutions was below the daily average, that the group prosecutions continue to occur daily in that courthouse, and that a few days earlier there had been two separate group prosecution sessions of approximately 100 individuals each.

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## Guilty Pleas Procured In *En Masse* Proceedings May Not Be Valid

There are serious concerns about the validity of guilty pleas exacted pursuant to Zero Tolerance and Operation Streamline. In 2001, the Supreme Court reiterated that undocumented immigrants are owed full due process protections, just as U.S. citizens and legal residents, under the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.<sup>24</sup> But today undocumented immigrants are not being granted their full due process rights in these expedited group prosecutions. It is absolutely fundamental to the American criminal justice system that any individual charged with a crime has the right to meaningful notice of the charges against him or her, the right to present a defense and the right to the effective assistance of counsel in developing that defense. But under the rush of these proceedings, a defense attorney has only a brief opportunity to meet his or her clients -- in a public setting -- immediately prior to a scheduled guilty plea hearing to discuss the charges and the decision whether to plead guilty. As one witness to this process has observed:

... consultations between attorneys and defendants are held in the open -- in the very same courtroom that will later hold the *en masse* trial. Within earshot of one defendant might be a relative, someone from the same hometown, the defendant's own smuggler, or someone else who may be able to exact influence upon the defendant, either during a prison sentence or upon return back home. A defendant under such circumstances would understandably be reluctant to be fully open with his or her lawyer and may withhold information that could have a real impact on his or her case.<sup>25</sup>

Nor can defense attorneys be expected to evaluate the limited evidence they are provided in these prosecutions, or investigate the veracity of the allegations and any potential defenses, in fulfillment of counsel's duty to provide effective assistance of counsel:

... defense attorneys in Tucson are typically afforded no longer than 30 minutes per client for individual consultations on the morning of the trials. In this short time, a defense attorney will need to cover dozens of topics, including explaining the charges, the prosecutor's plea deal and the consequences of a guilty plea. Will the defense attorney have time to determine if the defendant has a derivative claim to U.S. citizenship? Will the defense attorney be able to screen for potential asylum claims? Will the defense attorney have sufficient time and resources to determine if any physical or mental health factors may have an impact on the outcome of the case? Thirty minutes is insufficient time to uncover all the potential avenues for legal recourse for a client, let alone to explain the consequences of a guilty plea.<sup>26</sup>

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<sup>24</sup> *Zadvydas v. Davis, et al.*, 533 U.S. 678, 690-696 (2001).

<sup>25</sup> "Operation Streamline -- A Failure of Due Process," *National Immigrant Justice Center*, December 11, 2015, available at <https://www.immigrantjustice.org/staff/blog/operation-streamline-failure-due-process>.

<sup>26</sup> *Id.*

Defenses to improper entry do exist. Although a violation of 8 U.S.C. §1325 requires only proof of entry into the United States at an undesignated place or by eluding inspection, individuals may have valid (but complex) citizenship claims that require significant investigation. Some may have lacked the necessary criminal intent due to mental illness. Recent reports of border agents telling migrants seeking asylum at lawful ports of entry that the border is “closed” or to come back another day because there is “no room,” raise the question whether viable duress or entrapment defenses may exist for individuals who were thereby prevented from entering the United States properly in order to seek asylum at a port of entry, as is lawful under United States and international law.<sup>27</sup>

Apart from having little opportunity to investigate viable defenses, defense counsel has very limited time to properly prepare a client to knowingly plead guilty. For example, under *Padilla v. Kentucky*, 559 U.S. 356 (2010), defense attorneys are required to advise criminal defendants of the immigration consequences of a conviction prior to pleading guilty. Convictions for illegal entry can impact eligibility for discretionary forms of immigration relief such as asylum.<sup>28</sup> Many defendants are wholly unfamiliar with the American legal system and may have low levels of formal education. Moreover, many may be sleep-deprived and dehydrated following long journeys through the desert, calling into question their ability to truly understand and meaningfully engage in the proceedings, even if there are no language barriers.<sup>29</sup> Worse, some of these hapless individuals have been required to sign complex “immigration waivers” in exchange for receiving sentences of time served, thereby waiving their rights to asylum or to apply for other relief from removal, in exchange for this “leniency” in criminal sentencing.<sup>30</sup>

Judges and magistrates are also placed in untenable positions presiding over these group prosecution proceedings. The Federal Rules of Criminal Procedure require that a judge make a finding, before accepting a plea of guilty to a criminal offense, that each guilty plea is entered into knowingly, voluntarily and intelligently. Fed. R. Crim. P. 11. But when a judge performs plea colloquies *en masse*, it is practically impossible to determine whether each individual knowingly and voluntarily waived his or her Fifth or Sixth Amendment rights against self-incrimination, the right to confront their accusers, or the

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<sup>27</sup> See <https://theintercept.com/2018/06/16/immigration-border-asylum-central-america/>.

<sup>28</sup> A July 18, 2018 memo from USCIS, *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-*, pp. 7-8, stated that a conviction for illegal entry may be used as a negative discretionary factor to deny an otherwise valid claim of asylum.

<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf>.

<sup>29</sup> <https://www.immigrantjustice.org/staff/blog/operation-streamline-failure-due-process>.

<sup>30</sup> See recent reports by the American Immigration Council, <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions> and Human Rights First, <https://www.humanrightsfirst.org/resource/punishing-refugees-and-migrants-trump-administrations-misuse-criminal-prosecutions>. Despite serious concerns about the group prosecutions, raising individual legal challenges is extremely difficult, in large part because most clients are offered time served in exchange for guilty pleas, whereas litigating issues or investigating or pursuing defenses at trial would require continuances and likely detention in federal criminal custody for months or longer.

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right to a trial.<sup>31</sup> The 9<sup>th</sup> Circuit Court of Appeals has concluded that collective group questioning like this, without the judge observing his duty under Rule 11 to “address the defendant personally in open court,” -- which “includes both informing the defendant of her rights and determining that she understands those rights” -- violates Fed. R. Crim. P. 11(b)(1).<sup>32</sup> The time demands of Operation Streamline, as a practical matter, make it all but impossible for a judge to comply with this duty.

It has been credibly reported that border crossers seeking asylum have been asked to sign plea agreements waiving their claim for asylum in exchange for “leniency” in criminal sentencing.<sup>33</sup> In a Phoenix illegal entry prosecution of an asylum seeker who had experienced severe abuse in Mexico due to his sexual orientation, the prosecutor told the defense attorney that she could remove the immigration rights waiver from the plea agreement, but that in return the prosecutor would recommend a more severe sentence to the judge.<sup>34</sup>

The *en masse* prosecutions and guilty pleas resulting from the Zero Tolerance and Operation Streamline policies routinely violate the American Bar Association blackletter Criminal Justice Standards for Pleas of Guilty. Standard 14-1.3(b) provides that the Court should not accept the plea unless there has been “a reasonable time for deliberation” and unless the defendant has been advised by the Court pursuant to Standard 14-1.4.<sup>35</sup> Standard 14-1.4 requires -- among other things -- a judge to address a defendant “personally in open court” so that the judge can be sure that the defendant understands what is being charged, its elements, and its potential penalties and also understands the nature of the trial rights that the defendant is giving up by pleading guilty, such as the right to a speedy and public trial, the right to trial by jury, the right to insist at trial that the prosecution establish guilt beyond a reasonable doubt, the right to testify or not testify at a trial, the right to be confronted by the witnesses against him or her, to present witnesses on his or her behalf, and to have compulsory process in securing their attendance.<sup>36</sup> The judge must also address the defendant personally to determine whether the guilty plea is fully voluntary, and specifically whether any promises or any force or threats were used to obtain the plea.<sup>37</sup> However, it appears commonly that many questions—such as if defendants understand the consequences of perjury, whether they are being treated for

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<sup>31</sup> See *Boykin v. Alabama*, 395 U.S. 238, 243-244 (1969).

<sup>32</sup> *U.S. v. Arqueta-Ramos*, 730 F.3d 1133, 1138-1139 (9<sup>th</sup> Cir. 2013).

<sup>33</sup> See, e.g., *Punishing Refugees and Migrants, The Trump Administration's Misuse of Criminal Prosecutions*, Human Rights First, January, 2018, at p. 19-20, available at: <https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf>

<sup>34</sup> *Id.*, at p.12.

<sup>35</sup> American Bar Association Criminal Justice Standards for Pleas of Guilty, Standard 14-1.3(b), available at: [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_guiltypleas\\_blk/#1.1](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk/#1.1)

<sup>36</sup> American Bar Association Criminal Justice Standards for Pleas of Guilty, Standard 14-1.4, available at: [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_guiltypleas\\_blk/#1.1](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk/#1.1)

<sup>37</sup> American Bar Association Criminal Justice Standards for Pleas of Guilty, Standard 14-1.5, available at: [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_guiltypleas\\_blk/#1.1](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk/#1.1)

medical or psychological reasons, or if they understand everything their attorneys have explained to them—are not posed personally to defendants but are asked *en masse*.<sup>38</sup>

### **Mandatory Criminal Prosecution of Legitimate Asylum Seekers is Improper**

A zero tolerance policy that prosecutes everyone for unlawful entry, including asylum seekers, deprives prosecutors of the discretion to consider each case on its merits. This is contrary to accepted norms concerning the sound exercise of prosecutorial discretion; indeed the United States Attorneys' Manual, prior to February 2018, stated that the decision on what charges to bring “always should reflect an individualized assessment and should fairly reflect the defendant's criminal conduct.”<sup>39</sup>

A zero tolerance policy also violates Federal law and United States treaty obligations concerning the proper treatment of asylum seekers. Section 208(a)(1) of the Immigration and Nationality Act explicitly states that a person who “arrives” at the borders “*whether or not at a designated a port of arrival ... may apply for asylum.*” The Universal Declaration of Human Rights, adopted by the United States, states, “Everyone has the right to seek...asylum from persecution.”<sup>40</sup> The 1951 United Nations Convention Relating to the Status of Refugees (“Refugee Convention”), adopted after World War II's refugee crisis, protects refugees from return to persecution, prohibits countries from penalizing them for illegal entry or presence, and requires that member countries provide refugees with certain minimum protections and rights.<sup>41</sup> The United States helped lead efforts to draft the Convention and ratified its 1967 Protocol on November 1, 1968, legally binding itself to the Convention's provisions.<sup>42</sup> Article 31 of the Convention, acknowledging that “a refugee whose departure from his country of origin is usually in flight, is rarely in a position to comply with the requirements for legal entry” and “that the seeking of asylum can require refugees to breach immigration rules,”<sup>43</sup> provides:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

<sup>38</sup> *Punishing Refugees and Migrants*, Human Rights First (January 2018) p.19, available at <https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf>.

<sup>39</sup> *United States Attorneys' Manual*, § 9-27.300.

<sup>40</sup> United Nations General Assembly, sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdfMigrants.phttp://www.ohchr.org/EN/UDHR/Documents/UDHR\_Translations/eng.pdf.

<sup>41</sup> The 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol, UNHCR (September 2011), available at <https://www.unhcr.org/4ec262df9.pdf>

<sup>42</sup> *Punishing Refugees and Migrants, The Trump Administration's Misuse of Criminal Prosecutions*, Human Rights First, January, 2018, at p. 11-12, available at: <https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf>.

<sup>43</sup> *Id.*, at p.12.

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2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.<sup>44</sup>

These provisions protect refugees from experiencing penal consequences as the result of their illegal entry or illegal presence, subject to three qualifying conditions: ‘directness’, ‘promptness’ and good cause.<sup>45</sup> It is “well-settled” that this provision applies to asylum-seekers.<sup>46</sup> Such persons are “*prima facie* entitled to the protections of Article 31(1) until a final decision on their protection need has been administered in a fair procedure.”<sup>47</sup> Under accepted readings of the Refugee Treaty, refugees are not required to have come directly from their country of origin and what is reasonably prompt presentation to authorities showing good cause for their illegal entry or presence depends on the circumstances of the individual case.<sup>48</sup> Each breach of a treaty obligation gives rise to State responsibility and Article 27 of the 1969 Vienna Convention on the Law of Treaties provides that a contracting party (such as the United States) may not invoke the provisions of its internal or domestic law as justification for its failure to perform a treaty.<sup>49</sup>

Prosecuting legitimate asylum seekers creates procedural unfairness. The Department of Homeland Security’s Office of the Inspector General reported in 2015 that Border Patrol’s practices on criminal referrals for individuals who express a fear of return are problematic.<sup>50</sup> In some locations, individuals who claim fear do not undergo the credible fear determination process until after they have been prosecuted and, if convicted, have served their time.<sup>51</sup> As the OIG report noted, “referring for prosecution aliens expressing fear of persecution, prior to determining their refugee status, may violate U.S. obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, which the United States ratified in 1968.”<sup>52</sup>

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<sup>44</sup> The 1951 United States Convention Relating to the Status of Refugees and its 1967 Protocol, UNHCR (September 2011), available at <https://www.unhcr.org/4ec262df9.pdf>

<sup>45</sup> Office of the United Nations High Commissioner for Refugees, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, Dr. Cathryn Costello, et al., (July 2017), at p.10, available at: <http://www.refworld.org/pdfid/59ad55c24.pdf>.

<sup>46</sup> *Id.*, at p.14-15 & fn.73 & fn.74 (citing several cases).

<sup>47</sup> *Id.*, citing to Guy S. Goodwin-Gill, Professor of International Refugee Law, University of Oxford, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection*, (October 2001).

<sup>48</sup> *Id.*, at pp. 17-31; see also Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection*, (October 2001) at pp. 9-11.

<sup>49</sup> Vienna Convention on the law of treaties (with annex), 23 May 1969, available at: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

<sup>50</sup> Report, U.S. Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, (August 2, 2016), at p.56, available at: <https://www.uscifr.gov/sites/default/files/Barriers%20To%20Protection.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> *Streamline: Measuring Its Effect on Illegal Border Crossing*, DHS Office of the Inspector General, OIG-15-95 (May 15, 2015), at p. 16, [https://www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-95\\_May15.pdf](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf).

**Conclusion**

For these reasons, we respectfully request that the House of Delegates adopt this resolution.

Respectfully submitted,

Lucian Dervan  
Chair, Criminal Justice Section

Wendy S. Wayne,  
Chair, Commission on Immigration

January 2019

GENERAL INFORMATION FORM

Submitting Entities: Criminal Justice Section, Commission on Immigration

Submitted By: Lucian Dervan, Chair, ABA Criminal Justice Section  
Wendy S. Wayne, Chair, ABA Commission on Immigration

1. Summary of Resolution(s).

This resolution urges the Attorney General to rescind the Zero Tolerance and Operation Streamline policies that mandate the prosecution of all persons alleged to have improperly entered the United States for the first time, a misdemeanor under 8 U.S.C. 1325, and urges the Attorney General to end the practice of expedited mass prosecution of immigrants and to allow an individualized determination of whether to file criminal charges. This Resolution also urges the federal judiciary to take appropriate measures to ensure that every defendant charged with the misdemeanor offense of illegal entry is represented by counsel who has had an opportunity to consult with the defendant and that any guilty plea is knowing, intelligent and voluntary. Finally, the resolution urges Congress to provide sufficient funding for the federal judiciary to enable adequate resources for legal representation when entry-related criminal offenses are prosecuted, adequate investigation of viable defenses, and effective assistance of counsel to all indigent individuals who are prosecuted.

2. Approval by Submitting Entity.

This resolution was approved by the Criminal Justice Section on November 3, 2018 and by the Commission on Immigration on November 12, 2018.

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

No.

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

The following Association policies are relevant but none would be affected by the adoption of this resolution:

02AY115B: Protection of Rights of Immigration Detainees  
Opposing incommunicado detention of foreign nationals and urging immigration authorities to adopt certain detention standards, including access to counsel and legal information.

- 06M107A: Due Process Right to Counsel in Immigration Related Matters:  
Supporting the due process right to counsel for all persons in removal proceedings, and the availability of legal representation for all non-citizens in immigration-related matters.
- 06M107B: Immigration Reform  
Supporting a regulated, orderly and safe system of immigration and the need for an effective and credible immigration enforcement strategy, including one that respects domestic and international legal norms.
- 06M107C: Due Process and Judicial Review in Immigration Related Matters:  
Urging an administrative agency structure that will provide all non-citizens with due process of law and in the conduct of their hearings or appeals; supporting the neutrality and independence of immigration judges so that such judges and agencies are not subject to the control of any executive cabinet officer.
- 06MY107D: Administration of Immigration Laws  
Supporting a system for administering our immigration laws that is transparent, user-friendly, accessible, fair and efficient, and that has sufficient resources to carry out its function in a timely manner.
- 06M107E: Detention in Immigration Removal Proceedings  
Opposing the detention of non-citizens in removal proceedings except in extraordinary circumstances; supporting the use of humane alternatives to detention that are the least restrictive necessary to ensure appearance at immigration proceedings.
- 06MY107G: Crime Victims in Immigration Related Matters  
Supporting avenues for lawful immigration status for victims of human trafficking and other related crimes; opposing the apprehension of victims of human trafficking and other related crimes.

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08M111B:

## Immigration Detention Standards

Supporting the issuance of federal regulations that codify the DHS-ICE National Detention Standards, and the improvement, periodic review and increased oversight of the standards to ensure that detained non-citizens and their families are treated humanely and have effective access to counsel and to the legal process.

09M101C:

## Due Process and Access to Counsel in Immigration Enforcement Actions

Supporting legislation and/or administrative standards to ensure due process and access to appropriate legal assistance to persons arrested or detained in connection with immigration enforcement actions.

10M102G:

## Non-Partisan Attorneys in the Department of Justice

Urging the President and the Attorney General to ensure that lawyers in the Department of Justice, and leaders of state, local and territorial legal offices, do not make decisions concerning investigation or proceedings based upon partisan political interests and do not perceive that they will be rewarded for, or punished for not, making a decision based upon partisan political interests.

17M10C:

## Urges the President to Withdraw Executive Order 13769

Urging that the Executive Branch, while fulfilling its responsibilities to secure the nation's borders, take care that any Executive Orders regarding border security, immigration enforcement, and terrorism respect the bounds of the U.S. Constitution and facilitate a transparent, accessible, fair, and efficient system of administering the immigration laws and policies of the United States.

18M108E:

Urging the Executive Branch to rescind its decision to end the Deferred Action for Childhood arrivals (DACA) program and urging Congress to enact legislation protecting DACA recipients and other undocumented immigrants who were brought to the United States as

children and who meet age, residency, educational and other qualifications as set forth by the U.S. Citizenship and Immigration Service ("DREAMers").

18A10C: Urging Congress to enact immigration reform addressing children separated from their parents at the United States border.

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

N/A.

6. Status of Legislation.

None known

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

This resolution will be used by the ABA, as well as by ABA members who wish to engage with members of Congress and the Executive Branch to advocate on behalf of the interests expressed in this resolution.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

Standing Committee on Legal Aid & Indigent Defense  
 Commission on Disability Rights  
 Commission on Hispanic Legal Rights and Responsibilities  
 Commission on Homelessness and Poverty  
 Center for Human Rights  
 Commission on Racial and Ethnic Diversity in the Profession  
 Commission on Youth at Risk  
 Young Lawyer's Division

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Section of Civil Rights and Social Justice  
Government and Public Sector Lawyers Division  
Section of International Law  
National Conference of Federal Trial Judges  
National Conference of State Trial Judges  
Law Practice Division  
Section of Science & Technology  
Health Law Section  
Section of Litigation

## 11. Contact Name and Address Information. (Prior to the meeting)

Kevin J. Curtin  
200 Trade Center, 3<sup>rd</sup> floor  
Woburn, MA. 01801  
T: (508) 423-0140  
Email: kevinjcurtin@icloud.com

Wendy Wayne  
ABA Commission on Immigration  
Committee for Public Counsel Services  
21 McGrath Highway  
Somerville, MA 02143  
Tel: 617-623-0591  
[wwayne@publiccounsel.net](mailto:wwayne@publiccounsel.net)

## 12. Contact Name and Address Information. (Who will present the report to the House?)

Stephen Saltzburg  
2000 H Street, NW  
Washington, D. C. 20052  
T: 202-994-7089  
E: [ssaltz@law.gwu.edu](mailto:ssaltz@law.gwu.edu)

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Cell: 305-333-5444  
E: [nrslaw@sonnett.com](mailto:nrslaw@sonnett.com)

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This Resolution urges the Attorney General to rescind the “Zero Tolerance” and “Operation Streamline” policies mandating the prosecution of all persons alleged to have improperly entered the United States for the first time, a misdemeanor under 8 U.S.C. 1325, and urges the Attorney General to refrain completely from prosecuting asylum seekers and first-time offenders, and to focus resources instead on prosecuting violent criminal activity and other serious felonies at the southern border. This Resolution also urges Congress to provide sufficient funding for the federal judiciary to ensure adequate resources for legal representation when entry-related criminal offenses are prosecuted, adequate investigation of viable defenses, and effective assistance of counsel to all indigent individuals who are prosecuted.

### 2. Summary of the Issue that the Resolution Addresses

This Resolution addresses the Attorney General’s policies of criminal prosecution for illegal entry of all individuals entering the United States at the southern border without prior authorization under 8 U.S.C. 1325, without exercising prosecutorial discretion for asylum seekers and first-time offenders, without adequate legal resources for indigent individuals subject to such prosecutions, and in lieu of prosecutions for serious violent criminal activity in that region of the U.S.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

This resolution will be used by the ABA, as well as by ABA members who wish to engage with members of Congress and the Executive Branch to advocate on behalf of the interests expressed in this resolution.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

No internal or external opposition or expression of minority views have been identified.



**AMERICAN BAR ASSOCIATION**

**CRIMINAL JUSTICE SECTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association urges federal, state, local, territorial and
- 2 tribal legislatures to define criminal arrests, charges, and dispositions that are eligible for
- 3 expungement or removal from public view by sealing, and set out procedures for
- 4 individuals to apply for the same.



## REPORT

### Summary

This resolution urges federal, state, local, territorial and tribal legislatures to define criminal arrests, charges, and dispositions eligible for expungement or removal from public view via sealing, and set out procedures for individuals to apply for the same.

### I. Introduction<sup>1</sup>

#### Background

The general trend within criminal justice reform has been toward facilitating productive reentry into the social fabric for ex-offenders. The numerous collateral consequences associated with a criminal conviction lead to recidivism by perpetuating a cycle of unemployment and disenfranchisement through discrimination in hiring, promotion, and professional licensure.<sup>2</sup> It is especially striking when 1 in 3 American adults are estimated to have a criminal record.<sup>3</sup>

As of January 2018, 41 states have some form of record sealing or expungement law in place.<sup>4</sup> Although these laws vary from state to state,<sup>5</sup> generally, the expungement of a criminal record involves a legal process in which the record or existence of an arrest, charge, or in some cases, the conviction, is removed from public view.<sup>6</sup> “Public view” means only police records and court records, not news or social media, or in some cases private background check software.<sup>7</sup> But while most states now recognize the need for “second chance” legislation for ex-offenders, there is no federal law that permits those convicted of non-violent federal crimes to seek the expungement or sealing of their

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<sup>1</sup> Portions of this Report are taken from ABA House of Delegates Resolution 112F, which urged governments to enact laws allowing individuals to petition to expunge all criminal justice records pertaining to charges or arrests that did not result in a conviction. The arguments, research, and positions expressed within Resolution 112F are nearly identical to those made in support of expunging non-violent federal convictions and have been incorporated into this Report.  
[https://www.americanbar.org/news/reporter\\_resources/annual-meeting-2017/house-of-delegates-resolutions/112f.html](https://www.americanbar.org/news/reporter_resources/annual-meeting-2017/house-of-delegates-resolutions/112f.html)

<sup>2</sup> Selbin, McCrary & Epstein, Unmarked? Criminal Record Clearing and Employment Outcomes. *Journal of Criminal Law and Criminology*, Vol. 108, No. 1, 2017.

<sup>3</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2486867](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2486867)

<sup>4</sup> *Id.*

<sup>5</sup> See <http://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Jan-2018.pdf>

<sup>6</sup> Anna Kessler, Excavating Expungement Law: A Comprehensive Approach, 87 Temp. L. Rev. 403 (2015)

<sup>7</sup> Kele Onyejekwe, Erasing the Past: How to Expunge a Client's Criminal Record, TYL, <http://www.americanbar.org/publications/tyl/topics/client-development/erasing-past-how-expunge-clients-criminal-record.html>

<sup>7</sup> What is Expungement? Insights on Law and Society, American Bar Association, [http://www.americanbar.org/publications/insights\\_on\\_law\\_and\\_society/16/winter2016/expungement.html](http://www.americanbar.org/publications/insights_on_law_and_society/16/winter2016/expungement.html)

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criminal records and some states still do not provide such a remedy (Alabama, Alaska, Arizona, Florida, Idaho, Iowa, Nebraska, New Mexico and Virginia<sup>8</sup>).

President Trump called for criminal justice reform in the State of the Union address to Congress on January 30, 2018. This sentiment creates an opportunity for the ABA to gather support from across the political divide for a federal law that would expunge or seal non-violent federal convictions, and for the remaining states to adopt similar laws.

The ABA House of Delegates previously adopted two resolutions regarding expungement (they were approved by the Criminal Justice Section in Spring, 2017, and adopted by the House of Delegates in August 2017)<sup>9</sup>:

RESOLVED, That the American Bar Association urges Federal, State, Local, Territorial and Tribal Governments to adopt laws allowing for the expungement of convictions, including judgments of guilt of violations, for carrying out otherwise non-criminal life sustaining practices or acts in public spaces associated with homelessness.

RESOLVED, That the American Bar Association urges Federal, State, Local, Territorial and Tribal Governments to adopt laws allowing individuals to petition to expunge criminal justice records of charges or arrests that did not result in a conviction.

The currently proposed resolution seeks to broaden ABA policy on expungement law by calling for federal, state, local, territorial and tribal legislatures to define criminal arrests, charges, and dispositions eligible for expungement or removal from public view via sealing, and set out procedures for individuals to apply for the same.

## **II. The Problem**

One third of Americans have a criminal record resulting from a felony or misdemeanor conviction on a criminal offense.<sup>10</sup> These marks on their criminal record can lead to negative impacts on their employment prospects, housing, and professional licensure.<sup>11</sup> Despite the nationwide popularity of “ban the box” legislation, which prohibits employers from asking whether applicants have a criminal record early into the recruitment process,

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<sup>8</sup> Restoration of Rights Project, 50 State Comparison, Updated August 2018, available at <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/>

<sup>9</sup> ABA Criminal Justice Section Policy Bulletin Summer 2017, available at [https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/policy\\_bulletin\\_summer2017.pdf](https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/policy_bulletin_summer2017.pdf)

<sup>10</sup> Selbin, McCrary & Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, Journal of Criminal Law and Criminology, Vol. 108, No. 1, 2017.

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2486867](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2486867)

<sup>11</sup> *Id.*

recent research suggests that in the absence of the ability to screen based on criminal record, such policies may actually increase discrimination against minority applicants.<sup>12</sup>

The definition of “expungement” varies from state to state.<sup>13</sup> For the purposes of this resolution, “expungement” refers to the complete removal from public view of an individual’s criminal records including arrests, charges, and convictions. Expungement is different from record sealing. Many states have policies that allow for the “sealing” of criminal records. The key difference is that after sealing, these criminal records may still be available to law enforcement and some professional licensure agencies, and may be “unsealed” with a court order.<sup>14</sup> While the sealing of a non-violent conviction would benefit many, the expungement of these convictions more appropriately allows individuals to truthfully say “no” if asked whether they have ever been arrested, charged, or convicted of a crime in jurisdictions that have not embraced “ban the box” style legislation.<sup>15</sup> Regardless of the name for the remedy, preventing public disclosure while preserving appropriate access to law enforcement for the purposes of subsequent arrests serves the overall interests of society.

Expungement or record sealing also recognizes those individuals who have lived a life free from further contact with the criminal justice system, be it state or federal. Studies suggest that this “point of redemption” is between 3 and 8 years, depending on the age at the time the crime was committed.<sup>16</sup> Expunging or sealing non-violent federal convictions is an acknowledgement that people who have paid their debt to society and reformed their ways do not need to be permanently branded with the scarlet letter of a criminal conviction that they can never hope to shield from public view.

### **III. Positive Outcomes Related to Expungement**

More permissive expungement laws allow people to obtain jobs and housing that can lift them out of poverty.<sup>17</sup> Securing meaningful employment has been shown to be one of the most predictive factors of criminal recidivism.<sup>18</sup> For individuals with criminal convictions who have previously served time in prison, the employment prospects are grim.<sup>19</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> Anna Kessler, Excavating Expungement Law: A Comprehensive Approach, 87 Temp. L. Rev. 403 (2015)

<sup>14</sup> See N.Y. Crim. Proc. sec. 160.59(7)

<sup>15</sup> Kessler, Excavating Expungement Law: A Comprehensive Approach, 87 Temp. L. Rev. 403 (2015)

<sup>16</sup> Amy L. Solomon, In Search of a Job: Criminal Records as Barriers to Employment <https://www.ncjrs.gov/pdffiles1/nij/238488.pdf>

<sup>17</sup> Jon Geffen & Stefanie Letze, Chained to the Past: An Overview of Criminal Expungement Law in Minnesota-State v. Schultz, 31 Wm. Mitchell L. Rev. 1331 (2005)

<sup>18</sup> Lahny R. Silva, Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders, 79 U. Cin. L. Rev. 155 (2010).

<sup>19</sup> Amy L. Solomon, In Search of a Job: Criminal Records as Barriers to Employment, National Institute of Justice, <https://www.nij.gov/journals/270/pages/criminal-records.aspx>

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Studies conducted on the topic of record clearing suggest that record clearing increases both employment rates and earnings.<sup>20</sup> In one study, participants who had their record cleared experienced a 5 to 10 percent increase in employment rate after having their records cleared.<sup>21</sup> Additionally, these participants also experienced an increase in earnings after having their records cleared.<sup>22</sup> In the three years after record clearing, participant earnings increased by roughly \$6,000, which equates to roughly one third of the sample's average earnings of \$18,000 annually.<sup>23</sup> While more data is needed on the topic of record expungement, these results point towards a net positive impact on employment prospects for individuals who have successfully cleared their criminal records, and a net benefit to society as a whole.

In addition to poor employment prospects, individuals with a criminal record experience discrimination in housing.<sup>24</sup> This type of discrimination is not limited to simply denying individuals housing who have a criminal record.<sup>25</sup> Poor credit histories and a lack of rental history also contribute negatively to housing prospects.<sup>26</sup> Expungement of criminal records can lead to better housing outcomes, and thus, more stability and likelihood for economic success.<sup>27</sup> Family unification is also a major concern. In many cases, public housing regulations prohibit those with criminal records to live in public housing.<sup>28</sup> This causes the breakup of family units, and unfairly penalizes primary caregivers by removing their partners from the household and prevents them from meaningfully sharing household responsibilities.<sup>29</sup>

The societal and economic benefits of a federal expungement or sealing law are numerous, and on a human level, securing meaningful employment leads to lower

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<sup>20</sup> Selbin, McCrary & Epstein, Unmarked? Criminal Record Clearing and Employment Outcomes. Journal of Criminal Law and Criminology, Vol. 108, No. 1, 2017.

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2486867](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2486867)

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Rebecca Oyama, Do not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act, Michigan Journal of Race and Law, (Fall 2009).

<sup>25</sup> Economic Perspectives on Incarceration and the Criminal Justice System, The White House, (April 2016), [https://www.whitehouse.gov/sites/default/files/page/files/20160423\\_cea\\_incarceration\\_criminal\\_justice.pdf](https://www.whitehouse.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf)

<sup>26</sup> *Id.*

<sup>27</sup> Kathryn E. McCollister, Michael T. French, and Hai Fang, The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation, (January 13, 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2835847/>

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

incidences of drug and alcohol abuse<sup>30</sup>, lower levels of depression<sup>31</sup>, and more healthy family relationships.<sup>32</sup>

## **IV. Legislative Proposals**

There were currently several bills in the 115<sup>th</sup> Congress, each with the goal of making federal criminal record sealing a reality. The REDEEM Act (Record Expungement Designed to Enhance Employment), introduced in the Senate by Sen. Rand Paul (R, KY) and Sen. Cory Booker (D, NJ) and in the House by Rep. Elijah Cummings (D, MD), is the most expansive.<sup>33</sup> This bill would permit those convicted of nonviolent federal crimes to petition the court to have their records sealed. Under this bill, someone sentenced to imprisonment, probation, or supervised release is eligible to have his or her record sealed 1 year after completion of their sentence. Otherwise, eligibility begins on the date when the case is disposed of.

Also pending in the Senate is the Clean Start Act. This bill, sponsored by Sen. Joe Manchin (D, WV) with no co-sponsors and no corresponding bill in the House, would allow the sealing of nonviolent federal convictions committed as a result of a substance disorder.<sup>34</sup> This bill requires completion of a treatment program as a condition of eligibility and has a 3-year waiting period.

Pending in the House is the Renew Act, introduced by Rep. Hakeem Jeffries (D, NY) and co-sponsored by both Republican and Democratic representatives, which would allow for record expungement to first-time offenders convicted of nonviolent drug possession.<sup>35</sup> To qualify, those convicted must be under 25 years old and successfully complete a sentence of probation. There is no corresponding bill pending in the Senate.

## **V. Conclusion**

The stigma associated with a criminal conviction in jurisdictions without a sealing or expungement remedy currently follows a person throughout their entire life. Affording these individuals a way to expunge or seal their non-violent convictions recognizes both the accomplishments of the individual in building a life free from further contact with the

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<sup>30</sup> Alejandro Badel, Brian Greaney, Exploring the Link between Drug Use and Job Status in the U.S., The Regional Economist, (July 2013), *See also* Ioana Popovici and Michael T. French, Does Unemployment Lead to Greater Alcohol Consumption? Industrial Relations: A Journal of Economy & Society (18 March 2013), <https://www.stlouisfed.org/Publications/Regional-Economist/July-2013/Exploring-the-Link-between-Drug-Use-and-Job-Status-in-the-US>;

<sup>31</sup> Susan Adams, How Unemployment And Depression Fit Together, Forbes, (June 9, 2014 12:15 PM) <http://www.forbes.com/sites/susanadams/2014/06/09/how-unemployment-and-depression-fit-together/#52d0f97a3fa1>

<sup>32</sup> Andrea Kay, At Work: Job, self-esteem tied tightly together, USA Today (Aug. 31, 2013), <http://www.usatoday.com/story/money/columnist/kay/2013/08/31/at-work-self-esteem-depression/2736083/>

<sup>33</sup> <https://www.congress.gov/bill/115th-congress/senate-bill/8271>

<sup>34</sup> <https://www.congress.gov/bill/115th-congress/senate-bill/511>

<sup>35</sup> <https://www.congress.gov/bill/115th-congress/house-bill/2617>

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criminal justice system and the need to reduce the collateral consequences of a conviction. The ABA can help move this important initiative forward by urging federal, state, local, territorial and tribal legislatures to define criminal arrests, charges, and dispositions eligible for expungement or removal from public view via sealing, and set out procedures for individuals to apply for the same.

Respectfully submitted,

Lucian Dervan,  
Chair, Criminal Justice Section  
January 2019

**GENERAL INFORMATION FORM**

Submitting Entity: Criminal Justice Section

Submitted By: Lucien Dervan, Chair

1. Summary of Resolution(s).

The proposed resolution seeks to broaden ABA policy on expungement law by urging federal, state, local, territorial and tribal legislatures to define criminal arrests, charges and dispositions eligible for expungement or removal from public view via sealing, and set out procedures for individuals to apply for the same.

2. Approval by Submitting Entity.

This resolution was passed by the Criminal Justice Council at the Fall Meeting in Washington, DC, on November 3, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously? No

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

The ABA House of Delegates previously adopted two resolutions regarding expungement (they were approved by the Criminal Justice Section in Spring, 2017, and adopted by the House of Delegates in August 2017):

RESOLVED, That the American Bar Association urges Federal, State, Local, Territorial and Tribal Governments to adopt laws allowing for the expungement of convictions, including judgments of guilt of violations, for carrying out otherwise non-criminal life sustaining practices or acts in public spaces associated with homelessness.

RESOLVED, That the American Bar Association urges Federal, State, Local, Territorial and Tribal Governments to adopt laws allowing individuals to petition to expunge criminal justice records of charges or arrests that did not result in a conviction.

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

Not applicable.

6. Status of Legislation. (If applicable)

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

This resolution will be used to advocate for federal, state, local, territorial and tribal legislation.

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

No cost to the Association.

9. Disclosure of Interest. (If applicable)

Not applicable

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

Business Law  
Center for Human Rights  
Civil Rights and Social Justice  
Commission on Disability Rights  
Commission on Homelessness and Poverty  
Commission on Immigration  
Commission on Youth at Risk  
Federal Trial Judges  
Government and Public Sector Lawyers  
Health Law  
Hispanic Legal Rights and Responsibilities  
International Law  
Law Practice Division  
Legal Aid & Indigent Defense  
Litigation  
Racial & Ethnic Diversity  
Racial & Ethnic Justice  
Science & Technology  
State Trial Judges  
Young Lawyers Division

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This resolution urges federal, state, local, territorial and tribal legislatures to define criminal arrests, charges, and dispositions eligible for expungement or removal from public view via sealing, and set out procedures for individuals to apply for the same.

### 2. Summary of the Issue that the Resolution Addresses

The resolution addresses the effort to reduce the consequences of federal, state, local, territorial and tribal criminal convictions on a person's ability to work via expungement or sealing of these records.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

Record expungement and/or sealing allows individuals to not be burdened by the judgment and discrimination that occurs when they must disclose criminal arrests, records, and convictions to potential employers.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified. None

**AMERICAN BAR ASSOCIATION**

**CRIMINAL JUSTICE SECTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and  
2 tribal legislatures to enact legislation, and correctional and detention facilities to enact  
3 policies, to provide all women prisoners in all forms of detention, both adult and juvenile,  
4 with unrestricted access, on housing units, to free toilet paper and a range of free feminine  
5 hygiene products, including both tampons and sanitary pads, in sufficient quantities to  
6 address their needs.



## REPORT

This resolution urges federal, state, local, territorial, and tribal governments to enact legislation, and correctional and detention facilities to enact policies, to provide all women prisoners in all forms of detention with unrestricted access to free toilet paper and a range of free feminine hygiene products, including both tampons and sanitary pads, in sufficient quantities to address their needs.

### **The growing number of incarcerated women and young women**

Over 200,000 women are confined in state and federal prisons, local jails, territorial facilities, and Indian Country jails. Women prisoners comprise the fastest growing segment of the incarcerated population.<sup>1</sup> In addition, young women constitute 15 percent of the total confined juvenile population and are most prevalent in detention (19 percent) and residential treatment programs (29 percent).<sup>2</sup> Between 1980 and 2015, the rate of women's imprisonment has outpaced that of men by over 50%.<sup>3</sup> Despite this alarming growth rate, women comprise only 10% of our nation's prisoners.<sup>4</sup> Women therefore enter correctional systems designed for, and based on the needs of men. Policies written for men rarely meet women's unique needs, which are consequently overlooked or ignored. Nowhere is this more apparent than in how facilities distribute and provide access to feminine hygiene products related to menstruation – specifically, sanitary pads and tampons.

Too often, women prisoners do not have access to sufficient feminine hygiene supplies. Facilities may provide women with some sanitary pads, but often in insufficient quantities. Access to even these limited supplies is often severely restricted, and supplies are often not available when women need them. Women who have the financial means to do so must purchase tampons and additional sanitary pads through a commissary, but unfortunately, not all women have this option.

Several departments of corrections have developed policies to provide free sanitary pads and tampons to women prisoners. However, access to basic hygiene products should extend to all women prisoners, both adult and juvenile, regardless of the facility in which they are confined. All women prisoners deserve access to sufficient

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<sup>1</sup> Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, Prison Policy Initiative (January 9, 2018). Between 2000 and 2015, the women's jail population grew 40%, while the overall jail population grew 17%; and the women's prison population increased 22% compared to a 7% increase in the total prison population. See also *Overlooked: Women and Jails in an Era of Reform*, the Vera Institute (August 2016).

<sup>2</sup> Andrea J. Sedlak and Karla S. McPherson, Conditions of Confinement: Findings from the Survey of Youth in Residential Placement, OJJDP Juvenile Justice Bulletin (May 2010), based on 2003 statistics.

<sup>3</sup> United States Department of Justice Bureau of Justice Statistics, *Prisoners in 2014; The Sentencing Project: Incarcerated Women and Girls* (November 2015).

<sup>4</sup> Walmsley, Roy, *World Female Imprisonment List*. 4th ed. (2017).

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feminine hygiene supplies to meet their menstrual needs, and both legislative bodies and correctional and detention facilities should ensure that they have that access.

**Women prisoners typically do not have access to sufficient basic feminine hygiene supplies.<sup>5</sup>**

Feminine hygiene products, including tampons, sanitary pads, and toilet paper are fundamental, basic necessities for women prisoners who need them. Women should have free access to these supplies — yet they rarely do. Facilities will generally provide prisoners with some basic sanitary supplies, including toilet paper and feminine hygiene products. However, the quantity and variety of these supplies are often severely limited, and access needlessly restricted.

Many facilities limit the quantity of sanitary napkins they provide to women prisoners. Until recently, the New York state issued women 24 sanitary pads each month, which the vast majority of prisoners reported was inadequate.<sup>6</sup> The state-issued sanitary pads were so thin that women reported needing to wear up to four pads at a time to adequately control their menstrual flow.<sup>7</sup> Women had the option of requesting additional pads through the medical unit, but often faced degrading and unrealistic requirements when they did. One facility required women to be screened for anemia before being authorized to receive additional pads.<sup>8</sup> Far worse, however, was the requirement for women at New York's Bayview Correctional Facility. There, the Medical Director demanded concrete evidence that a woman needed additional supplies: "We need her to bring in a bag of used sanitary napkins to show that she actually has used them and needs more."<sup>9</sup>

Prisoners in other states face similar problems with inadequate hygiene supplies.<sup>10</sup> Prisoners in California jails describe being forced to reuse pads and to beg for hygiene supplies.<sup>11</sup> Prisoners in Connecticut describe receiving five pads per week to split

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<sup>5</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS (3d ed. 2011), Standard 23-3.5(c).

<sup>6</sup> Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 66, Women in Prison Project of the Correctional Association of New York (2015).

<sup>7</sup> Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 66, Women in Prison Project of the Correctional Association of New York (2015).

<sup>8</sup> Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 67, Women in Prison Project of the Correctional Association of New York (2015).

<sup>9</sup> Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 67, Women in Prison Project of the Correctional Association of New York (2015).

<sup>10</sup> ACLU of California, *Reproductive Health Behind Bars in California* at 20-21 (2016).

<sup>11</sup> ACLU of California, *Reproductive Health Behind Bars in California* at 20 (2016).

between two women in a cell.<sup>12</sup> The low-quality pads often fell out of women's pantlegs when the adhesive failed to adequately keep the pads in place.<sup>13</sup> Women who could afford to buy additional supplies in a commissary could avoid that fate by using up to six pads at once. Women in Texas receive 30 sanitary pads and 6 tampons per month, and women routinely exhaust this supply.<sup>14</sup>

In Michigan, women in the Muskegon County Jail filed a lawsuit based in part on inadequate access to feminine hygiene products and toilet paper.<sup>15</sup> Women described delays of up to two days in receiving sanitary napkins, causing them to bleed through their clothes despite their repeated requests. Women were forced to wear bloody clothes until the next available laundry day, which occurred once per week.

Women prisoners who need additional supplies may purchase them through a commissary, but often lack the means to do so. The vast majority of women prisoners are indigent and cannot purchase additional supplies.<sup>16</sup> Even prisoners who work will be forced to spend much or all of their earnings on sanitary supplies – average wages for regular (non-industry) prison jobs range from an average of \$0.14 per hour to an \$0.63 per hour, and some states do not pay prisoners for their work.<sup>17</sup> Tampons and pads are often sold in prison commissaries at significantly inflated prices. In New York, single tampons are offered for 12 cents, 17 cents, or 24 cents; and single pads cost 21 cents or 22 cents, depending on the facility.<sup>18</sup> In Arizona, a woman would need to work for 21 hours to purchase a box of 16 pads, and 27 hours for a box of 20 tampons.<sup>19</sup>

The same problems that arise with insufficient quantities of menstrual supplies also arise with insufficient quantities of toilet paper. The Correctional Association of New York found that New York provided women prisoners with the same quantities of toilet paper

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<sup>12</sup> Bozelko, Chandra, *Prisons that Withhold Menstrual Pads Humiliate Women and Violate Basic Human Rights*, The Guardian (June 15, 2015).

<sup>13</sup> *Id.*

<sup>14</sup> *The Treatment of Women in Texas' Criminal Justice System* at 10, Texas Criminal Justice Coalition (April 2018).

<sup>15</sup> *Semelbauer v. Muskegon County*, 1:14-cv-01245 (W.D. Mich.)

<sup>16</sup> Experts estimate that 80% of prisoners are indigent. Eisen, Lauren-Brooke, *Charging Inmates Perpetuates Mass Incarceration*. Brennan Center for Justice (2015). This figure is not broken down by gender and includes both men and women.

<sup>17</sup> *How Much Do Incarcerated People Earn in Each State?* Prison Policy Initiative, (April 10, 2017) [www.prisonpolicy.org/blog/2017/04/10/wages](http://www.prisonpolicy.org/blog/2017/04/10/wages). Seven states do not pay prisoners for their work. Wages for jobs in "Correctional Industries" are higher – averaging between \$0.33 and \$1.41 per hour – but women's prisons frequently do not offer industry jobs, or have limited spaces available.

<sup>18</sup> Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 67, Women in Prison Project of the Correctional Association of New York (2015).

<sup>19</sup> Lydia O'Connor, *Federal Prisons Made Menstrual Products Free. Now Some States May Follow Suit*. Huffington Post (February 7, 2018).

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as they provided men prisoners, even though women routinely need more toilet paper than men.<sup>20</sup> Not surprisingly, women routinely reported running out of toilet paper and resorting to using “magazines, newspaper, lined paper and washcloths” instead.<sup>21</sup>

The type of feminine hygiene products offered is crucial. Tampons are rarely provided free of charge to women prisoners. Some women will prefer tampons to pads, especially to the low-quality state-issued pads they often receive. In prison, any desired item – whether it is a necessity, a luxury, or even something illegal – becomes a part of the prison economy.<sup>22</sup> Feminine hygiene products are no exception. Without access to the amount or type of sanitary supplies that they need, women are often forced to resort to the underground economy to obtain these basic necessities.<sup>23</sup>

In some facilities, however, lack of access to tampons can have far worse consequences. Many women prisoners must use group showers, where menstruating prisoners without access to tampons face the impossible choice of either not bathing for the five to seven days of menstruation, or of visibly bleeding while showering in full view of other prisoners, or even correctional staff. Unfortunately, unscrupulous correctional staff can take advantage of these women’s desperation, even demanding sexual acts in return for tampons.<sup>24</sup>

**Women prisoners can safely be provided with unrestricted access to free tampons, sanitary pads, and toilet paper.**

External organizations that evaluate women’s prisons routinely conclude that women prisoners should have access to sufficient quantities of tampons, pads, and toilet paper.<sup>25</sup> Notably, several states and the Federal Bureau of Prisons have instituted

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<sup>20</sup> Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 68, Women in Prison Project of the Correctional Association of New York (2015).

<sup>21</sup> Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 67, Women in Prison Project of the Correctional Association of New York (2015).

<sup>22</sup> B. Owens, J. Wells, J. Pollock: *In Search of Safety: Confronting Inequality in Women’s Imprisonment* at 75 (2017).

<sup>23</sup> B. Owens, J. Wells, J. Pollock: *In Search of Safety: Confronting Inequality in Women’s Imprisonment* at 75 (2017).

<sup>24</sup> Letter from Acting Assistant Attorney General Jocelyn Samuels to Governor Robert Bentley, January 17, 2014. A consent decree resolving this case requires Alabama’s Tutwiler Prison for Women to provide free, unlimited tampons and pads to their women prisoners – and they have been doing so since March 2016. See State of Alabama Department of Corrections Standard Operating Procedure 8-27 (March 8, 2016). Currently, all housing unit bathrooms have open cabinets containing toilet paper, maxi pads, and tampons. The same supplies are available on the segregation unit and medical unit, although outside of the cells.

<sup>25</sup> *Women and Imprisonment: The Handbook for Prison Managers and Policy-Makers*, United Nations (2015); Task Force on Correctional Health Care Standards, *Standards for Health Services in Correctional Institutions*, American Public Health Association at 150 (3<sup>rd</sup> ed. 2003)(“Toilet paper must be provided to all prisoners and all female prisoners must be issued sanitary napkins and/or tampons when they are needed.”); Rachel Ramirez, *Reentry*

policies to provide women prisoners with sufficient sanitary supplies. For example, the Federal Bureau of Prisons issued an Operations Memorandum on August 1, 2017 to provide women prisoners, at no cost, with tampons (regular and super size); maxi pads with wings (regular and super size), and panty liners.<sup>26</sup> Julia Tutwiler Prison for Women in Alabama has provided free toilet paper, sanitary napkins, and tampons (regular and super size) to women since March 2016.<sup>27</sup> The Nebraska Department of Corrections took the initiative in January 2018 to provide free tampons and pads to women prisoners after legislation that would have mandated free tampons and pads for women prisoners failed.<sup>28</sup>

When agencies do develop policies to provide appropriate, free menstrual supplies to women prisoners, it is critical to specifically provide for meaningful access to the products, and policies must explicitly address distribution methods. The U.S. Department of Justice's Office of Inspector General evaluated federal women prisoners' access to menstrual supplies in its September 2018 Review of the Federal Bureau of Prisons' Management of its Female Inmate Population.<sup>29</sup> The Bureau of Prisons' policy had simply required that "products for female hygiene needs shall be available," but did not address any method of distributing the supplies."<sup>30</sup> Although each of the 29 federal institutions that house women were following the identical policy, distribution methods varied across facilities, even of the same security level, and negatively impacted the availability of sanitary supplies.<sup>31</sup> The OIG recommended that the BOP modify its current policy to "[c]larify guidance on the distribution of feminine hygiene products to ensure sufficient access to the amount of products inmates need free of charge."<sup>32</sup> The BOP agreed to do so.<sup>33</sup>

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*Considerations for Justice Involved Women*, National Resource Center on Justice Involved Women; *Gender Responsive Policy and Practice Assessment*, National Institute of Corrections.

<sup>26</sup> Federal Bureau of Prisons Operations Memorandum 001-2017, *Provision of Feminine Hygiene Products* (August 1, 2017)(re-issued August 1, 2018).

<sup>27</sup> State of Alabama Department of Corrections, Standard Operating Procedure 8-27, *Hygiene Item Issuance*, (March 8, 2016).

<sup>28</sup> *New Tampon Policy Provides Them Free to Nebraska Prisoners*, Oklahoma World-Herald (January 19, 2018). Like most other states, Nebraska had previously provided free pads, with tampons available at the commissary for inflated prices.

<sup>29</sup> Office of the Inspector General, U.S. Department of Justice, *Review of the Federal Bureau of Prisons' Management of its Female Inmate Population*, Evaluations and Inspections Report 18-05 (September 2018).

<sup>30</sup> Office of the Inspector General, U.S. Department of Justice, *Review of the Federal Bureau of Prisons' Management of its Female Inmate Population* at p. 29. The investigation occurred prior to the revised Operations Memorandum for the Provision of Feminine Hygiene Products, and therefore evaluated the earlier policy. Neither the earlier policy nor the current policy addresses distribution.

<sup>31</sup> *Id.* at 29.

<sup>32</sup> *Id.* at 44.

<sup>33</sup> *Id.* at 50.

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The Alabama Department of Corrections, in contrast, provides clear guidance on access to the free tampons, pads, and toilet paper that it provides to women prisoners at Julia Tutwiler Prison for Women.<sup>34</sup> The policy requires hygiene items to be readily available in bathroom areas, assigns specific inventory and distribution responsibilities to the Housekeeping Officer, and designates an Administrative Lieutenant to ensure that the hygiene items are provided as required. An Independent Monitor has evaluated women prisoners' access to these supplies under a 2015 Consent Decree.<sup>35</sup> All six compliance reports that the Monitor has filed with the court reflects that Tutwiler is following their policy, and that women prisoners have unrestricted access to free tampons, pads, and toilet paper.

## **Potential problems with unrestricted access to hygiene supplies can be addressed without restricting access to all women.**

Perceived and actual problems with providing unrestricted access to free pads and tampons can be adequately addressed without depriving women of basic sanitary supplies. Facilities often worry that women will use feminine hygiene products for reasons other than they are intended, such as for cleaning supplies or to address other basic housekeeping issues in the prison. And that does happen. Women have reportedly used pads to clean housing units, "to quiet squeaky doors, steady uneven tables and chairs,"<sup>36</sup> as toilet covers for stainless steel toilets, or to pad blisters on their feet.<sup>37</sup> However, as the Correctional Association of New York recommended, the problem of women using sanitary supplies for housekeeping can be easily alleviated by providing women with appropriate cleaning supplies.<sup>38</sup> Other problems reflect basic supervision issues, which can be resolved without restricting all prisoners' access to pads and tampons.<sup>39</sup>

The most commonly reported problem with unrestricted access to feminine hygiene supplies is that women tend to hoard the supplies, at least initially. However,

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<sup>34</sup> State of Alabama Department of Corrections, Standard Operating Procedure 8-27, *Hygiene Item Issuance*, (March 8, 2016).

<sup>35</sup> *United States v. Alabama*, 2:15-cv-00368 (May 28, 2015).

<sup>36</sup> Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 67, Women in Prison Project of the Correctional Association of New York (2015).

<sup>37</sup> Chandra Bozelko, *Prisons that Withhold Menstrual Pads Humiliate Women and Violate Basic Human Rights*, The Guardian (June 15, 2015).

<sup>38</sup> Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 66, Women in Prison Project of the Correctional Association of New York (2015).

<sup>39</sup> See also Office of the Inspector General, U.S. Department of Justice, *Review of the Federal Bureau of Prisons' Management of its Female Inmate Population*, Evaluation and Inspection Report 18-05 at 30-31. ("Other state officials told us that if inmates were misusing feminine hygiene products for other purposes, they would address the issue with the individual inmates rather than changing the distribution method for all inmates.").

once women come to trust that they will continue to have access to the supplies, they no longer hoard them because there is no reason to do so.<sup>40</sup>

Significantly, no security issues related to unrestricted access to feminine hygiene have been identified. The Office of Inspector General's report on the federal facilities noted that "no BOP staff member told us that feminine hygiene products were misused in a manner that presented a security concern."<sup>41</sup> The Administrator of the Women and Special Populations Branch concurred that making feminine hygiene products freely accessible could not be a security concern.<sup>42</sup>

Women prisoners in both juvenile and adult systems deserve unrestricted access to necessary basic feminine hygiene supplies. Women should not be forced to forfeit their dignity, their health, or their safety to obtain tampons, sanitary pads, or toilet paper. All legislatures and correctional facilities should take action to ensure that women have the necessary supplies to meet their biological needs.

Respectfully submitted,

Lucien Dervan  
Chair, Criminal Justice Section  
January 2019

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<sup>40</sup> See also Office of the Inspector General, U.S. Department of Justice, *Review of the Federal Bureau of Prisons' Management of its Female Inmate Population*, Evaluation and Inspection Report 18-05 at 30. (State official explained that an initial hoarding issue stopped when prisoners realized that they would continue to have access to hygiene products.).

<sup>41</sup> *Id.* at p. 30 n. 65.

<sup>42</sup> *Id.*

## GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Lucian Dervan, Chair

### 1. Summary of Resolution(s).

This resolution urges federal, state, local, tribal and territorial governments to enact legislation, and correctional and detention facilities to enact policies, to provide all women prisoners in all forms of detention, both adult and juvenile, with unrestricted access to a free toilet paper and a range of free feminine hygiene products, including both tampons and sanitary pads in sufficient quantities to address their needs.

2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Council at the Fall Meeting in Washington, DC, on November 3, 2018.

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

No.

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

The Criminal Justice Standards for the Treatment of Prisoners, Standards 23-3.5c and 23-6.1(iv), state generally that correctional authorities should ensure that special health care protocols are used for female prisoners. This resolution is very specific because institutions have failed to understand exactly what female prisoners, both adult and juvenile, need in order to adequately respond to their monthly menstrual cycles.

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

Not applicable.

6. Status of Legislation. (If applicable)

Not applicable.

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

This policy will be used as a basis of advocacy in federal, state, local, territorial and tribal correctional systems.

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

No cost to the Association.

9. Disclosure of Interest. (If applicable)

Not applicable

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

Commission on Veteran's Legal Services  
Legal Aid & Indigent Defense  
Commission on Disability Rights  
Special Committee on Hispanic Legal Rights & Responsibilities  
Commission on Homelessness and Poverty  
Commission on Women  
Center for Human Rights  
Commission on Immigration  
Racial & Ethnic Diversity  
Racial & Ethnic Justice  
Commission on Youth at Risk  
Young Lawyer's Division  
Civil Rights and Social Justice  
Government and Public Sector Lawyers  
International Law  
Federal Trial Judges  
State Trial Judges  
Law Practice Division  
Science & Technology  
Health Law  
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**EXECUTIVE SUMMARY****1. Summary of the Resolution**

This resolution urges federal, state, local, tribal and territorial governments to enact legislation, and correctional and detention facilities to enact policies, to provide all women prisoners in all forms of detention with unrestricted access to a free toilet paper and a range of free feminine hygiene products, including both tampons and sanitary pads in sufficient quantities to address their needs.

**2. Summary of the Issue that the Resolution Addresses**

The resolution addresses the need for all correctional facilities to provide women prisoners with appropriate hygiene products.

**3. Please Explain How the Proposed Policy Position Will Address the Issue**

The resolution urges all correctional facilities to provide feminine hygiene products in sufficient quantities and to make them available free of charge.

**4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified.**

Some correctional facilities have expressed concerns about women hoarding supplies, or using sanitary napkins to clean cells or housing units, quiet squeaky doors, stabilize uneven chairs or tables, to protect blisters, or to pad cold metal toilet seats.



**AMERICAN BAR ASSOCIATION**  
**CRIMINAL JUSTICE SECTION**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges federal, state, local, tribal and  
2 territorial governments to amend existing laws or enact new laws to clearly define  
3 child torture and make child torture a felony offense regardless of whether a serious  
4 physical injury occurs; and  
5

6 FURTHER RESOLVED, That the American Bar Association urges governments to  
7 promote training for judges, prosecutors, physicians, law enforcement, child protection  
8 authorities, and victim-witness advocates on emerging evidence-based, victim-centered  
9 and effective practices, and to utilize the Child Advocacy Care (CAC) model of  
10 collaboration and providing services to improve government responsiveness to severe  
11 cases of child abuse.



## REPORT

### Executive Summary

Child abuse is a significant problem in the United States. In fiscal year 2016 (the latest year for which there is national data), 50 states, the District of Columbia, and the Commonwealth of Puerto Rico substantiated 676,000 children as victims of child abuse and neglect.<sup>1</sup> The U.S. Department of Health and Human Services estimated that for the same year at least 1,750 children died from child abuse and neglect.<sup>2</sup>

Child torture is a documented subset of severe child abuse.<sup>3</sup> Child torture includes a combination of two or more cruel inhuman degrading treatments occurring for protracted periods of time, such as:

- intentionally starving the child,
- forcing the child to sit in urine or feces,
- binding or restraining the child,
- repeatedly physically injuring the child,
- exposing the child to extreme temperatures without adequate clothing,
- locking the child in closets or other small spaces, and
- forcing the child into stress positions or exercise.

resulting in prolonged suffering, permanent disfigurement/dysfunction, or death.<sup>4</sup>

In a number of states, some cases of child torture do not result in a category of serious physical injury that is required for a felony charge.<sup>5</sup> Amending or enacting criminal codes to include a felony charge for these cases will protect child survivors.

Furthermore, promoting education of judges, law enforcement, child protection authorities, prosecutors, and victim advocates on emerging evidence-based and effective practices to improve government responsiveness to severe cases of child abuse will also help protect child victims.

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<sup>1</sup> U.S. Dep’t of Health and Human Servs., Admin. for Children and Families, Admin. on Children, Youth and Families, Children’s Bureau, *Child Maltreatment 2016*, 18 (2018), <https://www.acf.hhs.gov/sites/default/files/cb/cm2016.pdf>.

<sup>2</sup> *Id.* at 53; see U.S. Gov’t Accountability Office, *Child Maltreatment: Strengthening National Data on Child Fatalities Could Aid in Prevention*, GAO-11-599, at 9 (2011) (“More children have likely died from maltreatment than are reflected in the national estimate. . . . A major reason for the likely undercounting of child maltreatment fatalities is that nearly half of states report to NCANDS data only on children already known to CPS agencies—yet not all children who die from maltreatment were previously brought to the attention of CPS”), <https://www.gao.gov/assets/330/320774.pdf>.

<sup>3</sup> See Barbara L. Knox, et al., *Child Torture As A Form Of Child Abuse*, 7 J. Child Adolescent Trauma 38, 44-46 (2014), [https://pdfs.semanticscholar.org/2d88/139a3af0775d9a20333b03bb8f356cbc6615.pdf?\\_ga=2.7318258.1186776278.1539534964-179640352.1539534964](https://pdfs.semanticscholar.org/2d88/139a3af0775d9a20333b03bb8f356cbc6615.pdf?_ga=2.7318258.1186776278.1539534964-179640352.1539534964).

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Sadie Gurman, *Woman Pleads Guilty In Denver Child Abuse Case*, Coloradoan: A Part of the USA Today Network (Aug. 8 2014) (“Prosecutors said . . . the case was among the most horrific they had ever seen, but the state’s child abuse laws kept them from pursuing harsher penalties because the children, ages 2 to 6, did not suffer serious physical injuries”), <https://www.coloradoan.com/story/news/local/colorado/2014/08/08/woman-pleads-guilty-denver-child-abuse-case/13800793/>.

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## Existing American BA Resolutions and/or Standards

The American Bar Association (ABA) has a history of advocating for the importance of investigating and prosecuting those who perpetrate crimes against children.

In 2013, the ABA adopted a policy 113C urging states to review their child abuse and neglect laws to potentially strengthen/adjust:

- a) Mandatory reporting requirements for child abuse and neglect;
- b) Sanctions for failure to report child abuse and neglect, and for the making of a maliciously false report;
- c) Penalties for endangering a child's life through physical abuse, sexual abuse, and severe neglect; and
- d) Whether and how to extend civil immunity to those who in good faith participate or assist in child protective investigations and other child protective actions.<sup>6</sup>

## Scope of the Problem

According to the U. S. Department of Health and Human Services (HHS), in fiscal year 2016, state Child Protective Service ("CPS") agencies received 4.1 million referrals of suspected child abuse involving approximately 7.4 million children.<sup>7</sup> In 2016, 50 states, the District of Columbia, and the Commonwealth of Puerto Rico substantiated 676,000 children as victims of child abuse and neglect.<sup>8</sup> The majority of victims consisted of three races or ethnicities – White (44.9%), Hispanic (22.0%), and African-American (24.9%).<sup>9</sup> Forty-nine states reported 1,700 child fatalities due to abuse and neglect.<sup>10</sup> HHS estimates that at least 1,750 children died due to abuse and neglect across the U.S.<sup>11</sup> In 2016, more children died from child abuse and neglect than from all childhood cancers combined.<sup>12</sup>

For the child victims that survive, consequences can last lifetimes.<sup>13</sup> Such long-term consequences may be:

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<sup>6</sup> Am. Bar. Assn., Resolution 113C (Adopted Aug. 2013).

<sup>7</sup> U.S. Dep't of Health and Human Servs., Admin. for Children and Families, Admin. on Children, Youth and Families, Children's Bureau, *Child Maltreatment 2016*, 6 (2018).

<sup>8</sup> *Id.* at 18.

<sup>9</sup> *Id.* at 20.

<sup>10</sup> *Id.* at 53.

<sup>11</sup> *Id.*

<sup>12</sup> See Am. Cancer Soc'y, *Cancer Facts and Figures 2016*, 11 (2016) (estimating that 1,250 cancer deaths would occur among children ages 0-14 years in 2016), <https://www.cancer.org/content/dam/cancer-org/research/cancer-facts-and-statistics/annual-cancer-facts-and-figures/2016/cancer-facts-and-figures-2016.pdf>.

<sup>13</sup> U.S. Dep't of Health & Human Servs., Child Welfare Information Gateway, *Long Term Consequences of Child Abuse and Neglect* 1 (2013), [https://www.childwelfare.gov/pubpdfs/long\\_term\\_consequences.pdf](https://www.childwelfare.gov/pubpdfs/long_term_consequences.pdf).

- Physical (e.g., impaired brain development, poor health including cancer);
- Psychological (e.g., depression, anxiety, relationship difficulties);
- Behavioral (e.g., juvenile delinquency, adult criminality, teen pregnancy, low academic achievement, alcohol and drug use, mental health problems, abusive behavior); and
- Societal (e.g., direct costs associated with maintaining a child welfare system to investigate and respond to allegations of child abuse and neglect, as well as expenditures by the judicial, law enforcement, health, and mental health systems, and indirect costs associated with juvenile and adult criminal activity, mental illness, substance abuse, domestic violence, loss of productivity due to unemployment and underemployment, the cost of special education services, and increased use of the health care system).<sup>14</sup>

### ***Child Torture as a Form of Child Abuse***

Child torture is a medical subcategory of child abuse including unique clinical features which require specific child assessment, diagnostic, and treatment approaches.<sup>15</sup> Child torture includes a combination of two or more cruel inhuman degrading treatments for protracted periods of time, such as:

- intentionally starving the child,
- forcing the child to sit in urine or feces,
- binding or restraining the child,
- repeatedly physically injuring the child,
- exposing the child to extreme temperatures without adequate clothing,
- locking the child in closets or other small spaces, and
- forcing the child into stress positions or exercise.

resulting in prolonged suffering, permanent disfigurement/dysfunction, or death.<sup>16</sup>

An estimated 1-2% of children evaluated for child maltreatment fall into the category of child torture.<sup>17</sup> Not all cases of child torture result in an instantly life-threatening or serious physical injury.

### **Review of Criminal Codes**

Courts have defined torture as used in child-endangering statutes as the infliction of severe pain or suffering of body or mind.<sup>18</sup> Some state codes lack a felony charge for

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<sup>14</sup> *Id.* at 2-6.

<sup>15</sup> Knox et al., *supra* note 3, at 38.

<sup>16</sup> *See Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *See* State v. Corcoran, No. C-160627, 2017 Ohio 7084, 14 (Ohio App., 2017), quoting State v. Wainscot, No. CA2015-07-056, 2016-Ohio-1153, 24 (Ohio App., 2016), quoting State v. Surles, No. 23345, 2007-Ohio-6050, 5 (Ohio App., 2007)

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cases of child torture not resulting in a serious physical injury as defined by statute.<sup>19</sup> In cases where the child survives without serious physical injuries, the only charges that fit the elements of the crime in these states may be misdemeanors.<sup>20</sup>

For example, some states have recognized the problem and have adopted statutes to explicitly address the issue. The South Dakota statute § 26-10-1 states, “Any person who abuses, exposes, tortures, torments, or cruelly punishes a minor in a manner which does not constitute [a felony], is guilty of a Class 4 felony.”<sup>21</sup>

Thirty-seven state codes contain some form of a child torture statute.<sup>22</sup> Criminal child torture statutes in the U.S. fall into one of the following categories, as applied to children:

- (1) the state code explicitly prohibits “torture” or an analogous element<sup>23</sup> such as “unusual cruelty” or “unjustifiable suffering;”
- (2) the state prohibits causing a mental or physical injury, and further defines that injury to include torture, pain, or synonymous element such as “unusual cruelty” or “unjustifiable suffering;” or
- (3) the state code bans repeated pattern of injuries that result in torture.<sup>24</sup>

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<sup>19</sup> See Ann Ratnayake Macy, *U.S. 50 State Study: A Precarious Gap in U.S. Criminal Codes Exists for Cases of Child Torture*, J. of Child and Youth Review (to be published 2019). (E.g. Alaska, Arkansas, Hawaii, Illinois, Indiana, Maryland, Maine, Massachusetts, Montana, New Hampshire, New York, Oregon, Pennsylvania, and West Virginia); see, e.g., Del. Code Ann. tit. 11 § 222 (26) (defining “serious physical injury” as “physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ, or which causes the unlawful termination of a pregnancy without the consent of the pregnant female”).

<sup>20</sup> See, e.g., Sadie Gurman, *Woman Pleads Guilty In Denver Child Abuse Case*, Coloradoan: A Part of the USA Today Network (Aug. 8 2014) (“Prosecutors said . . . the case was among the most horrific they had ever seen, but the state’s child abuse laws kept them from pursuing harsher penalties because the children, ages 2 to 6, did not suffer serious physical injuries”) (Colo. Rev. Stat. §18-6-401 includes a serious bodily injury limitation in the sentencing scheme).

<sup>21</sup> S.D. Codified Laws § 26-10-1 (2018).

<sup>22</sup> See Ratnayake, *supra* note 17.

<sup>23</sup> See generally: Waldron, Jeremy, “Cruel, Inhuman, and Degrading Treatment: The Words Themselves” 98 New York University Public Law and Legal Theory Working Papers (2008), <https://core.ac.uk/download/pdf/13524478.pdf> (“cruel,” “degrading treatment,” “causing great suffering,” and similar wording are used in the context of prohibiting torture)

<sup>24</sup> *Id.* (The term torture is also cited in the following other contexts: animal cruelty, sentencing enhancements to murder, capital/non-capital punishment sentencing guidelines, obscenity statutes, sadomasochist statutes, human trafficking statutes, and parental termination/reunification determinations statutes. These statutes were purposefully excluded from the analysis due to relevance and application to limited circumstances.)

The statutes are wide ranging and heterogenous.<sup>25</sup> The maximum penalties vary from five years in jail to a lifetime in prison.<sup>26</sup> Some child torture statutes only apply if the perpetrator of the acts has legal custody of the child.<sup>27</sup> Others criminalize all acts of torture against children regardless of whether the perpetrator had legal custody of the child,<sup>28</sup> or range in between legal custody and at least an informal custody agreement.<sup>29</sup> Additionally, in certain states, the application of the child torture statute is limited by a serious bodily injury requirement.<sup>30</sup> Lastly, while a child is usually considered a person under the age of eighteen years, some state statutes limit the application of the child torture provisions to only younger children.<sup>31</sup>

For states that lack a felony charge for cases of child torture not resulting in serious bodily injury or for states with significant loopholes within their child torture statutes, the Michigan statute, Mich. Comp. Laws § 750.85, is an example of an effective statute. Furthermore, it not only protects child victims, but also other vulnerable populations such as the elderly, disabled, and domestic violence victims.

*Mich. Comp. Laws Serv. § 750.85 Torture; Felony*

(1) A person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture and is guilty of a felony punishable by imprisonment for life or any term of years.

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<sup>25</sup> *Id.*; see Ala. Code § 26-15-3 Torture, Willful Abuse, Etc., Of Child (2018); AZ Code § 13-3623, Child Or Vulnerable Adult Abuse; Emotional Abuse (2018); Cal. Penal Code § 206 Torture (2018); COLO. REV. STAT. § 18-6-401 Child Abuse (2018); Conn. Gen. Stat. Ann. § 53-20 Cruelty To Persons (2018); D.C. Code § 22-1101 Cruelty To Children Definition (2018); Del. Codestate Tit. 11 § 1103B (2018); Fla. Stat. § 827.03, Abuse, Aggravated Abuse, And Neglect Of A Child (2018); Ga. Code Ann. 16-5-70 Cruelty To Children (2018); Id. Code Ann. 18-1501, Injury To Children (2018); Kan. Stat. § 21-5602 Abuse Of A Child (2018); Ky. Rev. Stat. Ann. § 508.120 (2018); La. Rev. Stat. Ann. § 14:93 Cruelty To Juveniles (2018); Mich. Comp. Laws Serv. § 750.85 Torture (2018); MINN. STAT. § 609.37725 Malicious Punishment Of Child (2018); Miss. Code Ann. § 97-5-39 Contributing To The Neglect Or Delinquency Of A Child (2018); Felonious Abuse And/Or Battery Of A Child; Mo. Stat. § 568.060 Abuse Or Neglect Of Child (2018); Neb. Rev. Stat. § 28-707 Child Abuse Penalties (2018); Nev. Rev. Stat. § 200.508 Abuse, Neglect Or Endangerment Of Child (2018); N.J. STAT. ANN. § 2C:24-4 - Endangering Welfare Of Children (2018); N.M. Stat. § 30-6-1 Abandonment Or Abuse Of A Child (2018); N.C. Gen. Stat. § 14-318.4 Child Abuse A Felony (2018); N.D. Cent. Code § 14-09-2225 – Abuse Of Child – Penalty (2018); Ohio Rev. Code Ann. § 2919.2225 Endangering Children (2018); Okla. Stat. Tit. 21 Ann. § 843.5 Child Abuse (2018); ;RI Gen L § 11-9-5.3 (2018). S.C. CODE ANN. § 63-5-70 Unlawful Conduct Toward A Child (2018); S.D. Codified Laws § 26-10-125 Abuse Of Or Cruelty To Minor (2018); TENN. CODE ANN. § 39-15-402 Aggravated Child Abuse And Neglect (2018); Texas Penal Code § 22.0425 Injury To A Child, Elderly Individual, Or Disabled Individual (2018); Utah Code Ann. § 76-5-10925 Child Abuse--Child Abandonment (2018); VA Stat § 40.1-10325 Cruelty And Injuries To Children (2018); Vt. Stat. Ann. Tit. 13 § 1304 Cruelty To Child (2018); Wash. Rev. Code 9A.36.120 Child 25abuse in the first degree (2018); W. Va. Code, § 61-8D-3 (2018); Wis. Stat. Ann. § 948.0325 Physical Abuse Of A Child (2018); WY Stat 6-2-50325 Child Abuse; Penalty (2018).

<sup>26</sup> *E.g.*, Conn. Gen. Stat. Ann. § 53-20 Cruelty To Persons (2018).

<sup>27</sup> *E.g.*, N.M. Stat. § 30-6-1 Abandonment Or Abuse Of A Child (2018).

<sup>28</sup> *E.g.*, Miss. Code Ann. § 97-5-39 Contributing To The Neglect Or Delinquency Of A Child; Felonious Abuse And/Or Battery Of A Child (2018).

<sup>29</sup> *E.g.*, N.J. Stat. Ann. § 2C:24-4 Endangering Welfare Of Children (2018). (Has Legal Custody Or Assumed Responsibility To Care For Child).

<sup>30</sup> *E.g.*, Del. Code State Tit. 11 § 1103B Cruelty To Children Definition (2018).

<sup>31</sup> *E.g.*, Texas Penal Code § 22.04 Injury to a Child, Elderly Individual, or Disabled Individual (2018).

(2) As used in this section: (a) "Cruel" means brutal, inhuman, sadistic, or that which torments. (b) "Custody or physical control" means the forcible restriction of a person's movements or forcible confinement of the person so as to interfere with that person's liberty, without that person's consent or without lawful authority. (c) "Great bodily injury" means either of the following: (i) Serious impairment of a body function as that term is defined in section 58c of the Michigan vehicle code, 1949 PA 300, MCL 257.58c. (ii) One or more of the following conditions: internal injury, poisoning, serious burns or scalding, severe cuts, or multiple puncture wounds. (d) "Severe mental pain or suffering" means a mental injury that results in a substantial alteration of mental functioning that is manifested in a visibly demonstrable manner caused by or resulting from any of the following: (i) The intentional infliction or threatened infliction of great bodily injury. (ii) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt the senses or the personality. (iii) The threat of imminent death. (iv) The threat that another person will imminently be subjected to death, great bodily injury, or the administration or application of mind-altering substances or other procedures calculated to disrupt the senses or personality. (3) Proof that a victim suffered pain is not an element of the crime under this section. (4) A conviction or sentence under this section does not preclude a conviction or sentence for a violation of any other law of this state arising from the same transaction.

## **Education for Multidisciplinary Professionals**

Multidisciplinary child protection professionals such as judges, pediatricians, prosecutors, law enforcement, child protection authorities, victim-witness advocates will better protect children from severe abuse and neglect if educated on emerging evidenced-based or effective practices, and collaborate using the Child Advocacy Care (CAC) model.

Common barriers to an effective government response include lack of a multidisciplinary team approach to dealing with child abuse, inadequate or non-existent protocols for child fatalities, inadequate training in the collection and presentation of forensic evidence, and lack of understanding of latest social research related to trauma and childhood development<sup>32</sup> lack of understanding of the latest medical research such as child torture,<sup>33</sup> lack of understanding of the latest case law such as *Ohio v. Clark*,<sup>34</sup> and lack of training in emerging areas such as legally securing digital evidence from computers, smart phones, tablets, and other electronic devices.

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<sup>32</sup> See U.S. Cent. For Disease Control and Prevention, Adverse Childhood Experiences (ACEs) (*Apr. 1, 2016*), <https://www.cdc.gov/violenceprevention/acestudy/index.html> (children with high ACEs score may have PTSD).

<sup>33</sup> See Barbara L. Knox et al., *Child Torture As A Form Of Child Abuse*, 7 J. Child Adolescent Trauma, 38 (2014) (CPS had not substantiated abuse for half of the study's participants due to lack of understanding of dynamics of child torture).

<sup>34</sup> See *Ohio v. Clark*, 135 S. Ct. 2180, 2182 (2015) (statements made by a very young child are rarely if ever testimonial: "young children have little understanding of prosecution . . . [and] it is extremely unlikely that a 3-year-old child . . . would intend his statements to be a substitute for trial testimony. . . . [A] young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all. [In fact,] "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause").

Children are unable to protect themselves and will always need highly trained and competent investigators, prosecutors, victim/witness specialists, social workers, forensic interviewers, child protective service workers, doctors, sexual assault nurse examiners, psychologists, psychiatrists, scientific forensic experts, and computer forensic examiners to protect them.

In addition to training to enhance government responsiveness to child abuse, the ABA also urges governments to adopt the Child Advocacy Center (CAC) model, and seek accreditation by the National Children's Alliance. CACs are community-based, child-friendly, multidisciplinary services for children and families affected by sexual abuse or severe physical abuse, and provide a hub for collaborating on child abuse cases. CACs bring together, often in one location, child protective services investigators, law enforcement, prosecutors, and medical and mental health professionals to provide a coordinated, comprehensive response to victims and their caregivers, and lead to better outcomes.<sup>35</sup>

### **Conclusion**

To improve government responsiveness to cases of severe child abuse, the ABA urges governments to take the following actions. First, jurisdictions should amend existing laws or enact new laws to ensure that a felony charge exists for cases of child torture that does not result in a severe physical injury. In addition, jurisdictions should educate judges, prosecutors, law enforcement, child protection authorities, and victim-witness advocates on emerging evidence-based and effective practices to address child abuse and encourage the implementation of the Child Advocacy Care (CAC) model of collaboration.

Respectfully submitted,

Lucian Dervan  
Chair, Criminal Justice Section  
January 2019

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<sup>35</sup> See Smith, D. W., Witte, T. H., & Fricker-Elhai, A. E. *Service Outcomes In Physical And Sexual Abuse Cases: A Comparison Of Child Advocacy Center-Based And Standard Services*, 11 *Child Maltreatment*, 354–360 (2006); Jones, Lisa M. Et Al., *Do Children's Advocacy Centers Improve Families' Experiences Of Child Sexual Abuse Investigations?*, 31 *Child Abuse & Neglect*, 1069-85 (2007); Walsh, Wendy A., Et Al., *Which Sexual Abuse Victims Receive A Forensic Medical Examination?: The Impact Of Children's Advocacy Centers*, 31 *Child Abuse & Neglect*, 1053-1068 (2007).

## GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Lucian Dervan, Chair

1. Summary of Resolution(s).

This resolution urges federal, state, territorial and tribal legislatures to amend existing laws or enact new laws to clearly define child torture and make child torture a felony offense regardless of whether a serious physical injury occurs, and to promote training for all court and medical personnel in these cases on emerging evidence-based, victim centered and effective practices, and to utilize the Child Advocacy Care (CAC) model of collaboration and providing services to improve government responsiveness to severe maltreatment of children that does not inflict serious bodily injury.

2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Council at the Fall Meeting in Washington, DC, on November 3, 2018.

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

No.

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

In 2013, the ABA adopted a policy 113C urging states to review their child abuse and neglect laws to potentially strengthen/adjust:

- a) Mandatory reporting requirements for child abuse and neglect;
- b) Sanctions for failure to report child abuse and neglect, and for the making of a maliciously false report;
- c) Penalties for endangering a child's life through physical abuse, sexual abuse, and severe neglect; and
- d) Whether and how to extend civil immunity to those who in good faith participate or assist in child protective investigations and other child protective actions.<sup>36</sup>

This resolution builds on subsection (c) urging states to strengthen/adjust penalties for child torture which endangers a child's life through severe abuse.

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

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<sup>36</sup> Am. Bar. Assn., Resolution 113C (Adopted Aug. 2013).

6. Status of Legislation. (If applicable)

A number of states have successfully enacted statutes that appropriately penalize child torture, but many states have not and there is no law in those states that protect children from acts of child torture.

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

The Section would advocate enactment of appropriate legislation across the country.

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

None

9. Disclosure of Interest. (If applicable)

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

Standing Committees

Ethics and Professional Responsibility

Special Committees and Commissions

Center on Children and the Law

Commission on Civic Education in the Nation's Schools

Commission on Domestic and Sexual Violence

Commission on Lawyer Assistance Programs

Commission on Youth at Risk

Sections, Divisions

Civil Rights and Social Justice

Family Law

Health Law

Judicial Division

Litigation

Senior Lawyers Division

State and Local Government Law

Young Lawyers Division

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11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This resolution urges federal, state, territorial and tribal legislatures to amend existing laws or enact new laws to clearly define child torture and make child torture a felony offense regardless of whether a serious physical injury occurs, and to promote training for all court and medical personnel in these cases on emerging evidence-based, victim-centered, using the Child Advocacy Care (CAC) model of collaboration to improve government responsiveness to severe maltreatment of children that does not inflict serious bodily injury.

### 2. Summary of the Issue that the Resolution Addresses

Child abuse is a significant problem in the United States. In fiscal year 2016 (the latest year for which we have national data), 50 states, the District of Columbia, and the Commonwealth of Puerto Rico substantiated 676,000 children as victims of child abuse and neglect.<sup>37</sup> The U.S. Department of Health and Human Services estimated that for the same year at least 1,750 children died from child abuse and neglect.<sup>38</sup>

Child torture is a documented subset of severe child abuse.<sup>39</sup> Child torture includes a combination of two or more cruel inhuman degrading treatments occurring for protracted periods of time, such as:

- intentionally starving the child,
- forcing the child to sit in urine or feces,
- binding or restraining the child,
- repeatedly physically injuring the child,
- exposing the child to extreme temperatures without adequate clothing,
- locking the child in closets or other small spaces, and
- forcing the child into stress positions or exercise.

resulting in prolonged suffering, permanent disfigurement/dysfunction, or death.<sup>40</sup>

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<sup>37</sup> U.S. Dep't of Health and Human Servs., Admin. for Children and Families, Admin. on Children, Youth and Families, Children's Bureau, *Child Maltreatment 2016*, 18 (2018), <https://www.acf.hhs.gov/sites/default/files/cb/cm2016.pdf>.

<sup>38</sup> *Id.* at 53; see U.S. Gov't Accountability Office, *Child Maltreatment: Strengthening National Data on Child Fatalities Could Aid in Prevention*, GAO-11-599, at 9 (2011) ("More children have likely died from maltreatment than are reflected in the national estimate. . . . A major reason for the likely undercounting of child maltreatment fatalities is that nearly half of states report to NCANDS data only on children already known to CPS agencies—yet not all children who die from maltreatment were previously brought to the attention of CPS"), <https://www.gao.gov/assets/330/320774.pdf>.

<sup>39</sup> See Barbara L. Knox, et al., *Child Torture As A Form Of Child Abuse*, 7 J. Child Adolescent Trauma 38, 44-46 (2014), [https://pdfs.semanticscholar.org/2d88/139a3af0775d9a20333b03bb8f356cbc6615.pdf?\\_ga=2.7318258.1186776278.1539534964-179640352.1539534964](https://pdfs.semanticscholar.org/2d88/139a3af0775d9a20333b03bb8f356cbc6615.pdf?_ga=2.7318258.1186776278.1539534964-179640352.1539534964).

<sup>40</sup> *Id.*

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In a number of states, a felony abuse charge requires a serious physical injury.<sup>41</sup> Some cases of child torture do not result in a category of serious physical injury required by these statutes. Amending or enacting criminal codes to include a felony charge for these cases will protect child survivors. Furthermore, promoting education of judges, law enforcement, child protection authorities, prosecutors, and victim advocates on emerging evidence-based, victim-centered and effective practices, and to utilize the Child Advocacy Care (CAC) model of collaboration to improve government responsiveness to severe cases of child abuse will also help protect child victims.

## 3. Please Explain How the Proposed Policy Position Will Address the Issue

The resolution urges these jurisdictions to enact laws that clearly define torture and make child torture a felony regardless of whether serious physical injury occurs. The resolution will close the gap in certain state criminal codes which allow cases of severe child abuse to be potentially treated as a misdemeanor, and urges jurisdictions to improve government responsiveness to child abuse by providing training on emerging issues in child protection, and by utilizing the Child Advocacy Care (CAC) model of collaboration and providing services.

## 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified.

N/A

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<sup>41</sup> See, e.g., Sadie Gurman, *Woman Pleads Guilty In Denver Child Abuse Case*, Coloradoan: A Part of the USA Today Network (Aug. 8 2014) (“Prosecutors said . . . the case was among the most horrific they had ever seen, but the state’s child abuse laws kept them from pursuing harsher penalties because the children, ages 2 to 6, did not suffer serious physical injuries”), <https://www.coloradoan.com/story/news/local/colorado/2014/08/08/woman-pleads-guilty-denver-child-abuse-case/13800793/>.

**AMERICAN BAR ASSOCIATION  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association approves the Uniform Criminal Records
- 2 Accuracy Act, promulgated by the National Conference of Commissioners on Uniform
- 3 State Laws, as an appropriate Act for those states desiring to adopt the specific
- 4 substantive law suggested therein.



**REPORT****Uniform Criminal Records Accuracy Act***Summary*

Many developments concerning criminal records have occurred over the past twenty years, including the creation of the National Criminal Background Check System in 1993, the establishment of criminal history repositories in all states, and the increasing use of criminal record checks in connection with eligibility for employment, professional and occupational licenses, credit worthiness, and other non-criminal justice purposes. Recent studies have demonstrated that criminal records accessed for these purposes may be inaccurate or incomplete. Some of the causes of inaccuracy or incompleteness are: lack of information on dispositions after an arrest; data entry errors such as an incorrect listing of the offense, or multiple listings of the same offense, or attribution of an offense to a wrong individual; criminal identity theft; and searches for criminal record information resulting in one person's criminal record information appearing in search results initiated for a different individual.

Although precise numbers are hard to come by the FBI has over 77.7 million individuals on file in its master criminal database involving felonies and misdemeanors. Criminal history record information (commonly called a RAP sheet) is generated when an individual is arrested or charged with an offense. The RAP sheet includes information on arrests, charges, bail, detention, convictions, acquittals, and sentencing. It should but does not always include the disposition after an arrest when no charges are filed, or charges are dropped. Criminal history record information is being used in an increasing number of contexts, including employment, housing, licensing, and public services.

The Uniform Criminal Records Accuracy Act is designed to improve the accuracy of criminal history record information that is frequently used in determining the eligibility of a person for employment, housing, credit, and licensing, in addition to law enforcement purposes.

The Act is premised on three principles:

1. Society has a vital interest in the accuracy of criminal history record information.
2. Subjects are entitled to have their criminal history record information kept accurate.
3. The government has an obligation to ensure that the criminal history record information that it collects, stores, maintains, submits and disseminates is accurate.

The act imposes duties on governmental law enforcement agencies and courts that collect, store and use criminal history records, to ensure the accuracy of the criminal history record information. The Act provides that states create a central repository (Section 201) and mandates that any criminal history records information be submitted to the central repository no later than five days after the information is collected.

# 110A

The Act requires the collection of biometric information, such as fingerprints or, for purposes of identification, when permitted or required by other law (Section 202). The use of biometric information should help ensure more complete and accurate records.

The Act limits the dissemination of criminal history record information only as permitted by this Act or by other law (Section 204). A dissemination log must be maintained to record all disclosures (Section 304).

The Act provides individuals the right to see their criminal history record information (Section 302). The Act further provides individuals the right to correct errors in their criminal history record information (Section 401).

The Act mandates the creation and maintenance of a mistaken identity prevention registry (Section 501). Through use of a mistaken identity prevention registry, the Act also provides a mechanism by which an individual whose name is similar to and confused with a person who is the subject of criminal-history-record information, receives a certification to minimize the possibility of a mistaken arrest. It is prima face evidence of the fact and can be used when applying for housing, employment, credit, or other opportunities.

The Act provides for several oversight functions, such as establishing procedures for conducting periodic audits of criminal history record information (Section 602).

The Act includes optional remedies for enforcement for non-compliance (Sections 701 and 702).

Accurate criminal history record information is essential for a properly functioning criminal justice system. Errors can result in problems for both citizens and law enforcement officials. The goal of the Uniform Criminal History Records Accuracy Act is to ensure the accuracy of the information contained in criminal-history-record information, and to provide a means for an individual to seek correction of inaccurate information.

The Uniform Criminal Records Accuracy Act is the result of three years of drafting work and collaboration with representatives from the ABA, (Steve Salzburg Criminal Justice Section; Michael Aisenberg, Science and Technology; Stephanie Domitrovich, Judicial Division), National Center for State Courts, SEARCH, Consumer Data Industry Association, National Employment Law Project, Brennan Center for Justice, RELX Inc, Legal Aid Society of New York, National Association of Correctional Records Administrators, National Association of Attorneys General, National Federation of Independent Businesses, National Association of Criminal Defense Lawyers, Conference of State Court Administrators, National Association of Professional Background Screeners, National Sheriff's Association, Administrators of States' Central Repositories of Criminal Records, Sargent Shriver National Center on Poverty Law, National Consumer Reporting Inc, Frank Campbell, Margaret C Love, and others for a total of 48 observers.

The Uniform Criminal Records Accuracy Act and the work of the Drafting Committee is available at [www.uniformlaws.org](http://www.uniformlaws.org), the website of the Conference.

Respectfully submitted,

Anita Ramasastry, President,  
National Conference of Commissioners  
on Uniform State Laws  
January 2019

## GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Anita Ramasastry, President

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Criminal Records Accuracy Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2018 Annual Meeting.

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

No.

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

This drafting project was undertaken at the request of the Criminal Law Section of the ABA. The ABA previously approved a resolution (87M116A) to support the Uniform Criminal History Records Act, which was finalized by NCCUSL in 1986. That Act provides fundamental law to govern criminal history records information, such as the responsibilities of the collecting agency, its rulemaking powers, what it collects and who may have access to the information. The current Act supplements that prior Act. The ABA has a policy (76M117) to support legislation to restrict unauthorized and harmful dissemination of criminal justice data identifiable to a person.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Criminal Records Accuracy Act has not yet been enacted in any jurisdiction.

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

NCCUSL will present the Act to state legislatures for consideration and enactment.

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

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee's work can be found at [www.uniformlaws.org](http://www.uniformlaws.org).

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Steve Willborn, NCCUSL Interim Executive Director  
111 North Wabash Ave., Suite 1010  
Chicago, IL 60602  
(312) 450-6604 (office)  
(402) 617-4815 (cell)  
[swillborn@uniformlaws.org](mailto:swillborn@uniformlaws.org)

12. Contact Name and Address 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.*)

Anita Ramasastry, NCCUSL President  
Professor of Law  
University of Washington School of Law  
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Seattle, WA 98195-3020 US  
(206) 616-8441 (office)  
(206) 419-5489 (cell)  
[aramasastry@uniformlaws.org](mailto:aramasastry@uniformlaws.org)

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

That the American Bar Association approves the Uniform Criminal Records Accuracy Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2018 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

### 2. Summary of the Issue that the Resolution Addresses

The Uniform Criminal Records Accuracy Act is designed to improve the accuracy of criminal history records, commonly called a RAP sheet, that are frequently used in determining the eligibility of a person for employment, housing, credit, and licensing, in addition to law enforcement purposes. The Act imposes duties on governmental law enforcement agencies and courts that collect, store and use criminal history records, to ensure the accuracy of the information contained in the RAP sheet. The Act provides individuals the right to see and correct errors in their RAP sheet. Through use of a mistaken identity prevention registry, the Act also provides a mechanism by which an individual whose name is similar to and confused with a person who is the subject of criminal-history-record information, a means to minimize the possibility of a mistaken arrest or denial of housing, employment, credit, or other opportunities.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

Approval of the Uniform Criminal Records Accuracy Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None known.

**AMERICAN BAR ASSOCIATION  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association approves the Uniform Civil Remedies
- 2 for Unauthorized Disclosure of Intimate Images Act, promulgated by the National
- 3 Conference of Commissioners on Uniform State Laws, as an appropriate Act for those
- 4 states desiring to adopt the specific substantive law suggested therein.



## REPORT

### **Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act**

#### *Summary*

The disclosure of private, sexually explicit images without consent and for no legitimate purpose—often referred to as “revenge porn”—causes immediate, devastating, and in many cases irreversible harm. A vengeful ex-partner, opportunistic hacker, or other person with mal-intentions can upload an explicit image of a victim to a website where thousands of people can view it and hundreds of other websites can share it. In a matter of days, that image can dominate the first several pages of search engine results for the victim’s name, as well as be emailed or otherwise exhibited to the victim’s family, employers, co-workers, and peers. Additionally, victims of revenge porn often find their personal safety is at a heightened risk after an unauthorized disclosure is made. Incidents of revenge porn and non-consensual pornography are increasing nationally. States have adopted criminal and civil laws to address this issue. However, they differ considerably in their definitions, scope, effectiveness, and remedies. This lack of uniformity creates confusion and inefficiency and leaves victims without a clear path to justice. In response to this issue the Uniform Law Commission promulgated the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (UCRUDIIA) in 2018.

Section 3 of the UCRUDIIA creates a cause of action for the unauthorized disclosure of intimate images. The basic elements of this cause of action are: (1) an intentional disclosure or threat to disclose; (2) an intimate image; (3) of an identifiable individual; and (4) without the consent of the depicted individual. Additionally, the act limits liability to those who (5) know or show reckless disregard for whether the depicted individual had a reasonable expectation of privacy or know or show reckless disregard for whether the intimate image was made accessible through theft, bribery, or similarly unlawful means. The act leaves the question of whether a cause of action under this act survives the death of the depicted individual for the states to decide.

Section 4 provides for exceptions to liability for disclosures made in good faith under the act. Disclosure is permitted for law enforcement, legal proceedings, medical education or treatment and other proper needs. Section 4 further provides that a discloser who is a child’s parent or legal guardian, or individual with legal custody of the child is not liable under the act for the disclosure or threatened disclosure of an intimate image, unless the disclosure was prohibited by law other than this act or made for the purpose of sexual arousal, sexual gratification, humiliation, degradation, or monetary or commercial gain.

Section 5 protects the privacy of a plaintiff. This section allows the plaintiff to use a pseudonym and otherwise protect his or her identity. Section 5 further permits the court to exclude or redact other identifying characteristics of the plaintiff from all pleadings and documents filed in the action. To exercise this right, a plaintiff must file with the court a confidential information form that includes the plaintiff’s real name and other information and serve a copy of this form on a respondent.

# 110B

Section 6 provides various remedies for victims. A prevailing plaintiff may recover actual damages, statutory damages, punitive damages, and attorney's fees. A plaintiff may also recover an amount equal to the gain made by the respondent from disclosure of the intimate image if applicable. Section 6 does not affect a right or remedy available under other law.

Section 7 addresses statutes of limitations. Under this section, an action for the unauthorized disclosure of intimate images must be brought no later than four years from the date the unauthorized disclosure was discovered or should have been discovered with the exercise of reasonable diligence. Actions brought under the act for a threat to disclose an intimate image must be brought no later than four years from the date of the threat to disclose. The act also applies relevant state tolling statutes. For actions brought by individuals who are minors, this section provides states with an optional provision allowing the statute of limitations to begin running on the date the depicted individual attains the age of majority. This section is drafted to allow states to choose a different period of limitation if desired.

Section 8 excludes interactive computer service providers from coverage under the act to the extent they are already protected under federal law. This section does not alter state law on sovereign or governmental immunity.

The Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act and the work of the Drafting Committee is available at [www.uniformlaws.org](http://www.uniformlaws.org), the website of the Conference.

Respectfully submitted,

Anita Ramasastry, President  
National Conference of Commissioners  
on Uniform State Laws  
January 2019

**GENERAL INFORMATION FORM**

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Anita Ramastastry, President

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2018 Annual Meeting.

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

No.

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

Not applicable.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act has not yet been enacted in any jurisdiction.

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

NCCUSL will present the Act to state legislatures for consideration and enactment.

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

None.

# 110B

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee's work can be at [uniformlaws.org](http://uniformlaws.org).

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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(402) 617-4815 (cell)  
[swillborn@uniformlaws.org](mailto:swillborn@uniformlaws.org)

12. Contact Name and Address 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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(206) 616-8441 (office)  
(206) 419-5489 (cell)  
[aramasastry@uniformlaws.org](mailto:aramasastry@uniformlaws.org)

**EXECUTIVE SUMMARY****1. Summary of the Resolution**

That the American Bar Association approves the Uniform Unauthorized Disclosure of Intimate Images Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2018 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

**2. Summary of the Issue that the Resolution Addresses**

The disclosure of private, sexually explicit images without consent and for no legitimate purpose—often referred to as “revenge porn”—causes immediate, devastating, and in many cases irreversible harm. States have adopted criminal and civil laws to address this issue. However, they differ considerably in their definitions, scope, effectiveness, and remedies. The Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act provides uniformity, eliminates confusion, and offers victims a clear path to justice.

**3. Please Explain How the Proposed Policy Position Will Address the Issue**

Approval of the Uniform Unauthorized Disclosure of Intimate Images Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

**4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**

None known.



**AMERICAN BAR ASSOCIATION  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association approves the Uniform Fiduciary
- 2 Income and Principal Act (UFIPA), promulgated by the National Conference of
- 3 Commissioners on Uniform State Laws, as an appropriate Act for those states
- 4 desiring to adopt the specific substantive law suggested therein.



## **REPORT**

### **Uniform Fiduciary Income and Principal Act**

#### *Summary*

The Uniform Fiduciary Income and Principal Act (UFIPA), approved by the Uniform Law Commission (ULC) in 2018, is an updated version of the Uniform Principal and Income Act (UPIA). For this latest revision, the title was changed to differentiate the act from its predecessors, and also to avoid confusion with the closely related Uniform Prudent Investor Act, which shared the UPIA acronym. The Uniform Principal and Income Act was originally approved by the ULC in 1931 and revised twice in 1962 and 1997. Nearly every state has adopted a version.

UFIPA provides rules for allocating receipts and disbursements between income and principal accounts of a trust in accordance with the fiduciary duty to treat all beneficiaries loyally and impartially, unless the terms of the trust specify otherwise. This revision includes provisions allowing conversion of a traditional trust with income and principal beneficiaries into a total-return unitrust when all beneficiaries consent.

Traditionally, beneficiaries of many trusts were either entitled to receive income earned by the trust investments, or to inherit a share of the trust principal. In this scenario, the trustee's allocation of receipts and expenditures to income or principal had a direct effect on the beneficial interests. The UPIA provided a set of accounting rules to guide trustees in making these allocations.

In the last few decades, the historical distinction between income and principal has become less important for two reasons. First, the development of modern portfolio theory allows trustees to invest for the maximum total return, whether the return is in the form of income or growth of principal. Second, modern trusts are often drafted with more flexible terms giving trustees discretion to accumulate income or invade principal when advantageous to further the purposes of the trust. UFIPA recognizes these developments and gives trustees additional flexibility to administer discretionary trusts.

The 1997 UPIA did not include provisions for converting a traditional trust into a "unitrust" to allow for total-return investing. At the time the tax treatment of unitrusts was uncertain, so the drafters instead added a section allowing a trustee to adjust between income and principal as necessary. This created an administrative burden for trustees that could be avoided with a unitrust. Then in 2003 the Internal Revenue Service published regulations respecting unitrust conversions under certain conditions if authorized under state law. Once federally sanctioned, over thirty states amended their UPIA statutes to allow unitrust conversions in some form, but these statutes are not uniform and are often overly restrictive.

# 110C

Article 3 of UFIPA contains flexible and innovative unitrust provisions that improve upon current state laws. Trustees can establish a unitrust policy with a variable or adjustable rate of return based on market conditions or on the needs of individual beneficiaries. A proposed unitrust policy must be disclosed in advance to beneficiaries who may consent or object. Restrictions apply when the trust qualifies for certain tax benefits to ensure compliance with federal regulations.

UFIPA Section 104 provides a new default rule on governing law. The law of the situs of the trust will apply, unless the terms of the trust specify a different jurisdiction. This rule is consistent with other uniform trust and estate acts and will help prevent multi-state disputes.

The Uniform Fiduciary Income and Principal Act and the work of the drafting committee is available at [www.uniformlaws.org](http://www.uniformlaws.org), the website of the Conference.

Respectfully submitted,

Anita Ramasastry, President  
National Conference of Commissioners  
on Uniform State Laws  
January 2019

## GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Anita Ramasastry, President

1. Summary of Resolution.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Fiduciary Income and Principal Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2018 Annual Meeting.

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

Yes. ABA Policy 98M101A approved a prior version of the act, which was then called the Uniform Principal and Income Act.

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

This will replace the Revised Uniform Principal and Income Act (1997), which was subsequently amended in 2000 and 2008. That Act was approved by Resolution 98M101A. This resolution would replace that prior resolution.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Fiduciary Income and Principal Act has not yet been enacted in any jurisdiction.

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

NCCUSL will present the act to state legislatures for consideration and enactment.

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

# 110C

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The drafting committee's work can be found at [uniformlaws.org](http://uniformlaws.org), the website of the Conference.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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[swillborn@uniformlaws.org](mailto:swillborn@uniformlaws.org)

12. Contact Name and Address 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.*)

Anita Ramasastry, President  
Uniform Law Commission  
C/O University of Washington School of Law  
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Seattle, WA 98195-3020  
(206) 616-8441 (office)  
(206) 419-5489 (cell)  
[aramasastry@uniformlaws.org](mailto:aramasastry@uniformlaws.org)

**EXECUTIVE SUMMARY****1. Summary of the Resolution**

That the American Bar Association approves the Uniform Fiduciary Income and Principal Act, promulgated by the National Conference of Commissioners on Uniform State Laws in July 2018 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

**2. Summary of the Issue that the Resolution Addresses**

The Uniform Fiduciary Income and Principal Act provides rules for allocating receipts and disbursements between income and principal accounts of a trust in accordance with the fiduciary duty to treat all beneficiaries loyally and impartially, unless the terms of the trust specify otherwise. This revision includes provisions allowing conversion of a traditional trust with income and principal beneficiaries into a total-return unitrust when all beneficiaries consent.

**3. Please Explain How the Proposed Policy Position Will Address the Issue**

Approval of the Uniform Fiduciary Income and Principal Act by the ABA House of Delegates would help demonstrate to state legislatures that the Act is an appropriate approach for addressing the issues described above.

**4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**

None Known.



**AMERICAN BAR ASSOCIATION  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association approves the Uniform Nonparent
- 2 Custody and Visitation Act promulgated by the National Conference of
- 3 Commissioners on Uniform State Laws, as an appropriate Act for those states
- 4 desiring to adopt the specific substantive law contained in the act.



## REPORT

### **Uniform Nonparent Custody and Visitation Act**

#### *Summary*

The Uniform Nonparent Custody and Visitation Act (UNCVA) (2018) provides states with a uniform legal framework for establishing child custody and visitation rights of nonparents.

In *Troxel v. Granville*, 530 U.S. 57 (2000), the U.S. Supreme Court recognized a right of a fit parent to make decisions regarding the rearing of his or her child. With that in mind, the UNCVA seeks to balance, within constitutional restraints, the interests of children, parents, and certain nonparents. Notably, the UNCVA:

Recognizes a right to seek custody or visitation for two categories of nonparents: (a) nonparents who have acted as consistent caretakers of a child without expectation of compensation, and (b) nonparents who have a substantial relationship (formed without expectation of compensation) with a child and who demonstrate that denial of custody or visitation cause harm to the child with clear-and-convincing evidence.

Requires that a nonparent's petition be verified and include specific facts on which the request for custody or visitation is based. This will aid courts in filtering out cases in which the petitioner does not have a meritorious claim and will facilitate more efficient and clear procedures for evaluating custody and visitation petitions.

Provides a presumption that the parent's decision about custody or visitation is in the best interest of the child. A nonparent would have the burden of rebutting that presumption with clear-and-convincing evidence.

Requires that when custody or visitation rights are sought, notice must be provided to: (a) any parent of the child; (b) any person having custody of the child; (c) any individual having court-ordered visitation with the child; and (d) any attorney, guardian, or similar representative for the child.

Provides a list of factors to guide the court's decision regarding the child's best interest. These factors include the child's relationships with parents and nonparents, the opinion of the child, the age and maturity of the child, past behavior by parents or nonparents, and the impact of the requested rights on the child.

Provides protections for victims of domestic abuse. The court shall presume that custody or visitation rights are not in the best interests of the child if the court finds abuse, neglect, violence, sexual assault, or stalking was committed by the nonparent or member of the nonparent's household.

# 110D

Provides that a nonparent granted visitation may be ordered to pay the cost of facilitating visitation, including the cost of transportation.

Does not apply to a proceeding between two or more nonparents unless a parent is party, nor does the act apply to children who are the subject of proceedings for abuse, neglect, or dependency. In addition, under an optional provision, a nonparent may not maintain a proceeding under this act solely on the basis of having served as a foster parent.

The Uniform Nonparent Custody and Visitation Act and the work of the drafting committee is available at [www.uniformlaws.org](http://www.uniformlaws.org), the website of the Conference.

Respectfully submitted,

Anita Ramasastry, President  
National Conference of Commissioners on  
Uniform State Laws  
January 2019

**GENERAL INFORMATION FORM**

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Anita Ramasastry, President

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Nonparent Custody and Visitation Act (2018) by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2018 Annual Meeting.

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

No.

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

In 1989, the ABA approved 89M106, encouraging further development of state law on grandparent visitation in accordance with certain guidelines. The UNCVA is not inconsistent with the guidelines in 89M106.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Nonparent Custody and Visitation Act has not yet been enacted in any jurisdiction.

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

NCCUSL will present the Act to state legislatures for consideration and enactment.

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

# 110D

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project and those that expressed interest were provided with tentative drafts. The drafting committee's work can be found at [uniformlaws.org](http://uniformlaws.org).

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Steven L. Willborn, NCCUSL Interim Executive Director  
111 North Wabash, Suite 1010  
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(402) 617-4815 (cell)  
[swillborn@uniformlaws.org](mailto:swillborn@uniformlaws.org)

12. Contact Name and Address 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.*)

Anita Ramasastry, NCCUSL President  
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(206) 616-8441 (office)  
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[aramasastry@uniformlaws.org](mailto:aramasastry@uniformlaws.org)

**EXECUTIVE SUMMARY****1. Summary of the Resolution**

That the American Bar Association approves the Uniform Nonparent Custody and Visitation Act (2018), promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

**2. Summary of the Issue that the Resolution Addresses**

The Uniform Nonparent Custody and Visitation Act (2018) provides states with a uniform framework for establishing child custody and visitation rights of nonparents.

**3. Please Explain How the Proposed Policy Position Will Address the Issue**

Approval of the Uniform Nonparent Custody and Visitation Act (2018) by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

**4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified:**

None known.



**AMERICAN BAR ASSOCIATION  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association approves the Uniform Supplemental  
2 Commercial Law for the Uniform Regulation of Virtual-Currency Businesses Act,  
3 promulgated by the National Conference of Commissioners on Uniform State Laws, as  
4 an appropriate Act for those states desiring to adopt the specific substantive law  
5 suggested therein.



**REPORT****UNIFORM SUPPLEMENTAL COMMERCIAL LAW FOR THE UNIFORM  
REGULATION OF VIRTUAL-CURRENCY BUSINESSES ACT***Summary*

The Uniform Supplemental Commercial Law for the Uniform Regulation of Virtual-Currency Businesses Act (the “Supplemental Act”) is a follow-up to the Uniform Regulation of Virtual-Currency Businesses Act (“URVCBA”). The URVCBA establishes a regulatory framework for virtual-currency businesses to operate either by license or registration in a state and creates safeguards to protect users of virtual-currency business services. While the URVCBA provides numerous robust user protections based on commercial law principles, it does not directly address the commercial law rules for transactions and relationships between virtual-currency businesses and consumers.

The Supplemental Act provides commercial law rules using the time-tested duties and rights of customers of securities intermediaries under the Uniform Commercial Code. The Supplemental Act does this by requiring the incorporation of Article 8 of the Uniform Commercial Code into the agreement made between a virtual-currency licensee or registrant and users.

This approach provides certainty and finality to virtual-currency transactions by treating virtual currency as a financial asset under UCC Article 8 rules. This makes virtual currency “negotiable” by allowing good faith purchasers for value to achieve “protected purchaser” status. This also facilitates the use of virtual currency as collateral for UCC Article 9 secured transactions.

The utilization of UCC Article 8 to supply the commercial law rules does not determine the characterization or treatment of virtual currency under other laws, such as income taxation or securities or commodities regulation.

The act also provides that a party’s failure to comply with the Supplemental Act is a violation of the URVCBA, which may result in civil penalties and license or registration revocation or suspension.

The Supplemental Act is designed to replace the user protections in Section 502 of the URVCBA in a state that already has the URVCBA or to take effect when a state enacts the URVCBA.

The Uniform Supplemental Commercial Law for the Uniform Regulation of Virtual-Currency Businesses Act and the work of the Drafting Committee is available at [www.uniformlaws.org](http://www.uniformlaws.org), the website of the Conference.

**110E**

Respectfully submitted,

Anita Ramasastry, President  
National Conference of Commissioners  
on Uniform State Laws  
January 2019

**GENERAL INFORMATION FORM**

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Anita Ramasastry, President

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Supplemental Commercial Law for the Uniform Regulation of Virtual-Currency Businesses Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2018 Annual Meeting.

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

Yes, the House of Delegates approved the Uniform Regulation of Virtual-Currency Businesses Act at its 2018 Midyear Meeting (ABA House Report 18M112F). The Uniform Supplemental Commercial Law for the Uniform Regulation of Virtual-Currency Businesses Act is designed to be enacted alongside the Uniform Regulation of Virtual-Currency Businesses Act. Adoption of this resolution is important because of the related nature of the acts—one act provides the regulatory framework for virtual-currency businesses and the other provides the commercial law rules to govern virtual-currency transactions.

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

None.

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

6. Status of Legislation. (If applicable)

The Uniform Supplemental Commercial Law for the Uniform Regulation of Virtual-Currency Businesses Act has not yet been enacted in any jurisdiction.

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

NCCUSL will present the Act to state legislatures for consideration and enactment.

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

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee's work can be found at [uniformlaws.org](http://uniformlaws.org).

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Steve Willborn, NCCUSL Interim Executive Director  
111 North Wabash Ave., Suite 1010  
Chicago, IL 60602  
(312) 450-6604 (office)  
(402) 617-4815 (cell)  
[swillborn@uniformlaws.org](mailto:swillborn@uniformlaws.org)

12. Contact Name and Address 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.*)

Anita Ramasastry, NCCUSL President  
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University of Washington School of Law  
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**EXECUTIVE SUMMARY**1. Summary of the Resolution

That the American Bar Association approves the Uniform Supplemental Commercial Law for the Uniform Regulation of Virtual-Currency Businesses Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2018 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

The Uniform Supplemental Commercial Law for the Uniform Regulation of Virtual-Currency Businesses Act provides commercial law rules using the time-tested duties and rights of customers of securities intermediaries under the Uniform Commercial Code. The Supplemental Act does this by requiring the incorporation of Article 8 of the Uniform Commercial Code into the agreement made between a virtual-currency licensee or registrant and users.

3. Please Explain How the Proposed Policy Position Will Address the Issue

Approval of the Uniform Supplemental Commercial Law for the Uniform Regulation of Virtual-Currency Businesses Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None known.



**AMERICAN BAR ASSOCIATION**  
**SECTION OF FAMILY LAW**  
**SECTION OF SCIENCE AND TECHNOLOGY LAW**  
**COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association adopts the ABA Model Act Governing  
2 Assisted Reproduction [2019] dated January 28, 2019 (“Model Act [2019]”) to replace the  
3 2008 ABA Model Act Governing Assisted Reproductive Technology; and  
4  
5 FURTHER RESOLVED, That the American Bar Association approves the Model Act  
6 [2019] as an appropriate Act for those states desiring to adopt the specific substantive  
7 law contained in the Act.



**AMERICAN BAR ASSOCIATION  
MODEL ACT GOVERNING  
ASSISTED REPRODUCTION [2019]**

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## ARTICLE 1. GENERAL PROVISIONS

### SECTION 101. SHORT TITLE

This Act is entitled the Model Act Governing Assisted Reproduction [2019].

### SECTION 102. DEFINITIONS

1. “ART Storage Facility” means a licensed facility that stores reproductive, biological, or genetic material used in Assisted Reproductive Technology, and is in compliance with the Fertility Clinic and Certification and Success Rate Act of 1992 (FCSRCA, or Public Law 102-493).
2. “Assisted Reproduction” means a method of causing pregnancy through means other than by sexual intercourse. In the foregoing context, the term includes, but is not limited to:
  - (a) Intrauterine or intracervical insemination;
  - (b) Donation of eggs or sperm;
  - (c) Donation of Embryos;
  - (d) In vitro fertilization and Embryo Transfer; and
  - (e) Intracytoplasmic sperm injection.
3. “Assisted Reproductive Technology” (“ART” as used in this Act) means any medical or scientific procedures or treatment provided by a medical Provider, with the intent of having a Child.
4. “ASRM” means The American Society for Reproductive Medicine.
5. “Child” means an individual born pursuant to Assisted Reproduction whose parentage may be determined under this Act or other law.
6. “Collaborative Reproduction” means any Assisted Reproduction in which an individual other than an Intended Parent provides genetic material or any Assisted Reproduction involving a Gestational or Genetic Surrogate.
7. “Compensation” means payment of any valuable consideration for time, effort, pain and/or risk.
8. “Consultation” means a meeting with a licensed mental health professional for the purpose of counseling and educating the Participant in accordance with ASRM guidelines about the effects and potential consequences of their participation in any ART procedure.
9. “Court” means the appropriate court with competent jurisdiction as determined by the State.

- 148  
149 10. "Donor" means an individual, including an Embryo Donor or a Genetic Surrogate, who  
150 provides gametes for Assisted Reproduction. The term does not include: (a) an  
151 Intended Parent who provides gametes to be used for Assisted Reproduction; (b) a  
152 woman who gives birth to a Child by means of Assisted Reproduction except as  
153 otherwise provided in Article 6; or (c) a Parent under Article 6 or an Intended Parent  
154 under Article 7.  
155
- 156 11. "Embryo" means a fertilized egg that has the potential to develop into a fetus if  
157 transferred into a uterus.  
158
- 159 12. "Embryo Donor" means an individual who transfers ownership of an Embryo to  
160 another and intends to have no parental rights or obligations to the resulting Child.  
161
- 162 13. "Embryo Transfer" (also referred to herein as "Transfer") means the placement of an  
163 Embryo into a uterus.  
164
- 165 14. "Escrow Account" means an independent, insured, bonded escrow depository  
166 maintained by a licensed, independent, bonded escrow company; or an insured and  
167 bonded trust account maintained by an attorney.  
168
- 169 (a) For purposes of this section, a non-attorney ART Agency may not have a  
170 financial interest in any escrow company holding client funds. A non-attorney ART  
171 Agency and any of its officers, managers, owners of more than 5% ownership  
172 interest, directors or employees shall not be an agent of any escrow company  
173 holding client funds; and  
174
- 175 (b) Client funds may only be disbursed by the attorney or Escrow Agent as set  
176 forth in the assisted reproduction agreement and the fund management agreement  
177 between the Intended Parent(s) and the Escrow Account holder.  
178
- 179 15. "Escrow Agent" means the trustee for an Escrow Account.  
180
- 181 16. "Evaluation" means a Consultation with and, where required by this Act, an  
182 assessment in accordance with ASRM guidelines as to whether a Participant is  
183 cleared to proceed with participation in any ART procedure.  
184
- 185 17. "Gamete" means a cell containing a haploid complement of DNA that has the potential  
186 to form an Embryo when combined with another Gamete. Sperm and eggs are  
187 Gametes. A Gamete may consist of nuclear DNA from one human being combined  
188 with the cytoplasm, including cytoplasmic DNA, of another human being.  
189
- 190 18. "Gamete Provider" means an individual who provides sperm or eggs for use in  
191 Assisted Reproduction.  
192

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19. “Genetic Surrogate” means an adult, not an Intended Parent, who enters into a Surrogacy Agreement to bear a Child and who is a Gamete Provider for the Child.
20. “Genetic Surrogacy Agreement” is a written contract between Intended Parent(s) and a Genetic Surrogate.
21. “Genetic Surrogacy Arrangement” means the process by which a Genetic Surrogate intends to carry and give birth to a Child.
22. “Gestational Surrogate” means an adult, not an Intended Parent, who enters into a Surrogacy Agreement to bear a Child and who is not a Gamete Provider for the Child.
23. “Gestational Surrogacy Agreement” is a written contract between Intended Parent(s) and a Gestational Surrogate.
24. “Gestational Surrogacy Arrangement” means the process by which a Gestational Surrogate intends to carry and give birth to a Child.
25. “Independent Legal Representation” (also referred to herein as “Independent Legal Counsel”) means representation of the Participants by separate legal counsel as required by the applicable rules of professional responsibility.
26. “Infertility” means the definition set forth by ASRM.
27. “Intended Parent” means an individual who intends to be legally bound as a Parent of the Child.
28. “Legal Spouse” means an individual married to another.
29. “Medical Evaluation” means a Consultation with and an evaluation by a physician meeting the requirements of Section 903.
30. “Medical Information” means any protected individually identifiable health information obtained by a health care provider in the course of Medical Evaluation, Consultation, diagnosis, or treatment.
31. “Mental Health Counseling” means additional Consultation(s) after an initial Consultation for the purpose of advising and supporting the Participant throughout the implementation of any ART procedure.
32. “Mental Health Evaluation” means a Consultation with and an evaluation by a mental health professional meeting the requirements of Section 301.
33. “Parent” means an individual who has established a Parent-Child Relationship under this Act or other applicable law.

34. "Parent-Child Relationship" means the legal relationship between the Child and a Parent of the Child.
35. "Participant" means an Intended Parent, Donor, Gestational or Genetic Surrogate and their Legal Spouse, if applicable, who is involved in Collaborative Reproduction under this Act.
36. "Patient" means an individual participating in Assisted Reproduction under the direction of a Provider.
37. "Physician" means an individual licensed to practice medicine.
38. "Provider" means an individual, including all medical, psychological, or counseling professionals: (a) licensed to administer health care; (b) who is qualified under this Act to provide Assisted Reproduction services; and (c) has a Provider-Patient relationship with a Participant. Any professional corporation or corporation licensed by the State to provide health care, of which a Provider is an owner or employee, is also a Provider.
39. "Record" means information inscribed in a tangible medium or stored in an electronic or other medium that is retrievable in perceivable form.
40. "Retrieval" means the procurement of eggs or sperm from a Gamete Provider.
41. "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.
42. "Surrogacy Agreement" is a written contract between Intended Parent(s) and a Gestational or Genetic Surrogate.
43. "Surrogacy Arrangement" means the process by which a Gestational or Genetic Surrogate intends to carry and give birth to a Child.
44. "Transfer" means a procedure for Assisted Reproduction by which an Embryo or sperm is placed into the body of the individual who will give birth to a Child.

## ARTICLE 2. INFORMED CONSENT

The requirements of Article 2 apply only to medical facilities providing ART to Participants.

### SECTION 201. INFORMED CONSENT STANDARDS

1. Informed consent must be provided by all Participants to the ART Provider prior to the commencement of any medical or scientific procedures or treatment.

2. Informed consent requires that all of the following be provided to all Participants orally and in a Record that meets the requirements of Section 202:

(a) A statement that the Patient retains the right to withhold or withdraw consent at any time prior to Transfer of Gametes or Embryo Transfer without affecting the right to receive and/or make decisions about future care or treatment, or risking the loss or withdrawal of any program benefits to which the Patient would otherwise be entitled.

(b) A statement that the ART Provider retains the right to withdraw for reasonable justification and with reasonable notice.

(c) A statement that the Donor's, right to withhold or withdraw consent to fertilization terminates upon Retrieval of his or her Gametes, subject only to the terms of any prior agreement in a Record pursuant to Article 5.

(d) A statement of the known, potential medical and procedural risks and benefits of ART. Such description shall include the inherent risk of Embryo loss due to aneuploidy, thawing, and failure of implantation; the risks associated with the use of hormones and other drugs that may be used; the procedural risks associated with egg Retrieval and/or other ART procedures; the incidence of, and risks regarding, multiple pregnancies and selective reduction; and the incidence and risk of birth defects associated with IVF.

(e) A statement of acknowledgement that alternative therapies and options have been discussed in detail.

(f) A statement that the Patient shall be informed that there may be foreseen, or unforeseen legal consequences and that Independent Legal Representation is advisable and may be required by this Act or by State law.

(g) A statement describing all existing confidentiality protections.

(h) A statement of guarantee that a Patient, whether a Donor, Intended Parent, Gestational Surrogate or Genetic Surrogate (a Participant), has access to all of his/her Medical Information to the extent allowed by applicable law and not otherwise waived by the Participant. The Patient may have to pay a fee for copies of the Record.

(i) A statement that the Intended Parent has a right to access a summary of medical and psychological information about Donors and Gestational or Genetic Surrogates as described in this Act.

(j) A statement that the release of any Participant-identifiable information, including images, shall not occur without the consent of the Participant in a Record.

(k) A statement that the Intended Parent(s) or an Embryo Donor, not the ART Provider or ART Storage Facility, has the right to possession and control of their Embryos, subject to any prior agreement in a Record or as provided in Section 504.

(l) A statement of the need for Intended Parents to agree in advance who shall acquire the right to possession and control of the Embryos or Gametes in the event of marriage dissolution or separation of the Intended Parents, death of one or both of them, or subsequent disagreement over disposition in compliance with the provisions of Section 501 of this Act.

(m) The policy of the provider regarding the number of Embryos Transferred and any limitation on the number of Embryos Transferred, as well as the existence of national guidelines as published by the ASRM.

(n) A statement of the need for Participants to decide whether the Embryos or Gametes can be used for purposes other than Assisted Reproduction.

(o) Signed in presence of member of staff of the Provider or notary.

## **SECTION 202. RECORD AUTHORIZATION REQUIRED**

1. The Provider must document informed consent in a Record for each Participant that must:

(a) Be in plain language;

(b) Be dated and signed by the Provider and by the Participant in the presence of a member of the staff of the provider or before a notary;

(c) State that disclosures have been made pursuant to this Act;

(d) Specify the length of time the consent remains valid; and

(e) Advise the party signing the informed consent document of the right to receive a copy of the Record.

2. The Record(s) must be executed in accordance with this Act before informed consent is valid or the commencement of any ART.

3. The Record required in paragraph 1 of this Section shall become part of the medical record.

4. Prior to the start of any medications, the Record must reflect whether the Participants have entered into a legal agreement.

**SECTION 203. DISCLOSURES**

1. Disposition of cryopreserved Gametes or Embryos: Prior to each Retrieval, a Provider must disclose to all Intended Parents and Donors, whose identity is known to the Provider, the following possible dispositions of Embryos:

- (a) Storage, including length of time, costs, and location;
- (b) Embryo Transfer;
- (c) Donation:
  - (i) To a known individual for Embryo Transfer;
  - (ii) To an anonymous individual for Embryo Transfer, either directly or through the provider, or through a third party Embryo donation program;
  - (iii) For scientific or clinical research, including the institution conducting the research and the intended nature of the research, if known, subject to any agreement in a Record as provided in Section 502; or
- (d) Destruction.

2. Right to transport. A Provider is not required to offer all possible dispositions, but the provider must inform the Patient that other providers may offer other options and that the Patient has the right to transport Embryos to other providers.

3. Embryo Transfer disclosure. Before each Embryo Transfer cycle, the Provider must provide each Intended Parent with the following information in a Record, where applicable:

- (a) Method used to achieve fertilization and the results of semen analysis, including, but not limited to, motility, count, and morphology;
- (b) Number of eggs retrieved;
- (c) For the Retrieval and Transfer of fresh Embryos:
  - (i) Number formed;
  - (ii) Number viable for Embryo Transfer;
  - (iii) Number to be Transferred;
  - (iv) Number to be cryopreserved;

(v) Quality of each Embryo Transferred; and

(vi) Quality of each Embryo cryopreserved;

(d) For the Transfer of cryopreserved Embryos:

(i) Number of Embryos thawed;

(ii) Number of Embryos viable for Embryo Transfer after thawing; and

(iii) Quality of Embryos Transferred;

(iv) Remaining viability of thawed but unused Embryos, if any.

(e) A statement that failure to adhere to drug administration schedules may affect the outcome of the treatment.

4. Disclosure to Donors. If additional information is learned through Medical Evaluation or Mental Health Evaluation prior to or upon Retrieval of Gametes that is relevant to the Donor's health that information must be made available to the Donor if the Donor has made such a request. The Provider must disclose to a Donor that such information can be made available upon request.

5. Disclosure regarding health. Individuals from whom eggs are retrieved must be informed prior to the Retrieval or commencement of medications of the health risks and adverse effects of ovarian stimulation and retrieval. Women undergoing Transfer must be informed of the health risks of that process. Health risk disclosures must include, where relevant, the following information regarding the fertility drugs to be used:

(a) Known potential present and future side effects;

(b) Alternative drug therapies and natural cycling;

(c) Process of drug administration; and

(d) Whether the drug is approved by the Food and Drug Administration (FDA).

6. Disclosure regarding multiple births/Retrievals. Where relevant, a Provider must disclose in a Record, to Participants other than Donors, prior to Retrieval, the known risks of multiple births to the Participant and to the fetuses, including the positive and negative factors involved in selective reduction; and the known potential birth defects related to IVF. A Provider must disclose prior to Retrieval to individuals undergoing egg retrieval the known potential present and future risks of multiple courses of ovarian stimulation drugs. A Provider must disclose prior to Embryo Transfer to a Gestational Surrogate or Genetic Surrogate the number of embryos to be transferred.

7. Disclosure regarding Embryo research. A Provider shall not accept from a Participant an Embryo designated for research under Section 502, and the Provider must disclose the existence of any financial or professional relationship with any entity accepting the Embryo for research.

#### **SECTION 204. DONOR LIMITATIONS**

In accordance with the requirements set forth elsewhere in this Act:

1. A Donor of Gametes or Embryos may condition donation on a reasonable assurance of anonymity so long as non-identifying health information is provided.

2. A Donor who has given permission for release of identifying health or other information may not revoke such permission after transfer of ownership of the donated Gametes or Embryos.

3. A Donor of Gametes or Embryos may condition donation on other reasonable use or disposition restrictions as set forth in a Record prior to donation.

#### **SECTION 205. COLLECTION OF GAMETES FROM CRYOPRESERVED TISSUE OR GAMETES FROM DECEASED OR INCOMPETENT INDIVIDUALS**

1. Gametes shall not be collected from deceased or incompetent individuals or from cryopreserved tissues unless consent in a Record was executed prior to death or incompetency by the individual from whom the Gametes are to be collected, or the individual's authorized fiduciary who has express authorization from the principal to so consent, does consent.

2. In the event of an emergency where the required consent is alleged but unavailable and where, in the opinion of the treating Physician, loss of viability would occur as a result of delay, and where there is a genuine question as to the existence of consent in a Record, an exception is permissible.

3. If Gametes are collected pursuant to paragraph 2 of this Section, Transfer of Gametes or of an Embryo formed from such a Gamete is expressly prohibited unless approved by a Court. Absence of a Record as described in paragraph 1 of this Section shall constitute a presumption of non-consent.

**Legislative Note:** *States should customize this article to comport with the State's criminal code.*

#### **SECTION 206. LOSS OF EMBRYOS OR GAMETES DUE TO NATURAL DISASTER, ACT OF GOD, TERRORISM, OR WAR**

An ART Storage Facility for Embryos or Gametes is not liable for destruction or loss of Embryos due to natural disaster, act of God, terrorism or war.

### **ARTICLE 3. MENTAL HEALTH EVALUATION AND ADDITIONAL COUNSELING**

The requirements of Article 3 apply only to medical facilities providing ART to Participants.

#### **SECTION 301. MENTAL HEALTH EVALUATION**

1. Intended Parents must receive a Consultation prior to undergoing any Collaborative Reproduction ART procedure.

2. All other Participants known to the ART Provider, other than Intended Parents, must undergo a Mental Health Evaluation with a Mental Health Professional in accordance with the most recently published Professional Guidelines of ASRM prior to Collaborative Reproduction ART procedure. The results of this Evaluation shall only be used to determine suitability to participate in Collaborative Reproduction.

3. During a Consultation or Mental Health Evaluation described above, the Provider must inform the Participant(s) of additional counseling options. The Participant's acceptance of additional counseling is voluntary.

4. For purposes of this Article, Mental Health Professional is an individual who:

(a) Holds a master's or doctoral degree in the field of psychiatry, psychology, counseling, social work, psychiatric nursing, marriage and family therapy, or State equivalent; and

(b) Is licensed, certified, or registered to practice in the mental health field; and

(c) Has received training in reproductive physiology; the testing, diagnosis, and treatment of Infertility; and the psychological issues in Infertility and Collaborative Reproduction. If there are questions about inherited or genetic disorders, the Mental Health Professional must refer the Participant to a qualified professional for Consultation.

#### **SECTION 302. ADDITIONAL COUNSELING REQUIREMENTS**

1. An ART procedure using Collaborative Reproduction shall not be initiated or performed until:

(a) All Participants made known to the ART Provider have been offered Mental Health Counseling following the initial Mental Health Evaluation or Consultation as provided for in Section 301; and

(b) The Mental Health Professional(s) have prepared and delivered to the medical Provider(s) a statement in a Record that he or she has met with the Participant(s) and that they have undergone the requisite Mental Health Evaluation and/or Consultation;

2. Opportunity to receive counseling. It shall be conclusively presumed that a Participant has been offered an opportunity to receive additional counseling from a Mental Health Professional pursuant to Section 301 if that individual signs a statement containing the following language:

“I understand that counseling is recommended for all participants in collaborative reproduction and that counseling is a separate process from any consultation that [Provider] has required me to complete. [Provider] has given me the opportunity to meet with and receive counseling from a mental health professional with specialized knowledge of the social and psychological impact of assisted and collaborative reproduction on participants. I understand that I may choose any such mental health professional, and that I am not required to choose one recommended by this treatment facility.”

3. Assessment available to Intended Parents. A Mental Health Professional's recommendation regarding the assessment of a Gamete Donor or Surrogate Participant for Collaborative Reproduction shall be transmitted to an Intended Parent only if:

- (a) Intended Parent has requested such recommendation;
- (b) Intended Parent's request is prior to Transfer of Gametes or Embryos;
- (c) Intended Parent's request is prior to execution of any Collaborative Reproduction agreement; and
- (d) The affected Participant's Informed Consent was obtained pursuant to Article 201.
- (e) Any such transmission as well as the retention of the information transmitted or the documents or other materials upon which the assessment was based, shall otherwise be controlled by applicable state or Federal law.

#### **ARTICLE 4. PRIVACY AND CONFIDENTIALITY**

The requirements of Article 4 apply only to medical facilities providing ART to Participants.

#### **SECTION 401. INDIVIDUALLY IDENTIFIABLE MEDICAL INFORMATION**

All individually identifiable information obtained or created in the course of ART treatment is Medical Information and subject to medical record confidentiality requirements.

**SECTION 402. INFORMATION ABOUT DONORS**

**1. DEFINITIONS.**

- (a) "Identifying information" means: the full name of a Donor; the date of birth of the Donor; and the permanent and, if different, current address of the Donor at the time of the donation.
- (b) "Medical history" means information regarding any: present illness of a Donor; past illness of the Donor; and social, genetic, and family history pertaining to the health of the donor.

**2. COLLECTION OF INFORMATION.**

For Gametes collected after the effective date of this Act, a Gamete bank or Provider licensed in this State shall collect from a Donor the Donor's identifying information and medical history at the time of the donation. If the Gametes of a Donor are sent to another Gamete bank or Provider, a sending Gamete bank or Provider also shall forward any identifying information and medical history of the Donor, including the Donor's signed declaration under Section 402 (3) regarding identity disclosure, to a receiving Gamete bank or Provider. A receiving Gamete bank or Provider licensed in this State must collect and retain the information about the Donor and the sending Gamete bank or Provider.

**3. DECLARATION REGARDING IDENTITY DISCLOSURE.**

- (a) A Gamete bank or Provider licensed in this State that collects Gametes from a Donor shall:
  - (i) provide the Donor with information in a Record about the Donor's choice regarding identity disclosure; and
  - (ii) obtain a declaration from the Donor regarding identity disclosure.
- (b) The Gamete bank or Provider shall give the Donor the choice to sign a declaration, attested by a notarial officer or witnessed by at least one individual, that either:
  - (i) states that the Donor agrees to disclose the Donor's identity to a Child conceived by assisted reproduction with the Donor's Gametes on request once the Child becomes 18 years of age; or
  - (ii) states that the Donor presently does not agree to disclose the Donor's identity to the Child.

- (c) The Gamete bank or Provider shall permit a Donor who has signed a declaration under paragraph (b)(ii) of this Section to withdraw the declaration by signing a declaration under paragraph (b)(i) of this Section at any time.

#### 4. DISCLOSURE OF IDENTIFYING INFORMATION AND MEDICAL HISTORY.

- (a) On request of a Child conceived by Assisted Reproduction who is at least 18 years of age, a Gamete bank or Provider licensed in this State which collected, stored, or released for use the Gametes used in the Assisted Reproduction shall make a good-faith effort to provide the Child with identifying information of the Donor who provided the Gametes, unless the Donor signed and did not withdraw a declaration under paragraph 3(b)(ii) of this Section. If the Donor signed and did not withdraw a declaration under paragraph 3(b)(ii) of this Section, the Gamete bank or Provider must make a good-faith effort to notify the Donor, who may elect disclose the Donor's identity declaration under paragraph 3(b)(i) of this Section.
- (b) Regardless of whether a Donor signed a declaration under paragraph 3 of this Section, on request by a Child conceived by Assisted Reproduction who is at least 18 years of age, or, if the Child is a minor, by a Parent or guardian of the Child, the Gamete bank or Provider shall make a good faith effort to provide the Child or, if the Child is a minor, the Parent or guardian of the Child, access to non-identifying medical history of the Donor.

5. RECORDKEEPING. A Gamete bank or Provider licensed in this State, which collects, stores, or releases Gametes for use in Assisted Reproduction, shall collect and maintain identifying information and medical history about each Donor. The Gamete bank or Provider shall collect and maintain records of Gamete screening and testing and comply with reporting requirements, in accordance with federal law and applicable law of this State other than this Act.

### ARTICLE 5. EMBRYO TRANSFER AND DISPOSITION OF GAMETES OR EMBRYOS

The requirements of Article 5 apply only to medical facilities providing ART to Participants.

#### SECTION 501. DISPOSITION OF GAMETES AND EMBRYOS

1. Intended Parent(s) shall enter into a written agreement prior to Embryo formation through in vitro fertilization detailing:

- (a) Intended use of Embryos;
- (b) Disposition of cryopreserved Embryos in the event of:
- (i) Dissolution of Intended Parents' relationship (or divorce of Intended Parents, if married); and

(ii) Incapacity or death of one or both Intended Parents.

2. Such agreements may be amended in a Record provided to the Provider, at any time prior to Embryo Transfer or the death of either Intended Parent.

3. Intended Parent(s) entering into such agreements shall provide the Provider with an address and permanent identifier.

4. All such agreements must be delivered to the Providers and the ART Storage Facility, if any.

5. Any party to an Embryo storage or disposition agreement may withdraw his or her consent to the terms of the agreement in writing prior to an Embryo Transfer to a uterus of an Intended Parent, Gestational Surrogate, or Genetic Surrogate.

(a) Notice of said withdrawal of consent to the terms of the agreement must be given in a Record to the parties to the agreement and to the Providers and ART Storage Facility, if any.

(b) After receipt of said notice in a Record by the other Intended Parent and/or by the ART Provider or ART Storage Facility of that individual's intent to avoid Embryo Transfer, an Intended Parent may not Transfer the Embryos into the uterus of any individual with the intent to have a Child. No prior agreement to the contrary will be enforceable.

(c) In the event that an Embryo Transfer occurs after receipt of notice in a Record of that individual's intent to avoid Embryo Transfer as set forth in paragraph 5(b) of this Section that Intended Parent will not be the Parent of a resulting Child.

6. Following the death of an Intended Parent who has previously consented in a Record to posthumous use of cryopreserved Gametes and/or Embryos, the surviving Intended Parent or the individual designated in the Record to receive control of use of the Embryos may use the Embryos in accordance with the decedent's written consent in a Record. Except as otherwise provided in the enacting jurisdiction's probate code, the Child born as a result of Embryo Transfer after the death of an Intended Parent or Gamete Provider is not the Child of that Gamete Provider or Intended Parent unless the deceased individual consented in a Record that if Assisted Reproduction were to occur after death, the deceased individual would be a Parent of the Child.

7. No Provider shall Transfer or form any Embryos following the death of an Intended Parent unless the necessary consent referred to in paragraph 6 of this Section is obtained and permanently recorded.

8. In the event that a written agreement pursuant to paragraph 1 of this Section is not executed prior to Embryo formation, the Intended Parent[s] may execute an agreement consistent with this Section that may be enforceable on a prospective basis.

#### **SECTION 502. DONATION OF UNUSED GAMETES OR EMBRYOS**

Intended Parent(s) may choose to donate their unused Gametes or Embryos for any of the following purposes subject only to any limitations set forth in a Record prior to donation as permitted and imposed pursuant to the provisions of Section 204 hereof, which choices shall be reflected in their agreement(s):

1. Donation to another Patient(s), either known or anonymous, for the purpose of the recipient attempting to have a Child and become that Child's Parent.

2. Donation for approved research, the nature of which may be specifically set forth in the informed consent Record and which has received the approval of an institutional review board. No research will be permitted that is not within the scope of the informed consent of the recorded agreement. This agreement may only be modified with the consent of the Intended Parent(s). After an Intended Parent has died, that individual's consent endures and is irrevocable.

#### **SECTION 503. SCREENING OF GAMETE OR EMBRYO DONORS**

Donors shall be screened prior to such donation in compliance with applicable State and federal law in accordance with applicable medical standards. Records of the donation shall be maintained in compliance with applicable State and federal law.

#### **SECTION 504. ABANDONMENT OF GAMETES OR EMBRYOS AND DISPOSITION OF ABANDONED GAMETES OR EMBRYOS**

1. A Gamete or an Embryo is deemed to be abandoned only if:

(a) At least five years have elapsed since last communication from Intended Parents to Provider and/or ART Storage Facility unless the Participants select another time by agreement as provided in a Record; and

(b) A diligent attempt to notify the interested Participants, as well any Provider(s) who contracted for storage, that the Gamete or Embryo is deemed to be abandoned (such attempt shall include, but not be limited to, notice by certified mail (or equivalent trackable medium) to each interested Participant's permanent address or last known address, and shall require a period of not less than ninety days to elapse before any action is taken); and

(c) The interested Participants have acknowledged that they have been informed of the provisions of (a) and (b) of this paragraph in an agreement in a Record executed prior to storage with the Provider and/or ART Storage Facility.

2. Disposition of a Gamete or an Embryo deemed to be abandoned under paragraph 1 of this Section must be in accordance with the most recent recorded agreement between Participants and the ART Storage Facility. If there is no agreement in a Record, or if no agreement in a Record can be found after a diligent search, disposition must be as ordered by a Court.

3. Any Provider and/or ART Storage Facility that disposes of Gametes or Embryos in compliance with this Section is immune from all civil and criminal liability that may arise as a result of the disposition of such Gametes or Embryos, absent criminal intent, gross negligence, or intentional misconduct.

#### **SECTION 505. TRANSPORTATION OF GAMETES OR EMBRYOS**

1. Transportation of Gametes or Embryos is the responsibility of the individual or individuals requesting the transport.

2. Unless the ART Storage Facility has requested or required transport, it is immune from all civil and criminal liability incurred as a result of the transport, absent criminal intent, gross negligence, or intentional misconduct.

### **ARTICLE 6. CHILD OF ASSISTED REPRODUCTION**

#### **SECTION 601. SCOPE OF ARTICLE**

This Article does not apply to the birth of a Child conceived by means of sexual intercourse, or as the result of a Surrogacy Agreement as provided in Article 7.

#### **SECTION 602. PARENTAL STATUS OF DONOR**

A. A Donor is not a Parent of a Child conceived by means of Assisted Reproduction.

B. A determination that an individual is a Donor under paragraph (A) of this Section does not require proof of a written agreement or compliance with Articles 1 through 5 of this Act.

C. Donor Agreements Authorized.

1. A Gamete Donor and an Intended Parent(s) may enter into an agreement in a Record providing:

(a) That the Donor agrees to donate Gametes in order for the Intended Parent(s) to conceive a Child through Assisted Reproduction; and

(b) That the Donor, and spouse if married, has no property, parental, or other rights, responsibilities and claims with respect to any resulting Gametes, Embryos, and any Child born as a result of the Gamete donation;

(c) That any donated Gametes, and any Embryos formed from the donated Gametes, shall be the sole property and responsibility of the Intended Parent(s), subject to the terms of the Donor agreement; and

(d) That the Donor is not a Parent of any Child conceived through Assisted Reproduction using the Donor's gamete(s), and the Intended Parent(s) shall be the Child's Parent(s) with all the rights and responsibilities resulting therefrom.

2. Any Donor limitations as noted in Section 204 should be specified in the Donor agreement.

### **SECTION 603. PARENTAGE OF CHILD OF ASSISTED REPRODUCTION**

An individual who consents to Assisted Reproduction by an individual as provided in Section 604 with the intent to be a Parent of the Child is a Parent of the resulting Child. Compliance with Articles 1 through 5 of this Act is not required for a determination that an individual is a Parent under this Section.

### **SECTION 604. CONSENT TO ASSISTED REPRODUCTION**

1. Except as otherwise provided in Section 604(2), the consent described in Section 603, must be in a Record signed by the individual giving birth to a Child conceived by Assisted Reproduction and any individual who intends to be a Parent of the Child.

2. Failure of an Intended Parent to sign a consent in a Record as required by paragraph 1 of this Section, before or after birth of the Child, does not preclude a finding of parentage if:

(a) The individual seeking to establish that the Intended Parent is a Parent of the Child proves by clear-and-convincing evidence the existence of an express agreement entered into before conception that the Intended Parent and the individual who gave birth intended they both would be Parents of the Child; or

(b) the individual giving birth and the individual alleged to be an Intended Parent resided together with the Child during the first two years of the Child's life and openly held out the Child as their own, unless the individual dies or becomes incapacitated before the Child becomes two years of age or the Child dies before the Child becomes two years of age, in which case a court may find consent to parentage under this paragraph if a party proves by clear-and-convincing evidence that the individual giving birth and the individual intended to reside together in the same household with the Child and both intended that the individual would openly hold out the Child as the individual's Child, but that the individual was prevented from carrying out that intent by death or incapacity.

### **SECTION 605. LIMITATION ON LEGAL SPOUSE'S DISPUTE OF PARENTAGE**

1. Except as otherwise provided in Section 605(2), an individual, who at the time of a Child's birth, is the Legal Spouse of the woman who gave birth to the Child by Assisted Reproduction, may not challenge the individual's parentage of the Child unless:

(a) Not later than two years after the birth of the Child, the individual commences a proceeding to adjudicate the individual's parentage of the Child; and

(b) A Court finds the individual did not consent to the Assisted Reproduction, before, on, or after birth of the Child, or withdrew consent under Section 606.

2. A proceeding to adjudicate a Legal Spouse's parentage of a Child born by Assisted Reproduction may be commenced at any time if the court determines the:

(a) Legal Spouse neither provided a gamete for, nor consented to, the Assisted Reproduction;

(b) Legal Spouse and the woman who gave birth to the Child have not cohabited since the probable time of Assisted Reproduction; and

(c) Legal Spouse never openly held out the Child as the Legal Spouse's Child.

3. This Section applies to a Legal Spouse's dispute of parentage even if the Legal Spouse's marriage is declared invalid after Assisted Reproduction occurs.

#### **SECTION 606. EFFECT OF DISSOLUTION OF MARRIAGE OR WITHDRAWAL OF CONSENT**

1. If a marriage is dissolved before an insemination or Embryo Transfer the former spouse is not a Parent of the resulting Child unless the former spouse consented in a Record that if Assisted Reproduction were to occur after a divorce, the former spouse would be a Parent of the Child.

2. The consent of an individual to Assisted Reproduction may be withdrawn by that individual in a Record with written notice to the individual undergoing Assisted Reproduction at any time before an insemination or Embryo Transfer. An individual who withdraws consent under this Section is not a Parent of the resulting Child.

#### **SECTION 607. PARENTAL STATUS OF DECEASED INDIVIDUAL**

Except as otherwise provided in the enacting jurisdiction's probate code, if an individual who consented in a Record to be a Parent by Assisted Reproduction dies before an insemination or Embryo Transfer, the deceased individual is not a Parent of the resulting Child unless the deceased spouse consented in a Record that if Assisted Reproduction were to occur after death, the deceased individual would be a Parent of the Child.

## ARTICLE 7. SURROGACY

### SECTION 701. SURROGACY AGREEMENTS AUTHORIZED

- A. A Gestational or Genetic Surrogate and, if married, the Gestational or Genetic Surrogate's Legal Spouse and the Intended Parent(s) may enter into an agreement in a Record providing that:
  1. The Gestational or Genetic Surrogate agrees to attempt pregnancy by means of Assisted Reproduction;
  2. The Gestational or Genetic Surrogate and, if married, the Gestational or Genetic Surrogate's Legal Spouse have no claims to parentage with respect to any Child resulting from the Assisted Reproduction procedure(s); and
  3. The Intended Parent(s) shall be recognized as the sole Parent(s) of the Child.
- B. A Surrogacy Agreement may provide for payment of consideration under Article 8 of this Act.
- C. A Surrogacy Agreement may not limit the right of the Gestational or Genetic Surrogate to make any health and welfare decisions regarding the Surrogate and the Surrogate's pregnancy. This Act does not enlarge or diminish the surrogate's right to terminate or to continue the pregnancy.
- D. A Genetic Surrogacy Agreement shall be subject to the following additional requirements and is enforceable only if:
  1. Judicially validated as provided in Section 706; and
  2. The Assisted Reproduction procedure(s) utilized to attempt a pregnancy are performed under the supervision of a licensed Physician.

### SECTION 702. ELIGIBILITY

- A. A Gestational or Genetic Surrogate shall be deemed to have satisfied the requirements of this Act if the Gestational or Genetic Surrogate has met the following requirements at the time the Surrogacy Agreement is executed and prior to the anticipated pregnancy. The Gestational or Genetic Surrogate:
  1. Is at least twenty-one (21) years of age;
  2. Has given birth to at least one (1) Child;
  3. Has completed a Medical Evaluation relating to the anticipated pregnancy;

4. Has completed a Mental Health Evaluation relating to the anticipated Surrogacy Arrangement;
  5. Is represented by Independent Legal Counsel and has undergone legal Consultation regarding the terms of the Surrogacy Agreement and the potential legal consequences of the Surrogacy Arrangement;
  6. Has or will obtain a health insurance policy or other coverage for major medical treatments and hospitalization and the health insurance policy has a term that extends throughout the duration of the expected pregnancy and for eight (8) weeks after the birth of the Child.
- B. The Intended Parent(s) shall be deemed to have satisfied the requirements of this Act if the Intended Parent(s) have met the following requirements at the time the Surrogacy Agreement is executed and prior to the anticipated pregnancy:
1. Intended Parent(s) have completed a Consultation relating to the anticipated Surrogacy Arrangement; and
  2. Intended Parent(s) are represented by Independent Legal Counsel and have undergone legal Consultation regarding the same and the potential legal consequences of the Surrogacy Arrangement.
- C. The relevant State regulatory agency may adopt rules pertaining to the required Medical Evaluations, Consultations and Mental Health Evaluations for a Surrogacy Agreement. Until the relevant State regulatory agency adopts such rules, Medical Evaluations, Consultations and Mental Health Evaluations and procedures shall be conducted in accordance with the recommended guidelines published by ASRM. The rules may adopt these guidelines or others by reference.

### **SECTION 703. REQUIREMENTS FOR A SURROGACY AGREEMENT**

- A. A Surrogacy Agreement is enforceable only if:
1. It meets the contractual requirements set forth in Section 703(B); and
  2. It contains at a minimum each of the terms set forth in Section 703(C); and
  3. If the Surrogacy Agreement is a Genetic Surrogacy Agreement, it must be judicially validated, as required by Section 706, prior to attempting pregnancy by means of Assisted Reproduction.
- B. A Surrogacy Agreement shall meet the following requirements:
1. It shall be in writing;

2. It shall be executed prior to the commencement of any medical procedures in furtherance of the Surrogacy Arrangement (other than Medical Evaluations, Consultations or Mental Health Evaluations necessary to determine eligibility of the parties pursuant to Section 702 of this Act), by:
    - (a) A Gestational or Genetic Surrogate meeting the eligibility requirements of Section 702(A) of this Act and, if married, the Gestational or Genetic Surrogate's Legal Spouse; and
    - (b) The Intended Parent(s) meeting the eligibility requirements of Section 702(B) of this Act.
  3. The Gestational or Genetic Surrogate, and, if married, the Gestational or Genetic Surrogate's Legal Spouse, and the Intended Parent(s) shall be represented by Independent Legal Counsel in all matters concerning the Surrogacy Arrangement and the Surrogacy Agreement;
  4. Each of the parties acknowledge in writing that they received information about the legal, financial, and contractual rights, expectations, penalties, and obligations of the Surrogacy Agreement;
  5. If the Surrogacy Agreement provides for the payment of Compensation to the Gestational or Genetic Surrogate, the Compensation shall be placed in escrow with an independent Escrow Agent prior to the Gestational or Genetic Surrogate's commencement of any medical procedure (other than Medical Evaluations, Consultation or Mental Health Evaluations necessary to determine the Gestational or Genetic Surrogate's eligibility pursuant to Section 702(A) of this Act); and
  6. Each party's signature shall be notarized or witnessed by two (2) competent adults who are not parties to the Surrogacy Agreement.
- C. A Surrogacy Agreement shall provide for:
1. The express written agreement of the Gestational or Genetic Surrogate to:
    - (a) Undergo Assisted Reproduction procedure(s) to achieve a pregnancy and attempt to carry and give birth to a Child; and
    - (b) Surrender custody of any Child resulting from such Assisted Reproduction procedure(s) to the Intended Parent(s) immediately upon birth;
  2. If the Gestational or Genetic Surrogate is married, the express agreement of the Gestational or Genetic Surrogate's Legal Spouse to:

- (a) Undertake the obligations imposed on the Gestational or Genetic Surrogate pursuant to the terms of the Surrogacy Agreement; and
    - (b) Surrender custody of any Child resulting from such Assisted Reproduction procedure(s) to the Intended Parent(s) immediately upon birth;
  3. The right of the Gestational or Genetic Surrogate to utilize the services of a Physician chosen by the Gestational or Genetic Surrogate to provide care to the Gestational or Genetic Surrogate during the pregnancy; and
  4. The right of the Gestational or Genetic Surrogate to make any health and welfare decisions regarding the Surrogate and the Surrogate's pregnancy including continuation or termination of the pregnancy.
  5. The express written agreement of the Intended Parent(s) to:
    - (a) Accept custody of any Child resulting from such Assisted Reproduction procedure(s) immediately upon birth regardless of number, gender, or mental or physical condition; and
    - (b) Assume sole responsibility for the support of the Child immediately upon birth.
  6. Intended Parent(s) payment of reasonable legal, medical and/or ancillary expenses, including:
    - (a) The premiums for a health insurance policy that covers medical treatment and hospitalization for the Gestational or Genetic Surrogate unless otherwise mutually agreed upon by the parties, pursuant to the terms of the Surrogacy Agreement; and
    - (b) The payment of all uncovered medical expenses; and
    - (c) The payment of reasonable legal fees for the Gestational or Genetic Surrogate's legal representation; and
    - (d) The payment of life insurance premiums; and
    - (e) Other reasonable financial arrangements mutually agreed upon by the parties, including any applicable reimbursement and compensation schedule, pursuant to the terms of the Surrogacy Agreement.

D. A court has jurisdiction to determine the Parent-Child Relationship pursuant to a Surrogacy Agreement where:

1. At least one of the parties to the Surrogacy Agreement is a resident; or
2. At least one of the medical procedures pursuant to the Surrogacy Agreement occurs; or
3. The birth occurs or is anticipated to occur.
4. If none of the above applies, the appropriate jurisdiction for determining the Parent-Child Relationship may be determined under the Uniform Child Custody Jurisdiction and Enforcement Act.

E. A Surrogacy Agreement is enforceable even if it contains one or more of the following provisions:

1. The Gestational or Genetic Surrogate's agreement to undergo all medical exams and/or treatments, and to follow activity restrictions, as instructed by the Physician for the success of the pregnancy (although there shall be no specific performance remedy for a breach of such provisions);
2. The agreement of the Intended Parent(s) to pay the Gestational or Genetic Surrogate reasonable Compensation;
3. The agreement of the Intended Parent(s) to pay for or reimburse the Gestational or Genetic Surrogate for reasonable expenses (including, without limitation, medical, legal, or other professional or necessary expenses) related to the Surrogacy Arrangement and to the Surrogacy Agreement.

## **SECTION 704. TERMINATION OF SURROGACY AGREEMENT**

A. Prior to Pregnancy

1. Before a Gestational or Genetic Surrogate undergoes the Assisted Reproduction procedure(s) to attempt pregnancy, and subject to the terms of the Surrogacy Agreement, any party may terminate the Surrogacy Agreement by giving written notice of termination to all other parties.
2. No party may terminate the Surrogacy Agreement after an Embryo Transfer procedure and prior to a pregnancy test at a time to be determined by a qualified Physician.
3. Any party who terminates a Genetic Surrogacy Agreement after the appropriate Court issues an order validating a Genetic Surrogacy Agreement under Section 706 but before the Genetic Surrogate becomes pregnant by means of Assisted

Reproduction shall also file notice of the termination with the appropriate Court. On receipt of the notice, the appropriate Court shall order a stay on all medical procedures contemplated under the terms of the Genetic Surrogacy Agreement.

4. Except as otherwise agreed to among the parties in the Surrogacy Agreement, no party shall be liable to any other party for terminating the Surrogacy Agreement before the Gestational or Genetic Surrogate becomes pregnant by means of Assisted Reproduction.

**B. After Pregnancy is confirmed.**

1. Subject to the provisions of Section 714(C), no party may terminate a Surrogacy Agreement once a successful pregnancy is confirmed.

**SECTION 705. ESTABLISHMENT OF PARENT CHILD RELATIONSHIP IN GESTATIONAL SURROGACY**

**A. RIGHTS OF PARENTAGE**

1. Except as provided in this Act, a woman who gives birth to a Child is a Parent of that Child for purposes of State law.
2. The parties to a Gestational Surrogacy Agreement shall assume the rights and obligations of this Article if:
  - (a) The Gestational Surrogate satisfies the eligibility requirements set forth in Section 702(A);
  - (b) The Intended Parent(s) satisfy the eligibility requirements set forth in Section 702(B); and
  - (c) The Gestational Surrogacy Agreement complies with the requirements of Section 703.
3. In the case of a Gestational Surrogacy Agreement satisfying the requirements set forth in this Article:
  - (a) The Intended Parent(s) shall be the Parents of the Child for purposes of State law immediately upon the birth of the Child;
  - (b) The Child shall be considered the Child of the Intended Parent(s) for purposes of State law immediately upon the birth of the Child;
  - (c) Parental rights shall vest in the Intended Parent(s) immediately upon the birth of the Child;

(d) Sole custody of the Child shall rest with the Intended Parent(s) immediately upon the birth of the Child; and

(e) Neither the Gestational Surrogate nor the Gestational Surrogate's Legal Spouse, if any, shall be the Parent of the Child for purposes of State law immediately upon the birth of the Child.

4. If the parentage of a Child born to a Gestational Surrogate is alleged not to be the result of the Assisted Reproduction procedure(s), the appropriate Court shall order genetic testing to determine the parentage of the Child. If the Child was not conceived as result of the Assisted Reproduction procedure(s), the Parent-Child Relationship shall be determined as provided under other applicable State law.

5. In the case of a Gestational Surrogacy Arrangement meeting the requirements set forth in this Section 705, in the event of a laboratory error in which the laboratory transfers Embryo(s) not legally belonging to the Intended Parent(s), the Intended Parents will be the Parents of the Child for purposes of State law unless otherwise determined by a Court in an action which can only be brought by one or more of the parties to the Surrogacy Agreement or the genetic contributors within two (2) years of the date of the Child's birth.

#### B. ADMINISTRATIVE ESTABLISHMENT OF THE PARENT-CHILD RELATIONSHIP.

If an applicable State law provides for the administrative establishment of the Parent-Child Relationship, that process may be utilized by the parties for purposes of establishing a Parent-Child Relationship.

### SECTION 706. ESTABLISHMENT OF PARENT CHILD RELATIONSHIP IN GENETIC SURROGACY

#### A. RIGHTS OF PARENTAGE

1. The parties to a Genetic Surrogacy Agreement shall assume the rights and obligations of paragraphs 2 and 3 of this Section 706(A) if:

(a) The Genetic Surrogate satisfies the eligibility requirements set forth in Section 702(A);

(b) The Intended Parent(s) satisfy the eligibility requirements set forth in Section 702(B); and

(c) The Genetic Surrogacy Agreement complies with the requirements of Section 703 and has been judicially pre-approved prior to the

commencement of any medical procedures in furtherance of the Surrogacy Arrangement (other than Medical Evaluations, Consultation or Mental Health Evaluations necessary to determine eligibility of the parties pursuant to Section 702 of this Act) as set forth in this Section 706.

2. In the case of a Genetic Surrogacy Agreement satisfying the requirements set forth in paragraph 1 of this Section 706(A):

- (a) The Intended Parent(s) shall be the Parents of the Child for purposes of State law immediately upon the birth of the Child;
- (b) The Child shall be considered the Child of the Intended Parent(s) for purposes of State law immediately upon the birth of the Child;
- (c) Parental rights shall vest in the Intended Parent(s) immediately upon the birth of the Child;
- (d) Sole custody of the Child shall rest with the Intended Parent(s) immediately upon the birth of the Child; and
- (e) Neither the Genetic Surrogate nor the Genetic Surrogate's Legal Spouse, if any, shall be the Parent of the Child for purposes of State law immediately upon the birth of the Child.

3. In the case of a Genetic Surrogacy Arrangement meeting the requirements set forth in this Section 706, in the event of a laboratory error in which the laboratory transfers Embryo(s) not legally belonging to the Intended Parent(s), the Intended Parents will be the Parents of the Child for purposes of State law unless otherwise determined by a Court in an action which can only be brought by one or more of the parties to the Surrogacy Agreement or the genetic contributors within two (2) years of the date of the Child's birth.

#### B. JUDICIAL PRE-APPROVAL OF GENETIC SURROGACY AGREEMENT

1. Prior to the commencement of any medical procedures in furtherance of the Genetic Surrogacy Arrangement (other than Medical Evaluations, Consultation or Mental Health Evaluations necessary to determine eligibility of the parties pursuant to Section 702 of this Act), the Intended Parent(s), the Genetic Surrogate, and Genetic Surrogate's Legal Spouse, if any, shall commence a proceeding to obtain judicial pre-approval of a Genetic Surrogacy Agreement by filing a petition in the appropriate Court. A proceeding to obtain judicial pre-approval of a Genetic Surrogacy Agreement may not be maintained unless all parties to the Genetic Surrogacy Agreement join in the petition. A copy of the fully-executed Genetic Surrogacy Agreement must be filed with the petition.

2. If the requirements of paragraph 1 of this Section 706(B) are satisfied, the appropriate Court shall issue an order validating the Genetic Surrogacy Agreement and declaring that the Intended Parent(s) will, subject to the issuance of a final post birth order, be the sole Parent(s) of a Child born during the term of the Genetic Surrogacy Agreement.
3. The Court shall issue an order under this Section 706(B) only on finding that:
  - (a) The requirements of Section 702 have been satisfied;
  - (b) The requirements of Section 706(B) have been satisfied;
  - (c) All parties have voluntarily entered into the Genetic Surrogacy Agreement meeting the requirements of Section 703 and understand its terms;
  - (d) Adequate provision has been made for all reasonable health-care expenses associated with the Genetic Surrogacy Agreement, including responsibility for those expenses if the Genetic Surrogacy Agreement is terminated, as set forth in Section 703(C)(6); and
  - (e) The consideration, if any, to be paid to the Genetic Surrogate is reasonable.

#### C. PARENTAGE UNDER A JUDICIALLY PRE-APPROVED GENETIC SURROGACY AGREEMENT

1. Upon birth of a Child pursuant to a judicially pre-approved Genetic Surrogacy Agreement, all parties shall jointly file a notice with the appropriate Court that a Child has been born as a result of the Assisted Reproduction procedure(s). Thereupon, the appropriate Court shall issue an order:
  - (a) Confirming that the Intended Parent(s) are the Parent(s) of the Child;
  - (b) If necessary, ordering that the Child be surrendered to the Intended Parent(s); and
  - (c) Directing the agency maintaining birth records to issue a birth certificate naming the Intended Parent(s) as Parent(s) of the Child on an expedited basis.
2. If the parentage of a Child born to a Genetic Surrogate is alleged not to be the result of the Assisted Reproduction procedure(s), the appropriate Court shall order genetic testing to determine the parentage of the Child. If the Child was not conceived as result of the Assisted Reproduction procedure(s), the Parent-

Child Relationship shall be determined as provided under other applicable State law.

3. If the parties fail to comply with paragraph 1 of this Section 706(C), the appropriate State agency may, upon request of any party, file notice with the appropriate Court that a Child has been born to the Genetic Surrogate as a result of Assisted Reproduction. Upon proof of a Court order issued pursuant to Section 706(B) validating the Genetic Surrogacy Agreement, the appropriate Court shall order that the Intended Parent(s) are the sole legal Parent(s) of the Child and are financially responsible for the Child.
4. If a birth results under a Genetic Surrogacy Agreement that is not judicially pre-approved as provided in this Section 706, the Parent-Child Relationship shall be determined as provided under other applicable State law specifically taking into consideration the intent of the parties at the time of the execution of the Genetic Surrogacy Agreement and the best interests of the Child. An Intended Parent has standing to request and be awarded legal parentage of the Child for the purposes of this provisions and any parentage proceeding hereunder.

#### **SECTION 707. FULL FAITH AND CREDIT**

An establishment of parentage pursuant to an order of Court under Section 705 (A) or 706 of this Act shall be given full faith and credit in another State if the establishment was in a signed Record and otherwise complies with the law of the other State.

#### **SECTION 708. DUTY TO SUPPORT**

- A. Any individual who is considered to be the Parent of the Child pursuant to Section 705 or Section 706 of this Act shall be obligated to support the Child.
- B. Intended Parents who are parties to a non-compliant Gestational Surrogacy Arrangement or an unapproved Genetic Surrogacy Agreement may be held liable for support of the resulting Child under other law.
- C. Breach of the Surrogacy Agreement by the Intended Parent(s) shall not relieve such Intended Parent(s) of the support obligations imposed by this Act.

#### **SECTION 709. EFFECT OF SURROGATE'S SUBSEQUENT MARRIAGE**

- A. Gestational Surrogacy

Subsequent marriage of the Gestational Surrogate after execution of a Surrogacy Agreement under this article does not affect the validity of the Surrogacy Agreement, consent to the Surrogacy Agreement from the Gestational Surrogate's Legal Spouse is not required, and the Gestational Surrogate's Legal Spouse is not a presumed Parent of the resulting Child.

B. Genetic Surrogacy

After the issuance of an order validating a Surrogacy Agreement between Intended Parents and a Genetic Surrogate under this article, subsequent marriage of the Genetic Surrogate does not affect the validity of a Surrogacy Agreement, consent to the Surrogacy Agreement from the Genetic Surrogate's Legal Spouse is not required, and the Genetic Surrogate's Legal Spouse is not a presumed Parent of the resulting Child.

**SECTION 710. IRREVOCABILITY**

No action to challenge the rights of parentage established pursuant to Section 705 or Section 706 of this Act or the relevant State parentage act provisions shall be commenced after twelve (12) months from the date of birth of the Child.

**SECTION 711. NONCOMPLIANCE**

Noncompliance occurs when a Gestational or Genetic Surrogate, and, if married, the Gestational or Genetic Surrogate's Legal Spouse, or the Intended Parent(s) breach a provision of the Surrogacy Agreement or any party to or agreement for a Surrogacy Arrangement fails to meet any of the requirements of this Act.

**SECTION 712. EFFECT OF NONCOMPLIANCE**

In the event of noncompliance with this Article, the appropriate Court of competent jurisdiction shall determine the respective rights and obligations of the parties to any Surrogacy Arrangement based solely on evidence of the parties' original intent.

**SECTION 713. IMMUNITIES**

Except as provided in this Act, no individual shall be civilly or criminally liable under State law for non-negligent actions taken pursuant to the requirements of this Act. This provision shall not prevent liability or actions between or among the parties, including actions brought by or on behalf of the Child, based on negligent, reckless, willful, or intentional acts that result in damages to any party.

**SECTION 714. DAMAGES**

- A. Except as expressly provided in the Surrogacy Agreement, the Intended Parent(s) shall be entitled to all remedies available at law or equity in the event of a breach of the Surrogacy Agreement.
- B. Except as expressly provided in the Surrogacy Agreement, a Gestational or Genetic Surrogate shall be entitled to all remedies available at law or equity in the event of a breach of the Surrogacy Agreement.

C. There shall be no specific performance remedy available for a breach by a Gestational or Genetic Surrogate of a Surrogacy Agreement that:

1. Limits the right of the Gestational or Genetic Surrogate to make decisions regarding the Gestational or Genetic Surrogate's own health or pregnancy;
2. Forces the Gestational or Genetic Surrogate to undergo Assisted Reproduction for the purposes of becoming pregnant; or
3. Requires or prevents a Gestational or Genetic Surrogate from terminating the pregnancy.

#### **SECTION 715. INSPECTION OF RECORDS**

The proceedings, records, and identities of the individual parties to a Surrogacy Agreement under this Article are subject to inspection by the parties and their attorneys of record under the standards of confidentiality applicable to adoptions as provided under other law of this State.

#### **SECTION 716. EXCLUSIVE, CONTINUING JURISDICTION**

During the period governed by the Surrogacy Agreement, the Court conducting a proceeding under this Act has exclusive, continuing jurisdiction of all matters arising out of the Surrogacy Agreement until the Child, delivered by the Gestational or Genetic Surrogate during the term of the Surrogacy Agreement, attains the age of ninety (90) days; however, nothing in this provision gives the Court jurisdiction over a child custody or a child support action where such jurisdiction is not otherwise authorized.

### **ARTICLE 8. PAYMENT TO DONORS AND GESTATIONAL OR GENETIC SURROGATES**

#### **SECTION 801. REIMBURSEMENT**

1. A Donor may receive reimbursement for economic losses resulting from the Retrieval or storage of Gametes or Embryos and incurred after the Donor has entered into a valid agreement in a Record to be a Donor.
2. Economic losses occurring before a Donor, Gestational Surrogate or Genetic Surrogate has entered into valid agreement in a Record may not be reimbursed unless subsequently agreed upon in the agreement, except as provided for in paragraph 3 of this Section.
3. Premiums paid for insurance against economic losses directly resulting from the Retrieval or storage of Gametes or Embryos for donation may be reimbursed, even if such premiums have been paid before the Donor has entered into a valid agreement in a

Record, so long as such agreement becomes valid and effective before the Gametes or Embryos are used in Assisted Reproduction in accordance with the agreement.

## **SECTION 802. COMPENSATION**

1. The Compensation, if any, paid to a Donor, Gestational Surrogate, or Genetic Surrogate must be reasonable according to industry standards and negotiated in good faith between the parties.

2. Compensation may not be conditioned upon the quantity, purported quality or genome-related traits of the Gametes or Embryos.

3. Compensation may not be conditioned on actual genotypic or phenotypic characteristics of the Donor or of the Child.

## **ARTICLE 9. HEALTH INSURANCE**

### **SECTION 901. INFERTILITY AND EXPERIMENTAL PROCEDURES**

1. The ASRM or other appropriate governmental regulatory authority may designate, from time to time, a list of ART procedures and treatments considered to be experimental.

### **SECTION 902. REQUIRED NOTICE**

1. Each group health benefit plan that offers assisted reproductive health services shall provide notice in a Record to each enrollee in the plan of the specific coverage provided for those services.

2. The notice required under this Section must be prominently positioned in any literature, insurance application, or insurance policy plan description made available or distributed by the group health benefits plan to enrollees.

### **SECTION 903. QUALIFICATION OF PROVIDERS**

A health insurer may require that any licensed Physician participating in the treatment of Infertility must be:

(a) Board certified in Obstetrics and Gynecology by the American Board of Obstetrics and Gynecology and have a practice comprised substantially of Infertility cases; or

(b) Board certified in both Obstetrics and Gynecology and in Reproductive Endocrinology by the American Board of Obstetrics and Gynecology, with a practice comprised substantially of Infertility cases; or

(c) Board certified in both Andrology and Urology by the American Board of Urology.

## **ARTICLE 10. QUALITY ASSURANCE**

### **SECTION 1001. QUALIFICATIONS OF PROVIDERS**

1. ART Providers and ART Storage Facilities (hereafter “Program”) shall assure the quality of their services by developing and complying with at least the following quality assurance measures:

(a) Personnel. The Program shall document that senior and supervisory staff are adequately trained, including formal training in genetics. Documentation shall also include staff participation in laboratory training programs and regular updating of staff skills and knowledge.

(b) Equipment. The Program shall develop, implement, and test regularly backup and contingency plans for cryopreservation systems, computer systems, and records.

(c) Testing. The Program shall use a laboratory that participates in proficiency testing and on-site inspection, in compliance with the requirements for certification promulgated by the State Department of Health, if any. If genetic diagnostic services are provided, the Program or the laboratory shall comply with the applicable guidelines of organizations otherwise recognized by ASRM, such as the College of American Pathologists and the American College of Medical Genetics.

### **SECTION 1002. COLLABORATIVE REPRODUCTION REGISTRIES**

1. Collaborative Reproduction registries (or equivalent) created for the purpose of maintaining contact, medical, and psychosocial information about Donors, Gestational or Genetic Surrogates, and Children born as a result of ART, or to benefit the public health, operating within this jurisdiction shall incorporate, at a minimum, the following elements:

(a) Establish procedures to allow the disclosure of non-identifying information, while protecting the anonymity of Donors;

(b) Establish procedures to allow the disclosure of identifying information about Participants only if mutual consent of all parties affected is obtained prior to the release of such information;

(c) Maintain medical and genetic information and updated current health information, including change in health status, about the Donor; Donors or Providers are not required to update such information unless required by written agreement;

(d) Establish procedures to allow disclosure of non-identifying medical and psychosocial information to the resulting Child;

(e) Establish whether a resulting Child is authorized to contact a program; and

(f) Retain all records involving third party reproduction until the resulting Child has reached the age of 40.

2. Health care Providers in this jurisdiction shall not utilize registries that fail to comply with the requirements of paragraph 1 of this Section, except as may be otherwise required or permitted by federal or State law.

### **SECTION 1003. HEALTH INFORMATION MANAGEMENT**

1. The Program shall maintain all records in compliance with State and Federal law.

2. The Provider:

(a) Shall attempt to maintain, contact information, including an address, of the Participants for contact by Patients, resulting Children, and Participants;

(b) Shall participate in a national Donor and Collaborative Reproduction registry, if established as described in Section 1002 of this Act, so that Intended Parents and Donors can provide the program with address information;

(c) Shall participate in a national Donor and Collaborative Reproduction registry, if established as described in Section 1002 of this Act, by collecting medical and genetic information and updated current health information, including change in health status of the Donor; and

(d) Shall maintain an accurate record of the disposition of all Gametes and Embryos.

3. The Program shall transfer all records involving Collaborative Reproduction to a national Donor and Collaborative Reproduction registry in compliance with its requirements, if established as described in Section 1002 of this Act.

4. Disclosure of Medical Information.

(a) Medical Information may be disclosed to an interested party or resulting Child only if an authorization is provided in accordance with applicable law;

(b) The Program may disclose aggregate, non-identifiable data for quality assurance and reporting requirements, for the limited purpose of:

- (i) Ensuring a standard for the maintenance of records on laboratory tests and procedures performed, including safe sample disposal;
- (ii) Maintaining records on personnel and facilities, schedules of preventive maintenance; and
- (iii) Ensuring minimum qualification standards for personnel.

#### **SECTION 1004. PATIENT SAFETY**

The program shall:

1. Conduct medical testing for sexually transmitted diseases in Gamete Providers, whether Donors or Intended Parents, and Gestational and Genetic Surrogates in compliance with the laws and regulations of or applying to appropriate governmental regulatory authorities; and
2. Conduct medical screening and genetic testing of Gamete and Embryo Donors for genetic disorders. The extent of such screening shall be in conformity with guidelines established by the ASRM. In the event that no such guidelines have been developed, the screening shall be in accordance with accepted standards of medical practice for ART Providers.
3. Establish procedures for the proper labeling of Embryos and Gametes in compliance with the laws and regulations of or applying to appropriate governmental regulatory authorities.

#### **ARTICLE 11. ENFORCEMENT**

##### **SECTION 1101. DAMAGES**

1. The failure of a Provider to comply with this Act shall constitute unprofessional conduct and may be reported to any controlling licensing authority.
2. In addition to other remedies available at law, including but not limited to causes of action under HIPAA, a Participant whose confidential information has been used or disclosed in violation of this Act and who has sustained economic loss or personal or emotional injury therefrom may recover compensatory damages, reasonable attorney's fees, and the costs of litigation.
3. Failure to account for all Embryos, misuse of Embryos, theft of Embryos, or unauthorized disposition of Embryos may subject a Provider or ART Storage Facility to criminal and civil penalties, including punitive damages, and reasonable legal fees to the prevailing party.

4. Any individual or entity not acting in accordance with this Act may be subject to civil and/or criminal liability.

## **ARTICLE 12. MISCELLANEOUS PROVISIONS**

### **SECTION 1201.     LIMITATION OF MEDICAL PROFESSIONAL LIABILITY**

1. Licensed Providers rendering services in compliance with practice and ethical guidelines (contemporaneous to the time of alleged breach of the standard of care) or applicable State or federal regulations or statutes are presumed to have rendered care within accepted standards of care.

### **SECTION 1202.     SEVERABILITY**

The invalidation of any part of this Act by a court of competent jurisdiction shall not result in the invalidation of any other part.

## **REPORT**

### **Introduction & Summary**

This ABA Model Act Governing Assisted Reproduction [2019] (“Model Act [2019]”) was developed by the American Bar Association Section of Family Law to replace the ABA Model Act Governing Assisted Reproductive Technology (2008) (“Model Act [2008]”).

Significant social, legal, and medical advancements require modernization of the provisions of the Model Act [2008]. Many changes in the form, makeup, and reality of modern families affect how we form parental relationships and impose support obligations. Advances in medicine continue to expand the options for and genetic nuances of intended parents and their resulting children. To keep up with the modern realities of assisted reproductive technology and the modern realities of how families are formed, the Model Act must be updated as well.

The Section of Family Law circulated the substantive draft documents to the following ABA entities, who were also invited to take part in working group sessions for review and feedback: Section of Business Law; Section of Civil Rights and Social Justice; Section of Health Law; Section of International Law; Section of Litigation, Real Property, Trust and Estate Law; Section of Science and Technology Law; the Solo, Small Firm and General Practice Division; Section of Tort, Trial and Insurance Practice; the Young Lawyers Division; and the ABA Commission on Sexual Orientation and Gender Identity. The draft documents were also circulated to the following additional non-ABA entities who also participated in working group sessions to review and provide additional feedback: National Center for Lesbian Rights; National LGBT Bar Association; and the Uniform Law Commission. Many of these groups were active participants in the development of the Model Act [2019].

That there is a need for such uniform legislation is expressed clearly in an appellate decision involving a dispute about parentage:

We join the chorus of judicial voices pleading for legislative attention to the increasing number of complex legal issues spawned by recent advances in the field of assisted reproduction. Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some over-all legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions.” *In re Marriage of Buzzanca*, 61 Cal.App.4th 1410, 1428-29, 72 Cal. Rptr. 280 (Cal.App. 1998).

### **Background**

The Model Act [2008] provided a framework to resolve contemporary controversies over parentage via assisted reproduction, a framework to resolve controversies yet to

come but that were envisioned by the advancement in assisted reproductive technology, and a framework to guide the expansion of ways by which families are formed. See [https://www.americanbar.org/content/dam/aba/publishing/family\\_law\\_quarterly/family\\_fl\\_q\\_artmodelact.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/family_law_quarterly/family_fl_q_artmodelact.authcheckdam.pdf).

However, in 2015, the U.S. Supreme Court ruled in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that marriage is a fundamental right guaranteed to same-sex couples by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. This advancement of marital rights for same-sex couples in and of itself dictates that the Model Act [2008] be modernized to remove gender- and sexual-orientation-based references. Courts around the country have already begun to expand the definition of parentage in light of *Obergefell*. Accordingly, the provisions of the Model Act [2008] must be replaced with gender-neutral definitions and language throughout to insure equal treatment of those children born through assisted reproduction to same-sex couples.

Additionally, the Model Act [2008] sections dealing with parentage were intended, as much as possible, to be consistent with and to track the corresponding provisions of the Uniform Parentage Act (“UPA”).<sup>1</sup> The UPA addresses a wide variety of parentage issues, including parentage via assisted reproduction. However, the UPA as amended in 2002 was never widely adopted; only two of the eleven states that adopted the UPA (2002) to date adopted the Article 8 provisions governing surrogacy, and five of those eleven states enacted alternative regulatory schemes for surrogacy that are not based on the UPA. Likewise, since 2008, several other states have enacted surrogacy legislation, which borrowed only minimally from the UPA and the Model Act [2008]. This suggests that the substance of both the UPA and Model Act [2008] are not necessarily a preferred method of regulating surrogacy arrangements and that those provisions should be updated to make them more consistent with current surrogacy practice. The UPA was significantly updated in 2017, and as of the date of this Report, has been enacted in three states (California, Vermont and Washington State). The Model Act [2019] provides similarly significant updates to replace the Model Act [2008].

Finally, according to the last success rate updates issued by the Centers for Disease Control and Prevention on February 24, 2016, 1.6 percent of all infants born in the United States each year are conceived using assisted reproductive technology (ART). Thus, it is important to replace the Model Act [2008] to address the issue of the resulting children’s right to access information about their gamete (sperm or egg) donor.

### **Major Overhaul to the Model Act [2008] Provided by Model Act [2019]**

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<sup>1</sup> The Uniform Parentage Act is a uniform act originally promulgated in 1973 by the National Conference of Commissioners of Uniform State Laws (now known as the Uniform Law Commission). It has since been amended and the most recent changes are reflected in the UPA (2017) approved by the ABA House of Delegates in February 2018. Where the subjects of parentage and assisted reproduction overlap, the Model Act [2019] tracks the relevant provisions of the UPA (2017) with some differences in regard to Genetic Surrogacy. Likewise, Sections 402, 605 and other select portions of this Model Act [2019] were taken directly from the Uniform Parentage Act (2017).

With this background in mind, the major revisions to the Model Act [2008] are as follows:

1. Model Act [2019] includes new definitions and gender/sexual orientation neutral language throughout the Act – New defined terms have been added to the Model Act [2019] and definitions have been updated throughout to allow for gender-neutral terminology. These updates leave behind the outdated notion that families are created only by two, heterosexual parents, and render the Act equally applicable to children of all individuals building families through ART.
2. Model Act [2019] Addresses Traditional/Genetic Surrogacy - The Model Act [2008] addressed only gestational surrogacy and did not address traditional/genetic surrogacy.
3. Model Act [2019] Replaces the Gestational Surrogacy Parental Establishment Provisions of the Model Act [2008] -The Model Act [2019] replaces the parental establishment provisions for gestational surrogacy in the Model Act [2008]. The original and now outdated judicial pre-approval process for gestational surrogacy in the Model Act [2008] has been removed.
4. Model Act [2019] Adds Parental Establishment Provisions via Traditional/Genetic Surrogacy Which Were Not Addressed in the 2008 Act - The Model Act [2019] substitutes “genetic surrogate” (a surrogate who contributes the surrogate’s own eggs in a surrogacy arrangement) for the more commonly used, but vague, term “traditional surrogate.” Addressing parentage through genetic surrogacy for the first time, the Model Act [2019] requires a judicial pre-approval process for genetic surrogacy along with a final, post-birth order confirming parentage assuming all parties are still in agreement. If agreement between the parties is lacking, or compliance with the Act is lacking, the Model Act [2019] requires parentage to be determined in accordance with existing parentage presumptions and procedures under applicable state law. Further, the provisions of the Model Act [2019] provide intended parents a right to reimbursement and/or damages if a surrogate breaches the surrogacy agreement.
5. Model Act [2019] Includes Baseline Best Practice and Eligibility Requirements for all Surrogacy - The Model Act [2019] also includes best-practice baseline requirements for both types of surrogacy in regard to eligibility and proper medical screening and education for surrogates and intended parents, as well as establishing foundational requirements that must be present in written surrogacy agreements.

Note regarding the Consultations and Mental Health Evaluations required in Collaborative Reproduction: The American Society for Reproductive Medicine (“ASRM”), continues to study, promulgate and update clear best practice and ethical guidelines for assisted reproduction as the practice around collaborative and assisted reproduction have grown and changed. In particular, ASRM provides

the latest recommendations for evaluation of surrogates and intended parents, incorporating information from the Centers for Disease Control, National Institutes of Health and the U.S. Food and Drug Administration among others. These guidelines include screening and testing for intended parents and surrogates to reduce the possibility of complications, to reduce the spread of infectious diseases and to address the complex medical and psychological issues that confront the parties, as well as the resulting children. The guidelines represent an effort to make the screening procedures for parties involved in third-party reproduction more consistent as well.

According to ASRM, “the decision to use a gestational carrier is complex, and patients and their partners (if applicable) benefit from psychosocial education to aid in this decision. The physician should strongly recommend psychosocial education and counseling by a qualified mental health professional to all intended parents. Psychosocial evaluation and counseling by a qualified mental health professional is also strongly recommended for all potential carriers and their partners. The education and counseling should include a clinical interview and, where appropriate, psychological testing. Psychological test data should be handled in accordance with American Psychological Association ethical standards.

See “Recommendations for practices utilizing gestational carriers: a committee opinion”; Fertility and Sterility® Vol. 107, No. 2, February 2017 0015-0282.

### **Conclusion**

The Model Act Governing Assisted Reproduction [2019] seeks to bring current parentage law up to speed with social, legal, and medical advancements and is a necessary step in the right direction in preparing for the future of parentage law.

Respectfully submitted,

Melissa Avery  
Chair, Section of Family Law  
January 2019

**GENERAL INFORMATION FORM**

Submitting Entity: Section of Family Law

Submitted By: Melissa Avery, Chair, Section of Family Law

1. Summary of Resolution(s). The Resolution adopts the Model Act Governing Assisted Reproduction [2019], dated January 2019, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the Act.
2. Approval by Submitting Entity. The ABA Section of Family Law approved submission of this Resolution on November 7, 2018.
3. Has this or a similar resolution been submitted to the House or Board previously?  
Yes, this Resolution was previously submitted for the 2018 Midyear and Annual Meetings and was subsequently withdrawn to address further comments from interested sections of the ABA and entities outside the ABA.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The ABA Model Act Governing Assisted Reproduction Technologies [2008] ("Model Act [2008]") was adopted by the ABA House of Delegates in 2008 ("Resolution 107"). See 2008M107. First, social, legal, and medical advancements in the area of assisted reproductive technologies ("ART") require modernization of the Model Act [2008]. These include making the language neutral as to gender- and sexual-orientation to ensure equal treatment of those children born through assisted reproduction to same-sex couples. Second, the Model Act [2008] aimed to be consistent with and to track the corresponding provisions of the Uniform Parentage Act ("UPA") (2000), as amended in 2002. As the UPA (2002) provisions regulating surrogacy arrangements and ART-parentage have recently been updated for consistency with current practice, so too have the Model Act provisions. Finally, the proposed revisions address the issue of the resulting children's right to access information about their gamete (sperm or egg) donor. This Model Act [2019] addresses those issues and is intended to replace the Model Act [2008].
5. If this is a late report, what urgency exists which requires action at this meeting of the House? Not Applicable.
6. Status of Legislation. (If applicable). Not Applicable.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, the Family Law Section, with the assistance of its Assisted Reproductive Technologies Committee, intends to submit the Model Act [2019] as an appropriate Act for those states desiring to adopt the specific substantive law contained in the Act.
8. Cost to the Association. (Both direct and indirect costs). None

9. Disclosure of Interest. (If applicable). Not Applicable.

10. Referrals. The Section of Family Law circulated the substantive draft documents to the following ABA entities, who were also invited to take part in Working Group sessions in June 2017 and February, March and April of 2018, and August, September and October of 2018:

- a. Section of Business Law;
- b. Section of Civil Rights and Social Justice;
- c. Commission on Sexual Orientation and Gender Identity;
- d. Section of Health Law;
- e. Section of International Law;
- f. Section of Litigation;
- g. Section of Real Property, Trust and Estate Law;
- h. Section of Science and Technology Law;
- i. Solo, Small Firm and General Practice Division;
- j. Section of Tort, Trial and Insurance Practice;
- k. Young Lawyers Division;
- l. National Center for Lesbian Rights;
- m. National LGBT Bar Association; and
- n. Uniform Law Commission.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address).

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 323-904-4728  
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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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## EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution approves the Model Act Governing Assisted Reproduction [2019] (“Model Act [2019]”) as an appropriate Act for those states desiring to adopt the specific substantive law contained in the Act.

2. Summary of the Issue that the Resolution Addresses

The Section of Family proposes the Model Act [2019] to replace the Model Act Governing Assisted Reproductive Technology [2008] (“Model Act [2008]”) previously approved by the House of Delegates. First, social, legal, and medical advancements in the area of assisted reproductive technologies (“ART”) require modernization of the Model Act [2008]. These include making the language neutral as to gender- and sexual-orientation to insure equal treatment of those children born through assisted reproduction to same-sex couples. Second, the Model Act [2008] aimed to be consistent with and to track the corresponding provisions of the Uniform Parentage Act (“UPA”) (2000), as amended in 2002. The UPA (2002) provisions regulating surrogacy arrangements and ART-parentage have recently been updated by the UPA (2017) for consistency with current practice; so too have the Model Act provisions. Finally, the proposed revisions address the issue of the resulting children’s right to access information about their gamete (sperm or egg) donor.

3. Please Explain How the Proposed Policy Position will address the issue

The Model Act [2019] includes new defined terms and updated definitions throughout to allow for gender-neutral terminology, updates provisions regulating surrogacy arrangements and Assisted Reproduction-parentage for consistency with current practice and addresses children’s right to access information about their gamete (sperm or egg) donor. The Model Act [2019] brings current parentage law up to speed with social, legal, and medical advancements and is a necessary step in the right direction in preparing for the future of parentage law.

4. Summary of Minority Views

Concerns raised by the Sections of Health Law, Science and Technology and Real Property, Trusts and Estates as well as the ABA Commission on Sexual Orientation and Gender Identity, the National Center for Lesbian Rights, the National LGBT Bar Association and the Uniform Law Commission were addressed in substantive working group meetings. Otherwise, the sponsors are aware of no other minority views, opposition or concerns with the Resolution.

**AMERICAN BAR ASSOCIATION**  
**TORT TRIAL AND INSURANCE PRACTICE SECTION**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association urges Congress and the United States
- 2 Department of Defense to direct the Armed Forces and its Public Private Venture housing
- 3 contractors to enact uniform breed-neutral pet policies for families living in military
- 4 housing.



## REPORT

### Introduction

The challenges of being a military family, who is often transferred between duty stations, produce stress and anxiety for all involved, with children being the most vulnerable. A substantial body of research has shown the benefits that pets provide to military families, especially in times of uncertainty. For some families, their dogs are not pets, but are service animals or emotional support animals under the law. These dogs perform tasks for a person with a disability or a mental or emotional condition, as outlined below. Additionally, military housing can be a very complex system to navigate. For military families with pets, this system is even more difficult to decipher given the inconsistent breed-bans adopted by military bases throughout the world.

Military families may be forced to give up their pet or to move into less convenient and perhaps more expensive private housing when they transfer in order to retain their family pet, an option often unavailable. Thus, instead of having the loved pet to help them through the transfer process, the families often experience the emotional trauma of leaving the pet behind. For example, Mellita McCullen and her fiancé, both soldiers stationed at Ft. Hood, were forced to give up their young pit bull type dog in order to move into military housing after a new breed ban came into effect.<sup>1</sup> She commented that the policy is unfair to soldiers who need military housing due to their financial situations.<sup>2</sup> Similarly, while stationed in Colorado, Joshua Brown and his wife had a pet labrador/pit bull mixed breed dog.<sup>3</sup> Brown and his wife were told they must choose between the dog and living in military housing because of the breed of the dog.<sup>4</sup> Brown said that the puppy is part of their family and he would rather move.<sup>5</sup> Brown's mother commented that the puppy had done more than the Army or anyone else in comforting her son after a turbulent year in Iraq.<sup>6</sup> A consistent breed-neutral policy would allow military families to retain loved well-behaved family pets as they are transferred time and time again, providing continuity and emotional support to military members and their families.

Members of the military and their families devote their lives to serving the United States. These families sacrifice tremendously to protect the freedoms enjoyed by all Americans. Many service members have made the ultimate sacrifice of giving their lives while serving. The American Bar Association has recognized the unique responsibilities that military families undertake and urged support for their families by forming the Standing Committee on Armed Forces Law, Military Law Coordinating Committee, the Military Committee of the Family Law Section, the Committee on Veterans Affairs, the Military Justice Committee of the Criminal Justice Section, and the Legal Assistance for Military

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<sup>1</sup> Amanda Kim Stairrett, *Pit Bulls banned from Fort Hood*, KILLEEN DAILY HERALD (Sept. 2, 2008).

<sup>2</sup> *Id.*

<sup>3</sup> Lance Benzel, *Puppy Love? Not at These Apartments*, THE GAZETTE (Colorado Spring, Aug. 27, 2010).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

Personnel program.<sup>7</sup> Along with these responsibilities come great challenges. Extensive legislation has been enacted to help military families deal with the realities of their service.

This Resolution, in line with the ABA's history of supporting and advancing the personal rights and interests of members of the United States military and their families, including many who are lawyers, as well as national trends in dangerous dog legislation, seeks to expand upon prior Resolutions 100 (Aug. 2012) and 303 (Feb. 2012). It also ensures that military families who fight for our freedom have the ability to own and retain loved, well-behaved, family pets regardless of breed while living in the military housing system by urging Congress, the Department of Defense, and the Armed Forces to adopt breed-neutral pet policies on military bases.

### The Life of a Military Family

The United States military requires that military families move based upon the needs of the service at any given time. Service members may face federal criminal penalties if they fail to report to a new duty station as ordered.<sup>8</sup> Members disobeying orders to move may face jail, loss of rank, or dishonorable discharge.<sup>9</sup> Thus, failing to move is not an option. Frequent moves are a large part of military family life. On average, the typical military family moves every thirty-three months.<sup>10</sup> In addition, military members are often absent from their families due to temporary duty or extended deployments.

The moving process is very disruptive and stressful for military families, especially for children.<sup>11</sup> Adding to the anxiety caused by moving is the fact that some military families are forced to give up their pets when they move due to inconsistent policies that ban pet dogs in military housing simply because of their appearance or breed. This leaves no options for families seeking alternative places to live with their pet unless they move into private housing that may be more expensive and inconvenient and thus often not a realistic option. For children who have become attached to their pets, losing their pet can be a significant hardship. The U.S. Marine Corps recognized this hardship in April 2002 and classified all pets belonging to people in the marines as part of the family instead of the previous "household possessions" classification.<sup>12</sup> Today, throughout the military,

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<sup>7</sup> See e.g. American Bar Association Resolution 121(A) (2006); 111 (2003); and 130 (1995).

<sup>8</sup> UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 886 (1951).

<sup>9</sup> *Id.* § 885.

<sup>10</sup> DEPARTMENT OF DEFENSE, MILITARY FAMILY LIFE PROJECT: ACTIVE DUTY SPOUSE STUDY (2010), <https://download.militaryonesource.mil/12038/MOS/Reports/MFLP-Longitudinal-Analyses-Report.pdf>.

<sup>11</sup> Perry R. Chumley, et al. *Companion Animal Attachment and Military Transfer*, 6 ANTHROZOOS 258, 259 (1993).

<sup>12</sup> MARADMIN 595-16 (Nov 21, 2016) ("Household pets (dogs and cats) are important members of marine families. The shipment of pets during a Permanent Change of Station (PCS) move, particularly overseas, can be very expensive and a stressful event if not properly planned well in advance. Shipping a pet is considered a benefit and not an entitlement ...."); see also MARADMIN 192-18 (Apr 18, 2018) (Peak Moving Season Preparations . . . "This MARADMIN also recognizes the importance of pets as members of the Marine family and explains how Marines with PCS Orders overseas must coordinate early to reserve pet spaces aboard Air Mobility Command-Patriot Express (AMC-PE) flights.")

pets may live at military bases in the U.S. or in neutral territories.

Pets are especially helpful to those who are forced to move frequently. Research shows that a companion animal can provide a sense of continuity and emotional support for military families during periods of change, while facilitating adaptation to new environments.<sup>13</sup> If the families cannot move with their pet, instead of having the loved pet to help them through the transfer process, the families often experience the emotional trauma of leaving the pet behind.<sup>14</sup> This, in turn, can lead to family problems, poor adaptation to the new environment, and animosity toward the military service.<sup>15</sup>

### Lack of Consistent Pet Policy

Currently, there is no consistent Department of Defense (DoD) pet policy. Dog ownership policies in military housing, whether leased directly through the Armed Forces or through Public Private Ventures (PPV),<sup>16</sup> vary greatly among the military branches and often among specific duty stations within a branch. There is no consistent ban on specific breeds of dog; instead there is a patchwork of breed bans in place across the various housing available to military families both on base and off. The Air Force has a force-wide pet policy banning “aggressive or potentially aggressive breeds of dogs...defined as, both purebred or mixed breed, Pit Bull (American Staffordshire Bull Terrier or [English] Staffordshire Bull Terrier), Rottweiler, Doberman Pinscher, Chow and wolf hybrids.”<sup>17</sup> The Navy pet policy is deferred to local commanders who decide which breeds are banned in their on-base housing.<sup>18</sup> However, one *On Base Housing Policy* for a Navy station prohibits “Chows, Doberman Pinschers, Presa Canarios, Pit Bulls . . . Rottweiler’s, any Wolf Hybrid, or any mix of the aforementioned breeds.”<sup>19</sup> The Army currently prohibits “dangerous dog breeds” that include “American Pit Bull, Stafford Bull Terrier, Bull Mastiffs, Dogo Argentino, Rhodesian Ridge Back, Dogu-de-Bordeaux, Chinese Fighting dog,

<sup>13</sup> Chumley, *supra* note 11, at 258.

<sup>14</sup> *Id.* at 269.

<sup>15</sup> *Id.*; see also Anderson, Lynn J. *The Pet in the Military Family at Transfer Time: It is No Small Matter*, 8 MARRIAGE AND FAMILY REV. 205, 208, 216, 219 (1985).

<sup>16</sup> Congress established the Military Housing Privatization Initiative, [National Defense Authorization Act for Fiscal Year 1996, Public Law 104-106 \(110, Stat 186, Section 2801\)](#), to improve the quality of living conditions for military families. It authorizes the DoD to work with the public sector to “build, renovate, and sustain military housing” Office of the Asst. Secretary of Defense for Energy, Installations, and Environment, *Military Housing Privatization*, [https://www.acq.osd.mil/eie/fim/Housing/Housing\\_index.html](https://www.acq.osd.mil/eie/fim/Housing/Housing_index.html). Such privatized military housing is referred to a Public Private Venture (PPV) housing, owned by a private entity and governed by a business agreement with DoD. The DoD has “privatized 99 percent of its domestic housing.” GAO, *Military Housing privatization: DoD Should Take Steps to Improve Monitoring, Reporting, and Risk Assessment*, GAO-18-218 at 1 (Mar, 2018).

<sup>17</sup> Secretary of the Air Force Instruction (AFI) 32-6001 (Oct. 24, 2008), AFI 32-6007, Ch. 4, § 4.22 (Aug. 2, 2012).

<sup>18</sup> Commander Navy Installations Command (CNIC) Instruction 11103.2A, §4.f(2) (Aug. 2, 2013) <https://www.cnic.navy.mil/content/dam/cnic/hq/pdfs/Instructions/11000Series/CNICINST%2011103.2A.pdf>.

<sup>19</sup> On Base Housing Policy, <http://www.frcw.navy.mil/pets.pdf> (last visited Sept. 3, 2018).

Doberman Pincher, and crossbreeds of these dogs.”<sup>20</sup> The Marine Corps policy prohibits all “full or mixed breeds of Pit Bulls, Rottweilers and canid/wolf hybrids.”<sup>21</sup> They further direct a Veterinary Corps Officer or civilian veterinarian to make a determination of “majority breed” when an owner does not possess a breed registry certificate.<sup>22</sup> Thus, a military family owning a mixed-breed terrier and living in military housing may be fine at one place, but if they transfer, they may learn that their dog is banned in their new military housing.

The pressure and hardship to a military family moving around with a mixed-breed dog is compounded by the visual identifications made by an officer, military police, or veterinarian. The determination of the installation veterinarian on the breed of the dog is usually final. However, studies have shown that visual identification is often inaccurate and inconsistent.<sup>23</sup> For example, a published study on visual breed identification of animal welfare and law enforcement professionals compared to DNA breed identification showed visual identification ranges between 6-30% accurate when compared to the scientific method, DNA.<sup>24</sup> Another notable study found that, when animal shelter and animal adoption agency staff were tasked with identifying the breed makeup of dogs of unknown origin, 87.5% of the dogs identified by an adoption agency as having specific breeds in their ancestry did not have all of those breeds detected by DNA analysis.<sup>25</sup> In a second study, experienced dog professionals were tasked with visual breed identification of twenty dogs.<sup>26</sup> Fewer than half of the professionals were able to correctly identify the predominant breed (as little as 12.5% match based on DNA analysis could qualify as “predominant”) for 14 of the 20 dogs. Moreover, for three of the dogs, visual identification did not match any (major or minor) DNA breed identification. Further, the experts were unable to agree with each other—for only seven dogs (35%) could even half the observers agree on a predominant breed.<sup>27</sup>

This research, coupled with the fact that a majority of the dogs in the United States are of mixed breed, suggests that identification of mixed-breed dogs for purposes of enforcing

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<sup>20</sup> Department of the Army, Policy Letter No. 34 (July 21, 2013), <https://www.army.mil/e2/c/downloads/328371.pdf>.

<sup>21</sup> Marine Corps Order (MCO) 11000.22 Ch.1, § 5003 (Jan 22, 2018).

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., Victoria L. Voith, et al., *Comparison of Adoption Agency Breed Identification and DNA Breed Identification of Dogs*, 12(3) J. APPLIED ANIMAL WELFARE SCI., 253-62 (2009); Victoria L. Voith, et al., *Comparison of visual and DNA breed identification of dogs and inter-observer reliability*, 3(2) AM. J. SOCIOLOGICAL RESEARCH, 17-29 (2013); K. Croy, et al., *Dog Breed Identification: What kind of dog is that?*, MADDIE’S SHELTER MEDICINE PROGRAM (2012), <http://sheltermedicine.vetmed.ufl.edu/library/research-studies/current-studies/dog-breeds/> (last visited Sept. 15, 2018); K.R. Olson, K. R., et al., *Inconsistent identification of pit bull-type dogs by shelter staff*, 1 VETERINARY J., 206, 197-202 (2015).

<sup>24</sup> Olson, *supra* note 23.

<sup>25</sup> See *Comparison of Adoption Agency Breed Identification and DNA Breed Identification of Dogs*, *supra* note 23, 253, 260.

<sup>26</sup> See *Comparison of visual and DNA breed identification of dogs and inter-observer reliability*, *supra* note 23, 17-29.

<sup>27</sup> *Id.*

any of the military base policies is insufficient and unreliable.<sup>28</sup> This can lead to much confusion, frustration, and heartache for military families. Instead, a pet policy intended to protect the installation and community from a dog's dangerousness should be based on a dog's behavior. Not only will such a policy avoid the difficulties with accurately and consistently determining the breed of the dog but will be more effective.

For researchers who studied dog-bite related fatalities, the most remarkable finding was not the appearance of the dog, but the co-occurrence of multiple factors potentially under the control of dog owners: isolation of dogs from positive family interaction and other human contact; mismanagement of dogs by owners; abuse or neglect of dogs by owners; dogs left unsupervised with a child or vulnerable adult who may be unfamiliar to the dog; and maintenance of dogs in an environment where they are trapped, neglected, and isolated and have little control over either the environment or choice of behavior.<sup>29</sup> Notably, the breed, mix of breeds, or appearance of the dog was not one of the factors.

### National Trends in Dangerous Dog Legislation

The trend throughout the United States is to repeal breed discriminatory ordinances and replace them with dangerous dog laws that focus on the behavior of the individual dog and the individual owner. The National Canine Research Council estimates that between January 2012 and May 2014, at least 97 municipalities repealed breed discriminatory legislation, at least 61 municipalities rejected it, and five (5) states enacted statewide preemption laws, compared to only 21 municipalities enacting such legislation in that time frame.<sup>30</sup> Best Friends Animal Society estimates that, from 2014 to present, an additional two (2) states have enacted statewide preemption laws and at least 28 additional cities and three (3) additional counties have rejected breed discriminatory legislation by either repealing existing legislation or enacting breed-neutral legislation.

State legislators have varying reasons for adopting state preemptions on breed specific legislation. "The most important part of [the advocates' testimony] was a screen they put up in front of us that showed about 16 dogs, and they said pick out which one is a pit bull. And you couldn't do it," said Representative Tim Rounds, South Dakota District 24.<sup>31</sup>

Several studies have been conducted on the topic of the impact and effectiveness of laws that regulate dogs based on breed or appearance instead of behavior. The United Kingdom banned "pit bulls" in 1991. One study examined the U.K.'s Dangerous Dog Act

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<sup>28</sup> JANIS BRADLEY, THE RELEVANCE OF BREED IN SELECTING A COMPANION DOG 11, (National Canine Research Council 2011), *see also* Sandy Robins, *First Mutt Census Reveals Strong Dog DNA Trends*, TODAY, Apr. 4, 2011.

<sup>29</sup> Patronek, et al. *Co-Occurrence of Potentially Preventable Factors in 256 Dog Bite Related Fatalities in the United States (2000-2009)*, 243 J. AM. VETERINARY MED. ASS'N 1726, 1732 (Dec. 15, 2013).

<sup>30</sup> *Breed Specific Legislation is on the Decline*, NATIONAL CANINE RESEARCH COUNCIL, <https://www.nationalcanineresearchcouncil.com/sites/default/files/Breed-specific-legislation-is-on-the-decline-2016.pdf> (last visited Nov. 10, 2017).

<sup>31</sup> *The Debate to End Breed Discrimination*, YOUTUBE, [https://www.youtube.com/watch?time\\_continue=331&v=8ylkstRpCnQ](https://www.youtube.com/watch?time_continue=331&v=8ylkstRpCnQ) (last visited Sept. 3, 2018).

and concluded that the ban had no effect on stopping dog attacks.<sup>32</sup> The Netherlands repealed a “pit bull” ban that had been in place for 15 years because it had failed to reduce the incidence of dog bites.<sup>33</sup> These published studies are consistent with a 2009 article discussing the effect of the Denver, Colorado breed discriminatory law.<sup>34</sup> Twenty years after the ban was enacted, the director of Denver Animal Control admitted that he is unable to say with any certainty whether it has made Denver any safer.<sup>35</sup> Other cities with breed bans have determined that the ban is ineffective in protecting the public from dog attacks and is problematic to enforce by field officers.<sup>36</sup>

Some elected officials believe that banning dogs based on appearance alone is a personal property issue. “It’s not a dog bill. This is actually a private property rights bill. House Bill 97 protects the property rights of Utahans by allowing responsible dog owners to welcome any type of dog into their home while still allowing the cities to go after irresponsible dog owners,” said Senator Margaret Dayton, Utah District 15.<sup>37</sup>

Ultimately, the trend is for states and cities alike to adopt breed-neutral dangerous dog laws that target behavior and not appearance. This is consistent with the 2012 American Bar Association Resolution 100 which “urged all state, territorial, and local legislative bodies and governmental agencies to adopt comprehensive breed-neutral dangerous dog/reckless owner laws that ensure due process protections for owners, encourage responsible pet ownership and focus on the behavior of both dog owners and dogs, and to repeal any breed discriminatory or breed specific provisions.”<sup>38</sup>

## Effect of Inconsistent Policy on Service and Emotional Support Animals

Family members of service members, former service members and recovering service members have service animals or emotional support animals. A service animal is “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental

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<sup>32</sup> B. Klaassen, J.R. Buckley & A. Esmail, *Does the Dangerous Dog Act Protect Against Animal Attacks: A Prospective Study of Mammalian Bites in the Accident and Emergency Department*, 27(2) INJURY 89-91 (1996) (examining incidents seen at one urban accident and emergency department before the implementation of the act and again two years later).

<sup>33</sup> Expatica.com, *Dutch Agriculture Minister Scraps Pit Bull Ban* (June 11, 2008) [http://www.expatica.com/nl/news/local\\_news/Dutch-Agriculture-Minister-scraps-pit-bull-ban.html](http://www.expatica.com/nl/news/local_news/Dutch-Agriculture-Minister-scraps-pit-bull-ban.html) (last visited September 18, 2018.)

<sup>34</sup> Peter Marcus, *Do Dog Breed Bans Work?* DENVER DAILY NEWS, Mar. 3, 2009, reprinted, <https://stopbsl.org/2009/03/03/denver-co-do-dog-breed-bans-work/>

<sup>35</sup> *Id.*

<sup>36</sup> City of Topeka Summary of Frequently Asked Questions, September 2010 (from City of Topeka home page follow link to Summary FAQ's of new animal ordinance, <http://www.topeka.org/pdfs/SummaryFAQs.pdf>) (related to the repeal of its breed specific ordinance, outlining that the ordinance was wholly ineffective). See e.g. Memorandum from Eric Thompson, City of Overland Park, Kansas Chief Animal Control Officer to James Braun, Hays Kansas Police Chief (June 18, 2009) (on file with author).

<sup>37</sup> *Id.*

<sup>38</sup> American Bar Association Resolution 100 (2012).

disability.”<sup>39</sup> These animals are protected under Title II and III of the Americans with Disabilities Act (ADA) which requires reasonable access to individuals with disabilities to any public entity or accommodation.<sup>40</sup> “Although the ADA is not binding on the DoD, a 2008 DoD memorandum states that DoD facilities of all types shall comply with the ADA as well as Section 501 of the Rehabilitation Act of 1973 and the Fair Housing Act (FHA). Accordingly, service animals are allowed on military installations, and the policies of the Defense Commissary Agency (DeCA), the Navy Exchange (NEX), and the Army & Air Force Exchange Service (AAFES) are to comply with the ADA in their facilities.”<sup>41</sup> While the ADA does not specifically address prohibitions on breeds of dogs or mixed-breed dogs, the United States Department of Justice (DOJ) found it is neither appropriate nor consistent with the ADA to defer to local laws that prohibit certain breeds of dogs.<sup>42</sup> However, the DoD memorandum does not reconcile the absence of ADA language on breed specific bans with the guidelines from the DOJ so military families living on base have no guidance. In 2016, the DoD issued the “Guidance on the Use of Service Dogs by Service Members”<sup>43</sup> that states that “Recovering Service members (RSMs) who have medical conditions that require the assistance of a service dog for activities of daily living may utilize service dogs on DoD installations while on active duty.”<sup>44</sup> Moreover, the Secretaries of the Military Departments “ensure that Service members with service dogs have access to appropriate housing” but “retain and exercise authority and discretion in developing and implementing policies regarding all animals, including service dogs, not addressed in this policy.”<sup>45</sup> Thus, military families living on based have no guidance on whether or not a breed-specific ban in military housing applies to their service animal except perhaps for one used by a RSM as the DoD’s guidance does not appear to apply to the family of military personnel.

In February 2012, the American Bar Association adopted Resolution 303 which “urges all federal, state, territorial, and local legislative bodies to repeal or amend all laws or policies inconsistent with the regulations implementing the ADA and to implement policies to ensure that persons with disabilities utilizing service animals are provided access to services, programs and activities of public entities and public accommodations in compliance with the regulations implementing the Americans with Disabilities Act in a manner that: . . . 3. Provides for a size, weight and breed-neutral policy, utilizing a case-by-case analysis to determine whether a particular animal can be excluded from a public entity or public accommodation based on the particular’s animal’s actual behavior . . . .” This, coupled with the guidance from the DOJ, should provide enough weight for the DoD

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<sup>39</sup> 28 C.F.R. §§ 35.104 (2016).

<sup>40</sup> *Id.* (“public accommodation” is defined private entity that owns, operates, leases, or leases to, a place of public accommodation).

<sup>41</sup> Lt. Lauren Hugel, *Service and Support Animals on Military Installations*, 8(2) ADVISOR 8 (Dec. 2015); see Memorandum from Deputy Secretary of Defense to Secretaries of the Military Departments, et al. (Oct. 31, 2008), available at <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/14-architectural-barriers-act/263-dod-memorandum>.

<sup>42</sup> 28 C.F.R. § 35.136 Supp. 81 (2010); see also *Sak v. City of Aurelia, Iowa*, 832 F. Supp. 2d 1026, 1033 (N.D. Iowa 2011).

<sup>43</sup> Dept. Defense Instruction 1300.27 (Jan. 7, 2016).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

to ensure that all service animals that may fall under a banned breed are allowed in military housing.

An emotional support animal is distinguished from a service animal in that an emotional support animal provides a therapeutic benefit for someone with a mental disability but is not required to be individually trained to do work or perform tasks.<sup>46</sup> Emotional support animals are included in the definition of “assistance animals” under the FHA, along with animals who qualify as service animals under the ADA.<sup>47</sup> The DoD’s memorandum also applies to the FHA.<sup>48</sup> Like the ADA, breed, weight, or size limitations may not be used to exclude assistance animals from housing under the FHA. Accordingly, any military base housing must also not discriminate against an assistance animal’s breed.

### Recent History of Inconsistent Pet Policy

On December 14, 2011, Congressmen Walter B. Jones of North Carolina and Tom Rooney of Florida wrote a letter to the Secretary of the Army, the Honorable John McHugh, asking that the U.S. Army Veterinary Service review dog ownership policies throughout the services.<sup>49</sup> They believed that such an evaluation would lead to the establishment of a consistent breed-neutral pet policy that would replace ineffective breed bans with strict dangerous dog laws. They wrote that “banning or declaring a dog inherently dangerous based on breed or physical appearance unfairly punishes responsible military dog-owning families.”<sup>50</sup> They further noted that “responsibly-owned, well-socialized family pets are beneficial to the overall morale and well-being of service members and their families.”<sup>51</sup>

The Secretary of the Army declined to provide such a review and suggested that service members who own a breed banned at their current installation should seek housing in the community.<sup>52</sup> This view is consistent with the varying pet policies in each of the military branches, referenced above.<sup>53</sup> However, one year later, the U.S. Army’s veterinarian community stated these breed bans are written in the absence of professional veterinarian or animal behavior advice. In a memorandum distributed Army-wide on February 3, 2012, Col. Bob Walters, director of the Army’s Veterinarian Service Activity, stated there is no scientific method to determine a breed and that breed bans are unlikely to protect installation residents. The memorandum recommends generic, non-breed-

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<sup>46</sup> Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791 et seq.; Fair Housing Act and Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 et seq.

<sup>47</sup> U.S. Dept. Housing and Urban Dev., *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs*, FHEO Notice-2013-01 (Apr. 25, 2013)

<sup>48</sup> See Hugel, *supra* note 41.

<sup>49</sup> Letter from Walter B. Jones & Tom Rooney, Members of Congress, to Honorable John McHugh, Secretary of the Army (Dec. 14, 2011).

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

<sup>51</sup> *Id.*

<sup>52</sup> Letter from Honorable John McHugh, Secretary of the Army, to Walter B. Jones & Tom Rooney, Members of Congress (Feb. 13, 2012).

<sup>53</sup> See *supra* text accompanying notes 16-22.

specific dangerous dog regulations with emphasis on identification of dangerous and chronically irresponsible owners, consistent with the American Bar Association's Resolution 100<sup>54</sup> and in agreement with the studies regarding breed identification, referenced above.<sup>55</sup> Nevertheless, to date, no action has been taken by the DoD nor any of the military branches to adopt breed-neutral pet policies, resulting in a patchwork of breed-bans across branches and installations, as described above.<sup>56</sup>

## Conclusion

This resolution calls for the implementation of a single strong, breed-neutral dog policy for military housing in place of the patchwork of ineffective breed discriminatory policies which currently exist across the majority of military housing. Given the sacrifice all military families make to serve our country, the least our country can do for these families is allow them to responsibly own well-behaved dogs of their choice regardless of breed while living in military housing.

The Tort Trial and Insurance Practice Sections urges the Congress and the United States Department of Defense to direct the Armed Forces and its PPV housing contractors, to enact consistent breed-neutral pet policies for military families living in military housing.

Respectfully Submitted,

Roy Alan Cohen  
Chair, ABA Tort Trial & Insurance Practice Section  
January 2019

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<sup>54</sup> Department of Defense Veterinary Service Activity Memorandum, by Col. Bob E. Walters (Feb. 3, 2012).

<sup>55</sup> See *supra* text accompanying notes 23-27.

<sup>56</sup> See *supra* text accompanying notes 16-22.

## GENERAL INFORMATION FORM

Submitting Entity: Tort Trial & Insurance Practice Section

Submitted By: Roy Alan Cohen

### 1. Summary of Resolution

Urges Congress and the United States Department of Defense to direct the Armed Forces and its Public Private Venture housing contractors to enact uniform breed-neutral pet policies for families living in military housing.

### 2. Approval by Submitting Entity.

Approved by the Council of the Tort Trial & Insurance Practice Section on October 13, 2018

### 3. Has This or a Similar Recommendation Been Submitted to the House or Board Previously?

No.

### 4. What Existing Association Policies are Relevant to This Recommendation and How Would They Be Affected By Its Adoption?

This resolution is consistent with 2012 ABA Resolution 100 and 2012 ABA Resolution 303 and expands upon them both to apply to the military. Moreover, as many military personnel are lawyers who may live in military housing, this resolution not only protects the interests of military families but advances the ABA's interest in the legal profession.

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

Not applicable.

### 6. Status of Legislation. (If applicable.)

Not applicable.

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

To lobby Congress, via the Armed Forces Committees of the House and Senate, to enact legislation directing the Department of Defense to implement uniform breed-neutral pet policies throughout all military housing, including PPV housing and/or to request the Secretary of Defense, directly, to implement uniform breed-neutral pet policies throughout all military housing, including PPV housing.

8. Cost to the Association. (Both Direct and Indirect Costs)

None.

9. Disclosure of Interest. (If applicable.)

Not applicable.

10. Referral.

This Report and Recommendation is referred to the Chairs and Staff Directors of all ABA Sections and Divisions, specifically including all military entities within the ABA.

11. Contact Persons. (Prior to the Meeting)

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12. Contact Person. (Who Will Present the Report to the House.)

TBD

## EXECUTIVE SUMMARY

### 1. Summary of the Recommendation

This resolution urges Congress and the United States Department of Defense to direct the Armed Forces and its Public Private Venture housing contractors to enact uniform breed-neutral pet policies for families living in military housing.

### 2. Summary of the Issue that the Recommendation Addresses

The challenges of being a military family, who are often transferred between duty stations, produces stress and anxiety for all involved, with children being the most vulnerable. Military housing can be a very complex system to navigate. For military families with pets, this system is even more difficult to decipher given the inconsistent breed-bans adopted by military bases throughout the world. Military families may be forced to give up their pet merely because of the way the dog looks. Alternatively, transferred families must move into private housing that is less convenient and may be more expensive in order to retain their family pet, an option which can be wholly unavailable in some areas of the country. Thus, instead of having the loved pet to help them through the transfer process, the families often experience the emotional trauma of leaving the pet behind.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

Adopting uniform breed-neutral pet policies for families living in military housing will resolve the difficulty for military families with well-behaved pets of all breeds and allow them to move freely within military housing without having to give up their pet.

### 4. Summary of Minority Views or Opposition Which Have Been Identified

None.

**AMERICAN BAR ASSOCIATION**  
**NATIONAL LGBT BAR ASSOCIATION**  
**COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association opposes laws, regulations, and rules or  
2 practices that discriminate against LGBT individuals in the exercise of the fundamental  
3 right to parent;  
4

5 FURTHER RESOLVED, That the American Bar Association urges lawmakers in  
6 jurisdictions where such discriminatory laws, regulations, and practices exist to promptly  
7 repeal them and ensure the equal protection of all LGBT individuals under the law; and  
8

9 FURTHER RESOLVED, That the American Bar Association urges bar associations and  
10 attorneys to defend victims of anti-LGBT discrimination, and to recognize and support  
11 their colleagues taking on this work.



## REPORT

### I. Introduction

Despite significantly increased recognition of LGBT rights in recent decades, state and federal lawmakers have attempted and often succeeded in restricting LGBT individuals' fundamental right to parent. This report will describe the current state of the law regarding LGBT parenting rights, the increased threats to these rights, and all available data on the reality of LGBT parenting.

As it stands, a patchwork of current laws and judicial decisions have incorporated LGBT parents and families into areas of family law that previously only considered different-sex married couples and their families.

In its reasoning in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court acknowledged that LGBT individuals are parents to millions of children around the country and that these families deserve the same recognition and protection as any other family. However, since *Obergefell*, not every state has updated its laws to incorporate the reasoning and spirit of *Obergefell* and lawmakers in some states have incorrectly argued that there is ambiguity in the breadth of *Obergefell's* holding that still permits discrimination against LGBT individuals. For example, ten states now permit state-licensed child welfare agencies to refuse to place and provide services to children and families if doing so conflicts with the agency's religious or moral beliefs. These policies have acutely affected LGBT parents, who are disproportionately more likely to adopt or foster children.

Any purported ambiguity supporting these policies does not exist. The Supreme Court's decision last year in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), made clear that rights afforded to different-sex parents by the state cannot be denied to LGBT parents. Notably, *Pavan* extends *Obergefell* beyond marriage to require that states afford equal recognition to same-sex parents in all the same ways that they recognize different-sex parents. However, family law in each state continues to vary greatly. Some states have fully embraced the parental rights of LGBT parents, while other states are more reticent, forcing their courts to recognize rights for LGBT parents on an ad hoc basis.

Discriminatory laws restricting LGBT individuals' right to parent fly in the face of long-standing medical, psychological, sociological, and developmental research. Experts in these fields overwhelmingly agree that sexual orientation has no bearing on an individual's ability to be a fit parent. Above all, children need love, stability, and strong relationships with committed parents. LGBT parents are as capable to meet these needs as any other parents. With tens of thousands of children in foster care or awaiting adoption, restricting the number of potential loving homes on the basis of sexual orientation is arbitrary and harmful to the most vulnerable children.

## II. The Current State of the Law Regarding Parenting Rights of LGBT Individuals

Over the past forty years, states have recognized that sexual orientation should no longer create a presumption against parental fitness. As a result, different levels of government have recognized that the fundamental right to parent encompasses LGBT parents, although this protection varies greatly from jurisdiction to jurisdiction.

### Married Couples

Same-sex married couples enjoy the same attendant “constellation of benefits that the States have linked to marriage” that different-sex married couples enjoy. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015). As part of its reasoning, the Supreme Court reviewed family law across the country and found a “powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.” *Id.* at 2600. One of the “benefits” recognized in *Obergefell* – the fundamental right to parent – has already been reaffirmed by the Supreme Court. States are categorically prohibited from abridging parental recognition offered to different-sex married couples. *See Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (“As a result, same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child’s birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school...*Obergefell* proscribes such disparate treatment.”). However, the parentage presumption flowing from marriage (that children born to a married couple during their marriage are legally the children of the two adults) is not yet uniformly applied to same-sex couples, although some states have begun to update their statutes or interpret them in gender-neutral ways.<sup>1</sup>

### Adoption

Ten states allow second-parent adoption<sup>2</sup> either by explicit authorization in the state’s adoption statute or by appellate ruling. 1 ADOPTION LAW AND PRACTICE § 3.06. Seventeen other states have counties where trial court judges have granted second-parent adoptions. *Id.* One state’s valid final judgment of adoption regarding same-sex parents must be given full faith and credit by all other states. *V.L. v. E.L.*, 136 S. Ct. 1017 (2016). It is worth noting that family law practitioners agree that adoption remains the strongest legal connection an LGBT parent can have with their child, aside from biological relationship, because in many instances one or both parents may not be biologically related to their child.<sup>3</sup>

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<sup>1</sup> See, e.g., UNIFORM LAW COMMISSION, UNIFORM PARENTAGE ACT OF 2017 SUMMARY (2017) <http://www.uniformlaws.org/Shared/Docs/Parentage/SummaryUPA%20final.pdf>.

<sup>2</sup> “A second parent adoption (also called a co-parent adoption) is a legal procedure that allows a same-sex parent, regardless of whether they have a legally recognized relationship to the other parent, to adopt her or his partner’s biological or adoptive child without terminating the first parent’s legal status as a parent.” NATIONAL CENTER FOR LESBIAN RIGHTS, ADOPTION BY LGBT PARENTS, [http://www.nclrights.org/wp-content/uploads/2013/07/2PA\\_state\\_list.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf) (last updated March 2018).

<sup>3</sup> HUMAN RIGHTS CAMPAIGN FOUNDATION, SECOND PARENT ADOPTION, <https://www.hrc.org/resources/second-parent-adoption> (last accessed November 5, 2018).

### Foster Parents

Prior to *Obergefell*, Arkansas's supreme court had already held that prohibitions against LGBT foster parents violated the best interest of the child standard. See, e.g., *Dep't Human Serv. & Child Welfare Agency Review Bd. v. Howard*, 238 S.W.3d 1 (Ark. 2006) (finding a promulgated rule that created a blanket exclusion of homosexuals and individuals who resided with a homosexual from becoming foster parents violated separation of powers because it did "not promote the health, safety, or welfare of foster children [required in the organic statute] but rather act[ed] to exclude a set of individuals from becoming foster parents based upon morality and bias."). In 2006, the Missouri attorney general indicated that the state must drop its "long-standing unwritten policy of not licensing homosexuals" when a plaintiff prevailed at trial after being declared unfit for a foster care license based only on their sexual orientation. COURTNEY G. JOSLIN, SHANNON P. MINTER, & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 2:9 (2018).

Nine other states prior to *Obergefell* statutorily prohibited discrimination against sexual orientation in licensing foster parents: Massachusetts in 1990, Connecticut in 1991, Rhode Island in 1997, Nevada in 2002, District of Columbia in 2006, Oregon in 2008, California and Maryland in 2009, and Wisconsin in 2015. *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 2:10. New Jersey and New York prohibited discrimination against LGBT foster parents by regulation as well in 1994 and 2003, respectively. *Id.*

Additionally, since *Obergefell* Nebraska's supreme court upheld a trial court ruling that, pursuant to *Obergefell*, "the current practice of subjecting gay and lesbian individuals and couples and 'unrelated, unmarried adults residing together' to additional levels of review [for licensing or placement in foster or adoptive homes] than heterosexual individuals and heterosexual married couples" violates the Equal Protection and Due Process clauses of the Federal Constitution. *Stewart v. Heineman*, No. CI13-0003157, 2015 WL 10373584 at \*4 (Neb. Dist. Ct. 2015), *aff'd*, *Stewart v. Heineman*, 892 N.W.2d. 542 (Neb. 2017).

### Custody

Family law's common law recognition of de facto parenthood is applicable for same-sex partners to establish standing to contest custody or visitation determinations. 1 *CHILD CUSTODY AND VISITATION* § 10.05; see also, *Conover v. Conover*, 146 A.3d 433 (Md. 2016). It violates rational basis review to prohibit same-sex parents from enjoying parental rights not limited to married couples. E.g., *D.M.T. v. T.M.H.*, 129 So. 3d 320 (Fla. 2013) (finding that an assisted reproduction statute did not limit "commissioning couple" to married individuals, so it violates rational basis review to exclude only same-sex couples as "commissioning couple.").

\* \* \*

The policies behind these decisions consider the "best interest of the child" standard, and also safeguard a parent's Equal Protection and Due Process rights under the Fourteenth Amendment. Nonetheless, these rights are vulnerable to attack because LGBT-inclusive interpretations of the Equal Protection and Due Process clauses are not uniformly applied

by statute, common law, or appellate decision. Instead, they arise from a patchwork of local and state attempts to include LGBT families in legal categories that were originally created solely for different-sex couples.

### III. Increased Threats to LGBT Parenting

Even as “our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,”<sup>4</sup> state-sanctioned discrimination against LGBT individuals who wish to raise children has dramatically increased in recent years. LGBT individuals enjoy the same fundamental right to parent as non-LGBT individuals, yet state governments have chipped away at this right for the LGBT community.

A number of states now permit state-licensed child welfare agencies to refuse to place and provide services to children and families, including LGBT individuals and same-sex couples, if doing so conflicts with the agency’s religious or moral beliefs. The following ten states have enacted these laws (dates indicate when such laws were passed):

- North Dakota – April 2003
- Virginia – April 2012
- Michigan – September 2015
- Mississippi – April 2016
- South Dakota – March 2017
- Alabama – April 2017
- Texas – June 2017
- Oklahoma – May 2018
- Kansas – May 2018
- South Carolina – July 2018

Eight of the ten did so in the past three years, after *Obergefell*. Six of the eight did so after the 2016 election. Just this past spring, similar bills were considered, but ultimately rejected, in Colorado and Georgia. Child welfare agencies in other states have invoked these laws in seeking similar accommodations.<sup>5</sup> Other threats to LGBT parents are likely to come in coming months and years because only eight states and the District of Columbia expressly prohibit discrimination based on sexual orientation or gender identity in adoption and foster care.<sup>6</sup>

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<sup>4</sup> *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018)

<sup>5</sup> For example, in March 2018, a religiously-affiliated child welfare agency sued the City of Philadelphia after the City indicated it would no longer make referrals to agencies that discriminated against LGBT parents. A federal district court denied the agency’s motion for a preliminary injunction in *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661 (E.D. Pa. July 13, 2018), but the agency appealed this decision to the Third Circuit Court of Appeals where it is pending.

<sup>6</sup> Currently, these states are California, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Wisconsin.

These disturbing developments are not limited to state governments. In April 2017, the Child Welfare Provider Inclusion Act was introduced to both houses of Congress.<sup>7</sup> This bill sought to prohibit the federal and state governments from discriminating or taking adverse action against child welfare agencies which refuse to provide services on the basis of their sincerely held religious beliefs or moral convictions – essentially a federal version of the growing number of similar state laws. As of November 2018, the bill has not been seriously considered by a subcommittee of either chamber. Nonetheless, in July 2018, the House Appropriations Committee approved funding for the Departments of Labor, Health and Human Services, and Education with a provision known as the “Aderholt Amendment,” which contained all the same provisions as the Child Welfare Provider Inclusion Act. Fortunately, this amendment was removed from the final appropriations bill voted on by the full House of Representatives and Senate in September 2018, but it demonstrates the extent to which all levels of government have tried to undermine the dignity and equality of LGBT families.

All these laws disregard the central consideration of family law: the best interests of children. Every child deserves a stable, loving, forever family and all child welfare decisions should be made in the best interests of the child, *not* based on the personal beliefs of a child services agency or its workers. There are approximately 440,000 children in foster care nationwide, with approximately 120,000 children waiting to be adopted.<sup>8</sup> By allowing child welfare agencies to make decisions upon their personal beliefs, children remain in foster care or government group homes longer because agencies arbitrarily narrow the pool of qualified foster and adoptive homes. No one wants children to languish longer in a state’s child welfare system. Allowing an agency to discriminate against LGBT parents sends a clear message – the agency’s religious and moral beliefs are superior to their core mission of finding loving, permanent homes for children.

These discriminatory laws disproportionately affect LGBT families because LGBT individuals are significantly more likely to be raising adopted or foster children.<sup>9</sup> According to recent research, one in five same-sex couples (21.4%) are raising adopted children compared to just 3% of different-sex couples, and 2.9% of same-sex couples have foster

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<sup>7</sup> Child Welfare Provider Inclusion Act of 2017, H.R. 1881, S.811, 115th Cong. (2017).

<sup>8</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILD. AND FAMS., CHILDREN’S BUREAU, *The AFCARS Report* (Oct. 20, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.

<sup>9</sup> Not only are LGBT people more likely to raise adopted or foster children, but many state-licensed agencies that engage in adoptive and foster care placement are religious organizations. This only amplifies the discriminatory effects of these laws because these religious organizations either have no restrictions on to whom they can deny services or are only specifically forbidden from considering historically protected categories such as race, ethnicity, or national origin when providing services. See, e.g., TEX. HUM. RES. CODE ANN. § 45.009(f) (prohibiting agencies from considering race, ethnicity, or national origin); S.D. CODIFIED LAWS § 26-6-42 (same). Given the lack of affirmative non-discrimination laws in many states, these state-licensed religious organizations could single out LGBT people for discrimination.

children compared to 0.4% of different-sex couples.<sup>10</sup> This data reveals that LGBT parents are approximately seven times more likely to be raising adopted or foster children. An estimated 2 million LGBT adults are interested in adoption.<sup>11</sup> Even more prospective adoptive parents likely exist now after nationwide marriage equality because same-sex couples who are married or consider themselves married are more than twice as likely to raise children as same-sex couples who are not married.<sup>12</sup>

The recent increase in discriminatory laws aimed at limiting the rights of LGBT parents shows no sign of slowing down unless legal organizations push for the repeal of such laws and for the passage of affirmative protections for LGBT parents. Without such action, LGBT parents will continue to face de facto and de jure discrimination, harming children in foster care and children awaiting adoption.

#### IV. Research and Expert Opinions on LGBT Parenting

In light of all available data regarding the competency of LGBT parents and the needs of vulnerable children, the recent threats to the rights of LGBT parents defy logic, equity, and compassion. Virtually every organization that works with children recognizes the fitness of LGBT parents and opposes restrictions against their ability to raise, foster, and adopt children. The best interests of children obligate governments to increase the number of safe and supportive homes available for placement. LGBT parents foster and adopt at a much higher rate than the general population and can provide these loving homes.

Several decades of research have proven that same-sex and different-sex parents make equally good parents. In every measure of childhood development, children of same-sex and different-sex parents fare equally well.<sup>13</sup> The sexual orientation of parents does not impact the emotional, cognitive, social, or behavioral development of children.<sup>14</sup>

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<sup>10</sup> PRESS RELEASE, SHOSHANA GOLDBERG & KERITH CONRON, WILLIAMS INSTITUTE, HOW MANY SAME-SEX COUPLES IN THE U.S. ARE RAISING CHILDREN? (2018), <https://williamsinstitute.law.ucla.edu/press/press-releases/same-sex-parenting/>.

<sup>11</sup> GARY GATES ET AL., WILLIAMS INSTITUTE, ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES (2007), <https://williamsinstitute.law.ucla.edu/research/parenting/adoption-and-foster-care-by-gay-and-lesbian-parents-in-the-united-states/>.

<sup>12</sup> CATHRYN OAKLEY, HUMAN RIGHTS CAMPAIGN FOUNDATION, DISREGARDING THE BEST INTEREST OF THE CHILD: LICENSES TO DISCRIMINATE IN CHILD WELFARE SERVICES (2017), <https://www.hrc.org/blog/hrcf-report-details-harms-of-writing-anti-lgbtq-discrimination-in-child-wel>. As of June 2017, approximately 10.2% of LGBT adults are now married to a same-sex spouse, which is up from approximately 7.9% prior to *Obergefell*. Jeffrey Jones, *In U.S., 10.2% of LGBT Adults Now Married to Same-Sex Spouse*, GALLUP (2017), [https://news.gallup.com/poll/212702/lgbt-adults-married-sex-spouse.aspx?utm\\_source=alert&utm\\_medium=email&utm\\_content=morelink&utm\\_campaign=syndication](https://news.gallup.com/poll/212702/lgbt-adults-married-sex-spouse.aspx?utm_source=alert&utm_medium=email&utm_content=morelink&utm_campaign=syndication)

<sup>13</sup> Abbie E. Goldberg, Nanette K. Gartrell & Gary Gates, Research on LGBT-Parent Families, THE WILLIAMS INST., UCLA SCH. OF L. (July 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/lgb-parent-families-july-2014.pdf>.

<sup>14</sup> Ellen C. Perrin & Benjamin S. Siegel, *Technical Report: Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian*, 131 *Pediatrics* e1374 (April 2013), <http://pediatrics.aappublications.org/content/pediatrics/131/4/e1374.full.pdf>; Rachel H. Farr et al., Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?, 14 *APPLIED DEVELOPMENTAL SCI.* 164, 175 (2010), <https://williamsinstitute.law.ucla.edu/wp->

Additionally, same-sex couples and different-sex couples display no differences when it comes to parenting skills, attitudes, or emotional health.<sup>15</sup> Current research indicates that factors such as the quality of the child's relationship with parents, the quality of the relationship between parents, and the availability of economic and socio-economic resources are far more important to a child's development than his or her parent's sexual orientation.<sup>16</sup> Thus, "the optimal development for children is not based on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults."<sup>17</sup> LGBT parents are as fit as any others to meet the needs of their children and to provide them with these stable attachments in a nurturing home environment. In short, the children of LGBT individuals "grow up as happy, healthy, and well-adjusted as the children of heterosexual parents."<sup>18</sup>

Limiting the ability of LGBT parents to foster and adopt hurts families in a multitude of ways. It deprives foster children of a safe and stable environment to grow. It deprives those awaiting adoption of the strong familial relationship to which they are entitled, and from which they could reap innumerable economic and social benefits including social security benefits, workers' compensation, health insurance, and child support – all made possible by a formal adoption relationship.<sup>19</sup> Even more importantly, a permanent family, regardless of the parents' sexual orientation, can provide them with the love, support, stability, strong relationships, and role models that experts have concluded are crucial to raising well-adjusted and healthy children. These qualities affect a child's development far more than their parents' sexual orientation.

The data is so clear that a number of professional associations and child advocacy organizations have made statements supporting the competency of LGBT parents and have called for their equal consideration in foster care and adoption placements. The list of organizations that have made statements supporting the capability of LGBT parents includes:

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[content/uploads/Patterson-Farr-Forsell-AppliedDevScience-Jul-2010.pdf](#); Nanette Gartrell & Henny Bos, US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents, 126 PEDIATRICS 1, 7 (July 2010), <http://pediatrics.aappublications.org/content/126/1/28>.

<sup>15</sup> Judith Stacey and Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159 (Apr. 2001), <https://www.jstor.org/stable/2657413>; Abbie E. Goldberg & JuliAnna Z. Smith, *Predictors of Parenting Stress in Lesbian, Gay, and Heterosexual Adoptive Parents During Early Parenthood*, 28 J. FAM. PSYCHOL. 125 (Apr. 2014), <http://dx.doi.org/10.1037/a0036007>.

<sup>16</sup> Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, 16 APPL. DEV. SCI. 98 (Apr. 23, 2012).

<sup>17</sup> APA, Press Release, *Adoption and Co-Parenting of Children by Same-Sex Couples*, Release No. 02-46 (Dec. 13, 2002), <http://www.ncirights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

<sup>18</sup> ACLU, *Overview of Lesbian and Gay Parenting, Adoption, and Foster Care*, <https://www.aclu.org/fact-sheet/overview-lesbian-and-gay-parenting-adoption-and-foster-care> (last visited Oct. 29, 2018).

<sup>19</sup> Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1603—08 (2013). Available at: [http://openscholarship.wustl.edu/law\\_lawreview/vol90/iss6/2](http://openscholarship.wustl.edu/law_lawreview/vol90/iss6/2); American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339 (2002).

- the American Academy of Child and Adolescent Psychiatry (AACAP);<sup>20</sup>
- the American Academy of Family Physicians (AAFP);<sup>21</sup>
- the American Academy of Pediatrics (AAP);<sup>22</sup>
- the American Medical Association (AMA);<sup>23</sup>
- the American Psychiatric Association (APA);<sup>24</sup>
- the American Psychoanalytic Association (APsaA);<sup>25</sup>
- the American Psychological Association (APA);<sup>26</sup>
- the Child Welfare League of America (CWLA);<sup>27</sup>
- the Evan B. Donaldson Adoption Institute (DAI);<sup>28</sup>
- the National Adoption Center (NAC);<sup>29</sup>
- the National Association of Social Workers (NASW);<sup>30</sup>
- the National Foster Parent Association (NFPA);<sup>31</sup> and

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<sup>20</sup> AACAP, Policy Statement, *Gay, Lesbian, Bisexual, or Transgender Parents* (revised and approved by Council 2009), [https://www.aacap.org/AACAP/Policy\\_Statements/2008/Gay\\_Lesbian\\_Bisexual\\_or\\_Transgender\\_Parents.aspx](https://www.aacap.org/AACAP/Policy_Statements/2008/Gay_Lesbian_Bisexual_or_Transgender_Parents.aspx).

<sup>21</sup> AAFP, *Children's Health* (2002) (2007), <http://www.ncrlrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

<sup>22</sup> Perrin & Siegel, *supra* note 13.

<sup>23</sup> AMA House of Delegates, Resolution 204, A-04 (2004), <http://www.ncrlrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

<sup>24</sup> APA Press Release, *supra* note 16; Position Statement, *Adoption and Co-parenting of Children by Same-sex Couples* (approved November 2002), <http://www.ncrlrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>; APA, Resource Document, *Controversies in Child Custody: Gay and Lesbian Parenting; Transracial Adoptions; Joint versus Sole Custody; and Custody Gender Issues*, (approved Dec. 1997), <http://www.ncrlrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

<sup>25</sup> APsaA, *Position Statement, Gay and Lesbian Parenting* (adopted May 16, 2002), <http://www.ncrlrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

<sup>26</sup> APA, *Resolution on Sexual Orientation, Parents, and Children* (adopted July 2004), Sexual Orientation, Parents, and Children.

<sup>27</sup> CWLA, *Position Statement on Parenting of Children by Lesbian, Gay, Bisexual, and Transgender Adults* (April 2015), <https://www.cwla.org/wp-content/uploads/2016/01/PositionStatementOnParentingOfChildrenByLGBT.pdf>.

<sup>28</sup> Evan B. Donaldson Adoption Institute, *Expanding Resources for Children: Is Adoption by Gays and Lesbians Part of the Answer for Boys and Girls Who Need Homes?* (Mar. 2006), [https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2006\\_Expanding\\_Resources\\_for\\_Children-March\\_.pdf](https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2006_Expanding_Resources_for_Children-March_.pdf); Evan B. Donaldson Adoption Institute, *Expanding Resources For Waiting Children II: Eliminating Legal And Practice Barriers To Gay And Lesbian Adoption From Foster Care* (Sep. 2008), [https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2008\\_09\\_Expanding\\_Resources\\_Legal.pdf](https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2008_09_Expanding_Resources_Legal.pdf);

<sup>29</sup> NAC, *Adoptive Parent Assessment* (approved Sep. 17, 1998), <http://www.ncrlrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

<sup>30</sup> NASW, Policy Statement, *Lesbian, Gay and Bisexual Issues* (2005), <http://www.ncrlrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

<sup>31</sup> NFPA, *121.07 Fair & Equal Consideration of Foster & Adoptive Parents* (adopted May 2007), <http://www.ncrlrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

- the North American Council on Adoptable Children (NACAC).<sup>32</sup>

As the Evan B. Donaldson Adoption Institute stated, “[i]t is through a commitment to expanding adoptive family resources that we can achieve the outcomes that are federally mandated for each child in foster care: safety, well-being, and a permanent family.”<sup>33</sup> To pursue the best interests of children at a societal level, “children should not be deprived of the opportunity for temporary foster care or adoption by single parents or couples, regardless of their sexual orientation.”<sup>34</sup> The Supreme Court itself noted in *Obergefell*, “[m]ost States have allowed gays and lesbians to adopt...and many adopted and foster children have same-sex parents,” which the Court declared to be a “powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.” 135 S. Ct. 2584, 2600.

Discriminatory barriers to fostering and adoption are particularly disturbing in light of the ever-growing number of children in the United States in need of foster homes or adoption. In 2016,<sup>35</sup> over 687,000 children entered foster care,<sup>36</sup> and on any given day, nearly 440,000 children resided in foster care.<sup>37</sup> Children remain in foster care for an average of two years.<sup>38</sup> Each year, more than 23,000 children age out of the foster care system without ever having an opportunity to be placed with a permanent family.<sup>39</sup> Children who age out of foster care face particularly daunting prospects. For example, only 6% ever attend an institution of higher learning, even though 70% of children in foster care say they would like to attend college.<sup>40</sup>

LGBT families can provide supportive, stable homes for these children. As noted above, same-sex couples foster children at over seven times the rate of different-sex couples.<sup>41</sup> Similarly, 21.4% of same-sex couples raise adopted children, compared to 3% of different-sex couples.<sup>42</sup> Out of an estimated 705,000 same-sex couples in the U.S., about

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<sup>32</sup> NACAC, Gay and Lesbian Adoptions and Foster Care (passed April 9, 2005), <http://www.ncrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

<sup>33</sup> Evan B. Donaldson Adoption Institute, 2008 Statement, *supra* note 27.

<sup>34</sup> Perrin & Siegel, *supra* note 2, at e1381.

<sup>35</sup> This is the most recent year with data available.

<sup>36</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILD. AND FAMS., CHILDREN'S BUREAU, *Trends in Foster Care and Adoption*, <https://www.acf.hhs.gov/cb/resource/trends-in-foster-care-and-adoption> (last visited Nov. 1, 2018).

<sup>37</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILD. AND FAMS., CHILDREN'S BUREAU, *The AFCARS Report* (Oct. 20, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.

<sup>38</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILD. AND FAMS., CHILDREN'S BUREAU, *The AFCARS Report* (Oct. 20, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.

<sup>39</sup> National Foster Youth Institute, *51 Useful Aging Out of Foster Care Statistics | Social Race Media* (May 26, 2017), <https://www.nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media>.

<sup>40</sup> National Foster Youth Institute, *51 Useful Aging Out of Foster Care Statistics | Social Race Media* (May 26, 2017), <https://www.nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media>.

<sup>41</sup> Press Release, Williams Institute, Same-Sex Parenting in the U.S. (July 31, 2018), <https://williamsinstitute.law.ucla.edu/press/press-releases/same-sex-parenting>.

<sup>42</sup> Press Release, Williams Institute, Same-Sex Parenting in the U.S. (July 31, 2018), <https://williamsinstitute.law.ucla.edu/press/press-releases/same-sex-parenting>.

114,000 couples are raising children.<sup>43</sup> Among LGBT individuals under age 50 who are living alone or with a spouse or partner, nearly half of LGBT women (48%) are raising a child under age 18 and nearly a fifth of LGBT men (20%) are doing so as well.<sup>44</sup> These numbers could be higher if laws were non-discriminatory. In Michigan and Virginia for example, both of which have passed laws permitting child welfare agencies to discriminate against LGBT individuals, LGBT parents are raising children at a rate lower than the national average.<sup>45</sup> Meanwhile, thousands of children in each of these states continue to lack the stability of a permanent family while they wait for adoption.<sup>46</sup>

Meeting the needs of these children is not only statistically compelling, but also federally mandated. Federal law establishes specific priorities for state child-welfare systems, including increasing the number of available foster and adoptive homes.<sup>47</sup> State and local foster-care systems cannot, therefore, arbitrarily reduce the number of potential foster and adoptive parents. Yet, laws that allow child welfare agencies to discriminate against LGBT parents do just that. This interference with the attainment of a permanent family relationship infringes upon a “child’s fundamental constitutional right to a secure and stable family relationship.”<sup>48</sup>

In short, experts of all disciplines relating to child welfare have overwhelmingly agreed that LGBT individuals make fit parents and that an individual’s sexual orientation has no bearing on their capabilities as a parent. Additionally, shrinking children’s chances of finding a caring home simply because potential parents are LGBT causes them unnecessary harm and violates their rights. Governments must treat LGBT parents equally to safeguard their fundamental right to parent and the fundamental rights of their children to enjoy a familial relationship.

## V. Conclusion

LGBT individuals possess the same fundamental right to parent as non-LGBT individuals. By supporting an LGBT-inclusive understanding of parental rights, the ABA can stand with all families to ensure that children nationwide can grow up in loving, supportive, permanent homes without unreasonable and arbitrary interference.

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<sup>43</sup> <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf>

<sup>44</sup> Gary Gates, *LGBT Parenting in the United States*, THE WILLIAMS INSTITUTE (2013), <https://escholarship.org/uc/item/9xs6g8xx>.

<sup>45</sup> Angeliki Kastanis et al., *Same-sex Couple and LGBT Demographic Data Interactive*, THE WILLIAMS INST., UCLA SCH. OF L. (May 2016), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=SS&area=42#density> (follow hyperlink, and then click on Michigan and Virginia in map).

<sup>46</sup> *Id.* In Michigan, about 12,000 children are in foster care at any given time, and about 3,500 await adoption. In Virginia, about 5,000 children are in foster care at any given time, and about 2,000 children await adoption. *Id.*

<sup>47</sup> Federal Child Welfare Law, 42 U.S.C. § 675(5)(A).

<sup>48</sup> Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child’s Right to a Permanent Family*, 46 WAKE FOREST L. REV. 1, 30, 36–37 (2011).

Respectfully submitted,

Gregory Cheikhameguyaz  
President, National LGBT Bar Association  
January 2019

## GENERAL INFORMATION FORM

Submitting Entity: National LGBT Bar Association

Submitted By: Gregory Cheikhameguyaz, President

1. Summary of Resolution.

This Resolution states the ABA's opposition to legalized discrimination against LGBT people who are or are desiring to parent children, and sets forth the ABA's call to action to legislators to repeal such laws and regulations as well as its call to bar associations and lawyers to defend against anti-LGBT discrimination.

2. Approval by Submitting Entity.

N/A

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

To the best of our knowledge and information, no similar resolution has been submitted to the House or Board previously.

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

To the best of our knowledge and information, there is no existing Association policy relevant to this matter.

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

N/A

6. Status of Legislation. (If applicable)

N/A

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

Implementation requirements for the policy will be nominal, if any. The policy will be used as a guidance document for attorneys within the profession.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

None.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)  
D'Arcy Kemnitz  
Executive Director  
National LGBT Bar Association and Foundation  
1200 18th St. NW, #700  
Washington, DC 20036  
(202) 637-7661 (office)  
darcy@lgbtbar.org
12. Contact Name and Address 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.*)

The LGBT Bar Delegate is John Stephens. The substitute Delegate presenting the Resolution will be D'Arcy Kemnitz.

D'Arcy Kemnitz  
Executive Director  
National LGBT Bar Association and Foundation  
1200 18th St. NW, #700  
Washington, DC 20036  
(202) 607-0732 (cell)  
darcy@lgbtbar.org

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This Resolution states the ABA's opposition to legalized discrimination against LGBT people who are parents or are desiring to be parents, and sets forth the ABA's call to action to legislators to repeal such laws and regulations as well as its call to bar associations and lawyers to defend against anti-LGBT discrimination.

### 2. Summary of the Issue that the Resolution Addresses

Despite significantly increased recognition of LGBT rights, in recent years, state and federal lawmakers have attempted and often succeeded in restricting LGBT individuals' fundamental right to parent. For example, ten states permit state-licensed child welfare agencies to refuse to place and provide services to children and families if doing so conflicts with the agency's religious or moral beliefs. These policies have acutely affected LGBT individuals, who are disproportionately more likely to adopt or foster children.

In its reasoning in *Obergefell v. Hodges*, the Supreme Court acknowledged that LGBT individuals are parents to millions of children around the country and that these families deserve the same recognition and protection as any other family. Going further, in *Pavan v. Smith*, the Supreme Court ruled that states are categorically prohibited from abridging parental recognition offered to different-sex married couples. Any discriminatory law which restricts an LGBT individual's right to parent not only disregards these precedents, but also contradicts longstanding research. Decades of medical, psychological, sociological, and developmental research overwhelmingly conclude that sexual orientation has no bearing on an individual's ability to be a fit parent. This Resolution therefore reaffirms the equal parenting rights of LGBT individuals.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

Adoption of this Resolution would ensure that the American Bar Association, representing the American legal community at large, stands with LGBT individuals and their families against the increased threat to their ability to raise children. This ABA policy position would enable further advocacy in this area by providing authority for other organizations, legislatures, and courts to consult when confronted by LGBT parenting issues. The policy would also allow the ABA to directly advocate on behalf of LGBT families and make clear its stance that laws which permit discrimination against LGBT individuals are unconstitutional.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

To date, none have been identified.

**AMERICAN BAR ASSOCIATION**  
**COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1   RESOLVED, That the American Bar Association urges Congress to enact the federal  
2   Equality Act, H.R. 2282 (115th Congress), or similar legislation which explicitly affirms  
3   that: (1) discrimination because of sexual orientation or gender identity is sex  
4   discrimination prohibited by the Civil Rights Act of 1964 and certain other federal statutes;  
5   and (2) federal statutory protections for religious freedom do not authorize violation of  
6   nondiscrimination laws; and
- 7   FURTHER RESOLVED, That the American Bar Association urges all courts within the  
8   United States to recognize that religiously neutral laws of general applicability prohibiting  
9   discrimination based on sexual orientation or gender identity do not improperly burden  
10   the religious free exercise rights of those operating places of public accommodation.



## REPORT

This Resolution states that: (1) discrimination because of sexual orientation or gender identity is sex discrimination prohibited by the Civil Rights Act of 1964 and certain other federal statutes; and (2) federal statutory protections for religious freedom do not authorize violation of nondiscrimination laws. This Resolution also affirms that religiously neutral laws of general applicability prohibiting discrimination based on sexual orientation or gender identity do not improperly burden the religious free exercise rights of those operating places of public accommodation. This report addresses the legal authority supporting this understanding and call to action, including two actions in particular: (1) passage by Congress of the federal Equality Act,<sup>1</sup> which affirms explicitly that discrimination because of sexual orientation or gender identity is sex discrimination prohibited by the Civil Rights Act of 1964 and certain other federal statutes, and that federal statutory protection for religious freedom does not authorize violation of the nondiscrimination laws; and (2) further confirmation by the United States Supreme Court and lower courts that religiously neutral laws of general applicability prohibiting discrimination based on sexual orientation or gender identity do not improperly burden the religious free exercise rights of those operating places of public accommodation.

The ABA has adopted several policies that are consistent with this Resolution and these calls to action, including multiple resolutions supporting sexual orientation and gender identity (SOGI) nondiscrimination, as well as policies robustly supporting religious freedom together with the responsibility of government to maintain order and protect the interests of third parties. The ABA first resolved to support sexual orientation nondiscrimination in employment, housing and public accommodations in 1989 (1989 MY & 89M8), and supported nondiscrimination based on gender identity in 2006 (06A122B). In 1991, the ABA resolved to support federal legislation requiring that laws burdening religious exercise receive strict scrutiny review (91M105). Congress enacted such legislation in 1993 in the form of the federal Religious Freedom Restoration Act (RFRA).<sup>2</sup> In 2017, the ABA filed an *amicus* brief in the United States Supreme Court in *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.*, urging the Court to affirm the judgment of the Colorado Court of Appeals below<sup>3</sup> and to reject, *inter alia*, arguments that federal constitutional guarantees of religious free exercise excuse the refusal by a commercial business and its proprietor to serve a same-sex couple on equal terms as they serve different-sex couples, as required by the State's nondiscrimination law.<sup>4</sup> In 2018, the ABA resolved to support an interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), that its prohibition on sex discrimination in employment by covered employers includes discrimination on the bases of sexual orientation and gender identity (18M116A).

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<sup>1</sup> H.R. 2282 (115th Congress).

<sup>2</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb, *et seq.*

<sup>3</sup> 370 P.3d 272 (Colo. App. 2015).

<sup>4</sup> The ABA's *amicus* brief is available at <http://www.scotusblog.com/wp-content/uploads/2017/11/16-111-bsac-american-bar-association.pdf>.

At issue now is whether the ABA's prior support for RFRA creates a conflict with supporting the Equality Act, and whether the ABA should continue to affirm as a friend-of-the-court its support for nondiscrimination by places of public accommodation notwithstanding a religious objection. Longstanding case law and the ABA's existing policies support an understanding that religious liberty protections including RFRA do not authorize discrimination against others in the public sphere. Because RFRA does not excuse otherwise unlawful discrimination, there actually is no conflict between RFRA and the Equality Act. Consequently, the Equality Act's provision confirming that RFRA does not provide a defense to discrimination claims under the Equality Act does not change what RFRA actually does protect.

By addressing directly the relationship between the Equality Act and RFRA, this Resolution enables the ABA to dispel any perceived tensions between this SOGI nondiscrimination bill and federal religious liberty protections, and to continue to urge both legislatures to enact and courts to enforce protections against SOGI discrimination.<sup>5</sup>

### Discussion

In *Masterpiece Cakeshop*, the Supreme Court majority of six justices observed that, while “religious and philosophical objections [to same-sex couples marrying] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”<sup>6</sup> The Court supported that general rule with reference to its 1968 *per curiam* opinion in *Newman v. Piggie Park Enterprises, Inc.*<sup>7</sup> *Piggie Park* considered this principle in the context of a white proprietor of a chain of barbeque restaurants whose religious beliefs called for segregation of white and black people.<sup>8</sup> Black would-be patrons generally were refused service, though occasionally were served from a kitchen window and directed to take their food from the premises before eating.<sup>9</sup> The Supreme Court not only affirmed the lower courts’ rejection of the owner’s religious liberty defense against the black would-be patron’s Civil Rights Act claim, but deemed the defense “patently frivolous.”<sup>10</sup>

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<sup>5</sup> This Resolution and report only address religious objections to nondiscrimination laws, not objections based on rights of free speech, expressive conduct, or expressive association. For example, compare the Supreme Court’s general rejection of religion-based exemptions to civil rights laws in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n*, \_\_\_ U.S. \_\_\_, 138 S.Ct. 1719, 1727 (2018), with the Court’s deferral of the free speech questions in that case for a future day. *Id.* at 1728-1729.

<sup>6</sup> *Id.* at 1727.

<sup>7</sup> 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968).

<sup>8</sup> See 256 F. Supp. 941, 944 (D.S.C. 1966) (noting that the owner’s “religious beliefs compel him to oppose any integration of the races whatever”), *rev’d in part*, 377 F.2d 433, 437-438 (4th Cir. 1967) (reversing to hold that the Civil Rights Act applied to defendant’s restaurants), *aff’d*, 390 U.S. at 400.

<sup>9</sup> 256 F. Supp. at 944, 946-947.

<sup>10</sup> 390 U.S. at 402, n.5.

The clarity and forcefulness of the *Piggie Park* decisions on this point might be expected today, given the legal and social consensus against race discrimination that has evolved since then. But the federal law was still new in 1968. And en route to the current national consensus that our civil rights laws serve essential public interests, it faced not only religion-based objections but other serious legal challenges as well.<sup>11</sup>

In multiple contexts thereafter, the Court recognized the importance of distinguishing between protected freedom of religious belief and limits on the ability to invoke those beliefs to justify discrimination in publicly regulated activities.<sup>12</sup> Now, by citing *Piggie Park* as it did in *Masterpiece Cakeshop*, the Supreme Court has confirmed there is to be consistent application of the general principle that religious beliefs do not excuse unlawful discrimination by place of public accommodation whether the discrimination is based on race or sexual orientation.

It should not be surprising that the issue of a religious objection to a law barring sexual orientation discrimination reached the U.S. Supreme Court via an appeal from a state court concerning enforceability of a state law. At present, Title II of the Civil Rights Act does not bar such discrimination either explicitly or as a form of sex discrimination.<sup>13</sup> A substantial and growing number of state courts have considered religious objections to state and local nondiscrimination laws, and systematically have rejected the religious exemption claims in a manner consistent with *Piggie Park*.<sup>14</sup> These decisions also are

<sup>11</sup> See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (rejecting argument that Commerce Clause provided insufficient authorization for Title II of the Civil Rights Act's prohibition against racial segregation of business establishments); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (finding discrimination by places of public accommodation imposed sufficient burdens on interstate commerce to affirm constitutionality of Civil Rights Act).

<sup>12</sup> See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (religious school's freedom to teach religious doctrine against interracial relationships did not entitle it to preferential tax status if it acted on that doctrine to the detriment of students); *Loving v. Virginia*, 388 U.S. 1 (1967) (rejecting religious justification for laws banning interracial marriage). See also *United States v. Lee*, 455 U.S. 252 (1982) (business owner had religious right to refuse to participate in Social Security system on his own behalf but could not impose that belief on employees by refusing to pay on their behalf).

<sup>13</sup> 42 U.S.C. § 2000a. Compare, for example, the nondiscrimination implications of the sex discrimination bans in Title VII, Title IX, the Fair Housing Act, the Equal Credit Opportunity Act, and the Affordable Care Act. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir. 2018) (en banc) (sexual orientation discrimination in employment); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc) (same); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (gender identity discrimination in employment); *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017) (gender identity discrimination in education); *Wetzel v. Glen St. Andrew Living Community, LLC*, 901 F.3d 856 (7th Cir. 2018) (sexual orientation discrimination in housing); *Smith v. Avanti*, 249 F.Supp.3d 1194 (D. Colo. 2017) (gender identity discrimination in housing); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir.2000) (gender identity discrimination in credit); *Rumble v. Fairview Health Services*, No. 14–cv–2037, 2015 WL 1197415 (March 16, 2015; N. D. Ill. 2015) (gender identity discrimination in health services).

<sup>14</sup> See, e.g., *Klein d/b/a Sweetcakes by Melissa v. Oregon Bureau of Labor & Industries (BOLI)*, 289 Or.App. 507, 410 P.3d 1051 (Or. App. 2017) (rejecting religious objection defense and holding that bakery and its owners violated state nondiscrimination law by refusing to sell wedding cake to lesbian couple), *review denied*, No. S065744 (Or. June 21, 2018), *cert. petition filed*, No. 18-547 (Oct. 19, 2018); *Cervelli v. Aloha Bed & Breakfast*, 142 Hawai'i 177 (Haw. Intermed. App. 2018) (rejecting religious defense of B&B proprietor who refused lodging to lesbian couple, contrary to state law), *review denied*, No. SCWC-13-0000806, 2018

consistent with the body of state case law similarly rejecting religious exemption arguments in the context of state and local laws forbidding marital status discrimination in rental housing or in employment,<sup>15</sup> as well as federal cases rejecting religious exemption arguments to justify sex or age discrimination in employment.<sup>16</sup>

## Two Federal Standards of Review

To assess whether federal religious free exercise rights are likely to be in conflict with the SOGI nondiscrimination protections to be codified explicitly by the Equality Act, it is helpful to begin by identifying the standard of review that would apply. Federal law currently provides two arguably relevant sources of religious free exercise rights that could be

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WL 3358586 (Haw. July 10, 2018), *cert. petition filed*, No. 18-451 (Oct. 9, 2018); *Brush & Nib Studio LC v. City of Phoenix*, 244 Ariz. 59, 418 P.3d 426 (Ariz. App. 2018) (finding local sexual orientation nondiscrimination ordinance did not improperly burden religious rights of business that offered printing and calligraphy services); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015) (finding state law, which prohibits businesses from refusing services based on sexual orientation, did not violate baker's religious rights), *cert. denied*, No. 15SC738 (Colo. Apr. 25, 2016), *reversed on other grounds, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) (finding florist's religious rights did not excuse refusal to provide custom-arranged flowers for same-sex couple's wedding was sexual orientation discrimination contrary to state law), *cert. granted, reversed and remanded for reconsideration in light of Masterpiece Cakeshop*, 138 S.Ct. 2671 (2018); *Telescope Media Grp. v. Lindsey*, 271 F.Supp.3d 1090 (D. Minn. 2017) (finding state law, which prohibits businesses from discriminating based on sexual orientation, does not infringe business owner's religious rights); *Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y.S. 3d, 2016) (finding venue owners' religious rights did not authorize refusal, contrary to state law, to rent space for same-sex couple's wedding); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (finding commercial photographer's religious rights did not justify refusal to photograph same-sex couple's wedding, contrary to state law), *cert. denied*, 134 S. Ct. 1787 (2014); *North Coast Women's Care Medical Group, Inc. v. Superior Court (Benitez)*, 44 Cal.4th 1145, 189 P.3d 959 (2008) (holding physicians' religious rights did not excuse refusal to treat lesbian patient the same as other patients, contrary to state law).

<sup>15</sup> See, e.g., *Smith v. Fair Emp. & Housing Comm'n*, 12 Cal.4th 1143, 913 P. 2d 909, 925 (Cal. 1996) (rejecting landlord's religious exercise defense because fair housing law did not substantially burden religious exercise); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (rejecting landlord's religious defense to marital status discrimination claim of unmarried different-sex couple); *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 847 (Minn. 1985) (religious rights of health club owners—self-described born-again Christians—did not excuse owners' violation of state law by refusing to employ “individuals living with but not married to a person of the opposite sex; a young, single woman working without her father's consent or a married woman working without her husband's consent; a person whose commitment to a non-Christian religion is strong; and someone who is ‘antagonistic to the Bible,’ which according to *Galations* 5:19-21 includes fornicators and homosexuals.”).

<sup>16</sup> See, e.g., *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1397–1399 (4th Cir. 1990) (employer's religious free exercise rights did not justify violation of Fair Labor Standards Act's requirement of equal pay for women); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1367–1369 (9th Cir. 1986) (school's religious exercise rights did not justify sex-based discrimination in health benefits provided to female employees, contrary to Title VII and the Equal Pay Act); *Donovan v. Tony and Susan Alamo Foundation*, 722 F.2d 397 (8th Cir.1983), *aff'd*, 471 U.S. 290, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985) (non-profit corporation's first amendment free exercise right did not excuse alleged violation of minimum wage, overtime, and record keeping provisions of 29 U.S.C. 201 *et seq.*); *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (religious interests of Hasidic male student bus riders did not excuse employer's refusal to hire women bus drivers, contrary to Title VII); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57, 61 (E.D. Pa. 1991) (hospital's free exercise rights did not justify violation of Age Discrimination in Employment Act).

invoked as a defense to claims under the Equality Act: the First Amendment to the U.S. Constitution and RFRA. Each is considered in turn.

### The First Amendment

Prior to 1990, the U.S. Supreme Court analyzed First Amendment-based religious free exercise claims using a strict scrutiny test.<sup>17</sup> Under that test, a religious believer may object to enforcement of a law by showing that the law imposes a substantial burden on her or his religious practice. Upon such a showing, the government nonetheless may enforce the law or policy upon demonstrating that it serves a compelling governmental interest in the least restrictive manner.<sup>18</sup>

The Supreme Court has explained how that test should work in situations in which there is conflict between the religious rights of one running a business and third parties whose interests would be harmed. For example, in *United States v. Lee*, the owner objected on religious grounds to paying into the Social Security system for himself and for his employees.<sup>19</sup> Applying the strict scrutiny test, the Court held that he could withhold payment on his own account for when he was self-employed because Congress provided that accommodation in the statute, however, he could not withhold payment for his employees.<sup>20</sup> To do so would be to impose his religious beliefs to the detriment of his employees, who were entitled to benefit from the federal retirement system.<sup>21</sup>

### Employment Division v. Smith

The Court reevaluated our constitutional history in this area in 1990 in a case concerning whether a Native American man who used peyote during a traditional religious ritual had First Amendment protection such that he could not be denied unemployment benefits upon being terminated from his job for having done so.<sup>22</sup> Confirming that religious liberty is a core value, the Court nonetheless concluded that the First Amendment “has not been offended” by burdens that are “merely the incidental effect of a generally applicable and otherwise valid provision,”<sup>23</sup> and that laws of general application “could not function” if

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<sup>17</sup> *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). See also *United States v. Lee*, 455 U.S. 252 (1982).

<sup>18</sup> *Sherbert*, 374 U.S. at 398; *Yoder*, 406 U.S. at 205.

<sup>19</sup> *United States v. Lee*, 455 U.S. at 254.

<sup>20</sup> *Id.* at 257-262.

<sup>21</sup> *Id.* at 261 (observing that, “When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.”).

<sup>22</sup> *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990).

<sup>23</sup> 494 U.S. at 878.

they were continually subject to challenge on religious grounds.<sup>24</sup> The Court thus concluded that religiously neutral laws of general applicability are to be reviewed according to a rational basis standard;<sup>25</sup> strict scrutiny review is only warranted when a law or its enforcement targets religious beliefs or practices.<sup>26</sup>

### *The Religious Freedom Restoration Act*

The *Employment Division v. Smith* decision received considerable public critique, which prompted Congress to pass the Religious Freedom Restoration Act three years later to “restore” strict scrutiny review when a law or policy is challenged as imposing an improper burden on religious free exercise.<sup>27</sup> RFRA makes findings, including that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”<sup>28</sup> It cites *Sherbert v. Verner*<sup>29</sup> and *Wisconsin v. Yoder*<sup>30</sup> as illustrating the compelling interest test, otherwise known as strict scrutiny, to be required due to the new federal statute. Subsequent litigation led the Supreme Court to determine that RFRA offers a defense against applications of federal law claimed to impose a wrongful burden on religious exercise, but not against state or local laws.<sup>31</sup>

### *RFRA and the Equality Act*

Regarding potential concerns whether support for the Equality Act is inconsistent with support for the rights protected by RFRA, there are at least two reasons why there is no conflict.

First, as a partial resolution, RFRA creates a defense against actions by government, not actions by private parties.<sup>32</sup> The Equality Act includes explicit protections against SOGI discrimination within the Civil Rights Act of 1964 and other federal statutes, which provide remedies enforceable by private parties. As to actions by such parties, there obviously is no conflict because RFRA does not apply.

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<sup>24</sup> *Id.* at 880. *Accord Bob Jones Univ.*, 461 U.S. at 604.

<sup>25</sup> *Employment Div.*, 494 U.S. at 882.

<sup>26</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

<sup>27</sup> 42 U.S.C. § 2000bb *et seq.*

<sup>28</sup> 42 U.S.C. § 2000bb(a)(5).

<sup>29</sup> 374 U.S. 398 (1963).

<sup>30</sup> 406 U.S. 205 (1972).

<sup>31</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>32</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018); *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010) (“Congress intended RFRA to apply only to suits in which the government is a party.”).

Second, even when the government enforces provisions of the Civil Rights Act on behalf of those protected, RFRA still does not justify otherwise forbidden discrimination. The Sixth Circuit recently considered the relationship between RFRA and Title VII in *EEOC v. R.G. & G.R. Harris Funeral Homes*, a case in which Aimee Stephens, a funeral home director, was fired because of her gender identity by the business owner who asserted RFRA as a defense.<sup>33</sup> Because the government enforced Title VII on behalf of Ms. Stephens, RFRA applied, requiring the courts to test whether Title VII survives strict scrutiny review. After a detailed analysis, the court confirmed that the civil rights law does prevail because it serves compelling interests in preventing discrimination, and does so in the least restrictive manner.<sup>34</sup>

Addressing the nature of the government's interest in enforcing Title VII, the Circuit explained, "Failing to enforce Title VII against the Funeral Home means the EEOC would be allowing a particular person — Stephens — to suffer discrimination, and such an outcome is directly contrary to the EEOC's compelling interest in combating discrimination in the workforce. *See, e.g., United States v. Burke*, 504 U.S. 229, 238, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) ('[I]t is beyond question that discrimination in employment on the basis of sex ... is, as ... this Court consistently has held, an invidious practice that causes grave harm to its victims.').<sup>35</sup> The Circuit then further confirmed the point in an authoritative footnote:

Courts have repeatedly acknowledged that Title VII serves a compelling interest in eradicating all forms of invidious employment discrimination proscribed by the statute. *See, e.g., EEOC v. Miss. Coll.*, 626 F.2d 477, 488–89 (5th Cir. 1980). As the Supreme Court stated, the "stigmatizing injury" of discrimination, "and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *see also EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) ("By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority.' Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."), *abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991).<sup>36</sup>

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<sup>33</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d at \*20.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at \*20, fn.12. *See also, e.g., North Coast Women's Care Medical Group*, 44 Cal.4th at 1158 (noting that the civil rights law "furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation"); *State by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d at 853 (government has an overriding compelling interest in prohibiting discrimination in employment and public accommodations).

Addressing the other element of the compelling interest test, the Circuit held that Title VII forbids nothing more than the workplace discrimination that is the object of the statute, and thus is the least restrictive means for serving the compelling interest.<sup>37</sup>

The Sixth Circuit in *Harris Funeral Homes* points out that the Supreme Court apparently also reads Title VII as necessarily prevailing when an employee's interest in equal treatment encounters an employer's religion-based wish to discriminate.<sup>38</sup> Discussing *Burwell v. Hobby Lobby Stores, Inc.*,<sup>39</sup> the Circuit noted that:

the majority opinion stated that its decision should not be read as providing a “shield” to those who seek to “cloak[ ] as religious practice” their efforts to engage in “discrimination in hiring, for example on the basis of race.” 134 S.Ct. at 2783. As the *Hobby Lobby* Court explained, “[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.” *Id.* We understand this to mean that enforcement actions brought under Title VII, which aims to “provid[e] an equal opportunity to participate in the workforce without regard to race” and an array of other protected traits, *see id.*, will necessarily defeat RFRA defenses to discrimination made illegal by Title VII.<sup>40</sup>

Justice Kennedy's separate *Hobby Lobby* concurrence reinforces this conclusion by emphasizing that protected exercises of religion must not “unduly restrict other persons, such as employees, in protecting their own interests, *interests the law deems compelling*.”<sup>41</sup>

The Supreme Court's recent confirmation that our civil rights laws serve compelling interests in the least restrictive way, and reliance in *Masterpiece Cakeshop* on its *Piggie*

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<sup>37</sup> *Id.* at \*23, citing *Redhead v. Conf. of Seventh-Day Adventists*, 440 F.Supp.2d 211, 222 (E.D.N.Y. 2006) (“the Title VII framework is the least restrictive means of furthering” the government's interest in avoiding discrimination), *adhered to on reconsideration*, 566 F.Supp.2d 125 (E.D.N.Y. 2008); *EEOC v. Preferred Mgmt. Corp.*, 216 F.Supp.2d 763, 810–11 (S.D. Ind. 2002) (“[I]n addition to finding that the EEOC's intrusion into [the employer's] religious practices is pursuant to a compelling government interest,” — i.e., “the eradication of employment discrimination based on the criteria identified in Title VII” — “we also find that the intrusion is the least restrictive means that Congress could have used to effectuate its purpose.”). *See also, e.g., North Coast Women's Care Medical Group*, 44 Cal.4th at 1158 (“there are no less restrictive means for the state to achieve that [nondiscrimination] goal”); *State by McClure*, 370 N.W.2d at 853 (same, and observing that “when appellants entered into the economic arena and began trafficking in the market place, they have subjected themselves to the standards the legislature has prescribed not only for the benefit of prospective and existing employees, but also for the benefit of the citizens of the state as a whole in an effort to eliminate pernicious discrimination”).

<sup>38</sup> *Id.*

<sup>39</sup> 134 S.Ct. 2751, 2783 (2014).

<sup>40</sup> *Harris Funeral Homes*, 884 F.3d at \*23.

<sup>41</sup> *Hobby Lobby*, 134 S.Ct. at 2787 (emphasis added).

*Park* decision rejecting a religious defense as “patently frivolous,” is consistent with perhaps the most famous of the early cases testing and affirming the constitutionality of the Civil Rights Act. In *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court observed that “The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”<sup>42</sup> The Court explained that the Act was designed to address both the “moral and social wrong” and the disruptive effects of discrimination, which together meant that places of public accommodation have “no ‘right’ to select [their] guests as [they] see[] fit, free from governmental regulation.”<sup>43</sup> Justice Goldberg reinforced the human-impact point in his concurrence, observing that “Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public.”<sup>44</sup>

The Equality Act proposes to codify case law interpreting the sex discrimination provisions of the Civil Rights Act and other federal statutes as covering SOGI discrimination, and to make other changes to create greater consistency across those laws. Like the existing statutes, the Equality Act will serve compelling interests in preventing discrimination, and will do so in the least restrictive manner. Accordingly, whether the law’s protections would be enforced by government or private parties, its nondiscrimination requirements would prevail both against RFRA-based objections entitled to strict scrutiny review, and against First Amendment-based religious objections subject to rational basis review. In sum, ABA support for the Equality Act would be consistent with the ABA’s longstanding support for sexual orientation and gender identity nondiscrimination protections, and would not create any new conflict with the ABA’s continuing support for RFRA.

## Conclusion

The Supreme Court has long recognized that our Nation’s commitment to civic equality requires enforcement of civil rights laws that govern the public sphere despite the religious objections of some to the equal treatment of certain others. In keeping with existing ABA policy and Goals III and IV of the ABA’s Mission, the ABA ~~should~~ supports the Equality Act, a federal bill to make explicit that discrimination because of gender identity or sexual orientation is sex discrimination prohibited by the Civil Rights Act of 1964 and other federal nondiscrimination laws, and that federal statutory protections for religious freedom do not authorize violation of those nondiscrimination laws. Add in one sentence about the second resolved clause?

Respectfully submitted,

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<sup>42</sup> 85 S.Ct. 348, 354 (1964).

<sup>43</sup> *Id.* at 357-358.

<sup>44</sup> *Id.* at 292 (internal quotation marks omitted). See also *Romer v. Evans*, 517 U.S. 620, 631 (1996) (nondiscrimination laws “protect[] against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society”).

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Victor Marquez  
Chair, Commission on Sexual Orientation and Gender Identity  
January 2019

## GENERAL INFORMATION FORM

Submitting Entities: ABA Commission on Sexual Orientation and Gender Identity

Submitted By: Victor Marquez, Chair, Commission on Sexual Orientation and Gender Identity

1. Summary of Resolution

This Resolution would affirm that: (1) discrimination because of sexual orientation or gender identity is sex discrimination prohibited by the Civil Rights Act of 1964 and certain other federal statutes; and (2) federal statutory protections for religious freedom do not authorize violation of nondiscrimination laws. This Resolution also affirms that religiously neutral laws of general applicability prohibiting discrimination based on sexual orientation or gender identity do not improperly burden the religious free exercise rights of those operating places of public accommodation

2. Approval by Submitting Entity

The Commission on Sexual Orientation and Gender Identity approved this resolution by vote on its members on 12/10/2018.

3. Has This or a Similar Recommendation Been Submitted to the House or Board Previously?

No.

4. What Existing Association Policies are Relevant to This Resolution and How Would They be Affected by its Adoption?

This resolution is consistent with prior policy supporting laws that protect free exercise of religion and the case law resolving how those laws relate to religiously neutral laws of general applicability on other subjects, including nondiscrimination. See 89M8, 06A122B, 91M105.

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

n/a

6. Status of Legislation

This resolution is in anticipation of the reintroduction of the Equality Act H.R.2282; S.1006. The Equality Act would provide consistent and explicit non-discrimination protections for LGBTQ people across key areas of life, including employment,

housing, credit, education, public spaces and services, federally funded programs, and jury service.

7. Plans for Implementation of the Policy if Adopted by the House of Delegates

The policy will provide authority for supporting legislation concerning sexual orientation and gender identity nondiscrimination, and related religious liberty concerns, and for preparation and filing of one or more ABA *amicus curiae* briefs in the U.S. Supreme Court or other appropriate judicial forum in any case presenting the issues that are addressed in the policy.

8. Cost to the Association (both direct and indirect costs).

Adoption of this Resolution would result only in minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

9. Disclosure of Interest

There are no known conflicts of interest to this recommendation.

10. Referrals

This Resolution will be referred to the following entities:

Government and Public Sector Lawyers Division  
 Law Practice Division  
 Judicial Division  
 Law Student Division  
 Senior Lawyers Division  
 Young Lawyers Division  
 Section of Business Law  
 Section of Civil Rights and Social Justice  
 Section of Dispute Resolution  
 Section of International Law  
 Section of Labor and Employment Law  
 Section of Litigation  
 Section of State and Local Government Law  
 Section of Tort Trial and Insurance Practice  
 All Commissions of the Office of Diversity and Inclusion

11. Contact Persons (prior to meeting)

Skip Harsch  
 Director, ABA Commission on Sexual Orientation and Gender Identity  
 321 N. Clark St.

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312.988.5137  
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12. Contact Persons (who will present the report to the House)

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**EXECUTIVE SUMMARY**1. Summary of the Resolution

The Resolution will establish policy that sex discrimination in employment prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., includes discrimination on the bases of (1) sexual orientation and (2) gender identity.

2. Summary of the Issue that the Resolution Addresses

The Resolution addresses a split of interpretations on the application of Title VII's prohibition of sex discrimination to claims of discrimination by (1) lesbian, gay, and bisexual individuals challenging discrimination on the basis of their sexual orientation and (2) transgender individuals challenging discrimination on the basis of their gender identity.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The Resolution clarifies and emphasizes the ABA's position on employment discrimination on the bases of sexual orientation and/or gender identity and more fully enables the ABA Governmental Affairs Office, the ABA President, and the Standing Committee on Amicus Curiae Briefs to act.

4. Summary of Minority Views

No opposing views have been expressed by other ABA entities or organizations as of the preparation of this summary. The Section will work with other ABA entities, as necessary, on wording and scope of this Resolution.

AMERICAN BAR ASSOCIATION  
COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE  
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE  
LAW STUDENT DIVISION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association opposes the imposition upon sexual  
2 assault victims of a legal burden of resistance before legal protection attaches; and  
3  
4 FURTHER RESOLVED, That the American Bar Association opposes, and urges federal,  
5 state, local, territorial, and tribal jurisdictions to oppose, laws or rules that allow consent  
6 to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical  
7 resistance.



## REPORT

### I. Introduction

Given the ongoing and contemporary discussions around sexual violence and consent in our society, recognition that consent to sexual activity may not be inferred from the absence of resistance is long past due.

Survivors of sexual violence experience profound violations of their autonomy that shatter the “very foundation of their identity.”<sup>1</sup> As scholar Sarah Deer recognized: “If our sexuality is part of that which defines who and what each of us is, then it is at the very core of our self-identity...[T]his is because the very nature of sexuality represents the best of humanity—the creation of new life, or the sharing of deep mutual affection and attraction. When this manifestation of our humanity is violated, it has life-changing ramifications for one’s feelings about self, others, justice, and trust. In consequence, rape damages something critical to our being and personhood.”<sup>2</sup>

Similarly, the American Law Institute has noted:

Basing liability on lack of consent [...] is consistent with the social recognition that the criminal law must protect individuals against violations of their sexual autonomy, not merely against sex obtained by physical force or coercion. The decision to share sexual intimacy with another, whether made spontaneously or with great deliberation, is a core feature of our humanity. The decision must always be a matter of individual choice.<sup>3</sup> A person who seeks sexual intimacy with another must heed the other person’s right to decide whether to engage in, refuse, or defer sexual acts, including penetration or oral sex.<sup>4</sup>

The ALI goes on to document the current state of the law globally, recognizing the shift away from centering sexual assault inquiries on the victim’s supposed responsibility to resist forcible assault, to focus instead on the the perpetrator’s responsibility to know they are acting with consent.

Well over half of American jurisdictions currently treat penetration without consent as a crime, even in the absence of other aggravating circumstances.

This is the prevalent trend, not only nationally but elsewhere around the world.

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<sup>1</sup> Sarah Deer, *THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA* xvi (University of Minn. Press 2015).

<sup>2</sup> Sarah Deer, *THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA* xvi-xvii (University of Minn. Press 2015).

<sup>3</sup> See generally Stephen J. Schulhofer, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998) (discussing authorities that document the emergence of autonomy as the principal interest to be protected by the law of sexual assault). See also *M.C. v. Bulgaria*, [2003] ECHR 39272/98, ¶ 106, ¶¶ 163-165 (canvassing legal systems worldwide and concluding that “[t]he basic principle which is truly common to [the reviewed] legal systems is that serious violations of sexual autonomy are to be penalized.” (internal quotation marks omitted)).

<sup>4</sup> American Law Institute, *Model Penal Code: Sexual Assault and Related Offenses* Revision Project, Reporters’ Notes to Section 213.6 (forthcoming).

In 2012, the FBI amended the rape definition used for its national crime statistics to include any act of “penetration, no matter how slight, of the vagina or anus . . . , or oral penetration by a sex organ of another person, . . . without the consent of the victim.”<sup>5</sup> In 2003, the European Court of Human Rights observed that “[even where] the definition of rape [in European countries] contains references to the use of violence or threats of violence . . . , in case-law and legal theory lack of consent, not force, is seen as the constituent element of the offence. [T]he prosecution of non-consensual sexual acts [even in the absence of force] is sought in practice by means of interpretation of the relevant statutory terms . . . and through a context-sensitive assessment of the evidence. [There is] a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse . . . .”<sup>6</sup> In 2011, the Council of Europe adopted the Istanbul Convention, which requires member states to criminalize all “non-consensual acts of sexual nature” and stipulates that “[c]onsent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.”<sup>7</sup> The convention, signed by 45 of the Council’s 47 member nations, entered into force in 2014;<sup>8</sup> in consequence a number of European states have recently revised their domestic legislation to make sexual penetration and oral sex without consent the equivalent of a serious felony.<sup>9</sup>

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<sup>5</sup> U.S. Dep’t of Justice, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division Uniform Crime Reporting (UCR) Program, Reporting Rape in 2013: Summary Reporting System (SRS) User Manual and Technical Specification (April 9, 2014), at 3, available at <https://ucr.fbi.gov/recent-program-updates/reporting-rape-in-2013-revised>. The prior definition followed the common-law standard: “carnal knowledge of a female forcibly and against her will.”

<sup>6</sup> M.C. v. Bulgaria, [2003] ECHR 39272/98, ¶¶ 163-165.

<sup>7</sup> See *Council of Europe Treaty Series - No. 210, Convention on Preventing and Combating Violence Against Women and Domestic Violence*, May 11, 2011, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>. Article 36 provides:

“Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: (a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; (b) engaging in other non-consensual acts of a sexual nature with a person; . . . . Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.”

The Convention leaves each nation discretion to define “intent.” See *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence*, May 11, 2011, ¶ 189, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210> (noting that “[t]he interpretation of the word ‘intentionally’ is left to domestic law.”)

<sup>8</sup> Only Russia and Azerbaijan failed to sign. See Council of Europe, *Historical Background*, Council of Europe Portal (2018), <https://www.coe.int/en/web/istanbul-convention/historical-background>; Council of Europe, *Chart of signatures and ratifications of Treaty 210*, Council of Europe Portal: Treaty Office (July 8, 2018), <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures?desktop=true>.

<sup>9</sup> E.g., BROTTSBALKEN [BRB][PENAL CODE] 6:1 (1998:393) (Swed.). The 2018 Swedish provision defines consent as largely equivalent affirmative permission. See, e.g., Christina Anderson, Swedish Law Now Recognizes Sex Without Consent as Rape, N.Y. Times, May 23, 2018 (noting that “the law require[s] explicit consent—verbal or physical — from participants before they engage in a sexual act.”), <https://www.nytimes.com/2018/05/23/world/europe/sweden-rape-consent-sex.html>; Meka Beresford, Sweden outlaws sex without consent as Europe pushed to tighten rape laws, Reuters (May 23, 2018),

This recognition that sexual penetration and oral sex without consent should be treated as serious criminal offenses, even in the absence of force or other coercion, is widespread and growing. Popular press reports on the FBI's new definition of rape did not describe it as an outlier or on the vanguard in defining rape, but rather as harmonizing with existing law,<sup>10</sup> and several states have recently updated their codes to make absence of consent sufficient for conviction of a sexual offense.<sup>11,12</sup>

## II. The Requirement of Resistance Effectively Authorizes the Use of Force, Coercion, and Abuse to Secure Sexual Access

The history of rape law is both shameful and brutal.<sup>13</sup> As originally defined under the law, rape prohibited only “[c]arnal knowledge of a woman forcibly and against her will” outside of a marital relationship with her husband<sup>14</sup> and was considered a crime perpetrated against the *property* of fathers and husbands.<sup>15</sup> Historically, the law imposed unique obstacles for rape victims that other crime victims did not have to overcome:

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<https://www.reuters.com/article/us-sweden-sexcrimes-rape/sweden-outlaws-sex-without-consent-as-europe-pushed-to-tighten-rape-laws-idUSKCN1IO2WD>.

The recent Icelandic legislation likewise defines consent in terms of affirmative permission. See Paul Fontaine, Iceland Unanimously Passes Landmark Law On Sexual Consent, The Reykjavik Grapevine, March 23, 2018 (reporting that “[t]oday, Iceland’s Parliament [unanimously] passed a law putting the onus of consent on being told ‘yes’; rather than not being told ‘no’.”),

<https://grapevine.is/news/2018/03/23/iceland-unanimously-passes-landmark-law-on-sexual-consent/>.

In contrast, the 2016 German enactment appears closer to adopting a “no means no” standard. See STRAFGESETZBUCH [STGB] [Penal Code] §§ 177 (2016) (amendment deleting requirement to prove force and providing that “[w]ho[ever], against the recognizable will of another person, performs sexual acts with this person or makes her act sexually or induces the other person to suffer sexual acts by a third person or to perform sexual acts with a third person, will be punished with imprisonment between six months and five years.” See Tatjana Hörnle, The New German Law on Sexual Assault and Sexual Harassment, 18 GERMAN L.J. 1309 (2017).

<sup>10</sup> See, e.g., Charlie Savage, U.S. to Expand Its Definition of Rape in Statistics, N.Y. Times (Jan. 6, 2012) (“Many states have long since adopted a more expansive definition of rapes in their criminal laws, and officials said that local police departments had been breaking down their numbers and sending only a fraction of the reported rapes to the F.B.I. to comply with outdated federal standards.”); Kevin Johnson, FBI changes definition of rape to include men as victims, USA Today (Jan. 6, 2012) (reporting that “a survey of major city police chiefs found that 80% believed the old definition was ‘not adequate’”). See also, e.g., 2015 La. Sess. Law Serv. Act 256 (S.B. 117) (West) (amending state’s third-degree rape law, which carries up to 25 years of imprisonment, to include a consent-based subsection, namely “(4) When the offender acts without the consent of the victim,” now codified as La. Stat. Ann. § 14:43(A)(4)).

<sup>11</sup> E.g., 2015 La. Sess. Law Serv. Act 256 (S.B. 117) (West) (amending state’s third-degree rape law, which carries up to 25 years of imprisonment, to include a consent-based subsection, namely “(4) When the offender acts without the consent of the victim,” now codified as La. Stat. Ann. § 14:43(A)(4)).

<sup>12</sup> American Law Institute, Model Penal Code: Sexual Assault and Related Offenses Revision Project, Reporters’ Notes to Section 213.6 (forthcoming).

<sup>13</sup> See e.g. Susan Estrich, *Rape*, 95 YALE L.J. (1986).

<sup>14</sup> WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND \*210 (1765) (University of Chicago Press ed., 1979).

<sup>15</sup> Sarah Deer, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 17 (University of Minn. Press 2015).

Derived from English common law and applicable in most jurisdictions until the mid to late 1970s, these formal rules embodied clear presumptions against women who complained of having been raped. These rules included absolute exemptions from criminal liability for men who raped their wives. They included requirements that the victim establish that she resisted her attacker to the utmost, freshly complained of having been raped and corroborated her testimony with other evidence.<sup>16</sup>

Courts routinely failed to prohibit the use of force or threats by perpetrators and instead placed the burden of resistance on female victims before they could secure the law's protections—which they often could not<sup>17</sup>: “coercive, aggressive, overbearing and even frightening actions, if not physically brutal, were *legally permissible*.”<sup>18</sup> This left countless victims unprotected by criminal law over the centuries and created an appalling norm that allowed sexual aggression to go unchecked in the majority of cases.

As a product of its time, it is not surprising that the 1962 Model Penal Code on Sexual Assault and Related Offenses (“MPC”) codified this distressing history and continued to impose legal burdens on rape victims of demonstrating more than “token initial resistance.” Unfortunately, many jurisdictions followed the example of the MPC and “require at least ‘reasonable resistance’” to be demonstrated<sup>19</sup>.

Despite the modern legal trend towards the removal of force and resistance as essential elements of sexual assault, many current codes and pending legislative proposals, including the 2018 draft of the MPC Sexual Assault and Related Offenses Revision Project, still allow both “inaction” and the lack of “verbal or physical resistance” to serve as evidence of consent. This is contrary to the FBI Uniform Crime Reports (UCR) which, in 2012, re-defined rape simply as “any sexual penetration without consent.”<sup>20</sup> The incorporation of resistance into the very definition of consent contradicts contemporary notions of consent. It also ignores significant scientific research on the neurobiology of

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<sup>16</sup> Michelle J. Anderson, “Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine,” 46 *Villanova L. Rev.* (No. 5) 924-25 (2001).

<sup>17</sup> “In an 1880 case, the Wisconsin Supreme Court reversed a rape conviction despite the complainant’s testimony that “He had my hands tight, and my feet tight and I couldn’t move...I got so tired out. I tried to save me as much as I could, but...he held me, and...I worked so much as I could, and I gave up.” The court reversed the conviction, holding that “she ought to have continued [resisting] to the last... [T]he testimony does not show that the threat of personal violence overpowered her will.” *Whittaker v. State*, 50 Wis. 519, 520, 522 (1880). In a similar 1906 case, typical for the period, the court reversed a rape conviction because the victim had failed to make “the most vehement exercise of every physical means or faculty within the woman’s power.” *Brown v. States*, 127 Wis. 193 (1906); *id.* at 199–200 (explaining “[a] woman is equipped to interpose most effective obstacles by means of hands and feet and pelvic muscles. Indeed, medical writers insist that these obstacles are practically insuperable in the absence of more than the usual relative disproportion of age and strength between man and woman.”).

<sup>18</sup> American Law Institute, Model Penal Code Preliminary Draft No. 3 (October 30, 2013).

<sup>19</sup> ALI MPC Preliminary Draft No. 3 (October 30, 2013) (citing Michelle J. Anderson, Reviving Resistance in Rape Law, 1998 U. Ill. L. Rev. 953 (1999)).

<sup>20</sup> Press Release, U.S. DOJ, Attorney Eric Holder Announces Revision to the Uniform Crime Report’s Definition of Rape (Jan. 6, 2012), available at <https://www.justice.gov/opa/pr/attorney-general-eric-holder-announces-revisions-uniform-crime-report-s-definition-rape>. See also ABA House of Delegates Resolution 12M114 (“urging the Federal Bureau of Investigation to implement expeditiously the expanded definition of rape in the Uniform Crime Reporting Summary Reporting Program”).

trauma, which shows that resistance by a sexual assault victim is often impossible, and is evidence of disabling fear rather than consent.

### III. Research on the Varying and Individualized Responses by Victims of Sexual Violence Should Preclude Any Consent Definition that Relies on Inaction or a Lack of Resistance

Common myths persist about sexual violence victim behavior and veracity, such as whether they failed to physically resist the attacker, did not sustain significant injury, failed to report the assault immediately, continued to associate with the offender, recanted an initial report, or provided a statement or testimony in support of the offender. When a victim's behavior may appear to be “counterintuitive,”<sup>21</sup> and the reasons for the behavior are not adequately explained, our system of justice is compromised and supplanted by the court of popular (and uninformed) opinion.<sup>22</sup>

The impact of rape myths and a misunderstanding of “counterintuitive” victim behavior was revealed in a study undertaken by British researchers.<sup>23</sup> The study involved presentation of mock testimony in a sexual assault trial in which the victim had delayed her report of the assault, displayed a flat emotional affect on the witness stand, and suffered no physical injury beyond the act of penetration. The researchers observed jurors' deliberations when they received no expert instruction, as well as when they received education in the form of either expert testimony or a detailed jury instruction. In *State v. Obeta*, 796 N.W.2d 282 (Minn. 2011), the Minnesota Supreme Court described in its opinion the findings of the study as follows:

Drs. Ellison and Munro examined the deliberations of the groups that did not receive any educational information to determine whether the mock jurors subscribed to rape myths. Ellison & Munro, *Reacting to Rape*, *supra*, at 206. They found that mock jurors' “commitment to the belief that a ‘normal’ response to sexual attack would be to struggle physically was, in many cases, unshakeable.” *Id.* Additionally, jurors harbored “strong, but unfounded, convictions that vaginal tissues are easily torn, that pelvic muscles can be rigidified at will and that intercourse without trauma only occurs where a

<sup>21</sup> Behavior may seem “counterintuitive” when the actual experiences and behaviors of victims of sexual violence clash with the expectations of jurors, whose notions about rape and sexual assault have been unconsciously influenced by widespread societal myths concerning how someone becomes a victim of sexual violence, how victims respond during the assault itself, the resulting physical injury (or lack of injury) as a result of the assault, the victim's behavior following the assault, and the ability of the victim later to recall and recount details of the assault.

<sup>22</sup> Even victims themselves are not immune to the effects of rape myths. Victims may blame themselves for the assault or—realizing that police, prosecutors, and jurors may be influenced by those erroneous beliefs—become convinced that they will never receive justice for the violence and indignity they have suffered.

<sup>23</sup> Louise Ellison & Vanessa E. Munro, *Turning Mirrors into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials*, 49 Brit. J. Criminology 363 (2009); Louise Ellison & Vanessa E. Munro, *Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility*, 49 Brit. J. Criminology 202 (2009).

woman is aroused, which, in the jurors' minds, was wholly inconsistent with rape." *Id.* at 207. The study also yielded support for the proposition that jurors view delayed reporting as indicative of a fabricated report, although the jurors were receptive to the idea that a victim may delay reporting for other reasons. *Id.* at 209–10. [*Obeta*, 796 N.W.2d at 285.]

Many jurisdictions stress the importance of understanding victim behavior in crimes of sexual violence, including the need for expert testimony on the subject, in their benchbooks on crimes of sexual violence.<sup>24</sup> Pennsylvania's Benchbook has devoted many pages to the contrast between rape myths and reality, as borne out by studies and statistics.<sup>25</sup> The PA Benchbook also discusses the physical, emotional, and psychological effects of sexual assault on victims and their behavior during and after the assault, including the traumatic effects of testifying in court.<sup>26</sup>

Authorities and experts responsible for training law enforcement officers investigating these cases, prosecutors who must try them, and medical personnel responsible for treating victims of sexual violence also emphasize the need to understand the traumatic effects of violence on the ability of victims to recount what has happened to them, as essential knowledge required for these professionals to properly perform their duties.<sup>27</sup>

When the need to educate judges, police officers, prosecutors, and medical professionals about victim behavior and the effects of traumatic victimization is so widely and universally recognized, it is clear that a legal definition of consent must reflect the realities of sexual victimization—rather than perpetuate myths that victims should be required to physically resist their attacker.

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<sup>24</sup> See, e.g., Michigan's Sexual Assault Benchbook—Revised Edition § 8.6 (2015), available at <http://courts.mi.gov/education/mji/publications/documents/sexual-assault.pdf>; the Tribal Law and Policy Institute's Tribal Court Judges Sexual Assault Bench Book at 9-12, 41-42 (2011) available at <http://www.tribalinstitute.org/download/TribalJudgeSABenchbook6-9-11.pdf>; The United Kingdom's Crown Court Bench Book (2010) available at [https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook\\_criminal\\_2010.pdf](https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf).

<sup>25</sup> Pennsylvania Coalition Against Rape & Administrative Office of Pennsylvania Courts, Pennsylvania Crimes of Sexual Violence Benchbook at 1-9 to 17 (2015) available at <http://www.pacourts.us/assets/files/setting-3008/file-723.pdf?cb=01a225>.

<sup>26</sup> *Id.* at 1-17 to 26.

<sup>27</sup> See, e.g., with respect to sexual assault forensic nurse examiners, U.S. Department of Justice, Office on Violence Against Women, A National Protocol for Sexual Assault Medical Forensic Examinations: Adults/Adolescents, Second Edition at 30-42 (on effects of trauma and other considerations affecting victims), 50-54 (on reports to law enforcement), 121-123 (on courtroom testimony as experts) (Apr. 2013), available at [http://c.yomcdn.com/sites/www.forensicnurses.org/resource/resmgr/Education/National\\_Protocol\\_2013.pdf?hhSearchTerms=%22victim+and+behavior%22](http://c.yomcdn.com/sites/www.forensicnurses.org/resource/resmgr/Education/National_Protocol_2013.pdf?hhSearchTerms=%22victim+and+behavior%22); with respect to prosecutors, Jennifer G. Long, Nat'l District Attny's Assoc., Introducing Expert Testimony to Explain Victim Behavior (2007), available at [http://www.ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf); with respect to law enforcement, International Association of Chiefs of Police, Police Response to Violence Against Women, <http://www.theiacp.org/Police-Response-to-Violence-Against-Women> (see section on investigation of sexual assault).

#### IV. Affirmative Consent Better Protects Sexual Autonomy than Resistance Requirements

The criminal law has too often failed to fully recognize that “no means no”—to the “great surprise of many lawyers, law students, and members of the general public.”<sup>28</sup> For example, jurisdictions like New York (and until recently Maryland)<sup>29</sup> require something in excess of express unwillingness to sexual contact before the law protects against sexual violence.<sup>30</sup> In juxtaposition, states like Wisconsin and Colorado represent the modern view of sexual autonomy within American criminal law, recognizing not only that “no means no,” but also that “yes means yes”.<sup>31</sup> Specifically, the codification of affirmative consent, which requires an individual to indicate willingness through words or action before another may engage in sexual contact or activity with them, is the proper, and increasingly common, legal and policy requirement to address sexual violence.<sup>32</sup>

Affirmative consent offers greater protection against sexual violence because it avoids a requirement that victims take some action before the law will protect them, or that, absent a clear “no”, sexual access may be inferred. An affirmative consent rule begins to reverse the unacceptable history of burdening victims rather than constraining perpetrators of sexual violence, and recognizes the significant scientific research on the neurobiology of trauma.<sup>33</sup>

#### V. Conclusion

The appalling history of sexual violence, and of the status of women as the sexual property of men, should no longer form the basis of the law governing sexual assault. No longer should the law countenance consent to sexual activity being inferred absent resistance. Rather, as is the case in all other human relationships, freely given consent should not be inferred, but sought. The ABA should recognize every individual’s inherent right of sexual autonomy, acknowledging that victims have no prior burden of

<sup>28</sup> ALI Prospectus for a Project Revision (May 14, 2012).

<sup>29</sup> See Laura French, *New Maryland Law No Longer Requires Rape Victims to Prove Physical Resistance*, FORENSIC MAGAZINE (Apr. 19, 2017), available at <https://www.forensicmag.com/news/2017/04/new-maryland-law-no-longer-requires-rape-victims-prove-physical-resistance>.

<sup>30</sup> N.Y. Penal Law § 130.05(2)(d) (2011); MD

<sup>31</sup> Wis. Stat. § 940.225(4) (2011) (“Consent...means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse...”); Colo. Rev. Stat. Ann. § 18-3-401 (West 2011). (“Consent” means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent under the provisions of this part. Submission under the influence of fear shall not constitute consent.”)

<sup>32</sup> See Cal. Educ. Code § 67386; see also Kevin de León & Hannah-Beth Jackson, *Why We Made ‘Yes Means Yes’ California Law*, Wash. Post (Oct. 13, 2015), available at [https://www.washingtonpost.com/news/in-theory/wp/2015/10/13/why-we-made-yes-means-yes-california-law/?utm\\_term=.7f29e6821ad4](https://www.washingtonpost.com/news/in-theory/wp/2015/10/13/why-we-made-yes-means-yes-california-law/?utm_term=.7f29e6821ad4).

<sup>33</sup> See, e.g., Rebecca Campbell, PhD, “The Neurobiology of Sexual Assault: An NIJ Research for the Real World Seminar” (December 3, 2012) available at <https://nij.gov/multimedia/presenter/presenter-campbell/pages/presenter-campbell-transcript.aspx>.

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demonstrating resistance, and oppose laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.

Respectfully submitted,

Mark I. Schickman  
Chair, Commission on Domestic & Sexual Violence  
January 2019

**GENERAL INFORMATION FORM**

Submitting Entity: Commission on Domestic & Sexual Violence

Submitted By: Mark I. Schickman, Chair

1. Summary of Resolution(s). The resolution opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches, and calls upon all jurisdictions to oppose any laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.
2. Approval by Submitting Entity. The CDSV approved this resolution at its Fall Business meeting, October 19, 2018.
3. Has this or a similar resolution been submitted to the House or Board previously? No.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? There are no ABA policies related to the burden of demonstrating resistance to sexual assault, or to the principle that consent to sexual activity may not be inferred from inaction or lack of resistance.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a
6. Status of Legislation. (If applicable) Changes in the definitions of consent in the Model Penal Code are currently being considered by the ALI.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Following adoption, this policy will be presented to model code drafters and legislative bodies to support widespread adoption..
8. Cost to the Association. (Both direct and indirect costs) None.
9. Disclosure of Interest. (If applicable) n/a
10. Referrals. Criminal Justice Section; Civil Rights and Social Justice Section; Commission on Women in the Profession; Commission on Youth at Risk; Family Law Section; Young Lawyers Division; Law Student Division; Judicial Division; Tort Trial & Insurance Practice Section; Solo, Small Firm and General Practice Division; Litigation Section.
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address) Vivian Huelgo, Chief Counsel, Commission on Domestic & Sexual Violence, 1050 Connecticut Ave. NW, Washington, DC 20036, 202-662-8637, [vivian.huelgo@americanbar.org](mailto:vivian.huelgo@americanbar.org)

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12. Contact Name and Address 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.*) Mark Schickman, Chair, Commission on Domestic & Sexual Violence, [schickman@freelandlaw.com](mailto:schickman@freelandlaw.com)

**EXECUTIVE SUMMARY**1. Summary of the Resolution

The resolution opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches, and calls upon all jurisdictions to oppose any laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.

2. Summary of the Issue that the Resolution Addresses

The resolution opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches, and calls upon all jurisdictions to oppose any laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The ABA's adoption of the proposed policy will provide the proper policy rule regarding consent to sexual conduct, and the platform to seek change to or rejection of conflicting policy.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None.



**AMERICAN BAR ASSOCIATION**  
**RULE OF LAW INITIATIVE**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges States and entities working to  
2 implement the *Global Compact on Refugees (December 2018)* and the *Global Compact*  
3 *for Safe, Orderly and Regular Migration (July 2018)* (collectively, the “Compacts”) to fully  
4 implement the Compacts and also act to:

- 5 1) Address the root causes of internal displacement and forced migration, including  
6 by providing support to transitional justice mechanisms and justice institutions  
7 that address widespread repression, persecution and violence in fragile  
8 communities;
- 9 2) Develop policies that discourage the criminal prosecution of migrants and  
10 refugees, especially asylum seekers, for unauthorized entry, and further  
11 encourage the accountable use of prosecutorial discretion in the exercise of  
12 enforcement measures;
- 13 3) Support and promote the establishment of a system of robust and equitable  
14 global responsibility-sharing to foster solutions to protracted displacement;
- 15 4) Promote the dignity and self-reliance of displaced persons, and recognize and  
16 emphasize the protection of their rights, particularly those of internally displaced  
17 persons (IDPs);
- 18 5) Protect refugees, migrants, and IDPs from bias and discrimination, including by  
19 (a) promoting specific legislative or other measures to provide protections  
20 against discrimination on the basis of gender, race, ethnicity, national origin,  
21 religion, disability, age, sexual orientation, and gender identity; and (b) ensuring  
22 a right to protection from discrimination and pervasive bias, through the  
23 promotion of evidence-based and inclusive conversation and decision making  
24 around the issues of migration and displacement.



## REPORT

Approximately 68.5 million people are currently displaced within and across national borders.<sup>1</sup> With the increase of global displacement as a result of conflict, persecution and human rights violations occurring for extended periods of time, and as more nations threaten to close their borders, it is clear that the magnitude and drawn-out nature of the global displacement crisis demands long-term solutions that go beyond isolated sectoral and State responses. The scope and scale of forced migration today requires a new approach that tackles the root causes of migration and displacement, ensures the safety and human dignity of those forced to flee, and provides sustainable solutions for migrants, refugees and internally displaced people (IDPs).

The United Nations has convened nation states to negotiate two global compacts – the Global Compact on Safe, Orderly and Regular Migration (Global Compact on Migration) and the Global Compact on Refugees (Global Refugee Compact). The Global Compact on Migration, which was finalized in July 2018, covers all dimensions of international migration from a holistic point of view.<sup>2</sup> The Global Refugee Compact is set to be released at the end of 2018, and it seeks to provide a comprehensive refugee response framework that acknowledges a shared international responsibility.<sup>3</sup> While both global compacts represent a collaborative effort to address the global migration and displacement crisis, they are limited in scope and protection. Given the scale of the crisis and the fact that displacement has significant human rights and development ramifications at both the international and national levels, it is imperative that states and entities working to implement the global compacts create a more comprehensive and inclusive approach to the problem. Rule of law approaches to forced migration and sustainable development in countries of origin, transit and destination should be prioritized, and thus it is critical that this resolution be passed by the ABA House of Delegates in parallel with the finalization of these compacts and while there is global attention on these issues.

**I. Addressing root causes of internal displacement and forced migration, including support to transitional justice mechanisms and justice institutions that address widespread repression, persecution and violence in fragile communities.**

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<sup>1</sup> UNCHR, *Global Trends: Forced Displacement in 2017*, 2 (2018), <http://www.unhcr.org/5b27be547.pdf>.

<sup>2</sup> Press Release, United Nations, United Nations Finalizes First Ever Global Compact For Migration (July 13, 2018), [https://refugeesmigrants.un.org/sites/default/files/gcm\\_press\\_release\\_final.pdf](https://refugeesmigrants.un.org/sites/default/files/gcm_press_release_final.pdf).

<sup>3</sup> UNHCR, *Towards a Global Compact on Refugees: Key Elements of the Roadmap* (May 17, 2017), <http://www.unhcr.org/58d135517.pdf>; U.N.G.A., *Report of the United Nations High Commissioner for Refugees*, ¶ 32, 48, U.N. Doc. A/73/12 (Part II) (Sept. 13, 2018), [http://www.unhcr.org/gcr/GCR\\_English.pdf](http://www.unhcr.org/gcr/GCR_English.pdf).

This resolution encourages states and parties working to implement the global compacts to address the root causes of displacement, including gaps in the rule of law.

The New York Declaration for Refugees and Migrants (New York Declaration), adopted by the United Nations (U.N.) General Assembly in 2016, states:

We, Heads of State and Government and High Representatives ... are determined to address the root causes of large movements of refugees and migrants, including through increased efforts aimed at early prevention of crisis situations based on preventive diplomacy. We will address them also through the prevention and peaceful resolution of conflict, greater coordination of humanitarian, development and peacebuilding efforts, the promotion of the rule of law at the national and international levels and the protection of human rights.<sup>4</sup>

According to the U.N. High Commissioner for Refugees (UNHCR), conflict, systemic violence and persecution are three of the largest factors pushing people to flee from their home countries.<sup>5</sup> For example, Guatemala, Honduras and El Salvador form one of the most dangerous regions in the world – commonly called the Northern Triangle – due to a high prevalence of organized crime and gang violence that goes without punishment or redress. Over 300,000 people fled the region in 2016, and reports show that asylum applications to United States, Belize, Costa Rica, Nicaragua, and Panama have increased by over 1000% from 2011 – 2017.<sup>6</sup> Similarly, millions of people from countries like Syria (6.3 million), South Sudan (2.4 millions) and Myanmar (1.2 million) have fled their homes due to civil unrest and violence.<sup>7</sup> The lack of effective and independent justice institutions in these countries makes it difficult to hold those responsible accountable for their actions, and undermines public trust in the system. Without that support, refugees,

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<sup>4</sup> G.A. Res. A/Res/71/1, New York Declaration for Refugees and Migrants: Resolution (Oct. 3, 2016), available at: <http://www.refworld.org/docid/57ceb74a4.html>.

<sup>5</sup> UNHCR, *More Efforts Needed to Address the Root Causes of Forced Displacement* (May 19, 2016), <http://www.unhcr.org/en-us/news/press/2016/5/573f037e4/efforts-needed-address-root-causes-forced-displacement.html>.

<sup>6</sup> Silva Mathema, *They Are (Still) Refugees: People Continue to Flee Violence in Latin American Countries*, CTR. FOR AMERICAN PROGRESS (June 1, 2018), <https://www.americanprogress.org/issues/immigration/reports/2018/06/01/451474/still-refugees-people-continue-flee-violence-latin-american-countries/>; UNHCR, *Central American Refugee Crisis*, (<https://www.unrefugees.org/emergencies/central-america/> (last visited Oct. 24, 2018)).

<sup>7</sup> World Vision, *Forced to Flee: Top Countries Refugees are Coming From* (June 26, 2018), <https://www.worldvision.org/refugees-news-stories/forced-to-flee-top-countries-refugees-coming-from>

IDPs and migrants are left in limbo as their country lacks the protections to address their problems.<sup>8</sup>

Despite the global compacts' failure to reflect this emphasis on tackling the root causes of forced migration, it is imperative that States address these issues. Merely trying to fix the problem after the fact has not worked in the past, and it will not ameliorate the situation in the future. Furthermore, without this approach, an even heavier burden is placed on States to keep taking refugees and migrants in the hopes that the situation will resolve itself. Proactive resolutions that strengthen justice and governance systems and build the capacity of the legal profession are necessary to tackle the violence, and provide adequate support to people coming in. People need to know that their problems can be resolved through the courts. Strengthening rule of law systems and tackling the underlying issues of corruption, weak accountability mechanisms, poor governance and inequality will eventually give them that ability and will ensure that state and non-state actors face consequences for violating human rights.

**II. Develop policies that discourage the criminal prosecution of migrants and refugees, especially asylum seekers, for unauthorized entry, and further encourage the accountable use of prosecutorial discretion in the exercise of enforcement measures.**

This resolution encourages State actors and parties to the global compact to treat migrants and refugees as people in need of protection rather than criminals. Specifically, the recommendation calls for policies to be developed that discourage the criminal prosecution of those who seek asylum in other countries.

By the end of 2017, about 3.1 million people were awaiting a decision on their application for asylum, about half in developing regions,<sup>9</sup> as they seek protection from the violence, conflict and persecution in their home countries. While it is a fundamental human right to leave one's country and to seek asylum,<sup>10</sup> efforts to exercise those rights are gradually being criminalized. The U.S., for example, which has stood as a beacon of hope for immigrants and refugees from around the world for centuries, is issuing bans on refugee admissions and ending programs aimed at protecting particularly vulnerable groups of migrants, such as the Temporary Protected Status (TPS) for Salvadoran, Haitian, Sudanese, and Nicaraguan nationals or the Deferred Action for Childhood Arrivals (DACA) program. In the E.U., member states are entering into bilateral migration agreements with third countries (e.g., E.U.-Turkey and Italy-Libya deals), aimed to deter

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<sup>8</sup> Mathema, *supra* note 6; Rocio CaraLabrador and Danielle Renwioc, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (June 26, 2018), <https://www.cfr.org/background/central-americas-violent-northern-triangle>.

<sup>9</sup> *Global Trends*, *supra* note 1, at 2.

<sup>10</sup> G.A. Res. 217(III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

arrivals and minimize a backlog of asylum applications. These agreements undermine fundamental principles of international refugee law and human rights, including the principle of non-refoulement.

Furthermore, a comprehensive response framework should seriously examine if not limit any practices involving the prosecution of individuals solely for technical “entry-related offenses,” when no other criminal activity is present, and especially for failing to distinguish between initial entries versus re-entries. ABA’s Criminal Justice Standards for the Prosecution Function note that a prosecutor should exercise sound discretion and independent judgment in the performance of the prosecution function,<sup>11</sup> and further notes that the primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.<sup>12</sup> The Standard goes on to state that the prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety, both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to refrain from pursuing criminal charges in appropriate circumstances.<sup>13</sup> Prosecutions that fail to do this are arguably not furthering public safety or the public interest and fail to address the root causes of such illegal entries.

While recognizing a nation’s sovereign rights, this resolution encourages states and entities supporting the implementation of the global compacts to refrain from criminalizing refugees and migrants. Under international law, they have a right to flee from dangerous and volatile situations and prosecuting them would contradict the efforts of the compacts. In enforcing national immigration laws, states are also encouraged to employ prosecutorial discretion when dealing with the unique needs of refugees and migrants, especially asylum seekers.

### **III. Support and Promote the Establishment of a System of Robust and Equitable Global Responsibility-Sharing to Foster Solutions to Protracted Displacement**

This resolution encourages states to support and promote a system of burden sharing among all states in order to better assist host communities and refugees. The Global Compact intends to give states a “predictable and equitable burden- and responsibility-sharing” for hosting communities, refugees, and all stakeholders and to ensure the “full

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<sup>11</sup> ABA Criminal Justice, *Criminal Justice Standards for the Prosecution Function*, Standard 3-1.2 (a) (June 16, 2016), [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition-TableofContents/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition-TableofContents/).

<sup>12</sup> *Id.* at Standard 3-1.2 (b).

<sup>13</sup> *Id.*

realization of the principles of international solidarity and cooperation.”<sup>14</sup> Currently, the burden of caring for and supporting refugees has fallen to fragile and developing states.<sup>15</sup> Twenty percent of the world’s refugee population is hosted by low income countries.<sup>16</sup> Middle-income countries host 68% of the world’s refugee population and do not have the infrastructure to properly deliver services for their refugee populations.<sup>17</sup> No single approach can adequately assist states currently hosting refugees, instead, all relevant stakeholders, including NGOs and IGOs, must look to a new approach in burden-sharing to assist refugee populations.<sup>18</sup>

Under the system proposed by the Global Compact, the UNHCR will coordinate meetings with all relevant stakeholders to pledge their support in assisting in the goals of the Global Compact. In pledging their support for assisting host countries, states should seek to fill current gaps in support identified and recommended in the 2019 report conducted by technical experts on the impact of hosting refugees and gaps in international cooperation to further responsibility-sharing.<sup>19</sup> The Compacts have identified areas for states to further their current engagements in responsibility-sharing through situation specific programming and assistance. For example, states can financially and technically support host countries and communities by providing quality humanitarian assistance and long-term assistance to both the host communities and refugee communities through bilateral partnerships. States can also assist host countries and communities by energizing their private sectors to invest and assist in infrastructure strengthening in the host community. Additionally, states can fill gaps by welcoming refugees for resettlement and providing pathways for admission into third party countries.<sup>20</sup> States should also work with all relevant stakeholders to effectively implement and create a strong network of support for host communities.<sup>21</sup> While assisting in sharing the burden of hosting refugees, states and all relevant stakeholders should seek to ensure that “the arrangements [to assist the host community are] efficient, effective, and practicable.”<sup>22</sup> States implementing the Compacts

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<sup>14</sup> UN, *The Global Compact on Refugees: Final Draft*, ¶ 2 (June 26, 2018), <https://www.unhcr.org/5b3295167.pdf> and *The Global Compact on Refugees: Final Draft*, ¶ 16, UNHCR.ORG (June 26, 2018), <https://www.unhcr.org/5b3295167.pdf>.

<sup>15</sup> Sarnata Reynolds and Juan Pabot Vacatello, *Building a Lifeline: A Proposed Global Platform and Responsibility Sharing Model for the Global Compact on Refugees*, ZOLBERG INSTITUTE, 10 (Dec. 2017), [https://zolberginstitute.org/wp-content/uploads/2018/09/Sarnata\\_Reynolds\\_Final.pdf](https://zolberginstitute.org/wp-content/uploads/2018/09/Sarnata_Reynolds_Final.pdf).

<sup>16</sup> International Rescue Committee and Center for Global Development, *Refugee Compact: Addressing the Crisis of Protracted Displacement*, 2 (2017), <https://www.cgdev.org/sites/default/files/Refugee-Compacts-Report.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.* at ¶ 48.

<sup>20</sup> U.N.G.A., *Report of the United Nations High Commissioner for Refugees*, ¶ 17, U.N. Doc. A/73/12 (Part II) (Sept. 13, 2018), [http://www.unhcr.org/gcr/GCR\\_English.pdf](http://www.unhcr.org/gcr/GCR_English.pdf).

<sup>21</sup> *The Global Compact on Refugees: Final Draft*, ¶ 3, UNHCR.ORG (June 26, 2018), <https://www.unhcr.org/5b3295167.pdf>.

<sup>22</sup> *Id.* at ¶ 16.

should also take part in the Support Platform to provide context-specific support to states calling upon the international community.<sup>23</sup>

#### **IV. Extending rights and protections to people considered to be Internally Displaced Persons (IDPs)**

Ensuring that the root causes of displacement are addressed and asylum seekers are protected, this resolution urges States to extend rights and protections for people considered to be IDPs. The New York Declaration recognized that around 40 million people were displaced within national borders, and that there was a need for effective strategies ensuring that they were protected, and that their displacement was prevented or reduced.<sup>24</sup> The UNHCR has noted that many IDPs “remain at high risk of physical attack, sexual assault and abduction, and frequently are deprived of adequate shelter, food and health services.”<sup>25</sup> For example, if IDPs flee without basic identity documents, they may have no recourse but to return to their home communities to access pensions or register to vote. This exposes them to grave dangers. Furthermore, IDPs often become refugees when they leave their countries; in order to reduce the number of refugees countries should also protect IDPs.

Currently the only protection for IDPs is through international legal guidance that encourages States to develop humane approaches to internal displacement. These guidelines, the Guiding Principles on Internal Displacement, were initially introduced by the Representative of the Secretary-General, Mr. Francis M. Deng to the UN Commission on Human Rights in 1998.<sup>26</sup> These principles identified rights and outlined how the international community could “contribute to enhancing the protection of IDPs in conflict and crisis situations.”<sup>27</sup> Presently, over 40 states have developed laws and policies on IDPs.

National mechanisms are stronger to protect IDPs because there is no single organization that handles the protection of IDPs.<sup>28</sup> By extending rights and protections to IDPs from a state level, IDPs gain rights guaranteed under international humanitarian standards. They

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<sup>23</sup> *Report of the United Nations High Commissioner for Refugees*, *supra* note 20, at ¶¶ 23-25.

<sup>24</sup> New York Declaration, *supra* note 4, at ¶ 20.

<sup>25</sup> UNHCR, *Questions and Answers about IDPs*,

<https://www.ohchr.org/en/issues/idpersons/pages/issues.aspx> (last visited Oct. 24, 2018).

<sup>26</sup> United Nations, Commission on Human Rights, *The Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (1998). However, the Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention) does bind members of the African Union to these guiding principles as they are adopted in the Kampala Convention.

<sup>27</sup> *Id.* at 2; Brookings-Bern Project on Internal Displacement, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting* (Oct. 1, 2004), <http://www.refworld.org/docid/4c51531f2.html>.

<sup>28</sup> James Hathaway, *A Global Solution to a Global Refugee Crisis*, OPEN GLOBAL RIGHTS (Feb. 29, 2016), <https://www.openglobalrights.org/global-solution-to-global-refugee-crisis/>

are free to defend their rights - including the freedom of movement, freedom from prejudice, freedom from physical violence, and rights to pursue economic interests. In addition, states should also extend other international human rights laws pertaining to nationality, statelessness, gender-based violence, smuggling, human trafficking, corruption, and detention to IDPs as they are aimed at preventing forced migration and reducing the negative effects of displacement.

## **V. Adopt inclusive laws protecting LGBTQI refugees and migrants**

Refugees and migrants who identify as lesbian, gay, bisexual, transgender, queer, or intersex (LGBTQI) people often face discrimination, isolation, marginalization and bias-motivated violence due to their gender identity or sexual orientation.<sup>29</sup> In nearly 80 countries, repressive laws criminalizing same-sex relations expose individuals to imprisonment and mistreatment.<sup>30</sup> Many of these issues go unnoticed and legal frameworks fail to hold aggressors accountable for homophobic and other hate crimes. Furthermore, despite reports of persecution and abuse taking place during transit and in host countries, accurate information is hard to gather as LGBTQI refugees and migrants make attempts to hide their sexual orientation or gender identities from aid organizations out of fear.<sup>31</sup>

Even though UNHCR Guidelines on International Protection and the Yogyakarta Principles on Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (SOGI) affirm that people fleeing persecution on the grounds of SOGI can qualify as refugees<sup>32</sup>, neither global compact speaks to the need for protection of LGBTQI people within migrant and refugee populations. Instead, protection is sometimes granted within a limited framework because refugee claims grounded in SOGI are categorized as issues under the 'membership of a particular social group' category, and often no need for protection is recognized at all.<sup>33</sup>

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<sup>29</sup> U.S. Department of State, *Protecting and Assisting LGBT Refugees*, <https://www.state.gov/j/prm/policyissues/issues/c62979.htm> (last visited Oct. 24, 2018); Human Rights First, *Persistent Needs and Gaps: The Protection of LGTBI Refugees* (Sept. 9, 2010), <https://www.humanrightsfirst.org/resource/persistent-needs-and-gaps-protection-lgbti-refugees>.

<sup>30</sup> U.S. Department of State, *supra* note 24.

<sup>31</sup> UNHCR, *Emergency Handbook: Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Persons*, <https://emergency.unhcr.org/entry/113891/lesbian-gay-bisexual-transgender-and-intersex-lgbti-persons#1,1532639108422> (last visited Oct. 24, 2018).

<sup>32</sup> UNHCR, Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention AND/OR Its 1967 Protocol Relation to the Status of Refugees, U.N. Doc. HCR/GIP/12/09, (Oct. 23, 2012), <http://www.unhcr.org/509136ca9.pdf>; Yogyakarta Principles on Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Principle 23, YOGYAKARTAPRINCIPLES.ORG. (Nov. 10, 2017), [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf). (originally issued March 2007 by International Panel on Experts in the International Human Rights Law on Sexual Orientation and Gender Identity).

<sup>33</sup> Guidelines on International Protection No. 9:, *supra* note 39.

This resolution encourages nation states active in implementing the global compacts to specifically recognize LGBTQI refugees' and migrants' unique needs. As with any other vulnerable group within the migrant and refugee communities, they are at risk of exploitation and they deserve to be protected from abuse and mistreatment. Specific laws encouraging their protection would close the gap between some protection and comprehensive protection.

## **VI. Establish a right to protection from xenophobia, discrimination and pervasive bias, and counter any associated stigma through evidence-based conversation and decision making around migration and displacement issues.**

This resolution urges states to positively influence public discourse surrounding migrants and refugees. With the rise of extremism and elevated levels of violent discourse around migrants and refugees becoming a cause for concern, xenophobic rhetoric has shaped many of the conversations, policies and debates on whether states should or should not take in refugees and migrants. States should not only condemn violence against refugees and migrants, but laws regarding hate crimes should also be implemented and enforced. States should counter any stigma and discrimination that arises through evidence-based public conversation and decision making

Several key international treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the 1951 Refugee Convention and the Outcome Document of the Durban Review Conference, outline specific obligations and commitments of states to protect refugees, asylum seekers, migrants, and other persons of concern from discrimination and bias-motivated violent acts.<sup>34</sup> In the Global Compact for Safe, Orderly and Regular Migration, member states reaffirmed their commitment to eliminating all forms of discrimination, including xenophobia.<sup>35</sup> However, the commitments in these compacts are non-binding, and states choose voluntarily to honor the stipulated protections for refugees and migrants.

## **Conclusion**

States have the primary obligation to protect migrants and refugees from discrimination and bias. Even with international laws providing guidance on the issue, their direct actions

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<sup>34</sup> Human Rights First, *Combating Xenophobic and Bias-Motivated Violence – A Framework for Action*, 2 (2011), [https://www.humanrightsfirst.org/wp-content/uploads/pdf/UNHCR\\_Blueprint.pdf](https://www.humanrightsfirst.org/wp-content/uploads/pdf/UNHCR_Blueprint.pdf).

<sup>35</sup> United Nations, General Assembly, Global, *Compact for Safe, Orderly and Regular Migration*, (July 13, 2018), [https://refugeesmigrants.un.org/sites/default/files/180713\\_agreed\\_outcome\\_global\\_compact\\_for\\_migration.pdf](https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf).

and policies will influence how much effective implementation will take place.<sup>36</sup> Refugee and migrant populations are particularly vulnerable to discrimination and bias-motivated violence because they are seen as outsiders in their host countries. Xenophobia and bias-motivated violence can result in deaths, serious injuries, mass displacement, and a range of other protection challenges.<sup>37</sup> The lack of formal, permanent, or even temporary legal status for migrants and refugees negatively affects their ability to defend and access basic human rights. States should take active steps to promote protection of refugees and migrants, including laws regarding hate crimes. They should also work to counter any stigma and discrimination by engaging in evidence-based and respectful public conversation and decision making.

Respectfully submitted,

Paulette Brown  
Member, ABA ROLI Board  
January 2019

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<sup>36</sup> *Combating Xenophobic and Bias-Motivated Violence*, *supra* note 24; U.N. High Commissioner for Refugees, *UNHCR's contribution to the Secretary-General's report with recommendations on global trends in the fight against racism, racial discrimination, xenophobia, and related intolerance to the General Assembly for its 66th session pursuant to A/RES/64/148*, (June 2011), <http://www.unhcr.org/refworld/pdfid/4e02d33f2.pdf>.

<sup>37</sup> *Combating Xenophobic and Bias-Motivated Violence*, *supra* note 24.

### General Information Form

#### **1. Summary of Resolution.**

This resolution encourages states and entities working to implement the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration to take additional steps to address root causes of displacement and forced migration, develop policies that discourage the criminal prosecution of migrants and refugees, encourage the accountable use of prosecutorial discretion, and protect migrants and refugees from bias and discrimination regardless of gender, race, sexual orientation, sexual identity, national origin, and religion.

#### **2. Approval by Submitting Entity.**

This Resolution was approved by the Rule of Law Initiative Board through a vote of its members on November 12, 2018.

#### **3. Has this or a similar Resolution been submitted to the House or Board previously?**

No. A previous version of this Resolution and Report was withdrawn before submission to the House (August 2018).

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

This resolution is consistent with, and expands upon, several policies previously adopted by the ABA on issues relating to immigration, human rights, and antidiscrimination.

Supports multinational cooperation and consultation in the formulation of national laws and policies relating to migration and urges the United States government to enter into regional and international discussions and agreements governing the flow of workers. 06A123B

Opposes legislation creating a crime based merely on an alien's undocumented presence (e.g., entering the country without documents or inspection or overstaying a lawful visa). 04M105

Reaffirms support for the establishment of laws, policies, and practices that ensure access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge. Opposes the use of religion or nationality as a basis for barring an otherwise eligible individual from entry to the United States 17M10B

Supports adherence to the United States' international law obligations, including the 1967 Protocol Relating to the Status of Refugees of the 1951 Convention, the International Covenant on Civil and Political Rights, and international bilateral

agreements and treaties. Facilitate a transparent, accessible, fair, and efficient system of administering the immigration laws and policies of the United States, including the adjudication of visa applications, applications for immigration benefits, and applications for entry to the United States. 17M10C

Supports the enactment of legislation and the implementation of public policy to enable a United States citizen or lawful permanent resident who shares a mutual, interdependent, committed relationship with a non-citizen of the same sex to sponsor that person for permanent residence in the United States. 09M108

Recognizes the rights of individuals who are lesbian, gay, bisexual or transgender (LGBT) as basic human rights and condemns laws, regulations, rules and practices that discriminate against them on the basis of their LGBT status. 14A114B

**5. If this is a late Report, what urgency exists which requires action at this meeting of the House?**

N/A

**6. Status of Legislation (if applicable).**

N/A.

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

ABA ROLI will post the text of the resolution and continue outreach efforts on social media to publicize and support awareness of the issues the resolution addresses.

**8. Cost to the Association (both indirect and direct costs).**

No ABA funds are necessary for the implementation of this Resolution.

**9. Disclosure of Interest.**

No conflicts of interest are known.

**10. Referrals.**

An earlier draft of this Resolution was referred to the following ABA entities in September 2018: Commission on Immigration, Section on International Law, Center for Human Rights, Civil Rights and Social Justice, and Commission on Sexual Orientation and Gender Identity. ABA ROLI reached out to the Commission on Women in the Profession and the Commission on Racial and Ethnic Diversity in the Profession for their feedback. They were supportive of the resolution.

**11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)**

Linda Bishai  
ABA Rule of Law Initiative  
1050 Connecticut Avenue NW  
Washington, DC 20036  
202-662-1967  
Linda.bishai@americanbar.org

**12. Contact Name and Address 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.)**

Paulette Brown, ABA ROLI Board  
  
Morristown, NJ 07960-1602  
  
Email: Paulette.Brown@lockelord.com

## Executive Summary

### **1. Summary of Resolution.**

This resolution encourages states and entities working to implement the Global Compact on Refugees and the Global Compact for Migration to address root causes of displacement and forced migration, develop policies that discourage the criminal prosecution of migrants and refugees but encourage the accountable use of prosecutorial discretion, and protect migrants and refugees from bias and discrimination on the basis of gender, race, sexual orientation, sexual identity, national origin, and religion.

### **2. Summary of the issue which the Resolution addresses.**

Although more public policy attention has been given to migrants and refugees through the Global Compacts and other international law standards, many individuals who are forced to leave their homes due to conflict, persecution and human rights violations still endure harsh and inhumane treatment in country of origin, in transit, and in countries of destination. Those forced to flee are often victims of xenophobic hate crimes, and many countries do not recognize rights and protections for LGBTI and internally displaced persons. In addition, asylum seekers are still being persecuted while seeking safety. Given the scale of the crisis and the implications these policies would have on migration and refugee policies, it is imperative that states and entities working to implement the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration support and encourage reforms that protect all refugees and migrants.

### **3. An explanation of how the proposed policy position will address the issue.**

This resolution would have the ABA encourage states and entities working to implement the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration to better protect refugees and migrants. Specifically, the recommendation calls for states to address the root causes of displacement and forced migration by supporting transitional justice mechanisms which would address the drivers of violence in fragile communities. Policies should be developed to discourage the criminal prosecution of asylum seekers, and prosecutorial discretion should be encouraged as an enforcement tool. This policy also seeks to ensure that internally displaced persons and LGBTI people are given rights and protections consistent with internationally recognized human rights treaties. Finally, this policy would help call attention to xenophobic rhetoric that has surrounded conversation concerning migrants and refugees. Evidence-based conversation and decision making should be promoted to counter hateful rhetoric.

### **4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified.**

We are unaware of any minority views or opposition to this Resolution.



**AMERICAN BAR ASSOCIATION**  
**HOUSE COMMITTEE ON CREDENTIALS AND ADMISSIONS**

**Recommendation regarding request from the California Lawyers Association for Representation in the House of Delegates**

The Credentials and Admissions Committee recommends that the California Lawyers Association be admitted into the ABA House of Delegates as the secondary state bar of California and that it receives five of the State Bar of California's current eleven delegates as follows:

- At the conclusion of the 2019 Annual Meeting, the CLA will be eligible to certify three of the State Bar of California's current delegate seats for two-year terms that would expire at the conclusion of the 2021 Annual Meeting;
- At the conclusion of the 2020 Annual Meeting, the CLA will be eligible to certify two of the State Bar of California's current delegate seats, including its one young lawyer seat, for two-year terms that would expire at the conclusion of the 2022 Annual Meeting.



## REPORT

In October 2017, California enacted a new law, Senate Bill 36, mandating that the State Bar of California (“SBC”) spin off its sections into an independent voluntary bar association, while retaining its licensing and discipline functions. The statute directed the SBC to enter into a memorandum of understanding with the new organization regarding the terms of separation and the transfer of the functions and activities of the existing bar sections.

Under that memorandum of understanding, the former Sections of the SBC became the California Lawyers Association (“CLA”) on January 1, 2018. The California Young Lawyers Association (“CYLA”) is part of the CLA (*See Appendices I*). The CLA’s stated mission is, “Promoting excellence, diversity and inclusion in the legal profession, and fairness in the administration of justice and the rule of law.”

On October 26, 2018, the CLA’s President and Vice President, both of whom are ABA members, wrote the Chair of the House of Delegates Credentials and Admissions Committee petitioning for the CLA’s admission to House. The petition proposed that the House admit the CLA as the secondary state bar in the California Delegation and allocate to it five of the eleven delegate seats currently held by the SBC. One of the CLA’s seats would be for a young lawyer delegate. The petition included a copy of the CLA’s bylaws.

The petition reported that the CLA has approximately 50,000 members, and an additional 50,000 CYLA members. It emphasized that the CLA had placed a high priority on developing a productive relationship with the ABA and pledged the organization’s support for the ABA’s goals of furthering the practice of law, enhancing justice, diversity, and the rule of law, and protecting the public. The CLA stated that its admission to the House would facilitate a close relationship and benefit both organizations.

On October 30, 2018, the SBC’s Executive Director and the President of its Board of Trustees wrote the Chair of the Credentials and Admissions Committee to “support wholeheartedly” the CLA’s petition for representation in the House, including the proposal to transfer five of the SBC’s eleven delegates to the CLA (*See Appendices II*). The letter stated that, “Such a split of the state-wide delegation recognizes that both the State Bar and CLA should be represented in the American Bar Association House of Delegates to ensure full and fair representation of the interests of California attorneys on the range of issues that span both organizations.” The letter also noted that the SBC “has been impressed with CLA’s accomplishments and outreach in its first year and looks forward to collaborating with CLA going forward on a range of initiatives, including in the American Bar Association House of Delegates.”

The House Committee on Credentials and Admissions met by conference call to review the CLA’s petition and credentials. The Committee determined that three other states have two recognized state bars (District of Columbia, North Carolina, and Virginia). In all three instances, the mandatory state bar and the secondary state bar shared the

delegates allocated to the state bar under Section 6.4 of the ABA's Constitution. Based on the CLA's 50,000 active and resident lawyer members of which 10,032 are ABA members, the Committee determined that the CLA meets the threshold set by Section 6.4 for state bar representation in the House. Therefore, the Committee recommends that the House approve the CLA's request to be admitted into the House as the secondary state bar of California and that it receive five of the SBC's current eleven delegates as follows:

- At the conclusion of the 2019 Annual Meeting, the CLA will be eligible to certify 3 of SBC's current delegate seats for two-year terms that would expire at the conclusion of the 2021 Annual Meeting;
- At the conclusion of the 2020 Annual Meeting, the CLA will be eligible to certify 2 of SBC's current delegate seats, including its one young lawyer seat, for two-year terms that would expire at the conclusion of the 2022 Annual Meeting.

This recommendation would allow the CLA to have its own delegates representing the organization in the House. It would increase the number of state bar associations represented in the House, but would not increase the number of seats in the California delegation.

October 26, 2018

**Via Express Mail and Electronic Mail**

Eileen Letts, Chair and Members of Credentials and Admissions Committee  
American Bar Association House of Delegates  
321 North Clark Street  
Chicago, Illinois 60654

Re: *Petition for Admission of California Lawyers Association to American Bar Association House of Delegates and Split of California Delegates Currently Allocated to the State Bar of California*

Dear Chair Letts and Members of the Credentials and Admissions Committee of the American Bar Association House of Delegates:

Pursuant to California Senate Bill 36 (“SB 36”), the Sections of the California State Bar and the California Young Lawyers Association (“CYLA”) were split off from the State Bar of California, becoming the California Lawyers Association (“CLA”). In essence, the State Bar retained its licensing and discipline functions while turning over its former professional association functions to the CLA as of January 1 of this year.

Even prior to separation, the State Bar had agreed in a Memorandum of Understanding to support representation of the CLA in the American Bar Association House of Delegates. And post-separation, the CLA has been hard at work rebuilding ties with the American Bar Association, bringing a deep appreciation for the work of the American Bar Association and a desire to contribute meaningfully to that work as the second largest bar association in the Nation.

As the first President and Vice-President of the CLA, it is our distinct pleasure to petition the American Bar Association House of Delegates for representation in the House pursuant to an agreement reached with, and with the support of, the California State Bar. Per that agreement, five of the eleven delegates appointed by the State Bar of California would be transferred to the CLA, including the young lawyer delegate. By petitioning to split the delegation between the California State Bar and the CLA, California’s interests, and ability to contribute meaningfully to the important work of the American Bar Association, will be preserved and enhanced. As always, the California Delegation would continue to be represented by the elected State Delegate, Laura V. Farber, who supports this petition.

**I. INTRODUCTION**

Launching on January 1, 2018 in accordance with SB 36, the CLA was formed pursuant to that legislation as a new 501(c)(6). The CLA has approximately 50,000 members and an additional 50,000 CYLA members. We have a mission of promoting excellence, diversity and inclusion in the legal profession, and fairness in the administration of justice and the rule of law.

## **II. HISTORY AND ACTIVITIES OF THE CLA**

Post separation, we have reinvigorated activities that the Sections conducted previously, to re-build our close ties with different organizations, and to work closely with the Chief Justice of the California Supreme Court.

### *A. Rebuild and Deepen Ties with State, Local, and Affinity Bar Organizations*

Early on, we continued to work closely with the California State Bar, and establish lines of communication, to support its goal of public protection and to fulfill our own mandate of providing low-cost and no-cost CLE education. In particular, Emilio was appointed to be the first liaison to the California State Bar, attending the California State Bar's Board of Trustees meeting, reporting back to the CLA, and helping develop points of collaboration. In conjunction with that role, Emilio worked with the California State Bar to reach the agreement by which the California State Bar is supporting this petition.

Furthermore, we stepped into the role previously undertaken by the California State Bar to increase the dialogue and collaboration among different local and affinity bar organizations in California. To that end, CLA hired Ellen Miller-Sharp, who was the previous Executive Director of the San Diego County Bar Association and previously worked for the American Bar Association and the California State Bar, as our new Director of Bar Collaboration and Special Initiatives. We envision that CLA will facilitate bringing together the various metropolitan, specialty, and affinity bar organizations in California to offer education, generally collaborate with each other to meet the highest standards in the profession, and provide thoughtful advocacy, including through the American Bar Association House of Delegates.

### *B. Assist the California Legislature and the Initiatives of the Chief Justice of the California Supreme Court in Providing Thought Advocacy and Support*

For decades, many of the CLA Sections have provided substantive and technical support to the California Legislature in their state practice areas. The CLA not only has continued that support but also has engaged in thoughtful and general advocacy on legislation of concern to the legal profession as a whole in California involving the practice of law and the administration of justice. For example, just this year, CLA supported legislative efforts to bring more international arbitrations to California as a way of deepening the practice of international law consistent with the protection of the public and promoting California as an international hub for arbitration.

CLA is also moving forward to support the initiatives and legislative agenda of the Chief Justice of the California Supreme Court and the California Judicial Council to ensure the smooth running of the court system and the further development of the legal profession and the rule of law. For example, CLA was invited by the Chief Justice to participate in the statewide Civic Education initiative, originally launched in 2013, to give students the knowledge, skills, and interest necessary to participate meaningfully in civic life.

In this respect, CLA looks to the American Bar Association, and its nationwide activities with Congress and the judiciary, as a model for its own efforts on the state level. And CLA participation in the American Bar Association House of Delegates would be an important complement to our providing thoughtful advocacy on initiatives of import to the profession as a whole in California.

### *C. CLA Initiatives*

CLA has launched three association-wide initiatives, consistent with its mission statement, and all supported robustly by an army of volunteers and the new CLA Director of Bar Collaboration and Special Projects. Those initiatives are as follows:

1. Diversity, Equity, & Inclusion.
2. Access to Justice & Pro Bono.
3. Civic Education (discussed above).

With regard to diversity, CLA is working on further diversity in its own leadership and in the legal profession as well as exploring how it can support and further diversity in the pipeline for law school students, thereby best serving Californians who need legal services. And with regard to Access to Justice and Pro Bono, CLA has been engaged in active dialog with stakeholders across the state, as well as the State Bar and the American Bar Association, to determine how CLA and its 100,000 members can support and deepen efforts to ensure public access to critical legal services.

### *D. General CLA and Specific Section Educational and Networking Activities*

The CLA, and its Sections, conduct general and specific educational and networking activities of great import to the practice of law and protection of the public. The CLA just finished its Annual Meeting in San Diego, the theme of which was *Shaping the Future for all California Lawyers*, offering outstanding CLE programming, two keynote luncheons, awards, receptions and more, including the participation of the American Bar President, Bob Carlson.

In 2019, the CLA will not only have its second Annual Meeting in Monterey (as the CLA as it has held Annual Meetings under the California State Bar for over 80 years) but also will hold its first Solo and Small Firm Summit under CLA aegis (though the Summit has a long history under the California State Bar). The Summit will present programming most relevant to solo and small firms across the state, with an expected emphasis on technology-based practices, issues, and solutions. As part of the Summit, CLA used the connections Emilio developed at the ABA's own Annual Meeting to initiate a discussion about the participation of the ABA Cybersecurity Legal Task Force in the Summit and is working to develop other partnerships to enhance the success of the Summit.

The individual Sections have continued to conduct specific educational and networking activities post-separation for the benefit of their members and to meet the mission of CLA itself. A few examples of the myriad of activities conducted by the individual Sections follow:

1. The Environmental Law Section is holding its flagship event this month in Yosemite, which is the largest and most prestigious gathering in California of leaders in environmental, land use, and natural resources law.
2. The International Law Section successfully invited foreign law delegations from Malaysia; Vietnam; Marseille, France; Osaka, Japan; and Mexico to attend the Annual Meeting and exchange diverse viewpoints as to the practice of law and the furtherance of the rule of law.
3. The Law Practice Management and Technology Section held its first ever in-person Legal Technology Summit in San Diego, including the attendance of Associate General Counsel for Microsoft, and co-sponsoring legal technology conferences with local bar associations and law schools.
4. The Public Law Section hosted its third annual Public Records and Open Meeting Law at UCLA School of Law.
5. The Taxation Section held a meeting at the Eagle Lodge to work with state taxing agencies to identify technical areas of the law that require clarification for improvement to benefit taxpayers and tax administration in California and will be holding its own Annual Meeting in November of 2018.
6. The Trusts and Estates Section held an Educating Seniors Program, which provides critical information to attorneys, judges, medical experts, and senior organizations so as to help dependent adults to avoid frauds and scams. It is working with local bar associations to replicate this program in different counties.

Other sections with very active programs and activities include Intellectual Property, Labor & Employment, Solo & Small Firm, Criminal Law, Workers Compensation, and the California Young Lawyers Association. Emilio had the pleasure of attending the American Bar Association's Section Officers Conference on behalf of CLA to further develop ties between CLA's Sections and the individual Sections of the American Bar Association. CLA strongly believes that membership in the American Bar Association's House of Delegation will further allow the development of the Section-to-Section ties.

### **III. PETITION FOR REPRESENTATION IN THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES**

CLA places great importance on developing its relationship with the American Bar Association. Together, we can further the practice of law, enhance justice, diversity, and the rule of law, and protect the public. To that end, CLA greatly desires representation on the policy-making body of the American Bar Association, the House of Delegates and looks forward to playing a constructive role in the debate and passage of resolutions on the myriad range of issues impacting the profession as well as the governance of the American Bar Association itself. *See, e.g.,* American Bar Association, Resolutions with Reports to the House of Delegates, 2018 Annual Meeting (Aug. 6-7, 2018), [https://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/ebook-of-resolutions-with-reports/2018\\_annual\\_electronic\\_resolution\\_book.pdf](https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/ebook-of-resolutions-with-reports/2018_annual_electronic_resolution_book.pdf). Accordingly, pursuant to its agreement with the State Bar of California, the CLA submits this Petition to the House of Delegates to re-allocate five out of the eleven delegates allocated to the California State Bar to CLA.

Eileen Letts, Chair and Members of Credentials and Admissions Committee  
American Bar Association House of Delegates  
October 26, 2018  
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Accompanying the email transmission of this petition is a spreadsheet with the list of CLA members, and their State Bar numbers, of CLA (excluding CYLA), which CLA understands will be reviewed confidentially by staff of the American Bar Association for compliance with the rules governing the apportionment of representatives in the House of Delegates. If there are any questions, please do not hesitate to contact us.

Sincerely,

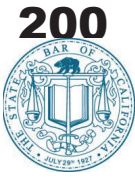


Heather Linn Rosing  
President, California Lawyers Association



Emilio Varanini  
Vice-President and American Bar Association  
Liaison, California Lawyers Association

cc: Leah T. Wilson, Executive Director, California State Bar  
Laura Farber, California State Delegate



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## The State Bar of California

## APPENDIX II

180 Howard Street, San Francisco, CA 94105

Tel: 415-538-2000

October 30, 2018

Eileen Letts, Chair and Members  
Credentials and Admissions Committee  
American Bar Association House of Delegates  
321 North Clark Street  
Chicago, Illinois 60654

*Re: Petition for Admission of California Lawyers Association to American Bar Association House of Delegates and Split of California Delegates Currently Allocated to the State Bar of California*

Dear Chair Letts and Members of Credentials and Admissions Committee of American Bar Association House of Delegates:

The State Bar of California has been honored to be able to send 11 delegates to the American Bar Association House of Delegates and to support the American Bar Association House of Delegates in its very important work of protecting and promoting the profession, the rule of law, and the fair administration of justice. The State Bar of California transferred its sections and the California Young Lawyers Association from the State Bar to the new California Lawyers Association (CLA) effective this past January 1. We have been impressed with the efforts of CLA to energize its membership and play a critical role in the advancement and education of the profession.

It is thus our great pleasure to support wholeheartedly the petition of CLA for admission to the American Bar Association and for the transferring of 5 out of 11 of our delegates over to CLA, including the young lawyer delegate. Such a split of the state-wide delegation recognizes that both the State Bar and CLA should be represented in the American Bar Association House of Delegates to ensure full and fair representation of the interests of California attorneys on the range of issues that span both organizations. The State Bar has been impressed with CLA's accomplishments and outreach in its first year and looks forward to collaborating with CLA going forward on a range of initiatives, including in the American Bar Association House of Delegates.

Sincerely,

Jason P. Lee  
Chair, Board of Trustees

Leah T. Wilson  
Executive Director

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