AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION ASSEMBLY
Friday, August 9, 2019
San Francisco, California
1:00pm – 4:00pm

**Fit2Practice Guided Meditation**
*Christina Sava, Member Resources Team Member, San Francisco, CA*

**Social Media Engagement Presentation**
*Chris Jennison, ABA YLD Resolutions Team Member and Law Student Outreach Director, Silver Spring, MD*

**OPENING & INTRODUCTORY REMARKS**

**Call to Order**
*Daiquiri Steele, YLD Assembly Speaker, New Orleans, LA*

**Presentation of the Colors**
*San Francisco Police Department Honor Guard*

**National Anthem**
*Negeen Sadeghi-Movahed, ABA Law Student Division Chair, Washington, DC*

**Pledge of Allegiance**
*Lacee Ecker, Allegheny County Bar Association Young Lawyers Division Immediate Past Chair, Pittsburgh, PA*

**Invocation**
*Victor Flores, Texas Young Lawyers Association President, Plano, TX*

**Credentials Report**
*Jamie Davis, YLD Assembly Clerk, Mission, KS*

**Explanation of Assembly Mission, Delegate Duties and Standing Rules; Adoption of the Assembly Standing Rules and the Assembly Agenda**
*Daiquiri Steele, YLD Assembly Speaker, New Orleans, LA*

**Presentation of the Consent Calendar**
*Daiquiri Steele, YLD Assembly Speaker, New Orleans, LA*

List of Resolutions on Consent Calendar:

**HOD Resolution 10B**— (Submitted by the Colorado Bar Association, Montana Bar Association, Tort Trial & Insurance Practice Section, Solo, Small Firm and General Practice Division, and Standing Committee on the Delivery of Legal Services)
Urges Congress, state, local, territorial, and tribal legislatures to enact legislation and appropriate adequate funding to ensure equal access to justice for Americans living in rural communities by assuring proper broadband access is provided throughout the United States
HOD Resolution 102 (Submitted by the Law Student Division)  
Urges state, territorial, tribal courts and law schools to explore the feasibility of implementing a “Pro Bono Scholars”-style program in their respective jurisdictions to allow law students, in the final semester of their third year of law school, to obtain a full-time, externship placement providing supervised pro bono services and to allow these scholars to take the February Bar examination (if offered) during their final semester of law school.

HOD Resolution 106 (Submitted by the Commission on Women in the Profession)  
Urges all legal employers to implement and maintain policies and practices to close the compensation gap between similarly situated male and female lawyers.

HOD Resolution 114 (Submitted by the Commission on Domestic and Sexual Violence; Commission on Domestic and Sexual Violence; Criminal Justice Section; and Civil Rights and Social Justice)  
Urges legislatures and courts to define consent in sexual assault cases as the assent of a person who is competent to give consent to engage in a specific act of sexual penetration, oral sex, or sexual contact, to provide that consent is expressed by words or action in the context of all the circumstances, and to reject any requirement that sexual assault victims have a legal burden of verbal or physical resistance.

HOD Resolution 115A (Submitted by the Section of Civil Rights & Social Justice; National Native American Bar Association; and Commission on Homelessness and Poverty)  
Urges Congress to ensure that the health care delivered by the Indian Health Service (IHS) is exempt from government shutdowns and federal budget sequestrations on par with the exemptions provided to the Veterans Health Administration.

HOD Resolution 115B – (Submitted by the Section of Civil Rights and Social Justice)  
Urges Congress, states, and territories to enact legislation that would provide stronger remedies and protections against pay discrimination on the basis of sex (including gender and gender identity), race and ethnicity to help overcome the persistent barriers that continue to impede the achievement of pay equity.

HOD Resolution 115E – (Submitted by the Section of Civil Rights and Social Justice and Commission on Sexual Orientation and Gender Identity)  
Urges the United States Congress, and local, state, territorial and tribal governments to enact legislation or regulations that require all law enforcement entities to meet training standards set by the Commission on Police Officer and Standard Training (POST) similar to California’s legislation, AB 2504, Peace Officer Training.

HOD Resolution 116 (Submitted by the Section of Litigation)  
Urges courts, as well as their respective bar associations, to carefully review their policies on use and admittance of cellphones in courthouses, to ensure meaningful access to our judicial system, balancing the security risks posed by cellphone use with the needs of litigants, and in particular, those who are self-represented or of lower income.

HOD Resolution 118 (Submitted by the Commission on Youth at Risk, Commission on Homelessness and Poverty; Section of Litigation)
Emphasizes the right of parents and children to family integrity and family unity and the maintenance of family connectedness if a child does need to enter foster care.

Constitutional Amendment 11-3 - (Submitted by Anthony Ciolli)
Amends §6.4(a) to allow individuals who meet a state’s definition of young lawyer to serve as a young lawyer member of the House of Delegates for that state.

DEBATE HOD Resolution 111 – Climate Change (Submitted by the Environment, Energy & Resources Section; Law Student Division; International Law Section; Science & Technology Law Section)

Urges the United States Government, state, territorial, and tribal governments to take a leadership role in addressing the issue of climate change and urges Congress to enact and the President to sign appropriate climate change legislation.

Pro: Casey Payton, District Representative for District 10, St. Thomas, VI

Con: Kristina Bilowus, Vice-Chair, ABA YLD Women in the Profession Committee Chair and ABA YLD Scholar, Novi, MI

UPDATED CREDENTIALS REPORT

Jamie Davis, YLD Assembly Clerk, Mission, KS

PRESENTATION

Tommy Preston, ABA YLD Chair, North Charleston, SC

DEBATE HOD Resolution 115F – (Submitted by the Section of Civil Rights and Social Justice and Commission on Women in the Profession)

Urges federal, state, local, territorial, and tribal governments to refrain from imposing upon reproductive healthcare providers requirements that are not medically necessary or have the purpose or effect of burdening women’s access to such services.

Pro: Rachel Blunk, YLD Liaison to the Sexual Orientation and Gender Identity Commission, Greensboro, NC

Con: TBD

ROSNER & ROSNER YOUNG LAWYERS PROFESSIONALISM AWARD

Presented by: Jamie Davis, YLD Assembly Clerk, Mission, KS
DEBATE  

YLD Resolution 19-5YL (Submitted by the YLD Government, Military & Public Sector Lawyers Committee)

Urges agencies of the United States federal government to include in any exit interview with a departing employee a question about the impact of federal government shutdowns on the employee’s decision to leave the agency, and urges Congress to request a study on the impact of federal government shutdowns on 1) the longevity of the current federal legal workforce, 2) the ability of agencies to hire and retain attorneys, and 3) the decision of recent law school graduates to apply for legal work in federal agencies.

Pro:  Cameo Joseph, ABA YLD Scholar, Greenville, SC

Con:  TBD

OUTSTANDING YOUNG MILITARY SERVICE LAWYER AWARDS

Captain Fabiani A. Duarte, U.S. Air Force, Ramstein Air Base, Germany

Award Recipients:

U.S. Marine Corps:  Captain Nicole Rimal  
U.S. Navy:  Lieutenant James Howland  
U.S. Army:  Major Henry Wayne Janoe  
U.S. Coast Guard:  Lieutenant Commander Anthony DeStefano  
U.S. Air Force:  Major Joshua Starr

INTRODUCTION OF UNCONTESTED CANDIDATES FOR OFFICE

Secretory:  Choi Portis, Detroit, MI  
Assembly Clerk:  Christopher Jennison, Silver Spring, MD  
Board of Governors Nominee:  Shayda Le, Portland, OR  
YLD Representative to the ABA House of Delegates:  Daiquiri Steele, New Orleans, LA and Sheila Willis, Columbia, SC

PRESENTATION

Shenique Moss, ABA YLD Nominating Committee Representative, Detroit, MI

PRESENTATION

Jamie Davis, ABA YLD Assembly Clerk, Mission, KS

RECESS
AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION ASSEMBLY
Saturday, August 10, 2019
San Francisco, California
9:00am – 12:00pm

Fit2Practice Guided Meditation
Christina Sava, Member Resources Team Member, San Francisco, CA

Social Media Engagement Presentation
Chris Jennison, ABA YLD Resolutions Team Member and Law Student Outreach Director, Silver Spring, MD

OPENING & INTRODUCTORY REMARKS

Call to Order
Daiquiri Steele, YLD Assembly Speaker, New Orleans, LA

Updated Credentials Report
Jamie Davis, YLD Assembly Clerk, Mission, KS

PRESENTATION

Bob Carlson, ABA President, Butte, MT

To Be Introduced by: Andrew VanSingel, Disaster Legal Services Team Special Advisor, Chicago, IL

DEBATE

YLD Resolution 19-6YL (Submitted by the YLD HOD Representatives)
Amends the ABA YLD’s bylaws to make each state’s designated young lawyer representative to the ABA House of Delegates pursuant to Article 6.4(a) of the ABA Constitution, or his or her proxy, a delegate to the ABA YLD Assembly.

Pro: Lacy Durham, ABA YLD House of Delegates Representative, Dallas, TX

Con: Shasta Inman, ABA YLD Scholar and New Mexico YLD Vice Chair, Albuquerque, NM

PRESENTATION

William R. Bay, ABA House of Delegates Chair, St. Louis, MO

To Be Introduced By: Rene Morency, Chair-Elect, Bar Association of Metropolitan St. Louis, Young Lawyers Division, St. Louis, MO
PRESENTATION

Danielle Borel, 2019 ABA YLD Fall Conference Co-Chair, Baton Rouge, LA

Graham Ryan, 2019 ABA YLD Fall Conference Co-Chair, New Orleans, LA

DEBATE    YLD Resolution 19-7YL (Submitted by the Kansas Bar Association Young Lawyers Section; New Jersey State Bar Association Young Lawyers Division; New York State Bar Association Young Lawyers Section)

Amends the definition of a young lawyer to mean a lawyer who has been admitted to practice in his or her first bar within the past ten years without regard to age.

   Pro:    Rick Davis, District Representative for District 22, Kansas City, MO

   Con:    Jay Ray, Former ABA YLD Chair, Dallas, TX

PRESENTATION

Judy Perry Martinez, ABA President-Elect, New Orleans, LA

To Be Introduced by: Felicia Hamilton, Credentials Board Member, Shreveport, LA

SPECIAL ORDER OF BUSINESS – PASSING OF THE GAVEL TO INCOMING YLD CHAIR

Closing Remarks by Tommy Preston, YLD Chair, North Charleston, SC

Passing of the Gavel to Incoming YLD Chair Logan Murphy, Tampa, FL

SPECIAL ORDER OF BUSINESS – PASSING OF THE GAVEL TO INCOMING YLD ASSEMBLY SPEAKER

Closing Remarks by Daiquiri Steele, YLD Assembly Speaker, New Orleans, LA

Passing of Gavel to Incoming YLD Assembly Speaker, Jamie Davis, Mission, KS

ADJOURNMENT
RESOLUTION

RESOLVED, that the American Bar Association urges agencies of the United States federal government to include in any exit interview with a departing employee a question about the impact of federal government shutdowns on the employee's decision to leave the agency, and

FURTHER RESOLVED, that the American Bar Association urges Congress to request a study on the impact of federal government shutdowns on 1) the longevity of the current federal legal workforce, 2) the ability of agencies to hire and retain attorneys, and 3) the decision of recent law school graduates to apply for legal work in federal agencies.
REPORT

Background
This most recent partial government shutdown was the longest in U.S. history and directly impacted about 800,000 federal employees. As a result, many federal government attorneys are questioning their long-term commitment to federal government work. This resolution and report suggest the importance of why Congress should study the impact of government shutdowns on the federal bar.

History of Government Shutdowns
Prior to 1980, the federal government did not shut down when a lapse in funding occurred. However, a 1980 interpretation of the Antideficiency Act declared that non-essential operations of the federal government were to cease in the event of a funding lapse.¹ Since that 1980 interpretation by then-U.S. Attorney General Benjamin Civiletti, the federal government has had 10 shutdowns in which federal employees were furloughed.

The 1980 shutdown was the first time a funding lapse resulted in furloughed employees. While this lapse only impacted the Federal Trade Commission, the shutdowns of 1981, 1984 and 1986 impacted multiple federal agencies. Each of these shutdowns only lasted a single day. In 1990, all federal agencies were closed due to a lapse in appropriations for three days, but only a few thousand employees were furloughed because the shutdown occurred over Columbus Day weekend. However, in November 1995, the federal government shut down for five days and approximately 800,000 employees were consequently furloughed. Shortly thereafter, a 21-day shutdown occurred from December 16, 1995 to January 6, 1996 and during this time approximately 280,000 employees were prohibited from working and earning their paychecks.

The first shutdown of the new millennium happened in 2013 and lasted from October 1 to October 16. In terms of the number of federal employees that were impacted, 800,000 employees were furloughed and more than 1 million worked without knowing when they would receive payment for their work. In January 2018, the federal government closed for three days which led to approximately 690,000 employees being furloughed. Most recently, parts of the federal government were closed from December 22, 2018 to January 25, 2019 (a record 35 days) resulting in 380,000 furloughed employees.

employees and 420,000 employees that worked without knowing when they would receive payment for their work.

Impact of Shutdowns

The impact of government shutdowns takes a variety of forms. A study of the October 2013 shutdown showed that individuals impacted by that shutdown saw an increase in their debt due to delayed payments. During the most recent government shutdown, the social media hashtag #ShutdownStories highlighted the stories of federal employees who missed mortgage payments, filed unemployment claims, scrambled to make their student loan payments, and waited in food bank lines. The financial impact is especially onerous for attorneys employed by the federal government because law school graduates tend to have higher levels of student loan debt and earn significantly less than their private-sector counterparts.

Government shutdowns also impact mental and emotional health as well as employee morale. The October 2013 shutdown was found to result in “decreased life satisfaction and increased work–family conflict and physical, cognitive, and emotional burnout 5 weeks after the shutdown ended.” This is especially concerning in light of the significant rates of behavioral and mental health problems across the attorney population at large. Federal employees further reported having lower morale and

2 Michael Gelman, et al., How individuals respond to a liquidity shock: Evidence from the 2013 government shutdown, July 26, 2018

3 Amelia Brust, #ShutdownStories trending as feds share furlough frustration, January 8, 2019
https://federalnewsnetwork.com/workforce/2019/01/shutdownstories-trending-as-feds-share-their-furlough-frustration/slide/1/

4 Stephanie Francis Ward, Law schools should make students' borrowing data public, include with admissions offers, report says, February 1, 2018
http://www.abajournal.com/news/article/make_law_school_borrowing_data_public_and_include_it_with_a_dmissions_offers


https://journals.sagepub.com/doi/abs/10.1177/0894845318763880

7 Patrick Krill, et al., The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys, Journal of Addiction Medicine, January/February 2016
https://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx
predicted an increase in employee turnover following the October 2013 shutdown.\textsuperscript{8} In a study of different factors impacting employee retention, respondents expressed a lack of trust in the federal budget process and an uncertainty in when the next shutdown would occur.\textsuperscript{9}

During the most recent shutdown, three major recruiting websites indicated that there was a 10 percent increase in the number of federal employees searching for new jobs.\textsuperscript{10} According to Glassdoor Economic Research, there was a 46 percent decrease in the number of applications for jobs at those federal agencies impacted by the partial shutdown.\textsuperscript{11} Moreover, the popular professional networking site LinkedIn reported that individuals employed by affected agencies indicated a willingness to be contacted about private sector jobs at a rate that was 59 percent higher than those at agencies that were not impacted by the shutdown.\textsuperscript{12} During this time, the website USAJobs.gov saw 22.5 percent fewer average daily visits.\textsuperscript{13} Sixty-seven percent of federal employees who used ZipRecruiter to look for work identified the shutdown as a reason for seeking private sector work.\textsuperscript{14}

**Federal Workforce Trends**

These numbers coming out of the 2018-2019 shutdown are particularly concerning when considered in light of the aging federal workforce and difficulties in the acquisition and retention of new federal employees. Approximately one-fourth of the federal workforce is older than 55 and only 17 percent of the workforce is younger than 35.\textsuperscript{15} In the private sector, about 40 percent of the workforce is younger than 35.\textsuperscript{16}

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\textsuperscript{9} Id.


\textsuperscript{11} Id.

\textsuperscript{12} Id.

\textsuperscript{13} Id.


\textsuperscript{15} Id.

\textsuperscript{16} Id.
years, the federal government has had difficulty in hiring and retaining new employees as demonstrated by a 2015 study by Accenture.\textsuperscript{17} According to the study, 64 percent of public sector employers reported trouble attracting and retaining new talent.\textsuperscript{18} This data is further underscored by statistics from the Bureau of Labor Statistics (BLS) which generally show a steady uptrend in the number of separations from federal government employment from 2014 to 2018.\textsuperscript{19}

**Attorneys in Federal Government**

According to BLS, there were approximately 792,000 people employed as attorneys in 2016.\textsuperscript{20} As of March 2016, there were more than 37,000 attorneys working for a federal executive or independent agency in attorney positions.\textsuperscript{21} Approximately 12,000 individuals fill administrative law judge (ALJ) and administrative judge (AJ) roles.\textsuperscript{22,23} An additional 74,000 individuals were employed in law-related positions.\textsuperscript{23} The following agencies historically employ the largest number of attorneys: Department of Justice, Department of Homeland Security, and Department of Treasury.\textsuperscript{24} Each of these agencies was impacted by the partial government shutdown of 2018-2019.

Attorneys play a critical role in the operations of the federal government. As ALJs and AJs, attorneys preside over hearings, resolve disputes, adjudicate claims for various benefits and perform a host of other functions in areas such as immigration, equal employment, government contracts, and security clearances. These functions are supported by attorneys that provide advice and legal counsel to agency adjudicators.

\textsuperscript{17} Id.

\textsuperscript{18} Id.


\textsuperscript{22} Office of Personnel Management, Administrative Law Judges https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency


\textsuperscript{24} Id.
Furthermore, attorneys represent agencies before other agencies, the legislative and judicial branches, state and local law-making entities, international bodies, interest groups, and the general public.

The importance of attorneys to the operations of the federal government cannot be overstated. This importance coupled with the documented difficulty in the acquisition and retention of talent across the public sector is concerning. The outlook becomes bleaker when one accounts for the existing federal employees’ waning faith in the budget process and shaky commitment to maintaining federal employment. The country has an interest in a fully-staffed and experienced federal bar.

It is for these reasons that the ABA should urge the U.S. Office of Personnel Management to gather information on the impact of government shutdowns on attorneys’ decisions to depart from federal employment. Congress should also act to study the long-term impact of the most recent partial government shutdown on the composition of the federal bar and whether the shutdown has impacted recent law graduates’ decisions to apply for federal employment. Finally, the ABA should reaffirm its commitment to support and uplift attorneys employed by the federal government--especially during times of a government shutdown.

Respectfully submitted,
Victoria Walker, Chair
YLD Government, Military & Public Sector Lawyers Committee
July 2019
GENERAL INFORMATION FORM

Submitting Entity: YLD Government, Military & Public Sector Lawyers Committee

Submitted By: Victoria Walker, Chair of the YLD Government, Military & Public Sector Lawyers Committee

1. Summary of Recommendation:

The ABA should lobby the U.S. Office of Personnel Management and Congress to specifically track the impact of federal government shutdowns on acquisition and retention of attorneys in federal executive and independent agencies. The ABA should also reaffirm its commitment to attorneys employed by elevating the profile of the work of federal government attorneys and offering resources and support during prolonged government shutdowns.

2. Approval of Submitting Entity:

Not Applicable

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

Not that the committee is aware of.

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

None of which I am aware.

5. Does this recommendation require immediate action at the next Assembly? If so, why?

Yes. Many federal government attorneys who have chosen to leave the federal government for the private sector have likely either already done so or are in the midst of their job search. Moreover, given the current political climate, it is very likely that there will be another shutdown in the near future and it would be helpful to federal government attorneys if OPM, Congress and the ABA adopted the recommendations contained herein.
6. **Status of Legislation (if applicable):**

None of which I am aware.

7. **Cost to Association.**

There would likely be a need for ABA staff to assist in the elevation of federal government attorney work and highlighting resources and support during prolonged government shutdowns.

8. **Disclosure of Conflict of Interest.**

None of which I am aware.

9. **Referrals.**

The recommendation in its final form will be circulated to the Government and Public Sector Lawyers Division.

10. **Contact Person (prior to meeting).**

Victoria Walker  
Chair, YLD Government, Military & Public Sector Lawyers Committee  
Board of Veterans’ Appeals  
425 I St NW  
Washington, DC 20001  
202-632-5707  
wwalker6@masonlive.gmu.edu

11. **Contact Person (to present the report to the House)**

Victoria Walker  
Chair, YLD Government, Military & Public Sector Lawyers Committee  
Board of Veterans’ Appeals  
425 I St NW  
Washington, DC 20001  
202-632-5707  
wwalker6@masonlive.gmu.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution focuses on the impact of federal government shutdowns on the acquisition and retention of attorneys. This resolution seeks to urge the U.S. Office of Personnel Management and Congress to study the impact of government shutdowns on retention of legal professions, and urges the ABA to elevate the profile of the work of federal attorneys and provide support and resources to federal attorneys during prolonged government shutdowns.

2. Summary of the Issue that the Resolution Addresses

The 2018-2019 government shutdown caused many federal employees, including attorneys, to reconsider their future as federal employees. The federal government and the ABA have an interest in maintaining an experienced and fully-staffed federal bar and recurrent government shutdowns directly harm that interest. This resolution seeks to produce curated information that directly represents how attorneys, who earn significantly less than their private sector counterparts.

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

The proposed policy will encourage the federal executive and legislative branches to begin to collect data on whether government shutdowns impact attorneys’ (and judges’) decisions to remain in federal government and it will also allow these same entities to track the impact of increased turnover on agency productivity. The proposed policy will also encourage attorneys to consider careers in the federal government because these roles are highlighted and celebrated by the ABA, and there will be available resources for attorneys during prolonged shutdowns.
RESOLVED, That section 4.2(a) of the Bylaws of the Young Lawyers Division of the American Bar Association be amended by striking and inserting language as indicated:

(a) **Delegates.** The Assembly consists of—

1. (1) voting members of the Council as defined in section 5.2;
2. (2) delegates representing the affiliates in each state, each of whom is a member in good standing of an affiliate in that state;
3. (3) two delegates representing each national affiliate, who are members of that affiliate;
4. (4) a delegate appointed by and representing the chief legal officer of each of the United States’ armed forces;
5. (5) delegates that meet the requirements of section 4.2(c); and
6. (6) members of the YLD Scholarship and YLD Emerging Leaders Programs; and
7. (7) each state’s designated young lawyer representative to the House of Delegates pursuant to Article 6.4(a) of the ABA Constitution, or his or her proxy.

No person shall become a delegate unless he or she is a Member of the Division, except that an affiliate may name a delegate who is a member in good standing of that affiliate and of the ABA even if he or she is not a member of the Division. No delegate shall vote in more than one capacity.

FURTHER RESOLVED, That these Amendments shall come into effect at the Assembly meeting immediately following approval by the ABA Board of Governors.
REPORT

The mission of the American Bar Association's Young Lawyers Division is, among other things, “to represent young lawyers in the Association, and to represent the Association to young lawyers,” “to help shape the policies and priorities that affect young lawyers and the legal culture in which they practice,” and “to create a deliberative forum for the exchange and expression of young lawyers' views.” The Division exercises this mandate through its Assembly, which serves as the highest policy-making body for the Division.

The Division’s Strategic Plan, “YLD 2021,” recognizes that the issues debated and policies adopted in the Assembly should not remain in a vacuum. Our Strategic Plan provides that

[O]ur Assembly should be more aligned with the issues being discussed in the ABA’s House of Delegates. We should be proposing more resolutions that will go to the HOD; responding to existing HOD resolutions; and being more involved in issues related to innovation.

Article 6.4(a) of the ABA Constitution provides that every state, as well as the United States Virgin Islands, receive a young lawyer representative to the HOD, which does not count against the jurisdiction’s delegate allotment. The state young lawyer representatives to the HOD serve as a direct connection between the affiliates in that state and the HOD.

Unfortunately, although these young lawyer representatives are engaged in the House, a significant number do not attend the Assembly. This lack of attendance is due, in part, to how the Assembly delegates are allocated and selected. Small jurisdictions, which may be entitled to only two or three Assembly delegates, may not be able to “make room” for their young lawyer HOD representative. Even large jurisdictions may decline to certify their young lawyer HOD representative to the Assembly in order to “spread the wealth” by allowing young lawyers without an ABA appointment to attend. In some cases, the young lawyer HOD representative may not have a strong connection to his or her state affiliate at all (for instance, in the states where the young lawyer HOD representative is selected by the state’s “Big Bar” rather than by the state affiliate) and may not be aware of the opportunity to serve in the Assembly.

The proposed amendment, if adopted, would eliminate these barriers to participation by providing for each state’s designated young lawyer representative to the House of Delegates to automatically serve as a delegate in the Assembly, without having their service count against their state for delegate allocation purposes. This would further the stated goal of the YLD Strategic Plan to provide for a greater degree of interaction between the Assembly and the HOD, in that the 53 state and territorial young lawyer

1 AM. BAR ASS’N YOUNG LAWYERS DIV. BYLAWS § 1.2.

2 AM. BAR ASS’N YOUNG LAWYERS DIV. STRATEGIC PLAN, p. 13.
representatives would simultaneously serve in both the Assembly and the HOD, and thus allow both bodies to benefit from their experience. Since some states have more than one young lawyer serving in their HOD delegation, the amendment limits the automatic representation only to the designated young lawyer representative. However, recognizing that some young lawyer HOD representatives may already serve in the Assembly in another capacity, or may not be able to attend the Assembly, the amendment permits for appointment of a proxy, just as is the case with the YLD District Representatives.

Respectfully submitted,

Lacy Durham
Delegate of the ABA YLD to the ABA HOD
August 2019
GENERAL INFORMATION FORM

Submitting Individual: Lacy Durham

1. **Summary of Resolution(s).** The Resolution amends the ABA Young Lawyers Division’s by-laws to incorporate the young lawyer representatives in the ABA House of Delegates as delegates in the YLD Assembly. This is done to increase communication between the YLD and young lawyers throughout the Association.

2. **Approval by Submitting Entity.** This resolution has approved by the Council of the Young Lawyers Division in May 2019.

3. **Has this or a similar resolution been submitted to the Assembly?** 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?** 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 YLD will diligently work to implement in time for the Midyear 2020 meeting.

8. **Cost to the Association.** (Both direct and indirect costs) None.

9. **Disclosure of Interest.** (If applicable) No interests are implicated by this Resolution.

10. **Referrals.** Not applicable.

11. **Contact Name:** Lacy Durham  
    ABA YLD Representative to the ABA House of Delegates  
    ABA YLD Past Chair  
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    2200 Ross Ave, Suite 1600  
    Dallas, TX 75201-6703  
    (214) 840-1926  
    lacydurhamlaw@yahoo.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution amends the ABA Young Lawyers Division’s by-laws to incorporate the young lawyer representatives in the ABA House of Delegates as delegates in the YLD Assembly. This is done to increase communication between the YLD and young lawyers throughout the Association.

2. Summary of the Issue that the Resolution Addresses

There currently exists a split between the population that makes up young lawyers in the House of Delegates and that which makes up the Young Lawyers Division assembly. Many young lawyer delegates in the HOD are not otherwise credentialed to sit in the YLD assembly. This amendment would remedy this situation.

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

This amendment would credential all young lawyer HOD members as YLD Assembly delegates.

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

None.
SPONSORS: Young Lawyers Section, Kansas Bar Association; Young Lawyers Division, New Jersey State Bar Association; Young Lawyers Section, New York State Bar Association

PROPOSAL: Amends §§ 2.1 of the Division’s Bylaws to change the definition of a “Young Lawyer” to better reflect the changing demographics of young lawyers in America.

Amends §1.2 of the Division’s Bylaws to read as follows:

Article I
General Provisions

§ 1.2 Mission

The Division’s mission is to further the Association’s goals and purposes, and thereby to serve the community and the legal profession; to represent young lawyers in the Association, and to represent the Association to young lawyers; to help shape the policies and priorities that affect young lawyers and the legal culture in which they practice; and to create a deliberative forum for the exchange and expression of young lawyers’ views, and a voice to advocate those views.

The Division is intended to be an incubator to membership within the Association. Therefore, the focus of the Division shall be on developing its members within the Division for the first five years of the member’s practice. Once a member reaches his or her sixth year of practice, the Division will continue to promote participation within the Division but will also focus on encouraging participation in other Sections, Divisions, and Forums so as to expose the Member to the benefits of continued membership in the Association after the completion of his or her time as a young lawyer.

(Legislative Draft – additions underlined, deletions struck-through):

Article I
General Provisions

§ 1.2 Mission

The Division’s mission is to further the Association’s goals and purposes, and thereby to serve the community and the legal profession; to represent young lawyers in the Association, and to represent the Association to young lawyers; to help shape the policies and priorities that affect young lawyers and the legal culture in which they practice; and to create a deliberative forum for the exchange and expression of young lawyers’ views, and a voice to advocate those views.
The Division is intended to be an incubator to membership within the Association. Therefore, the focus of the Division shall be on developing its members within the Division for the first five years of the member’s practice. Once a member reaches his or her sixth year of practice, the Division will continue to promote participation within the Division but will also focus on encouraging participation in other Sections, Divisions, and Forums so as to expose the Member to the benefits of continued membership in the Association after the completion of his or her time as a young lawyer.

Amends §2.1 of the Division’s Bylaws to read as follows:

Article II
Membership

§ 2.1. Young lawyer Members

The term "Member" as used herein means a person who is a "young lawyer" within the Division. Until September 1, 2021, a “young lawyer” means a lawyer who has been admitted to practice in his or her first bar within the past ten years, or is less than thirty-six years old.

After September 1, 2021, a “young lawyer” means a lawyer who has been admitted to practice in his or her first bar within the past ten years without regard to the age of the Young Lawyer. Notwithstanding the foregoing, any person elected to an Officer position or appointed into a leadership position shall remain a Young Lawyer until the completion of his or her term in that position so as long as the person qualified as a Young Lawyer at the time of the election or appointment.

(Legislative Draft – additions underlined, deletions struck-through):

Article II
Membership

§ 2.1. Young lawyer Members

The term "Member" as used herein means a person who is a "young lawyer" within the Division. A “young lawyer” means a lawyer who has been admitted to practice in his or her first bar within the past five years, or is less than thirty-six years old. Through August 31, 2021, a young lawyer means a lawyer who has been admitted to practice in his or her first bar within the past five years, or is less than thirty-six years old. After August 31, 2021, a young lawyer means a lawyer who has been admitted to practice in his or her first bar within the past ten years without regard to the age of the Young Lawyer.
REPORT

These Resolutions are seeking to accomplish the following goals of (1) changing the
definition of a young lawyer to better reflect the changing demographics of young lawyers,
(2) codify the Young Lawyer Division’s objective to be an incubator that encourages its
members to become active in other Sections, Divisions, and Forums, and (3) to eliminate
the inequality that results from the current definition of a young lawyer, which also has a
disparate impact on minority young lawyers.

These Amendments will change the definition of a young lawyer as used to determine
who is a “Member” of the ABA Young Lawyer Division. Furthermore, an additional
component of these Resolutions will help shape the focus of the Division to promoting the
growth of the Division members during the members early years and then as the member
gains experience in the profession and Division, encouraging the Division members to
join other Sections, Divisions, and Forums within the Association. Together, these
changes will help to ensure that the Division membership accurately reflects the
demographics of new lawyers entering the profession and that the Division can serve as
an incubator to greater participation of younger lawyers throughout Association. It is
important to highlight that this Resolution is not intended to reinstate eligibility as a young
lawyer in the Division once the new policy is implemented.

As presently written, the YLD Bylaws and ABA Constitution define a young lawyer as
anyone who is less than 36 years old or who has been admitted his or her first bar within
the past five years. A young lawyer remains a young lawyer through the completion of the
bar year in which they no longer meet this definition.

A young lawyer who follows the “traditional path” of going to law school immediately
following undergrad would qualify as a young lawyer for ten or more years under this
definition. This is because the young lawyer graduates law school around age 25 and
would continue as a young lawyer until the end of the bar year following his or her 36th
birthday. This is a significant period of time in which can grow within the Division and learn
about the benefits of ABA Membership outside of the Young Lawyers Division.

With that being said, the average age of young lawyers has been steadily increasing
resulting in fewer and fewer lawyers who will take the “traditional path” within the Division.
According to a report issued by the Law School Admissions Council in January of 2017,
the average age of law school applicants is now between 26 and 27 years old.1 28% of
all law school applicants in 2015, were between the ages of 25 and 29 and 42% of all
applicants are between the ages of 25 and 40.2 Furthermore, the average age of
incoming law students at many law schools is now as high as 29 or 30 years old.3

If a law student enters law school at the age of 27, he or she will graduate at age 30
and will have only five years -- or half of the “traditional path” young lawyer -- to participate

2 Id. at p. 7, table 6.
3 See Exhibit 1, infra.
in the Division or serve as a young lawyer delegate to the House of Delegates. This short window of time as a young lawyer discourages these members from joining or staying members of the ABA provides fewer opportunities for the young lawyer to learn about or become involved with the ABA and limits the professional development opportunities for these young lawyers. This is creating inequality within the Division as young lawyers have vastly different experiences within the Association. Furthermore, as will be discussed in more detail below, the Association is trailing behind many other bars and legal associations that have already extended membership to address the changing demographics of young lawyers.\(^4\)

**Meet Maria: A Hypothetical Illustration of the Need for Change**

To illustrate the importance of this Amendment, this section of the report will discuss a fictional young lawyer named Maria.

Maria is a 30-year-old law school graduate. She is the average age of her classmates at law school and she is just about to start her first job at a midsize local law firm. Prior to law school, Maria waited tables and bartended after she was unable to find a job with her communications degree that paid more than waiting tables. Maria is married and has one child.

Maria is the first person in her family to graduate from college, and thus also the first to hold a professional degree. Because there is no legal or professional experience in her family, Maria has no connection to the legal community other than her classmates in law school.

In hopes of connecting with other lawyers, Maria joins her local and state bar associations. However, Maria quickly learns the participation in these associations is very limited and that the happy hours are sparsely attended. As such, she is looking for another way to be a part of the legal community.

A little over a year into her practice, Maria is provided with the opportunity to attend an ABA YLD conference in Nashville, Tennessee. Maria cannot believe her eyes as she meets hundreds of young lawyers who are driven to improve the profession and who are active members of the bar associations in their home states. Maria enjoys talking to each of these young lawyers and learning about what their state and local bar associations do to encourage membership and participation. As she goes to her hotel room at night, Maria begins researching how she can get involved in the Division.

This is when Maria begins to get discouraged. Many of the people Maria has met have been involved in the Association for 8, 9 or even 10 years. As she reviews the YLD Bylaws, she discovers that she only has a few years as a young lawyer and will not be able to take advantage of all of the opportunities she has learned about during the conference. She is discouraged as she was very excited about becoming a part of this Division and the Association.

\(^4\) See Exhibit 3, *infra.*
The excitement and enthusiasm that Maria once had is now gone. Not giving up hope, Maria begins looking at the other sections within the ABA, including the Real Property, Trust, and Estates Section which is directly applicable to her estate planning practice. Maria does not know anyone in these other Sections and notes that the leadership is much more experienced than her. She finds this intimidating and is unsure how to get involved with the Section other than signing up for an email list.

Maria gets home from the conference and decides that the ABA is not right for her. She sets up an email filter to automatically delete the regular emails she receives from the ABA and does not attend any future ABA events. When the membership year ends, Maria does not renew her membership.

Maria's story is fictitious, but large parts of her story can relate to many young lawyers, including the primary proponent of this Amendment. I am a first-generation college student who managed restaurants before going to law school. I was a little younger than Maria as I graduated at the age of 29, but I have three children. I became involved in the ABA as a district representative and have a very short window for participation in the Division before I age out this year. Like Maria, I was discouraged when I saw that I would have limited opportunities compared to other young lawyers.

Moreover, Maria and my story are not anomalies. Maria is the age of many law school graduates throughout the country. This is the story of thousands of attorneys who enter the profession each year throughout our country. These attorneys are denied the home that the YLD provides and the opportunities to grow their professional development at the pace of other young lawyers. There is no Division for these lawyers to join other than the YLD, but yet they are treated as second-class members of the Division. This is why it is important that we take action to provide a home for these young lawyers within the ABA before it is too late.

**The Current Eligibility Guidelines Have a Disparate Effect on Racial and Ethnic Minorities Who Are More Likely to Graduate Law School Later**

Although the rising age of law students affects all young lawyers who want to be members of the Division, the need to raise the age for eligibility in the Division is even more evident when reviewing the statistics related to minority law students.

According to an LSAC study, almost 60% of all African American law school applicants are over the age of 25 when applying for law school.\(^5\) Similarly, more than half of all Hispanics are over the age of 25 when applying for law school. In contrast, only 43.6% of all Caucasian applicants are over the age of 25 when applying for law school. As such, although the current definition of a young lawyer is racially neutral, it has a disparate impact as a young African American lawyer is 28% more likely to age out of the Division prior to having the same opportunities of a Caucasian young lawyer.

\(^5\) *Dustman*, P. 2.
This is a significant and important issue that cannot be overlooked. The Association’s Goal III, which was adopted by the ABA House of Delegates in 2008, states that it is an objective of the Association to “promote full and equal participation in the association, or profession, and the justice system by all persons” and to “eliminate bias in the legal profession and the justice system.” In order to ensure the Association is achieving the goals set forth in Goal III, the Goal III Entities – The Commission on Racial and Ethnic Diversity, the Commission on Disability Rights, the Commission on Women in the Profession, and the Commission on Sexual Orientation and Gender Equality – issue a joint annual report to measure the “full and equal participation in the Association’s leadership by diverse persons.” Through the adoption of Goal III and commitment of resources to projects such as the Goal III Report and other programs to address implicit bias in the legal profession, the Association has shown that eradicating inequality is one of its most important objectives.

Furthermore, it might be easy to dismiss this issue by noting that there is nothing inherently discriminatory in the current eligibility requirements and/or because the Association is taking other actions to address racial inequality in the Association. This position, however, misses the bigger issue. The legal community and our courts have a long-standing history of recognizing how disparate impact of facially neutral policies is discriminatory to minorities. For example, courts have found that facially neutral employment policies are discriminatory and a violation of Title VIII of the 1964 Civil Rights Act when they have an unjustified adverse impact on members of a protected class. Furthermore, it does not matter if the discrimination was intentional.

Other federal laws recognize that facially neutral provisions can be discriminatory when there is a disparate impact, including but not limited to, the Age Discrimination in Employment Act of 1967, the Fair Housing Act of 1968, and the Voting Rights Act of 1965.

**The Limited Window of Participation for an Average Law School Graduate has a Greater Effect on Female Lawyers Who May Take Time Off for Childbirth**

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6 About ABA Goal III and the Commission, ABA COMMISSION ON DISABILITY RIGHTS, https://www.americanbar.org/groups/diversity/disabilityrights/pages/GoalIII/ (last visited April 12, 2019).


10 See, e.g., Smith v. City of Jackson, Miss., 544 U.S. 228, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005); see also 29 U.S.C. § 633.


The disparate impact of the current eligibility guidelines be a member of the Young Lawyers Division or serve as a young lawyer delegate to the House of Delegates also effects women in addition to racial minorities as many young women have to temporarily leave the workforce for childbirth. When a young woman lawyer is only a member of the Division for five years, even one child can significantly decrease her opportunities to get involved in the Division.

In September of 2018, the Association published a study that found that 58% of women attorneys of color have been mistaken for administrative staff or janitors.\(^\text{13}\) This is 50% more often than their male counterparts. Furthermore, 63% of all women attorneys of color "report having to go ‘above and beyond’ to get the same recognition as their colleagues."\(^\text{14}\) The support of an association, such as the ABA is important for these young woman lawyers and the Association can be successful on with its goals to eliminate these implicit biases by ensuring that young woman lawyers become active within the Association.

**The Average Law Graduate Has Less Opportunity to Participate in Division Leadership as the Result of his or her Shortened Time as a Young Lawyer**

In order to ensure the Division reflects the population of American young lawyers as a whole, there must be opportunities for all young lawyers to get involved in Division leadership. The current definition of a young lawyer makes it difficult for a large percentage of young lawyers to get involved in the Division’s leadership.

For example, the Chair of the Division is not elected directly. Instead, a person interested in becoming Chair must run for the position of secretary and is then later "promoted" into the position of Chair-elect and then Chair.\(^\text{15}\) Therefore, in order to run for secretary, a person must be a young lawyer for three years or through the end of the prospective term as Chair.\(^\text{16}\)

This progression of leadership is not limited to the Chair of the Division. The Speaker is elected as the Assembly Clerk and promoted into the Speaker Position.\(^\text{17}\) Similarly, the 2018-2019 ABA YLD Position Descriptions & Expectations lists “multiple years of


\(^\text{14}\) Id.

\(^\text{15}\) American Bar Association, Young Lawyers Division, Bylaws, Section 7.2, [https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/governance/yld_Bylaws.pdf](https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/governance/yld_Bylaws.pdf) (last visited December 26, 2018).

\(^\text{16}\) American Bar Association, Young Lawyers Division, Bylaws, Section 6.2a, [https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/governance/yld_Bylaws.pdf](https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/governance/yld_Bylaws.pdf) (last visited December 26, 2018).

\(^\text{17}\) American Bar Association, Young Lawyers Division, Bylaws, Section 7.2, [https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/governance/yld_Bylaws.pdf](https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/governance/yld_Bylaws.pdf) (last visited December 26, 2018).
Division involvement” as a requirement, expectation, or preference for each of the senior leadership positions within the Division.¹⁸

The requirement of Division involvement is important because it ensures there is institutional knowledge within the Division. It also, however, makes it very difficult – if not impossible – for a slightly older to become a leader within the Division. Moreover, because minority lawyers are more likely to be older when entering the workplace, they have fewer opportunities to grow into leadership positions within the Division.

A law school graduate who is thirty at the time he or she becomes a lawyer (which is a large portion of the young lawyer population) would have only five years within the Division. Therefore, if he or she wanted to develop into a leadership position, he or she would have to get actively involved in the Association immediately upon graduation to have any chance of reaching a senior leadership position.

As a result of the challenges for slightly older lawyers getting involved in leadership, the leadership of the Division is not representative of the population of young lawyers who are progressively becoming older. As slightly older young lawyers are underrepresented in leadership, it is less likely that the programs and events sponsored by the Division will meet the needs of these lawyers. Therefore, a very large segment of lawyers entering the workforce are not being welcomed into the Young Lawyers Division, and subsequently, the larger Association.

**Numerous State, Local and Affinity Bar Associations Have Already Made the Change to Utilize More Expansive Definitions of “Young Lawyers”**

Other bar associations through the country have recognized the issue related to the rising age of new lawyers. Twenty-four states, plus Puerto Rico and the Virgin Islands define a young lawyer by either more years of practice or a higher age requirement that the ABA Young Lawyer’s Division.¹⁹ Furthermore, countless other national, affinity, and local bar associations have more representative eligibility requirements for young lawyers.²⁰ These other national organizations include both the Federal Bar Association and the National Bar Association.

For example, the attorney rating service Super Lawyers defines its rising stars as anyone under the age of forty or who has practiced ten years or less.²¹ The Defense Research Institute²², Kentucky Defense Counsel²³, Ohio Association for Justice Ab Initio

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¹⁹ Exhibit 2, infra.
²⁰ Exhibit 3, infra.
Section 24, the American Intellectual Property Law Association New Lawyers Section 25, National Center for State Courts Young Lawyers Committee 26, American Association for Justice New Lawyers Division 27, and The Canadian Defence Lawyers 28 all include lawyers within their first ten years of practice within their definition of a new or young lawyer.

Our counterparts to the north in the Canadian Bar Association also define a young lawyer as anyone under the age of forty or who has practiced for ten years or less. 29

To determine why these organizations all have more expansive eligibility requirements for young lawyers, one needs only to look at an article written by a young lawyer regarding the September 12, 2016 change by the Federal Bar Association to expand their definition from the current ABA definition to including all lawyers under age 40 and within their first ten years of practice. 30 In that article, Glen R. McMurry, the then treasurer of the Federal Bar Associations’ Younger Lawyers Division, explains that changing times, the economy and other factors have lead to an increase in slightly older new lawyers. 31 As such, the Federal Bar Association made the decision to “lead the way” to adapt to the “new wave of older law school graduates.” 32

In the article, McMurry notes that there are other Sections and Forums within the ABA that define a young lawyer more expansively than the Young Lawyers Division. For example, the ABA Real Property, Trust and Estates Law Section defines a young lawyer as anyone under the age of thirty-six or within their first ten years of practice. 33 Similarly, the ABA Business Law Section fellows program defines a young lawyer as someone under the age of forty or who has been in practice for less than ten years. 34

31 Id.
32 Id.
With such widespread adoption of more expansive definitions for young lawyers, it is too late for the ABA and the Young Lawyers Division to “lead the way” but by acting now the ABA can avoid being the last to the party.

**Consideration of Counterarguments and Positions**

No discussion of a proposed Resolution can be complete without addressing the counter-arguments. Therefore, this section of the report will discuss some of the more common objections or questions heard when discussing this Resolution with other leaders within the Association.

**Will this Resolution allow an “old lawyer” to be a member of the YLD?**

First of all, is this really a bad thing? The issues that are faced by young lawyers have more to do with the lack of legal experience than they do age. You do not magically learn how to perform at a deposition because you’re 30 years old. You also don’t have connections within the legal community just because you’re a little older when you go to law school. With that being said, nothing about this Amendment would allow this to happen any more than it already does. The Bylaws as they are currently written provide that any new lawyer, regardless of age, is a member of the Division or can serve as a young lawyer delegate to the House of Delegates for the first five years of their practice. Therefore, a 90-year-old new lawyer would already be a member of the YLD under the current rules of the Division. Moreover, he or she can serve as a young lawyer delegate to the House of Delegates. As such, this change would not open the door for older lawyers to be members of the Division any more than they are already and this should not be a reason to vote against this Amendment. Moreover, the majority of people affected by this Resolution are only a few years older and the 90-year-old new lawyer is a rare occurrence as less than 2% of all law students begin law school after the age of 40.

**Does this Amendment conflict with the new membership model that was approved by the ABA at the beginning of this bar year?**

This has been an important consideration as we have moved forward with this Resolution and the Resolution has been drafted to specifically align with the new membership model. The new membership model does not differentiate between young lawyers and non-young lawyers. The membership rates are based on years of practice with new lawyers paying $75 per year for their first five years of practice and $150 per year for years 5-10. As the leadership that designed the new membership model built it around years of practice, this proposed change to the Bylaws is very consistent with the new membership model approved by the ABA.

Furthermore, the complementary proposal to amend the objectives of the Division align well within this model as for the first five years of a young lawyer’s practice, the Division will focus on encouraging participation within the Division. Then during years 5-

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35 *Dustman*, P. 6, Table 3 and P. 7, Table 4.
10, the Division will encourage participation in other Sections, Divisions, and Forums. The five- and ten-year increments were selected because they directly align with the first two dues classifications under the new membership model.

**Is this proposal budget neutral?**

Yes. This proposal does not request any additional funding nor does it necessitate any additional funding. Prior to the official proposal of this Amendment, there was some discussion that this Amendment might have an effect on the overall ABA budget. The rationale behind this belief is that since the Division does not charge dues and is funded by the greater ABA, an increase in membership within the Division would require more funding from the ABA.

This, however, is not correct. The budget for the YLD is not based on a formula calculated using the number of members in the Division. The Division will have the same number of officers, directors, coordinators, and district representatives even if there is an increase in overall Division membership. These funded positions do not change or fluctuate based on overall Division membership, and thus, there is no reason to increase spending in this area because of this Amendment. Similarly, the Division's grants, initiatives, and programs are based upon the budget available and the goals of the Division's leadership. None of the Division's programs reach every single Division member, and thus, an increase in membership does not necessitate a larger budget.

It should also be noted that this Amendment could result in higher overall revenue for ABA as many new lawyers who are slightly older either do not join the ABA or leave the ABA after a few years of involvement as they see they have limited opportunities and feel disenfranchised by the Division. If overall ABA membership increases, so do overall revenues, which would cause this proposal to be budget positive instead of budget neutral.

**Will this Amendment lead to a decrease in membership in other Sections, Divisions, and Forums?**

One of the goals of this Resolution is to ensure that the Young Lawyers Division is an incubator for participation within the greater ABA and that in the later years of a young lawyers time in the Division, he or she is encouraged to branch out and join other Sections, Divisions, and Forums. There is no cost to be a member of the YLD, and therefore, membership within this Division does not prevent participation in other Sections, Divisions, and Forums. With the new focus on encouraging participation outside of the Division, participation and membership in other Sections, Divisions, and Forums should increase as a result of these changes.

**Should these changes wait to be part of bigger overall planning for the ABA or the Division?**

The time for these changes is now. The ABA is going through a large repositioning with the new membership model and other changes. This Resolution is drafted to
complement these changes and to encourage further participation throughout the Association. Moreover, the current version of the Resolution is the result of numerous conversations with many stakeholders and revisions have been made to ensure this Resolution has the most positive impact possible on both the ABA and the Division. Finally, this Resolution is about equality. Right now, certain members of the Division have opportunities that are not available to other members. Once this inequality is recognized, we have a moral and ethical duty to act quickly to make changes to eliminate this inequality.

How did you select the specific changes being suggested for the definition of a Young Lawyer?

The final Resolution is the result of numerous conversations with different people and entities within the Association and has been drafted to best align with the new membership model and to promote greater participation by young lawyers in the larger association. Furthermore, the central tenant of this Resolution is to provide equal opportunities for all young lawyers. If the Amendment merely extended the years barred component but left the component regarding the age of the young lawyer, the Bylaws would still provide for unequal opportunities for young lawyers. For example, if a law student graduated from college in three years and was young for her class, she may become a lawyer at age 23. This young lawyer would then be a member of the Division for 13 years, or in other words, longer than other young lawyers who graduated a little later. By providing a single definition of a young lawyer based on years in practice, all young lawyers are provided the same opportunities to get involved in the Division as their young lawyer counterparts.

Does the removal of the portion of the Bylaws that defines a young lawyer by age constitute a fundamental change to the Division?

No. This is and always be the Young Lawyers Division; however, this proposal is ensuring that all young lawyers have the same opportunity as other young lawyers. A young lawyer should not have a greater opportunity within the Division simply because he or she graduated from law school earlier.

Furthermore, the Division currently allows for older lawyers to be members of the Division in their first five years of practice. Despite this, the Division has not been overrun by older lawyers. The percentage of applicants that apply for law school after the age of 40 is only 6% of all applicants.36 Furthermore, individuals over 40 are less likely to be accepted to law school, and those that are are more likely to elect not to go to law school after being accepted.37 As such, less than 2% of all law students begin law school after the age of 40.38 Therefore, young lawyers will continue to be the largest demographic within the Division and the Division will continue to be the Young Lawyers Division. Furthermore, while the average age within the Division will slightly increase as part of this

36 Id.
37 Id.
38 Id.
Amendment, the increase will help the Division to better align with the demographics of young lawyers entering the profession, and thus, should be viewed as a positive outcome for the Division as its mission is to represent all young lawyers.

A slight majority of states use the same definition for a young lawyer as that currently used by the Division, should the Division not merely mirror the definition used in the majority of states?

No. The ABA is a leader in the legal community, not a follower. By approving this Amendment, the Division has the opportunity to take a step forward in providing equal opportunities to all young lawyers. Furthermore, many of the state definitions are modeled after the ABA. Therefore, it becomes circular logic for the ABA to follow what those states are doing (as those states are following the ABA). What is more telling is that 24 states, Puerto Rico, the Virgin Islands, and countless national, affinity, and local bar associations have more inclusive definitions for young lawyers within their bar association than that used by the ABA.39

What if a slightly older young lawyer does not want to be part of this Division?

This proposal is about providing equal opportunities – not defining each lawyer’s path within the Association. It is our goal to provide an equal opportunity to all lawyers to take advantage of the benefits of the Division and then transition into other Sections, Divisions, and Forums. If a slightly older, new lawyer does not want to be involved with the Division, he or she does not have to be. That is entirely that lawyer’s choice, but the Division should strive to be an open tent that welcomes all that want to be a part of the membership.

Closing Thoughts

As noted above, a person is a young lawyer according to the current Bylaws of the Division and can serve as a young lawyer delegate to the House of Delegates when they are below the age of 36 or within their first five years of practice. By choosing this definition of a young lawyer, the ABA and the Division have recognized that the challenges being faced by those new to the practice are similar regardless of age and that opportunities to develop as a lawyer should be provided to all new lawyers. Where this current definition falls short, however, is that it limits the opportunities available to young lawyers for a slightly older new lawyer to only five years or half the time of a young lawyer who graduates law school immediately following undergrad. As such, a slightly older new lawyer has fewer opportunities than the traditional young lawyer to grow and develop within the Division and very limited opportunities to be involved in Division leadership.

The ABA has taken a strong and important stance on diversity and inclusion; however, this is one area where the Association falls short on providing equal opportunities to its members. It could be strongly argued that an attorney in his or her late thirties that has been practicing for six years is in greater need of the resources and opportunities provided

39 Exhibit 3, infra.
by the Young Lawyers Division than a thirty-four-year-old attorney who is a partner in his or her firm and has been practicing for over a decade. Once the decision was made to include new lawyers in the Young Lawyer Division, it is unjust to provide unequal opportunities to the slightly older lawyers who are later to enter the practice. Furthermore, as the current definition has a disparate impact on minority Young Lawyers, addressing this issue is something that should be a priority for this Association.

For these reasons, this report urges the Division to amend the Bylaws to provide for a more inclusive definition for young lawyers that provides all young lawyers with an equal opportunity to grow within the Division and for the House of Delegates to amend the qualifications for a member to serve as a young lawyer delegate to the House to better reflect the changing demographics of young lawyers in America.
### Exhibit 1
Survey of Law School Incoming Class Profiles

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### Exhibit 2

#### State Bar Associations

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<td><a href="https://www.alabar.org/membership/sections/young-lawyers/">https://www.alabar.org/membership/sections/young-lawyers/</a></td>
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<td>Puerto Rico</td>
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<td>Anthony Ciolli, former Bar President</td>
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</table>
Virgin Islands 40 10 Phone Call with State Bar Association

*the qualifications are amended to 40 years of age or 8 years of practice for the former chair and all elected officers can finish his or her term in office regardless of the qualification requirements.

**an amendment to modify the eligibility requirements to 10 years of practice is currently pending approval.

***when determining eligibility, only years licensed in that jurisdiction count and years licensed in other jurisdictions are disregarded.
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1) Summary of Recommendation

This Resolution is part of a series of Resolutions before the Young Lawyers Division, the ABA House of Delegates, and the Board of Governors that are seeking to accomplish the following goals of (1) changing the definition of a young lawyer to better reflect the changing demographics of young lawyers, (2) codify the Young Lawyer Division's objective to be an incubator that encourages its members to become active in other Sections, Divisions, and Forums, and (3) to eliminate the inequality that results from the current definition of a young lawyer, which also has a disparate impact on minority young lawyers.

This specific Resolution is focused on goals one and three and will seek to modify the Bylaws for the Young Lawyers Division of the American Bar Association to state that any lawyer who is a member of the American Bar Association shall be a member of the Division for the first ten years after his or her first admission to any bar without regard to the age of the young lawyer.

2) Date of Approval by the Submitting Entity

Approved September 11, 2018, by the Board of Directors for the Kansas Bar Association Young Lawyers Section.

3) Has this or a similar recommendation been submitted to the Assembly or ABA Previously?

No.

4) Are there any Division or ABA policies that are relevant to this recommendation and, if so, would they be affected by its adoption?

This proposal – and the other related proposals – have been drafted to complement the new membership model which provides two tiers of membership based on years in
practice and seeks to focus on encouraging young lawyers to participate throughout the greater Association.

5) **Does this recommendation require immediate action at the next Assembly? If so, why?**

No. With that being said, this is an important issue that should be addressed promptly by the Assembly.

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

N/A.

7) **Cost to the Association?**

None.

8) **Disclosure of Conflict of Interest (if applicable)?**

The submitting District Representative is a young lawyer who will age out this year under the current Bylaws. If this recommendation is passed, he would remain a young lawyer for four more years.

9) **Referrals?**

None.

10) **Contact Person (Prior to the Meeting)?**

    **Rick Davis**, District 22 Representative  
    Kansas Bar Association, Young Lawyers Section  
    201 E Loula Street, Suite 203  
    Olathe, Kansas 66061  
    Phone: (913) 283-8300  
    Fax: (913) 426-9126  
    Email: rick@rickdavislegal.com

11) **Contact Person (Who will present the report to the Executive Council and/or Assembly)?**

    **Rick Davis**, District 22 Representative  
    Kansas Bar Association, Young Lawyers Section  
    201 E Loula Street, Suite 203  
    Olathe, Kansas 66061  
    Phone: (913) 283-8300  
    Fax: (913) 426-9126  
    Email: rick@rickdavislegal.com
Brandon Wolff, District,
New Jersey State Bar Association, Young Lawyer Division
New York State Bar Association, Young Lawyer Section
885 Third Avenue, Sixteenth Floor
New York, New York, 10022
Phone: (212) 634-5035
Fax: (212) 634-5038
Email: brandon.wolff@leclairryan.com
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal legislatures to enact legislation and appropriate adequate funding to ensure equal access to justice for Americans living in rural communities by deploying, to at least 98% of the population, broadband infrastructure with a download speed of at least 100 megabits per second, and an upload speed of at least 30 megabits per second.
I. Introduction

Rural America is at risk of being left behind in an increasingly digital age. While reports of broadband and high-speed Internet coverage in rural areas vary, the overarching message is clear: Americans in rural areas have far less consistent access to high-speed Internet. In addition, the main street attorney in rural America is continuously becoming a thing of the past. This landscape creates two main problems for ensuring equal access to justice for those living in these areas: (1) rural communities are struggling to attract new attorneys partially based on difficulties to practice law, and (2) self-represented litigants have a heightened barrier to accessing court resources and non-profit organizations and being able to prosecute or defend their cases.

Approximately 24 million Americans lack broadband (high-speed Internet) access, 96% of whom live in rural areas. \(^1\) Broadband has been called the great infrastructure challenge of our time, and it is increasingly being referred to as the fourth utility. \(^2\) Even more striking, is less than half of households living on under $20,000 are connected. \(^3\) “The collective deficit in opportunity, education and prospects—everything implied in ‘being connected’—further separates [Americans] into have and have-nots.” \(^4\)

In rural Caledonia, Missouri, for example, Jeanne Johnson raises sheep and goats, but has to drive four miles to a local gas station for internet access. \(^5\) At her 420-acre farm, Ms. Johnson pays $170 a month for satellite internet service, but it is too slow to even

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\(^4\) Id.

upload photos, let alone conduct business. Ms. Johnson is 60-years-old and describes the feeling of not having access to proper high-speed internet, “We don’t feel like we’re worth it.” Even the county’s 911 dispatch center sometimes loses its connection to the state emergency system. The ability to successfully operate a law practice under such conditions is nearly impossible.

The ABA has a long history of striving to ensure equal access to justice by supporting resolutions and dedicating resources to its access to justice committee and legal aid. The Resolution urges Congress, state, local, territorial, and tribal legislatures to enact legislation and appropriate adequate funding to ensure equal access to justice for Americans living in rural communities by deploying broadband infrastructure throughout the United States. This Report explains why ABA policy is necessary—not only for the legal profession, but across all professions. It also explains how broadband is defined, the history of the government’s role in the deployment of utilities, as well as government funding and existing legislation.

Rural Americans face plenty of uphill battles without adding unnecessary hurdles. Action must be taken to deploy broadband infrastructure to ensure these rural communities do not remain on the other side of the digital divide.

II. Access to Justice in Rural America

Access to justice is a problem throughout the United States. In rural America, however, the problem is worse. Geographic distance, declining and aging populations, problems attracting and retaining lawyers, outdated technology, and slow or nonexistent Internet connectivity contribute to the problem. Removing the internet connectivity barrier is an important place to start to help remedy the problem. Electricity was harnessed to turn the lights on, but ended up completely transforming society. Eliminating this digital divide and providing broadband access in rural communities across the country could have a similar impact.

Courts Need to Enhance Access to Justice in Rural America, supra note 1, at 1. 10

E.g., 12A10B, when the ABA approved the State Bar of South Dakota’s 2012 proposed Resolution urging federal, state, territorial, tribal, and local governments to support efforts to address the decline in the number of lawyers practicing in rural areas and to address access to justice issues for residents in rural America. Report on the ABA Annual Meeting, Am. Bar Ass’n, 9 (Aug. 20, 2012), https://cdn.ymaws.com/www.nabnet.org/resource/resmgr/imported/Report%20on%20ABA%20Annual%20Meeting.pdf; Impact of Resolutions: Access to Rural Justice, Am. Bar Ass’n (Nov. 19, 2017), https://www.americanbar.org/news/abaneews/aba-news-archives/2016/06/impact_of_resolution. See also 06A112B, where the ABA adopted the principles of a state system for the delivery of civil legal aid. and 06A112A, advocating for the right to counsel to low income persons where basic human rights are at stake.

Counts Need to Enhance Access to Justice in Rural America, supra note 1, at 1.

The Internet experience for millions of Americans in rural areas is appalling. Librarians in rural areas are observing students sitting in library parking lots after hours in order to use the free Wi-Fi to finish their homework. People are required to leave their homes to find fast enough Internet to upload or download files for work. An online college teacher in Weston, West Virginia has to regularly drive a half an hour to her brother’s house just to be able to enter grades in a database. Even using a cell phone in rural areas to access the Internet is not guaranteed, as Verizon has been known to terminate coverage to rural residents due to excessive roaming charges. Although some rural areas may be lucky enough to have high-speed Internet and cell phone service, the costs may be prohibitively expensive.

A. Attorneys in Rural America

A shortage of professionals exists in rural communities across our country. Attorneys, physicians, nurses, mental health counselors, and translators increasingly do not want to live in these rural areas. Many professionals who left their rural hometown for educational opportunities in urban centers stay because of the perceived potential of high-income and necessity to pay off high-debt. The fear of unemployment back home is not enticing. Nor is the potential of being digitally disconnected.

Regarding access to justice, there is an increasing shortage of attorneys, judges, and court staff in rural communities. The inability for a small town to attract these professionals means that more people are required to leave their homes in order to use the free Wi-Fi to finish their homework. People are required to leave their homes to find fast enough Internet to upload or download files for work. An online college teacher in Weston, West Virginia has to regularly drive a half an hour to her brother’s house just to be able to enter grades in a database. Even using a cell phone in rural areas to access the Internet is not guaranteed, as Verizon has been known to terminate coverage to rural residents due to excessive roaming charges. Although some rural areas may be lucky enough to have high-speed Internet and cell phone service, the costs may be prohibitively expensive.

14 Izaguirre, supra note 1 (“There is a way around the notoriously sluggish Internet in West Virginia. You just need a car and some time. . . . I just kept wanting to beat my head into a wall. . . . I added so much additional work for me, and I just don’t have the time.”).
17 Jennifer Levitz & Valerie Bauerlein, Rural America is Stranded in the Dial-Up Age, WALL ST. JST. JUNE 15, 2017, https://www.wsj.com/articles/rural-america-is-stranded-in-the-dial-up-age-1497535841 (“Rural America isn’t connected broadband: Too few customers are spread over too great a distance. The gold standard is fiber-optic service, but rural internet providers say they can’t invest in door-to-door connections with such a limited number of subscribers.”).
professionals threatens the residents’ ability to access the justice system. Rural communities are struggling to attract new attorneys while the older attorneys are retiring. Even though 20% of people in the United States live in rural America, only 2% of small law practices are located in rural America. In South Dakota, “the strain on local budgets as a result of not having local lawyers is astronomical.” Rural governments sometimes need to pay judges, prosecutors, and private defense attorneys to handle local cases. In order to find legal help, a rural resident has to overcome vast distances, insufficient public transit, and a lack of Internet service.

Many states offer additional examples of the same problem. For example, Colorado’s Delta County is approximately 1,150 square miles with a population of over 31,000 people—comparable, for example, to Rhode Island, which is approximately 1,200 square miles. Only 22 practicing attorneys remain in Delta County, the youngest of whom is 55. In rural Inyo and Mono counties in California, there are approximately 22 attorneys in private practice—only a handful who are under 62. In Wishek, North Dakota, the situation became even more dire when Wishek’s only lawyer retired. Residents were left without anyone nearby to handle their basic legal needs. Likewise, in Bennett County, South Dakota, after the only attorney retired, the closest lawyer is now 120 miles away.

Practically every state has a Delta County—a county or municipality in a similar situation. The average age of lawyers across the nation is reaching 49-years-old. As attorneys in rural communities begin retiring without anyone to replace them, many more counties like the ones above will begin appearing. Rural America constitutes approximately 97% of the land area of the United States and every state has a county or municipality with a population of less than 2,500. Providing equal access to justice in rural communities should therefore be a priority for every state in the country.

Lorelei Laird, in Rural America, There are Job Opportunities and a Need for Lawyers, ABA J. (Oct. 2014), http://www.abajournal.com/magazine/article/many_lawyers_not_here_in_rural_america_lawyers_are_few_and_far_between. The problem includes criminal defense attorneys. See Jacob Kang-Brown & Ram Subramanian, Out of Sight: The Growth of Jails in Rural America, VERA INST. OF JUST., 18-19 (June 2017) (“Many rural counties lack skilled practitioners—judges, prosecutors, investigators, public defenders, and court administrators—to run or oversee the basic functions of a local criminal justice system, posing serious operational challenges.”).

Pruitt, supra note 18, at 22 (noting the number is likely inflated as it counts attorneys who are inactive, working for the government, and working in non-legal jobs). Laird, supra note 20 (quoting 2011-12 president of the State Bar of South Dakota).

Pruitt, supra note 18, at 22; Levitz, supra note 16 (About 39% of the U.S. rural population, or 23 million people, lack access to broadband internet service . . . compared with 4% of the urban residents.).

Counts Need to Enhance Access to Justice in Rural America, supra note 1, at 3.

Laird, supra note 20.

Id. (residents were left “without anyone nearby to handle their basic legal needs. . . . ‘It’s always a challenge to get professionals into a rural area’”).

Id.

Counts Need to Enhance Access to Justice in Rural America, supra note 1, at 3.

Id. at 1.

Lorelei Laird, in Rural America, There are Job Opportunities and a Need for Lawyers, ABA J. (Oct. 2014), http://www.abajournal.com/magazine/article/many_lawyers_not_here_in_rural_america_lawyers_are_few_and_far_between. The problem includes criminal defense attorneys. See Jacob Kang-Brown & Ram Subramanian, Out of Sight: The Growth of Jails in Rural America, VERA INST. OF JUST., 18-19 (June 2017) (“Many rural counties lack skilled practitioners—judges, prosecutors, investigators, public defenders, and court administrators—to run or oversee the basic functions of a local criminal justice system, posing serious operational challenges.”).

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Id.

Counts Need to Enhance Access to Justice in Rural America, supra note 1, at 3.

Id. at 1.
Part of the access to justice problem in rural America is clearly due to attorney shortages. Without proper high-speed Internet, however, these communities have little chance of attracting new lawyers. High-speed Internet has great potential to attract attorneys to work in these places, as well as providing the ability to work remotely. Legal research, communication, and filings are all done primarily over the Internet today. Sufficient download and upload speeds are required. Non-metro-area attorneys cannot thrive without the ability to communicate and file documents electronically in their practices.

Most new lawyers will not accept inadequate Internet service in their practices. Young lawyers consider it a basic utility, as important as ensuring that the lights are on and the phone is working. The practice of law is no longer pursued with manila folders and 17-inch pleadings. In law school and in urban areas, practically everything is done over the Internet. In rural areas, however, stories about lawyers needing to drive over an hour to upload a pleading or motion are all too common.30 This type of antiquated practice is so outside the norm within law schools, newly graduated lawyers are simply not prepared or willing to make it the focus of their practice.

Some law schools and states are now putting forth efforts to attract law students to rural areas. For example, the State Bar of Wisconsin has organized an annual tour, taking law students and recent law grads to rural areas to familiarize them with practice opportunities.31 Similarly, the Maine Law Rural Lawyer Project pairs law students with lawyers in underserved rural communities with hopes they may practice there after graduation.32 On the national level, LSC and Equal Justice Works offer Rural Summer Legal Corps, which places students with civil legal aid organizations across the country.33 South Dakota has taken the most comprehensive approach through its Rural Attorney Recruitment Program, where attorneys receive a significant financial incentive to practice in a rural area for five continuous years.34 These efforts, coupled with the rising costs of living in large cities, demonstrate some potential for attracting attorneys to rural areas.35 Without broadband access throughout the United States, however, these efforts will fall short.

Assuring these rural attorneys have proper broadband access can help them and their clients immensely. In addition to the basic legal practice needs of communication, research, and filings, technology allows lawyers to increase their client pool by drawing


from a larger area while reducing potential conflicts of interest. With adequate broadband access, modern lawyers can run virtual offices, permitting longer-distance client relationships allowing lawyers and clients to participate in video conferences and share documents which can be accessed remotely through client portals.

Indeed, Nebraska has demonstrated the potential of extending broadband to rural areas. As a result of improving broadband in Cherry and Cheyenne, Internet speeds increased 60%, which allowed the use of video interpreters in courts and participation by incarcerated individuals in court by video from correctional facilities. This not only increased access to justice and saved money, but also lowered the inherent risk in transporting inmates. The time has come to assure the practice of law in rural areas is not impractical and undesirable due to poor Internet connection.

B. Self-Represented Litigants in Rural America

Similarly affected are self-represented litigants in rural America. Not having a basic utility like broadband access creates an unnecessary burden on people who are already less likely to receive justice. One of the most pressing issues affecting access to justice is the staggering amount of people foregoing an attorney, primarily due to the rising costs of legal services. Approximately 86% of low-income Americans with a civil legal problem receive either inadequate or no help. This is not a small amount of people, as approximately ten million rural Americans have incomes below 125% of the federal poverty line. This demand far surpasses the supply of help, as only one legal aid attorney is available for every 6,415 eligible people. In Colorado, for example, it is estimated that more than 60% of all litigants arrive at the courthouse without a lawyer.

Rural life does not mean a simple life without the need for legal help. Three-quarters of America’s low-income rural residents face at least one civil legal problem a year, while a quarter face six or more. The primary legal issues involve health, consumer and finance, and employment. Even more concerning is that elderly, disabled, and veterans are affected the worst in rural areas.43

36 Courts Need to Enhance Access to Justice in Rural America, supra note 1, at 7.
39 Laird, supra note 20.
40 Erika Holmes, Modern Representation: A Win-Win for Clients and Lawyers, 46 COLO.LAW, 77, (March 2017) (“Statistics from the State Court Administrator’s Office show that for fiscal year 2015, 75% of the parties in domestic relations cases, 37% of parties in district civil cases, and 60% of parties in county court civil cases proceeded pro se.”).
41 The Justice Gap, supra note 38, at 21.
42 Id. at 48.
Even if a person can afford an attorney, there may be none around, as discussed above. Rural residents may have to drive 100 miles or more to take care of routine matters like estate planning, taxes, and child custody. In North Dakota, for example, only 85 out of 357 towns have an attorney, while six rural counties in South Dakota and 12 in Nebraska have no attorneys at all. 45

For some, travelling to obtain legal help is not an option. Many people living in rural areas—particularly low-income rural residents—may not have the means to travel considerable distances to meet with a lawyer or go to court. 46 Travel is even more difficult in locations like Colorado and California due to landscape and weather. Census information shows that rural communities are disproportionately poor, and with a day away from work, the gas required, and possibility of an overnight stay, travel becomes a logistical hardship widening the justice gap. 47

Due to the cost and/or the shortage of rural attorneys, rural residents may be left to represent themselves. This difficult task now becomes even worse without broadband access. Similar to the demands of attorneys, these individuals need the ability to download forms from courts’ websites and need to be able to communicate with organizations that provide assistance to self-represented litigants. Access to justice in the United States should not be made daunting or dangerous because a person lives in a rural area. 48

Technology, particularly broadband access, has already demonstrated its ability to help with access to justice for self-represented litigants. For example, Online Dispute Resolution provides opportunities to help with legal disputes outside of the courtroom. 49 This umbrella term includes a range of services, which can be as simple as email or as complex as conducting an entire mediation session online. 50 Across the country, states are utilizing broadband to create self-help programs. In Georgia, a law library provides Internet and computer access for legal research. In Wisconsin, a legal aid provider started an online legal advice program. In Montana, courts use video conferencing to better serve rural populations. In South Dakota, people can call “Ask a Lawyer” toll-free and ask for free advice on family issues contracts, wills, and real estate. 51 Such efforts are of little use, however, in areas where Internet access is slow or non-existent. "Technology may

45 Courts Need to Enhance Access to Justice in Rural America, supra note 1, at 3.
46 Pruitt, supra note 18, at 25 n.42.
47 Laird, supra note 20.
48 Courts Need to Enhance Access to Justice in Rural America, supra note 1, at 1.
50 Id. at 12. See also Margaret Hagen, Participatory Design for Innovation in Access to Justice, Am. Acads. Art & Sci (2006), https://www.amacad.org/publication/participatory-design-innovation-access-justice (“the civil justice sector can experiment with community-led agendas for innovation efforts and better situate and launch new technologies and services.”).
51 Pruitt, supra note 18, at 136.

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offer several opportunities to connect rural residents with urban legal services, but its effectiveness depends on the existence of technology infrastructure, like high-speed Internet and cell reception, in the rural communities to be served.\textsuperscript{52}

Many self-represented litigants find themselves on the wrong side of this digital divide. A lack of broadband access affects attorneys in rural areas as well as those who represent themselves. Without universal broadband access in our country, these rural self-represented litigants may lose the opportunity to meaningfully defend or prosecute their cases. With such a high barrier, “rural residents may cease to recognize their legal rights.”\textsuperscript{53} They may begin to see the legal system as irrelevant to them, and these vulnerable populations will become even more disconnected from the rest of the country.\textsuperscript{54}

## III. National Importance Beyond the Legal Profession

Deploying broadband access throughout the United States will not only benefit access to justice, but also will provide countless opportunities for rural communities to participate in national and global economies on a broader scale. A brief discussion of the scope of the issue is important to mention. When you start to look closely, it becomes apparent that practically every field requires high-speed Internet in today’s digital age.\textsuperscript{55}

Traditionally, when people used the Internet only for email and simple websites, speeds of 1-2 Mbps would suffice.\textsuperscript{56} Today, however, with video conferencing, modern websites, the ability to work remotely, streaming video, and high volume file transfers, broadband speeds are essential. Without such access, rural communities are being left behind.

Extending broadband to rural America is not just about faster Internet. Rather, it is about connecting these communities to the rest of the country in the digital age. “Broadband is a platform to create today’s high-performance America—an America of universal opportunity and unceasing innovation, an America that can continue to lead the global economy.”\textsuperscript{57} Here are some additional reasons why broadband access is essential:

### A. Public Safety

Broadband can assure everyone has proper access to emergency services, as well as improve how Americans are notified about emergencies. Providing broadband access to emergency personnel

\textsuperscript{52} Hillary A. Wandler, Spreading Justice to Rural Montana: Expanding Local Legal Services in Underserved Rural Communities, 77 MONT. L. REV. 235, 261 (2016).

\textsuperscript{53} Pruitt, supra note 18, at 127.

\textsuperscript{55} Id.


provides these professionals with the resources they need to serve and better protect citizens.⁵⁸

B. Health Care. Broadband can improve access to health records, doctors, and prescriptions. Such access is also necessary for many medical devices today. Medical professionals can communicate in real time with global specialists around the world, as well as quickly send large files and images for review.⁵⁹

C. Education. Broadband provides students with the technology they need in the 21st century. For example, approximately 12 million school-aged children do not have the broadband at home that they need for nightly schoolwork.⁶⁰ Broadband allows students to engage in proper research, as well as earn degrees remotely and connect with teachers in different countries.

D. Agriculture. Broadband can help farmers take advantage of precision agriculture technology and increase their efficiency by upward of 10%.⁶¹ Rural farmers could also sell their products all over the world. "Using GPS, the harvester could, in real time, map, monitor, and record massive amounts of data—such as crop yield and soil moisture levels—which would let a farmer know exactly which rows required attention."⁶²

E. Environment. An increase in the ability to work remotely can help decrease carbon emissions from excess commuting. Broadband can play a major role in the transition to a clean energy economy, as well as modernize the electrical grid by making it more reliable and efficient.⁶³

F. Civic Engagement. Broadband can improve the quality and quantity of engagement with representatives and agencies. With proper broadband access, government can become more open and transparent, and allow those in rural areas to participate in the democratic process easily and efficiently.⁶⁴

G. Technology. Impending technological advancements such as driverless cars will require a high-speed connection. As homes and appliances become "smart," for example, with smoke alarms and thermostats

⁵⁷ Id. at XIV.
⁵⁸ Kruse, supra note 11, at 3.
⁶⁰ Whitelaw Reid, Stuck In Mud: Broadband ‘Disconnect’ has Big Consequences for Midwest Farmers, UVA TODAY (Oct. 8, 2016), https://news.virginia.edu/content/stuck-mud-broadband-disconnect-has-big-consequences-midwest-farmers.
⁶¹ Id.
⁶² Connecting America: The National Broadband Plan, supra note 2, at XIV.
⁶³ Id.
connected to the Internet, a reliable and fast broadband connection is essential. With the rise of smart phones, tablets, streaming video, etc., the demand for high-speed, reliable Internet is widespread.35

IV. Broadband Internet Service

The term broadband originally described a type of data transmission where a single wire could carry multiple signals at once.68 In contrast, baseband transmission could carry only one signal at a time.69 Practically, however, the term broadband has become synonymous with high-speed Internet, which is faster than outdated dial-up access. It implies a certain threshold speed for an Internet connection.70

Internet speed is measured by how many bits of data can be received and sent to and from your Internet connection. This speed is measured in “bits per second” (bps) units, and contains a downstream figure (the download speed) and an upstream figure (the upload speed).71 The two speeds are not always equal. The FCC is the primary authority on providing the minimum speed to be considered broadband. The current FCC minimum speed is 25 megabits (1,000,000 bps) per second (Mbps) download and 3 Mbps upload (25 Mbps/3 Mbps).72 As indicated above, approximately 24 million Americans and 30% of rural Americans do not have access to these speeds.

Broadband can be provided through various delivery technologies, including wireless connections. Unlike dial-up Internet, broadband ensures a continuous connection to the Internet. All of the following may be considered broadband:73

A. Fiber. Considered the gold standard of broadband. Fiber optic cables convert electrical signals to light and send the light through glass fibers about the size of a human hair. Speeds up to 1000 Mbps (“Gigabit Internet”) are possible. Fiber is often the most expensive to build.

65 Kruse, supra note 11, at 6.
66 Id. at 2.
67 Id.
69 Id.
71 What Every County Commissioner Needs to Know About Broadband, supra note 2, at 3.
72 2018 Broadband Deployment Report, supra note 1.
73 Kruse, supra note 11, at 3-4.
B. Cable. Delivers an Internet connection through the coaxial cables already installed for cable TV. Speeds typically range from 30-150 Mbps. Cable is a shared service where speed can decrease with many people using it in the area.

C. DSL (Digital Subscriber Line). Delivers an Internet connection through the existing copper telephone lines. Speeds typically range from 1.5-30 Mbps. Speed diminishes with distance from telephone company's central office.

D. Wireless Broadband. Wireless Internet is a way of using radio waves to send and receive data. Often used to provide service to rural areas where the above varieties are not available. The Wi-Fi used in homes and businesses converts a physical connection into short-range radio waves. The term encompasses mobile, fixed wireless, and satellite.

1. Mobile Broadband. Mobile phone carriers began using the term "mobile broadband" as a synonym for Internet access to a portable device. Wireless Internet access is delivered through cellular towers to smartphones and other digital devices. A mobile service must have a base station that is connected to a landline.

2. Fixed Wireless. A type of wireless Internet access different than mobile broadband where the connection to service providers again use radio signals rather than cables. Small stations transfer data at high speeds to each other similar to satellites. Unlike satellites, however, the speed is not affected by bad weather. These dedicated wireless connections are usually faster than cellular networks.

3. Satellite Broadband. Satellites orbiting the Earth provide necessary links for broadband. Service can be disrupted in extreme weather conditions and are typically oversubscribed. Due to the large distance from satellites, there can be latency issues (high lag time between sending and receiving data). A home satellite dish is required.

The range of speeds can vary dramatically between the various technologies listed above. Many rural locations simply do not have any broadband options, or may have to pay high costs for very slow technology, typically in the range of 1.5-3 Mbps.\(^7\) Sometimes only dial-up Internet may be available, which is slower than broadband by a huge magnitude, typically averaging only 0.05 Mbps. With bandwidth consumption by homes and businesses doubling every year, rural communities will not be able to keep up.

Fiber-optic cables have frequently been laid along highways and railroad lines. This infrastructure is referred to as the "middle mile." Many rural areas require connection from this middle mile backbone to individual residences and businesses. The end-user component (copper, satellite, microwave, cable, etc.) is known as the "last mile." The last mile must yield enough subscriber dollars to entice private enterprise to invest in that infrastructure. The last mile is frequently missing because it is not economical based purely on private investment. The last mile, however, is necessary to make high-speed service possible.

The cost to deploy FCC minimum broadband infrastructure and connect this last mile using fiber cables is estimated to be $40 billion—less than 1 percent of the federal government's 2019 budget as currently proposed. The proposed Resolution recommends deploying broadband infrastructure with a download speed of at least 100 megabits per second and an upload speed of at least 30 megabits per second to at least 98% of the United States population. These speeds were chosen to assure rural residents have proper high-speed Internet for the foreseeable future. Achieving minimum broadband deployment to the remaining 2% of the population is estimated to cost another $40 billion based on the challenges associated with the extreme remoteness and/or topography of these areas.

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V. History of Government Involvement in Utilities and Current Governmental Funding and Legislation

In the 1930s, many parts of rural America were left in the dark without electricity or telephone lines. An electrical divide existed between rural and urban America. Due to a lack of return on investment, electrical and telephone companies were unwilling to lay the infrastructure necessary to connect these areas to the rest of the country. Similar to the creation of the transcontinental railroad of the prior century, the federal government eventually intervened in 1936 by creating and funding the Rural Electrification Administration. Along with help from private utilities and cooperatives, rural electrification was finished in a remarkably short time. In nine years, more than nine thousand miles of line was laid, connecting 1.6 million new consumers. From 1945 to

78 Kline, supra note 77, at 141; Rural Electrification Act of 1936, 7 U.S.C. § 901 et seq. (effective May 20, 1936).
79 Kline, supra note 77, at 220.
80 Kline, supra note 77, at 141; Rural Electrification Act of 1936, 7 U.S.C. § 901 et seq. (effective May 20, 1936).
1954, the percentage of electrified farms grew from 48 to 93 percent, and the postwar years have been called "the climax of the great transformation of rural America."80

It is now time for the government to focus on the "fourth utility" and create and fund a program to deploy broadband infrastructure. The proposed Resolution from the Colorado Bar Association requests the ABA to urge Congress, state, local, territorial, and tribal legislatures to enact legislation and provide adequate funding for broadband expansion into rural America. Broadband should be a top priority for any future infrastructure legislation. Past efforts thus far from the government and private entities have not been particularly successful on a broad scale across the country. New legislation and funding will be necessary to complete the last mile and bridge the divide.

Following a 2008 release of broadband statistics, which suggested that the U.S. may be lagging in broadband, Congress passed the American Recovery and Reinvestment Act of 2009, requiring the FCC to draft a National Broadband Plan.81 In March 2009, the FCC released its 360-page plan, which set out a roadmap for extending broadband and maximizing its benefits.82 The Obama administration stated that universal broadband access was a top priority and such access was critical to America’s future.83 A federal grant program to expand wireless Internet in rural areas looked helpful but is on hold while the FCC investigates whether carriers submitted incorrect data for the maps used to allocate funds.84 More coordination, funding, and legislation need to be implemented.85

More recently, on April 12, 2019, the White House and the FCC announced a $20.4 billion "Rural Divide Opportunity Fund" to help connect up to four million rural homes and small businesses over the next decade.86 The program would be part of a Universal Service Fund, an existing program from the prior administration. Although lacking details, the FCC intends to utilize a physical broadband base along with upcoming 5G technology to deliver high-speed Internet to rural communities.

New 5G technology stands for the 5th Generation of digital cellular networks. The speed of 5G could be in the range of 200-634 Mbps, which would be significantly faster than current 4G technology.87

80 Id. at 215, 219.
81 See Connecting America: The National Broadband Plan, supra note 2, at XI.
82 Id. at 216.
85 Despite its importance, Federal resources supporting broadband expansion are poorly tracked with little coordination across agencies or departments that are doing this work, making it harder for our local businesses and community leaders to access them. Press Release, Tonko Reintroduces House-Passed Bill to Increase Broadband Access in Undererved Areas (Apr. 4, 2019), available at https://tonko.house.gov/news/documentsingle.aspx?DocumentID=839.
87 Id. at 215, 219.
88 See Connecting America: The National Broadband Plan, supra note 2, at XI.
89 Id. at 13.
92 Despite its importance, Federal resources supporting broadband expansion are poorly tracked with little coordination across agencies or departments that are doing this work, making it harder for our local businesses and community leaders to access them. Press Release, Tonko Reintroduces House-Passed Bill to Increase Broadband Access in Undererved Areas (Apr. 4, 2019), available at https://tonko.house.gov/news/documentsingle.aspx?DocumentID=839.
than the current 4G and could be widespread by 2020.87 A broadband base, however, is still required as 5G mobile networks need fiber lines to cell sites, and will likely not be a solution for rural communities.88 The nature of 5G infrastructure does not make sense in rural America, and will likely only be available in larger cities for the foreseeable future.89

The Rural Divide Opportunity Fund is still in its infancy and proper oversight and adequate funding will be required. The inclusion of state and local governments80 and cooperatives, research on the safety of future technology, the creation of accurate and up-to-date broadband maps, along with the accountability of participating private carriers81 will all be necessary in order to properly deliver high-speed Internet at a fair price to rural America.

A recent bill in Congress, House Bill 1328, called the Access Broadband Act, is relevant to this Resolution.82 This bill was first introduced last year (H.R. 3994),83 where it passed the House but failed to move forward in the Senate. The bill was re-introduced this year with a companion bill in the Senate (S. 1046).84

89 Shara Tibken, Why 5G is Out of Reach for More People Than You Think, CBS INTERACTIVE INC. (Oct. 25, 2018), https://www.cnet.com/news/why-5gs-out-of-reach-for-more-people-than-you-think/ (“The key spectrum only covers 5G or 5G-only bands. It runs problems when there’s even a tree in the way and requires lots of expensive towers installed close to each other.”).
90 Kendra Chamberlain, Municipal Broadband is Roadblocked or Outlawed in 26 States, BROADBANDNOW (Apr. 17, 2019), https://broadbandnow.com/report/municipal-broadband-roadblocks (“There are now 26 states with laws on the books that either roadblock or ban outright municipally-owned broadband networks.”).
91 See Every County Commissioner Needs to Know About Broadband, supra note 2, at 2 (“It has become obvious to most rural leaders that deferring to private industry or ‘leaving it up to the market’ is not a course of action likely to result in better service, and that more direct involvement is needed at the local level.”).
92 Access Broadband Act, H.R. 1328, 116th Cong. (2019). The Access Broadband Act was first introduced in 2017 and failed to pass the House. This bill is significantly different than the “Leading Infrastructure for Tomorrow’s America Act,” H.R. 2479, which contains some of the same language as this Resolution. H.R. 2479, 115th Cong. (2017). The “Leading Infrastructure for Tomorrow’s America Act” was a massive infrastructure bill that mandated the expansion of broadband (as well as improvements to many other areas such as drinking water, natural gas, clean energy, and hospital infrastructure), including minimum broadband speeds and asking for $40 billion over five years. H.R. 2479 failed to pass the House.
The Access Broadband Act is a bipartisan act that would establish the Office of Internet Connectivity and Growth within the National Telecommunications and Information Administration. The act is primarily administrative in nature and calls for no additional funding. One of the current problems regarding federal broadband funding is the patchwork of agencies and applications handling the limited funds. The Office of Internet Connectivity and Growth would streamline the management of federal broadband resources and simplify the process for small businesses and local developers.

The act would also establish a single point of contact to tap into existing federal broadband resources, and only one application would need to be submitted to apply for all federal broadband support programs. The new office would conduct outreach, including holding workshops to help rural communities develop the best plan for their specific needs. Additional funding and the establishment of minimum broadband speeds in rural areas, however, will still need to be addressed.

VI. Conclusion

This resolution will allow ABA staff and members to educate Congress, state, local, territorial, and tribal legislatures about ensuring rural communities are not left behind in the digital age. Providing access to the fourth utility of high-speed Internet to rural communities is a nationwide issue that touches practically every sector of our economy from the legal profession, to healthcare, to the education of our children. The United Kingdom, Spain, Switzerland, and Finland all consider broadband service a "universal service obligation," and ensure all their citizens have proper Internet access. The United States should too. The digital divide needs to be bridged before Americans living in rural communities are left behind.

Respectfully Submitted,

John M. Vaught, President
Colorado Bar Association
August 2019

GENERAL INFORMATION FORM

Submitting Entity: Colorado Bar Association
Submitted By: John M. Vaught, Colorado Bar Association President

1. Summary of Resolution

The Resolution calls for the American Bar Association to adopt policy urging federal, state, local, territorial, and tribal legislatures to enact legislation and appropriate adequate funding to ensure at least 98% of the United States population has proper broadband access (high-speed internet). The policy would call for a download speed of at least 100 megabits per second and an upload speed of at least 30 megabits per second across the country. Slow or non-existent broadband access is a major issue in many rural communities throughout the United States, affecting practically every field including the legal profession. Without proper high-speed internet, attorneys and self-represented litigants in rural areas face extremely high barriers, and these communities cannot attract new lawyers. The result is a pressing access to justice issue. Federal, state, and local funding, legislation, and oversight is necessary to successfully bridge this digital divide.

2. Approval by Submitting Entity

The Colorado Bar Association Board of Governors approved this Resolution on May 7, 2019. The following organizations have also approved co-sponsorship of this Resolution: the State Bar of Montana on May 3, 2019; the ABA Tort Trial & Insurance Practice Section on May 4, 2019; the ABA Standing Committee on the Delivery of Legal Services on May 24, 2019; and the ABA Solo, Small Firm, and General Practice Division on May 4, 2019.

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 Resolution compliments Resolution 12A10B by helping address access to justice in rural communities through improvements in broadband access. Resolution 01AM105A addresses the need for access to technology in underserved communities. This Resolution relates to 01AM105A but provides a more modern and specific solution. This Resolution also supports ABA policy favoring access to justice, such as 06A112A and 06A112B, which support civil legal aid and the right to counsel.
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)  
House Bill 1328, called the Access Broadband Act, was first introduced last year, where it passed the House but failed to move forward in the Senate. The bill was re-introduced this year with a companion bill in the Senate, S. 1046. The Access Broadband Act is a bipartisan act that would establish the Office of Internet Connectivity and Growth within the National Telecommunications and Information Administration. This new office would streamline the management of federal broadband resources and simplify the process for small businesses and local developers to apply for government grants.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.  
The policy would allow ABA staff and members to educate federal, state, local, territorial, and tribal legislatures to appropriate adequate funding to ensure that the future of our American rural communities includes access to justice for each of its citizens. Additionally, adopting this policy would permit the ABA president to speak on behalf of this cause, as well as provide ABA support for legislation.

8. Cost to the Association. (Both direct and indirect costs)  
None.

9. Disclosure of Interest. (If applicable)  
None.

10. Referrals.  
This Resolution is in the process of being referred to the bar associations for all 50 states as well as the following ABA entities that may have an interest in the subject matter:

   - Center for Professional Responsibility
   - Coalition on Racial and Ethnic Justice
   - Commission on Hispanic Legal Rights and Responsibilities
   - Commission on Immigration
   - Commission on Racial and Ethnic Diversity in the Profession
   - Commission on Sexual Orientation and Gender Identity
   - Commission on Women
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

John M. Vaught
President, Colorado Bar Association
1290 Broadway, 17th Fl.
Denver, Colorado 80203
Tel: 303-244-1876
vaught@wtotrial.com

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.)

John M. Vaught
President, Colorado Bar Association
1290 Broadway, 17th Fl.
Denver, Colorado 80203
Tel: 303-244-1876
vaught@wtotrial.com
EXECUTIVE SUMMARY

1. Summary of the Resolution
The Resolution calls for the American Bar Association to adopt policy urging federal, state, local, territorial, and tribal legislatures to enact legislation and appropriate adequate funding to ensure equal access to justice for Americans living in rural communities by assuring proper broadband access is provided throughout the United States.

2. Summary of the Issue that the Resolution Addresses
Approximately 24 million Americans lack the bare minimum broadband speeds according to the Federal Communications Commission, 96% of whom live in rural areas. These individuals lack access to high-speed broadband at a rate four times higher than the national average. Non-metro-area attorneys cannot thrive without the ability to communicate and file documents electronically in their practices. Rural communities are struggling to attract new attorneys and the attorneys practicing in many of those areas are aging out. Self-represented litigants also need to be able to prosecute and defend their cases in rural communities. The ABA consistently hears concerns regarding the rising costs of legal services and the availability of lawyers in certain areas is limited. As a result, more and more people are forced to appear pro se. These individuals need the ability to download forms from courts’ websites and communicate with organizations that provide assistance. Not having the ability to do so creates an unnecessary burden on people who are already less likely to receive justice.

3. Please Explain How the Proposed Policy Position Will Address the Issue
Deploying broadband infrastructure promotes access to justice by removing the electronic barrier of inadequate internet service affecting attorneys and self-represented litigants in rural areas. Reliable high-speed internet in rural communities will help bridge the divide between rural and urban areas, giving lawyers and self-represented litigants the tools they need in today’s digital world. Solving the digital divide will also have tremendous consequences outside the legal profession, including public safety, health care, education, and agriculture.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
None identified.
RESOLVED, That the American Bar Association urges state, territorial, tribal courts, and law schools to adopt a “Pro Bono Scholars Program” in their respective jurisdictions that allows law students, in their final semester of law school, to obtain a full-time externship placement providing supervised pro bono services which deliver legal and other law-related services to the underserved through non-profit legal organizations; and

FURTHER RESOLVED, That the American Bar Association urges that eligible “Pro Bono Scholars” be provided the opportunity to take the February bar examination in their respective jurisdictions (if offered) during their final semester of law school.
REPORT

Introduction

In February of 2014, the State of New York spearheaded a new initiative: the “Pro Bono Scholars Program.” This program marries practical experience for law students with the community’s need for more pro bono legal services.

The Pro Bono Scholars Program allows third-year law students to devote their final semester of law school studies to serving underprivileged populations in an externship-style placement. Following an application process, accepted students take New York’s February Bar Exam and proceed to work full-time from March through May, performing approximately 500 hours of pro bono legal services. In addition, these students attend a weekly seminar, hosted by law school faculty, on topics chosen by their respective law schools. In essence, the Pro Bono Scholars Program is an academic externship with extra benefits for those involved. Growing continually, 2018 graduated the largest class of participants yet - close to 80 students across the state of New York.

We encourage the American Bar Association (“ABA”) to embolden law schools, courts, and bar associations nationwide to design and implement a Pro Bono Scholars Programs in their respective jurisdictions. While this Report will use New York as an example and model for the purposes of illustration, each state has the ability to design and implement its own Pro Bono Scholars Program, in conjunction with local legal aid providers, court systems, and law schools.

Responsibility of the Profession

Pro bono service is a pillar of the legal profession. For law students, it provides a multitude of personal and professional benefits. Underlying these benefits, however, is the responsibility that pro bono service presents the members of the profession and those who seek to gain admission to it. Such service calls for lawyers, regardless of

2 Verified by Samantha Pallini (primary drafter) in the Summer of 2018. Data available upon request.
3 Indeed, Rule 6.1 of the ABA Model Rules of Professional Conduct state that “a lawyer should aspire to render at least (50) hours of pro bono publico legal services per year” and that “a substantial majority of the (50) hours” should be to “persons of limited means” or to organizations that support the needs of persons of limited means. Model Rules of Prof’l Conduct R. 6.1 (2009).
“prominence” or “workload,” to use their talents and skills to improve the lives of underprivileged populations. Developing this understanding and skillset during law school can significantly benefit underprivileged populations and bridge the rapidly growing gap between the legal needs of those who cannot afford legal services and the resources available to meet those needs.

In 2013, the ABA’s Standing Committee on Pro Bono and Public Service conducted a report on American lawyers’ pro bono work. This nationwide study revealed that, in order to fulfill the legal profession’s responsibility to provide pro bono legal services to those most in need, institutional leadership needed to come from, among other entities, law schools. This came as no surprise to the Committee or to those reading the report. Yet, access to justice initiatives today still struggle with a host of monetary, resource, and volunteer-related issues. In fact, in 2017, the Legal Services Corporation (“LSC”) reported that “low-income Americans approached LSC-funded legal aid organizations for support with an estimated 1.7 million problems[,]” for which those Americans could receive “only limited or no legal help for more than half of their problems due to a lack of resources.”

It is for these reasons that law schools must continue to expand and grow their pro bono involvement and programming, so as to fulfill their professional obligations, prepare their students for the profession to which they seek to gain admission, and, most importantly, to continue to work toward bridging the gap between legal services and those in need of them.

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5 See, e.g., Preamble to the Model Rules of Prof’l Conduct R. 6.1 (2009). “A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.”

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Composition and Administration of the Program

This program enables law students to effectively complete their law school academic classes in five semesters, with the sixth semester of coursework being dedicated to providing full-time pro bono legal services to underprivileged populations. As the former New York Court of Appeals Chief Judge, Jonathan Lippman, stated in his announcement of New York’s program, “[t]he overarching goal for the Pro Bono Scholars Program is to instill in future members of the New York Bar the value of public service to the poor.”9

After an application and acceptance process, and at the completion of their fifth semester of law school, 3L law students accepted into the Pro Bono Scholars Program are effectively finished with traditional law school academic coursework.10 During the couple of months that follow, program participants study in preparation for the February Bar Exam (if offered).11 After taking the February Bar Exam, participants proceed to their pro bono placements in March, wherein they work approximately 45-hour weeks “under the supervision of a legal services provider, law firm, or corporation in partnership with their law school.”12 This placement lasts for 12 weeks, and it provides the participants with a minimum of 12 academic credit hours.13 In addition to working at their placements, students attend a weekly seminar hosted by their respective law schools, wherein they discuss a variety of legally-relevant topics (e.g., client confidentiality).14 At the close of their 12-week commitment, participants will have completed at least 500 hours of pro bono work and will proceed to walk at graduation with their fellow 3L classmates.15

In summary, participants “receive law school credit for their work and remain under their law school’s educational umbrella and stewardship while gaining practical

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9 Id. at 4.
11 Id.
14 Id.
15 Id.
experience in the real world and helping those who cannot afford legal services.” 16 This is the current composition and administration of New York’s version of a Pro Bono Scholars Program; however, the management and operation of a Pro Bono Scholars Program is not something that needs to be identical from state-to-state. Law schools are encouraged to work closely with their respective court systems and bar associations to develop a program that is best for their students, their community, their jurisdiction, and their legal aid providers.

Pursuant to ABA Standards 303 and 304, a program of this nature also satisfies the curriculum standard that students must participate in a minimum of six credits of experiential learning.17 Moreover, a Pro Bono Scholars Program mimics the format of the already ABA-approved externship programs. It is, therefore, a feasible program for law schools nationwide to implement, as the framework for externship programs is already a heavily-utilized and widely-accepted educational arrangement.18 Finally, each state (except Delaware) has a February Bar Exam, furthering the ability of almost every state to implement a Pro Bono Scholars Program.

Benefits of Nationwide Adoption

I. Benefit to Students

Pro bono work in a full-time, semester-long capacity provides students with an abundance of practical experience, which also fulfills curriculum standards set forth by the ABA.19 As aforementioned, this program is an externship with additional benefits. The ABA Section of Legal Education and Admissions to the Bar, Managing Director’s Guidance Memo, Standard 303(a)(3) (March 2015), accessible at https://www.lsc.gov/media-center/publications/2017-justice-gap-report.


ABA Section of Legal Education and Admissions to the Bar, Managing Director’s Guidance Memo (March 2015), accessible at https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_standards_303_304_experiential_course_requirement_.authcheckdam.pdf.


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The key differences between an externship and the Pro Bono Scholars Program is accelerated testing for the Bar and how the work specifically targets "the availability of legal services to needy populations."20

Following New York's creation of the Pro Bono Scholars Program, Chief Judge Lippman formed an advisory committee made up of law school deans from around the state.21 Led by Judge Victoria Graffeo, Chief Judge Lippman tasked the committee with "collaboratively and expeditiously resolving any outstanding issues related to program implementation and evaluation[,] in addition to the assurance of a smooth transition for the new protocols."22 Following the implementation of New York's first semester of the Pro Bono Scholars Program in the spring of 2015, Judge Graffeo authored an article in the Journal of Experiential Learning.23 Therein, she clarified the program's objectives, structure, administration, and need.24

Moreover, one thing made abundantly clear is that accelerated testing for the Bar is an adequate reward for those law students who dedicate their final semester of law school to working exclusively on behalf of underprivileged populations.25 This perk of the program, however, would not be a reward if the students taking the Bar Exam were not adequately prepared for it and, in consequence, did not pass the Exam. Hearteningly, the law students who have participated in New York's Pro Bono Scholars Program are most often the students who pass on their first try. In February of 2017, 71% of first-time New York Bar Exam takers passed the Bar.26 However, this statistic refers to all of the February Bar Exam takers. With specific reference to those who were Pro Bono Scholars, The University at Buffalo School of Law reported that their students passed with a 100% pass rate in the New York Bar Exam.27

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24 Id.
25 Id.
27 Id.
28 Id.
29 Id.
rate. Moreover, Brooklyn Law School reported that 100% of their Pro Bono Scholars have passed every year since the program went into effect in the spring of 2015. The other New York schools echo these statistics, with rates at or above 80%, even dating back to the spring of 2015, when the statewide program’s first participants took the February Bar Exam. Consequently, this special reward offered to the Pro Bono Scholars has proven to be a fruitful one, as the students emerge from the February Bar Exam ready to take on the legal profession.

New York features law schools ranging from a #5 ranking to no ranking at all; and yet, the students participating in its various Pro Bono Scholars Programs have nevertheless proven that the commitment was worth the reward.

In most instances, program participants in New York enter their first post-graduate job with an advantage over their fellow first-year associates. One Pro Bono Scholars Program participant reports that she will be entering her post-graduate job in September of 2018 with “second-year associate status,” in a Manhattan attorney position, as a direct result of the 500 hours of practical experience she will have completed at her current pro bono placement. This advantage sets her, and other program participants, up for great success immediately upon starting at their post-graduate jobs. In some cases, participants of the program can even begin their post-graduate jobs as accepted attorneys as early as June or July, unlike their peers who will be in the midst of bar preparation and will not be admitted until several months later.

For those participants who do not have jobs upon graduation, the Pro Bono Scholars Program is an invaluable marketing tool for students to become more attractive to employers. The nature of the work performed in their placements benefits them by...


34 Press interviews with N.P. of Pace Law School, Spring 2018 participant in the Pro Bono Scholars Program, conducted January 9, 2018 and March 26, 2018.
“increasing their knowledge and marketability, [providing] practical experience, developing skills, enhancing their reputations[,] and [letting them] explore[] alternative career opportunities.”33 In their placements, program participants accumulate hundreds of hours of experience in motion practice, transactional work, client interaction, and appearances before courts - in addition to the experiences they have already amassed from prior internships and externships throughout their law school careers. This puts participants at an advantage over their peers when seeking out post-graduate job opportunities, as it affords them the time, space, and networking to explore viable post-graduate opportunities they may not have otherwise been afforded.

Chief among the benefits to program participants, however, is the education that comes from serving those in need. One program participant, Joseph Schofield of CUNY School of Law, spoke highly of his spring 2015 placement with the Housing Unit of the New York Legal Assistance Group (“NYLAG”):

“From the moment you arrive, there is a distinct impression that people are being pushed along in the machine of a deeply impersonal bureaucracy. It was the day of one of our last big snow storms. People were waiting outside as the snow fell, then waiting again to get through security where they had to remove their belts and jackets and weren’t allowed to bring in food or water. Their next task was to wait as long as an hour or more for a landlord’s attorney to call their name and begin negotiations. Too often in Housing Court, things happen only at the mercy of the landlord attorney. It is such a privilege to be able to help level that playing field.”34

Following Joseph’s placement with NYLAG, he was hired on as a full-time Poverty Justice Solutions Fellow after graduation, and today, he works as a Staff Attorney for NYLAG’s Tenants’ Rights Unit.35 Joseph is just one of the many examples where law students are given a window into the world of public service, providing them an occasion to witness the need for legal services for underprivileged communities whilst giving them opportunities, as it affords them the time, space, and networking to explore viable post-graduate opportunities they may not have otherwise been afforded.

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the opportunity to do something about it. Even when program participants do not find themselves in placements that become their “passion projects,” they are nonetheless exposed to the importance of service and the recognition of the immense privilege that accompanies those who pursue a career in the legal profession.36

As a final point, the reward of taking a Bar Exam prior to graduation means that the students who participate in the Pro Bono Scholars Program are non-degree-holding, full-time students. As a result, they receive academic credit for their placement, and, therefore, are able to proceed with the funding they have had for the entirety of their law school studies.37

II. Benefit to Law Schools

In recent years, the push for more innovative experiential programming – study abroad programs, accelerated programs, and externships in large cities – has become a focus for most legal institutions. With the creation of a Pro Bono Scholars Program, law schools will be able to market to prospective students the opportunity to switch academic coursework after two and a half years, thereafter permitting those students to go on into academic ‘practice’ in the spring of their third year. All of this adds to the attractiveness of exiting law school with an advantage and a greater base of hands-on, practical knowledge.

Chief among the benefits to law schools is the preservation of law school autonomy. A Pro Bono Scholars Program is a baseline that each school must meet: placements focused on underprivileged populations, a weekly academic seminar, an attorney supervisor, and so on.38 Despite these baselines, the creative minds behind New York’s Pro Bono Scholars Program emphasized the importance of each of the 15 law schools in New York having the flexibility to craft their programs according to their own

36 Jeff Donigan, a 2015 graduate of SUNY Buffalo Law School, was drawn to the Pro Bono Scholars Program after working for a summer with the Erie County Bar Association Volunteer Lawyers Project and observing the need for greater access to services. “[M]any of our clients are in terrible situations,” he said. “It is so rewarding to assist them and put a mile on their faces.” Gayle T. Murphy, New York State Bar Association, Pro Bono News, Volume 25, No. 2, at 14 (Spring 2015), accessible at https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=56200.

37 “Students are able to keep their scholarships, financial aid, and grants that they have because, during their sixth and final semester, they are still a full-time student. They haven’t received a degree yet, they’re still taking the weekly seminar class, so they’re doing the same thing that they would if they were participating in a clinic or an externship.” In-person interview with Kim Wolf Price, Externship Director of Syracuse University College of Law, conducted April 17, 2018.

students, curricula, and local communities’ needs. For example, program tailoring can be exercised with regard to details as minor as the amount of credits a law school awards to its students for participating. In contrast, program tailoring can also be as great as the qualifications expected of its participants, the means of application to the program, the number of students accepted to each program, and the selection of placements where students can be sent.

Beyond autonomy, law schools will benefit from the relationships they form with alumni, legal aid providers, and clientele. In giving back to their local communities through the service of their students, law schools engage underprivileged populations in more meaningful ways, strengthen alumni relationships through mentorship and supervision of their law students, and successfully comply with and exceed the standards and expectations of the ABA. In essence, permitting students to apply to a prestigious

[39 NORC at the University of Chicago for Legal Services Corporation, The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans, Legal Services Corporation (2017), accessible at https://www.lsc.gov/media-center/publications/2017-justice-gap-report (“Respecting the autonomy of law schools, the issues of student tuition assistance or financial aid are not addressed by the Pro Bono Scholars Program guidelines — those are matters left to each law school. In addition, each American Bar Association-approved law school, whether situated in New York or elsewhere in the United States, is given the flexibility to develop its own guidelines for student eligibility, including deciding the extent to which academic standing will be a factor in the selection of participants. […] Each law school will determine and design the appropriate academic component. To facilitate the role of the law school, in addition to a placement or clinical supervisor, each participant will be assigned a law school faculty supervisor who will monitor the student’s progress and specify the nature of the classroom/seminar requirements of the program. Hence, a student benefits from the involvement of two supervisors — one from the faculty and one overseeing the pro bono work performed for the placement sponsor.”).]


[42 Id.]

[43 See chart on page 13.]


39 NORC at the University of Chicago for Legal Services Corporation, The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans, Legal Services Corporation (2017), accessible at https://www.lsc.gov/media-center/publications/2017-justice-gap-report (“Respecting the autonomy of law schools, the issues of student tuition assistance or financial aid are not addressed by the Pro Bono Scholars Program guidelines — those are matters left to each law school. In addition, each American Bar Association-approved law school, whether situated in New York or elsewhere in the United States, is given the flexibility to develop its own guidelines for student eligibility, including deciding the extent to which academic standing will be a factor in the selection of participants. […] Each law school will determine and design the appropriate academic component. To facilitate the role of the law school, in addition to a placement or clinical supervisor, each participant will be assigned a law school faculty supervisor who will monitor the student’s progress and specify the nature of the classroom/seminar requirements of the program. Hence, a student benefits from the involvement of two supervisors — one from the faculty and one overseeing the pro bono work performed for the placement sponsor.”).]
“Scholars” program, accepting those students deemed qualified, and then sending those students out to serve in the community doubles back as a public relations and marketing tool for law schools. It builds a positive reputation in the community whilst enhancing its public image with prospective students and alumni.

Finally, by offering a Pro Bono Scholars Program, law schools can fulfill their obligations to the profession as a whole. As aforementioned, a nationwide study by the LSC revealed that, in order to “fulfill [the legal profession’s] responsibility to provide pro bono legal services to those most in need,” institutional leadership needed to come from, among other entities, law schools.45 It is crucial that law schools take this call to action seriously, and the offering of a Pro Bono Scholars Program would present a viable solution, with proven results, that would help so many people in such a short period of time.46 In summary, this offering could impact students for their entire career and it could impact clients for a lifetime.

III. Benefit to the Community

Pro bono work is vital to communities and families, who rely on such services not only for counsel, but for the protection of the essentials of their lives, such as housing, food, work, and familial ties. One New York City attorney described pro bono service as a foundational element of the American justice system.

“If access to justice is achieved through meaningful participation in the courts, then those of us who are officers of the court have a lot of work to do. By most accounts, some 80 percent of low-income litigants in our civil courts proceed without representation, and their legal outcomes suffer as a consequence. Not only do litigants face great harm – such as the loss of children, liberty and/or housing – but they learn that the courts are not a place of justice for all. It should be no surprise then that many low-income people eschew the courts when they have legal problems. The more our court system loses the trust of its citizens the less well it functions. . . . If pro


bono power is harnessed strategically[,] it has the capacity not only to reduce the gap in access to justice, but to transform the public support for and understanding of the importance of access to civil legal services overall."47

In 2011, the LSC created a Pro Bono Task Force to consider "how to effectively increase pro bono involvement by all lawyers" due to "the sharp rise in demand for legal services . . . as economic turbulence ha[d] caused the number of people living below the poverty line to soar."48 The Task Force outlined a variety of "requests for the legal profession as a whole."49 One of these requests was that LSC and its grantees "[i]nclude mechanisms for engaging non-lawyers as pro bono volunteers, including law students[.]"50

As the demand for pro bono services rises in communities, and the demand for law students to have more practical experience upon graduation remains a key request of employers, there is no more telling statistic than that of last year’s pro bono services rendered by law students. Not including the pro bono hours that go uncounted or are difficult to track, law students contributed 3.8 million hours in pro bono legal services in the 2016-2017 academic year.51 This is the equivalent of more than $92 million in legal services.52

In New York, the cities of Syracuse and Rochester have been ranked 13th and 12th, respectively, for the highest poverty rates in the country.53 Syracuse University College of Law’s Class of 2018 – compiled of approximately 180 students – has


49 Id.

50 Id.


52 Id.


54 Id.

55 Id.

56 Id.

completed a total of 6,007 pro bono hours for the underprivileged populations of Syracuse and Rochester between August of 2015 and March of 2018. That is an average of 5.5 hours per student, per semester. That is an excellent start for servicing the underprivileged populations of a community in need. With the Pro Bono Scholars program, however, Syracuse Law’s two spring 2018 participants performed a total of 1,000 pro bono hours in just 12 weeks. The impact of these two students offering 1,000 hours to the local Syracuse and Rochester underprivileged communities is incomparable. It is vital, therefore, that law schools and law students across the country are encouraged to take part in this opportunity to transform communities through service, all while benefitting personally and professionally.

Conclusion

By creating a Pro Bono Scholars Program in each state, the ABA, law schools, and law students will actively assist their communities and those who are desperately in need of pro bono services. If 3.8 million hours of pro bono legal services were provided by law students in one year, imagine how many more hours would be performed, and how many more people would be helped, if all 50 states, and all 200+ ABA-accredited law schools, created a Pro Bono Scholars Program for their 3Ls to participate in.

As United States Supreme Court Justice Sandra Day O’Connor once said, “The ever-increasing pressures of the legal marketplace, the need to bill hours, to market to clients, and to attend to the bottom line, have made fulfilling the responsibilities of community service quite difficult. But public service marks the difference between a business and a profession. While a business can afford to focus solely on profits, a profession cannot. It must devote itself first to the community it is responsible to serve. I can imagine no greater duty than fulfilling this obligation. And I can imagine no greater pleasure.”

We hope the ABA, and all of its members, will give serious consideration to this Resolution and Report, as we seek the encouragement of the creation of Pro Bono Scholars Programs across the country. “Those who have the privilege to know have the duty to act.”

Negeen Sadeghi-Movahed
Chair, Law Student Division
August, 2019

54 Pro Bono Graduation Honors for the Syracuse Law Class of 2018, compiled April 4, 2018.
56 Albert Einstein
1. **Summary of Resolution(s).** This Resolution urges state, territorial, tribal courts, and law schools to adopt a “Pro Bono Scholars Program” in their respective jurisdictions that allows law students, in the final semester of law school, to obtain a full-time externship placement providing supervised pro bono services which deliver legal and other law-related services to the underserved through non-profit legal organizations. The Resolution also urges that eligible “Pro Bono Scholars” be provided the opportunity to take the February bar examination in their respective jurisdictions (if offered) during their final semester of law school.

2. **Approval by Submitting Entity.** Approved by the LSD Council on April 28, 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?** 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.** N/A.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** Each state court system, in conjunction with the state’s law schools, will have a choice to implement this policy.

8. **Cost to the Association.** No costs.

9. **Disclosure of Interest.** No Law Student Division Council members are currently participating in a Pro Bono Scholars program. However, Matthew Wallace, the Law Student at-Large on the ABA Board of Governors as well as Samantha J. Pallini, the primary drafter of this resolution, both attended Syracuse University College of Law which is referenced throughout the resolution as a model for future Pro Bono Scholars programs. There are no personal interests to be gained by this Resolution.

10. **ABA/Judicial Division**
    ABA Section of Legal Education and Admissions to the Bar
    ABA Standing Committee on Delivery of Legal Services
ABA Standing Committee on Ethics and Professional Responsibility
ABA Standing Committee on Legal Aid and Indigent Defendants
ABA Standing Committee on Pro Bono and Public Service

11. Contact Name and Address Information.

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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 the Resolution

This Resolution urges state, territorial, tribal courts, and law schools to adopt a “Pro Bono Scholars Program” in their respective jurisdictions that allows law students, in the final semester of law school, to obtain a full-time externship placement providing supervised pro bono services which deliver legal and other law-related services to the underserved through non-profit legal organizations. The Resolution also urges that eligible “Pro Bono Scholars” be provided the opportunity to take the February bar examination in their respective jurisdictions (if offered) during their final semester of law school.

2. Summary of the Issue that the Resolution Addresses

This Resolution hits on three main issues: (1) moving towards closing the access-to-justice gap through the administration of greater pro bono legal services; (2) preparing law school graduates for the profession with greater practical experience; and (3) providing schools and states with a program that better prepares their students and better attracts students to their law schools and jurisdictions.

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

First, with regard to the access-to-justice gap, each law student who participates in a Scholars program will provide, on average, 500 hours of pro bono legal services to their local community. This is a substantial, immediate impact on communities nationwide.

Second, with regard to practical experience, it is undisputed that working full-time for several months prior to graduation from law school will prepare law students to be better lawyers. It will benefit both those students who do have jobs lined up to excel as first-year associates; and, it will give a significant advantage to those students who do not yet have jobs, by providing them connections, experience, and a head-start on their career.

Finally, through the development of these programs, law schools will maintain autonomy is designing a program, accepting students, selecting placements, and offering the classroom component. Moreover, this program provides an attractive marketing opportunity with regard to prospective students, forms strong connections between law schools and their local communities (thereby helping schools reap short and long term benefits), and does not dismiss schools’ needs with regard to tuition.

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

No opposition has been identified.
RESOLVED, That the American Bar Association urges all employers in the legal profession to implement and maintain policies and practices to address and close the compensation gap between similarly situated men and women lawyers. Such policies and practices for achieving that goal may, depending on the circumstances, include the following:

1. Commit to a policy where leadership and governance committees are comprised of a critical mass of women including diverse women;

2. Commit to include a critical mass of women including diverse women in the pool of candidates for leadership roles;

3. Not rely solely on prior salary history when setting compensation for new hires;

4. Implement training for the elimination of gender bias for all involved in hiring and compensation setting processes;

5. Ensure that in the performance review process implicit bias does not go unchecked and does not lead to an unwarranted compensation gap;

6. Have a transparent compensation system to allow leaders and executives to identify compensation gaps with attorneys who are similarly situated to them;

7. Identify, in writing, key elements that determine compensation and which may help the attorneys succeed and increase their compensation;

8. Provide an appeal process for compensation decisions;

9. Analyze on an individual basis the causes for any compensation gap between similarly situated attorneys of different genders, whether in base, bonus, or other compensation;
10. Have a written protocol for allocation of credit for business generation, including an appeal process;

11. Remove barriers to business generation, including gendered exclusion from business generation teams, inordinate legacy credit for existing clients and implement a transparent system for business origination opportunities;

12. Provide equal access to mentoring and sponsoring relationships and marketing opportunities across genders, and implement a transparent system for succession of leadership opportunities;

13. Analyze gaps in promotion rates between similarly qualified attorneys of different genders and addressing the cause of such gaps;

14. Review the assignment system to ensure that attorneys of different genders have equal access to high-impact and high-visibility assignments that may lead to higher compensation; and

15. Consider the impact of non-legal task assignments on attorneys of different genders and their compensation.
I. Introduction and Overview

This resolution urges all employers in the legal profession to implement and maintain policies and practices to close the compensation gap between similarly situated men and women lawyers. This Resolution also identifies policies and practices that legal employers may implement to work toward eliminating the gender pay gap in their organizations.

The ABA is committed to the elimination of bias and the enhancement of diversity in the legal profession. This commitment is not only recognized in prior resolutions passed by the House of Delegates, but also by the adoption of Goal III, which promotes full and equal participation in the association, the legal profession, and the judicial system.

As one of the Goal III entities, The Commission on Women in the Profession focuses on developing and supporting initiatives and research to secure full and equal participation of women in all areas of the legal profession.

II. The ABA Has Been A Pioneer In Addressing Issues of Gender Equity and Equal Pay for Women

The ABA has a long history of promoting gender equality in the legal profession and more specifically, equal pay between men and women lawyers. For nearly 50 years the ABA has passed resolutions and maintained active policy addressing discrimination in the legal profession. In 1972, the association passed resolution 72M23A, strongly condemning all forms of discriminatory hiring practices within the legal profession, including on the basis of sex. Later, in 1988, resolution 88A23A was passed to address the persistence of overt and subtle barriers that deny women the opportunity to achieve full integration and equal participation in the work, responsibilities, and rewards of the legal profession. This resolution also affirmed the fundamental principle that there is no place in the profession for these barriers and calls upon members to eliminate these barriers. In 1995, the ABA passed resolution 95M119 opposing bias and discrimination based on race and gender that prevented women from gaining full and equal participation in the legal profession and actively supporting efforts to eradicate this bias.

In addition to policy addressing the legal profession the ABA has more broadly called for gender equality in the workplace. In 2007, ABA passed resolution 07A302 urging Congress to amend Title VII of the Civil Rights Act of 1964 and other federal age and disability employment discrimination laws to ensure that the statute of limitations regarding claims involving compensation run from each payment that reflects the claimed

unlawful disparity. In 2010, the ABA passed resolution 10M107 urging Congress to enact legislation to provide more effective remedies, procedures, and protections for those subjected to pay discrimination. More recently, in 2016, the ABA passed resolution 16M10B supporting constitutional equality for women and urging the extension of legal rights, privileges, and responsibilities to all. This resolution also reaffirmed support of and affirmatively acts toward the goal of the ratification of the Equal Rights Amendment to the U.S. Constitution.

In addition to the resolutions passed by the House of Delegates, in August 2012, under the leadership of then-President Laurel Bellows, the ABA created a Blue-Ribbon Task Force on Gender Equity which addressed, in part, pay disparity between men and women lawyers. The Gender Equity Task Force created three reports and a toolkit. Those publications are: (1) Closing the Gap: A Roadmap for Achieving Gender Pay Equity in Law Firm Partner Compensation; (2) Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers; (3) Toolkit for Gender Equity in Partner Compensation; and (4) What You Need to Know about Negotiating Compensation. The recommendations in each report created by the Gender Equity Task Force are still relevant today.

More recently, Hilarie Bass initiated a study in her Presidential term titled Achieving Long Term Careers for Women in Law. This project is continuing in Bob Carlson’s current term as President of the ABA. The report for this research has not yet been published. However, several recommendations for practice changes set out in this Resolution are derived from these ABA Presidential projects. Others, as set out below, are derived from research conducted by the ABA Commission on Women in the Profession.

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1 ABA House of Delegates Resolution 07A302 (adopted Aug. 2007).
7 ABA Toolkit for Gender Equity in Partner Compensation, ABA WOMEN IN THE PROFESSION (June 15, 2019), https://www.americanbar.org/content/dam/aba/administrative/women/negotiations_guide_task_force.pdf.
9 Carol Fohlinberg, et al., What You Need to Know About Negotiating Compensation, ABA PRESIDENTIAL TASK FORCE ON GENDER EQUITY AND THE COMMISSION ON WOMEN IN THE PROFESSION (2013), https://www.americanbar.org/content/dam/aba/administrative/officer_president/initiative_Overview.pdf (last visited Apr. 11, 2019) (detailing the initiative which includes research projects to find “Best practices to stem the steady loss over time of experienced women lawyers in private practice”).
III. The Statistics Show That the Gender Pay Gap Is Still Wide

The 2012 Closing the Gap report, which was published by the ABA because of the work of the Task Force on Gender Equity, highlighted the extent of the gender pay gap regarding the compensation paid to men and women in law firms.\textsuperscript{13} The Closing the Gap report cites to significant research on the wage gap issue. Sadly, the issues raised in the Closing the Gap study have not been resolved. The most recent studies on the gender wage gap show:

- In 2018, the average male partner total compensation in an AM Law 200 firm was 53% more than the average female partner.\textsuperscript{14}
- In 2016, the average male partner total compensation in an AM Law 200 firm was 44% more than the average female partner.\textsuperscript{15}
- In 2019, male General Counsels were paid 39% more than their female counterparts, with only one woman among the 10 top-paid General Counsel positions.\textsuperscript{16}

According to the Association of Corporate Counsel, female in-house counsel (non-GC) also earned less than their male counterparts at all junctures of their career. Female in-house counsel, barred between 2015-2018, earn 91% of what their male colleagues earn.\textsuperscript{17} This disparity increases for in-house women barred before 2000, who earn only 74% of what their male counterparts earn.\textsuperscript{18} Looking at the entire legal profession including all levels of practice, the 2018 Bureau of Labor Statistics shows full-time women lawyers earn 77.8% of what full-time male lawyers earn.\textsuperscript{19} If current trends in pay persist, women would achieve parity to men in 2069; however, it would take substantially longer for women of color.\textsuperscript{20} For African American women, pay equity would not be achieved

\textsuperscript{13} See generally Closing the Gap, supra note 1.
\textsuperscript{15} Id.
\textsuperscript{18} Id.
until 2119, while Latinas would have to wait until 2224, over a hundred years, to secure parity.21

The Commission on Women in the Profession’s seminal reports, Visible Invisibility: Women of Color in Fortune 500 Legal Departments22 and Visible Invisibility: Women of Color in Law Firms,23 discuss the factors contributing to gaps in compensation for women of color in corporate legal departments and law firms. The Commission’s research showed that women of color were the least likely to be hired for top legal management positions and most likely to be hired at salary scales that were lower to both their white male and female counterparts.24 As both reports note, disparities in hiring and compensation have a ripple effect for future salary compensation and retention. For example, “what starts as a $2,000 salary gap for a woman entering a law firm, becomes a $66,000 annual gap upon promotion to equity partner.”25

In both law firm and corporate legal department settings, women of color face barriers not only in securing pay equity but also in salary negotiations. Both of the Visible Invisibility reports found that women of color are disproportionately the sole breadwinners in their households;26 they also worry that if they ask for too much, they will miss out on opportunities or will be viewed as aggressive.27 For women of color from ethnic groups, cultural socialization also affects how they navigate their advancement in the legal profession. For example, in a study by the Hispanic National Bar Association’s Commission on Latinas in the Profession, the report found Latinas are taught to be humble and not to “act bigger” which at times impacts their ability to push for advancement or higher salaries.28

21 Id.
24 Women of Color in Fortune 500 Legal Departments, supra note 15, at xv.
26 Women of Color in Fortune 500 Legal Departments, supra note 15 at xviii; Women of Color in Law Firms, supra note 16, at 27.
27 Women of Color in Fortune 500 Legal Departments, supra note 15 at xvii.

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21 Id.
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26 Women of Color in Fortune 500 Legal Departments, supra note 15 at xviii; Women of Color in Law Firms, supra note 16, at 27.
27 Women of Color in Fortune 500 Legal Departments, supra note 15 at xvii.
IV. Why The ABA Should Adopt This Resolution

The American Bar Association has been one of the organizations at the forefront of making recommendations to eliminate the gender pay gap. As this Resolution illustrates in the 16 suggested policies and procedures that legal employers may look to close the gap, the gap is not created by compensation systems alone. There are many pieces to the puzzle that impact the gender wage gap. These include the failure to promote women to leadership roles, gender bias (combined with racial bias for women of color), lack of transparency in compensation and hiring systems, and allocation of work assignments. In law firms the systems for establishing originiation credit can have a negative impact on women lawyers’ salaries.26 In corporate legal departments the failure to promote women creates a disparate impact on wages.

In 2018 the Association of Corporate Counsel reported that although there was growing parity in hiring within legal departments of Fortune 500 companies (57% male and 43% female), with promotions the gap was starting. In 2017, 35% of promotions and women only 21%.30 For law firms, external hires are over three times more likely to be men than women.31

The ABA has addressed many of these issues in various studies, toolkits and programs. The ABA is already providing research and information to assist legal employers in enacting some of the recommended policies and procedures outlined in this Resolution.32 Although the ABA already has an active voice in seeking to eliminate the gender wage gap, the adoption of this Resolution will amplify that voice.

This Resolution provides legal employers with a list of suggested actions that can be taken to eliminate practices that may contribute to the pay gap. The Closing the Gap

26 See Closing the Gap, supra note 1 at 15 (“Research shows that women are often excluded from the internal networks where male colleagues assist one another’s efforts and, in many cases, are bullied or otherwise intimidated by more senior male colleagues who aggressively pursue credit allocation.”).


See, e.g., ZERO TOLERANCE: BEST PRACTICES FOR COMBATING SEX-BASED HARASSMENT IN THE LEGAL PROFESSION (Wendi S. Lazar et al. eds., 2018) (providing tools for legal organizations and victims of harassment and bullying); Achieving Long Term Careers for Women in the Law, ABA PRESIDENTIAL INITIATIVE, https://www.americanbar.org/content/dam/aba/administrative/office_president/Initiative_Overview.pdf (last visited Apr. 11, 2019) (detailing the initiative which includes research projects to find “best practices to stem the steady loss over time of experienced women lawyers in private practice”); Joan C. Williams, et al., You Can’t Change What You Can’t See: Interrupting Racial & Gender Bias in the Legal Profession, ABA COMMISSION ON WOMEN IN THE PROFESSION AND MINORITY CORPORATE COUNSEL ASSOCIATION (2016), https://www.americanbar.org/content/dam/aba/administrative/women/Updated%20Bias%20Interrupters.pdf (finding that traditional diversity tools are not effective and providing new research and toolkits for law firms and in-house departments); Women of Color Research Initiative, ABA COMMISSION ON WOMEN IN THE PROFESSION, https://www.americanbar.org/groups/diversity/women/initiatives_awards/women_of_color_research_initiative/ (last visited Apr. 11, 2019) (exploring the bias and other obstacles women of color face in the legal profession due to the intersection of their gender and their race).
report found that “as long as the data demonstrates such a pay differential, there is a compelling need to look behind the numbers to understand the factors that help explain the disparity.” That is what this Resolution proposes. Each of the 15 practices outlined in this Resolution are provided as guidance to legal employers to assist them in looking behind and getting beyond the numbers in evaluating pay disparity in their organizations. These 15 recommendations are based on the ABA publications cited in this Report. This research has gone behind the numbers and created recommendations to help legal employers identify how wage disparity is created and how it can be changed. This Resolution will amplify those messages and urge legal employers to make changes.

V. Conclusion

In the research publications referenced in this report there is one common denominator: diversity and inclusion must be part of the fabric of the legal organization for the gender pay divide to close. The voice of the American Bar Association is an important part of the effort to eliminate the gender wage gap. By adopting this Resolution, which includes concrete recommendations backed by solid research, the ABA will be providing a great resource to legal employers who want to eradicate the gender wage gap in their organizations and continue to promote one of its goals in eliminating bias in the legal profession.

Respectfully submitted,

Stephanie A. Scharf
Chair, ABA Commission on Women in the Profession
August 2019

33 Closing the Gap, supra note 1 at 13.
GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Women in the Profession

Submitted By: Stephanie A. Scharf, Chair, ABA Commission on Women in the Profession

1. Summary of Resolution(s).

This Resolution urges all legal employers to implement and maintain policies and practices to close the compensation gap between similarly situated male and female lawyers. It also identifies the fifteen best practices and policies that legal employers can implement in order to eliminate the gender pay gap in their organizations.

2. Approval by Submitting Entity.

The ABA Commission on Women approved this policy on Friday, January 25, 2019 in Las Vegas, NV during its Midyear Business Meeting. Additional approval of substantive resolution modifications took place on Tuesday, May 28, 2019.

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 policy is consistent with prior policy supporting the prohibition of gender equality and opposing discrimination in the legal profession in 72M23A, 88A121, 95M119, 10M107, 16M10B, and 16M116.

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. N/A

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

The policy will provide authority for the ABA to advocate and promote pay equity within the legal profession through the various mechanisms currently used by the association.
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.** (If applicable) There are no known conflicts of interest.

10. **Referrals.** By copy of this form, the Report with Recommendation will be referred to the following entities:

- Law Practice Division
- Section of Civil Rights and Social Justice
- Section of Dispute Resolution
- Section of Labor and Employment Law
- Section of Litigation
- Young Lawyers Division
- Commission on Racial and Ethnic Diversity in the Legal Profession
- Commission on Sexual Orientation and Gender Identity
- Business Law Section

11. **Contact Name and Address Information.**

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Melissa Wood, Director  
Commission on Women in the Profession  
American Bar Association  
321 North Clark Street  
Chicago, IL 60654  
(312) 988-5676  
Email: Melissa.Wood@americanbar.org

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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.

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EXECUTIVE SUMMARY

1. Summary of the Resolution
   
   This Resolution urges all legal employers to implement and maintain policies and practices to close the compensation gap between similarly situated male and female lawyers. It also identifies fifteen best practices and policies that legal employers can implement in order to eliminate the gender pay gap in their organizations.

2. Summary of the Issue that the Resolution Addresses
   
   This Resolution addresses the compensation inequality that continues to exist between men and women within the legal profession. The Resolution outlines specific practices and policies based on the association’s own research and available data. By implementing the practice and policies outlined in this Resolution organizations can promote equality in compensation between male and female lawyers.

3. Please Explain How the Proposed Policy Position Will Address the Issue
   
   The proposed policy addresses the issue of compensation inequality by providing best practices and policies that legal employers can implement in order to eliminate compensation disparity.

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

   None at this time.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments, and the private sector, to recognize their obligation to address climate change and take action to achieve the following goals:
- Reduce U.S. greenhouse gas emissions to net zero or below as soon as possible, consistent with the latest peer-reviewed science, and
- Contribute the U.S. fair share to holding the increase in the global average temperature to the lowest possible increase above pre-industrial levels;

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation that would:
- Utilize a broad range of legal mechanisms, including but not limited to market-based mechanisms and removal of legal barriers to reduction of greenhouse gas emissions, to achieve the goals set out above.
- Utilize a broad range of legal mechanisms to encourage and enable adaptation to climate change by federal, state, local, territorial, and tribal governments, and the private sector.
- Provide for a just transition for the people and places most dependent on the carbon economy.
- Recognize and incorporate sustainable development principles in reducing greenhouse gas emissions and adapting to climate change, in order to simultaneously promote economic development, social well-being, national security, and environmental protection;

FURTHER RESOLVED, That the American Bar Association urges the United States government to: (1) engage in active and constructive international discussions under the United Nations Framework Convention on Climate Change and its progeny, and (2) remain in, negotiate, or ratify treaties and other agreements to reduce greenhouse gas emissions and adapt to climate change; and
FURTHER RESOLVED, That the American Bar Association urges lawyers to engage in pro bono activities to aid efforts to reduce greenhouse gas emissions and adapt to climate change, and to advise their clients of the risks and opportunities that climate change provides.
This resolution builds on prior House of Delegates resolutions on climate change and sustainable development, as well as ongoing activity by the American Bar Association (ABA) Board of Governors and other ABA leadership.

This resolution updates and substantially revises the climate change resolution adopted by the ABA House of Delegates on February 8, 2008. It differs from the 2008 resolution in four ways. First, that resolution urged the enactment of federal cap-and-trade legislation to fight climate change. That legislation was not adopted. This resolution instead urges the adoption of a wide range of legal measures to both reduce greenhouse gas emissions and to adapt to climate change. Second, the 2008 resolution was directed at the federal government; this resolution is addressed to federal, state, local, territorial and tribal governments, as well as the private sector. Third, the present resolution reflects the greater urgency of climate change. In the more than a decade since the 2008 resolution, the scientific community has even stronger evidence that climate change is occurring, is mostly caused by human activities, and is already having adverse consequences. Reducing greenhouse gas (GHG) emissions and preparing for the impacts of climate change must take on even greater urgency. Finally, the present resolution recognizes the need for, and urges a greater role for lawyers in addressing climate change.

This resolution also builds on a 2011 ABA House of Delegates resolution that urged “the United States government to ensure that federally-recognized Indian tribes ... may participate fully ... in policy discussions on the issue of climate change domestically and in international fora.”

Climate change must be addressed in the context of sustainable development—a conceptual framework that the ABA House of Delegates has endorsed three times. In August 2013, the ABA’s House of Delegates reaffirmed its 1991 and 2003 commitments to sustainable development, and defined sustainable development as “the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations.” It also urged “all governments, lawyers, and ABA entities to act in ways that accelerate progress toward sustainability.” In the 2003

1. carry out measures such as mitigating climate change, reducing greenhouse gases, and promoting renewable energy and energy efficiency; and
2. adapt to direct impacts from climate and sea-level changes to their territorial and reservation land bases and resources.

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resolution, the ABA House of Delegates agreed to “promote the principles of sustainable development in relevant fields of law.”

With these resolutions as a foundation, on November 9, 2018, the ABA Board of Governors approved the Mission Statement of the ABA Representative to the United Nations. One of the purposes of this representative is to “[e]nhance globally the reputation of the ABA, as a trusted partner of the United Nations and advocate for the Rule of Law, access to justice, defender of human rights and implementation of the UN’s Sustainable Development Goals.” The Sustainable Development Goals are more specific expressions of the meaning of sustainable development, and were adopted in 2015. Of one of the goals is to “take urgent action to combat climate change and its impacts.” This is precisely the objective of this resolution.

Climate change presents significant risks to this and future generations. Climate change presents environmental risks, to be sure, but it also presents security, economic, and social risks. At the same time, the national and international response to climate change provides major opportunities for improving environmental quality, fostering economic growth and job creation, and enhancing domestic and global security. To foster sustainable development, the United States should play a leadership role in addressing climate change.

I. Scientific Evidence and Consequences

According to the National Aeronautics and Space Administration (NASA), the past five years (2014-2018) are, together, “the warmest years in the modern record.” In 2018, average surface temperatures around the world were 1.5 degrees Fahrenheit (0.83 degrees Celsius) warmer than they were about 40 to 70 years ago. NASA also found that the past five years (2014-2018) are, together, “the warmest years in the modern record.” In 2018, average surface temperatures around the world were 1.5 degrees Fahrenheit (0.83 degrees Celsius) warmer than they were about 40 to 70 years ago. NASA also found


1. Strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries; (2) Integrate climate change measures into national policies, strategies and planning; (3) Improve education, awareness-raising and human and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning; (4) Implement the commitment undertaken by developed-country parties to the United Nations Framework Convention on Climate Change to a goal of mobilizing jointly $100 billion annually by 2020 from all sources to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation and fully operationalize the Green Climate Fund through its capitalization as soon as possible; and (5) Promote mechanisms for raising capacity for effective climate change-related planning and management in least developed countries and small island developing States, including focusing on women, youth and local and marginalized communities.


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that Earth’s global surface temperatures in 2018 ranked as the fourth warmest since 1880.\textsuperscript{10}

Increased atmospheric concentrations of GHGs, the Intergovernmental Panel on Climate Change (IPCC) concluded in 2014, "are extremely likely to have been the dominant cause of the observed warming since the mid-20th century."\textsuperscript{11} The IPCC also concluded that "further emission increases will have significant adverse effects." Continued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems.\textsuperscript{12}

The 2018 IPCC report\textsuperscript{13} makes clear that the scientific evidence of the magnitude, speed, and consequences of climate change is becoming increasingly urgent. According to this and other IPCC reports and those of the U.S. National Academy of Sciences and all other major national academy of science reports, climate change is occurring, human activities contribute to it, and climate change will have adverse effects on the United States and the rest of the world. While there remain some uncertainties about its magnitude, the evidence of climate change easily passes the certainty tests that are used to make decisions in other relevant areas of law and policy.

In 2009, after detailed analysis of the science and consideration of extensive public comment, the U.S. Environmental Protection Agency (EPA) made a formal finding that "six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations."\textsuperscript{14} For public health, EPA "has considered how elevated concentrations of the well-mixed greenhouse gases and associated climate change affect public health by evaluating the risks associated with changes in air quality, increases in temperatures, changes in extreme weather events, increases in food- and water-borne pathogens, and changes in aeroallergens."\textsuperscript{15} For public welfare, a term defined under the Clean Air Act (CAA) to include a wide variety of non-health-related impacts,\textsuperscript{16} EPA considered "numerous and far-ranging risks to food production and

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\textsuperscript{11} Id.


\textsuperscript{14} EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496, 66496 (Dec. 15, 2009) (codified at 40 C.F.R. ch. I). EPA also found that "the combined emissions of these greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas air pollution that endangers public health and welfare" under § 202(a) of the CAA, 42 U.S.C. § 7521(a). Id. The six gases are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. Id. at 66497. EPA denied petitions for reconsideration of that finding. EPA’s Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 Fed. Reg. 46056 (Aug 13, 2010).

\textsuperscript{15} 74 Fed. Reg. at 66497.

\textsuperscript{16} 42 U.S.C. § 7602(h).

All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as
agriculture, forestry, water resources, sea level rise and coastal areas, energy, infrastructure, and settlements, and ecosystems and wildlife. 17

The endangerment finding was then challenged before the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, which unanimously upheld the finding. 18 The U.S. Supreme Court took jurisdiction over another part of this case, and reversed the D.C. Circuit’s decision on that part of the case, but did not take jurisdiction over the endangerment finding decision. 19 The present Administration has not taken any action to date to modify or overturn the endangerment finding.

The endangerment finding is not the last word on the actual and likely impacts of climate change on the United States. The U.S. Global Change Research Program, which was authorized by the U.S. Congress in 1990, issued the first portion of its fourth climate change assessment in 2017. 20 Concentrations of CO2 in the atmosphere, the report said, are now more than 400 ppm [parts per million], “a level that last occurred about 3 million years ago, when both global average temperature and sea level were significantly higher than today.” 21 Global annually averaged surface air temperature has increased by about 1.8°F (1°C) over the last 115 years (1901–2016). 22 In addition, “over the next few decades (2021–2050), annual average temperatures are expected to rise by about 2.5°F for the United States, relative to the recent past (average from 1976–2005), under all plausible future climate scenarios.” 23 Finally, global annual average temperatures “could reach 9°F (5°C) or more by the end of this century” relative to pre-industrial times if the world continues on a business-as-usual pathway. 24 It projected sea-level rise by 2100 at one to four feet, and said that a rise of eight feet “cannot be ruled out.” 25 Already, U.S. Global Change Research Program explained, rainfall intensity is increasing, the incidence of forest fires is greater, the ocean is acidifying, and glaciers are melting. 26

All of these things cause or contribute to adverse effects on human rights in the United States and the rest of the world. 27 Extreme weather events, “their causes and consequences, raise questions of justice and human rights. Climate change affects

effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants. 17 74 Fed. Reg. at 66498.


19 Id.


21 Id. at 11.

22 Id. at 10.

23 Id. at 11.

24 Id. at 11–12.

25 Id. at 12.

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19 Id.


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everyone, but it disproportionately strikes those who have contributed least to it and who are also, for a variety of reasons, least well placed to respond.28 “Climate justice seeks to combine the climate change discussion with human rights in a way that is equitable for the most climate-vulnerable groups.”29 The adverse effects of climate change, particularly those in low-lying island countries and those in already hot regions, could potentially be catastrophic. For example, it may not be possible to even survive without air-conditioning in some very hot regions during the hottest months as temperatures increase.30

The evolving climate science indicates that adverse effects will be much lower if the temperature increase is as low as possible, and if emissions are reduced to net zero or lower as soon as possible. A review article comprehensively synthesizing recent research, for example, determined that climate disruption from GHG pollution would cause additional and more severe adverse impacts than those identified in EPA’s 2009 endangerment finding.31 The resolution links the GHG emissions reduction timetable to the latest peer-reviewed science.32

The resolution also indicates that the U.S. should contribute its fair share to reducing global greenhouse gas emissions, recognizing that, while responsibility for growing concentrations of greenhouse gas emissions is shared among many countries, the U.S. has a large historical responsibility for those concentrations, and that it should reduce its emissions accordingly.33

II. International Framework

The United States participated actively in the negotiations that led to the United Nations Framework Convention on Climate Change (Convention),34 and played a major role in shaping it. The United States signed the Convention on June 12, 1992, at the United Nations Conference on Environment and Development in Rio de Janeiro. The Senate gave its advice and consent on October 7, 1992.35 Less than a week later, on October 13, President George H.W. Bush signed the instrument of ratification and transmitted it to the Convention Secretariat,36 making the U.S. the fourth country in the world to ratify the Convention. The Convention took effect in 1994, and now has 197 parties—196 countries plus the European Union.37

28 Id. at 2.
29 Id. at 3.
30 Jeremy S. Pal & Elfatih A.B. Eltahir, Future Temperature in Southwest Asia Projected to Exceed a Threshold for Human Adaptability, 6 NATURE CLIMATE CHANGE 197 (2016).
As its name indicates, the Convention creates an international legal framework, including reporting, scientific and technological research, and annual meetings of the conference of the parties, to address climate change. The Convention does not contain any binding commitments to reduce GHG emissions by a certain amount by a date certain. The Convention treats developed countries and developing countries differently. As the Convention’s preamble states, developed countries have contributed the largest share of historical and current global emissions of greenhouse gases, and have higher per capita emissions levels than developing countries. Thus, in ratifying the Convention, developed countries agreed to adopt policies and measures that will demonstrate that they “are taking the lead” in addressing climate change.

On December 12, 2015, in Paris, France, the Parties to the Convention agreed to a goal of net zero GHG emissions by no later than the second half of this century. The zero emissions target in the Paris Agreement is framed in terms of “a balance between anthropogenic [human caused] emissions by sources and removals by sinks.” The term “net zero” derives from U.N. Convention. Carbon dioxide, the most important climate change pollutant, can be removed from the atmosphere by a variety of natural and other processes that are collectively defined as sinks. The “balance” of emissions and removals by sinks means net zero emissions.

The Paris Agreement, as it is called, marks the first time since the Convention was opened for signature in 1992 that all Parties have agreed to such a goal. It was also the first time that all Parties agreed to take actions to reduce their GHG emissions. The Kyoto Protocol did not contain an overall emissions reduction goal, and only limited developed countries’ emissions.

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The Paris Agreement was designed to achieve the objective of the Convention on Climate Change, which is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." The world’s understanding of what that level means is evolving in the direction of lower concentrations of GHGs and thus lower emissions. Prior to Paris, the most frequently stated goal was to hold the global increase in temperatures to 2°C (3.6°F) above pre-industrial levels. The Paris Agreement, however, aims to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C [3.7°F] above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change. As indicated above, subsequently published scientific reports indicate that much greater and more rapid reductions may be required.

In June 2017, the current President announced his intention to withdraw the United States from the Paris Agreement. Under the Paris Agreement, no country can withdraw from the agreement for a period of three years after the agreement enters into force. That withdrawal, in turn, is effective one year later. Because the Paris Agreement achieved sufficient number of ratifications and other approvals to enter into force on November 4, 2016, the earliest that the United States can actually withdraw is November 4, 2020, which is one day after the 2020 U.S. presidential election.

III. Current Efforts

A. State, Territorial, and Local Governments

State, territorial, and local governments are playing a leading role in addressing climate change in the United States. State efforts to compel action by the federal government in response to the current administration’s deregulatory agenda have been enhanced by Massachusetts v. EPA, which held that the federal government is responsible for demonstrating the ability to protect individual state interests, practically ensuring the ability of states to demonstrate standing in lawsuits against the federal government.51 State Attorneys General have been aggressive in recent litigation against the federal government.52

44 Convention, supra note 32, art. 2.
47 Id. art. 24.
48 Id. art. 22.
50 Paris Agreement, supra note 38, art. 28.1.
51 Id. at 63.
53 549 U.S. 497, 519-20 (2007) (holding “These sovereign prerogatives to force reductions in greenhouse gas emissions...are now lodged in the Federal Government...Congress has ordered [EPA] to protect Massachusetts...by prescribing applicable standards”); see Philip Green, Keeping Them Honest: How State Attorneys General Use Multistate Litigation to Exert Meaningful Oversight Over Administrative Agencies in the Trump Era, 71 ALBUN, L. REV. 251 (Winter 2019).
Many states are employing a planning process that involves a GHG reduction goal and implementation of a suite of legal and policy measures to achieve that goal. Others are acting without quantifiable reduction goals, but are nonetheless employing a suite of tools. These include, but are not limited to, renewable electricity portfolio standards, net metering, carbon dioxide limits on new power plants, energy efficiency provisions in building codes, public funding or benefit programs for efficiency and renewable energy, tax credits, and registries for early GHG reductions. In addition to reducing GHG emissions, these tools reduce negative external costs of energy generation, require energy conservation activities whose benefits exceed their costs, and use the market to reduce net emissions. They also limit and even lower energy costs for the poor, and create employment and economic growth. Use of these tools can also reduce emissions of other air pollutants, including sulfur dioxide and nitrogen oxides.

A growing number of states are acting on a regional basis. The most prominent of these is the Regional Greenhouse Gas Initiative (RGGI). RGGI is a cooperative effort among the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont to cap and reduce CO2 emissions from the power sector.53 New Jersey is preparing to rejoin RGGI and Virginia has proposed regulations that would allow trading with RGGI states.54 The nine-state RGGI program has put a descending cap on GHG from the power sector, and provides for trading of allowances.55 Another trading initiative involves the state of California and the provinces of Quebec and Ontario. The California-Quebec-Ontario program creates an economy-wide cap and trade program that covers all major GHG emission sources and further requires that distributors of fossil fuels and electricity importers surrender allowances equal to the emissions created by combustion of the fuels or generation of the imported electricity.56

At the local level, 1,060 U.S. municipalities have signed the Mayors Climate Protection Agreement, under which they agree to meet or exceed the Kyoto Protocol goal of a seven percent reduction in GHG emissions from 1990 levels by 2012.57 Ten states, 281 cities and counties, nine tribes, and more than 2,000 businesses and investors have joined the “We Are Still In” coalition to advance the goals of the Paris Climate Agreement.58 “We Are Still In” signatories represent a constituency of more than half of all Americans, and taken together, they represent $6.2 trillion, a bigger economy.

54 The State has published a proposed regulation that mirrors the RGGI program and would allow trading even without Virginia joining RGGI. 9VAC5-140. Regulation for Emissions Trading Programs (adding 9VAC5-140-65/10 through 9VAC5-140-6430), 34 VA. Reg. 924 (Jan. 8, 2018). See also, Darrell Proctor, Virginia Moves to Join RGGI Carbon-trading Market, Powir (Nov. 15, 2017), http://www.powirmag.com/virginia-moves-to-join-raggi-carbon-trading-market/.
than any nation other than the U.S. or China. In addition, ‘90 cities, more than ten counties and two states, have already adopted ambitious 100% clean energy goals.’ Six of these cities are already supplied by 100% renewable electricity.

B. Tribal Governments

There are 573 federally recognized American Indian and Alaska Native tribes, many of which have direct experience in coping with the impacts of climate change. The Fourth National Climate Assessment devotes a chapter to tribes and other indigenous peoples. Drawing on an extensive amount of published studies as well as meetings with tribal representatives and others with relevant expertise, that chapter presents some observations regarding the wide range of climate change impacts being experienced by Indian and Alaska Native tribes, including:

“...Though they may be affected by climate change in ways that are similar to others in the United States, Indigenous peoples can also be affected uniquely and disproportionately. Many Indigenous peoples have lived in particular areas for hundreds if not thousands of years, and their cultures, spiritual practices, and economies have evolved to be adaptive to local seasonal and interannual environmental changes...”

“Most Indigenous peoples across all regions of the United States pursue a mix of traditional subsistence and commercial sector activities that include agriculture, hunting and gathering, fisheries, forestry, energy, recreation, and tourism enterprises. Observed and projected changes of increased wildfire, diminished snowpack, pervasive drought, flooding, ocean acidification, and sea level rise threaten the viability of each of these enterprises...”

Over the last decade, many American Indian and Alaska Native tribes have begun aggressive efforts to understand climate change impacts on their tribal communities, and to plan for adaption action to reduce those impacts on their tribal members and on the built environment. Several key actions taken include comprehensive climate action and adaptation planning, strategic energy planning, and climate action assessments. More than 35 tribes have developed climate action assessment and adaption plans – most of which include distributed renewable energy projects as key components to adapting to climate change. These tribes have been supported by the Pacific Northwest Tribal Climate Change Research Program.

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Change Network at the University of Oregon and the Institute of Tribal Environmental Professionals at Northern Arizona University.  

The National Congress of American Indians (NCAI) recently launched a pair of intertribal initiatives to deal with climate change. Established in 1944, NCAI is the oldest, largest and most representative national organization made up of American Indian and Alaska Native tribal governments and their citizens. Since at least 2006, NCAI has expressed concern over the unique effects climate change has had on tribal nations and the need to create a national, mandatory program to reduce climate change within a timeframe that prevents irreversible and irreversible harm to human health, the economy and environment. Building on the expressed desires of NCAI’s voting membership (which includes tribal nations and individual citizens of tribal nations), in February 2019, at the NCAI Executive Council Winter Session, NCAI President Jefferson Keel announced the launch of the NCAI Climate Action Resource Center and the pending establishment of the NCAI Climate Action Task Force (CATF). These two initiatives represent a commitment by tribal nations not only to the importance of this issue, but also to share creative ways in which tribal nations, as front line communities, are leading initiatives to combat climate change.

As governments exercising inherent sovereignty within their reservations, tribes can make valuable contributions to the utilization of a wide range of legal mechanisms to reduce greenhouse gas emissions and to adapt to climate change. It should be noted, however, that tribes are different from state and local governments in certain ways, and some of the policy tools referred to in this report may require some modification to render them useful by tribes.

C. U.S. Government

The United States has no overall goal for reducing GHG emissions, although there are disparate legal mechanisms that can help reduce these emissions to a limited extent. Nor does the United States appear to be prepared to adapt to the consequences of climate change.

As a result, U.S. GHG emissions are about the same as they were in 1990. In 2017, net GHG emissions in the United States were 14.1% lower than they were in 2007 just

65University of Oregon, Tribal Climate Change Project, https://tribalclimate.uoregon.edu/ (last visited Apr. 27, 2019).

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The United States has had laws for several decades that support energy efficiency and conservation. The U.S. also has laws fostering the use of renewable energy. Finally, the U.S. Supreme Court decided in Massachusetts v. EPA that GHGs are pollutants under the Clean Air Act, thus providing the federal government with the ability to use the Clean Air Act to reduce greenhouse gas emissions. Federal efforts to address climate change intensified during the previous Administration, which used this decision to adopt the endangerment finding described in Section I of this report. Perhaps the most publicly visible and politically controversial manifestation of that was the Clean Power Plan, which was intended to reduce GHGs from electric power-generating facilities by 32% from 2005 levels by 2030.

On the other hand, the present Administration, seeing the climate change issue through the lenses of reducing government regulation and trying to revive the coal industry, has expressed skepticism about the basic science of climate change and initiated proceedings to roll back many previous Administration initiatives on climate change, including the Clean Power Plan.

### D. Private Sector


90 World Bank, CO2 Emissions (Metric Tons Per Capita) (showing U.S. per capita emissions to be 17.0 tons in 2011, which is exceeded only by Aruba, Bahrain, Brunei Darussalam, Kuwait, Luxembourg, Oman, Qatar, Trinidad and Tobago, and United Arab Emirates), http://data.worldbank.org/indicator/EN.ATM.CO2E.PC (last visited Apr. 27, 2019).

91 Rhodium Group, Preliminary US Emissions Estimates for 2018 (Jan. 8, 2019), https://columbiaclimatelaw.com/resources/climate-deregulation-tracker/ (showing U.S. per capita emissions to be 17.0 tons in 2011, which is exceeded only by Aruba, Bahrain, Brunei Darussalam, Kuwait, Luxembourg, Oman, Qatar, Trinidad and Tobago, and United Arab Emirates), http://data.worldbank.org/indicator/EN.ATM.CO2E.PC (last visited Apr. 27, 2019).


The U.S. business community is disadvantaged in implementing reductions by the absence of a comprehensive federal program, national flip-flopping on climate policy between Presidential Administrations, the proliferation of inconsistent state and regional regulations, and litigation that is intended to force (or substitute for) federal regulation. The lack of a federal program also makes capital expenditure for carbon reduction planning very difficult, inhibits research and development, robs businesses of economies of scale and of markets for climate-friendly technologies and products, and puts them at a disadvantage compared to companies in countries that have ratified the Kyoto Protocol, are working toward achievement of the goals in the Paris Agreement, or both.

The function of many other public climate change mitigation laws can be served—at least to some degree—by some form of private governance.79 This does not mean that private governance is necessarily of equal effectiveness to public governance, but it does mean “that there are more options available to decision makers than traditionally believed.”79 This is no small thing. Private corporate greenhouse gas emissions reductions could be as high as one-half billion tons of CO2 equivalent, which is “equal to a regulatory approach that would reduce the emissions of the U.S. transportation sector by a third.”79 In 2017, the World Wildlife Fund and others issued a report stating that “nearly half of the companies in the 2016 Fortune 500 have set targets to reduce greenhouse gases (GHG), improve energy efficiency, and/or increase renewable energy sourcing.”81 The Fortune 500 is comprised entirely of U.S. corporations.


Reducing U.S. GHGs to net zero or below by 2050 or earlier, or even to 20% of 1990 levels by 2050, is often referred to as “deep decarbonization”—“deep” because it requires systemic changes to the energy economy.82 More than a thousand legal tools are available to federal, state, tribal, territorial, and local governments, as well as the private sector, to get the job done.

77 Id. at 53.
78 Id. at 224.
80 Deep decarbonization applies not only to reductions in carbon dioxide, but also other GHG pollutants, such as methane and nitrous oxide. “Deep decarbonization” refers to the reduction of greenhouse gas (GHG) emissions over time to a level consistent with limiting global warming to 2°C or less, based on the scientific consensus that higher levels of warming pose an unacceptable risk of dangerous climate change.” JAMES H. WILLIAMS ET AL., PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES, U.S. 2050 REPORT, VOLUME 2: POLICY IMPLICATIONS OF DEEP DECARBONIZATION IN THE UNITED STATES 8 (Deep Decarbonization Pathways Project & Energy and Environmental Economics, Inc., 2015), http://deepdecarbonization.org/wp-content/uploads/2015/11/US_Deep_Decarbonization_Policy_Report.pdf [hereinafter DDPP U.S. POLICY REPORT].
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Two reports by the Deep Decarbonization Pathways Project (DDPP) outline a basic approach for deep decarbonization in the United States. The DDPP, which is led by the Sustainable Development Solutions Network and the Institute for Sustainable Development and International Relations, is the principal international effort to devise pathways to decarbonize the global economy.

The two DDPP reports, taken together, make remarkably clear the gap that exists between current law and the laws that are needed to achieve deep decarbonization. Perhaps the DDPP’s “most important finding is that it is technically feasible for the U.S. to reduce [carbon dioxide] emissions from fossil fuel combustion” to 85% below 1990 levels by 2050. If the United States did that, the report states, it could reduce its overall greenhouse gas emissions to 80% below 1990 levels by 2050. The overall cost to the U.S. economy in 2050, DDPP says, is about 0.8% of the expected GDP for 2050. The reports do not calculate the considerable public health, safety, security, economic, environmental and other benefits.

According to the reports, enormous changes would be required to achieve this level of reduction. The U.S. would more than double the efficiency with which energy is used. Nearly all electricity would be carbon free or use carbon capture and sequestration. Electricity production would also double because gasoline and diesel fuel for transportation would be mostly replaced by electricity. Significantly, the reports do not identify a single approach to deep decarbonization. Instead, they show four different pathways or scenarios—a high renewables scenario, a high nuclear energy scenario, a high carbon capture and sequestration scenario, and a mixed scenario involving a balanced combination of all three.

But how is this level of reduction to be accomplished? Ultimately, deep decarbonization is not likely to occur unless general policies are translated into proposed laws, enacted, and then implemented. More than 1,000 legal tools are available to achieve deep decarbonization in the United States, according to a newly published book, Legal
These legal tools are available to federal, state, tribal, territorial, and local governments, as well as to the private sector.

These legal tools fall into a dozen categories or types. The tools are not just the usual suspects (additional regulation, market-leveraging approaches, tradable permits or allowances), but also include reduction or removal of legal barriers to clean energy and removal of incentives for fossil fuel use. Additionally, they include information/education, facilities and operations, infrastructure development, research and development, insurance, property rights, and social equity. The latter is particularly important for individuals and communities dependent on the carbon economy. The term "just transition" is used in the resolution to indicate a range of tools and measures to ensure that the benefits and effects of the clean energy economy are equitably shared.

The wide range of legal tools has important consequences for lawyers. It means that lawyers in diverse fields in addition to energy and environment could help build a consensus for reducing and removing legal barriers to addressing climate change. Lawyers with expertise in finance, corporate law, municipal, procurement, contracting, real estate, and other areas bring vital skills for responding to climate change and fulfilling the duty of lawyers to serve justice.

Lawyers already engage in activities to reduce greenhouse gas emissions. Many lawyers already advise their clients to reduce the risks and maximize the opportunities that climate change raises. Other lawyers are working to address climate change in a variety of pro bono activities, including drafting model statutory, regulatory, or transactional language for the recommendations contained in Legal Pathways. The need for additional legal work is enormous.

### V. Conclusion: Urgent Need for Serious Action

The United States’ history of leadership on key international issues, including several involving international environmental law, provides an opportunity for leadership on climate change, regardless of the administration in power. As in many other areas of law and policy, the United States’ ability to influence other countries to reduce greenhouse gas emissions would be aided if we led by example. This is particularly true because of the historic contribution of developed countries to greenhouse gas emissions, and their superior financial and technological resources, as acknowledged by the Convention to which the U.S. is a party. Moreover, it is widely acknowledged that negative climate change effects will occur disproportionately in developing countries that are most vulnerable to climate change and that lack the resources to adapt effectively. The many legal tools available to federal, state, tribal, territorial, and local governments, as well as to the private sector, can help achieve a just transition.

### V. Conclusion: Urgent Need for Serious Action

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strengths of the United States—including its technological capacity, economic strength, comprehensive educational system, commitment to innovation, and legal institutions—give this country a unique and unparalleled opportunity to play a significant and constructive role in addressing climate change. The United States should resume its leading role in international environmental law, and take domestic actions to help the world lower its greenhouse gas emissions and prepare for the impacts of climate change.

Respectfully Submitted,

Amy L. Edwards
Chair, Environment, Energy, and Resources Section
August 2019
1. Summary of Resolution.

The American Bar Association urges federal, state, local, territorial, and tribal governments, and the private sector, to recognize their obligation to address climate change and take action to reduce U.S. greenhouse gas emissions to net zero or below as soon as possible, consistent with the latest peer-reviewed science, and to contribute the U.S. fair share to holding the increase in the global average temperature to the lowest possible increase above pre-industrial levels; urges the United States Government, state, territorial, and tribal governments, local governments, and the private sector to take a leadership role in addressing the issue of climate change; urges Congress to enact appropriate climate change legislation; urges the United States Government to engage in active international discussions to address climate change; urges lawyers to engage in pro bono activities to address climate change and urges them to advise their clients about the risks and opportunities in addressing climate change.

2. Approval by Submitting Entities.

Approved by the Section of Environment, Energy and Resources Council on April 26, 2019; by the Law Student Division Council on March 25, 2019; by the Section of International Law Council on April 9, 2019; and by the Section of Science & Technology Law Council on May 6, 2019.

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

In 2008, the House of Delegates adopted a resolution (HOD Resolution No. 08M 109) (American Bar Association House of Delegates Resolution 109 (Feb. 11, 2008), https://www.americanbar.org/content/dam/aba/directories/policy/2008_my_109.pdf) urging the adoption of national legislation to address climate change. This is a substantial revision to, and update of, that resolution.

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

As indicated above, this resolution is a substantially updated and revised version of HOD Resolution 109 adopted in 2008. This resolution also builds on a 2011 ABA House of Delegates resolution that urged "the United States government to ensure that federally-recognized Indian tribes … may participate fully … in policy discussions on the issue of climate change domestically and in international fora." (American Bar Association House of Delegates Resolution 112 (Aug. 8-9, 2011)).
The House of Delegates has also endorsed sustainable development, the conceptual framework for addressing climate change, in 2013 (American Bar Association House of Delegates Resolution 105 (Aug. 12-13, 2013)). This resolution does not impose costs on the Association beyond those already being incurred to advance the Rule of Law (Goal IV).

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.)
A variety of different bills to address some aspect of climate change have been proposed in Congress. Among the more prominent bills is H.R. 763, the proposed Energy Innovation and Carbon Dividend Act (2019). The resolution endorses no particular bill or legislative proposal, however.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
The sponsoring entities intend to host a series of educational programs (webinars, podcasts, and a one day conference in February 2020) about the current state of knowledge about climate change, mechanisms for adaptation, legal tools for deep decarbonization, and discuss other ways in which lawyers and their clients can get involved in this issue. They will also prepare white papers and make their attorneys available as resources to federal, state, local, territorial, and tribal governments interested in adopting legislation to reduce greenhouse gas emissions.

8. Cost to the Association. (Both direct and indirect costs.)
This resolution does not impose costs on the Association beyond those already being incurred to advance the Rule of Law (Goal IV).
9. **Disclosure of Interest** (if applicable.)
The cosponsoring entities engage in activities that address climate change legal issues, including CLE programming, providing information of ABA activities to governments, NGOs and others as well as development of policy resolutions. No individual associated with this resolution will benefit personally from adoption of the resolution.

10. **Referrals.** (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)
As it was being developed, this Report with Recommendations was circulated to representatives of:

- Business Law Section
- Infrastructure and Regulated Industries Section
- Law Student Division
- Section of Administrative Law and Regulatory Practice
- Section of Civil Rights and Social Justice
- Section of International Law
- Section of Science & Technology Law
- Section of State and Local Government Law
- Young Lawyers Division

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

The resolution urges federal, state, local, territorial, and tribal governments, and the private sector, to recognize their obligation to address climate change and take action to reduce U.S. greenhouse gas emissions to net zero or below as soon as possible, consistent with the latest peer-reviewed science, and to contribute the U.S. fair share to holding the increase in the global average temperature to the lowest possible increase above pre-industrial levels; urges the United States Government, state, territorial, and tribal governments, local governments, and the private sector to take a leadership role in addressing the issue of climate change; urges Congress to enact appropriate climate change legislation; urges the United States Government to engage in active international discussions to address climate change; urges lawyers to engage in pro bono activities to address climate change and urges them to advise their clients about the risks and opportunities in addressing climate change.

2. Summary of the issue which the Resolution Addresses.

Humans are contributing to climate change through emissions of greenhouse gases, principally carbon dioxide. Climate change presents significant risks to this and future generations. Climate change presents environmental risks, to be sure, but it also presents security, economic, and social risks. At the same time, the national and international response to climate change provides major opportunities for improving environmental quality, fostering economic growth and job creation, and enhancing domestic and global security. There is growing bipartisan agreement that climate change is a serious issue that requires further legal action at all levels of government and in private governance.


The proposed policy contained in the resolution will address this issue in four ways. First, it recommends that federal, state, local, territorial, and tribal governments, and the private sector, recognize their obligation to address climate change and to take action to reduce U.S. greenhouse gas emissions to net zero or below as soon as possible, consistent with the latest peer-reviewed science, and to contribute the U.S. fair share to holding the increase in the global average temperature to the lowest possible increase above pre-industrial levels. Second, the resolution recommends that Congress adopt appropriate climate change legislation. Third, it urges the United States Government to engage in active international discussions to address climate change. Fourth, the resolution encourages lawyers to engage in pro bono activities to address climate change and to advise their clients about the risks and opportunities in addressing climate change.
4. A summary of any minority views or opposition which have been identified.
None.
RESOLVED, That the American Bar Association urges legislatures and courts to define consent in sexual assault cases as the assent of a person who is competent to give consent to engage in a specific act of sexual penetration, oral sex, or sexual contact, to provide that consent is expressed by words or action in the context of all the circumstances, and to reject any requirement that sexual assault victims have a legal burden of verbal or physical resistance.
I. Introduction

Given the ongoing and contemporary discussions around sexual violence and consent in our society, the recognition that consent to sexual activity may not be assumed or premised is long past due. The time has come to expressly reject the “traditional premise in the law...that individuals are presumed to be sexually available and willing to have intercourse—with anyone, at any time, at any place—in the absence of clear indications to the contrary.” This traditional premise of willingness condones, and encourages, sexual intrusion regardless of the fact that such intimacy was entirely unwanted. This premise is manifested in the enormous number of victims subjected to unwanted sexual intimacy whose experience has been documented in the #MeToo Movement. The proposed definition of consent rejects any traditional premise of willingness, and requires words or action considered in the context of the totality of the circumstances to express a person’s willingness to engage in sexual activity.

As noted by Stephen J. Schulhofer and Erin Murphy, the Reporters for the American Law Institute’s Model Penal Code Sexual Assault Offenses Revision Project, “[t]he decision to share sexual intimacy with another person is a core feature of our humanity and personhood and thus should always be a matter of actual individual choice. Survivors of sexual violence experience profound violations of their autonomy that shatter the ‘very foundation of their identity.’”

II. Our history, and legal trend

As originally defined under the law, rape prohibited only “carnal knowledge of a woman forcibly and against her will” outside of a marital relationship with her husband2 and was considered a crime perpetrated against the property of fathers and husbands.3 Historically, the law imposed unique obstacles upon rape victims that other crime victims did not have to overcome.

Derived from English common law and applicable in most jurisdictions until the mid to late 1970s, these formal rules embodied 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.4

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3 DEER, supra note 1, at xvi–xvii.
Courts routinely failed to prohibit the use of force or threats by perpetrators and placed the burden of resistance on female victims before they could secure the law’s protections—which they often could not. Courts were unable to prohibit the use of force or threats by perpetrators and placed the burden of resistance on female victims before they could secure the law’s protections—which they often could not. 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 (MPC) on Sexual Assault and Related Offenses codified this distasteful history and continued legal burdens on rape victims of demonstrating more than “token initial resistance.” A significant number of jurisdictions followed the example of the MPC and “require at least ‘reasonable resistance.’”

Fortunately, in reaction to the horrific history of rape law, the recent trend in the states has been clearly and consistently in the direction of requiring words or actions to establish consent or excuse, for example, defines consent as the testimony of a woman who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.” Wis. Stat. §940.225(4). California defines consent as “positive cooperation in act or attitude pursuant to an exercise of free will.” Cal. Penal Code, §281.6.

III. The Position of the ALI Reporters and Council.

In 2012, the American Law Institute (“ALI”) undertook the revision of its Model Penal Code ("MPC") on Sexual Assault and Related Offenses, which has not been updated since 1962. The related May 14, 2012 Prospectus for a Project Revision recounted the reasons for this revision:

When drafted in the 1950s, Article 213 of the Model Penal Code was a forward-looking document, well ahead of its time. Yet shortly after the ALI approved it in 1962, dramatic social and cultural changes quickly overtook its once-progressive formulations, rendering them outmoded and in some instances even offensive to new sensibilities. A half-century has passed since the adoption of Article 213. Much of it no longer reflects American law or the best thinking about the desirable

4 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 my life 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. State, 127 Wis. 193, 199 (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.”).


7 Id. (citing Michelle J. Anderson, Reviving Resistance in Rape Law, 1998 U. ILL. L. REV. 953, 966 (1998)).
shape of a penal code applicable to sexual offenses. As a result, that Article 213 no longer serves as a reliable guide for legislatures and courts confronting contemporary legal issues in this arena.

On April 22, 2013, Columbia Law School Dean Lance Liebman acknowledged within the ALI Discussion Draft’s Foreword that “[f]or some time experts have told us that this portion of the MPC needed to be rewritten to fit with contemporary knowledge and values”. To lead this revision effort, the ALI selected NYU Law School Professors Stephen Schulhofer and Erin Murphy.

After considering the current state of the law, societal attitudes, advances in neurobiology, and harm from violations of sexual autonomy, in 2014, the ALI Reporters proposed revising the Model Penal Code. The ALI engaged in rigorous debate over a period of several years to determine the best way to define consent. The ALI revision of the MPC is not yet final.

The ALI review has explored territory that scholars have pondered for some time. Compare, e.g., Lani A. Remick, Read Her Lips: An Argument for a Verbal Consent Standard in Rape, 141 U. PA. L. REV. 1103, 1130 (1993) (arguing for an affirmative consent requirement) with Vivian Berger, Not So Simple Rape, 7 CRIM. JUST. ETHICS 69, 75–76 (Winter-Spring 1988) (arguing that an express consent requirement patronizes and over-protects women).

**IV. A Definition Requiring Consent By Words or Action Considered in the Totality of the Circumstances is Supported by Current Research on the Neurobiology of Trauma.**

The ALI Reporters highlighted the significance of recent studies recognizing the ‘well-documented phenomenon of “frozen fright”: a person confronted by an unexpectedly aggressive partner or stranger succumbs to panic, becomes paralyzed by anxiety, or fears that resistance will engender even greater danger.”9 “Frozen fright” has been well-documented by researchers in the neurobiology of trauma.

Researchers such as Dr. Judith Herman and Dr. Jim Hopper of Harvard Medical School, as well as Dr. Rebecca Campbell of Michigan State University10, are among the nationally recognized experts writing about the neurobiology of trauma as it relates to sexual violence. This body of work can be simplified as identifying three common states of “inaction” that can affect victims: (1) Dissociation, (2) Tonic Immobility, and (3) Collapsed Immobility.

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9 Id. at 108.

Dissociation is a state of “profound passivity in which the victim relinquishes all initiative and struggle” to mentally disconnect from the trauma experienced by the body. Tonic Immobility, which is commonly referred to as “frozen fright,” leaves a victim temporarily paralyzed. Collapsed Immobility has a more sudden onset than tonic immobility, but more gradual offset, and it is hallmarked by an extreme drop in heart rate and blood pressure to create faintness, “sleepiness,” or loss of consciousness.

As described by researchers:

The fear-induced psychophysical states that impact a victim’s ability to react at the onset of or during a sexual assault are not unique to any one type of victim. They are seen in situations of extreme fear and (perceived) inescapable danger ranging from rape to combat. Nor are these reflective reactions unique to humans. The Deer in the headlights is the paradigm of Freeze… These psychophysical states are automatic, uncontrollable responses, the purpose of which is self-preservation. They have been repeatedly studied, described, and discussed in the professional literature, and are fully accepted in the field as required by the Frye test.

Law enforcement professionals, including police, prosecutors, and judges, now receive training on the neurobiology of trauma to better understand the response of victims to sexual violence. The consent rule must recognize the significance of modern understandings of the neurobiological impact of trauma on victims and avoids the dangers inherent in a consent standard that assumes consent absent expressions of unwillingness. As the ALI Reporters noted, “[t]o permit an inference of consent in these circumstances, when that person’s actual desires are relatively easy to clarify, is to expose individuals at risk to severe and readily avoidable danger.” Inherent in the consent definition is that “passivity cannot be equated with willingness.” In the face of passivity due to frozen fright (dissociation, tonic immobility, or collapsed immobility), inaction does not and should not imply the passive person’s desire to engage in sexual activity. As the ALI Reporters recognized, “evolving social standards around sexual behavior have increasingly favored more open and honest expressions of sexual needs and stressed the importance, in ambiguous circumstances, of discouraging sexual intimacy without first seeking greater clarity.”

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14 See, e.g., David Baldwin, Primitive mechanisms of trauma response: an evolutionary perspective on trauma-related disorders, 37 NEUROSCI. & BIOBEHAVIORAL REV. 1549 (2013).
24 See, e.g., David Baldwin, Primitive mechanisms of trauma response: an evolutionary perspective on trauma-related disorders, 37 NEUROSCI. & BIOBEHAVIORAL REV. 1549 (2013).
In a 2015 Henry Kaiser Family Foundation/Washington Post poll, students aged 17 to 26 overwhelmingly understood that the absence of a “no” did not equate to consent and that consenting to some sexual activity does not give consent to other sexual activity. This proposed definition is part of the next generation’s understanding of sexual autonomy.

This resolution urges several steps to define consent so that the focus is on the willingness of a person who is competent to give consent to engage in a specific act of sexual penetration, oral sex, or sexual contact. It makes clear that there should be no requirement that a victim resist, verbally or physically, to demonstrate unwillingness to engage in sexual activity. It recognizes that it is important to consider the totality of the behavior of both a defendant and a victim in the context of all the circumstances.

Conclusion

A history of sexual violence, and of the status of women as the sexual property of men, still informs the law governing sexual assault, and that should stop. The proposed definition is a step in that direction. The ABA should recognize the inherent right of sexual autonomy and lead the way toward the implementation in legal codes in every jurisdiction of requiring words or action to express consent to sexual activity.

Respectfully submitted,

Mark I. Schickman
Chair, Commission on Domestic & Sexual Violence

Lucian Dervan
Chair, Criminal Justice Section

August 2019
GENERAL INFORMATION FORM

Submitting Entity: Commission on Domestic and Sexual Violence
Criminal Justice Section

Submitted By: Mark I. Schickman, Chair, Commission on Domestic & Sexual Violence
Lucian Dervan, Chair, Criminal Justice Section

1. Summary of Resolution(s). The ABA urges legislatures and courts to define consent in sexual assault cases as the assent of a person who is competent to give consent to engage in a specific act of sexual penetration, oral sex, or sexual contact, to provide that consent is expressed by words or action in the context of all the circumstances, and to reject any requirement that sexual assault victims have a legal burden of verbal or physical resistance. Furthermore, the ABA urges all legislatures and courts to enact legislation or to adopt court rules that require judges in sexual assault cases in which consent is a disputed issue to specifically instruct juries that “the fact that a person did not resist, verbally or physically, to a specific act of sexual penetration, oral sex, or sexual contact does not mean that the person consented to that act.”


The Criminal Justice Section approved sponsorship of this resolution on April 5, 2019.

The Council of the Section of Civil Rights and Social Justice approved sponsorship of this resolution on April 13, 2019.

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

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? ABA Policy 115 (MY 2019) states that the American Bar Association opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches. This policy relates to the present resolution as it opposes the imposition of a legal burden of resistance upon sexual assault victims. This parallels with the current resolution as it expands on it to reject any requirement that sexual assault victims have a legal burden of verbal or physical resistance. Furthermore, it expands on policy 115 to state that consent is expressed by words or action in the context of all the circumstances. The new resolution updates existing ABA policy to include the inherent right of sexual autonomy and explicitly recognize how consent is expressed.

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

6. ABA Policy 115 (MY 2019)
6. Status of Legislation. Various legislatures and code bodies are considering changes to the Model Penal Code, and this resolution will make the ABA’s views known.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Passing this resolution will allow the ABA to recognize the inherent right of sexual autonomy, and urge code bodies, legislatures and courts towards the implementation in legal codes in every jurisdiction of requiring words or action to express consent to sexual activity.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only 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. (If applicable) n/a

10. Referrals.
   - Center for Human Rights
   - Coalition on Racial and Ethnic Justice
   - Commission on Sexual Orientation and Gender Identity
   - Commission on Women in the Profession
   - Section on Health Law
   - Section of State and Local Government Law
   - Government and Public Sector Lawyers Division
   - Law Student Division
   - Young Lawyers Division
   - Judicial Division

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

The ABA urges legislatures and courts to define consent in sexual assault cases as the assent of a person who is competent to give consent to engage in a specific act of sexual penetration, oral sex, or sexual contact, to provide that consent is expressed by words or action in the context of all the circumstances, and to reject any requirement that sexual assault victims have a legal burden of verbal or physical resistance. Furthermore, the ABA urges all legislatures and courts to enact legislation or to adopt court rules that require judges in sexual assault cases in which consent is a disputed issue to specifically instruct juries that “the fact that a person did not resist, verbally or physically, to a specific act of sexual penetration, oral sex, or sexual contact does not mean that the person consented to that act.”

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

Some jurisdictions and codes still assume a willingness to engage in sexual activity, even without any indication of consent absent significant resistance. The proposed definition of consent rejects that premise of willingness, and requires words or action to express a person’s willingness to engage in sexual activity.

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

The proposed policy proposition addresses this issue by supporting a definition of consent that requires words or action to express a person’s willingness to engage in sexual activity, and cautions that the absence of verbal or physical resistance does not mean that the victim consented to the sexual act.

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

n/a
RESOLVED, That the American Bar Association urges Congress to ensure that the health care delivered by the Indian Health Service ("IHS") is exempt from government shutdowns and federal budget sequestrations on par with the exemptions provided to the Veterans Health Administration;

FURTHER RESOLVED, That the American Bar Association urges Congress to enact advance appropriations legislation that would stabilize funding for IHS and provide funding that becomes available one year or more after the year of the appropriations act in which it is provided; and

FURTHER RESOLVED, That the American Bar Association encourages and supports legislation that:

1. addresses threats to the health and well-being of American Indian and Alaska Native people who tend to live in the most geographically remote and medically underserved parts of the United States;
2. avoids short-term continuing resolutions to fund the IHS budget;
3. ameliorates the harmful effects of federal budget sequestrations on IHS;
4. contributes to the fulfillment of the United States’ historic and unique federal trust responsibility owed to Indian tribes; and
5. provides sufficient, consistent, and predictable funding to support the basic health care needs of American Indian and Alaska Native people.
I. Introduction

This Resolution urges Congress to enact the Indian Programs Advanced Appropriations Act (H.R. 1128 and S. 229) and the Indian Health Service Advance Appropriations Act of 2019 (H.R. 1135), or similar legislation, and in addition, legislation that would exempt the Indian Health Service from federal budget sequestrations. The Indian Programs Advanced Appropriations Act and the Indian Health Service Advance Appropriations Act of 2019 would both authorize advance appropriations for the Indian Health Service (IHS). Legislation exempting IHS from federal budget sequestrations would safeguard IHS from funding reductions caused by automatic cuts to federal government spending.

IHS is a division within the U.S. Department of Health and Human Services that receives an annual appropriation from Congress to provide direct medical and health services to over 2 million American Indian and Alaska Native people in the United States. IHS provides services directly through a network of hospitals, clinics, and health stations operated by IHS, and also funds services provided at tribally operated health facilities. IHS’s mission is to raise the physical, mental, social, and spiritual health of American Indian and Alaska Native people to the highest level. IHS has the goal of assuring that comprehensive and culturally acceptable health services are available and accessible to American Indian and Alaska Native people.

The IHS organizational structure includes a headquarters office in Rockville, MD, and 12 area offices that work with a unique group of Indian tribes on a day-to-day basis through a network of hospitals, clinics, and health stations. As reported in 2017, facilities directly managed by IHS consisted of 26 hospitals, 59 health centers, and 32 health stations. IHS employs over 15,000 individuals, which include approximately 2,400 nurses, 730 physicians, 750 pharmacists, 270 dentists, 130 physician assistants, and 130 environmental health and sanitarians. The Urban Indian Health Program comprises of 41 different programs across the country. During 2017, the IHS system had more than 39,367 hospital admissions and nearly 13.8 million outpatient medical care visits.

As a result of treaties entered into between the United States federal government and Indian tribes, a unique government-to-government relationship exists between Indian tribes and the federal government. Consistent with this government-to-government relationship and statutory authority, IHS is committed to ensuring that comprehensive and culturally appropriate health services are available and accessible to American Indian and Alaska Native people. Over 60 percent of the IHS appropriation is administered by Indian tribes, primarily through self-determination contracts and self-governance compacts. IHS retains the remaining funds and delivers health services directly to Indian tribes that choose to have IHS administer health programs. IHS also works closely with Indian tribes as they assume a greater role in improving health care in their own communities.

Advance appropriations refer to federal funding that becomes available one year or more after the year of the appropriation is provided. To obtain an advance appropriation for a
federal program, legislation authorizing an advance appropriation for the program must first be enacted by Congress. Importantly, advance appropriations allow federal programs to prevent a funding gap from occurring until regular appropriations are completed or the fiscal year ends.

Sequestration refers to the process of automatic and largely across-the-board spending reductions under which budgetary resources are permanently canceled to enforce certain budget policy goals. When sequestration occurs, all nonexempt federal programs must be reduced by a uniform percentage. Congress may pass legislation to exempt certain federal programs from sequestrations and special rules to govern the sequestration of federal programs. Special rules adopted by Congress may provide that sequestrations can only reduce funding appropriated by a certain percentage.

For several years, Indian tribes and tribal organizations have urged Congress to enact legislation providing IHS with advance appropriations to facilitate improved planning and provide for more efficient spending. Legislation authorizing advance appropriations for IHS would prevent federal funding gaps and avoid uncertainties associated with receiving funds through the enactment of short-term continuing resolutions. In addition, the enactment of legislation exempting IHS from federal budget sequestrations and legislation authorizing advance appropriations would provide equivalent status to IHS that currently is afforded to the Veterans Health Administration.

II. Provide Equivalent Status to IHS as is Afforded to the Veterans Health Administration

The Veterans Health Administration provides direct medical care to eligible and enrolled veterans in the United States. In 2009, Congress enacted the Veterans Health Care and Budget Reform and Transparency Act of 2009 (Pub. L. No. 111-81) authorizing advance appropriations for three accounts that comprise the Veterans Health Administration: (1) Medical Services, (2) Medical Support and Compliance, and (3) Medical Facilities. The Veterans Health Care and Budget Reform and Transparency Act of 2009 also requires the Department of Veterans Affairs to submit a request for advance appropriations for the Veterans Health Administration with its budget request each year. Congress first provided advance appropriations for the three Veterans Health Administration accounts in FY 2010 and has continued to provide advance appropriations to the Veterans Health Administration accounts in each subsequent fiscal year. Additionally, Congress has enacted legislation that exempts programs administered by the Veterans Health Administration from sequestrations, including the Medical Care account.

The fact that Congress has enacted and implemented advance appropriations for medical accounts within the Veterans Health Administration provides a compelling reason for Congress to enact legislation that would authorize advance appropriations for medical accounts within IHS. Specifically, both the Veterans Health Administration and IHS provide direct medical care to specific segments of the United States population as a result of federal policy. Further, just as veterans organizations were alarmed of the impact

federal program, legislation authorizing an advance appropriation for the program must first be enacted by Congress. Importantly, advance appropriations allow federal programs to prevent a funding gap from occurring until regular appropriations are completed or the fiscal year ends.

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The fact that Congress has enacted and implemented advance appropriations for medical accounts within the Veterans Health Administration provides a compelling reason for Congress to enact legislation that would authorize advance appropriations for medical accounts within IHS. Specifically, both the Veterans Health Administration and IHS provide direct medical care to specific segments of the United States population as a result of federal policy. Further, just as veterans organizations were alarmed of the impact
of delayed funding upon the provision of health care services to veterans and the ability of the Veterans Health Administration to properly plan and manage its resources, Indian tribes and tribal organizations continue to have these same concerns about the IHS system. Specifically, the fact that Congress has authorized advance appropriations to the Veterans Health Administration and exempted the Veterans Health Administration from federal budget sequestrations should justify the enactment of legislation to provide equivalent treatment to IHS.

III. Benefits of Advance Appropriations for IHS and the Exemption of IHS from Federal Budget Sequestrations

The enactment of the Indian Programs Advanced Appropriations Act and the Indian Health Service Advance Appropriations Act of 2019, and separate legislation to exempt IHS from federal sequestrations is needed for a variety of reasons, including:

(1) Fulfillment of the federal government’s trust responsibility owed to Indian tribes. Through treaties between Indian tribes and the federal government, a trust responsibility was established in which the federal government promised the right of Indian tribes to govern themselves, and to enable Indian tribes to deliver essential services and provide adequate resources to do so effectively. Although the trust responsibility requires the federal government to provide for the health and welfare of Indian tribes, IHS remains highly underfunded, and American Indian and Alaska Native people continue to experience lower life expectancy and disproportionate disease rates compared with other Americans. Fulfillment of the federal government’s historic and unique federal trust responsibility owed to Indian tribes mandates that sufficient, consistent, and predictable funding is available to support the basic health care needs of American Indian and Alaska Native people.

(2) Avoiding the threat and effects of government shutdowns such as the recent 35-day government shutdown. The recent 35-day government shutdown, which took place December 22, 2018 to January 25, 2019, destabilized tribal health care delivery and access to health care providers within Indian Country. During this shutdown, Indian tribes and urban Indian centers across the United States were forced to ration health care services. Numerous facilities faced closure. In addition, the recent government shutdown caused doctors and medical staff to work without pay. Tribes are among the worst impacted by shutdowns because it affects the day-to-day operation of their health clinics and hospitals.

1 Susannah Luthi, Indian Health Service: Spending Levels and Characteristics of IHS and Three Other Federal Health Care Programs, U.S. Government Accountability Office (Dec. 10, 2018), https://www.gao.gov/assets/700/695871.pdf (comparing funding levels between IHS, the Veterans Health Administration, Medicare, and Medicaid. The GAO report noted that in 2016, IHS health care expenditures per person were only $2,834, compared to $9,990 per person for federal health care spending nationwide.)

For the Sault Ste. Marie Tribe, the government shutdown cost about $100,000, every day, of federal money that did not arrive to keep health clinics staffed, food pantry shelves full, and employees paid. In San Jose, California four IHS facilities serving 25,000 Native American patients per year experienced a lack in funding due to the shutdown. In San Diego County neighbors 18 federally recognized tribes, and Indian Health Centers in the area provide services for thousands of tribal members. In Navajo Nation, a 68-year-old woman who underwent eye surgery could not get a referral from furloughed Indian Health Service (IHS) staff to deal with high pressure in her eye. In Minnesota, the Red Lake Nation suspended construction of a dialysis center. A health care contractor announced the immediate suspension of dental services, and curtailment of financial assistance programs and ride share services, including addiction counseling.

(3) Avoiding the constant need to enact short-term continuing resolutions to fund the IHS budget. During virtually the entire last 20 years, short-term continuing resolutions have been enacted to fund the IHS budget while Congress works to pass an annual appropriations act. The constant enactment of short-term continuing resolutions to fund IHS results in periods of budget uncertainty and prohibits IHS providers from initiating new activities and projects intended to improve health care delivery services for American Indian and Alaska Native people. The enactment of legislation authorizing advance appropriations to the IHS budget would significantly mitigate the funding uncertainty and disruption to the delivery of health care services caused by the enactment of short-term continuing resolutions to fund the IHS budget.

(4) Addressing the harmful effects of federal budget sequestrations. In FY 2013, the federal budget sequestration resulted in a loss of over $219 million to the IHS budget, which translated into a reduction of primary health care and disease prevention services for American Indian and Alaska Native people. Federal budget sequestration and the impacts of the cancellation of budgetary resources continue to be a concern for Indian tribes and tribal organizations. Legislation exempting IHS from federal budget sequestrations is needed to allow IHS providers to do the best job possible in planning, decision-making, and administering health care programs.

(5) Improve the ability of IHS providers to budget, recruit, retain, provide services, maintain facilities, and perform necessary construction efforts. In general, IHS hospitals and tribal health care facilities are located in the most geographically remote and underserved areas, and the delivery of services to American Indian and Alaska Native people is dependent on the federal IHS budget. Interagency agreements and contracts between IHS and tribal health care facilities are critical to ensure these services are delivered. Without adequate funding, care disruption is likely. The enactment of legislation authorizing advance appropriations to the IHS budget would significantly mitigate the funding uncertainty and disruption to the delivery of health care services caused by the enactment of short-term continuing resolutions to fund the IHS budget.


IV. Supportive ABA Policy

The ABA has an extensive history of supporting comprehensive access to healthcare for American Indians and Alaska Natives, specifically through equitable and efficient funding streams.

In 2004, in 2004 MM 103C, the ABA called for addressing the various areas where health care for American Indians and Alaska Natives is deficient, including through the reauthorization of the Indian Health Care Improvement Act. The resolution specifically supports federal policy that encourages the administration of health care to Indian and Alaska Natives, and

"urges Congress to exercise oversight to assure that the Indian Health Service continues to carry out its responsibilities based upon the federal policies of tribal self-determination and self-governance."

This resolution is a natural extension of this broader policy to support Native access to healthcare.

In January 2019, the ABA acknowledged and condemned the devastating impact of the December 22, 2018 to January 25, 2019 federal government shutdown, 2019 MM 10B, particularly in the federal judiciary and the rule of law.

This resolution is also part of extensive ABA policy in support of access to health care generally. 1994 MM 105 reaffirms support from 1990 and 1972 resolutions, calling for access to quality health care for all Americans, regardless of income. 2009 AM 10A extended those calls, while broadening the call to not necessarily be restricted by the existence of a single-payor system. Notably, 2013 AM 101 calls for parity in coverage for mental health and substance use disorder treatment services with other health benefits coverage. 1997 AM 113 supports the provision of comprehensive health care for children 18 years of age and younger, and prenatal care for pregnant women.

The ABA has specifically recognized the importance of reliable and consistent healthcare funding to ensure continuity and quality of care. In 2017, resolution 2017 MM 116 called for broadening the scope of Medicare coverage from "medical necessity" to include medically underserved parts of the United States. These IHS and tribal health care providers face significant challenges recruiting and retaining qualified health professionals, which is exacerbated by inconsistent and uncertain federal funding for the IHS budget. The threat of inconsistent and uncertain funding for the IHS budget means that health care providers cannot budget with certainty, recruit and retain health professionals, and deliver health care services that American Indian and Alaska Native people need. Advance appropriations and the exemption of IHS from federal budget sequestrations would allow IHS and tribal health care providers to improve budgeting and better attract and retain medical professionals to work in remote and medically underserved areas within the United States.

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reasonable and necessary prognostic tests, so as to cover items and services for the prevention of disease, not just diagnose and treat. 2016 MM 308 sought to relieve administrative billing barriers against advanced practice providers as a means to increase productive and focus on patient-centric responsibilities. 2014 MM 110 similarly calls for recognizing outpatient observation care services in a hospital as billable under Medicare Part A. 2007 AM 122 calls for continuity in Medicaid funding for persons newly released from custody. 2003 AM 113B specifically highlights the shared legal obligation that the federal, state, and territorial governments have to provide a comprehensive set of benefits to all individuals who meet Medicaid eligibility criteria.

The ABA has additionally long taken a stance supporting Native peoples, including upholding the federal responsibility to Natives. In 1980, the ABA adopted 1980 MM 110, urging strict adherence to Indian treaty obligations. The report to the resolution notes:

The trust responsibility imposes on the United States an important standard of conduct. In Seminole Tribe of Florida v. United States, 366 U.S. 1, 286 (1942), the Supreme Court stated that the United States “has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealing with the Indians should therefore be judged by the most exacting fiduciary standards.” Id. at 297. … Under the trust responsibility to Indian tribes, specifically recognized by Congress and the courts and secured by the treaties, statutes, and 150 years of judicial precedent, Indian tribes should be able to look to the future confident that the federal government will approach its obligation to Indian tribes in a manner consistent with its duty of protection.

2015 AM 113, which adopts the recommendations contained in the 2014 U.S. Attorney General’s Advisory Committee on American Indian and Alaska Native Children Exposed to Violence report. In Recommendation 4.5, calling for periodic training in culturally adapted trauma-informed interventions and cultural competency for the Indian Health Service (IHS), the report notes that IHS is woefully under-resourced, noting that “IHS continues to operate at 52 percent of need and mental health and substance abuse services are funded at an appalling 7 percent of need.”

The ABA has previously sought party in funding access for tribes. In 2001, the ABA adopted 2001 AM 105C calling on Congress to amend Title IV-E of the Social Security Act to provide direct tribal access to federal Title IV-E foster care and adoption funding for children under tribal court jurisdiction. This was reiterated 2013 AM 111A, which called for the “increased use of federal Title IV-E cooperative agreements and memoranda of understanding.”

80M110, 2-3.

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understanding between states and Tribes to enable Tribes to operate their own child protection programs.” 2008 AM 117A urged long-term funding for tribal justice systems, noting “the effective operation of tribal courts is essential to promote the sovereignty and self-governance of the Indian tribes.” In adopting the Indian Law and Order Commission Report of 2010 in 2015 MM 111A, the ABA recognized immense deficiencies in federal funding for tribes.

V. Conclusion

The American Bar Association strongly supports and encourages the enactment of legislation that would bring stability and certainty to the IHS budget by changing its funding to advance appropriations and providing an exemption from federal budget sequestrations. This is what Congress has authorized for the medical accounts of the Veterans Health Administration, and comparable treatment should be authorized for IHS to promote to the highest level, the health, safety, and welfare of American Indian and Alaska Native people in the United States.

Respectfully submitted,

Wilson Adam Schooley
Chair, Section of Civil Rights & Social Justice
August 2019
1. Summary of Resolution(s). This resolution urges Congress to ensure that the health care delivered by the Indian Health Service (IHS) is exempt from government shutdowns and federal budget sequestrations on par with the exemptions provided to the Veterans Health Administration, and to enact advance appropriations legislation that would stabilize funding for IHS and provide for advance appropriations.


3. Has this or a similar resolution been submitted to the House or Board previously? No.


Submitted by: Wilson A. Schooley, Chair, Section of Civil Rights and Social Justice

Submitted By: Wilson A. Schooley, Chair, Section of Civil Rights and Social Justice
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. Three bills have been introduced in the House and Senate on this issue—the Indian Programs Advanced Appropriations Act (H.R. 1128 and S. 229) and the Indian Health Service Advance Appropriations Act of 2019 (H.R. 1135). S. 229 was introduced on Jan. 25th, 2019 and read twice and referred to the House? N/A

6. Status of Legislation. Three bills have been introduced in the House and Senate on this issue—the Indian Programs Advanced Appropriations Act (H.R. 1128 and S. 229) and the Indian Health Service Advance Appropriations Act of 2019 (H.R. 1135). S. 229 was introduced on Jan. 25th, 2019 and read twice and referred to the Indian Programs Appropriations Act of 2019 (H.R. 1128 and S. 229) and the Indian Health Service Advance Appropriations Act of 2019 (H.R. 1135).
Committee on the Budget the same day. H.R. 1128 was introduced Feb. 8th, 2019 and referred to the Subcommittee on Indigenous Peoples of the United States the same day. H.R. 1135 was introduced on Feb 8, 2019 and referred to the Subcommittee on Indigenous Peoples of the United States on March 13, 2019.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The ABA will urge Congress to enact the Indian Programs Advanced Appropriations Act (H.R. 1128 and S. 229) and the Indian Health Service Advance Appropriations Act of 2019 (H.R. 1135), or similar legislation that accomplishes the goals of the policy, and in addition, legislation that would exempt the Indian Health Service from federal budget sequestrations.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only 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.

10. Referrals. By copy of this form, the Report with Recommendation will be referred to the following entities:

- Health Law Section
- Commission on Law and Aging
- Section of Administrative Law and Regulatory Practice
- Commission on Legal Problems of the Elderly
- Senior Lawyers Division
- Young Lawyers Division
- Law Student Division
- Standing Committee on Legal Aid and Indigent Defendants
- Judicial Division
- Tribal Court Council
- Center for Human Rights
- Coalition on Racial and Ethnic Justice
- Commission on Disability Rights
- Commission on Hispanic Legal Rights and Responsibilities
- Commission on Sexual Orientation and Gender Identity
- Commission on Domestic and Sexual Violence
- Commission on Racial and Ethnic Diversity in the Profession
- Commission on Women in the Profession
- Section of State and Local Government Law
- Government and Public Sector Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)
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 Congress to ensure that the health care delivered by the Indian Health Service (IHS) is exempt from government shutdowns and federal budget sequestrations on par with the exemptions provided to the Veterans Health Administration, and to enact advance appropriations legislation that would stabilize funding for IHS and provide for advance appropriations.

2. Summary of the Issue that the Resolution Addresses
IHS is a division within the U.S. DHHS that receives an annual appropriation from Congress to provide direct medical and health services to over 2 million American Indian and Alaska Native people in the United States. IHS provides services directly through a network of hospitals, clinics, and health stations operated by IHS, and funds services provided at tribally operated health facilities.

This resolution seeks advance appropriations to allow federal programs to avert funding gaps and avoid short-term continuing resolutions that are enacted to prevent a funding gap from occurring until regular appropriations are completed or the fiscal year ends. When sequestration occurs, all nonexempt federal programs must be reduced by a uniform percentage. Congress may pass legislation to exempt certain federal programs from sequestrations and special rules to govern the sequestration of federal programs.

For several years, Indian tribes and tribal organizations have urged Congress to enact legislation providing IHS with advance appropriations to facilitate improved planning and provide for more efficient spending. Legislation authorizing advance appropriations for IHS would prevent federal funding gaps and avoid uncertainties associated with receiving funds through the enactment of short-term continuing resolutions. In addition, the enactment of legislation exempting IHS from federal budget sequestrations and legislation authorizing advance appropriations would provide equivalent status to IHS that currently is afforded to the Veterans Health Administration.

3. Please Explain How the Proposed Policy Position Will Address the Issue
This policy supports and encourages the enactment of legislation that would bring stability and certainty to the IHS budget by changing its funding to advance appropriations and providing an exemption from federal budget sequestrations. By adopting this Resolution, the ABA can promote the health, safety, and welfare of American Indian and Alaska Native people in the United States to the highest level.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA
No minority views or opposition have been identified.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact legislation that:

1. Requires equal pay rates for employees of a different sex (which includes sexual orientation, gender identity, and gender expression), race or ethnicity who perform substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions;

2. Requires that a "bona fide factor other than sex" relied upon by an employer for pay disparities be job-related and consistent with business necessity;

3. Requires that any reasonable legitimate factor(s) relied upon by an employer for pay disparities account for the entire pay differential;

4. Requires employers to supply pay scales upon the request of an applicant;

5. Prohibits employers from seeking or relying upon an applicant’s salary history information;

6. Ensures the right of employees to discuss or inquire about their own or their co-workers’ wages;

7. Prohibits retaliation against employees who are claimants of, or witnesses to, an equal pay violation.
The ABA has a long history of supporting protections against unequal pay and other forms of discrimination in the workplace.¹ This Resolution builds upon longstanding ABA precedent, and proposes that all jurisdictions follow the trend among states to take stated practical legislative steps necessary to achieve gender and racial pay equity.

I. Persistence of The Gender and Race-Based Wage Gap

In enacting the Equal Pay Act (EPA), Congress recognized in 1963 that unjustified wage differentials between men and women "depress[] wages and living standards for employees necessary for their health and efficiency."² More than 55 years later, women continue to earn less than their male counterparts in virtually every industry and occupation in this country.³ The pay gap persists across industries,⁴ occupations,⁵ and education levels.⁶ Women’s median earnings are lower than men’s in almost all occupations, whether they are predominantly performed by women, by men, or have an even mix of men and women.⁷ For women of color, disparities in earnings are greater.⁸

¹ In 1965 the ABA adopted a policy of not discriminating against someone on the basis of race, color, creed or national origin. In 1988, the Association recognized that the persistence of overt and subtle barriers denies women the opportunity to achieve full integration and equal participation in the work responsibilities and rewards of the legal profession. In 2007, the House of Delegates adopted a resolution urging Congress to amend Title VII of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e-5(e), and federal age or disability employment discrimination laws to ensure that in claims involving compensation discrimination, the statute of limitations runs from each payment reflecting the claimed unlawful disparity. A 2010 Resolution urged enactment of federal legislation to enhance remedies and procedures to better protect people against pay discrimination. Most recently, in 2019, the ABA officially supported the Paycheck Fairness Act (as introduced in February 2019), H.R. 7, which would strengthen the federal Equal Pay Act consistent with many provisions in the current resolution. E.g., Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963) ("EPA").
² A woman employed full time, year-round in the United States is typically paid 80 cents for every dollar paid to a man. This amounts to a typical loss of $10,086 per year for a working woman or $403,440 over a 40-year career. See NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, AMERICA’S WOMEN AND THE WAGE GAP (APRIL 2019), HTTP://WWW.NATIONALPARTNERSHIP.ORG/OUR-WORK/RESOURCES/WORKPLACE/FAIR-PAY/AMERICAS-WOMEN-AND-THE-WAGE-GAP.PDF.
³ A woman employed full time, year-round in the United States is typically paid 80 cents for every dollar paid to a man. This amounts to a typical loss of $10,086 per year for a working woman or $403,440 over a 40-year career. See NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, AMERICA’S WOMEN AND THE WAGE GAP (APRIL 2019), HTTP://WWW.NATIONALPARTNERSHIP.ORG/OUR-WORK/RESOURCES/WORKPLACE/FAIR-PAY/AMERICAS-WOMEN-AND-THE-WAGE-GAP.PDF.
⁵ Women’s median earnings are lower than men’s in almost all occupations, whether they are predominantly performed by women, by men, or have an even mix of men and women. For women of color, disparities in earnings are greater.
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⁸ In 1965 the ABA adopted a policy of not discriminating against someone on the basis of race, color, creed or national origin. In 1988, the Association recognized that the persistence of overt and subtle barriers denies women the opportunity to achieve full integration and equal participation in the work responsibilities and rewards of the legal profession. In 2007, the House of Delegates adopted a resolution urging Congress to amend Title VII of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e-5(e), and federal age or disability employment discrimination laws to ensure that in claims involving compensation discrimination, the statute of limitations runs from each payment reflecting the claimed unlawful disparity. A 2010 Resolution urged enactment of federal legislation to enhance remedies and procedures to better protect people against pay discrimination. Most recently, in 2019, the ABA officially supported the Paycheck Fairness Act (as introduced in February 2019), H.R. 7, which would strengthen the federal Equal Pay Act consistent with many provisions in the current resolution.

I. Persistence of The Gender and Race-Based Wage Gap

In enacting the Equal Pay Act (EPA), Congress recognized in 1963 that unjustified wage differentials between men and women "depress[] wages and living standards for employees necessary for their health and efficiency." More than 55 years later, women continue to earn less than their male counterparts in virtually every industry and occupation in this country. The pay gap persists across industries, occupations, and education levels. Women’s median earnings are lower than men’s in almost all occupations, whether they are predominantly performed by women, by men, or have an even mix of men and women. For women of color, disparities in earnings are greater.

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At the current rate, the gap between men and women’s earnings will not close until 2106.9. Collectively, women nationwide will lose nearly $900 billion to the wage gap in 2019. This lost income limits women’s spending power and their ability to support their families, who increasingly depend on women’s wages. Eliminating the gender wage gap would reduce the poverty rates of working women and their families by more than half. These income disparities (referred to as the wage gap) compound and widen over the course of a woman’s lifetime, which impacts her Social Security and retirement, and contributes to the gender and racial wealth gap, which is even larger than the wage or income gap.

The persistence of gender and race-based wage gaps affects women, families, and the overall economy and requires legislation that supplements existing law and addresses the factors that contribute to and perpetuate the pay gap.

II. Contributors to the Gender and Race-Based Pay Gap

Discrimination

Even when controlling for factors such as occupation, education, experience, and hours worked, 38 percent of the gender gap is left unexplained. Researchers attribute this unexplained portion to gender discrimination. Although research shows that the unexplained portion of the gender pay gap decreased dramatically in the 1980’s, it has since remained at its 1989 level.

Reliance on prior salary perpetuates wage discrimination

Research shows that women earn less than men starting just one year out of college, which is even larger than the

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Reliance on prior salary perpetuates wage discrimination

Research shows that women earn less than men starting just one year out of college,
even when controlling for factors such as college major, occupation, and hours worked. The same holds true for female graduates of business school, who start at lower salaries than men with MBAs despite having “similar career paths, performance and education.”

Women who start with lower salaries continue to earn less than their male counterparts when employers set pay based on prior salaries. This is especially true for women who begin their careers in lower-paid, female-dominated occupations. The U.S. Equal Employment Opportunity Commission (EEOC) therefore advises employers to avoid basing salary decisions on prior salary and recognizes that such a practice would perpetuate “inequality in compensation among genders.” Similarly, The Society for Human Resource Management (SHRM), the industry’s professional arm, advocates that “salary history should not be a factor in setting compensation. Compensation decisions should be based on the value of the position to the organization, competition in the market and other bona fide business factors.”

In recognition of the fact that employer inquiry into and reliance on prior salary perpetuates and compounds the wage gap, a growing number of states and localities have enacted legislation prohibiting employers from asking about or relying on applicants’ prior salary. Many companies have announced the voluntary elimination of this practice, including Amazon, American Express, Bank of America, Cisco Systems, Facebook, Google, GoDaddy, Progressive, Starbucks, Wells Fargo, Salesforce and The Gap. Research confirms that the wage gap is smaller in states where employers cannot inquire about salary history than in states where the practice is permissible. For these reasons, even when controlling for factors such as college major, occupation, and hours worked, the same holds true for female graduates of business school, who start at lower salaries than men with MBAs despite having “similar career paths, performance and education.”

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pay.

Pay Secrecy and Lack Of Transparency

According to the Institute for Women’s Policy Research, approximately half of workers nationwide are prohibited or strongly discouraged from disclosing their wages to other employees.27 When employees are unable to discuss their wages with their counterparts, it is difficult to determine if they are making less than their colleagues. Research shows that in states where pay secrecy is banned, the wages of both men and women are higher than those of their counterparts in states where pay secrecy is not banned.28 Pay transparency also correlates with increased productivity of workers.29

III. Emerging Efforts to Advance Pay Equity

Equal Pay Legislation in the States

California has set an example of legislation to more effectively combat the gender and race-based wage gap. In 2016, the state enacted SB 358, the California Fair Pay Act, which amended the California Equal Pay Act in several ways, including: requiring equal pay for employees performing “substantially similar” work; eliminating the “same establishment” requirement; narrowing the catch-all “bona fide factor other than sex” to ensure disparities in pay are justified by a business necessity that is related to the job; requiring employers to show that the factor(s) relied upon as a defense account for the entire pay differential; and prohibiting retaliation or discrimination against employees who disclose, discuss, or inquire about their own or co-workers’ wages. In 2018, California enacted AB 168, which prohibits employers from inquiring about an applicant’s prior salary and requires employers to provide the pay range for a given position upon reasonable request. In 2019, the state enacted AB 2282, which prohibits an employer from relying on prior salary at all to justify a wage differential under the CA Equal Pay Act.

Other states have also taken steps to pass or strengthen equal pay laws. To date, 19 states, including the District of Columbia, prohibit employers from retaliating against employees who disclose, discuss, or inquire about their own or co-workers’ wages. In 2018, California enacted AB 168, which prohibits employers from inquiring about an applicant’s prior salary and requires employers to provide the pay range for a given position upon reasonable request. In 2019, the state enacted AB 2282, which prohibits an employer from relying on prior salary at all to justify a wage differential under the CA Equal Pay Act.

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Pending Federal Legislation: The Paycheck Fairness Act (H.R. 7)

In recognition of the need to take a more comprehensive approach to advancing equal pay, on March 27, 2019, the U.S. House of Representatives passed the Paycheck Fairness Act, with the support of the ABA (See, Robert M. Carlson, ABA Support for H.R. 7, The Paycheck Fairness Act, (Feb. 12, 2019), available at https://www.americanbar.org/content/dam/aba/uncategorized/GAO/PFA%20House%20hearing%2011%20Feb%202019.pdf?lcqActivity=true ). Among other things, that bill:

- prohibits retaliation against workers for discussing or disclosing wages.
- prohibits employers from relying on salary history in determining future pay, so that prior pay discrimination does not follow workers from job to job.
- ensures that pay disparities are justified by job related business necessity
- provides women with the same remedies for sex-based pay discrimination as those available to victims of discrimination based on race and ethnicity.

This resolution is in keeping with the best trend in the law, and current ABA policy.

IV. Conclusion

The ABA has long recognized that gender-based and race-based wage gaps take a toll on women, families and the overall economy; that the wage gap persists, compounding the harm to women, particularly women of color, and their families; and that there should be more effective protections and remedies to eliminate pay discrimination.

This resolution supports the practical steps implemented by many jurisdictions, and passed by the House of Representatives, to actually narrow that gap. Truly requiring equal pay for equal work, limiting disparity justifications to jobrelated factors which support the gap, eliminating reliance upon past salary, and requiring employer pay transparency can help turn policy into reality.

31 Id.

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31 Id.
Respectfully submitted,

Wilson A. Schooley,  
Chair, Section of Civil Rights and Social Justice  
August 2019
1. Summary of Resolution(s). This resolution urges the enactment of legislation that would provide greater protections to those subjected to pay discrimination on the basis of sex, race and ethnicity in order to overcome the obstacles that exist to achieving equal pay, which contribute to sex and race-based wage gaps.


3. Has this or a similar resolution been submitted to the House or Board previously? A resolution related to equal pay was submitted to the House of Delegates in February 2010, urging enactment of federal legislation to enhance remedies and procedures under the federal Equal Pay Act to better protect people against pay discrimination. This current proposed resolution expands upon the 2010 resolution.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The ABA has a long history of supporting policies that enforce stronger protection against discrimination. In 1965 the ABA adopted a policy of not discriminating against someone on the basis of race, color, creed or national origin. In 1968, the Association recognized that the persistence of overt and subtle barriers denies women the opportunity to achieve full integration and equal participation in the work, responsibilities and rewards of the legal profession. In 2007, the House of Delegates adopted a resolution urging Congress to amend Title VII of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e-5(e), and federal age or disability employment discrimination laws to ensure that in claims involving discrimination in compensation, the statute of limitations runs from each payment reflecting the claimed unlawful disparity. Based on existing ABA Policy, in 2019, the ABA officially supported the Paycheck Fairness Act (as introduced in February 2019), which would strengthen the federal Equal Pay Act, which prohibits pay discrimination on the basis of sex. This Resolution is in line with, and builds upon, prior ABA policy, helping the ABA continue to support reforms necessary to achieve gender and racial pay equity (Dennis J. Drasco, Report and Resolution #104B: Federal Shield Law for Journalists, Am. Bar Assoc. (August 8-9, 2005), https://www.americanbar.org/content/dam/aba/directories/policy/2005_am_104b.authcheckdam.pdf.).

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. States nationwide have passed legislation to strengthen their equal protection laws. California was one of the first states do so in 2015 when they passed the Fair Pay Act (SB 358) which amended the California Equal Pay Act, requiring equal pay for employees performing “substantially similar” work; eliminating the “same establishment” requirement; narrowing the catch-all “bona fide factor other than sex” to ensure disparities in pay are justified by a business necessity that is related to the job; requiring employers show that the factor(s) relied upon as a defense account for the entire pay differential; and prohibiting retaliation or discrimination against employees who disclose, discuss, or inquire about their own or co-workers’ wage. Then in 2018, California enacted AB 168, which prohibits employers from inquiring about or relying on an applicant’s prior salary and requires employers to provide the pay range for a given position upon reasonable request. In 2019, the state enacted AB 2282, which prohibits an employer from relying on prior salary at all to justify a wage differential under the CA Equal Pay Act. In addition to California, 19 other states and the District of Columbia, have passed legislation to create greater protections against pay discrimination.34 At the federal level, on March 27, 2019, the U.S. House of Representatives passed the Paycheck Fairness Act,35 which contains many of the provisions reflected in this current Resolution (https://www.congress.gov/bill/116th-congress/house-bill/7?text?q=%7B%22search%22%3A%5B%22%22h%7B%22%5D%7D&r=1&c=2).

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Passing this resolution will allow the ABA to support more federal and state initiatives to be more comprehensive in pursuing greater protections against pay discrimination on the basis of sex, race and ethnicity.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.


10. Referrals.

- Section of Labor and Employment Law
- Coalition on Racial and Ethnic Justice
- Commission on Sexual Orientation and Gender Identity
- Commission on Women in the Profession
- Section of State and Local Government Law
- Commission on Domestic & Sexual Violence

35 The Paycheck Fairness Act (H.R. 7).
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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E-mail: Paula.Shapiro@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.)

Estelle H. Rogers, CRSJ Section Delegate  
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1. Summary of the Resolution

The Resolution urges Congress, the states, and territories to enact legislation that would provide stronger remedies and protections against pay discrimination on the basis of sex (including gender, gender identity, and gender expression), race and ethnicity to help overcome the persistent barriers that continue to impede the achievement of pay equity.

2. Summary of the Issue that the Resolution Addresses

Despite the fact that the federal Equal Pay Act (and many state equal pay laws) have been on the books for over 50 years, pay discrimination and the overall gender wage gap continue to persist, taking a tremendous toll on women, families, and communities as a whole. For women of color, who experience intersecting forms of discrimination, the pay gap is even worse. The lost income from the pay gap means that women and people of color are less able to build assets, which contributes to the equally dismal gender and racial wealth gap and higher rates of poverty. It is therefore critical that legislation be passed, and existing laws strengthened, to better address the many contributors to the gender and race wage gaps that continue to persist.

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

As set forth in the companion report, the proposed policy urges enactment of laws which provides important protections that go beyond existing federal and, in many cases, state equal pay laws.

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

None identified.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact legislation or regulations that require all law enforcement entities to meet training standards related to sexual orientation and gender identity similar to those developed by California’s Commission on Police Officer Standards and Training (POST) under California’s AB 2504 (September 30, 2018).
Introduction

The American Bar Association (ABA) adopts this Resolution to support legislation like AB 2504, requiring that police officers be trained about sexual orientation and gender identity (SOGI) minorities to improve law enforcement culture and effectiveness in serving the LGBTQ community. This report will describe the current state of law regarding hate crime, rising tensions between police officers and the LGBTQ community, and legislation adopted by other municipalities requiring SOGI training for law enforcement.

The ABA has adopted policies consistent with this Resolution condemning discrimination on the basis of SOGI in the justice system. The ABA recognized LGBTQ rights as basic human rights condemning laws, regulations, rules and practices that discriminate against individuals based on LGBT status. In 1996, the ABA passed a resolution urging state, territory and local bar associations to study bias against gays and lesbians in the legal profession and the justice system in their community, and make appropriate recommendations to eliminate such bias. In addition, the ABA also "urged enactment of legislation to curtail the 'gay panic' and 'trans panic' defenses, requiring courts to instruct juries that neither non-violent sexual advance, nor the discovery of a person's gender/sexual identity constitutes legally adequate provocation to mitigate the severity of non-capital crime". In 2017, the call for implicit bias training urges courts to develop plans of action to make anti-bias training an important part of both initial judicial training and continuing judicial education.

Existing policies support the initiative recognizing LGBTQ rights and de-stigmatizing their status, especially within the judicial process. This Resolution will stress the importance of educating law enforcement about SOGI, and how this will serve the community. With the rate of hate crimes increasing, minorities must feel protected by their local police force. For law enforcement officers to accomplish this, and change the discriminatory culture toward LGBTQ individuals, they must appreciate their differences and understand how to appropriately serve them.

Background

California Governor Jerry Brown signed AB 2504 into law on September 30, 2018. Under AB 2504, police officers are required to undergo training on SOGI. POST requires de-biasing strategies in law enforcement training.

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consultation with SOGI members of law enforcement, as well as those in their community with expertise regarding these issues, including at least one male member, one female member, and one transgender member. The training must include: (1) understanding the differences between sexual orientation and gender identity; (2) the vocabulary used to identify and describe sexual orientation and gender identity; (3) how to create an inclusive workplace within law enforcement for LGBTQI individuals; (4) important milestones in history relating to SOGI minorities and law enforcement, and (5) how law enforcement can effectively respond to domestic violence and hate crimes involving SOGI minorities.

Hate Crime

A hate or a bias-related crime occurs when the criminal act intentionally targets a victim because of who the victim is. Under the Bias-Related Crimes Act of 1989, a hate crime is defined as “one that demonstrates an accused’s prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance sexual orientation, gender identity or expression, family responsibility, homelessness, disability, matriculation, or political affiliation of a victim.” While violent crime is detrimental, prejudice-based acts have a stronger impact because they intend to send a threatening message targeting one community.

Statistical information has shown that lesbian, gay, bisexual and transgender people are attacked more often than heterosexuals in the United States. In a report by the Human Rights Watch, based on data from the Federal Bureau of Investigation (FBI), evidence shows that since 1991, more than 100,000 hate crime offenses have been reported. In 2007, 1,265 LGB-biased hate crimes were reported to the FBI, which is a 6-percent increase from 2006. The 2017 FBI statistics state 7,175 hate crimes were reported, 1,130 of which were based on sexual orientation bias, and 119 on gender identity bias, demonstrating an increase in reports of hate crimes related to SOGI. These statistics highlight the larger issue of violence against marginalized communities.

Police Officers and LGBT Community

It is important for marginalized groups, like the LGBTQI community, to feel protected and adequately served by police officers. Yet, police have targeted LGBTQI individuals and the places they congregate. In a Lambda Legal survey, it was reported among respondents that more than one in eight respondents (14%) who had police contact in the past five years reported verbal assault by police, while, 3% reported sexual harassment and 2% reported physical assault. Of respondents who complained about police misconduct, 71% said their complaint was not fully addressed by those they reported to.

Hate Crime

A hate or a bias-related crime occurs when the criminal act intentionally targets a victim because of who the victim is. Under the Bias-Related Crimes Act of 1989, a hate crime is defined as “one that demonstrates an accused’s prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance sexual orientation, gender identity or expression, family responsibility, homelessness, disability, matriculation, or political affiliation of a victim.” While violent crime is detrimental, prejudice-based acts have a stronger impact because they intend to send a threatening message targeting one community.

Statistical information has shown that lesbian, gay, bisexual and transgender people are attacked more often than heterosexuals in the United States. In a report by the Human Rights Watch, based on data from the Federal Bureau of Investigation (FBI), evidence shows that since 1991, more than 100,000 hate crime offenses have been reported. In 2007, 1,265 LGB-biased hate crimes were reported to the FBI, which is a 6-percent increase from 2006. The 2017 FBI statistics state 7,175 hate crimes were reported, 1,130 of which were based on sexual orientation bias, and 119 on gender identity bias, demonstrating an increase in reports of hate crimes related to SOGI. These statistics highlight the larger issue of violence against marginalized communities.

Police Officers and LGBT Community

It is important for marginalized groups, like the LGBTQI community, to feel protected and adequately served by police officers. Yet, police have targeted LGBTQI individuals and the places they congregate. In a Lambda Legal survey, it was reported among respondents that more than one in eight respondents (14%) who had police contact in the past five years reported verbal assault by police, while, 3% reported sexual harassment and 2% reported physical assault. Of respondents who complained about police misconduct, 71% said their complaint was not fully addressed by those they reported to.
In a 2016 study by the National Coalition of Anti Violence Programs, on police response to survivors affected by hate crime within the LGBTQ community, it was reported, of those who interacted with the police, 35% of survivors said police officers were indifferent. 31% said the police were hostile. 52 survivors reported police misconduct after the initial incident of violence, including excessive force, unjustified arrest, and entrapment. Black survivors were 2.8 times more likely to experience excessive force.9

Wagoner v. City of Portland (2014)

In 2014, Ms. Wagoner, a lesbian woman filed suit against the city of Portland, Oregon for false arrests and excessive force. According to Wagoner, she was a passenger in a vehicle leaving a well-known LGBTQ center. A police car began to follow them from a nearby gas station and turned on its head lights after they turned off their vehicle. The officer alleged Wagoner was not wearing a seat belt despite her stating she was, until the vehicle was stopped. During the arrest, Wagoner alleged that the officer slammed her to the ground which “caused her to chip her tooth and caused bruising and swelling to her wrists” and when being handcuffed the police officer “threatened to use pepper spray or a Taser on Wagoner if she continued to resist,” however decided against using either.10 When she asked for a female officer to search her, the male officer refused and pulled up her shirt and pulled down her pants to search her. Once in the station, it was reported by Wagoner that officers placed her in a hazardous holding cell, took photographs of her while crying and handcuffed, causing her severe emotional distress.11 All charges against her were later dismissed.

Incident: Gay Staten Island man says cops beat him outside of home, shouting homophobic slur.

On June 19, 2015, Louis Falcone, a gay man living in Staten Island, was confronted by four police officers at his home. He was arguing with his brother, so neighbors called police about the noise. When they arrived, Falcon asked why they were asking him to come outside. Falcone was yanked outside by police while shooing away his barking dog. Falcone said, the police officers threw him to the concrete in front of his house, smashed his face to the ground and yelled homophobic slurs.12 Falcone had recently had surgery on his foot and was wearing a boot, but the officers continued to step on him. According to Falcone, the attack left him with a broken nose, two black eyes, cuts to his face and body, and more foot surgery. Falcone’s version was confirmed by a video shot by his neighbor. He is suing the NYPD for violating his civil rights, and for the injuries he suffered. The ABA also advocates that police violence towards the LGBTQ community be addressed with a comprehensive training program on cultural competency and the proper

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use of force. While AB 2504 legislates standards for adequate training of police officers, it does not address how to remedy police violence toward the LGBTQ community. The ABA recommends rigorous practical training about how police officers can control their use of force, emphasizing de-escalation, and alternatives to arrest or summonses when appropriate.\textsuperscript{13} Also, to further decrease the excessive use of force, mandatory cultural competency training about issues of importance to the LGBTQ community must be implemented. Because police officers hold such powerful roles in the rule of law, they must be trained on how to counter biases against those they are not familiar with. Race, sexual orientation, gender identity and other distinguishing characteristics should not be factors in whether, or how a person is protected and served. Most importantly, trainings should be in a nonjudgmental space where police officers can share inappropriate force used against LGBTQ and other marginalized people, in order to evaluate mistakes and prevent them from recurring.

Federal Legislation

Only recently has the federal government expanded civil rights protections to include victims of bias-motivated crimes based on their actual or perceived gender, sexual orientation and gender identity. In 2009, the Matthew Shepard Hate Crimes Prevention Act was signed into law by President Barack Obama. This gives the “Justice Department the power to investigate and prosecute bias-motivated violence by providing the Justice Department with jurisdiction over crimes of violence where a perpetrator has selected a victim because of the victim’s actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability.”\textsuperscript{14} The Department of Justice (DOJ) published a guide for police officers to recognize and address biases, assumptions, and stereotypes about victims. Although not a requirement, it is a basis for developing trainings, protocols, and improved supervision, and can be especially useful to law enforcement when engaging with LGBT survivors, who may not feel safe coming forward to report violence in their relationships. Despite these advances, bias toward and violence against the LGBTQ community still happens, triggering initiatives that enforce stricter protection.

As recent racial and religious profiling incidents have garnered national attention, profiling LGBTQ individuals continues to be a problem, particularly for transgender people of color. The End Racial and Religious Profiling Act was introduced in the Senate by Sen. Ben Cardin (D-MD) on February 16, 2017 and in the House of Representatives by Rep. John Conyers (D-MI) on March 10, 2017, as the End Racial Profiling Act (ERPA). This requires law enforcement to maintain adequate policies and procedures to eliminate profiling, including increased data collection to accurately assess the extent of the problem. The bill also requires training for law enforcement officials on profiling, and mandates procedures for “receiving, investigating, and responding to complaints of alleged

\textsuperscript{13} President’s Task Force on 21st Century Policing, “Final report of the President’s task force on 21st century policing” (2015).

profiling”. Police misconduct, when not checked, impacts the culture of the agency, and fosters mistrust between the community and police.

Local Legislation

Several major metropolitan police departments have set internal policies regarding police interaction with the transgender community. They establish standards for recognizing identity, proper pronoun usage, appropriate housing, and search and seizure. These cities include Boston, Los Angeles, Denver, Washington D.C, Philadelphia, New Orleans and even West Hartford. In Los Angeles, the LAPD requires “officers to refer to transgender individuals by the name and gender they prefer.” Officers would not be allowed to search such individuals simply to determine their anatomical gender, and must ask if they prefer to be searched by a male or female officer, among other similar directives...”. By building policies from the inside, they are more likely to be implemented and respected. Additionally, it creates a positive collaboration between law enforcement and the LGBTQ community by seeking their input and guidance. This is especially true for those directly impacted by discriminatory policing.

An increasing number of cities have added to their police department policy handbook, how officers should best engage with the LGBTQ community. A challenge for LGBTQ individuals is being discriminated against in the legal process by their SOGI being used against them. In 2012, the Chicago Police Department implemented guidelines to make clear that law enforcement should respect a person’s self-identified gender and use their preferred name and pronoun. In addition, gender identity alone cannot provoke reasonable suspicion of criminal activity. Given the high rates of harassment by police officers towards LGBTQ and individuals, officer training is crucial.

Ensuring the safety of transgender inmates goes beyond whether they are placed appropriately, based on birth sex or lived gender, so county and city jails across the country developed policies addressing the broader needs of these inmates. In San Francisco County, California, transgender inmates are placed according to their stated placement preference in collaboration with a review committee. In Cumberland County, Maine, a Transgender Review Committee assesses housing placement, and other services. Additionally, transgender inmates may dress and use the names and pronouns consistent with their gender identity. These policies are vital for the safety of transgender people since the question, whether their basic needs will be met, is constant. Not only will it aid incarcerated transgender individuals, but it will also show a greater respect from police officers, cultivating better relationships between law enforcement and the LGBTQ community.

18 Id. at 17.
Positive Impact

The D.C. Gay and Lesbian Liaison Unit (GLLU) provides outreach to the gay community, educates its police officers, and actively participates in regular crime fighting and prevention. As of August 2005, they investigated over 300 domestic violence cases. More MPD officers were trained to understand the dynamics of same-sex relationships, and the assignment of a GLLU officer to guide the victims through the criminal justice system. In addition, the presence of reliable sources within the gay community resulted in a homicide case closure rate within the GLLU exceeding 95%. The program's most compelling report suggested that much of the city's gay community now views the D.C. Metropolitan Police as a trusted ally.19

Conclusion

For law enforcement officers to effectively serve the LGBTQ community, there should be proper training and education about their unique differences. By supporting regulations similar to those within the POST, the ABA can cultivate a culture change within law enforcement, but also an elimination in bias.

Respectfully submitted,

Wilson A. Schooley
Chair, Civil Rights and Social Justice Section
August 2019

1. Summary of Resolution(s).

This resolution urges the enactment of legislation or regulations that require all law enforcement entities to meet training standards similar to those set by the Commission on Police Officer and Standard Training (POST).

2. Approval by Submitting Entity.

The Council of the Section of Civil Rights and Social Justice approved sponsorship of the resolution on April 11, 2019.

The Commission on Sexual Orientation and Gender Identity approved sponsorship of this resolution on April 24, 2019.

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 a long history condemning discrimination on the basis of sexual orientation and gender identity to provide better access to justice. In LGBT Rights, the ABA recognizes the rights of LGBTQ individuals as basic human rights, and condemns laws, regulations, rules and practices that discriminate against individuals on the basis of LGBTQ status.\(^\text{20}\) Sexual Orientation, urges state, territorial and local bar associations to study bias in their community against gays and lesbians within the legal profession, and the justice system, and to make appropriate recommendations to eliminate such bias.\(^\text{21}\) The enactment of Gay Panic Defense in the effort to curtail the "gay panic" and "trans panic" defenses, including requiring courts to instruct juries that neither non-violent sexual advance nor the discovery of person’s gender/sexual identity constitute legally adequate provocation to mitigate severity of non-capital crime.\(^\text{22}\)

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

\(^{20}\) Id. at 1.
\(^{21}\) Id. at 2.
\(^{22}\) Id. at 3.

Assembly Bill 2504 was passed in the Senate. The Bill is authored by Assembly member Evan Low (D-Silicon Valley), Chair of the California Legislative LGBT Caucus. It was then approved by Governor Jerry Brown and Chaptered by Secretary of State - Chapter 969, Statutes of 2018.

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

An American Bar Association policy urging legislative bodies to adopt regulations similar to the standards set by the Commission on Police Officer and Standard Training (POST) and to California’s AB 2504, will be highly persuasive and offer law enforcement opportunities to improve the public perception regarding their fairness toward the LGBTQ community. It will elevate the standards of conduct of law enforcement and help the LGBTQ community to feel safe and protected.

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

Adoption of this proposed resolution would result in only 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. (If applicable)

There is no known conflict of interest.

10. Referrals.

- Criminal Justice Section
- Standing Committee on Legal Aid and Indigent Defendants
- Section of State and Local Government Law
- Commission on Disability Rights
- Commission on Domestic and Sexual Violence
- Commission on Youth at Risk
- Commission on Hispanic Legal Rights and Responsibilities
- Center on Children and the Law
- Commission on Homelessness and Poverty
- Coalition on Racial and Ethnic Justice
- Section of Alternative Dispute Resolution
- Commission on Racial and Ethnic Diversity in the Profession
- Commission on Women in the Profession
- Section of Litigation
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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Diana Flynn, SOGI Commissioner
Lambda Legal
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E-mail: dlf@aya.yale.edu

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 the Resolution**

This Resolution advocates for the requirement of all law enforcement agencies to adopt regulations similar to the standards set by the Commission on Police Officer and Standard Training (POST).

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

This Resolution seeks to elevate standards of training for law enforcement agencies to preserve their function of upholding fairness and equality in providing protection for all. In the effort to do so, police officers should be required to receive specific training on sexual orientation and gender identity to adequately serve their role of providing support and protection for all communities.

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

This resolution will be used by the ABA in its advocacy efforts, and by ABA members who wish to engage with members of Congress and other legislative bodies to support the interests expressed in this resolution, in coordination with the Governmental Affairs Office.

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

None identified
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments not to impose upon medical facilities and healthcare providers that offer reproductive health services to women, licensing or other regulatory requirements that are not medically necessary or that have the purpose or effect of burdening women’s access to such services.
The right to bodily autonomy and to make personal decisions about one's family have long been recognized by the Supreme Court of the United States. These rights are effectuated through a patient's right to choose and access reproductive healthcare. For women, the right to make personal decisions about reproductive healthcare is under threat. The increase in legislative activity at the state and federal level, coupled with the prospect of further Supreme Court consideration of reproductive health-related laws and regulations, makes the threat imminent and real.

In the first quarter of 2019 alone, over 300 restrictive reproductive healthcare bills affecting contraception, family planning, and abortion were introduced in state legislatures. As of 2017, states had already enacted close to a thousand bills restricting access to reproductive healthcare. These laws are often passed in the guise of protecting women but have the effect of shutting down medical facilities and making reproductive healthcare more difficult and expensive to obtain.

Laws and Regulations Impeding Reproductive Healthcare

The myriad restrictive bills, passed in the name of protecting women’s health, run the gamut, requiring:

- unnecessary services, such as ultrasounds, when not medically indicated;

1 Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing family decisions protected by the Fourteenth Amendment); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that married women have the right to contraception under the Fourteenth Amendment); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (expanding the right to contraception to all women, whether married or single); Roe v. Wade, 410 U.S. 113, 120 (1973) (recognizing the right to abortion under the Fourteenth Amendment); Carey v. Population Servs., Inc., 431 U.S. 678, 684 (1977) (striking down the presumption that only pharmacists could dispense nonprescription contraceptives); Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 848 (1992) (reaffirming the right to abortion and forbidding regulations that impose an undue burden on pre-viability abortion); Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 848 (1992) (reaffirming the right to abortion and forbidding regulations that impose an undue burden on pre-viability abortion); Clevend Bd. of Educ. v. LaFleur, 414 U.S. 632, 638 (1974) (upholding that personal choice in matters of family life, in this case to procreate, is a liberty that the Fourteenth Amendment protects); Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 279 (1990) (recognizing the right to refuse unwanted medical treatment); Lawrence v. Texas, 539 U.S. 558 (2003) (recognizing constitutional protections for intimate personal decisions and protecting same-sex conduct, along with private sexual activity more broadly); Most recently, in Obergefell v. Hodges, the Court held that the right to marry is a person of the same sex, “[i]ke choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution[,]” is protected by the Fourteenth Amendment. 135 S. Ct. 2564, 2688 (2015).

2 Throughout the report, “women” is used for ease and consistency, but it is recognized that not all people seeking reproductive healthcare, including pregnant people, identify as women.

3 These 300-plus bills seek to restrict access to contraception or abortion, to defund providers of comprehensive reproductive healthcare, or to support faith-based crisis pregnancy centers that do not provide medical care.


Overview

The right to bodily autonomy and to make personal decisions about one’s family have long been recognized by the Supreme Court of the United States. These rights are effectuated through a patient’s right to choose and access reproductive healthcare. For women, the right to make personal decisions about reproductive healthcare is under threat. The increase in legislative activity at the state and federal level, coupled with the prospect of further Supreme Court consideration of reproductive health-related laws and regulations, makes the threat imminent and real.

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biased and medically inaccurate counseling (including inaccurate information about physical or mental side effects of procedures); 

- delays before accessing services; 

- unreasonable physical plant requirements (such as the size of procedure rooms or the width of corridors); and 

- limits on private and public health insurance coverage.  

As noted, the proponents of many of these state restrictions have justified them under the guise of protecting women’s health and safety. For example, some states require providers to gain hospital admitting privileges even though they do not practice at hospitals—overregulation that is contrary to modern medical standards and to which both the American Medical Association (AMA) and the American College of Obstetricians and Gynecologists (ACOG) are publicly opposed.  

Requiring providers to have admitting privileges is unnecessary and puts many providers in an impossible situation. Hospitals often require a minimum number of admissions each year in order to maintain privileges. Nine out of ten abortions take place during the first trimester, and because abortion is so safe, less than 0.06% of these patients experience a complication requiring hospitalization. Providers therefore cannot meet admission minimums, are denied privileges, and can no longer serve the women these laws claim to protect.

One particular type of restrictive bill, which has been introduced with great frequency in recent years, imposes onerous and medically unnecessary regulations on the physical plant of reproductive health clinics. These laws are based upon the pretext that reproductive care is inherently dangerous, and facilities must mimic hospitals in order to be safe. Nothing could be further from the truth.

Reproductive healthcare is extremely safe. Contraception is well established to be safe and effective at reducing unintended pregnancy, and has been called by the Centers for Disease Control (“CDC”) one of the ten greatest public health achievements of the 20th century. 

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 twentieth century. In addition, as the CDC has observed: “Access to family planning and contraceptive services has altered social and economic roles of women. Family planning has provided health benefits such as smaller family size and longer intervals between the birth of children; increased opportunities for preconceptional [sic] counseling and screening; fewer infant, child, and maternal deaths; and the use of barrier contraceptives to prevent pregnancy and transmission of human immunodeficiency virus and other STDs.”

Abortion is likewise, in the recent words of the Supreme Court surveying the medical evidence, “extremely safe.” The risk of death in childbirth is 14 times higher than for abortion procedures. In fact, there are dozens of common medical procedures that are considered to be very safe but that are more risky than abortion. The mortality rates are higher for gallbladder removal, knee replacement surgery, bariatric surgery, and hernia surgery. According to the former president of the American College of Obstetricians and Gynecologists, the mortality rate of colonoscopy is 40 times greater than of abortion.

Research also demonstrates that states that have passed 10 or more reproductive healthcare restrictions also tend to be states where women and children have worse health outcomes than states with fewer restrictions on access to reproductive healthcare. According to the Guttmacher Institute, a leading research and policy organization in reproductive healthcare, despite exceptionally low complication rates for patients undergoing abortion, “24 states have laws or policies that regulate abortion providers [in ways that] go beyond what is necessary to ensure patients’ safety.” These laws have not improved the abortion procedure, but rather have made it more difficult to access not only abortion, but also other basic preventative care co-located in some clinics, including breast exams, cholesterol screening, diabetes screening, flu shots, employment and sports physicals, pregnancy care, menopause testing and treatment, and cervical cancer screenings.

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17 Id.
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23 Id.
At the federal level, there have been similar efforts to thwart access to a spectrum of reproductive health services. In one of his first acts as president, Donald Trump reinstated and expanded the Global Gag Rule, a destructive policy that restricts access to safe abortion services for women worldwide. The rule dictates that overseas groups receiving any health funds from the U.S. – not just family planning funding – may not use U.S. funds or even their own funds from other sources to provide safe and legal abortion services, provide information about or referrals for abortion, or provide funds to any groups that provide or discuss abortion. Multiple academic studies have found that the Global Gag Rule decreases healthcare services, including the dissemination of contraception, and thus, ironically, that it is associated with an increase in abortions.\(^{16}\)

Similarly, the administration’s recent regulation governing the Title X family planning program implements a “Domestic Gag Rule” that prohibits entities receiving Title X funding from providing referrals for or information about abortion. For example, Title X-funded health centers serve more than 4 million people and provide a critical entry point – the only entry point – into the health care system for many low-income, uninsured, and underserved clients.\(^{17}\) In fact, six in ten women receiving Title X services reported that a Title X-funded health center was their usual source of medical care,\(^{18}\) and four in ten reported it was their only source of care.\(^{18}\)

The “Domestic Gag Rule” also requires physical and financial separation between Title X services and abortion care and imposes strict limitations on the use of Title X funds. According to research by the Kaiser Family Foundation, the total cost for bringing organizations into compliance would equal $66.25 million, a quarter of the Title X program’s annual budget.\(^{20}\) Reallocation of these monies for compliance translates into reductions in quality of care and services for millions of women and their families.\(^{21}\) Many Title X funded health centers may also stop providing abortion services altogether.\(^{22}\)


\(^{19}\) id.


\(^{22}\) For example, in a rural state like Maine, 16 out of 17 abortion clinics would either close or stop providing abortion services. Maine Title X Recipients Take Trump Administration to Court, CTR. FOR REPRODUCTIVE SERVICES AND ABORTION CARE AND IMPOSES STRICT LIMITATIONS ON THE USE OF TITLE X FUNDS. ACCORDING TO RESEARCH BY THE KAISER FAMILY FOUNDATION, THE TOTAL COST FOR BRINGING ORGANIZATIONS INTO COMPLIANCE WOULD EQUAL $66.25 MILLION, A QUARTER OF THE TITLE X PROGRAM’S ANNUAL BUDGET. REALLOCATION OF THESE MONIES FOR COMPLIANCE TRANSLATES INTO REDUCTIONS IN QUALITY OF CARE AND SERVICES FOR MILLIONS OF WOMEN AND THEIR FAMILIES. MANY TITLE X FUNDED HEALTH CENTERS MAY ALSO STOP PROVIDING ABORTION SERVICES ALTOGETHER. AS FOR EXAMPLE, IN A RURAL STATE LIKE MAINE, 16 OUT OF 17 ABORTION CLINICS WOULD EITHER CLOSE OR STOP PROVIDING ABORTION SERVICES. MAINE TITLE X RECipients TAKE TRUMP ADMINISTRATION TO COURT, CTR. FOR REPRODUCTIVE SERVICES AND ABORTION CARE AND IMPOSES STRICT LIMITATIONS ON THE USE OF TITLE X FUNDS. ACCORDING TO RESEARCH BY THE KAISER FAMILY FOUNDATION, THE TOTAL COST FOR BRINGING ORGANIZATIONS INTO COMPLIANCE WOULD EQUAL $66.25 MILLION, A QUARTER OF THE TITLE X PROGRAM’S ANNUAL BUDGET. REALLOCATION OF THESE MONIES FOR COMPLIANCE TRANSLATES INTO REDUCTIONS IN QUALITY OF CARE AND SERVICES FOR MILLIONS OF WOMEN AND THEIR FAMILIES. MANY TITLE X FUNDED HEALTH CENTERS MAY ALSO STOP PROVIDING ABORTION SERVICES ALTOGETHER. AS
a result, it will hamper a patient’s ability to receive accurate information from her medical provider about the full range of reproductive healthcare and limit her ability to make informed decisions and access services.\textsuperscript{23}

Finally, under recent Title X regulations, grantees no longer need to follow evidence-based family planning protocols; Title X funds have been awarded even if a clinic does not offer contraceptive care.\textsuperscript{24} The Domestic Gag Rule would block the availability of Title X funds to some grantees, redirect funds to faith-based organizations disseminating religious messages, and eliminate the requirement that providers offer information about the full range of available reproductive healthcare. These changes will shrink the network of participating healthcare providers and have major repercussions for women across the country who rely on them.

Currently, more than 80 cases in state and federal courts are being litigated to protect access to a spectrum of reproductive health services that range from access to contraception, funding for medical providers offering contraceptive services, and access to abortion care. Passage of this resolution would put the ABA on record as opposed to medically unwarranted laws and regulations that are intended to make or have the effect of making access to reproductive healthcare more difficult.

ABA Policy Relevant to the Proposed Resolution

The ABA has adopted several policies that are consistent with this resolution and that strongly oppose restrictions that would burden women’s access to reproductive health services. The ABA has a long record of supporting personal autonomy in healthcare decision-making and opposing regulations that interfere with access to treatment and quality of care. In 1991, in anticipation of Rust v. Sullivan going to the Supreme Court, the ABA passed Resolution 91A10H, which expressed the association’s opposition to “unreasonable government-imposed restrictions on professional relationships [and] governmental intrusion into sensitive and confidential areas of healthcare.”\textsuperscript{25} In 1992, the ABA recognized individual liberty and bodily autonomy in making personal reproductive health choices with the passage of Resolution 92A12. The Resolution opposes state and federal legislation that would restrict the rights of women to terminate their pregnancies before viability, or after that point when necessary to protect the life or health of the woman.

In 2005, the ABA responded to passage of the Weldon Amendment, which prohibited federal agencies and state or local governments from “discriminating against any health


\textsuperscript{24} Jessie Hellman, Trump Administration Awards $1.7 Million Family Planning Grant to Anti-Abortion Clinics, \textit{The Hill} (Mar. 29, 2019), \url{https://thehill.com/policy/healthcare/436526-trump-administration-awards-1-7-million-family-planning-grant-to-anti-abortions}.

care entities for refusing to provide, pay for, provide coverage of, or make referrals for abortions under penalty of losing federal funds under the Consolidated Appropriations Act. At this time, the ABA adopted Resolution 05M104, reaffirming and expanding its 1991 policy, and adding that the medical providers must give relevant and medically accurate information for fully informed decision making “whether or not the provider chooses to offer such care.” With the passage of ABA Resolution 93M104, the association also opposed the use of government funding programs to suppress or discourage speech activities by grantees based on the government’s viewpoint. In adopting resolutions 91A10H, 01A118, 95M104 and 93M104, the ABA has made clear its support for the right of patients to receive full and adequate medical advice and referrals for all reproductive health options, and the correlative right of healthcare professionals to advise their patients in accordance with their best medical judgment and professional ethics.

The ABA has also supported the right to access quality reproductive health services irrespective of income and free from discrimination. Resolutions 90M108 and 94M105 support every American’s right to access quality health care regardless of the person’s income and describe the various characteristics required for such access and quality of care. In adopting ABA Resolution 18104C, the association also recognized that the prohibition of sex discrimination by covered health programs or activities includes, by definition, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, childbirth and related medical conditions.

The ABA has in the past adopted resolutions that are similar to and consistent with the resolution accompanying this report. The instant resolution is being proposed to apply principles the ABA previously endorsed to a wave of reproductive healthcare restrictions of a particular type: limitations that purport to be “women-protective” but are medically unnecessary and have the purpose or effect of reducing access to healthcare.

Challenges to Statutes Limiting Reproductive Health Care

Despite long-standing Supreme Court precedent supporting access to reproductive healthcare, including Roe v. Wade, Planned Parenthood of Southeastern Pa. v. Casey, and Whole Woman’s Health v. Hellerstedt, legislatures continue to pass restrictive regulations on medical facilities and healthcare providers that do not improve a woman’s reproductive health outcomes but rather burden her access to information and services.

29 ABA House of Delegates Resolution 05M108 (adopted Feb. 1990); ABA House of Delegates Resolution 94M105 (adopted Feb. 1994) (providing for every American to have access to quality healthcare regardless of the person’s income and describing the various characteristics required for access and quality care).
30 The stated purpose of protecting women with these restrictions is believed by the safety of abortion. In Whole Woman’s Health v. Hellerstedt, Texas defended these laws as an effort to improve abortion safety. But when the Texas Senate passed the law, the Texas Lieutenant Governor celebrated on Twitter with a map of clinic closures. The map was captioned “If SB5 passes, it would essentially ban abortion statewide,” and the Lieutenant Governor posted “We fought to pass SB5 through the Senate last night, this is why!”
The landmark 2016 decision in Whole Woman’s Health v. Hellerstedt struck down two parts of the omnibus 2013 Texas law known as HB2: the “admitting privileges” provision requires abortion providers to obtain local hospital admitting privileges, and the “ambulatory surgical center” provision requiring every licensed abortion facility to meet hospital-like building standards. The decision preserved access to healthcare for millions of Texas women, and signaled that laws like Louisiana’s Act 620 are also unconstitutional.

The decision reaffirmed that when courts assess benefits, they need to apply heightened scrutiny to the state’s claims about whether and how a law actually advances a valid state interest. The Court held that both the hospital admitting privileges requirement and the ambulatory surgical center requirement imposed undue burdens on abortion access by placing substantial obstacles in the paths of women attempting to obtain abortions. Both of these requirements offered little to no health benefits while increasing the difficulty in receiving care, and reducing the quality of care at the clinics that remain open.

A Louisiana law targeting the regulation of abortion providers, identical to the Texas admitting privileges law determined to be unconstitutional in Whole Woman’s Health v. Hellerstedt, is the subject of a petition for certiorari in the Supreme Court. June Medical Services LLC v. Kliebert, is the subject of a petition for certiorari in the Supreme Court. June Medical Services LLC v. Kliebert, is the subject of a petition for certiorari in the Supreme Court. June Medical Services LLC v. Kliebert, is the subject of a petition for certiorari in the Supreme Court. June Medical Services LLC v. Kliebert, is the subject of a petition for certiorari in the Supreme Court. June Medical Services LLC v. Kliebert, is the subject of a petition for certiorari in the Supreme Court. June Medical Services LLC v. Kliebert, is the subject of a petition for certiorari in the Supreme Court. June Medical Services LLC v. Kliebert, is the subject of a petition for certiorari in the Supreme Court. June Medical Services LLC v. Kliebert, is the subject of a petition for certiorari in the Supreme Court. June Medical Services LLC v. Kliebert, is the subject of a petition for certiorari in the Supreme Court. June Medical Services LLC v. Kliebert, is the subject of a petition for certiorari in the Supreme Court. June Medical Services LLC v. Kliebert, is the subject of a petition for certiorari in the Supreme Court. June Medical Services LLC v. Kliebert, is the subject of a petition for certiorari in the Supreme Court. June Medical Services LLC v. Kliebert, is the subject of a petition for certiorari in the Supreme Court.
Services v. Gee is a challenge to Louisiana Act 620, which would require any physician providing abortion services in Louisiana to have admitting privileges at a hospital within 30 miles of the procedure. Originally filed in 2014, the case was heard before the Fifth Circuit in 2018. The Fifth Circuit reversed the lower court, holding the law could go into effect, and refused a request for rehearing en banc. In his dissent, Judge Stephen Higginson stated the Fifth Circuit’s decision was issued with blatant disregard for the precedent set in Whole Woman’s Health v. Hellerstedt. Judge Higginson wrote that he is “unconvinced that any Justice of the Supreme Court who decided Whole Woman’s Health would endorse our opinion.”36 On February 7, 2019, the Supreme Court granted an emergency stay, and on April 17, 2019, a petition of certiorari was filed. The law will remain blocked until the disposition of this petition.39 Should this law go into effect, it is possible that two of the three remaining clinics in Louisiana will close.

Legislation Supporting Reproductive Care

Though this report has discussed a number of restrictions on reproductive healthcare, there are also legislators and advocates seeking to expand access to care. At the federal level, the Women’s Health Protection Act (WHPA) is a bill that would prohibit states from imposing restrictions on abortion that apply to no similar medical care, interfere with patient’s personal decision making, and block access to safe, legal abortion care. WHPA was first introduced by Sen. Richard Blumenthal (CT) and Rep. Judy Chu (CA) in November 2013; it has since been reintroduced in each session of Congress. Sen. Tammy Baldwin (WI) is a lead cosponsor in the Senate, and Rep. Marcia Fudge (OH) and Rep. Lois Frankel (FL) are lead cosponsors in the House of Representatives.

At the state level, lawmakers in 12 states introduced a Whole Woman’s Health Act before their state legislatures.37 Bills were introduced in 17 states to codify the birth control benefits of the Affordable Care Act, and those measures passed in Connecticut, Delaware, Maryland, Rhode Island, Washington, and Washington, D.C.38 Missouri and Kentucky considered legislation to repeal their mandatory delay requirements, allowing patients to receive abortion care more quickly, and the Arizona legislature considered a bill to repeal the state’s ban on using telemedicine to administer abortions.39

Conclusion

The ABA should continue its proud history of support for women’s privacy in making the most intimate decisions about their own healthcare. Passage of this resolution would allow the ABA to speak, whether through legislative advocacy or amicus briefs, against

35 June Medical Services, L.L.C. v. Gee, 913 F.3d 573, 585 (5th Cir. 2019) (Higginson, J., dissenting).

36 June Medical Services, L.L.C. v. Gee, 139 S. Ct. 603; see also June Medical Services v. Gee, CTR. FOR REPRODUCTIVE RIGHTS (Mar. 14, 2019), https://www.reproductivights.org/case/june-medical-services-v- gee-2014 (detailing the path of the case to date).


38 Id. at 21-23.

39 Id. at 21-23.
laws and regulations that use women’s health as a pretext for constraining women’s rights, and to endorse laws that reaffirm the right to privacy in medical decision making.

Respectfully submitted,

Wilson A. Schooley
Chair, Civil Rights & Social Justice Section
August 2019
1. **Summary of Resolution(s).** The ABA urges federal, state, local, territorial, and tribal governments to refrain from imposing upon reproductive healthcare providers requirements that are not medically necessary or have the purpose or effect of burdening women’s access to such services.

2. **Approval by Submitting Entity.** The Council of the Section of Civil Rights and Social Justice approved sponsorship of this resolution on April 12, 2019.

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

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** ABA Resolution 91A10H (1991) expresses the association’s opposition to “unreasonable government-imposed restrictions on professional relationships [and] governmental intrusion into sensitive and confidential areas of healthcare.” 40 ABA Resolution 92A12 (1992) recognizes individual liberty and bodily autonomy in making personal reproductive health choices and opposes state and federal legislation that would restrict the rights of women to terminate their pregnancies before viability, or after that point when necessary to protect the life or health of the woman. ABA Resolution 05M104 reaffirms and expands on its 1991 policy and adds that medical providers must give relevant and medically accurate information for fully informed decision making “whether or not the provider chooses to offer such care.” 41 ABA Resolution 93M104 opposed the use of government funding programs to suppress or discourage speech activities by grantees based on the government’s viewpoint. 42 ABA Resolution 94M105 support every American’s right to access quality health care regardless of the person’s income and describe the various characteristics required for such access and quality of care. ABA Resolution 18104C recognizes that the prohibition of sex discrimination by covered health programs or activities includes, by definition, discrimination based on pregnancy, false pregnancy, gender identity, and sex stereotyping. ABA Resolution 90M108 and 94M105 support every American’s right to access quality health care regardless of the person’s income and describe the various characteristics required for such access and quality of care. ABA Resolution 18104C recognizes that the prohibition of sex discrimination by covered health programs or activities includes, by definition, discrimination based on pregnancy, false pregnancy, gender identity, and sex stereotyping.

In addition, Resolutions 90M108 and 94M105 support every American’s right to access quality health care regardless of the person’s income and the various characteristics required for such access and quality of care. ABA Resolution 18104C recognizes that the prohibition of sex discrimination by covered health programs or activities includes, by definition, discrimination based on pregnancy, false pregnancy, gender identity, and sex stereotyping.

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42 ABA House of Delegates Resolution 93M104 (adopted 1993).
44 ABA House of Delegates Resolution 18104C (adopted 2018).
termination of pregnancy, childbirth and related medical conditions.

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) A number of bills relevant to this resolution are pending in state legislatures. For example, Oklahoma Senate Bill 857, introduced in February 2019, would require all abortion clinics to be licensed by the State Department of Health. Under this bill, the Commissioner of Health would be empowered to create standards for physical facilities, equipment, personnel, medical screening, and recovery rooms. Note that all of these licensing requirements would be in addition to requirements already applicable to other medical facilities. The bill would allow any Department of Health official to conduct warrantless inspections. All the State Commissioner of Health needs is “reasonable cause” to believe that the facility is not in compliance, which may lead to an action suspending or revoking a clinic’s license to operate.

Louisiana House Bill 484 would require physicians, medical staff—including medical directors and administrators—and owners of abortion facilities to designate one custodian of records for the clinic. The custodian is required to obtain and maintain medical records for each patient who has had an abortion at that facility. Medical records must be retained for at least seven years, longer for minors. The clinic’s record retention policy must be approved by the state department of health. The penalty for violating this law would be $1,000 or “imprison[ment] for not more than two years with or without hard labor, or both.” Physicians may also face professional disciplinary actions such as permanent disqualification from providing abortions.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Passing this resolution will allow the ABA to advocate for the passage of reasonable laws and regulations protecting reproductive health facilities and against onerous and burdensome laws and regulations that have no legitimate medical purpose. It will also allow the filing of amicus briefs in litigation challenging such laws that is sure to come before the U. S. Supreme Court and state appellate courts.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only 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. (If applicable) There are no known conflicts of interest.

10. Referrals. The Report with Recommendation will be referred to the following entities:
    • Center for Human Rights
    • Coalition on Racial and Ethnic Justice

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11. Contact Name and Address Information.

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EXECUTIVE SUMMARY

1. Summary of the Resolution
The ABA urges federal, state, local, territorial, and tribal governments to refrain from imposing upon reproductive healthcare providers requirements that are not medically necessary or have the purpose or effect of burdening women’s access to such services.

2. Summary of the Issue that the Resolution Addresses
The resolution addresses the obstacles that women face in obtaining reproductive health services due to restrictive and unnecessary requirements. Increasingly, states have enacted laws and regulations that make it more difficult to access services on the pretext of protecting women’s health, while scientific data does not support the health-related rationale for these restrictions.

3. Please Explain How the Proposed Policy Position Will Address the Issue
This proposed policy would address this issue by allowing the ABA to lobby in opposition to unnecessary requirements that serve no medical purpose but make it unduly burdensome for women seeking reproductive health care and to file amicus briefs in litigation on the same subject.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
No minority views or opposition have been identified.
RESOLVED, That the American Bar Association encourages all federal, state, tribal, territorial, and local court systems, in conjunction with state, territorial, tribal and local bar associations, to carefully review their cellphone policies, so as to balance the security risks posed by cellphone use with the needs of litigants to ensure meaningful access to our judicial system, especially to those who are self-represented;

FURTHER RESOLVED, That the American Bar Association opposes cellphone policies that impose undue burdens on litigants, particularly those who are self-represented, lower income, disabled, and/or seeking emergency access to the courts; and

FURTHER RESOLVED, That the American Bar Association opposes cellphone policies or procedures that force litigants to leave their cellphones in unsecure locations outside the courthouse or to pay a fee for storage at a location outside the courthouse.
REPORT

I. Introduction

This resolution addresses cellphone use in courthouses. Specifically, it encourages chief judges and court administrators to carefully consider cellphone access in the courtroom and to adopt policies that balance access and legitimate security concerns.

Cellphones today are no longer just for making phone calls. Advanced cellphones, often referred to as “smartphones,” may include cameras, video cameras, and Internet access for research, email, and text communications. They also allow users to disseminate information instantaneously.1

Cellphones are everywhere. According to one report, there were 435.31 million wireless-subscribers in the U.S. in the third quarter of 2018. Another study reports that in 2011, the number of cellphones in the U.S. exceeded the entire population of the United States, 327 million cellphones for 315 million people.2

As cellphone use has exploded, courts have grappled with their presence in the courtroom. Reasons cited in support of banning cellphones from courthouses and courtrooms include disruptiveness, security, and intimidation of witnesses and other trial participants. These are legitimate concerns for the orderly administration of justice. On the other hand, there is evidence that cellphone bans can impede access to the courts and limit some litigants’ ability to adequately present their cases.

Cellphone bans affect judges, court personnel, law enforcement and court security, lawyers, their clients, and the general public seeking access to the courts. Research shows that bans disproportionately disadvantage unrepresented and lower-income litigants.

II. Reasons in Support of Cellphone Bans

There are three principal arguments in support of cellphone bans: disruptiveness, security, and the protection of witnesses and other trial participants.

a. Disruptiveness

A common complaint among courts all over the country is that cellphones distract attention from judges and lawyers, and disrupt court proceedings. The Circuit Court in Lynchburg, Virginia, for example, does not allow cellphones in an effort to avoid distractions during hearings and interference with court proceedings that are recorded.

It has also been noted that cellphone interruptions can derail legal proceedings. In 2013, Cook County Chief Judge Tim Evans of Chicago, Illinois acknowledged that banning cellphones in the courthouse inconvenienced the public, but said sheriff's deputies had been unable to control the use of phones in court: "I wish it were possible to just say to the people coming to court, 'Please turn off your phones and devices.' The simple fact is we have tried that, and it does not work...People either ignore or refuse to comply with the judge's directions." The disruption caused by vibrating and ringing cellphones, was cited as a reason for a blanket cellphone ban in 2016 in the Lancaster Pennsylvania Court of Common Pleas. The court also cited the possibility that witnesses could be photographed and intimidated.

b. Security

Purported security risks are another reason cited for cellphone bans. Safety and security concerns have focused on cellphones possibly being used to conceal firearms, bombs, or to study courthouse layouts.

In 2012, a cellphone ban was implemented in the criminal court courthouse and civil courthouse of Madison County, Missouri, because law-enforcement bulletins had warned of the possibility that some cellphones could contain firearms.

2 Mahoney, supra note 1.
4 Erin Meyer, Cellphone Ban at Courthouse Leads to Confusion...and Some Creativity, DnaInfo (April 15, 2013), [https://www.dnainfo.com/chicago/20130415/little-village/cellphone-ban-at-courthouse-leads-confusion-creativity/]
5 Blanket cellphone Ban at the Lancaster County Courthouse ought to be refined, Lancaster Online (December 7, 2016), [https://lancasteronline.com/opinion/editorials/blanket-cellphone-ban-at-the-lancaster-county-courthouse-ought-to/article_76802748-bc09-11e6-94df-57053ce4d899.html]
6 Terry Hillig, Cellphone ban in Edwardsville courts shows security differences, St. Louis Post-Dispatch (March 19, 2012), [https://www.stltoday.com/news/local/crime-and-courts/article_379a6b3c-67e9-57053ce4d899.html]
7 Misty Hamrick, Blanket cell phone ban at the St. Louis Civil Courthouse inconveniences some, but not all, St. Louis Post-Dispatch (March 24, 2012), [https://www.stltoday.com/news/local/crime-and-courts/article_76802748-bc09-11e6-94df-57053ce4d899.html]
8 Erin Meyer, Cellphone Ban at Courthouse Leads to Confusion...and Some Creativity, DnaInfo (April 15, 2013), [https://www.dnainfo.com/chicago/20130415/little-village/cellphone-ban-at-courthouse-leads-confusion-creativity/]
9 Blanket cellphone Ban at the Lancaster County Courthouse ought to be refined, Lancaster Online (December 7, 2016), [https://lancasteronline.com/opinion/editorials/blanket-cellphone-ban-at-the-lancaster-county-courthouse-ought-to/article_76802748-bc09-11e6-94df-57053ce4d899.html]
10 Terry Hillig, Cellphone ban in Edwardsville courts shows security differences, St. Louis Post-Dispatch (March 19, 2012), [https://www.stltoday.com/news/local/crime-and-courts/article_379a6b3c-67e9-57053ce4d899.html]
Some also have said that cellphones could be used to trigger an explosive device. At least one court has cited concerns over terrorists using camera phones and technology to detonate bombs as the basis for banning cellphones from the courthouse. ⁹

The possibility that cellphones could be used to capture images to study courthouse security was cited as the basis for a total ban of all cellphones in Albuquerque, N.M. courts. ¹⁰

Despite these concerns, there are few actual examples of cellphones being detonated or used as weapons in courthouses. As one source observed, nationwide, there is no agreement in the federal system on whether telephones, pagers, laptop computers and other electronic devices pose a threat to court security or are just a ring-a-ting nuisance. The rule has been in effect for more than a decade, but why it exists eludes easy answer. ¹¹

**c. Protection of witnesses and trial participants**

Witness intimidation in the criminal courts appears to be the most significant and often cited reason for cellphone bans. Cellphone bans do not only protect witnesses and jurors from intimidation in high-profile criminal cases. Such bans also can protect the identity of minors and can prevent jurors, or potential jurors, from being exposed to biased opinions or messages concerning the case that may appear on the Internet. ¹² However, safety of witnesses and jurors in criminal cases remains a paramount consideration.

Because smartphones are equipped with cameras and video functionality, there is a real risk of individuals inappropriately capturing photographs or even testimony of victims, witnesses, jurors or court employees, which could easily be posted online. ¹³

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¹² Schober, supra note 5.


¹⁶ Schober, supra note 5.
online and used to threaten or intimidate witnesses. People could also use smartphones to broadcast the court proceedings to outside parties.

Numerous instances of witness intimidation during high-profile criminal cases have been documented in large cities and urban areas during the early 2000s, when many cellphone bans were being implemented. The danger of such a scenario is aptly illustrated by this description:

You’re sitting on the witness stand in a Philadelphia courtroom, about to provide incriminating eyewitness testimony in a Philadelphia homicide trial. You’ve overcome all the fear that comes along with living in a city that, according to the district attorney’s office, has a “near epidemic” level of witness intimidation. People in the gallery aren’t supposed to use their cellphones, but as you’re testifying somebody in the crowd takes one out and snaps a picture...Before you’re even off the stand, the photo has been uploaded to a social media website for all the world to see.

In 2007, a Massachusetts judge explained that cellular phones equipped with cameras could be used to intimidate jurors or witnesses or to identify undercover police officers, and told of an incident when a witness’s grand jury testimony was printed out and posted throughout the neighborhood.

Likewise, a Circuit Court judge explained the basis for a 2014 cellphone ban in Edgard, Louisiana that encompassed the entire building: “[T]he impetus for the complete ban was the result of someone secretly using a phone to record a court hearing then posting the recording to a social media site to intimidate witnesses.”

In the Cook County Criminal courthouse in Chicago, Illinois, a court official noted that gang members had taken pictures of judges and witnesses with their phones and texted testimony to their friends awaiting trial.

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In the Cook County Criminal courthouse in Chicago, Illinois, a court official noted that gang members had taken pictures of judges and witnesses with their phones and texted testimony to their friends awaiting trial.
In a television news interview in 2013, Cook County Circuit Court Chief Judge Timothy Evans said he believed the ability for courthouse visitors to photograph or film testimonies had absolutely led to the murder of witnesses. “Absolutely,” Evans said. “No question in my mind.”18

One of the most famous cases of cellphone use for possible witness intimidation was during the December 2018 trial of notorious drug kingpin Joaquin ‘El Chapo’ Guzman, who was accused of international drug trafficking and conspiracy to commit murder.19 Although electronics are strictly forbidden in the Brooklyn federal courthouse, El Chapo’s wife was caught bringing four cellphones into the courtroom, and was actively using them during trial proceedings. Mrs. Guzman told a security officer that “her attorney” gave her one of the cellphones. The presiding U.S. District Judge issued an order banning both attorneys from using cellphones inside the court for one year.

III. How Cellphone Bans Affect Access to Justice

a. Cellphone Bans Impinge on Presentation of Evidence, Communications, Language Access and Legal Research

Cellphones, and particularly smart phones, are a part of everyday life and dependence on cellphones cannot be overstated. A growing body of literature demonstrates that bans pose an inconvenience for all litigants, but particularly burden those without representation.

In a comprehensive report examining how bans affect access to justice, the Massachusetts Appleseed Center for Law and Justice categorized the problems into four distinct areas: evidence; communication and logistics; language access and accessibility; and information gathering and legal research.20

Evidence is often kept on cellphones. Examples in which self-represented litigants might need to use their cellphones to display evidence include proof of payment, proof of communication, proof of an agreement, and proof of property damage or injury. Litigants might use their cellphone to present this evidence in the form of

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texts, emails, pictures, or voicemails. For instance, they might show photographs of allegedly damaged property or text messages documenting custody disputes. Self-represented litigants are unable to access and present such evidence, if cellphones are banned from the courthouse.

The report also identified instances in which pro se litigants need to use their cellphones to communicate with individuals outside the courthouse, such as coordinating transportation, coordinating childcare, or communicating with employers. Producing a witness can be very difficult if the witness needs to be on-call at his or her job and the pro se litigant cannot use his or her cellphone to communicate with the witness.

The report also identified language access and accessibility issues for people who need to use their cellphones to communicate with individuals inside the courthouse. The hearing impaired need mobile devices to access translation services and hearing assistance applications to understand and communicate in the courtroom as their cases are being presented. Confidentiality may become an issue if a litigant who is hard of hearing has to communicate with his or her attorney at a shouting volume.

The necessity of using cellphones to connect the hearing-impaired with the world around them was demonstrated in 2016 when the highest court in the land set aside its policy against cellphones in the courtroom so that 12 members of the Deaf and Hard of Hearing Bar Association could be sworn into the United States Supreme Court Bar. The lawyers used their mobile devices to receive a real-time transcription of the swearing-in ceremony through a service called Communication Access Real-time Translation (CART). With the help of the transcription service on their mobile devices, the members were able to see and understand the proceedings as they were being sworn in.

Lastly, the report identified instances in which self-represented litigants need their cellphone for information gathering and legal research. For example, unrepresented individuals can use mobile devices to gather phone-based evidence, verify information before settling an agreement, obtain online legal aid materials, perform legal research, and fill out and store legal forms.

b. Cellphone Bans Create Storage Issues for Litigants

Still another significant obstacle for unrepresented litigants is the delay, angst and distress they experience when they arrive at a courthouse and realize they are not allowed to bring their phones inside. Many pro se litigants are unaware of the

23 Appleseed, supra, note 20.
cellphone policy until they arrive. Caught off guard, they are suddenly faced with figuring out what to do with their cellphones so they do not miss their court dates. This is especially problematic for people who use public transportation. The difficulty of having to determine what to do with a cellphone at the last minute, can present quite a significant barrier for unrepresented litigants trying to get to a hearing on time.

On the first day a court ban on recording and photography devices took effect in Onslow County, North Carolina, half of the court’s 566 visitors brought cellphones and were turned away. People appearing for jury duty and custody hearings were among those who left rather than lose their cellphones. A sheriff’s deputy described the scene as “pandemonium, chaos.” One person had appeared for jury duty, but had nowhere to take her phone, which she needed to call for a ride. Others left the courthouse entry point to take cellphones back to their cars.25

When the Cook County criminal courthouse began implementing a 60-day trial cellphone ban in March 2017, officers had to turn visitors away, many of whom had nowhere to store their devices. One couple whose mother dropped the couple off, had nowhere to store their phones, so the girlfriend held their phones in her hands while waiting outside in the cold.26

A spokesperson for the court said “For venues where many are dependent on public transportation it is unrealistic that they would leave a phone at home.” The spokesperson said that people who did not drive to the courthouses were hiding their phones under trees, or asking their attorneys to get the devices into the building for them.

In 2016 at the Leighton criminal courthouse in Chicago, those arriving were told they could not bring their cellphones into the building, and there was no place to store them. One person said: “In 2016, everyone has a cell phone. Are people who arrive on public transportation supposed to throw their phones away?”27

Being turned around at the courthouse doors because you have cellphone can be particularly burdensome for people with children. This is illustrated by the experience of a grandmother who traveled to a Virginia courthouse to file paperwork. She was babysitting three of her grandchildren, ages 8, 5, and 2 and took them with her. When she approached security, she was told she could not

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bring her cellphone inside. After she figured out where she needed to go to store her cellphone, she rounded up the three children, crossed light rail tracks and headed to the general District Court building, where she paid for a locker to store her phone. She then made the return trip back to the Circuit Court, but it was not until she made it back to the Circuit Court that she realized the information she needed for paperwork was stored on her phone.28

For victims of domestic violence, having a cellphone can be a matter of life and death. Obtaining emergency relief could be impeded if a victim of domestic violence seeking an order of protection, or a tenant illegally locked out of an apartment arrives at the court and is denied entry into the courthouse with their cellphone.29 Recognizing this possible consequence of cellphone bans has led some court officials to consider alternate solutions.30

When a cellphone ban first went into effect at Cook County criminal court people due in court had to leave to find storage for their phones. The courthouse provided a limited amount of storage at a cost of $3. But several people who did not have enough money for the kiosks were asking others for cash to cover the fees. One person was heard asking a reporter outside the courthouse, “Could you hold my phone while I go to court? I don’t have money for the machine.”31

IV. Alternatives to Cellphone Bans

Courts have the difficult task of regulating cellphones in a world where nearly 450 million people own them. Regulating cellphones in courtrooms for different purposes in different contexts only adds to the difficulty. Creating cellphone policies that take into account numerous competing interests; that honor the rights of all; and make sure litigants, represented or not, are not unduly affected, is a delicate balancing act. Can courts protect the interests of orderly justice and the safety of witnesses and jurors, while at the same time ensuring that unrepresented litigants and other vulnerable populations, such as the elderly, disabled, and domestic violence victims, have access to justice? How have courts throughout the country managed this balancing act?

a. Regulatory Efforts

29 Appleseed, supra note 20.
31 Meyer, supra, note 6.
Most courts regulate cellphone usage in some form. The National Center for State Courts reports that 33 states (including Hawaii and Guam) have promulgated policies governing electronic device use. The policies are set by Courtroom Rules of Conduct, Administrative Orders, Chief Judge Orders, Orders of Administrative Office of Courts, Supreme Court Rules, Local Court Rules, Office of Court Management, Supreme Court Order, and Rules of Professional Conduct. Statutes and regulations also govern the ability to regulate possession and use of electronic devices in some states.

There is no uniform policy in courts regarding cellphones. What is appropriate in one jurisdiction may be unnecessary in another. Moreover, the same policy may not even apply equally to every courthouse within the same judicial district. For example, the presiding judge in Bedford Circuit Court in Virginia allows cellphones as long as they are not a disruption. Next door, in the Lynchburg Virginia General District Court, cellphones have been banned since November 2016. Some courts have come full circle - from completely banning cellphones to later loosening those restrictions.

Judicial bodies at the federal level have promulgated guidance for the development of personal electronic device policies. For instance, the United States Office of the Courts Committee on Court Administration and Case Management (CACM) has provided guidance for the development of Portable Communication Devices to all federal judicial systems. The guidance sets out a comprehensive list of factors to consider when formulating policy, such as security; who should develop the policy; to whom the policy applies; public notice of the policy; use of devices by the media; the impact of workload on security officers; and processes for taking custody of devices.

34 Mahoney, supra, note 1.
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A survey of cellphone policies throughout the country shows there are three general categories of policy.

- Some jurisdictions allow cellphones in the courthouse and courtrooms with no formal restrictions.
- Some jurisdictions allow cellphones in the courthouse and courtrooms, but place restrictions on their use in and around the courtroom. For example, they may have to be turned off or silenced.
- Some jurisdictions prohibit devices in the courthouse; but grant exemptions to certain users. Court personnel, law enforcement, building tenants, and attorneys are afforded the greatest levels of access. Jurors typically have more restricted access to devices.

### i. Bans with Exemptions

Some courthouses bar all electronic devices unless approved by the court. The Leighton Criminal courthouse in Cook County was the first major metropolitan area to ban cellphones in courthouses in 2013. The ban exempted lawyers; judges; reporters; law enforcement officers; many government workers; jurors; building maintenance workers; domestic violence advocates and counselors; those seeking an order of protection or involved in the domestic violence assistance program; anyone required to wear an electronic monitoring device; and people with maintenance workers; domestic violence advocates and counselors; those seeking an order of protection or involved in the domestic violence assistance program; anyone required to wear an electronic monitoring device; and people with no formal restrictions.

### II. Bans with Exemptions

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37 Mahoney, supra, note 1.
A District of Columbia court policy provides that electronic devices (e.g., cellphones, iPads, and computers) may not be used in any courtroom. Anyone who violates the provisions may be subject to arrest, expulsion, or may be banned from entering D.C. Court buildings.

The Circuit Court for Anne Arundel County, Maryland, allows people to bring electronic devices into their facilities, subject to a list of enumerated restrictions.

In some courthouses, cellphones are allowed but they must be turned off or kept silent, and may be seized if they ring during a court proceeding and violators may have to pay a fine for the phone’s return.

The Circuit Court for Anne Arundel County, Maryland, allows people to bring electronic devices into their facilities, subject to a list of enumerated restrictions.
The restrictions prohibit photographs and video; interference with court proceedings or work; and devices in jury deliberation rooms. Further, cellphone possession or use may be restricted by court order when warranted by security or privacy issues in a particular case.47

The Virginia Model Policy states that visitors should be able to bring devices into the courthouse, but may use mobile devices in the courtroom only with authorization by a presiding judge. Judges have the discretion and authority to impose cellphone prohibitions in their courtrooms for particular cases, or place further reasonable restrictions. Judges and security officers may confiscate devices for violations of policy. 48 Some courts have revised their cellphone policies to apply only to certain floors of the courthouse, as a convenience for those doing business on the main floors.

In January 2019, three Circuit Judges in Harrisonburg, Virginia signed an order revising the court’s previous order that had prohibited electronic devices from the entire courthouse. The new order lifted the ban on the floor where the clerk’s office is located so as to avoid inconvenience for those simply wanting to complete a clerk-related task, such as apply for a passport or concealed-carry permit.49

iii. Storage Locker Availability

To accommodate individuals who appear at the courthouse with cellphones, some courthouses are supplying storage lockers that are available for a small fee. This service is especially important for individuals who arrive by public transportation or park far away. Having a safe place to store their cellphones may prevent such individuals from being late for a court hearing.

In Culpeper County, Virginia, a recent court order mandates the provision of storage lockers for those who otherwise have no means of storage available to them.50 Courthouses in Norfolk and Virginia Beach, Virginia, have lockers for the public to store their cellphones.51

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public. When the McLean County Law and Justice Center in Kentucky enacted a cellphone ban in 2017, visitors were allowed to secure their phones in storage lockers at the Sheriff’s Department’s Patrol Division. The U.S. Supreme Court building in Washington D.C. has coin-operated lockers where visitors may store their belongings, including cellphones.

An alternative storage device is the use of Yondr pouches, in which litigants keep their phone on their person, but it is sealed in such a way as to prevent its use. This method is used, for example, in the Criminal Division of the Philadelphia Court of Common Pleas.

For some courthouses where cellphone storage is unavailable, nearby businesses provide cellphone storage lockers, for example, behind their sales counters. The fees provide the proprietor additional income, while offering a solution for those who need to temporarily store their cellphones. Some individuals have even sought court approval to install kiosks immediately outside the courthouse.

Advertisements for cellphone storage lockers, displaying different models with pricing, have popped up online.

### c. Penalties for Violations

Courts have imposed various penalties for violations of a court’s cellphone policies, including confiscating the user’s phone. Judges may issue penalties of increasing severity, including stiff fines and arrest for contempt of court. “If it rings, it is subject to confiscation,” said a Williamsburg County Virginia Clerk of Court. The owner

51 Wilson, supra, note 28.
53 Lancaster Cellphone Policy, supra, note 7.
55 Cell Phone Storage Lockers Solves Courtroom Phone Ban Issue: Cellphones Banned From Court Creates New Market Opportunity For Cell Phone Storage Lockers, The Mailbox Works (February 23, 2015), https://www.mailboxworks.com/blog/cellphone-storage-lockers-courtrooms/ [hereinafter, New Market Opportunity].
56 One such advertisement targets courthouses: the “wall-mounted cell phone storage lockers…assist patrons of the court with their desire to follow the law while keeping their cell phones closed safe.” Cell phone lockers allow patrons to swiftly secure their cell phone and a small locker storage unit either by secured combination lock or keylock.” See, “Cell Phone Storage Lockers Solves Courtroom Phone Ban Issue: Cellphones Banned From Court Creates New Market Opportunity For Cell Phone Storage Lockers, The Mailbox Works” (February 23, 2015), https://www.mailboxworks.com/blog/cellphone-storage-lockers-courtrooms/ [hereinafter, New Market Opportunity].
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A defendant in an Orlando, Florida courtroom was sentenced to five days in jail for using a cellphone while sitting in the audience of the courtroom, as she continued to use her cellphone to check emails, despite being told to turn it off. A Cleveland Ohio judge overseeing a murder trial in 2009 had two trial attendees arrested for pointing cellphones towards a jury. The two men, one the defendant’s friend, and the other the defendant’s cousin, were seen pointing their devices at the jury during trial testimony from where they were seated in the back row of the courtroom. The judge ordered the two men arrested for contempt of court and also declared a mistrial.

d. Other Stakeholders

The news contains many examples illustrating that other stakeholders, such as the media and even attorneys, also have received penalties for violating court cellphone policies.

In one courtroom with a well-publicized prohibition against cellphone use after the start of proceedings, a media blogger covering a trial was removed from the courtroom for sending a text during the proceedings. He was banned from the courtroom, but was permitted to watch the trial in an overflow room.

e. Notice Requirements

Courthouses give notice of cellphone bans in a variety of ways. They include signage throughout the courthouse; printed notices on subpoenas and summons; and notices on county webpages.

Whatever policy is adopted, ample notice should be provided. This is especially important for unrepresented litigants who do not have an attorney to guide them through the process. Signs should be posted conspicuously outside the courtroom.


Robinson, supra, note 59.

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Robinson, supra, note 59.
As demonstrated above, there are legitimate security risks presented by cellphone use in courthouses, including possible threats to the safety of witnesses, jurors, prosecutors, or other trial participants, as well as the need to ensure proper decorum and prevent disruptions in courtrooms.

On the other hand, being unable to bring one’s cellphone into the courthouse may result in being unable to present evidence; conduct legal research; or for those with disabilities, understand or communicate during the proceedings. As a result, the ability to use cellphones may make the difference between winning and losing a case, or presenting crucial evidence and receiving a just outcome.

The unrepresented and low-income populations are the most likely to be adversely impacted by inability to bring their cellphones into the courthouse. Such litigants may be unaware of cellphone restrictions and may expect to offer evidence on their cellphones that may be necessary to prevail in their cases; may expect online self-help resources, such as online forms or financial calculation tools; or may anticipate using their cellphones for language accessibility.

The American Bar Association should endorse policies that address court administration concerns, while promoting access to justice for all.

Respectfully submitted,

Palmer Gene Vance II
Chair, Litigation Section
August 2019
1. **Summary of Resolution(s).** The Resolution urges courts, as well as their respective bar associations, to carefully review their policies on use and admittance of cellphones in courthouses, to ensure meaningful access to our judicial system, balancing the security risks posed by cellphone use with the needs of litigants, and in particular, those who are self-represented or of lower income.

2. **Approval by Submitting Entity.** This Resolution has been adopted by the Section of Litigation Council on May 6, 2019.

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?** None.

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 ABA Section of Litigation will publish the Resolution on its website and distribute the Resolution to federal and state courts throughout the United States.

8. **Cost to the Association.** (Both direct and indirect costs) None.

9. **Disclosure of Interest.** (If applicable) No interests of the Access to Justice Committee, or its members, are implicated by this Resolution.
10. Referrals.

Criminal Justice Section
Commission on Homelessness and Poverty
Family Law Section
Judicial 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 the Resolution

The Resolution urges courts, as well as their respective bar associations, to carefully review their policies on use and admittance of cellphones in courthouses, to ensure meaningful access to our judicial system, balancing the security risks posed by cellphone use with the needs of litigants, and in particular, those who are self-represented or of lower income.

2. Summary of the Issue that the Resolution Addresses

Courts’ policies on cellphone use and admittance to courthouses vary widely. Policies banning use and/or admittance of cellphones to courthouses is an access to justice issue because, on the one hand, there are legitimate security reasons to disallowing such use, while on the other, bans can harm the legitimate needs of litigants, disproportionately affecting those who are self-represented or of lower income.

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

The Resolution will urge courts, as well as their respective bar associations, to carefully review their policies on use and admittance of cellphones in courthouses, to ensure meaningful access to our judicial system, balancing the security risks posed by cellphone use with the needs of litigants, and in particular, those who are self-represented or of lower income.

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

None.

None.
RESOLUTION

RESOLVED, That the American Bar Association recognizes children and parents have legal rights to family integrity and family unity;

FURTHER RESOLVED, That the American Bar Association urges legal professionals, courts, and relevant state agencies to mitigate the trauma and long-term harm that can result from separation from parents and other primary caregivers;

FURTHER RESOLVED, That the American Bar Association supports the use of prevention services, including legal services, to ensure children’s safety without the need for removal from a parent or caregiver;

FURTHER RESOLVED, That the American Bar Association recognizes government action may intentionally interfere with rights to family integrity when necessary for the child’s health, safety, and well-being, provided that procedural protections are applied, including access to high quality legal representation for children and parents;

FURTHER RESOLVED, That the American Bar Association urges federal authorities seeking to separate a child from a parent to protect the child’s health, safety, or well-being to engage state or tribal child protection authorities, which have exclusive jurisdiction to take such action under state and federal statutory law; and

FURTHER RESOLVED, the American Bar Association urges, state, local, territorial, and tribal authorities to ensure family connectedness is safely maintained and supported with parents and kin during the pendency of the child welfare case if children cannot safely remain with their parents or other primary caregivers and must enter the custody of a state or tribe. The definition of kin in such circumstances should include relatives and unrelated persons with significant relationships to the child or family the children or youth identify as individuals with whom they want to remain connected. Additionally, child welfare agency staff, attorneys, and judges should:
a) Identify kin and ensure they are notified and engaged within 30 days of removal and throughout the life of the case. Family search and engagement efforts should seek not only kin resources as placement options, but as other types of long-term connections;

b) Prioritize placement with kin, including relatives, former caregivers, or close family friends;

c) Help children maintain important family connections and support, through regular family time and a presumption of unsupervised visitation unless the court finds that unsupervised visitation is not in the child’s best interests;

d) Tailor services and assistance to address the unique needs of kinship foster families, while still working toward the goal of safe reunification with parents where that is the case goal;

e) Seek to facilitate placing siblings together in the same foster home, absent a court finding of a safety or well-being concern, and allow regular and meaningful visitation between siblings when that is not possible. The definition of “sibling” should include those connected through one or more common parents and those connected through shared living arrangements, including those formed through foster home placements;

f) Support youth who may age out of the foster care system rather than achieve permanency by developing a network of positive adult connections (including their parents, if the youth wish) that serve as a support network while the youth are part of the child welfare system that can be maintained after the youth leave the system; and

g) Include family members, including parents and caregivers, in development of the service plan and critical treatments for youth in foster care.
Introduction

This policy derives from three recent developments in the child welfare field.

First, federal litigation challenging family separation at the U.S. Border has brought with it an increased focus on applying child welfare laws and principles in federal litigation across the country. Those cases emphasize that both children and parents have substantive and procedural rights to family integrity and government action can intentionally interfere with such rights only when it has a compelling reason to do so and follows required processes.

Second, Congress enacted new child welfare legislation in 2018, titled the Family First Prevention Services Act1 (“Family First Act” or “Family First”), which changes child welfare funding structures and emphasizes the overall importance of children’s connections to family, including birth parents, kin, siblings, and foster families.

Third, the federal government recently updated the Child Welfare Policy Manual of the U.S. Department of Health and Human Services to allow states to use federal funding to pay part of the cost of providing children and parents with legal counsel in child welfare/dependency cases. This change recognizes high quality child and parent legal representation protects children and parents’ substantive and procedural due process rights and produces better long-term outcomes for families, including shorter time to permanency (e.g., reunification, guardianship, or adoption).

All three developments – federal family separation litigation, the Family First Act, and new federal funding to support child and parent counsel – are unified around a theme of promoting family integrity and family connection for children and youth. Although the ABA has existing policy supporting children’s rights in a variety of contexts, it lacks policy addressing children and youth’s interests in family integrity and family connection. This resolution addresses that gap by recognizing:

- Children and parents have rights to family integrity and family unity;
- Children’s separation from parents and primary caregivers can produce trauma;
- Prevention services, including legal services, can ensure children’s safety without removing them from their families;
- Government may interfere with children and parents’ rights to family integrity when necessary for the child’s health, safety, and well-being;
- Decisions to separate a child from a parent to protect health, safety, and well-being are subject to state and tribal authorities; and

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1 Family First Prevention Services Act, P.L. 115-123 (enacted as part of the Bipartisan Budget Act of 2018 on Feb. 9, 2018) (“Family First Act”).
When children are in foster care, family connections should be safely maintained and supported with parents, kin, and siblings during the pendency of the case.

The following report structure corresponds with the five sections in the Resolution: (1) Legal Principles Defining Family Integrity; (2) Trauma of Removal; (3) Promoting Child Safety through Prevention Services; (4) Government Intervention and Foster Care Placement; (5) Jurisdictional Authority; and (6) Family Connections while in Foster Care.

I. Legal Principles Defining Family Integrity

The Supreme Court has repeatedly held parents have a constitutional liberty interest “in the care, custody, and control of their children.” In Troxel v. Granville, the Court went so far as to describe this parental interest as “perhaps the oldest of the fundamental liberty interests recognized.”

Although parental assertions of rights to family integrity under Troxel and related cases are not new, a more novel thread of family integrity assertions has also emerged in the border cases. In this group, the plaintiffs are children who have asserted the government

2 Troxel v. Granville, 530 U.S. 57, 65 (2000); see Parham v. J. R., 442 U.S. 584, 602 (explaining “our constitutional system long ago rejected any notion that a child is the mere creature of the State”); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (“It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘comes’ to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements”); see also B. v. O. of City of Dakota, 77 F.2d 1433, 1435 (8th Cir. 1985) (“We can conceive of no more important relationship, no more basic bond in American society, than the tie between parent and child”).


5 Ms. L, 310 F.Supp.3d at 1146.
violated their own rights to family integrity. Each federal court to address these assertions has agreed that children have their own rights to family integrity protected by the Fifth Amendment (and by extension the Fourteenth Amendment in states). For example, in *J.S.R. v. Sessions*, the District of Connecticut recognized that by "forcibly removing them from their parents without due process of law" the government "deprived the children of their family integrity – depriving them of their primary and only consistent source of support."12 Similarly, in *W.S.R. v. Sessions*, another case involving child plaintiffs, the Northern District of Illinois recognized "the liberty interest at stake is a child’s right to remain in the custody of his parent . . . [as] a fundamental right."19 Finally, in *Jacinto-Castanon de Nolasco v. ICE*, the D.C. District Court reviewed claims from a mother and sons and concluded all three plaintiffs were likely to "succeed on their substantive due process claim premised on their constitutional right to family integrity."10

In addition to these cases involving child plaintiffs, seventeen states and the District of Columbia challenged the federal government’s zero tolerance policy, arguing inter alia that both children and parents’ rights to family integrity had been violated.11 Specifically, the states asserted in Counts One and Two that "parents have a fundamental liberty interest in the care, custody, and control of their children..." and "minors have a reciprocal liberty interest in their parents’ care."10 To support the children’s rights assertion, the plaintiffs cited numerous state statutes and case law affirming the importance of children’s rights to family. A few key examples are included below:

- Massachusetts cited a state supreme court case finding “the interest of the child is best served by a stable, continuous environment with his or her own family.”13
- Iowa explained children and parents can be separated only in “the most exceptional circumstances” because remaining in parental custody is presumed to be in a child’s best interest and separation “inflict[s] a unique deprivation of a constitutionally protected liberty interest.”14

1 J.S.R. 330 F.Supp.3d at 742
2 W.S.R. 318 F.Supp.3d at 1124
4 See State of Washington, 2018 WL 3139446 (W.D. Wash.).
5 Id.
6 Adoption of Frederick, 405 Mass. 1, 4 (1989); see also Am. Acad. of Pediatrics v. Lungren, 16 Cal. 4th 307, 348 (1997) (preserving and fostering the parent-child relationship are “extremely important interests that rise to the level of ‘compelling interests’ for purposes of constitutional analysis.”)
7 In re M.S., 889 N.W.2d 675, 677-78 (Iowa Ct. App. 2016); see also Or. Rev. Stat. § 419B.090(3) (explaining that Oregon law requires the government to “safeguard and promote each child’s relationships with parents, siblings, grandparents, other relatives and adults with whom a child develops healthy emotional attachments.”)
8 In re M.S., 889 N.W.2d 675, 677-78 (Iowa Ct. App. 2016); see also Or. Rev. Stat. § 419B.090(3) (explaining that Oregon law requires the government to “safeguard and promote each child’s relationships with parents, siblings, grandparents, other relatives and adults with whom a child develops healthy emotional attachments.”)
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11 See 62 Pa. Stat. Ann. § 2172(a)(1) (requiring Pennsylvania officials to recognize “[t]he interest of the child is best served by a stable, continuous environment with his or her own family.”)
12 Id.
13 In re M.S., 889 N.W.2d 675, 677-78 (Iowa Ct. App. 2016); see also Or. Rev. Stat. § 419B.090(3) (explaining that Oregon law requires the government to “safeguard and promote each child’s relationships with parents, siblings, grandparents, other relatives and adults with whom a child develops healthy emotional attachments.”)
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II. Trauma of Removal

Recent federal litigation challenging family separation at the border has repeatedly emphasized the "irreparable harm" that can ensue from separating a child and parent.16 For example, Jack Shonkoff, Director of Harvard University’s Center on the Developing Child, explained when testifying before the House of Representatives that "[s]udden, unreasonable efforts to prevent removals and facilitate reunification as required by federal and state law.18


16 See e.g., Kia P. v. McIntyre, 235 F.3d 749, 759 (2d Cir. 2000) (finding children have a "parallel constitutionally protected liberty interest in not being dislocated from the emotional attachments that derive from the intimacy of daily family association."); cert. denied, 534 U.S. 820 (2001); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir.1977) ("[T]he right to the preservation of family integrity encompasses the reciprocal rights of both parent and children."). See also 2011 ABA Model Act Governing Representation of Children in Abuse, Neglect, and Dependency Proceedings at https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf (calling on children’s attorneys to serve as "client-directed" counsel representing children’s expressed interests).


19 See, e.g., Ms. L., 310 F.Supp.3d at 1146–47 (citing an amicus brief by the Children’s Defense Fund for evidence that “separating children from their mothers or fathers leads to serious, negative consequences to children’s health and development. Forced separation disrupts the parent-child relationship and puts children at increased risk for both physical and mental illness. ... The psychological distress, anxiety, and depression associated with separation from a parent would follow the children well after the immediate period of separation—even after eventual reunification with a parent or other family.”); see also W.S.R. at 1128 (noting that the child plaintiffs “have proven that every day of separation is causing dangerous harm to their mental health”); Jacinto-Castanon de Nolasco v. Duchesne, 319 F.Supp.3d at 501 (finding separation “absolutely precludes Ms. Jacinto-Castanon’s involvement in any aspect of her sons’ care, custody, and control, from religion to education” and “prevents her from expressing love for, and comfort to, her sons – comfort that they surely need as they endure the bewildering experience of detention”).
forcible separation of children from their parents is deeply traumatic for both.”

This research on the trauma of separating children from parents helps to shed light on the child welfare context that while foster care can be a critical response to certain family circumstances, it is not without consequences. As the American Academy of Pediatrics has stated “[r]emoval is emotionally traumatizing for almost all children, although for some, it is the first time they may feel safe.”

In federal FY 2017, 269,690 children entered foster care across the United States, to become part of the almost 443,000 youth in care that year. Research shows that removal from parents and transition into foster care is stressful and distressing to children, as children removed from their parents’ care often also lose connections to their homes, siblings, friends, other family members (if kinship care is not considered), pets, familiar environments, and sometimes school settings. A study completed by a professor at MIT in 2007 demonstrated that children “on the margin” (i.e., who could have avoided foster care placement) had better lifetime outcomes when they were raised by their families of origin than those raised in the foster care system.

The research on trauma does not suggest children should be left in harm’s way when circumstances require government intervention. Indeed, Dr. Shonkoff’s Congressional testimony provides a clear caution against such inaction by explaining “inadequate caregiving and limited nurturance very early in life can have long-term (and sometimes permanent) effects on immune and inflammatory responses.” In this respect, medical research on the trauma of separation does not justify a government’s failure to act to support children. Rather, it underscores the importance of investing in supports that address child health and safety within the family and ensuring due process when a child needs to be physically removed for safety reasons. This approach is consistent with state laws and policies that simultaneously affirm the importance of family integrity and identify government responsibilities to prevent the unnecessary removal of children from their homes. For example, Minnesota law provides “all children are entitled to live in families their homes. For example, Minnesota law provides “all children are entitled to live in families although for some, it is the first time they may feel safe.”

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that offer safe, nurturing, permanent relationships, and that public services be directed toward preventing the unnecessary separation of children from their families.24

ABA policy recognizing the trauma of child and parent separation can help inform attorney advocacy and judicial decision-making in the child welfare field where questions about keeping a child safe require considerations beyond simply whether to remove a child from the home. Instead, with an understanding of the trauma that such a removal may cause for the child as well as the family and community, legal professionals have a responsibility to examine alternative options when a child can be cared for safely without needing to effectuate a removal if that is in the child’s interests. In many instances, those options may include the provision of government assistance and support services to help stabilize a family and address specific safety concerns. We also encourage states to consider adopting language like Alaska’s statute, which requires courts reviewing removal petitions to consider potential harm to the child caused by removal from the home and family when making determinations about health, safety, and best interests.27

Importantly, when removal from parents or other primary caregivers is needed to ensure a child’s health or safety, legal professionals can also join the agency to develop policies that minimize the trauma of that transition for children.28

III. Promoting Child Safety through Prevention Services

Historically, federal child welfare funding has been limited to supporting children after they entered foster care.29 The corresponding lack of federal funding for prevention services to ensure that children enter foster care has long frustrated attempts at broad system improvement. A 2010 ABA resolution urged child welfare financing reform that would allow states to use federal funds available through Title IV-E to cover the safety and moral, emotional, mental, and physical welfare of the minor and the best interests of the community; [and] preserve and strengthen the minor’s family ties whenever possible.”); Md. Code Ann., Fam. Law § 4-401(1) (recognizing the government’s responsibility to “promote family stability, [and] to preserve family unity”); N.J. Stat. Ann. § 30A:4C-1(a) (New Jersey provides “the preservation and strengthening of family life is a matter of public concern as being in the interest of the general welfare.”); 23 Pa.C.S. § 3102(a) (in Pennsylvania “[f]amily is the basic unit in society and the protection and preservation of the family is of paramount public concern”); Adams v. Tessner, 354 N.C. 57, 60 (N.C. 2001) (explaining that the family unit is guaranteed not only by the U.S. Constitution but also by North Carolina law).

27 Alaska Stat. Ann. § 47.10.082 (requiring courts to consider children’s best interests and the “potential harm to the child caused by removal of the child from the home and family environment”).


29 42 U.S.C. 672(a)(2)(A)(ii) (providing for federal funding after a child has been placed in foster care).
of the Social Security Act on child abuse and neglect prevention, among other efforts to strengthen and stabilize families.\footnote{30}

The Family First Act, which was signed into law in 2018, addresses several of these proposals by bringing a range of improvements to the child welfare system. For example, states can now access federal Title IV-E funding to provide services and programs to children, parents, and kinship caregivers with the goal of preventing children from entering foster care. Eligible families in which a child is a “candidate for foster care” can access preventive mental health, substance abuse, and parenting skills services for up to 12 months.\footnote{31} The new federal law complements existing state responsibilities to support families and prevent child-parent separation when possible.\footnote{31}

Within the context of this new legislation, legal professionals have several key roles including a responsibility to protect children’s and parents’ rights to family integrity.\footnote{32} Similarly, counsel for child welfare agencies have an opportunity to work closely with their clients to ensure “reasonable efforts” are provided in a deliberate way to help families in need of services and prevent a child from entering foster care when services can help stabilize the family.\footnote{33} To protect legal rights while prevention services are being provided, jurisdictions should consider appointing counsel for children, parents, and agencies once a child has been deemed a “candidate for foster care” and prevention services are offered.\footnote{34} New federal funding for children’s counsel and parents’ counsel appears to permit federal reimbursement (at a 50% match rate) in such instances, creating new opportunities for pre-petition legal services.

As significant as the funding shifts are likely to be from Family First, it is far from a comprehensive approach to prevention and family support. Consequently, in addition to services to help families when children are at imminent risk of entering foster care, it is critical for states and communities to develop and offer programs and services that provide more robust primary prevention and family support. As noted by the Children’s Bureau of the U.S. Department of Health and Human Services, “coordinated and robust preventive mental health, substance abuse, and parenting skills services for up to 12

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primary prevention efforts are critically important to strengthen families, prevent the initial occurrence of and ongoing maltreatment, prevent unnecessary disruption of families, reduce family and child trauma, interrupt intergenerational cycles of maltreatment, and build a well-functioning child welfare system. 36

Legal services provide a core component of these more comprehensive prevention efforts. For example, medical-legal partnerships identify and address simultaneous legal and medical pressures that can exacerbate child health risks, such as when children’s medical, mental health, or special needs create challenges in the care they can receive at home. 36 The medical-legal partnership between Arkansas Children’s Hospital and Arkansas Legal Aid provides a useful example of a practice that assists children and families’ legal and medical needs concurrently. 37 Children’s Law Center in Washington, DC has a similar program in place with Children’s National Medical Center and several other health clinics; the medical-legal partnership between Mt Sinai-St. Luke’s Child and Family Institute and the Legal Aid Society in New York City provides education advocacy to students with significant emotional disabilities.

Multidisciplinary legal teams in child welfare representation can also strengthen families by incorporating an attorney, a social worker, and a peer advocate as part of a triad of service delivery.36 As a prevention model, the Detroit Center for Family Advocacy (CFA) provides an excellent example of how multidisciplinary representation can help eliminate the need for foster care placement.38 In CFA’s prevention services program, families with a substantiated allegation of child abuse or neglect but no filed petition or court proceeding were provided with a multidisciplinary legal team including a lawyer, a social worker, and a parent advocate who had been involved in the child welfare system to address the legal issues that put them at risk of a dependency petition. During a three-year evaluation, CFA’s multidisciplinary teams prevented the need for dependency petitions in nearly 93% of all cases handled.


38 For more information about the Arkansas medical-legal partnership, see http://arklegalaid.org/what-we-do/medical-legal-partnerships-in-arkansas.

39 Children’s Bureau No. ACYF-CD-IM-17-02, supra note 17 (noting several models of multidisciplinary representation in child welfare).

Finally, policymakers should explore efforts to expand access to civil legal aid to help families maintain stable housing, protect against domestic violence, and access benefits for which they are eligible. Each of these legal issues can affect child safety. Legal clinics and services co-located at Family Resource Centers throughout the country provide examples for how to expand primary prevention legal supports for families.

IV. Government Intervention and Foster Care Placement

There are circumstances when it is necessary for a child to separate from a parent or caregiver, and enter foster care to ensure the safety of the child. All state jurisdictions recognize this legal reality. State laws vary, however, in the statutory language they use to support parent-child separation. Some require a showing that the child’s health or safety are at risk. Other states use broader language. Because children and parents’ rights to family integrity are fundamental interests, the government may not intentionally intrude on rights to family integrity without a particularized court finding of unfitness on the part of each parent. Not every child found to be neglected or dependent must be removed from parental custody. Generally, a court determination of the necessity of removal should include assessment of the nature of the threat(s) of danger, the child’s vulnerability, and the risk factors for the child.

See Alaska Stat. § 47.10.082 (Alaska law requires courts to “keep the health and safety of the child as the court’s paramount concern”); Ark. Code Ann. § 9-27-328 (requiring the first judicial findings to include an analysis of “whether the removal and the reasons for the removal of the juvenile is necessary to protect the health and safety of the juvenile”); Id. Code Ann. § 16-1601 (“At all times, the health and safety of the child shall be the primary concern.”); N.Y. Fam. Ct. Act § 1027 (providing for a child’s removal from the parent when necessary to avoid imminent risk to the child’s life or health); Wash. Rev. Code § 26.44.010 (the state is justified to intervene in a parent-child relationship only if certain threats to the child’s safety occur); In re Dula, 143 N.C. App. 16, 17 (N.C. Ct. App. 2001) (allowing a child to be removed from the home only when “necessary to protect the safety and health of the child”);

See, e.g., Cal. Welf. & Inst. Code § 202(a), 16000(a) (providing for removal of a child from the custody of a parent “only when necessary for his or her welfare or for the safety and protection of the public”); Kan. Stat. Ann. 38-2243 (courts may order removal when the “health or welfare of the child may be endangered without further care”);

See Quilliam, 434 U.S. at 656; see also In re Sanders, 852 N.W.2d 524, 533, 539 (Mich. 2014).

See Nat’l Council of Juvenile and Family Court Judges, Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases 22 (2016) (noting that the key decision in a disposition hearing is whether a child must be placed away from home), available at https://www.ncjfcj.org/sites/default/files/EnhancedResource%20Guidelines%202016.pdf; Vivek S. Sankaran, When Child Protective Services Comes Knocking, 31 Fam. Advoc. 8, 14 (Winter 2009) (noting that even if the court makes a finding that a child was abused or neglected, the court may return the child home at any point, including at the dispositional hearing).

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family’s protective capacities to manage the threat. Judges and attorneys should understand these factors and develop a framework for child safety decision-making that facilitates consistency and clarity in the field. Assessing safety is relevant not only at the point of initial removal, but also when developing and approving an effective case plan and when determining whether a child can be reunited with parents or should achieve a different form of permanency (e.g. adoption or guardianship).

When a state or tribe seeks to prove a parent unfit and seeks removal of a child, procedural due process protections apply. For example, the parent must be given notice and an opportunity to contest the basis for that fitness determination. As a general rule, this court hearing should occur before the parent ‘may be deprived of the care, custody, or management of the children without their consent.’ Only in emergency situations, where the government has evidence that harm to the child is imminent, is the state assume custody of the child without court authorization or parental consent. Emergency removals should not be permitted when the agency has “reasonable time consistent with the safety of the child to obtain a judicial order.” To exercise these procedural safeguards, children and parents should have access to quality legal representation at every stage of the case. 45

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Attorneys and judges can use this emphasis on procedural protections to ensure children and parents’ rights to family integrity are protected while also keeping children safe.

Careful consideration of due process protections is also important when implementing the Family First Prevention Services Act because state and local child welfare agencies will be working with unrepresented parents and children in the context of providing prevention services and developing case plans without judicial review or legal representation.

V. Jurisdictional Authority

Determinations of parental fitness and the necessity of removal fall exclusively to state and tribal jurisdiction. In instances where federal authorities have custodial authority over a child and parent, decisions to separate the child from a parent to protect the child’s safety, health, or well-being require coordination with state or tribal authorities that have exclusive statutory authority to effectuate such separations as part of the jurisdiction’s child welfare legal process.

VI. Family Connections while in Foster Care

Once children enter state or tribal custody, their ties to family (whether parents, siblings, relatives, or unrelated persons with a significant relationship to the child or family) should be maintained. Attorneys and courts can develop, strengthen, and support a host of promising practices which have been recognized at the state and federal levels to maintain family connections for youth of all ages.

i. Kin and Relative Engagement

Decades of research confirms that children who cannot remain with their parents thrive when raised by relatives and close family friends, known as kinship care. Children in foster care with relatives have more stable and safe childhoods than children in foster care with non-relatives, with greater likelihood of a having a permanent home. They experience fewer school changes, have better behavioral and mental health outcomes, and report that they “always felt loved.” They keep their connections to brothers and sisters, family and community, and their cultural identity. Youth in kinship care homes themselves generally express more positive feelings about their placements and are less themselves generally express more positive feelings about their placements and are less

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likely to run away. Moreover, children in foster care with relatives are less likely to re-enter the foster care system after returning to birth parents. If returning to parents is not possible, relatives are often willing to adopt or become permanent guardians. In fact, in Fiscal Year 2017, 34% of all children adopted from foster care were adopted by relatives and 10% of children exited foster care into kinship guardianships.

Federal and state child welfare law and policy prioritize placing children in kinship care arrangements when children enter foster care. For example, federal law requires state child welfare agencies to notify all adult relatives when a child is removed from care of the parent within 30 days of the removal, and to exercise due diligence to identify and locate all adult relatives of the child. An exception is articulated for cases involving family or domestic violence. Most state laws and policies also support a priority for placement with a relative.

More recently, Family First includes increased support of kinship families. The Act seeks to improve licensing standards for relative foster family homes, by requiring states to locate all adult relatives of the child, and to exercise due diligence to identify and locate all adult relatives of the child. An exception is articulated for cases involving family or domestic violence. Most state laws and policies also support a priority for placement with a relative.

Building on the additional support for kin provided for through Family First, this ABA Resolution serves as an additional opportunity to urge judges and attorneys to ask about agency efforts to place a child with a kin caregiver. Judges and attorneys should also inquire about how family connections are being maintained throughout a case.

### ii. Unsupervised Visitation

Goals of family visitation after a child enters foster care include maintaining the parent-child relationship, reducing the trauma of separation, and promoting reunification. Frequent and meaningful family time can improve the child-parent relationship and promote permanency by engaging parents; a parent can be significantly motivated through meaningful and regular contact with a child. However, in unfamiliar settings supervised by unfamiliar people, a family may find it challenging to interact naturally.

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To promote meaningful visitation, family visits should be conducted in the least-restrictive environment available that supports the child’s safety, and the level of supervision a family requires should be determined on a case-by-case basis. In its recommendations for improving court practice, the National Council for Juvenile and Family Court Judges (NCJFCJ) has noted, “[c]onsistent with child safety, relationships between and among children, parents, and siblings are vital to child well-being. Judges must ensure that quality family time is an integral part of every case plan. Family time should be liberal and presumed unsupervised unless there is a demonstrated safety risk to the child.” 62 Some states have recognized the value of safe, unsupervised visitation and include the presumption in their statutes.63

State legislatures should examine this model as recommended by NCJFCJ and should consider adopting similar policies of allowing a presumption of unsupervised visits between children and parents. Attorneys and judges can also support a presumption for unsupervised visits, including the safety considerations that must be considered, and question what barriers exist to safe, unsupervised visitation in individual cases.

iii. Sibling Connections

Federal and state child welfare law and policy recognize the importance of sibling bonds for children and youth in foster care, and have explored many strategies and approaches to maintaining those connections.64 Absent a risk to child safety, courts should consider and attorneys advocate for regular, frequent contact between and among siblings.

Effective implementation of Family First will include careful consideration of the sibling-related provisions. For example, an exception to the limit on the number of children who can reside in a “foster family home” at the same time is available to place sibling groups together.65 Additionally, if a child is placed in a Qualified Residential Treatment Program, the program must provide outreach to relatives, including siblings, and document how the child’s sibling connections are being maintained.66 The state’s case plan must include

62 Nat’l Council of Juvenile and Family Court Judges, supra note 45.
63 See, e.g., Ga. Code Ann. 15-11-112(b) (establishing a presumption that visitation shall be unsupervised unless the court finds that unsupervised visitation is not in a child’s best interests).
64 See, e.g., U.S. Department of Health and Human Services, Children’s Bureau, Sibling Issues in Foster Care and Adoption (January 2013), https://www.childwelfare.gov/pubs/downloads/siblingsissues.pdf; See Fostering Connections Act, Sec. 206 (requiring child welfare agencies to make reasonable efforts to place siblings together, whether in foster care, kinship guardianship, or adoptive placements); Preventing Sex Trafficking and Strengthening Families Act of 2014, P.L. 113-183, Sec. 205(a)(2) (requiring child welfare agencies to notify parents of a child’s siblings when the child is removed from a parent’s care, to include individuals who would have been considered siblings if not for the termination or other disruption of parental rights).
placement preferences reflecting that children should be placed with their siblings absent a court order to the contrary.67

When sibling connections are considered, courts, attorneys, and agencies should not overlook the bonds developed between unrelated children and youth in a foster care setting. Children or youth who leave a foster care setting may want to maintain a relationship and connection with other young people they have lived with in that setting, and those ongoing relationships should be supported. Judges and attorneys should question how sibling bonds are being maintained during individual child welfare cases, whether the child’s siblings are also child welfare-involved or not. They should also seek the input of a child or youth in care as to who the youth wants to remain connected to in addition to biological relatives.

iv. Other Positive Adult Connections

As a great deal of research has shown, youth who age out of foster care face many challenges at higher rates than youth who were never in foster care or who exited foster care to reunify with parents or achieve another form of permanency.68 Often, the connection to family or another supportive adult is critical for older youth, and is key for youth to have permanent, emotionally sustaining, and committed relationships to reach self-sufficiency and to reduce the risk of negative outcomes such as homelessness and criminal involvement.

For example, a key recommendation from the Evan B. Donaldson Adoption Institute report, “Never Too Old: Achieving Permanency and Sustaining Connections for Older Youth in Foster Care”69 was to increase efforts to recruit, support, and use relatives by promoting kinship adoption and subsidized guardianship, and explore subsidized guardianship and adoption. One study showed the value of mentoring relationships, a role often fulfilled by a close relative which contributed to: socio-emotional development, problem-solving, and identity development. This was especially valuable to youth during vulnerable periods like transitions into and out of foster care.70 One strategy for facilitating engagement by caring adults is permanency planning that reflects efforts at relational permanency, demonstrated by building and maintaining connections with family and other supportive adults.71

69 Evan B. Donaldson Adoption Institute, Never Too Old: Achieving Permanency and Sustaining Connections for Older Youth in Foster Care, (2011), available at .
71 See, e.g., ABA Center on Children and the Law and Juvenile Law Center, Issue Brief: The Role of the Court in Implementing the Older Youth Provisions of the Strengthening Families Act (February 2016).

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Judges and attorneys in dependency cases should ensure older youth in care maintain family connections and establish positive relationships with adults. Judges should ask related questions during court proceedings. Attorneys representing youth in care should ask clients who they talk to regularly, who they seek advice from or go to for help, and who they would like to remain connected to after leaving state child welfare custody.

v. Service Plan and Treatment Plan

In recent years, child welfare professionals and legislators have focused on the importance and value of directly engaging youth in foster care in the creation of their service plans and any needed treatment plans, and also closely involving their families. For example, the Family First Act articulates how family members and others should be included in treatment for a youth placed in a Qualified Residential Treatment Program (QRTP). For a state to access federal funding for a child’s placement in a QRTP, the placement must be recommended by an impartial assessor and approved by the court.72 Part of the assessment involves consultation with a family and permanency team, which must consist of appropriate biological family members, relatives, fictive kin and “professionals who are a resource to the family...such as teachers, medical or mental health providers who have treated the child, or clergy.”73 And if the child placed in the QRTP is over 14, the team must also include members selected by the child. The QRTP must involve family members when it would be in the child’s best interest, describe how to integrate them in a post-discharge plan, and provide post-discharge and family-based support for six months.74

Building on these laws, judges should ensure the relevant federal and state rules are applied, and attorneys should advocate for youth’s active involvement in their own case planning, the involvement of family members and other adults important to the youth. Similarly, judges and attorneys should regularly pursue questions in court about the appropriateness of a child or youth’s specific placement in foster care. Once a state is using QRTPs as placements, more specific inquiries should be established.

Conclusion

Major events, legal actions, and child welfare legislative and policy changes have produced renewed attention on children and youth rights to family integrity and family connection. The legal community should serve as a leader advocating for and upholding these rights in legal representation, judicial decision-making, and legislative action.

Respectfully submitted,
Hon. Marguerite Downing
Chair, Commission on Youth at Risk
August 2019

73 See 42 U.S.C. § 675a(c)(1)(B).
74 See 42 U.S.C. § 675a(c).

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73 See 42 U.S.C. § 675a(c)(1)(B).
74 See 42 U.S.C. § 675a(c).
1. Summary of Resolution(s). This Resolution recognizes the children and parents legal right to family integrity and family unity. Relatedly, the Resolution urges the legal community to work to mitigate the trauma to children and families that separation causes and supports the use of prevention services to ensure children’s safety without the need for removal. The Resolution confirms that state actors may interfere with family integrity when necessary for a child’s health and safety, and outlines important procedural protections for children and parents when removal is necessary.

The Resolution further urges maintenance of family connectedness if a child does need to enter foster care. Specifically, the Resolution calls for prompt identification, notification, and engagement of the kin of a child in foster care; prioritization of placement of the child with kin; unsupervised visitation between parents and children in foster care, unless a court finds that unsupervised visitation is not in the child’s best interest; support for kinship foster families; maintained of sibling connections; positive adult connections for youth who may age out of foster care; and family involvement in the service plan and treatment of youth in foster care.

2. Approval by Submitting Entity.
Final approval by the Commission on Youth at Risk on May 7, 2019
Approved by the Section of Litigation on May 6, 2019
Approved by the Commission on Homelessness and Poverty on May 7, 2019

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 Resolution would build upon past ABA policies that have touched on related points:

- ABA House of Delegates Resolution 10M110 urged federal child welfare financing reform that would allow states to access federal funding for prevention services for families in need of support. That change was part of the Family First Prevention Services Act of 2018, and the new funding opportunity is highlighted in a section of this proposed Resolution’s accompanying Report.
This Resolution's inclusion of quality legal representation as part of the legal protections available when a child is removed from the home builds on the ABA House of Delegates Resolution 96M112A (adopting ABA Standards for Lawyers who Represent Children in Abuse and Neglect Cases), ABA House of Delegates Resolution 06A112A (adopting Standards of Practice for Lawyers who Represent Parents in Abuse and Neglect Cases), and ABA House of Delegates Resolution 11A101A (adopting ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings).

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. If adopted, this ABA Resolution with Report will be shared among networks of attorneys and judges involved in child welfare and immigration cases. We will encourage attorneys for children and parents in child welfare proceedings to use these and other sources of authority on the right to family integrity and connectedness when consistent with client interests.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with Commission staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

9. Disclosure of Interest. (If applicable) None

10. Referrals. By copy of this form, the Report with Recommendation will be referred to the following entities:
- Center for Human Rights
- Civil Rights and Social Justice Section
- Commission on Disability Rights
- Commission on Domestic and Sexual Violence
- Commission on Homelessness and Poverty
- Commission on Immigration
- Criminal Justice Section
- Family Law Section
- Health Law Section
- Judicial Division
- Litigation Section, Committee on Children’s Rights
- Section of Science and Technology
- Solo, Small Firm and General Practice Division
- Young Lawyers Division

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- Solo, Small Firm and General Practice Division
- Young Lawyers Division
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Prudence Beidler Carr  
Director, Center on Children and the Law and Commission on Youth at Risk  
1050 Connecticut Avenue, Suite 400  
Washington, DC 20036  
202-662-1740  
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Cristina Cooper  
Senior Attorney, Center on Children and the Law  
1050 Connecticut Avenue, Suite 400  
Washington, DC 20036  
202-662-8638  
Cristina.Cooper@americanbar.org

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.

Rhonda Hunter  
2600 Lone Star Drive, LB 22  
Dallas, TX 75212  
214-698-5900  
rhunter@hotmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution recognizes children and parents have legal rights to family integrity and family unity. Relatedly, the Resolution urges the legal community to work to mitigate the trauma to children and families that separation causes and supports the use of prevention services to ensure children’s safety without the need for removal. The Resolution confirms that state actors may interfere with family integrity when necessary for a child’s health and safety, and outlines important procedural protections for children and parents and jurisdictional requirements when removal is necessary.

The Resolution further urges maintenance of family connectedness if a child does need to enter foster care. Specifically, the Resolution calls for prompt identification, notification, and engagement of the kin of a child in foster care; prioritization of placement of the child with kin; unsupervised visitation between parents and children in foster care, unless a court finds that unsupervised visitation is not in the child’s best interest; support for kinship foster families; maintained of sibling connections; positive adult connections for youth who may age out of foster care; and family involvement in the service plan and treatment of youth in foster care.

2. Summary of the Issue that the Resolution Addresses

Promising practices and recent developments in the child welfare field call for development of this Resolution, which centers on family integrity and family connection. First, federal litigation challenging family separation at the U.S. Border has brought with it an increased focus on applying child welfare laws and principles in federal litigation across the country, including the substantive and procedural rights of children and parents to family integrity. Second, 2018 child welfare legislation titled the Family First Prevention Services Act (P.L. 115-123) changed child welfare funding structures and emphasized the overall importance of children’s connections to family, including birth parents, kin, siblings, and foster families. Third, the federal government recently updated the Child Welfare Policy Manual of the U.S. Department of Health and Human Services to allow states to use federal funding to pay part of the cost of providing children and parents with legal counsel in child welfare/dependency cases. This change recognizes high quality child and parent legal representation protects children and parents’ substantive and procedural due process rights and produces better long-term outcomes for families, including shorter time to permanency (e.g., reunification, guardianship or adoption).
All three developments are unified around a theme of promoting family integrity and family connection for children and youth. Although the ABA has existing policy supporting children’s rights in a variety of contexts, it lacks policy addressing children and youth’s interests in family integrity and family connection.

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

This resolution addresses the gap identified by urging that:

- Children and parents have legal rights to family integrity and family unity;
- The legal community and state agencies should work to mitigate the trauma resulting from children’s separation from parents;
- Prevention services, including quality legal representation services, can ensure children’s safety without removing them from their families;
- Government may interfere with children and parents’ rights to family integrity when necessary for the child’s health or safety; and
- When children are in foster care, family connections should be safely maintained and supported with parents, kin, and siblings during the pendency of the case.

This Resolution seeks to inform attorneys and judges in the child welfare and other legal fields of these important developments related to family integrity and family connectedness and provide guidance on effective implementation of the several intertwined practices and concepts.

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

None have been identified
SPONSORS: Anthony M. Ciolli

PROPOSAL:

Amends § 6.4(a) of the ABA Constitution to allow individuals who meet a state’s definition of young lawyer to serve as a young lawyer member of the House of Delegates for that state.

Amends § 6.4(a) of the ABA Constitution to read as follows:

§ 6.4 State Bar and Local Bar Association Delegates. (a) A state bar association is entitled to at least one delegate in the House of Delegates, except that if there is more than one state bar association in a state the House shall determine which associations may select delegates. A state bar association in a state that has more than 4,000 lawyers is entitled to an additional delegate for each additional 2,500 lawyers above 4,000 until it is entitled to four delegates. A state bar association in a state that has more than 14,000 lawyers and not more than 20,000 lawyers is entitled to five delegates. If it has more than 20,000 lawyers, it is entitled to six delegates. If the bar associations of a state are entitled to four or more delegates, at least one delegate representing the state bar or a local bar association in that state must have been admitted to practice in his or her first bar within the past five years, or must be less than 36 years old at the beginning of the term, or meet the state’s definition of a young lawyer. Each state delegation, or meet the state’s definition of a young lawyer, as well as the United States Virgin Islands, that did not have an additional young lawyer delegate prior to the 2015 Annual Meeting shall be entitled to one additional delegate, chosen by either the state bar association or one of the qualifying local bar associations referred to in Articles 6.4(b) and 6.9 below, provided that such delegate was admitted to his or her first bar within the past five years or is less than 36 years old or meets the state’s definition of a young lawyer at the beginning of his or her term. It is the responsibility of the state bar association to ensure that this requirement is satisfied. However, a state bar association is entitled to at least as many delegates as it was entitled to certify at the 1990 annual meeting.

(Legislative Draft – Additions underlined; deletions struck through)

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lawyers and not more than 20,000 lawyers is entitled to five delegates. If it has more than 20,000 lawyers, it is entitled to six delegates. If the bar associations of a state are entitled to four or more delegates, at least one delegate representing the state bar or a local bar association in that state must have been admitted to practice in his or her first bar within the past five years, or must be less than 36 years old at the beginning of the term, or meet the state’s definition of a young lawyer. Each state delegation, as well as the United States Virgin Islands, that did not have an additional young lawyer delegate prior to the 2015 Annual Meeting shall be entitled to one additional delegate, chosen by either the state bar association or one of the qualifying local bar associations referred to in Articles 6.4(b) and 6.9 below, provided that such delegate was admitted to his or her first bar within the past five years or is less than 36 years old or meets the state’s definition of a young lawyer at the beginning of his or her term. It is the responsibility of the state bar association to ensure that this requirement is satisfied. However, a state bar association is entitled to at least as many delegates as it was entitled to certify at the 1990 annual meeting.
These amendments reconcile the eligibility requirements for young lawyer members of the House of Delegates representing state bar associations with the more-inclusive definition of “young lawyer” employed by 23 state bar associations.

The term “young lawyer” is not defined in the ABA Constitution, but is defined in the Bylaws of the ABA Young Lawyers Division as “a lawyer who has been admitted to practice in his or her first bar within the past five years, or is less than thirty-six years old.” These age and practice limitations have been incorporated into the language of § 6.4(a) of the ABA Constitution. However, the positions created by § 6.4(a) are not intended to represent the ABA Young Lawyers Division, but young lawyers generally throughout the country.

When the ABA YLD first enacted the less than thirty-six years old age requirement in 1934, the average age of law school graduation was in the early 20s. However, in the ensuing 65 years, the average age of law school graduation has risen to the mid-to-late 20s. As a result, 23 state bar associations, other sections of the ABA, as well as numerous national, local, and international bar associations, have enacted expanded definitions of young lawyer that allow for greater age and years of practice limitations. Recognizing that state bar associations and other entities have enacted different definitions of “young lawyer,” the ABA Young Lawyers Division has amended its Bylaws to provide that individuals may continue to participate in Division governance if they are members in good standing of their state or local young lawyer affiliate, even if they are not members of the ABA YLD.

1 AM. BAR ASS’N YOUNG LAWYERS DIV. BYLAWS § 2.1.
2 The state bar associations with a definition of “young lawyer” that exceeds the definition of “young lawyer” found in the ABA YLD Bylaws include Arizona, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisina, Maryland, Massachusetts, Minnesota, Mississippi, Montana, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, the U.S. Virgin Islands, Vermont, and West Virginia.
3 ABA sections with a definition of “young lawyer” that exceeds those in the ABA YLD Bylaws include the ABA Business Law Section and the ABA Real Property, Trust, and Estates Section.
4 The number of local, national, and international bar associations that define “young lawyer” more inclusively is too voluminous to list, but includes the National Bar Association, the National Asian Pacific American Bar Association, the Canadian Bar Association, the American Association for Justice, the Defense Research Institute, the American Intellectual Property Law Association, the Chicago Bar Association, the Columbus Bar Association, and the New York City Bar Association.
5 Recognizing that state bar associations and other entities have enacted different definitions of “young lawyer,” the ABA Young Lawyers Division has amended its Bylaws to provide that individuals may continue to participate in Division governance if they are members in good standing of their state or local young lawyer affiliate, even if they are not members of the ABA YLD.
6 AM. BAR ASS’N YOUNG LAWYERS DIV. BYLAWS § 4.2(a).
These amendments, if adopted, will allow states that have enacted more-inclusive definitions of “young lawyer” to allow individuals who meet that state’s expanded definition to serve as that state’s young lawyer member of the House of Delegates, or to serve as a young lawyer member-at-large to the Board of Governors. Although it does not appear that any state has a less-inclusive definition of “young lawyer” than that found in the ABA YLD Bylaws, the ABA YLD definition of “young lawyer” will remain in § 6.4(a) so as to provide a floor for eligibility. These changes will respect the decisions of our states and territories to define young lawyer differently from the ABA, and allow all young lawyers to fill positions designated for young lawyers generally.

Respectfully submitted,

Anthony M. Ciolli