AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION ASSEMBLY
Saturday, January 26, 2019
9:00am – 12:00pm

AGENDA

Fit2Practice Guided Meditation
_Ashleigh Wilson, South Carolina Young Lawyers Division President, Columbia, SC_

Social Media Engagement Presentation
_Ray Panneton, ABA YLD Resolutions Team Member, Houston, TX_

OPENING REMARKS

Call to Order
_Daiquiri Steele, YLD Assembly Speaker, Birmingham, AL_

Presentation of Colors
_Nellis Air Force Base Honor Guard_

National Anthem of United States
_Felicia Hamilton, Credentials Board Member, Shreveport, LA_

Pledge of Allegiance
_Scott Lachman, Nevada Young Lawyers Division Chair, Las Vegas, NV_

Invocation
_Fabiani Duarte, YLD Solo, Small Firm & General Practice Committee Vice Chair, Alamogordo, NM_

Credentials Report
_Jamie Davis, ABA YLD Assembly Clerk, Mission, KS_

Explanation of Mission of the Assembly, Duties of Delegates, and Standing Rules; Adoption of Rules of Debate and Agenda
_Daiquiri Steele, YLD Assembly Speaker, Birmingham, AL_

Presentation of Consent Calendar
_Daiquiri Steele, YLD Assembly Speaker, Birmingham, AL_

List of Resolutions on Consent Calendar:

YLD Resolution 19-1YL – Asbestos Importation (Submitted by the YLD Environment, Energy, and Resources Committee): This resolution urges the U.S. Environmental Protection Agency to ban the importation and use of dangerous mineral fiber asbestos from the United States under its authority in the updated Toxic Substances Control Act.

YLD Resolution 19-2YL – Study on the Psychological Impacts (Submitted by the YLD Liaison to the ABA Commission on Youth at Risk): This resolution urges Congress and the United States Department of Education to collect data and prepare a specialized report on 1) how racism, poverty, and living in high crime communities psychologically impacts youth, 2) the quality
of school services that are provided to youth experiencing mental health problems as a result of these stressors, and 3) the quality of in-school mental health supports offered in high poverty communities. It further urges Congress to appropriate funds to in-school mental health services based upon its research and findings.

**HOD Resolution 101A – (Submitted by the ABA YLD):** This resolution encourages federal, state, local, territorial, and tribal legislatures and court systems, in conjunction with state and local bar associations, to support and assist with the establishment and maintenance of lactation areas in courthouses. The lactation areas should be available to members of the public, including lawyers, jurors, litigants, witnesses, and observers.

**HOD Resolution 101B – (Submitted by the ABA YLD):** This resolution urges the enactment of a rule by all state, local, territorial, and tribal legislative bodies or their highest courts charged with the regulation of the legal profession, as well as by all federal courts, providing that a motion for continuance based on parental leave of either the lead attorney or another integrally involved attorney in the matter shall be granted if made within a reasonable time after learning the basis for the continuance unless substantial prejudice to another party is shown; or the criminal defendant’s speedy trial rights are prejudiced.

**HOD Resolution 106B – (Submitted by the ABA Standing Committee on Gun Violence; ABA Commission on Disability Rights; Section of Civil Rights & Social Justice; Criminal Justice Section; ABA Commission on Domestic & Sexual Violence; ABA Commission on Sexual Orientation and Gender Identity):** This resolution urges federal, state, local, territorial and tribal governments to reduce potential harm that individuals may inflict on themselves or others by enacting statutes, rules, or regulations allowing individuals to temporarily prevent themselves from purchasing firearms.

**HOD Resolution 106C – (Submitted by the ABA Standing Committee on Gun Violence; ABA Criminal Justice Section; ABA Section of Civil Rights & Social Justice; ABA Commission on Domestic & Sexual Violence):** This resolution urges that the possession of firearms in and around courthouses be limited to persons with an official role in security and that such persons be required to complete annual training in firearm safety.

**HOD Resolution 107B – (Submitted by the ABA Section of Civil Rights & Social Justice; ABA Commission on Domestic & Sexual Violence; ABA Commission on Disability Rights; ABA Commission on Racial & Ethnic Diversity in the Profession; ABA Commission on Sexual Orientation & Gender Identity; ABA Commission on Hispanic Legal Rights & Responsibilities; ABA Commission on Women in the Profession):** This resolution urges legal employers not to require pre-dispute mandatory arbitration of claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status, or status as a victim of domestic or sexual violence.

**HOD Resolution 109C – Needs of Women Prisoners (Submitted by the ABA Criminal Justice Section):** Urges federal, state, local, territorial and tribal legislatures to enact legislation, and correctional and detention facilities to enact policies, to provide all women prisoners in all forms of detention with unrestricted access to free toilet paper and a range of free feminine hygiene products, in sufficient quantities to address their needs.

**HOD Resolution 109D – Amending Child Torture Laws (Submitted by the ABA Criminal Justice Section):** This resolution urges federal, state, local, territorial and tribal legislatures to
amend existing laws or enact new laws to clearly define child torture and make child torture a felony offense regardless of whether a serious physical injury occurs, and to promote training, for all court and medical personnel in these cases, on emerging evidence-based and effective practices to improve government responsiveness to severe maltreatment of children that does not inflict serious bodily injury.

HOD Resolution 115 – (Submitted by the ABA Commission on Domestic & Sexual Violence; ABA Section of Civil Rights & Social Justice; ABA Law Student Division): This resolution opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches, and urges federal, state, local, territorial, and tribal jurisdictions to oppose, laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.

PRESENTATION Wm. Reece Smith Jr. National Outstanding Young Lawyer Award

Michael Nguyen, ABA YLD Diversity Director, San Francisco, CA

PRESENTATION

Bob Carlson, ABA President, Butte, MT

To Be Introduced By: Tamara Nash, Chair, ABA YLD Minorities in the Profession Committee, Sioux Falls, SD

UPDATED CREDENTIALS REPORT

Jamie Davis, ABA YLD Assembly Clerk, Mission, KS

DEBATE YLD Resolution 19-3YL – Modification of Qualified Immunity in Officer-Involved Shootings (Submitted by the ABA YLD Section of Civil Rights & Social Justice)

This Resolution urges federal, state, local, tribal, and territorial courts to adopt laws that require specific due process considerations regarding the doctrine of qualified immunity as applied in the context of shootings by police officers and police officer use of force. It further urges courts and legislatures to bar disposition, by way of a defendant’s motion to dismiss or motion for summary judgment, cases involving police officer use of force and the doctrine of qualified immunity prior to trial.

Pro: Kasey A. Emmons, Chair, ABA YLD Civil Rights and Social Justice Committee, Boston, MA

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

PRESENTATION

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

To Be Introduced By: Ellise Washington, ABA YLD Scholar, McCalla, AL
DEBATE  
YLD Resolution 19-4YL: (Submitted by the YLD Ethics & Professionalism Committee; ABA Center for Professional Responsibility; YLD Litigation Committee; YLD Law Practice Committee; and YLD Public Education Committee): This resolution urges state supreme courts to study and adopt proactive management-based regulatory programs appropriate for their jurisdiction to assist lawyers and law firms in the development and maintenance of ethical infrastructures that help to prevent violations of the applicable rules of professional conduct and complaints to lawyer disciplinary authorities, and to enhance lawyers’ provision of competent and cost-effective legal services.

Pro:  Whitney Dunn, Liaison to the ABA Center for Professional Responsibility, St. Louis, MO

Con:  Kieone Cochran, ABA YLD Scholar, New Orleans, LA

REPORT OF THE YLD CHAIR

Tommy Preston, YLD Chair, North Charleston, SC

DEBATE  
HOD Resolution 106A: Opposition to Arming School Personnel (Submitted by the ABA Standing Committee on Gun Violence; ABA Section of Civil Rights & Social Justice; ABA Criminal Justice Section; ABA Commission on Domestic & Sexual Violence): This Resolution opposes laws that would authorize teachers, principals or other non-security school personnel to possess a firearm in, or in the vicinity of, a pre-K through grade 12 public, parochial, or private school, and the use of government or public funds to provide firearms training to teachers, principals, or other non-security school personnel, or to purchase firearms for those individuals.

Pro:  Andrew Hairston, ABA YLD Scholar, Washington, DC

Con:  TBD

REPORT OF THE YLD CHAIR- ELECT

Logan Murphy, YLD Chair- Elect, Tampa, FL

DEBATE  
HOD Resolution 105: Amendments to Standard 316 (Submitted by the Section of Legal Education and Admissions to the Bar)

This Resolution concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated January 2019 to Standard 316 (Bar Passage) of the ABA Standards and Rules of Procedure for Approval of Law Schools.

Pro:  Daniel Thies, Former ABA YLD Liaison to the ABA Section of Legal Education & Admissions to the Bar, Urbana, IL

Con:  Shasta Inman, Vice-Chair, ABA YLD Children and the Law Committee and ABA YLD Scholar, Albuquerque, NM
DEBATE YLD Resolution 10C – Opposition to Withholding Disaster Relief Aid (Submitted by the U.S. Virgin Islands Young Lawyers Division, U.S. Virgin Islands Bar Association and the Puerto Rico Bar Association)

This resolution opposes the withholding by the Executive Branch of funds previously appropriated by Congress for disaster relief and recovery, or their diversion for other purposes, including but not limited to construction of a border wall with Mexico. It also reaffirms the ABA’s support for the Principles of Rule of Law in Time of Major Disaster, including the principle that government assistance authorized by law should be distributed in an expeditious and efficient manner consistent with principles of equal treatment, due process and transparency.

Pro: Chivonne Thomas, U.S. Virgin Islands Bar Association President, St. Croix, VI

Con: TBD

PRESENTATION Spring Conference in Washington, DC Host Committee

2019 ABA YLD Spring Conference Host Committee

INTRODUCTION OF CANDIDATES FOR OFFICE

Secretary:
Choi Portis (MI)

Clerk:
Christopher Jennison (MD)

YLD Nominee to the ABA Board of Governors:
Shayda Zaepoor Le (OR)

YLD Nominee to the ABA House of Delegates (2 spots):
Anthony Ciolli (VI)
Daiquiri Steele (AL)
Sheila Willis (SC)

ADJOURNMENT
RECOMMENDATION AND REPORT TO THE
ASSEMBLY OF THE YOUNG LAWYERS DIVISION

RECOMMENDATION

WHEREAS, one of the American Bar Association’s goals is to advance the rule of law by holding governments accountable under the law; and

WHEREAS, the American Bar Association strives to support the environment and the general public through philanthropic works and services; and

WHEREAS, the promotion of a healthy environment free from toxic chemicals is in the best interests of the American Bar Association and its members;

NOW, THEREFORE, BE IT RESOLVED that the American Bar Association Young Lawyers Division urges the U.S. Environmental Protection Agency to ban the importation and use of dangerous mineral fiber asbestos from the United States under its authority in the updated Toxic Substances Control Act.
Asbestos is a mineral fiber found in many homes and jobsites across the country. Commonly used in fireproofing and insulation materials, automotive breaks, textile products, and wallboard materials. Asbestos was widely used across several industries and even notably in the US military. In the 1970’s scientific studies started to reveal the severe health impacts from exposure to asbestos. Several US Federal agencies and entities studied the mineral to gather more information about the negative health impacts. In 1989, the Bush Administration EPA announced plans to officially ban asbestos in a phase out process after conducting a ten-year study, under the authority of TSCA. The EPA promulgated a rule banning asbestos that was then challenged by the industries that used asbestos. The Fifth Circuit stuck down most of the EPA asbestos ban, thereby significantly weakening the agency’s authority to ban toxics. Congress recently amended TSCA in the 115th Congress, giving the EPA more leverage and authority to ban toxic substances. The EPA should now use its new statutory authority under the updated TSCA to finally ban the use and importation of toxic substance asbestos and save the lives of thousands of Americans from future exposure. The Obama Administration EPA started the process to ban a toxic substance under the new authority, the Trump Administration EPA has stalled. The ABA YLD should urge the EPA to finish the process to ban hazardous substance asbestos, in the interests of health and safety.

A. Asbestos’ History of Death and Disease

Asbestos gained national notoriety when its use was discovered in the US military, and a large number of US veterans died from this exposure. Indeed, nearly one third of all mesothelioma (a cancer caused by asbestos exposure) victims are US veterans. The material is prevalent in brake linings, housing insulation, and other common items used in everyday life. The Occupational Safety and Health Administration (OSHA) estimates that hundreds of thousands of workers are exposed to asbestos from friction products in auto repair shops, over a million construction workers may be exposed to asbestos when existing buildings are renovated or demolished, and thousands of custodial workers may encounter asbestos fibers while they clean commercial buildings. Additionally, secondary asbestos exposure impacts the family members of the military, construction workers, custodial workers, and auto shop workers. Many veterans or workers brought home asbestos dust on their work clothes. This exposed their spouses or children to the toxic mineral.

Asbestos exposure is linked to asbestosis, lung & gastrointestinal cancers, and an aggressive cancer called mesothelioma. Additionally, inhaling asbestos fibers can cause permanent and irreversible damage to vital organs. These serious health effects are well documented, with several federal entities conducting studies and analysis on the health impacts of asbestos.

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1 See 59 Fed. Reg. at 41029, 41030, 41033.
Additionally, in 1980, the National Institute for Occupational Safety and Health (NIOSH) announced that all levels of asbestos exposure studied to date have demonstrated asbestos-related disease, and there is no level of exposure below which clinical effects do not occur. Therefore, even low levels of exposure could cause serious health risks.

For several decades the exposure and mortality rates from asbestos were not recorded because a lack of information and knowledge about the deadly carcinogen. The Environmental Working Group (EWG) Action Fund calculated the recent mortality rates by combining federal death records with studies on lung cancer deaths from asbestos. These calculations illustrated that 12,000 to 15,000 Americans a year die from asbestos-related diseases, and in total from 1999 to 2013 an estimated 127,579 to 159,480 Americans died from asbestos exposure. 3

B. The EPA and Asbestos

The US Environmental Protection Agency (EPA) started to regulate asbestos in the early 1970’s when information regarding the serious public health risks posed by asbestos were entering the mainstream. 4 In 1971, the EPA promulgated an emission standard for asbestos under the authority in the Clean Air Act, 5 but regulation remained limited overall. This changed in 1979, when the EPA announced its intent to regulate asbestos under the authority of the Toxic Substances Control Act (TSCA). 6 The Reagan Administration received pressure from industry, and switched gears, referring the regulation of asbestos to Occupational Safety and Health Administration (OSHA) and the Consumer Product Safety Commission (CPSC). 7 EPA employees and the public were unhappy with this decision, so the EPA reversed its position again, and decided to support a possible ban on asbestos. 8

In 1989, after a ten-year study, the Bush Administration announced plans to ban known carcinogen asbestos, because of the unreasonable risks to human health. The EPA used its statutory authority under the previous, older version of TSCA to issue a rule to “prohibit, at staged intervals, the future manufacture, importation, processing, and distribution in commerce
of asbestos in almost all products.”9 The EPA under the Bush Administration stated that “[a]sbestos is a human carcinogen and one of the most hazardous substances to which humans are exposed,” and therefore banning the substance was crucial to public health.10 The ban applied to the manufacture, import, processing and distribution of asbestos products and would have affected 94% of all asbestos consumption, including a ban of asbestos-containing products like roofing and insulation.11

The industries that still used asbestos sued the EPA in federal court, seeking to overturn most, if not all, parts of the new rule on asbestos. The U.S. Court of Appeals for the Fifth Circuit overturned most of the rule, stating that although asbestos exposure causes cancer, the agency failed to prove that the ban was the “least burdensome alternative” for controlling the public’s exposure.12 The Bush Administration chose not to appeal the Fifth Circuit’s decision. The decision effectively overturned the EPA’s ban on asbestos and established a precedent that has made it almost impossible for the agency to ban any dangerous chemical. Even years later, when new evidence of asbestos’ hazards came to light, the EPA has largely been unable to act because of the Fifth Circuit ruling.13

C. New Statutory Authority under Updated TSCA

The 114th Congress passed a bipartisan updated Toxic Substances Control Act, titled Frank R. Lautenberg Chemical Safety Act for the 21st Century in June 2016.14 The amendments to TSCA gave the EPA more leverage in taking action against hazardous chemicals. Some of the notable changes to TSCA include the creation of screening assessments to determine the priority of chemicals, and a risk evaluation system for high-priority chemicals, to determine if the chemical is deemed “unsafe” and therefore subject to restrictions or a ban.15

Under the new screening requirements, the EPA was required to identify and prioritize a list of ten chemicals that it will eventually ban or restrict significantly. In December 2016, the Obama administration EPA named asbestos as one of the first ten chemicals it would be reviewing as high-priority in the new risk evaluation process. The EPA has already completed the first step of screening in the process to ban asbestos under the new authority.

The next step in the new statutory authority is the risk evaluation process. In the new risk evaluation process, the question before EPA is whether asbestos poses an unreasonable risk without consideration of costs or other non-risk factors.16 An amendment to TSCA specifically

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10 Id.
15 15 U.S.C. § 2603
excluded from consideration of unreasonable risk costs of restriction or a ban.\textsuperscript{17} If the EPA decides that asbestos does pose an unreasonable risk, it must then decide what regulatory measures are needed to reduce that risk, i.e. restrictions or a ban.\textsuperscript{18} The Trump EPA has stalled in this risk evaluation process. The EPA should be urged to continue the process of the ban in the interest of public health. Unlike other chemicals the EPA may evaluate, the hazards posed by asbestos have been widely studied and several authoritative reviews of the epidemiological and toxicological data on asbestos hazards exist. Therefore, the EPA could and should rely on these authoritative reviews of asbestos hazards in completing its evaluation and does not need to conduct a systematic review of the substance itself before proceeding to the ban.

\textbf{D. Health and Safety Benefits}

More than fifty countries, including the United Kingdom, Australia, Canada and all 28 countries of the European Union, have banned the use of asbestos.\textsuperscript{19} The United States remains one of the few industrialized western countries that has yet to ban all asbestos, and still regularly imports the dangerous mineral for certain industries and products. If the EPA were to use its statutory authority to ban asbestos completely in the United States the health and safety benefits for workers would be immeasurable.

As mentioned before, workers in various impacted industries are at great risk of disease or death from even low amounts of exposure to asbestos. The Occupational Safety and Health Administration (OSHA) estimates that hundreds of thousands of workers are exposed to asbestos from friction products in auto repair shops, over a million construction workers may be exposed to asbestos when existing buildings are renovated or demolished, and thousands of custodial workers may encounter asbestos fibers while they clean commercial buildings.\textsuperscript{20} If the EPA were to completely ban asbestos, the negative health effects caused by exposure for the workers in impacted industries would greatly be decreased. Workers would be safer at jobsites, and healthier in their daily lives. Additionally, family members would not suffer negative health effects from secondary exposure of asbestos.

\textbf{E. Opposition and minority views}

The industries that still use dangerous carcinogen asbestos would oppose this ban and action by the EPA because they would like to continue using asbestos. The EPA must take industry concerns under advisement when promulgating new rules, but in this case the EPA could act reasonably in banning asbestos. The reason for this is two-fold, first, many uses of asbestos have already been banned for quite some time and secondly the possibility of a ban has been imminent for over two decades, allowing more than enough time for these industries to find a reasonable alternative, such as the other industries have done where asbestos was already banned.

\begin{itemize}
\item \textsuperscript{17} See 15 U.S.C. § 2603(f)(2) versus 42 USC 2601(b)(2)
\item \textsuperscript{18} 15 U.S.C. § 2604(f)
\item \textsuperscript{20} See 59 Fed. Reg. at 41029, 41030, 41033.
\end{itemize}
Additionally, the industries that still utilize asbestos will claim that a ban will mean lost jobs, but other industries that had their uses of asbestos banned managed to find a substitute and stay in business. This minor inconvenience to the industries that utilize asbestos should not override the serious health benefits that would result from a complete ban by the EPA.

**Conclusion**

Asbestos is a carcinogen that has been proven to be hazardous to human health from even minor exposure from various scientific studies. Fifty other industrialized countries have completely banned the mineral, including the United Kingdom, Australia, Canada, and the countries in the European Union. The United States has not banned all uses of asbestos, nor has it banned the importation of asbestos. The US EPA has the statutory authority to finally completely ban the use and importation of asbestos, after Congress amended TSCA to provide the EPA more authority to ban toxic substances. The Obama Administration EPA started the process of banning asbestos under the new authority, by screening asbestos as one of the first ten high priority toxic substances. The process has now stalled in the Trump Administration EPA. The EPA should continue to use the new statutory authority and finally ban the importation and use of asbestos once and for all, in the interest of public health.

Respectfully submitted,
Bonnie Johnston, Chair
ABA YLD Environment, Energy and Resources Committee
November 2018
ABA YLD RECOMMENDATION GENERAL INFORMATION FORM

Submitting Entity: ABA YLD Environment, Energy and Resources Committee

Submitted By: Bonnie Johnston

1. Summary of Recommendations
That the American Bar Association Young Lawyers Division urge the EPA to ban the importation and use of dangerous chemical asbestos under the new statutory authority granted in the updated Toxic Substances Control Act.

2. Date of Approval by Submitting Entity
Resolution approved October 20, 2018 by ABA YLD Environment, Energy and Resources Committee.

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?
No.

5. Does this recommendation require immediate action at the next Assembly? If so, why?
No.

6. Status of Legislation (if applicable)
N/A.

7. Cost to the Association
None.

8. Disclosure of Conflict of Interest (if applicable)
While I am not a victim of asbestos exposure, nor do I represent any victims of asbestos exposure, I am employed by an association that has members that have asbestos litigation cases.

9. Referrals
None at this time.

10. Contact Person (Prior to the meeting)
Bonnie Johnston
Bonnie.johnston@justice.org

11. Contact Person (at the meeting)
Bonnie Johnston
Bonnie.johnston@justice.org
Executive Summary

1. Summary of the Recommendation

The recommendation is for a resolution from the American Bar Association Young Lawyers Division urging the U.S. Environmental Protection Agency to ban the importation and use of dangerous chemical asbestos under the new statutory authority in the updated federal law, Toxic Substances Control Act.

2. Summary of the issue which the Recommendation addresses

Asbestos is a naturally occurring mineral fiber that causes serious negative health effects and death from even low levels of exposure. It is estimated that 12,000 to 15,000 Americans die every year from exposure. Additionally, the Occupational Safety and Health Administration (OSHA) estimates that hundreds of thousands of workers are exposed to asbestos from friction products in auto repair shops, over a million construction workers may be exposed to asbestos when existing buildings are renovated or demolished, and thousands of custodial workers may encounter asbestos fibers while they clean commercial buildings. Asbestos is not completely banned in the United States, even though it is banned in fifty other countries including the United Kingdom, Australia, Canada, and the countries of the European Union.

3. Explanation of how the proposed policy position will address the issue

While the EPA promulgated a rule to completely ban asbestos importation and use in the United States in 1989, most of the rule was discarded by a ruling from the Fifth Circuit. Congress has since updated the law giving the EPA more discretion to ban hazardous chemicals. The Obama Administration EPA started the process of banning asbestos under the new authority, by screening asbestos as one of the first ten high priority toxic substances. The process has now stalled in the Trump Administration EPA. If the EPA were to continue to use the new statutory authority to ban asbestos, all of the negative health effects for thousands of workers would be greatly decreased. In addition, the lives of future Americans could be saved, with the possibility of asbestos exposure being eliminated.

4. Summary of any minority views or opposition which has been identified

The industries that still utilize asbestos would like to continue to do so, therefore these industries would oppose any ban on asbestos, even though the negative health effects are well documented. These industries will claim that a ban will mean lost jobs, but other industries that had their uses of asbestos banned managed to find a substitute and stay in business. This minor inconvenience to the industries that utilize asbestos should not override the serious health benefits that would result from a complete ban by the EPA.
AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION

RECOMMENDATION AND REPORT TO THE ASSEMBLY OF THE YOUNG LAWYERS DIVISION

RECOMMENDATION

RESOLVED that the American Bar Association urges Congress and the United States Department of Education to collect data and prepare a specialized report on: 1) how racism, poverty, and living in high crime communities psychologically impacts youth, 2) the quality of school services that are provided to youth experiencing mental health problems as a result of these stressors, and 3) the quality of in-school mental health supports offered in high poverty communities.

FURTHER RESOLVED that the American Bar Association urges Congress to appropriate funds to in-school mental health services based upon its research and findings. The funding should support the recruitment and training of school staff and mental and behavioral health professionals, including psychologist, to identify and address mental health conditions related to racism, poverty, and living in high crime communities.

FURTHER RESOLVED that the American Bar Association urges local governments, school districts, boards, and commissions to review and/or encourage school districts to review mental health policies and practices to ensure that the mental health needs of youth living in high poverty or high crime communities or experiencing race-based mental health illness are appropriately addressed.
I. Introduction

The purpose of this resolution is to ensure that children who live in poverty, high crime communities, or experience race based trauma, or related stress, receive the supports to maintain or restore good health. Good mental health helps to ensure that children achieve academic success and become productive members of society. Currently, schools service about 70 percent of all children who receive mental health services, and it is imperative that these services benefit our most vulnerable population—this includes children and youth dealing with the implications of systemic racism, personal discrimination, and/or neighborhood violence. To adequately address these needs, the American Bar Association urges Congress to collect data and prepare a specialized report that discusses how mental health is affected by racism, poverty, and/or living in high crime communities. The American Bar Association also seeks the appropriation of funds to support mental health services based upon the federal government’s findings. The funding should support hiring of mental health professionals that are trained in race based trauma, as well as training school staff to identify and properly address this type of trauma. This may also require implicit bias trainings for school staff and mental health professionals working with this particular population. Finally, this resolution encourages local governments, and school districts to review and update and/or encourage the review and update of mental health policies and practices as it relates to identifying or treating these types mental health problems.

II. Racism, Poverty, or Living in High Crime Communities Can Greatly Impact the Lives of Children and Youth

Racism is the power of one group to carry out systemic discrimination through institutional policies, while also shaping cultural beliefs and values that support these practices. These discriminatory policies and practices have created inequalities in several areas of life for racial minorities. In the United States many racial minority children live below the federal poverty line, thirty-three percent of Black or African American children, thirty-three percent of American Indian children, twenty-six percent of Hispanic or Latino children, eleven percent of white children, and nineteen percent of two or more races. “Poverty, segregation, and inequality are related to neighborhoods access to resources and ability to solve problems, including

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1 Dismantling Racism Works Web Workbook, (last updated July 2018), http://www.dismantlingracism.org/racism-defined.html. This definition is based in critical race theory, which is a broad social scientific approach to the study of race, racism, and society. “Central to critical race theory is that racism is much more than individual prejudice and bigotry; rather, racism is a systemic feature of social structure.” https://globalsocialtheory.org/topics/critical-race-theory/.
problems that foster crime.” 3 Regarding crime victimization in poor communities, research shows that people living below the federal poverty level had more than double the rate of violent victimization as people in high-income households. 4 Specifically for Black children, they are more likely to be victims of child abuse/neglect, robbery, and homicide. 5 In fact, homicide is the leading cause of death among Black males between the age of 15 to 34; 6 it is the second leading cause of death for Black females between the ages of 1-4, and 15-24. 7 Further, studies show Black and Brown children and youth witness crimes/violent crimes at a high rate. In a study involving seven year old children who lived in the inner-city, 75 percent reported having heard gunshots, 60 percent had seen drug deals, 18 percent had seen a dead body outside, and 10 percent had seen a shooting or stabbing at home. 8 In another study cited by the National Center for Victims of Crime, involving participants living in Chicago, approximately 25 percent of Black children reported witnessing a person shot and 29 percent indicated that they had seen a stabbing. 9

Black and Brown youth are also more likely to have negative encounters with the police that lead to arrest, charges, and confinement. African American youth are 4.1 times as likely to be committed to secure placements as whites, American Indians are 3.1 times as likely, and Hispanics are 1.5 times as likely. Although levels of youth confinement have significantly declined in recent years, the racial gap between black and American Indian compared to white youth has increased. 10 In 2016 Black youth accounted for 15 percent of all U.S. children, yet made up 35 percent of juvenile arrests in that year. 11 In the school setting, during the 2011-12 school year, Black student arrests and referrals to law enforcement was 31 percent, although they

7 Id.
10 Id.
made up 16 percent of all enrolled children. For the 2009-2010 school year, Black and Hispanic students represented more than 70 percent of in-school arrests or police referrals. In addition, as a result of high incarceration rates among African American and Hispanic adults, Black and Hispanic children are also more likely than white children to have a parent in prison. Among adults, African Americans and Latinos make up 57 percent of the U.S. prison population, yet they comprise 29 percent of the U.S. population.

In addition to these hardships faced by racial minorities, many children of color also experience personal discrimination as a result of their race or ethnicity. In a study analyzing data from a 2004–06 study of 5,147 fifth-graders and their parents, 20 percent of Black students, 15 percent of Hispanic students, 16 percent of students that were classified as “other”, and 7 percent of white students surveyed reported experiencing discrimination. More than half of these racial encounters were reported to have occurred at school. In addition, children who reported experiencing discrimination were more likely to have one or more of the following mental health disorders: depression, attention-deficit hyperactivity disorder, oppositional defiant disorder and conduct disorder.

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14 https://www.sentencingproject.org/publications/un-report-on-racial-disparities/

15 Regarding African American adults, 51 percent reported personally experiencing racial slurs, 52 percent reported people making negative assumptions or insensitive or offensive comments about their race—40 percent said people have acted afraid of them because of their race, and 42 percent have experienced racial violence. Discrimination in America: Experiences And Views of African Americans, NPR Robert Wood Johnson Foundation, (October 2017), https://www.npr.org/assets/img/2017/10/23/discriminationpoll-african-americans.pdf.


17 Amy Albin, “Mental Health Problems More Common in In Kids Who Feel Racial Discrimination,” UCLA Newsroom, (April 2009), http://newsroom.ucla.edu/releases/children-who-feel-racial-discrimination-89333. According to the U.S. Department of Education Office for Civil Rights, disparities in school suspension rates between white students and students of color are seen as young as pre-school. Although studies fail to show that Black students misbehave at higher rates than white students, Black students are three times more likely to be suspended or expelled.

18 Id.
Overall, racism can manifest itself in many areas of a child’s life. Given the magnitude of these issues it is imperative that governments and stakeholders fully appreciate the potential psychological effects. This resolution simply calls for Congress to take the charge in researching these issues further.

III. Schools Must Be Equipped to Handle Mental Health Problems Induced by Racism, Poverty, and High Crime Communities

“Traumatic events that occur as a result of witnessing or experiencing racism, discrimination, or structural prejudice (also known as institutional racism) can have a profound impact on the mental health of individuals exposed to these events.”19 Racial trauma or race-based traumatic stress, is the stressful impact or emotional pain as a result of experiencing racism and discrimination.20 Common traumatic stress reactions reflecting racial trauma include “increased vigilance and suspicion, increased sensitivity to threat, sense of a foreshortened future, and more maladaptive responses to stress such as aggression or substance use”.21 In addition, research shows for children and youth experiencing racism there was an increase in Attention Deficit Hyperactivity Disorder (by 3.2 percent), regardless of socioeconomic background, as well as anxiety and depression. Exposure to multiple traumatic events worsen traumatic stress reactions. This is particularly concerning for youth in low-income urban communities where there is increased risk for community violence and victimization. Notwithstanding these facts, research shows Hispanics and African Americans have less access to mental health services, and the services that they do receive are more likely of poorer quality.22

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21 Id.

According to “Children’s Mental Health Needs, Disparities and School-Based Services: A Fact Sheet,” on average, only one-fourth of all children in need of mental health care receive mental health services. Roughly 70 - 80 percent of children receiving mental health services, receive those services in a school setting. Nevertheless, research suggest that the response to Black and Hispanic children exhibiting mental health symptoms, which can include behavioral problems, is often school punishment. Black middle and high school students are over three times more likely to attend a school with more security staff than mental health personnel, with 4.2 percent of white students and 13.1 percent of black students attending such schools. Among high schools where more than 75 percent of students were black and Hispanic, 51 percent had a law enforcement officer. Latinos were 1.4 times more likely than whites to attend a school without a school counselor, but with a law enforcement officer.

Moreover, racism and high exposure to crime and violence can be psychologically damaging. Additional research is needed to fully understand the short and long terms effects these stressors can have on the lives of children and youth. Nevertheless, the research that has been done provides evidence that additional supports and services are needed in schools to support students in these areas. Consequently, this resolution calls for Congress to appropriate sufficient funding and resources to address these needs.

IV. Conclusion

In conclusion, The American Bar Association can and should urge stakeholders to do everything possible to ensure that these issues are thoroughly researched, and that children experiencing mental health problems due to racism, poverty, or high exposure to crime and community violence receive the in-school supports that they need.

Respectfully submitted,

Melissa A. Little
YLD Delegate

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24 Kristen Harper, Et Al., Compared to majority white schools, majority black schools are more likely to have security staff (April 2018), https://www.childtrends.org/compared-to-majority-white-schools-majority-black-schools-are-more-likely-to-have-security-staff.
ABA YLD RECOMMENDATION
GENERAL INFORMATION FORM

Submitting Entity: Melissa Little

Submitted By: Melissa A. Little
Commission on Youth at Risk YLD Liaison
mlittle@bklawva.com

1. Summary of Recommendation

This recommendation seeks to ensure that children who live in poverty, high crime communities, or experience race based trauma, or related stress, receive the in-school service supports needed to maintain or restore good health. It further seeks funding for the recruitment and training of school staff and mental and behavioral health professionals, including psychologist, to identify and address mental health conditions related to racism, poverty, and living in high crime communities.

2. Date of Approval by Submitting Entity

November 15, 2018

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?

N/A

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

Not at this time.

6. Status of Legislation (if applicable)

N/A

7. Cost to the Association

None.

8. Disclosure of Conflict of Interest (if applicable)
9. **Referrals**

This recommendation and report will be referred to the following entities with a request for co-sponsorship from WIPC:

- YLD Children and the Law
- YLD Health Law
- YLD Section of Civil Rights and Social Justice
- ABA Center on Children and the Law
- ABA Section of Civil Rights and Social Justice
- ABA Commission on Disability Rights
- ABA Commission on Homelessness and Poverty
- ABA Criminal Justice Section
- ABA Commission on Youth at Risk

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

   Melissa A. Little  
   ABA YLD Liaison – Commission on Youth At Risk  
   [mlittle@bklawva.com](mailto:mlittle@bklawva.com)  
   (716) 983-8750

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

   Melissa A. Little  
   ABA YLD Liaison – Commission on Youth At Risk  
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   (716) 983-8750
AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION

ABA YLD CIVIL RIGHTS AND SOCIAL COMMITTEE

RECOMMENDATION AND REPORT TO THE
ASSEMBLY OF THE YOUNG LAWYERS DIVISION

RECOMMENDATION

1. RESOLVED, that the American Bar Association Young Lawyers Division urges federal, state, local, tribal, and territorial courts to modify the doctrine of qualified immunity as it applies to shootings by police officers and police officer use of force.

2. FURTHER RESOLVED, that the American Bar Association Young Lawyers Division urges federal, state, local, tribal, and territorial legislatures to adopt laws that require specific due process considerations regarding the doctrine of qualified immunity as applied in the context of shootings by police officers and police officer use of force.

3. FURTHER RESOLVED, that the American Bar Association Young Lawyers Division urges courts and legislatures to bar disposition, by way of a defendant’s motion to dismiss or motion for summary judgment, cases involving police officer use of force and the doctrine of qualified immunity prior to trial.
REPORT

As of October 1st, there have been 841 fatal shootings by police in 2018.¹ From 2015 to 2017, law-enforcement officers fatally shot an average of nearly a thousand Americans each year.² “[A]mong the thousands of fatal shootings at the hands of police since 2005, only 54 officers have been [criminally] charged.”³ Twenty-one of those officers—almost half—were not convicted. Id. In each of these cases should civil, rather than criminal, litigation follow, the defendant-officer will most probably invoke the doctrine of qualified immunity as an affirmative defense. As currently applied, the doctrine shields the invoking officer from civil liability for the injuries, up to and including death, of the individual(s) harmed.

In a recent decision, Kisela v. Hughes, the Supreme Court made clear the trend in the law to all but immunize officers entirely when an injured person claims the officer used excessive force.⁴ Following a 911 call from a neighbor that a woman was cutting a tree with a kitchen knife (Plaintiff Hughes), three officers (one of them Defendant Kisela) responded to find a woman emerging from a house with a knife at her side. Officers saw another woman (Hughes’ roommate) in the driveway of that house. A locked gate separated officers from the two women. The second woman said to Hughes and the officers: “take it easy.” However, Hughes, while appearing calm, ignored officers’ two commands to drop the knife. In less than a minute from the time the officers saw Hughes, one of the officers, Kisela, fired shots at her.⁵

As was subsequently revealed, Hughes and the second woman were roommates, Hughes had a history of mental illness, the two were in a disagreement over a $20 debt owed to Hughes, and the roommate had gone to her car to get the $20 for Hughes. Ultimately, finding that all three officers perceived Hughes to be a threat to her roommate, the Court ruled in favor of Defendant Kisela on the basis of qualified immunity. Despite the officers’ perceived threat, the roommate submitted an affidavit for consideration on summary judgment stating “that she did not feel endangered at any time.”⁶

The purpose of this resolution is to change the application of the qualified immunity doctrine in these cases. The objective of this resolution is to urge courts and legislatures

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¹ Fatal Force Washington Post Database, available at https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?noredirect=on&utm_term=.002f7bcc7711 (last visited November 14, 2018). While this is the number of fatal police shootings tracked by the Washington Post, it is possible that the actual number is greater as, especially until recent years, not much data was collected in this area.
² Id.
⁵ Kisela, 138 S.Ct. at 1150-51.
⁶ Kisela, 138 S.Ct. at 1150-55.
to consider the specific due process rights of persons bringing these claims, and to ultimately abolish disposition of these cases prior to trial by way of defense motions. The reasons for this objective, as discussed *infra*, advocate for the importance of trials on the merits of these claims, in which police officers—and the agencies that employ them—should more critically consider officer use of force and training regarding use of force.

**BACKGROUND**

1. Police Officer Use of Force and the Doctrine of Qualified Immunity

The proposed resolution targets a specific type of case, often sharing a similar factual and procedural background: an officer is involved in the use of force, which may rise to lethal force, that results in substantial harm and/or the death of the individual upon whom the force was exerted. The individual harmed, or a representative on his or her behalf, subsequently brings a civil suit, whether solely against or also including a claim against the officer as an individual for personal liability. These suits typically include a claim for excessive force under 42 U.S.C. § 1983. The *Kisela* case discussed above serves as a good example for why the doctrine as currently applied is unfair.


Because of the lack of oversight and alternatives to ensure police and others who are involved in misconduct are held accountable, Section 1983 provides a viable option to remedy the qualified immunity exception. Section 1983 provides a basis for bringing a claim that makes it unlawful for any person acting under color of law to deprive another of “any rights, privileges, or immunities secured by the Constitution and laws. . .”

Under Section 1983, civil rights lawyers are bringing lawsuits against police alleging excessive use of force in violation of the Fourth Amendment of the United States Constitution, and state analogues. Courts are therefore tasked with assessing whether the force exerted was excessive. The accepted standard for such review is whether the person harmed “pose[d] a threat of serious physical harm, either to the officer or to others.” Of course, practically the perception of such threat is subjective in nature, and the people considered most qualified to determine whether a threat was posed are the responding police officers.

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7 See e.g., *Estate of Williams v. Ind. State Police*, 2014 WL 2604673 (S.D. Ind. 2014); *Alford v. Cumberland County*, 2007 U.S. App. LEXIS 24138 (4th Cir. 2007); *Raiche v. Pietroski*, 623 F.3d 30 (1st Cir. 2010); *Thomson v. Salt Lake County*, 584 F.3d 1304 (10th Cir. 2009).

8 There are frequently no internal consequences for alleged misconduct by police. For example, in Chicago in 2015, more than 99 percent of thousands of police misconduct complaints filed failed to result in any discipline against the officer. See, e.g., Timothy Williams, *Chicago Rarely Penalizes Officers for Complaints, Data Shows*, N.Y. Times (Nov. 18, 2015).


Of public concern in this area are incidents of police officer use of force against minority groups, such as individuals with mental illness and people of color. In cases involving persons in a mental health crisis, police may be responding to calls for medical assistance. In these cases, use of force can occur when the individual in the mental health crisis does not respond well to officer commands and show of authority.\(^{11}\) Another area of growing concern has been officer use of force against people of color.\(^{12}\)

### B. Qualified Immunity—a Court-Made Doctrine

The doctrine of qualified immunity protects police officers (and other state actors) from civil liability where their conduct does not violate clearly established rights that a reasonable person would know and where it was objectively reasonable for the officer (or state actor) to believe his or her acts were lawful. The focus on this inquiry, therefore, is whether the person charged with violating another’s rights was on notice that the alleged conduct was unlawful. The reasonableness of the invoking party’s conduct rests upon the state of the law at the time the alleged conduct occurred.\(^{13}\) Due to the volume of cases in particular areas of the law and/or clarity by courts in some of these areas, there are cases where the doctrine clearly does not apply.\(^{14}\) However, other areas remain open for greater interpretation—particularly in the area of officer use of force and reasonableness in the use of force exerted.

### II. Qualified Immunity as Applied in Police Shootings

The proposed resolution is limited to advocating for reconsideration of the doctrine only in cases involving police officer use of force. Both the claim alleging excessive use of force and the qualified immunity defense involve a reasonableness inquiry. Therefore,


\(^{13}\) See Kisela, 138 S.Ct. at 1152.

\(^{14}\) See e.g., *Jones v. Lopez*, 262 F. Supp. 2d 701, 720 n. 6 (W.D. Tex. 2001)(holding that defendant sheriff did not sufficiently demonstrated that he was entitled to qualified immunity by his own statement that his alleged actions were reasonable where plaintiff held in custody well beyond length of sentence without any legal justification); *Crocker v. Beatty*, 886 F.3d 1132, 1137-38 (11th Cir. 2018)(officer not entitled to qualified immunity were he violated a person’s Fourth Amendment rights against unreasonable search and seizures, because the right and exception the officer tried to invoke were clearly established at the time).
defendant-officers are able to claim, based on their training and experience, that their conduct was reasonable in the circumstances presented. The challenge for plaintiffs in these cases, then, is to dispute whether the force exerted was warranted and therefore whether doing so was reasonable. Understandably, it is difficult for a non-law enforcement individual to challenge the officer’s assertion of reasonableness. As a result, many cases are disposed of prior to trial upon the known undisputed facts (which may be very limited) and the defense’s position that such conduct was reasonable and conformed with the state of the law at the time.

III. Pre-trial Disposition of these Cases

When qualified immunity is invoked at the motion to dismiss stage of litigation, a “more stringent standard” applies in analyzing whether the claim must be dismissed. At this stage, the facts supporting the qualified immunity defense must appear in the complaint. Therefore, moving defendants argue that dismissal is warranted because the plaintiff pleaded facts supporting their defense. They are also alleging, in defense, that there are no set of facts, from the complaint, that may ultimately support the plaintiff’s claim.15

As it relates to summary judgment, the Kisela decision illustrates the challenges a plaintiff faces in arguing against qualified immunity. The Court concluded that because use of force claims are highly fact-intensive, officers are shielded by qualified immunity unless there is existing precedent directly covering the facts at issue.16 Under this analysis, it is nearly impossible to imagine a situation where two cases will be so factually similar (and the former resulting in a denial of qualified immunity to the moving officer in a civil suit) as to deny a police officer protection from civil suit under the doctrine of qualified immunity in the latter case.

Interestingly, as noted by the dissent in Kisela v. Hughes, on a motion for summary judgment, the central facts must be considered in the light most favorable to the non-moving party.17 Additionally in Kisela, the majority largely considered Defendant Kisela’s own subjective, though factually false, assumption that Hughes was a threat to her roommate to justify his use of force.18 Effectively this means that despite the summary judgment standard19, so long as a factually identical precedent hasn’t put the invoking officer on notice that his or her conduct would be unlawful, and in the face of the plaintiff’s claim that the use of force was excessive and unreasonable, the officer would remain immune from civil suit.

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15 See McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004).
16 Kisela, 138 S.Ct. at 1153.
17 See id. at 1155.
18 See id. at 1153-54.
19 Fed. R. Civ. P. 56(a)(“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).
The proposed resolution acknowledges that the issue of qualified immunity is typically intended to be resolved during the early stages of litigation. However, resolution of these cases prior to trial is an impractical—and unsatisfactory—disposition when officer use of force is involved. This is particularly true given that an adverse decision on the issue of qualified immunity may be subject to interlocutory appeal, despite not reaching final judgment, by the invoking officer. This puts plaintiffs in a position of overcoming the issue of qualified immunity both at the trial and appellate level prior to their claims being heard on the merits.

IV. The Court’s Role

Based on the above, courts are left conducting highly fact-intensive analysis without a trial on the merits of a claim. When raised at the motion to dismiss stage, the court is left to face only the four corners of the complaint and conclude from the plaintiff’s allegations whether the defendant’s affirmative defense has been established. At summary judgment, the court may be faced with little more evidence than the deposition testimony of the defendant-officer. The proposed resolution seeks to shift this burden from the court at the pre-trial stages of these cases and instead advocate for trials where a jury can hear and weigh the evidence and its credibility. As “lawsuits can serve as ‘a valuable source of information about police misconduct claims,’” courts play a significant role in shaping policy around claims of police misconduct—especially if the message is to shield police from personal civil liability.

V. The Legislature’s Role

While qualified immunity is a product of the judiciary, legislatures could weigh in on how statutes relied upon by plaintiffs in these types of cases should be interpreted. For example, advocacy against application of qualified immunity at the pre-trial stages of litigation could affect legislation around this issue. In fact, litigants may be less likely to pursue these claims absent a change in the law. Further, legislatures could adopt laws specifically addressing qualified immunity in this context.

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22 See Fed.R.Civ.P. 26 (b)(6); McKenna, 386 F.3d at 436.
24 See Alexander A. Reinert, Does Qualified Immunity Matter?, 8 U. St. Thomas L.J. 477, 492 (2011)(in a recent survey of several dozen civil-rights litigators, “[n]early every respondent, regardless of the breadth of her experience, confirmed that concerns about the qualified immunity defense play a substantial role at the screening stage.”).
REASONS IN FAVOR OF THE PROPOSED RESOLUTION

Courts and legislatures need to be educated about why cases involving officer use of force are different than other claims wherein defendants invoke the doctrine of qualified immunity. This resolution is limited to targeting cases involving police use of force because these cases are different on that very basis—they involve the use of force, resulting in harm, up to and including death, to or of another by a police officer.

These cases are different, and therefore require different treatment, for the following reasons:

First, police respond to scenarios in these types of cases that involve significant social justice issues. For example, police often respond to calls for medical assistance for persons experiencing mental health crises. Family, friends, and bystanders make calls for help for these individuals, and, when responding officers use force, these individuals can end up seriously injured or dead. In the *Kisela* case, the police responded to a call regarding a woman acting erratically and knew, or should have known upon arrival, that she may have been in a mental health crisis. Rather than address the situation with tactics learned from mental health training (which they may have never had), the police response escalated the situation and resulted in Hughes being shot. Another area of developing concern about police use of force is where such force is disproportionally used against people of color. In areas such as these, where the fallout of litigation against police officers could affect changes in the law and officer training and accountability, the application of this doctrine touches important areas of public concern.

Second, cases involving the doctrine of qualified immunity in this area are different simply because they involve police officers. Police officers serve the purpose of protecting the public. While it is certainly arguable that officer use of force is necessary to carry out this function, another perspective is that serious harm or death to members of the public is counterproductive to this end. Again, as was the case in *Kisela*, the officer ultimately shot and harmed a mentally ill woman. In these cases, the plaintiff faces circumstances where it is his or her word against that of the police officer as to what happened. Worse, in cases where the harmed person does not survive, the court may rely on the word of the officer alone.25 Members of the public may consider police officers inherently trustworthy—further depriving victims of excessive force justice. Opponents of the proposed resolution may rightfully point out that police officers are tasked with making split-second judgments and decisions. In fact, the doctrine of qualified immunity accounts for these considerations. However, urging courts and legislatures to modify the doctrine to more critically consider these factors does not deprive officers of the opportunity to argue them, it merely seeks to equally entitle plaintiffs to a trial on the merits of those claims; requiring a trial on these fact-intensive inquiries protects the rights of both officer and plaintiff. The proposed policy does not

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seek to challenge or discredit the important function served by the police; however, the policy does advocate for some skepticism (rather than assumption of truth and the absence of wrongdoing) and further inquiry into these situations to provide justice to those harmed and to prevent excessive use of force in future cases.

Third, and a related issue for why these cases are different where qualified immunity is applied, is that disposition prior to trial deprives the party claiming a violation of an opportunity to be heard on very serious claims. On a motion to dismiss, where the court relies solely on the plaintiff’s allegations, courts are dismissing claims challenging police use of force. Further, and perhaps more concerning, these cases are being disposed on summary judgment. At the summary judgment stage, the court may be relying on deposition testimony. To rule in favor of an officer-defendant in these cases, the court is weighing the credibility of that officer’s recitation of the facts to determine what is reasonable. In Kisela, the shot and injured plaintiff had to extensively litigate the issue of qualified immunity, while never getting to confront the officer that shot her in court. Further, the Court considered Kisela’s perception that Hughes was a threat to her roommate and the short period of time in which he had to make a decision in immunizing him from suit without trial. While a court is certainly able to make a determination of reasonableness, the proposed policy advocates for challenging officer credibility, rather than assuming truthfulness, and requiring trials for a fair assessment of credibility and reasonableness by a group of individuals after being able to consider all of the evidence and testimony of the parties. Pre-trial disposition also deprives the harmed plaintiff, or a representative on his or her behalf where death results, the opportunity to be heard at trial. The failure to get these cases to trial, and to instead dispose of them on motions practice by counsel, deprives justice to the lives of the individuals harmed and/or killed and that of their loved ones. It also never puts the officer using force in a position to defend those actions. The proposed resolution aims to modify the law so that it may reshape the way police officers are trained and perform their duties.

The current message to police officers on the issue of qualified immunity appears to be that it applies as a blanket shield26, justifying harm to, or the death of, another human being. A more critical analysis of this doctrine when invoked by an officer alleged to have used excessive force may encourage closer consideration by officers of their actions, and hopefully of their superiors of their training. There are certainly occasions when officer use of force is justified in carrying out the function of their job. However, shielding all use of force sends a message that current practices suffice. Closer analysis and criticism may encourage police departments to train officers to deescalate, to properly confront the mentally ill, and to perhaps consider the role of implicit bias in their decision-making processes in situations rising to the level of use of force.

26 See Kisela, 138 S. Ct. at 1155 (J. Sotomayor, dissenting)(“In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield.”).
SUMMARY

Qualified immunity needs to be reconsidered in the context of officer use of force. As currently applied, the doctrine entirely shields police officers from liability for injuries (that may result in death) of another. Many of these cases are disposed of at the pre-trial motions stage of litigation—depriving litigants of an opportunity to be heard and relinquishing the involved officer(s) from having to defend their conduct in any meaningful way. The recommended resolution is a vehicle by which the Young Lawyers Division can advocate for change in an area of law clearly on a slippery slope that all but immunizes any officer exerting force and defeats the basis upon which litigants bring these claims.

Respectfully submitted,

Date: November 15, 2018
Kasey A. Emmons, Chair
ABA YLD Civil Rights and Social Justice Committee
GENERAL INFORMATION FORM

1. Summary of Resolution.

The ABA YLD Civil Rights and Social Justice Committee urges the Young Lawyers Division to adopt a resolution that (1) urges federal, state, local, tribal, and territorial courts to modify the doctrine of qualified immunity as it applies to shootings by police officers and police officer use of force, (2) urges federal, state, local, tribal, and territorial legislatures to adopt laws that require specific due process considerations regarding the doctrine of qualified immunity as applied in the context of shootings by police officers and police officer use of force, and (3) urges courts and legislatures to bar disposition, by way of a defendant’s motion to dismiss or motion for summary judgment, cases involving police officer use of force and the doctrine of qualified immunity prior to trial.

2. Approval by Submitting Entity.

November 15, 2018

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

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

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

N/A


N/A

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

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

None.

None.

10. Referrals:

To be referred to the following committees and ABA entities:

- ABA Section of Civil Rights and Social Justice
- ABA Criminal Justice Section
- YLD Criminal Justice Committee

11. Contact Name and Address Information.

Kasey Emmons, Chair
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12. Contact Person (Who will present the report to the Executive Council and/or Assembly):

Kasey Emmons, Chair
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EXECUTIVE SUMMARY

1. Summary of Resolution.

The ABA YLD Civil Rights and Social Justice Committee urges the Young Lawyers Division to adopt a resolution that (1) urges federal, state, local, tribal, and territorial courts to modify the doctrine of qualified immunity as it applies to shootings by police officers and police officer use of force, (2) urges federal, state, local, tribal, and territorial legislatures to adopt laws that require specific due process considerations regarding the doctrine of qualified immunity as applied in the context of shootings by police officers and police officer use of force, and (3) urges courts and legislatures to bar disposition, by way of a defendant’s motion to dismiss or motion for summary judgment, cases involving police officer use of force and the doctrine of qualified immunity prior to trial.

2. Summary of the issue which the Resolution addresses.

Generally, the doctrine of qualified immunity, federally, entitles a police officer to qualified immunity from suit where his or her conduct does not violate clearly established rights that a reasonable person would know and where it was objectively reasonable for the officer to believe his or her acts were lawful.

As the doctrine turns on reasonableness, it currently is becoming a complete shield for police to protect themselves by saying that what they did was reasonable. In so doing, officer actions become self-justified and excused. In cases where an officer shoots and kills an individual, the only person to often tell that story is the police officer. These cases therefore become credibility determinations where there’s no evidence to refute the officer’s version.

This resolution would push for courts and legislatures to rethink the practicability of this doctrine as applied in these narrow—yet very significant—circumstances. The resolution advocates for barring disposition of these cases during pre-trial stages of litigation (dismissal, summary judgment) on the basis of the officer’s invocation of qualified immunity.

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

Where it appears the trend in courts in applying the doctrine of qualified immunity in these cases is to shield officers entirely from liability when a claim of excessive force is brought, the proposed resolution will advocate for lawyers to urge courts to reconsider this approach on the basis that these cases are different than a typical case where qualified immunity may be raised.

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

None identified.
RECOMMENDATION AND REPORT TO THE ASSEMBLY OF THE YOUNG LAWYERS DIVISION

RECOMMENDATION

RESOLVED, that the American Bar Association believes that lawyers’ compliance with their ethical obligations is paramount to the integrity of the legal profession; and

FURTHER RESOLVED: that the American Bar Association urges state supreme courts to study and adopt proactive management-based regulatory programs appropriate for their jurisdiction to assist lawyers and law firms in the development and maintenance of ethical infrastructures that help to prevent violations of the applicable rules of professional conduct and complaints to lawyer disciplinary authorities, and to enhance lawyers’ provision of competent and cost-effective legal services.
REPORT

“Ethics is knowing the difference between what you have a right to do and what is right to do.”

-Potter Stewart

Proactive Management-Based Regulation

The YLD Ethics & Professionalism Committee seeks the Assembly’s adoption of this Resolution supporting state supreme court study and adoption of jurisdictionally appropriate Proactive Management-Based Regulatory (“PMBR”) programs. PMBR generally refers to regulatory programs that, in a systemic way, seek to assist lawyers and law firms develop ethical infrastructures to improve the delivery of legal services and help prevent misconduct and malpractice and the resulting need for involvement with the lawyer disciplinary process. PMBR is different than other components of the lawyer regulatory system that are proactive in nature, including Central Intake, random audits of trust accounts, fee arbitration, ethics schools or law practice management assistance programs. While all of these things are done by regulators and the bar to help lawyers stay out of trouble—to, as Professor Laurel Terry says in her article, help “prevent problematic behavior”—they are more ad hoc in nature.

PMBR programs are holistic and systematic. They are about changing the relationship between the regulator and regulated, while also helping clients and the public maintain productive relationships with their counsel. Generally, in the U.S. the regulator is viewed as an “opponent” of the regulated. Hearing from the regulator is not viewed as something positive. With PMBR, the regulator and regulated have a different relationship – one where they work together to help the lawyer come into compliance with the PMBR program. In the PMBR framework, noncompliance will not be met with an immediate leap to discipline. Information shared between the regulator and regulated, as part of the PMBR process, should not be used by the disciplinary agency. As discussed in more detail below, it should be confidential to support the purpose of the program – that is, prevention instead of discipline. Of course, beyond preventing potential disciplinary action, PMBR works to help lawyers provide better legal services to a wide range of clients—with the end goal of reducing unhappy clients.

The principles guiding PMBR are particularly poignant to young lawyers who are tasked with learning best practices as early in their careers as possible. PMBR can assist young lawyers with learning how to practice good habits at the outset of their careers rather than rehabilitating poor habits later. PMBR programs are also helpful from a business development perspective. Because lawyers operate in a service industry, a lawyer’s reputation is the primary means by which he or she builds a book of business. PMBR programs can mitigate potential problems with office policies and promote efficiency and competence in the workplace. PMBR programs can assist young lawyers with developing positive reputations with clients, the court and the

1 See ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 1B, (2007).
legal community at large.

**Current Regulation of Lawyer Conduct in the United States**

In the United States, the highest court of appellate jurisdiction in each state possesses the inherent and/or constitutional authority to regulate the legal profession. The model used across the United States disciplines lawyers after they are adjudicated to have violated a rule of professional conduct or other regulatory standard. In 2016, the United States had over 1.2 million lawyers with active licenses, and 87,487 complaints about those lawyers. Of those complaints, lawyers were publicly disciplined about 2,782 times in 2016—about 3% of the time. At the point a complaint is filed, regulation becomes reactive, rather than proactive—where clients may already be irreparably harmed.

**The Nature of Legal Practice**

Lawyers regularly face the difficult challenge of balancing standards for professional conduct while addressing the needs of clients who may have never accessed the legal system. These competing interests may also be impacted by the lawyer’s self-interested desire to live a comfortable life. Of course, many lawyers who graduate in an economy with poor job prospects may lack practical skills training after being forced to hang their own “shingle” and thus miss out on the opportunity to be mentored or supervised. This is of particular concern in the solo and small firm practice area where the statistics show that such lawyers are much more likely to have actual or alleged violations of their ethical obligations—in large part because of the lack of structure that would be found in a large firm setting.

**The Future of Lawyer Regulation**

The Standing Committee on Professional Regulation (the “Committee”), as well as the larger ABA Center for Professional Responsibility (the “Center”), have been studying PMBR developments for a number of years. Realizing the potential of PMBR to enhance lawyer practice and help prevent misconduct, the Committee began educating and energizing U.S. regulators, bar leaders and others about PMBR. Since 2015, the Committee and Center have held three one-of-a-kind PMBR Workshops and Roundtables about this subject—to help regulators and the bar better understand the developments elsewhere, the possibilities for

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5 See 2016 SOLD at Chart I – Part B (number of lawyers publicly disciplined).
6 See ABA Model Rules of Professional Conduct, Preamble and Scope ¶ 7 (2016) (“[A] lawyer is also guided by personal conscience and the approbation of professional peers.” and “Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.”).
7 See Benjamin Cowgill, Ethical Hazards of Solo and Small Firm Practice, GPSolo Magazine (Jan./Feb. 2008).
implementing PMBR programs, and to assist the Committee in developing a policy proposal to submit to the ABA House of Delegates.

The first Workshop was held in 2015 at the Colorado Supreme Court. It was cosponsored by the Colorado Supreme Court, Office of Attorney Regulation and the Maurice Deane School of Law at Hofstra University. It brought together regulators from the U.S., Canada, and Australia and provided participants with opportunities to discuss their experiences, as well as the possibilities and challenges associated with proactive regulation of lawyers and law firms. The second Workshop was held in 2016 in Philadelphia. It built on themes discussed at the first PMBR Workshop. There were jurisdictional updates, participants engaged in a moderated discussion designed to help them to identify positive aspects of PMBR and to identify specific challenges that have arisen or that may arise from various sectors of the legal profession. Participants discussed next steps to advance the explorations and implementation of PMBR and to help ensure continued collaboration and examination.

The third Workshop took place in 2017. The Chief Justice of the Illinois Supreme Court opened those proceedings with remarks about Illinois’ new PMBR program, and how the work of the Committee and Center contributed to its adoption. Attendees identified the types of mechanisms and programs that appear to best accomplish the objectives of PMBR, and explored existing self-assessment documents and their contents in depth.

The conversation continued with a 2018 Roundtable discussion that focused on the progress in Illinois and Colorado and a discussion of resourcing for those programs. Representatives from Illinois and Colorado spoke about resourcing their programs. Planning is underway for the 4th Workshop to be held in 2019, which will focus on development of a PMBR toolkit for jurisdictions to use in their study and consideration of jurisdictionally appropriate PMBR programs for adoption.

Independent of the Committee’s work, the YLD Ethics & Professionalism Committee recognized the value of PMBR programs for young lawyers as they launch and develop their practices. With the common goal of helping lawyers and law firms optimize their skills (both practice and business) and ethical infrastructures, the Committee and the YLD Ethics & Professionalism Committee began a collaboration to develop an ABA policy on PMBR. This Division Assembly Resolution is the first step in that process. Adoption of this YLD Resolution will allow the Division to co-sponsor a joint Resolution to the House of Delegates on this subject at the 2019 ABA Annual Meeting.

In addition to the outstanding work already done by the Center on this issue, the National Organization of Bar Counsel (“NOBC”), a professional association of lawyer regulators that includes international regulators, has also dedicated time and resources to encouraging PMBR. The NOBC describes proactive regulation as an approach to prevent lawyer regulatory and service problems. The NOBC observes that many U.S. jurisdictions have some proactive

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mechanisms in place, including ethics hotlines, lawyer assistance programs, law practice management courses, and other outreach. As noted above, these programs are ad hoc. Further, bar associations, malpractice insurance carriers, and others have risk management programs that assist lawyers in understanding deficiencies, but many don’t appear to tailor the conversation to a process that examines each firm’s current practice, or they fail to address the needs of firms of all sizes.

Considering that the students in a law school professional responsibility course may lack context to properly understand the rules of professional conduct, the opportunity to revisit the lesson learned in the future is beneficial. To that end, continuing to educate practicing lawyers by building upon the foundation learned in law school may be much easier, and would give those lawyers the opportunity to learn in the context of their legal area and practice type.10 While PMBR has no one-size-fits-all approach, it is the YLD Ethics & Professionalism Committee’s hope that lawyers newer and more experienced, who lack the formal structure of a large law firm, complete with training programs and mentorship, will receive similar support from the regulator. Specifically, those lawyers who may have been forced to hang their own “shingle” will have the benefit of useful skills training and mentorship, which will work to help improve legal practice.

Beyond regulator support, PMBR programs may also receive support from professional liability carriers, who may see a benefit by way of lower claims from lawyers who have had special training, audits, or guidance. These carriers may also choose to provide further incentives to lawyers to increase PMBR participation through premium rebates and discounts.

The New South Wales Approach

In 2001, the New South Wales state of Australia created a framework for Incorporated Legal Practices (“ILP”), which included both lawyer and non-lawyer partners.11 What made the New South Wales program unique was that it provided strategies to avoid pitfalls facing lawyers by proactively addressing such problems.12 The framework led to the creation of a self-assessment process to evaluate compliance with the ILP’s 10 objectives of sound legal practice during the course of a radical change in the profession (e.g., allowing law firms to be publicly traded).

The ten objectives of sound legal practice to ensure compliance with professional obligations for ILPs in New South Wales were identified as:

1. Negligence (providing for competent work practices)
2. Communication (providing for effective, timely and courteous communication)
3. Delay (providing for timely review, delivery and follow up of legal

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9 Id.
12 Id.
services)

4. **Liens/file transfers** (providing for timely resolution of document/file transfers)

5. **Cost disclosure/billing practices/termination of retainer** (providing for shared understanding and appropriate documentation on commencement and termination of retainer as well as appropriate billing practices during the retainer)

6. **Conflict of interests** (providing for timely identification and resolution of conflict of interests, including when acting for both parties or acting against previous clients as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions[., etc.])

7. **Records management** ([minimizing] the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving[,] and providing for compliance with requirements regarding registers of files, safe custody, financial interests)

8. **Undertakings** (providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the OLSC, courts, costs assessors)

9. **Supervision of practice and staff** (providing for compliance with statutory obligations covering [license] and [practicing] certificate conditions, employment of persons and providing for proper quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services)

10. **Trust account requirements** (providing for compliance with Part 4 of the Legal Profession Uniform Law and proper accounting procedures)13

The results of the New South Wales approach appear to have positive outcomes; one study found that the requirement for ILPs to implement certain management systems, along with the self-assessment, encourage the reduction of the rules to practice and dramatically lowered regulatory complaints.14

**The Adoption of PMBR in the United States**

In 2017, Illinois adopted a proactive management-based regulation program.15 In doing so, Illinois created a framework that requires lawyers without malpractice insurance to complete a

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four-hour interactive, online self-assessment regarding the operation of their law firm, which covers both ethics rules and business practices.\textsuperscript{16} Anecdotally, Illinois has had great success with participation, including by those who were not required to take the course and found it useful to obtain the four complimentary CLE credits, or simply learn about best practices.\textsuperscript{17} To allay fears of disciplinary counsel obtaining information from the self-assessment and using the data to prosecute misconduct, the Illinois Supreme Court adopted rules to ensure that “[a]ll information related to the self-assessment shall be confidential, except for the fact of completion of the self-assessment, whether the information is in the possession of the Administrator or the lawyer.”\textsuperscript{18}

In 2017, Colorado also adopted proactive management-based regulation of the legal profession with the introduction of its online self-assessment tool.\textsuperscript{19} Unlike the Illinois program, which is mandatory for lawyers without professional liability insurance, Colorado’s program is purely voluntary, highlighting how the concept of PMBR is not “one-size-fits-all.” Colorado’s program, called the Lawyer Self-Assessment program, similarly affords lawyers the opportunity to earn up to three CLE credits through 10 self-assessments. The Office of Attorney Regulation Counsel notes on their website that they do “not receive any personally-attributable answers from the program.”\textsuperscript{20} As of June 6, 2018, it was noted that over 366 lawyers had completed at least one part of the self-assessment.\textsuperscript{21}

Due to the newness of both of these programs, no formal studies exist regarding the programs’ effectiveness. However, anecdotal responses have been overwhelmingly positive, and it is clear that “issue spotting” areas of weaknesses for lawyers should be a key driver of success of these programs, and helping clients and lawyers alike.

The McKay Commission and How PMBR Is Consistent With Longstanding ABA Policy:

The ABA created the Commission on Evaluation of Disciplinary Enforcement (“McKay Commission”) in 1989 to conduct a national evaluation of lawyer disciplinary enforcement and provide a model for responsible regulation in the future. The Commission was named after its original Chair, Robert McKay, who passed away before the Commission completed its work. The Recommendations of the Commission, most of which were adopted by the House of Delegates at the February 1992 Midyear Meeting, were published as “Lawyer Regulation for a

\textsuperscript{16}Id. at 2.
\textsuperscript{17}See Matthew Hector, ARDC Reports Positive Early Reaction to Lawyer Self-Assessment, Ill. B.J., Apr. 2018, at 10.
\textsuperscript{18}Ill. Supreme Court Rule 756(e)(2) (“Neither the Administrator nor the lawyer may offer this information into evidence in a disciplinary proceeding.”)
\textsuperscript{20}Colorado Supreme Court Attorney Regulation Counsel, Lawyer Self-Assessment Program available at http://www.coloradosupremecourt.us/AboutUs/LawyerSelfAssessmentProgram.asp.
New Century.” The recommendations in the McKay Commission Report called for a broader 
system of lawyer regulation that focused on increased public service and accessibility, as well 
as the creation of programs designed to help lawyers avoid the disciplinary process. The 
recommendations contained in the McKay Report were intended to help move disciplinary 
systems away from a purely prosecutorial model by increasing programs that help lawyers 
avoid discipline problems and incidents of client harm.22

Perhaps the most significant recommendation in that respect called for the creation of 
alternatives to discipline and diversion programs. The creation of these court approved 
programs permits the disciplinary agency, after receiving and investigating a complaint about a 
lawyer, to refer the lawyer to a remedial program such as law practice management, ethics 
school, trust accounting school or another educational program.23 If the lawyer successfully 
completes the program pursuant to the contract with the regulator, then the disciplinary 
complaint is dismissed. Alternatives to discipline programs are reactive in that they are 
implemented after a complaint about a lawyer is received by the disciplinary agency. They are 
intended to be available only when a lawyer commits an act or acts of lesser misconduct that do 
not warrant formal disciplinary proceedings. But they are also in some ways proactive in that 
they help the lawyers who have received the complaints correct minor deficiencies and learn 
how to avoid future contact with the disciplinary process.

In a number of ways, the components of alternatives to discipline programs are similar to those 
in PMBR programs; it is the timing of the lawyer’s participation in the regulatory construct that 
is different. PMBR frontloads the preventive measures. PMBR programs generally, and this 
Resolution specifically, are consistent with the letter and spirit of the McKay Recommendations 
and Model Rule for Lawyer Disciplinary Enforcement 11(G), adopted by the House of 
Delegates. The study and adoption of jurisdictionally appropriate PMBR programs, whether 
voluntary or mandatory, would complement alternatives to discipline programs as well as some 
of the other more ad hoc proactive programs cited above.

*The American Bar Association’s Role in Advocating for Proactive Regulation of the Legal 
Profession*

Learning from New South Wales, Illinois, Colorado, and the extensive work already done by the 
ABA Committee and Center, the ABA YLD should promote the use of PMBR programs. While 
costs may be of concern to states with limited budgets, the benefits to the profession appear to be 
plentiful. Additionally, much of the cost of implementing such programs comes from 
developing the accompanying technology and marketing those materials to lawyers. With the 
support of the ABA YLD, and ultimately the entire ABA, legal regulators across the United 
States would be able to study and adopt jurisdictionally appropriate PMBR programs that would 
be beneficial to lawyers, the public, and regulators around the country.

22 Comm’n On Evaluation Of Disciplinary Enforcement, Am. Bar Ass’n, Lawyer Regulation For A New Century, 
23 See generally, McKay Report; see also ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 11G 
(2007).
The ABA’s mission to serve lawyers and the public by defending liberty and delivering justice as the national representative of the legal profession resonates with the role to be a leader in creating proactive standards for the legal profession. Specifically, the ABA’s Goal II encourages the promotion of: high quality legal education; competence, ethical conduct and professionalism; and pro bono and public service by the legal profession. Creating a regulatory framework for encouraging proactive compliance, through positive interactions with the regulator that focus on promoting compliance rather than punishment, will help improve the profession and create a positive culture. In turn, the regulator will be able to extend finite resources to more pressing areas, such as pro bono and public service programs.

Summary

The recommended resolution will enable the ABA YLD to help improve the legal profession by encouraging the proactive management-based regulation of lawyers. Helping lawyers avoid misconduct before facing a disciplinary complaint helps the legal industry increase compliance, helps ensure high-quality representation to the public, and frees up resources at regulatory agencies to provide other services, including pro bono resources.

Respectfully submitted,

Emil J. Ali
Chair, ABA/YLD Ethics and Professionalism Committee

Whittney A. Dunn
ABA/YLD Liaison to Center for Professional Responsibility

November 15, 2018

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25 Id.
ABA/YLD RECOMMENDATION
GENERAL INFORMATION FORM

Submitting Entity: ABA/YLD Ethics and Professionalism Committee

Submitted By: Emil Ali, Chair
ABA/YLD Ethics and Professionalism Committee
Whitney A. Dunn
ABA/YLD Liaison to Center for Professional Responsibility

1. Summary of Recommendations:

The ABA supports encouraging states and lawyer regulators to establish frameworks for proactive management-based regulation of the legal profession by assisting lawyers and law firms in understanding best practices for complying with professional conduct rules.

2. Date of Approval by Submitting Entity:

Approved October 2, 2018 by Executive Committee of the YLD Ethics and Professionalism Committee.

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

A previous iteration of this resolution was submitted in 2017, but was ultimately withdrawn in 2018.

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

The ABA Center for Professional Responsibility is the leader in developing and interpreting standards for legal ethics and professional responsibility. The ABA/YLD Ethics and Professionalism Committee believes the support of the Center for Professional Responsibility is key to creating and promoting a proactive regulatory framework.

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

While there is no immediate action required due to state or federal law, prompt consideration of the recommendation will allow improvement of the legal profession and the delivery of legal services.

6. Status of Legislation (if applicable):

None.

7. Cost to the Association:
None.

8. Disclosure of Conflict of Interest (if applicable):
None.

9. Referrals:
Referred to the following:
None.

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

I. Why Do We Need This Change?

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

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

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

Sadly, these attorneys’ experiences are not unique, nor are they exceptions to the rule. While there have been notable strides in laws around the country expanding the protections for breastfeeding mothers—indeed, all 50 states plus the District of Columbia,
Puerto Rico, and the U.S. Virgin Islands now have laws that specifically allow women to breastfeed in any public or private location\(^5\)—breastfeeding mothers still face significant barriers, harassment, or are subjected to intense questioning, when breastfeeding in public. Moreover, breastfeeding mothers who are away from their babies face additional challenges in public places in finding a clean, accessible, comfortable, and private space to pump. Many of these mothers are protected in their places of employment,\(^6\) but if their employment requires travel to outside locations—such as a courthouse—the protections do not carry over.\(^7\)

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

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

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


\(^7\) This is as opposed to the nursing mothers who are actually employed by the judicial system in the courthouses, who would presumably be covered by the aforementioned federal and state laws.


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

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

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

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

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

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

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

[18] More Than 1 in 3 Lawyers Are Women, Jennifer Cheeseman Day, UNITED STATES CENSUS
(last accessed Oct. 19, 2018).

[19] As one author put it, because of the accelerating drop in female fertility between the ages of 31-
35, the fact that the average age of a law school graduate is 27 years old, and the fact that the average
path from associate to partner in a private firm setting is 10 years, “women are biologically encouraged to
bear children at the same time that their careers require the most commitment of time and energy.” The
Horrible Conflict Between Biology and Women Attorneys, Anusia Gillespie, JD, MBA, ABA CAREER CENTER,

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


[21] See Peery, supra note 9, at 3, 10, 11.

[22] ABA Resolution 88A121, at 2 (Sponsored by Commission on Women in the Profession).

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

II. The Physiological Need for a Lactation Area

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

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

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

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

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

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

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

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

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

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

28 *Id.*
29 *Id.*
30 See *Breastfeeding State Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, supra note 5.
32 See *Breastfeeding State Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, supra note 5.
Columbia and Puerto Rico have laws related to breastfeeding in the workplace. There are very few, if any, laws or court rules that pertain to the provision of dedicated lactation areas for the public in government-owned buildings such as courthouses, however.

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

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

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

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

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

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

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34 See *Breastfeeding State Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, supra note 5.
for establishing and maintaining lactation rooms in courthouses. It even includes suggested amenities, best practices for room access and room naming, and an inventory checklist. This Handbook would be an excellent resource for other bar associations to use in working with courthouses to create and maintain the lactation areas encouraged in this resolution.

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

IV. Conclusion

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

Respectfully submitted,

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


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

1. **Summary of Resolution**

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

2. **Approval by Submitting Body**

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

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

   No.

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

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

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

   In 2002, the ABA passed Resolution 02A112, which urged all federal, state, territorial, and municipal courts to help ensure equal access to justice by making courthouses and court proceedings accessible to individuals with disabilities, including lawyers, judges, jurors, litigants, court employees, witnesses, and observers.
This Resolution is a natural extension of the policy adopted in 88A121, and aims to accomplish a goal similar in scope and spirit to those highlighted in 96A112 and 02A112. This Resolution would not otherwise affect any of these policies.

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

N/A.


N/A.

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

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

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

None.


None.

10. Referrals

Center on Children and the Law
Criminal Justice Section
Government and Public Sector Lawyers Division
Judicial Division
Law Student Division
Section of Civil Rights and Social Justice
Section of Family Law
Section of Litigation
Standing Committee on Gun Violence
Tort, Trial, and Insurance Practice Section
Conference of Chief Justices
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ABA YLD Representative to the ABA House of Delegates  
ABA YLD Immediate Past Chair  
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12. **Contact Name and Address Information.** (Who will present the Resolution with Report to the House?)

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EXECUTIVE SUMMARY

1. **Summary of Resolution.**

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

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

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

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

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

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

   No minority or opposing views have been identified.
1 RESOLVED, That the American Bar Association urges the enactment of a rule by all
2 state, local, territorial, and tribal legislative bodies or their highest courts charged with the
3 regulation of the legal profession, as well as by all federal courts, providing that a motion
4 for continuance based on parental leave of either the lead attorney or another integrally
5 involved attorney in the matter shall be granted if:
6       a) consented to by all parties
7       b) or if not consented to by all parties and the movant demonstrates:
8          i. the motion is made within a reasonable time after;
9          ii. there is no substantial prejudice to another party;
10          iii. the criminal defendant’s speedy trial rights are not prejudiced, and
11          iv. the judge finds that the request was not made in bad faith, including for
12 purposes of undue delay.
REPORT

I. Why Do We Need This Rule?

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

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

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


3 Id.

4 Id.

5 Id.


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

8 See Zaretsky, supra note 11 (quoting the court’s decision).
Left with the choice of either abandoning her client or abandoning her child, the attorney made the only reasonable decision she could think of: she attended the hearing with her newborn baby. After that hearing, the attorney filed a formal complaint against the judge, noting that when he saw her with her child in court:

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

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

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

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

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9 See Zaretsky, supra note 11.
10 See Zaretsky, supra note 11 (quoting the subject complaint).
12 See Zaretsky, supra note 12.
13 Allowing such a rebuttal permits consideration by the court of the reasonable expectation that litigation can move forward in a timely manner, and that justice will be efficiently served.
14 See supra note 6.
despite the need for parental leave simply because a continuance under this rule would not be available. This result is contradictory to the resolution’s purpose.

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

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

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

\begin{footnotes}
\footnotetext[17]{See id.}
\footnotetext[18]{Id. at 5 n.3.}
\footnotetext[19]{Id. at 5 n.3.}
\footnotetext[21]{See supra note 21.}
\end{footnotes}
the justice system by all persons." The risk of having to threaten to hand off a case after months or even years of preparation may discourage attorneys from seeking parental leave at all, or discourage female attorneys from working on significant cases.

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

II. Current Legal Framework

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

25 This is in addition to the circumstances described above. See, e.g., Survey Results: Parental Leave Continuance Rule, Anonymous, NEW HAMPSHIRE WOMEN’S BAR ASSOCIATION (Sept. 11, 2018), at https://nhwba.org/page-8689/6664848 (last visited Oct. 31, 2018) (noting experiences of women lawyers in New Hampshire).
26 Most state rules regarding continuances provide that the trial court may grant one upon motion and for good cause shown or as justice may require. See, e.g., ARK. R. CIV. P. 40 (Arkansas); KANS. STAT. § 60-240 (b) (Kansas); Mo. R. CIV. PROC. 2-508 (a) (Maryland); MASS. R. CIV. PROC. 40 (Massachusetts); Mo. R. CIV. PROC. 9.1 (c) (Missouri); N.M. R. MUN. CT. PROC. 6-506 (2) (New Mexico); OR. R. CIV. P. 52 (Oregon). The same is true for federal court, although the language is typically a bit stronger. See, e.g., D. CONN. R. 16 (“A trial ready date will not be postponed at the request of a party except to prevent manifest injustice.”).
27 See In re Amendments to the Florida Rules of Judicial Administration—Parental Leave, Case No. SC 18-1554, Docket available at http://onlinedocketssc.flcourts.org/DocketResults/CaseByYear?CaseNumber=1554&CaseYear=2018 (last visited Oct. 31, 2018). The docket contains links to the subject petition for amendment to the rules, as well as the official comments submitted to the Court for consideration.
Florida Supreme Court in late 2018 or early 2019. The Florida Bar is presently in the process of soliciting comments from all interested persons on the subject of the proposed parental-leave rule. The proposed rule, Rule 2.570, provides:

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

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

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

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

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

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

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

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28 See id.
31 See Standing Order on Continuances Based on the Birth or Adoption of a Child, https://www.justext.net/JustextDocuments/7/STANDING%20ORDER%20ON%20CONTINUANCE%20BASED%20ON%20THE%20BIRTH%20OR%20ADOPTION%20OF%20A%20CHILD.pdf (July 26, 2018).
Unless and until the proposed Florida rule is adopted, this standing order is the only authority the drafters are aware of nation-wide concerning this issue.32

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

The instances of attorneys being denied continuances based on the need for parental leave following the birth or adoption of a child shows that the ABA’s voice and opinion is necessary to lead the way on this matter. Here, the proposed rule both protects clients’ unfettered rights to counsel of their choice33 and helps give effect to the FMLA and the policies behind parental leave. It also balances courts’ and litigants’ shared interest in the efficient resolution of legal matters. There is no reason why these considerations need to be mutually exclusive.

III. Conclusion

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

Respectfully submitted,

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

32 For the reasons laid out in Section I, the FMLA does not provide the necessary protections that the rule proposed by this Resolution does.
33 See, e.g., United States v. Gonzalez-Lopez, 548 U.S. 140, 148 (2006) (“Deprivation of the [Sixth Amendment] right is ‘complete’ when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.”).
1. Summary of Resolution

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

2. Approval by Submitting Body

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

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

No.

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

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

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

N/A.


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

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

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

None.


None.

10. Referrals

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

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

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

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EXECUTIVE SUMMARY

1. **Summary of Resolution.**

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

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

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

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

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

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

   No minority or opposing views have been identified.
RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated January 2019 to Standard 316 (Bar Passage) of the ABA Standards and Rules of Procedure for Approval of Law Schools.
American Bar Association  
Section of Legal Education and Admissions to the Bar  
Revised Standards for Approval of Law Schools  
January 2019

Standard 316. BAR PASSAGE

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

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

(1) That for students who graduated from the law school within the five most recently completed calendar years:
   (i) 75 percent or more of these graduates who sat for the bar passed a bar examination; or
   (ii) In at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.

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

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

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

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

(c) A school found out of compliance under paragraph (b) and that has not been able to come into compliance within the two year period specified in Rule 13(b) of the Rules of Procedure for Approval of Law Schools, may seek to demonstrate good cause for extending the period the law school has to demonstrate compliance by submitting evidence of:
(1) The law school's trend in bar passage rates for both first-time and subsequent takers: a clear trend of improvement will be considered in the school's favor, a declining or flat trend against it.

(2) The length of time the law school's bar passage rates have been below the first-time and ultimate rates established in paragraph A: a shorter time period will be considered in the school's favor, a longer period against it.

(3) Actions by the law school to address bar passage, particularly the law school's academic rigor and the demonstrated value and effectiveness of its academic support and bar preparation programs: value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the law school's favor; ineffective or only marginally effective programs or limited action by the law school against it.

(4) Efforts by the law school to facilitate bar passage for its graduates who did not pass the bar on prior attempts: effective and sustained efforts by the law school will be considered in the school's favor; ineffective or limited efforts by the law school against it.

(5) Efforts by the law school to provide broader access to legal education while maintaining academic rigor; sustained meaningful efforts will be viewed in the law school's favor intermittent or limited efforts by the law school against it.

(6) The demonstrated likelihood that the law school's students who transfer to other ABA-approved schools will pass the bar examination; transfers by students with a strong likelihood of passing the bar will be considered in the school's favor, providing the law school has undertaken counseling and other appropriate efforts to retain its well-performing students.

(7) Temporary circumstances beyond the control of the law school, but which the law school is addressing: for example, a natural disaster that disrupts operations or a significant increase in the standard for passing the relevant bar examination(s).

(8) Other factors, consistent with a law school's demonstrated and sustained mission, which the school considers relevant in explaining its deficient bar passage results and in explaining the school's efforts to improve them.
The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence the attached changes to Standard 316 of the ABA Standards and Rules of Procedure for Approval of Law Schools.

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

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

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

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

Features of the revised Standard:

1. The requirement of an ultimate passage rate of 75 percent remains unchanged from the requirement of current Standard 316(a)(1).

2. The period of time within which a law school must show that it has achieved a 75 percent passage rate is reduced from five calendar years to two years from the date of graduation.

3. The ability of a law school to report its ultimate pass rate based on only 70 percent of its graduates is eliminated.

4. The opportunity for a law school to satisfy its obligations under Standard 316 on the basis of its bar pass rate for first-time takers is eliminated.

5. Rule 13(c) provides for an extension for good cause shown. Current Standard 316(c) is, therefore, unnecessary and redundant.

Analysis of the revisions:

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

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

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

\(^2\) Standard 301(a) – Objectives of Program of Legal Education provides: “A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar ….”
is also a sensible approach, but there are practical problems\textsuperscript{3} with requiring a law school to track graduates by attempts. The data gathered by the Section and the NCBE demonstrate that a two-year period captures almost all graduates and assesses their success on the bar exam. It is a fair and appropriate piece of a revised bar passage standard.

b. The revision strikes the previous requirement that a law school needed to report on only 70 percent of its graduating class. That requirement, in large part, reflected the difficulty that many law schools reported in gathering bar exam outcomes. The data that the Section collected from law schools for 2015 graduates shows that law schools, in the aggregate, had information for 97.5 percent of graduates.\textsuperscript{4} The data collected show that the revision is a reasonable expectation. Full reporting is appropriate and certainly presents a more accurate picture of how a law school’s graduates are doing on the bar exam.

c. A significant change in the revised Standard is the elimination of current Standard 316(a)(2), which allows a law school to comply on the basis of first-time outcomes by showing that the law school’s first-time pass rate is within 15 percentage points of the pass rate in the jurisdiction(s) where its graduates took the bar exam\textsuperscript{5} for three of the preceding five years. For example, if a state bar pass rate for a particular year is 75 percent, then a law school would comply for that year if its first-time pass rate was 60 percent. This change was subject to notice and comment and generated considerable discussion. The reasons for this change were discussed in depth when the Council adopted the revised Standard. While the Council appreciated and understood the concerns of those who opposed this change, after considering the arguments on both sides and in the exercise of its informed judgment, the Council concluded that this change was not only appropriate, but also was necessary. First-time pass rates will continue to be collected and reported as consumer information. Compliance with the revised Standard, however, will be based exclusively on the ultimate pass rate for a law school’s graduates who sat for the bar exam.

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

\textsuperscript{3} E.g., continuing to track graduates over longer periods of time, coordination of data across jurisdictions.
\textsuperscript{4} Considered on a school-by-school basis, just eight of the 203 ABA-approved law schools reported not locating more than 10 percent of that cohort. On the other hand, more than 160 law schools reported locating at least 97 percent of their 2015 graduates. In practice, the revised Standard will require a law school to make reasonable efforts to find and report on all its graduates; law schools making reasonable efforts will not be non-complaint because a small number of graduates could not be tracked.
\textsuperscript{5} A weighted average is computed for a law school based on the number of graduates sitting in a jurisdiction and that jurisdiction’s outcomes.
bar examiner offices to law schools. In effect, first-time pass rates served as a proxy for the eventual, overall success of a law school's graduates on the bar exam, which was the primary focus of the Standard. Recent experience confirms, however, that ultimate passage data, at least for the two-year period that is part of the revised Standard, can be gathered with reasonable efforts by law schools.

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

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

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

a. There was a concern that more information about how the revised Standard would impact particular law schools, specifically those in California, where the passing score (cut score) is comparatively high, and those law schools that are designated minority-serving institutions, particularly historically black colleges and universities (HBCU).

b. There was a concern that the revised Standard could have a disproportionate impact on minority students and a desire for information on that topic.

c. There was a concern law schools in California retain a "relative" standard, in light of the high cut score in California and the California Supreme Court’s unwillingness to lower it.

d. There was a concern expressed by a few law schools about a perceived burden of gathering data under the revised Standard.
e. There were concerns that the case for changing the Standard had not been made.

**Responses to the concerns:**

Since, as discussed above, the Council collected substantial data following the prior HOD’s consideration of this matter, responses to some of the concerns related to the data are discussed in the analysis of the data below. Several general points, however, can be made:

1. While some additional work is required for law schools to collect additional data, the effort is reasonable given the significance of the information. If anything, perhaps more data – more complete and more “micro” in nature – should be collected and reported as consumer information. Additionally, bar examiner offices and the NCBE are working to improve the delivery of bar exam outcomes to law schools in ways that will continue to ease the burden of the data-gathering effort.

2. The Standard aims to protect students and the public. It is consistent with the Council’s overall responsibilities. The Standard neither aims to protect law schools nor to drive them from the market.

3. Bar passage is a fundamental outcome of a legal education program. While an acceptable bar passage rate is not sufficient, standing alone, to support the accreditation of a law school, an acceptable bar passage rate should be a necessary condition for accreditation.

4. While acknowledging that some law schools have special missions that are important, no law school can be exempted from reasonable outcomes-based requirements that aim to protect students and the public.

5. It may be difficult to establish what is a minimally “acceptable” bar exam outcome standard, but that determination must be made. The Council – comprised of lawyers, judges, academics, a student, and public members – is an appropriate body with appropriate experience and professional judgment to, after study and public comment, make the decision about what an acceptable minimum pass rate should be.

6. There is no evidence to support a conclusion that law schools would use a bar pass standard as a basis for diminishing their commitment to diversity. Standards 205 and 206 remain in place to provide the Council with the opportunity and responsibility to ensure that law schools are operating in a non-discriminatory, open, and inclusive manner.
7. Available data provide no support for a concern that the revisions to Standard 316 will disproportionately impact minority students or applicants to law school. The Standards, taken together, provide significant space for law schools to admit applicants, including minority applicants, that they believe deserve an opportunity for law study. Revised Standard 316 will work in concert with Standard 501 and Interpretation 501-3 to provide this space. Interpretation 501-3 allows a law school to have up to 20 percent non-transfer attrition without concerns about violating the Standards. Revised Standard 316 requires a law school to have at least a 75 percent ultimate pass rate. The combination of these two standards creates considerable room for a law school to provide opportunity to applicants, including minority applicants, who the law school believes are deserving of that opportunity. If there are concerns that the bar examination or the scoring of the bar examination have adverse impacts on minority graduates and on diversity in the profession, those concerns are appropriately addressed to the state supreme courts and bar admissions community. One cannot be a lawyer without passing a bar exam and the Council’s responsibility as an accredditor is to ensure that students/graduates complete the J.D. program and pass the bar examination in sufficient numbers to ensure applicants, the public, and the profession that law schools are not taking undue advantage of students.

8. Rule 13(b) of the ABA Rules of Procedure for the Approval of Law Schools provides a period of up to two years for a law school to take steps to cure its non-compliance with a Standard, including Standard 316. Rule 13(c) gives the Council authority to extend that period upon request of a law school and for good cause shown. Consequently, the Council determined that the provisions in current Standard 316(c), providing for an extension of time to come into compliance, were duplicative and unnecessary.

Collection of information about ultimate bar pass rates for 2013, 2014, and 2015 graduates:

Following the HOD’s non-concurrence, the Council directed the Managing Director’s Office to gather data that would inform the Council and address concerns that the Council had not gathered enough data to ensure there were no unintended, adverse impacts that might cause the Council to change its mind about how any revisions should be crafted.

This was done in two steps. First, following the June 2017 Council meeting, the Managing Director’s Office distributed to all ABA-approved law schools a brief, voluntary ultimate bar pass survey for 2013 and 2014 graduates based on the revised Standard. The Council received a report on that survey at its October 2017 meeting.

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6 The two-year period is a function of the requirements of the U.S. Department of Education’s recognition rules for accrediting authorities, with which the Council must comply.
Second, based in part on the success of the voluntary survey, the Council approved the gathering of consumer information on bar exam outcomes under Standard 509 in the data gathering process for the 2017-2018 year that also provides data relevant to the revisions to Standard 316. That data consisted of ultimate bar pass data for the class of 2015 (bar passage outcomes for 2015 graduates over the next two years) and first-time bar pass outcomes for the 2016 and 2017 graduating classes.

Some analysis of these data is reported below. Subsequent to the collection and publication of this data, the Council and the Managing Director’s Office have widely disseminated the outcomes in order to make others aware of the data. Those educational efforts and conversations will continue up to the HOD meeting.

**Responses to the Voluntary Survey**

Ninety-two (92) law schools responded to the voluntary survey, which is approximately 45 percent of all law schools. They reported on 19,000+ graduates for 2013 and 17,000+ graduates for 2014, which was more than 40 percent of the total number of graduates for each of those years. The aggregate data and a list of law schools who provided data was made public, but the specific law school data was not released. A range of law schools participated – from large to small, east to west, public and private, and ranging from among the most to the least selective.

Eighty-nine (89) of the 92 participating law schools had ultimate pass rates for both 2013 and 2014 graduating classes greater than the 75 percent required by revised Standard 316. One law school did not have a 75 percent ultimate pass rate for either 2013 or 2014. Two other law schools did not achieve a 75 percent pass rate for one of the two years.

The aggregate ultimate pass rate for those who sat for a bar exam was 92 percent for 2013 graduates and 89 percent for 2014 graduates. Looking at California and HBCU law schools, which were the focus of discussion during the HOD discussion in February 2017, three of the six HBCU law schools participated. Two of them had ultimate pass rates above 75 percent and one did not achieve that outcome for one of the two years covered by the survey. Eleven (11) of the 21 ABA-approved law schools in California participated, and none reported ultimate pass rates for 2013 and 2014 graduates below 75 percent.

**Ultimate Bar Passage Outcomes for the Graduating Class of 2015**

In January 2018, law schools reported on ultimate bar pass outcomes for 2015 graduates for the two years after graduation. Law schools reported on as many of their 2015 graduates as they could find with reasonable efforts. In the aggregate, they reported on 97.5 percent of all graduates. In the aggregate, 97 percent of all those graduates had sat for a bar exam within the two-year period. Of that group, 88.3 percent had passed a bar examination.

Looking at the individual law school reports, 183 of the 202 law schools reported an ultimate pass rate of 75 percent or higher. Of the 19 law schools below that threshold,
one had an ultimate pass rate of 59.75 percent and seven more law schools had rates between 60 and 69 percent. The other 10 law schools that did not reach 75 percent had ultimate pass rates in the 70-74.9 percent range. Of the six HBCU law schools, four reported ultimate pass rates of 75 percent or higher and two reported ultimate pass rates below 75 percent. Of the 21 ABA-approved law schools in California, 19 reported ultimate pass rates of 75 percent or above, and two reported ultimate pass rates below 75 percent.

**First-time Bar Passage Outcomes for the Graduating Classes of 2016 and 2017**

Law schools have also reported first-time bar passage outcomes for 2016 and 2017 graduates. The first-time data is an important piece of consumer information, apart from the accreditation standard on bar passage, but it also provides data on how a law school is progressing toward meeting the 75 percent threshold.

For 2016, 106 of 202 law schools met the 75 percent threshold in the first year following graduation. For the other 96 law schools, the majority had first-time pass rates in the 65-74 percent range. The 2015 ultimate pass rate data supports the position that law schools will have sufficient repeat-takers who pass or graduates who passed and had not sat for the exam in the first year following graduation to meet or exceed the 75 percent threshold after two years. There are, however, some concerning outcomes. Twenty-one (21) law schools had first-time rates for 2016 graduates below 50 percent. Of those, one is an HBCU and six are California law schools.

For 2017, the overall picture is marginally better. One hundred twenty-two (122) of 203 law schools had first-time pass rates at or above 75 percent after one year. However, there continue to be a number of law schools (15 for 2017) with first-time pass rates below 50 percent. (See [http://www.abarequireddisclosures.org/](http://www.abarequireddisclosures.org/).)

There are 11 law schools with sub-50 percent first-time pass rates for both 2016 and 2017. One is an HBCU and 4 are California law schools.

This bar passage data is publicly available on the Section’s website in the Statistics section. (See [http://www.abarequireddisclosures.org/](http://www.abarequireddisclosures.org/).

**Summary and Conclusion:**

Bar passage is an essential component of the accreditation requirements for law schools. The Council has identified several fundamental problems with the existing Standard: lack of full reporting of outcomes, an unnecessarily long review period, and an ineffective first-time bar pass compliance option. The revised Standard addresses these problems. Going forward, law schools will have the burden of demonstrating that their programs achieve the modest outcomes required by the revised Standard. The revised Standard appropriately protects students and the public. If bar passage rates decline, the solution is not to adapt a reasonable standard to make it more likely that law schools will comply or to continue a standard that, as it is written, allows law schools with very low pass rates to avoid the concerns of the Council and the accreditation process. Rather, the solution
is for law schools, state supreme courts, the bar examiner community, and the Council to work together to determine the cause(s) of the decline and take steps to address them.

Respectfully submitted,

Jeffrey E. Lewis
Chair, Council of the Section of Legal Education and Admissions to the Bar
January 2019
1. **Summary of Resolution(s).**

   Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated January 2019 to Standard 316 (Bar Passage) of the *ABA Standards and Rules of Procedure for Approval of Law Schools.*

2. **Approval by Submitting Entity.**

   Yes. The amendments were approved by the Council for Notice and Comment during its meetings held on March 11-12, 2016, and June 3-4, 2016. A public hearing was held on August 6, 2016. The Council approved the amendments at its meeting on October 20-22, 2016. The Council reaffirmed its approval at the September 13-15, 2018 meeting.

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

   Yes. This resolution was submitted to the House of Delegates at its February 2017 meeting. The House of Delegates did not concur.

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

   The amendments modify the existing *ABA Standards and Rules of Procedure for Approval of Law Schools.*

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

   Not applicable.

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

   Not applicable.

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

The Council will notify ABA-approved law schools and other interested entities of the approved changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*. The Council and the Managing Director’s Office will prepare guidance memoranda and training materials regarding the revised Standards.

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

   Not applicable.

9. **Disclosure of Interest.** (If applicable)

   Not applicable.

10. **Referrals.**

    ABA Diversity and Inclusion Center (and related groups)
    ABA Law Student Division
    ABA Section Directors and Delegates
    ABA Standing and Special Committees, Task Forces, and Commission Chairs
    ABA Young Lawyers Division
    AccessLex Institute
    American Association of Law Libraries
    Association of American Law Schools
    Association of Legal Writing Directors
    Clinical Legal Education Association
    Conference of Chief Justices
    Conference of State Delegates
    Deans and Associate Deans of Law Schools
    Law School Admission Council
    Minority Caucus
    National Association for Law Placement
    National Association of Bar Executives
    National Caucus of State Bar Associations
    National Conference of Bar Examiners
    National Conference of Bar Presidents
    SBA Presidents
    Society of American Law Teachers
    University Presidents
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated January 2019 to Standard 316 (Bar Passage) of the ABA Standards and Rules of Procedure for Approval of Law Schools.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses Standard 316 (Bar Passage) of the ABA Standards and Rules of Procedure for Approval of Law Schools. In accordance with Internal Operating Practice 8, the Council engages in an ongoing review of the Standards.

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

The proposals amend the 2018-2019 ABA Standards and Rules of Procedure for Approval of Law Schools.

4. Summary of Minority Views

At the time of this submission, the Council has not been notified by any ABA or other entity that it is opposed to this resolution. That said, and as indicated in the Report, opposition to the change to Standard 316 when it was first considered, centered principally on the following concerns: the lack of studies on how the proposed change would affect diversity and law school curricula; the lack of data on how law schools in states with low bar passage rates would be impacted; the lack of data that two years is sufficient for graduates to take a bar exam in that there is anecdotal evidence that graduates do not take the bar in consecutive administrations; and the lack of data on how the Uniform Bar Exam will affect law schools' bar passage rates.
RESOLVED, That the American Bar Association opposes laws and policies that would authorize teachers, principals or other non-security school personnel to possess a firearm in, or on the grounds of, a pre-K through grade 12 public, parochial, or private school; and

FURTHER RESOLVED, That the American Bar Association opposes the use of government or public funds to provide firearms training to teachers, principals, or other non-security school personnel, or to purchase firearms for those individuals.
I. Introduction

Since the 1999 Columbine High School massacre, more than 215,000 students experienced gun violence at 217 schools in the United States. At least 141 children, educators, and others have been killed and another 287 have been injured.¹ The February 14, 2018 shooting at Marjory Stoneman Douglas High School in Parkland, Florida in which 17 students and staff were fatally shot and 17 others were wounded but survived, sparked renewed debate over how to prevent such tragedies.² At a February 21”listening session” with survivors and parents of victims of school shootings, President of the United States Donald Trump said he was open to all ideas on improving school safety, but spoke about only one at length—allowing teachers to carry concealed weapons.³ The following day the President embraced the National Rifle Association position that the solution to school shootings is to arm teachers.⁴ On August 31, 2018, United States Secretary of Education DeVos wrote that the Department of Education will not provide guidance as to whether federal Student Support and Academic Enrichment grants may be used by the states to provide firearms training or to purchase firearms for teachers. She stated it is up to the states to determine the use of such grants signaling the federal government will not oppose such use.⁵

II. Background

With significant exceptions,⁶ the Gun-Free School Zones Act of 1990, as amended by the Omnibus Consolidated Appropriations Act in 1997,⁷ prohibits possession of a firearm “that has moved in or otherwise affects interstate or foreign commerce”⁸ in a

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⁷ 18 U.S.C §922(q)(2)(A)
⁸ The original enactment did not contain the quoted language. It was struck down as an unconstitutional exercise of Congress’s power under the Commerce Clause. United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L Ed.2d 626 (1995)
school zone. The “public, parochial or private school” language of this Resolution is taken from the statute. One exception under the statute is for those who are licensed to conceal carry by the state in which the school is located. Because of the exceptions under federal law, prohibition of guns in school zones has largely been by the states. Almost all states have legislation that prohibits guns in school zones. Forty of those states and the District of Columbia extend the prohibition to include those who have a concealed carry permit. Two additional states allow individual schools to decide whether to extend the prohibition to include those who have a concealed carry permit.

III. Opposition to Arming Teachers

The President’s proposal to repeal or amend gun-free school zone laws to allow teachers to be armed was roundly condemned by education professionals and others. The suggestion to arm teachers met with immediate, strong opposition from the National Education Association, the American Federation of Teachers, the National Association of School Resource Officers, the National Association of Secondary School Principals, and the National Association of School Psychologists. The National Association of Elementary School Principals and the National Association of Secondary School Principals have strongly opposed arming teachers and principals since that suggestion was made following the Sandy Hook massacre in 2012. Following Sandy Hook, The School Superintendents Association adopted a position paper that advocates a comprehensive solution to school shootings and states, “We oppose efforts to bring

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9 A school zone is defined as within 1,000 feet of the grounds of a public, parochial or private school. 18 U.S.C §921(a)(25).
more guns into our schools by teachers and administrators.” Following the Marjory Stoneman Douglas shooting, the Superintendents Association sent a letter to Congressional leaders regarding an appropriations bill that noted, “We applaud the language to prohibit the use of federal funding for purchasing firearms or for firearm training of teachers.”

When it became known on August 22, 2018 that Secretary DeVos was considering allowing federal Student Support and Academic Enrichment grants to be used by states to arm teachers,19 the National Education Association,20 the American Federation of Teachers,21 the National Association of School Psychologists,22 the National Association of Secondary School Principals,23 and the National Association of Elementary School Principals24 each immediately expressed strong opposition.

IV. Prior ABA Policies on Gun Violence

For the past 50 years, the ABA has weighed in on gun violence policy. Recognizing there is no simple solution, and consistent with a public health approach to address this national crisis, these policies cover a range of topics including research, education, prevention, enforcement, and regulation.25

In 2015, the ABA issued a white paper that concludes the U.S. Supreme Court and lower courts have made clear the Second Amendment is consistent with and does not

18 Letter from Noelle Ellerson Ng, Associate Executive Director, The School Superintendents Association to Senator Mitch McConnell, Majority Leader, Senator Charles Schumer, Minority Leader, United States Senate, Representative Paul Ryan, Speaker, Representative Nancy Pelosi, Minority Leader, United States House of Representatives (Mar. 22, 2018), http://aasa.org/uploadedFiles/AASA_Blog(1)/AASAFY18OmniLetter032218.pdf
20 Press Release, NEA opposes guidelines being considered by the Department of Education, National Education Association (August 23, 2018), http://www.nea.org/home/73911.htm
24 Press Release, Use Title IV Funds for Academic Enrichment and Mental Health Services, Not Guns, National Association of Elementary School Principals (August 23, 2018), https://www.naesp.org/content/use-title-iv-funds-academic-enrichment-and-mental-health-services-not-guns
bar a broad array of sensible laws to reduce gun violence. Our nation’s courts have repeatedly found that the types of laws supported by the ABA and introduced by legislators across America do not run afoul of the Constitution.26

Also in 2015, the ABA joined with eight physician organizations in issuing a call to action.27 The call to action contains recommendations aimed at reducing the health and public health consequences of firearms. There are now 52 signatories to the call to action.28

V. An Evidence-Based, Comprehensive Solution is Required

The day following the massacre at Marjory Stoneman Douglas High School, the American Medical Association issued a press release that states in part, “Gun violence in America today is a public health crisis, one that requires a comprehensive and far-reaching solution.”29 Shortly thereafter, on behalf of the American Bar Association, then President Hilarie Bass wrote to the Senate Judiciary Committee urging it “to take swift, evidence-informed steps to curb the scourge of gun violence.”30 The letter made specific legislative recommendations. The calls by the ABA and AMA for an evidence-based, comprehensive solution is supported by recognized experts in the field of gun violence and school security.

In a thorough book edited by Daniel W. Webster, Sc.D. MPH and Jon S. Vernick, JD, MPH, both with the Center for Gun Policy and Research, Johns Hopkins Bloomberg School of Public Health, numerous recommendations are made to reduce gun violence in America.31 Arming school personnel is not one of the them. A press release issued by the T.H. Chan School of Public Health, Harvard University, quotes Dariush Mozaffarian, associate professor in the Department of Epidemiology and lead author of a study published in the Journal of the American Medical Association, as stating, “Gun violence is a public health crisis, and addressing this will require a comprehensive, multi-

27 Firearm-Related Injury and Death in the United States: A Call to Action From 8 Health Professional Organizations and the ABA (Feb. 27, 2015)
29 David O. Barbe, President, American Medical Association, Action to address gun violence is long overdue (Feb. 15, 2018), https://wire.ama-assn.org/ama-news/action-address-gun-violence-long-overdue
30 Letter from Hilarie Bass, President, American Bar Association, to The Honorable Chuck Grassley, Chairman and The Honorable Dianne Feinstein, Ranking Member, Committee on the Judiciary, United States Senate, Support for Legislative Steps to Reduce Gun Violence (Mar. 6, 2018), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/March72018SenateJudiciarygunviolence.authcheckdam.pdf
dimensional public health strategy.” Arming school personnel is not part of that strategy. The Prevention Institute itemizes a comprehensive strategy to reduce gun violence. Arming teachers is not part of that strategy. In testimony before the a subcommittee of the House Judiciary Committee, Kristin Harper, Director of Policy Development, Child Trends, a research institute known for rigorous and objective research over four decades, makes many specific recommendations for improving school security. None of the recommendations involve arming school personnel.

In the wake of the Parkland massacre, 75 national medical, health, public health, and research organizations sent a letter to House and Senate lawmakers urging them “to find a bipartisan path forward to comprehensive legislative solutions to firearm-related injuries and fatalities.” They did not recommend arming school personnel. Four days later an interdisciplinary group of experts issued a call to action to prevent gun violence. The call to action recommended a comprehensive solution citing specific actions to be taken, none of which was to arm school personnel. It was endorsed by 84 national organizations, 165 state and local organizations, and over 4,400 individuals. The National PTA has adopted a position statement with numerous itemized recommendations to reduce gun violence at schools. It does not recommend arming school personnel.


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In July 2018 the U.S. Secret Service Threat Assessment Center issued a publication with recommendations for preventing targeted school violence. It recommends specific actions for schools to take. The U.S. Secret Service does not recommend arming school personnel.

VI. Arming School Personnel is Not an Evidence-Based Solution

Available data suggests that arming teachers will increase the risk of students being shot, not reduce it. As part of research for a working paper, a diverse group of law enforcement practitioners serving the Mid-Atlantic region participated in two round-table discussion sessions held at the Division of Public Safety Leadership, School of Education, Johns Hopkins University. The law enforcement professionals concluded that a large portion of the population and policy-makers who support arming teachers make incorrect assumptions about how effective armed teachers would be in an active shooter situation. The round-table participants identified 22 factors that an armed teacher would have to assess quickly and act upon in an active shooter situation. It was noted that evidence supporting the value of arming teachers and school officials is nonexistent. They concluded that the chance of a teacher or other school official using a gun to end an active shooter situation is “remote,” and that allowing teachers to carry guns in school creates an undue risk to students and creates the potential for teachers to use a gun in situations that do not warrant lethal force. Other research has found that in 160 active

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40 The NRA and other gun rights organizations assert a contrary view. In April 2013 the NRA released a report that supports arming teachers and recommends a model state law to allow armed school personnel. Asa Hutchinson, Director, The National School Shield (Apr. 2, 2013). Former Arkansas Governor Asa Hutchinson headed the effort and claimed the authors were independent of the NRA. That assertion was widely disbelieved, even in his home state. Max Brantley, Asa Distances himself from the NRA; not easy – Asa Hutchison has gotta be kidding, Arkansas Blog, Arkansas Times (Apr. 3, 2013). It is undisputed the NRA funded the report. It is undisputed there were no education professionals among the authors. It is undisputed the major conclusions of the report were announced by the NRA before the authors began preparing the report. Eric Lichtblau & Motoko Rich, N.R.A Envisions 'a Good guy With a Gun' in Every School, New York Times (Dec. 21, 2012). The report has been severely criticized both for its false assumptions and incorrect conclusions. E.g. Gordon A. Crews, et al., The Only Thing That Stops a Guy with a Bad Policy is a Guy with a Good Policy: An Examination of the NRA’s ‘National School Shield’ Proposal, Am. J. of Criminal Justice, 38(2):183-199 (Jun. 2013). Arming teachers is an extension of the assertion that guns carried in public reduce crime. That assertion has also been discredited. E.g. Dan A. Black & Daniel S. Nagin, 27 J. of Legal Studies 209 (Jan. 1998); Ian Ayres & John J. Donohue III, Shooting Down the More Guns, Less Crime Hypothesis, 55 Stan. L. Rev. 1193 (Jan. 1, 2003). As early as 1999, the U.S. Department of Justice issued a report that recommends developing a comprehensive strategy and makes specific recommendations to reduce gun violence in America. Shay Bilchik, Administrator, Office of Juvenile Justice and Delinquency Prevention, Promising Strategies to Reduce Gun Violence (Feb. 1999). Arming citizens is not one of those strategies.
shooter incidents in other locations, there was only one successful armed civilian intervention—and the civilian in that incident was a highly trained U.S. Marine.\textsuperscript{42} Using a gun in self-defense is no more likely to reduce the chance of being injured during a crime than various other forms of protective action.\textsuperscript{43}

Among the significant risks in arming teachers, there is the risk of bystander injury being increased. Law enforcement officers are trained not only to know how to shoot, but significantly are also trained to assess quickly a situation while under stress and to know when to withhold fire.\textsuperscript{44} With shots being fired from two or more directions, the risk of a bystander being shot is increased. Despite their training, a comprehensive study of the New York City Police Department found that in a gunfight, NYPD officers hit their intended target only 18\% of the time. It also found that they engaged in “reflexive shooting” or “contagious shooting,” without assessing the need to use deadly force, upon hearing certain cues, such as the words “he’s got a gun” or upon hearing the sound of gunfire.\textsuperscript{45} Other research of police firearm discharge data confirms that in high stress situations the vast majority of shots miss the intended target.\textsuperscript{46} A recent example of bystander death is when a fugitive entered a Trader Joe’s store in the Los Angeles area. The store manager was shot and killed, not by the fugitive, but unintentionally by a police officer.\textsuperscript{47} There is no data to suggest teachers would perform any better.\textsuperscript{48}

\begin{thebibliography}{99}
\item Matthew Santoni, \textit{Arming teachers: Pros and Cons}, \textit{Tribune-Review} (Feb. 23, 2018), \url{https://triblive.com/usworld/world/13340177-74/arming-teachers-pros-and-cons}
\item Despite the data showing that in high stress situations even highly trained police officers miss the intended target the vast majority of the time creating substantial risk of bystander injury or death, the National Association of School Resource Officers estimates there are between 14,000 and 20,000 School Resource Officers employed in the United States. NASRO \textit{Frequently Asked Questions}, \url{https://nasro.org/frequently-asked-questions/} (retrieved Nov. 6, 2018). A School Resource Officer is a career law enforcement officer with sworn authority who is deployed by an employing police department or agency in a community-oriented policing assignment to work in collaboration with one or more schools. They are usually armed. \textit{Id}. The use of police officers in schools has negative consequences and is less effective at reducing school shootings than other means. See e.g. Amanda Petteruti, \textit{Education Under Arrest: The Case Against Police in Schools}, Justice Policy Institute (Nov. 2011), \url{https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=264688}; Marilyn Elias, \textit{The School-to-Prison Pipeline}, \textit{Teaching Tolerance} (Spring 2013), \url{https://www.tolerance.org/magazine/spring-2013/theschooltoprison-pipeline}. “Put an armed guard in a school and you might prevent one shooting in one building. Put a counselor or psychologist in a school and you have the potential to help prevent shootings in any building anywhere in your community.” Testimony of Dewey Cornell, \textit{The Prevention of Gun Violence in Schools and Communities}, before House Committee on Education and the Workforce (Mar. 2018)
\end{thebibliography}
There is also the risk of law enforcement mistaking an armed teacher for the shooter. During a 2016 demonstration where dozens of open carry activists were present, five Dallas police officers were shot and killed, and nine more were shot and wounded. Two civilian bystanders were also shot and injured. Following the shootings, Dallas police chief David Brown commented that open carry laws can complicate telling the difference between the “good guy with a gun” and the criminal. When a man shot and killed three people at a Walmart in Thornton, Colorado, law enforcement noted that shoppers drawing weapons in self-defense “absolutely” slowed the process of identifying the suspect.

When Congresswoman Gabrielle Giffords was shot and injured in Tucson, Arizona, an armed civilian came very close to firing at the unarmed civilian who subdued the shooter. A recent example is when on July 31, 2018 an Aurora, Colorado policeman responding to a call of a home invasion mistakenly shot and killed the home owner who had just shot and killed the intruder. Police described it as a “very chaotic and violent scene.” There is no reason to think a school shooting with many more people and more guns present would be any less chaotic and violent.

There is the risk that a student intent on committing a mass shooting would not need to bring a gun into the school, but would know how to access a teacher’s gun. A recent study shows that the majority of children are aware of where their parents store their guns, and that more than one-third reported handling their parents guns—40 percent of them doing so without the knowledge of their parents. Another study of 37 school shootings in 26 states found that in nearly two-thirds of the incidents, the attacker got the gun from his or her own home or that of a relative.

The evidence-based data cited in the body of this report including that of the United States Secret Service Threat Assessment Center, nn.38 & 71, and by Dr. Cornell shows that focusing on prevention of school shootings by identifying troubled students in advance is more effective at reducing school shootings than is armed security. It also does not have the attendant risk of bystander injury or death that armed security does. It also reduces the risk of a student or anyone else being shot at a different location and thus provides more encompassing security and better protection of the entire community. Nevertheless, this Resolution is neutral on the use of armed security personnel in schools. It does not support or oppose the use of School Resource Officers or seek to delineate those who might be excluded from the term “non-security” as used in this Resolution.

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Centers for Disease Control conclude that nearly 50% of homicide perpetrators gave some type of warning signal, such as making a threat or leaving a note, prior to the event; and that firearms used in school-associated homicides and suicides came primarily from the perpetrator’s home or from friends or relatives.\textsuperscript{55}

There is the risk of an accidental discharge of a teacher’s gun endangering students. Dennis Alexander, a California teacher, was showing the students a gun during his advanced public safety class when the gun accidentally discharged. Mr. Alexander was pointing his gun at the ceiling when it fired causing pieces of the ceiling to fall to the floor. One student was injured when a bullet fragment hit his neck. Two other students were injured by falling debris.\textsuperscript{56} A Chicago criminal justice instructor accidentally discharged his gun during class striking a file cabinet and wall.\textsuperscript{57} A Utah teacher was injured when her gun accidentally discharged in a staff restroom striking the toilet bowl.\textsuperscript{58} An NRA gun safety instructor teaching a class for a concealed carry permit accidentally shot a student in the foot.\textsuperscript{59} Five people were accidentally shot and injured in 2013 at the first ever “Gun Appreciation Day.”\textsuperscript{60} The list could go on.

Gun violence in schools is horrific and gets media attention, but it occurs with much less frequency than do shootings of youth elsewhere. That does not minimize the important need to address school shootings, but it should inform the discussion of what would constitute a viable solution. A report issued by the U.S. Departments of Education and Justice found that between 1992 and 2006, at least 50-times as many murders of young people ages 5–18 occurred away from school than at school.\textsuperscript{61} During the 2010-11 school year, about one homicide or suicide of a school-age youth at school per 3.5 million enrolled students occurred.\textsuperscript{62} Only approximately one percent of all homicides

\begin{itemize}
\item \textsuperscript{55} School-Associated Violent Death Study, Centers for Disease Control and Prevention (Updated May 11, 2016), https://www.cdc.gov/violenceprevention/youthviolence/schoolviolence/SAVD.html
\item \textsuperscript{58} Utah teacher wounded when gun discharges in toilet, BBC News (Sept. 12, 2014), https://www.bbc.com/news/world-us-canada-29168777
\item \textsuperscript{59} Eloisa Ruano Gonzales, NRA gun instructor shoots student by accident, Orlando Sentinel (Feb. 21, 2010), http://articles.orlandosentinel.com/2010-02-21/news/os-nra-gun-instructor-shoots-student-022020100220_1_gun-safety-nra-church-s-communications-director
\item \textsuperscript{60} Five shot at ‘Gun Appreciation Day’ events, MSNBC (updated Aug. 22, 2013), http://www.msnbc.com/rachel-maddow-show/five-shot-gun-appreciation-day-even
\end{itemize}
among school-age children happen on school grounds, during school events, or on the way to and from school. Other studies concur.

But we are not always rational beings. Our emotions cloud our judgment and fear can dominate our thinking. Research on the psychology of risk has found that few risks worry us more than threats to our children. More than a third of parents irrationally think their local high school is “highly likely” to be the site of gun violence within three years. Such false heuristic risk assessments should not inform public policy.

There are two principal assertions in favor of arming teachers. One is that doing so will serve as a deterrent to mass shootings because a “gun-free zone” invites gunmen to enter. The second argument is that an armed teacher can respond more rapidly than law enforcement, particularly in rural communities that do not have school resource officers. The first argument is flawed because it falsely assumes the person who exhibits the high risk behavior of entering the school armed is instead acting with a rational, risk-avoidance mindset. Both arguments are flawed because they assume without supporting data that arming teachers will reduce the risk of students being shot, rather than increase it. Both arguments are also flawed because they incorrectly assume there are no other strategies available.

The assertion that gun-free zones invite mass shootings has been discredited by research showing that nearly 90% of all high-fatality gun massacres since 1966 have occurred wholly or partly in locations where civilian guns were allowed or where there was armed security or law enforcement present. That research also shows that when rampage shootings do occur, very rarely are they stopped by armed civilians. A committee of the National Academies of Science, Engineering and Medicine concluded in 2005 that data does not support the proposition that right-to-carry laws reduce crime.

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67 Matthew Santoni, Arming teachers: Pros and Cons, supra n.44.
VII. Evidence-Based Solutions Are Available

Reducing the number of school shootings should focus on preventing such shootings, rather than reacting to them. The first recommendation of Kristen Harper, Director of Policy Development, Child Trends, in her testimony previously noted before a subcommittee of the House Judiciary Committee is that the strategy to reduce gun violence in schools should be anchored with knowledge of trends in school safety over the last two decades. Her second recommendation is to prioritize approaches that will help schools prevent school shootings, not merely defend against them.\(^\text{70}\) The fact that the majority of guns used in school shootings come from the perpetrator’s home or that of a friend suggests that the issue of safe storage in the home should be addressed as a means to reduce the number of school shootings.\(^\text{71}\) Data-driven solutions to prevent such shootings are what all the experts noted previously recommend.

For example, the Secret Service recommends that schools

- establish a multidisciplinary threat assessment team,
- define prohibited and concerning behaviors,
- create a central reporting mechanism,
- determine a threshold for law enforcement intervention,
- establish assessment procedures,
- develop risk management options,
- create and promote safe school climates, and
- conduct training for all stakeholders.\(^\text{72}\)

The focus is to have an organized and systematic way to identify troubled students who exhibit threatening behavior and to intervene before a shooting occurs. Other experts also recommend legislative action that has supporting data.

Repealing gun-free school zone laws and arming teachers has no supporting data upon which to ground such a policy change. Instead, legislative bodies should focus on adopting laws to prevent school shootings that do have supporting data. In her letter to the Senate Judiciary Committee, then ABA President Hilarie Bass articulated the evidence-based rationale for the following legislative actions supported by previously adopted ABA policy:

- universal background checks,

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\(^{\text{70}}\) Harper, supra n.34.

\(^{\text{71}}\) Baxley, et al, supra n.53; Vossekuil, et al., supra n.54; School-Associated Violent Death Study, supra n.55.

\(^{\text{72}}\) Alathari, et al., supra n.39.
requiring timely and complete information reporting to the National Instant Criminal Background Check System (NICS),

• restricting access to semi-automatic rifles such as the AR-15,

• funding research on gun violence,

• providing for civil remedies and greater administrative enforcement such as by repealing the Protection of Lawful Commerce of Firearms Act of 2005 that grants broad immunity from negligence actions against gun dealers, manufacturers and their lobbyists, and

• state enactment of legislation authorizing gun violence protective orders (sometimes called “extreme risk protective orders”).

President Bass noted in her letter there are also other legislative actions supported by ABA policy positions.73

VIII. Summary and Conclusion

There are many known, evidence-based means to address the complex issue of school shootings. Arming teachers is not one of them. Available data suggests that arming teachers will increase the risk of students being shot, not reduce it. The ABA should continue its support for evidence-based gun violence policies and its opposition to proposals that lack it. The ABA should stand with the numerous other organizations that have publicly and forcefully opposed the suggestion that teachers be armed. We recommend adoption of this Resolution.

Respectfully submitted,

Joshu Harris
Chair, Standing Committee on Gun Violence
January 2019

73 Letter from Hilarie Bass, President, supra n.30.
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Gun Violence

Submitted By: Joshu Harris, Chair

1. **Summary of Resolution(s).**

This resolution opposes laws and policies that would authorize teachers, principals or other non-security school personnel to possess a firearm in, or on the grounds of, a pre-K through grade 12 public, parochial, or private school. It also opposes the use of government or public funds to provide firearms training to teachers, principals, or other non-security school personnel, or to purchase firearms for those individuals.

2. **Approval by Submitting Entity.** Approved by the Standing Committee on Gun Violence by conference call on October 10, 2018.

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

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

The ABA has approved a number of policies regarding state and federal regulation of firearms. These include: Gun Violence Restraining Orders (17A118B), a comprehensive approach to address gun violence at schools by children that includes preventative peer-mediation, firearms education, increased enforcement of laws to prevent unauthorized access to firearms by minors, and enactment of additional firearms laws (98A10E), and also policy expressly supporting the right of employers and private property owners to exclude firearms from their places of business or other private property (7M107).

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

6. **Status of Legislation.** (If applicable) NA

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

   If adopted this policy can be the basis of advocacy at the federal and state level and possible amicus brief applications. It will also be incorporated into trainings that the Gun Violence Committee offers.

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

9. **Disclosure of Interest.** (If applicable) none
10. Referrals.

This resolution will be circulated to all sections and interested committees and commissions, such as the Section of Civil Rights and Social Justice, Commission on Domestic and Sexual Violence, Section of Family Law, the Criminal Justice Section, and the Center on Children and the Law’s Commission on Youth at Risk.

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

Joshu Harris, Chair
1239 Crease St
Philadelphia, PA 19125-3901
(646) 621-4164

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)
Monte Frank
Pullman & Comley LLC
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Bridgeport, CT 06604
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EXECUTIVE SUMMARY

1. Summary of the Resolution

With significant exceptions, the Gun-Free Schools Zones Act of 1990, as amended, prohibits firearms in, or within 1,000 feet of the grounds of a public, parochial or private school. Virtually all states also have laws that prohibit firearms in a school zone. President Trump and certain interest groups have suggested the solution to school shootings is to arm teachers. This resolution opposes laws that would authorize teachers, principals or other non-security school personnel to possess a firearm in, or on the grounds of, a public, parochial, or private school. It also opposes the use of government or public funds to provide firearms training to teachers, principals, or other non-security school personnel, or to purchase firearms for those individuals. This Resolution excludes and does not take a position on the advisability of having armed security personnel in schools.

2. Summary of the Issue that the Resolution Addresses

President Trump and certain interest groups advocate the solution to school shootings is to arm teachers.

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

The proposed policy opposes arming teachers because available data suggests doing so will likely increase the risk to students rather than reduce it, and because other comprehensive, evidence-based solutions are available.

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

None
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to reduce potential harm that individuals may inflict on themselves or others by enacting statutes, rules, or regulations allowing individuals to temporarily prevent themselves from purchasing firearms. Such measures should include, at minimum, the following provisions that:

1. any person may voluntarily and confidentially request that their own name be added to the Index of the National Instant Criminal Background Check System, an equivalent state background system, or to both, to prevent future firearms purchases;

2. the statute, rule, or regulation provide a procedure with appropriate safeguards whereby the person may have their name removed and such record deleted from the System; and

3. the statute, rule, or regulation provide appropriate safeguards to reasonably ensure that persons who request inclusion or removal from the System do not face stigma, discrimination, or any adverse action, and are entitled to confidentiality so that the fact that the person prohibited from purchasing a firearm is only disclosed when a valid background check is done.
REPORT

I. Introduction

Suicide is a public health crisis. It is a leading cause of death in the United States. In 2016, nearly 45,000 lives were lost to suicide. That year, suicide was the second leading cause of death among individuals aged 10 to 34, and the fourth leading cause among those aged 35 to 54. From 1999 to 2016, suicide rates rose in almost every state, up more than 30 percent in half the states and highest in the western states.

Although mental health conditions are often perceived as the cause of suicide, in 2016, 54 percent of people who died by suicide did not have a known mental health condition. In fact, 84 percent of men and 16 percent women with no known mental health conditions committed suicide, compared to 69 percent of men and 31 percent of women with known mental health conditions. Among both individuals with and without known mental health conditions, many factors contribute to suicide. These include relationship problems (42%), crises in the past or upcoming two weeks (29%), problematic substance use (28%), physical health problems (22%), job/financial problems (16%), criminal legal problems (9%), and loss of housing (4%).

Suicides comprise nearly two-thirds of all firearm deaths in the United States, with firearm suicides outnumbering firearm homicides two to one. In 2016, 51 percent of all suicides (2,348 of 4,575 deaths) for males aged 15 to 24 involved firearms. For males aged 25 and over, the percentage of suicides involving firearms increased with age, from 48 percent among those aged 25 to 44 (5,362 of 11,181 deaths), to 55 percent among those aged 45 to 64 (6,579 of 11,943 deaths), to 74 percent among those aged 65 to 74 (2,574 of 3,463 deaths), and to 81 percent among those aged 75 and over (2,656 of 3,291 deaths).

Nearly three-quarters of all suicides among females aged 15 to 24 involved either suffocation (509 of 1,148 deaths or 44%) or firearms (335 deaths or 29%). Among females aged 25 to 44, 32 percent (1,035 of 3,215 deaths) involved firearms, 31 percent suffocation (1,004 deaths), and 28 percent poisoning (887 deaths). Firearms were the second most frequent means of suicide—poisoning first—among females aged 45 and

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2 Id.
4 CDC VITAL SIGNS, supra note 1.
5 Id.
6 Id.
7 Id.
8 Id.
over, accounting for 32 percent of suicides among those aged 45 to 64 (1,361 of 4,253 deaths), 38 percent among those aged 65 to 74 (358 of 940 deaths), and 33 percent among those aged 75 and over (168 of 510 deaths).\(^{11}\)

Firearms are a particularly lethal means of attempting suicide, with 85 to 90 percent of firearm suicide attempts ending in death,\(^ {12}\) compared to less than 10 percent across all attempts not involving a firearm.\(^ {13}\) Thus, a persuasive argument can be made that because individuals who attempt suicide with a gun rarely get a chance to reconsider their decisions, when guns are less available, fewer suicide attempts will result in fatality, more people will have the chance to reconsider their decisions, and suicide rates will decline.\(^ {14}\)

II. Need for Resolution

Giving individuals who believe they might be at risk for firearm suicide—whether they are struggling with life events, have a mental illness, or experience suicidal ideation—the opportunity to voluntarily put themselves on a no-gun registry may save lives.\(^ {15}\) This conclusion is based on three well-established clinical and epidemiologic observations. First, many suicides are impulsive. Seventy percent of people who made near-lethal suicide attempts took less than one hour between the decision to kill themselves and the actual attempt.\(^ {16}\) Second, suicidal crises are often precipitated by an immediate stressor (e.g., breakup of a romantic relationship, loss or job), so that as the acute phase of the crisis passes often so does the urge to attempt suicide.\(^ {17}\) Third, the great majority of individuals who survive a suicide attempt do not go on to later die by suicide.\(^ {18}\)

Similarly, giving individuals who believe they might be at risk for harming others the opportunity to voluntarily put themselves on a no-gun registry—may save lives as well. One recent study found that firearm waiting periods reduce homicide as well as suicide.\(^ {19}\)

This resolution urges “federal, state, local, territorial, and tribal governments to reduce potential harm that individuals may inflict on themselves or others by enacting statutes, rules, or regulations allowing individuals to temporarily prevent themselves from purchasing firearms.” Any person would be able to voluntarily and confidentially request that their own name be added to the Index of the National Instant Criminal Background

\(^{11}\) Id. at 4.


\(^{13}\) Id.

\(^{14}\) Id.


\(^{17}\) Miller et al., *supra* note 12.

\(^{18}\) Id.

Check System (NICS), an equivalent state background system, or to both, to prevent future firearms purchases. The idea behind the no-gun registry is to allow these individuals to prepare for potential crises before they occur.

This option would appeal to individuals who have suicidal ideations, whether due to relationship, substance abuse, physical or mental health, job or financial, criminal legal, or anger management problems, among other reasons. Among 200 people surveyed who were seeking inpatient and outpatient psychiatric care at an academic medical center, nearly half (46%) said they would sign up for the proposal.20 Further, in an on-line survey with 262 respondents, 29 percent said they would sign up for the proposal with a seven-day delay removal option.21 Some of these individuals may be at high risk for suicide (for all the reasons outlined above or for other reasons), but others may not be.

III. Do-Not-Sell List

The essential attributes of a do-not-sell list are a voluntary and confidential way to suspend one’s ability to purchase firearms. The second element is a mechanism, with adequate safeguards, for changing one’s mind and regaining the ability to purchase firearms.

The list could work as follows. An individual 18 years of age or older would request that their name be added to NICS, an equivalent (also secure) state background system, or to both, to prevent future firearms purchases from a licensed dealer. The signup process—whether by mail or email—would be voluntary and confidential and require identity verification. Implementation could vary, but examples of identity verification include notarization or electronic notarization. The interface would explain in plain language that the registrant may be temporarily waiving Second Amendment rights. The registrant could later request that their name be removed from the index and/or system. Three weeks after the request for removal, their name would be removed and all records of the transaction deleted. The 21-day delay period is to allow for adequate deliberation.

Note that only an individual can put himself or herself on a list. A person who has legal authority to make decisions for the individual, whether through a guardianship, durable power of attorney, or other means, cannot put the individual on the list.

At the time of registration, registrants would have the option of communicating their waiver of gun rights to others by providing their email addresses. The registry would then alert addressees that the registrant has waived their Second Amendment rights, as well as if the registrant later rescinds their waiver.

Registration prevents purchase only. Registrants who are later found to be in possession of a firearm would not be subject to criminal prosecution. The Do-Not-Sell List is designed

21 Ian Ayres & Fredrick E. Vars (Feb. 2016), Amazon Mechanical Turk/Qualtrics survey data, [Data on file with authors]. Fifteen percent of the sample reported being “diagnosed with a mental disorder.”
to prevent impulsive gun suicide and violence toward others, not to be a broader gun control measure. The List is prophylactic, not punitive. If an individual signed up but later obtained a firearm without a background check, that individual would not be criminally liable. Limiting easy access to firearms is the goal, not punishing individuals who, perhaps in a suicidal crisis, manage to get their hands on guns from other sources.

IV. Support for the Voluntary Do-Not-Sell List

Washington became the first state in the nation to enact legislation that creates a registry allowing individuals to voluntarily waive their right to purchase firearms.\(^\text{22}\) Washington citizens can add their names to a do-not-sell list, suspending their ability to buy guns from licensed dealers. Registrants may provide an alternate person to be contacted if they revoke the voluntary waiver. Registrants who do so need only make the request and wait seven days. The law requires in-person registration and withdrawal. Participants have the option of designating a third-party contact to be notified “if a voluntary waiver of firearm rights is revoked.” The law has confidentiality protections, including a prohibition on discrimination based on one’s participation in the program.

Legislators in Alabama, California, Massachusetts, Tennessee, and Wisconsin have introduced similar bills. The Alabama bill\(^\text{23}\) would allow individuals to voluntarily be added to the Voluntary Alabama Firearms Do Not Sell List via a secure Internet-based platform. Upon registering, receipt of a firearm by that person is unlawful. The registering individual’s information is reflected in the NICS Index Denied Persons File for Alabama. A registrant can submit email addresses of personal contacts to notify and advise that the registrant has added their name to the list or seeks to rescind their registration.

Registrants can request that their name be removed from the list at any time, and removal would take place automatically 21 days after the request. Upon removal, all records of the registration, associated transactions, and the request for removal are destroyed. The bill makes it unlawful for any person to inquire as to whether an individual is on the list or has requested to be added to or removed from the list for purposes of employment, education, housing, insurance, governmental benefits, or contracting. It is also unlawful to take any adverse action associated with those purposes or health care purposes based on an individual’s registration with the list. Violations give rise to a private civil action.

The California bill\(^\text{24}\) directs the state’ department of justice to “study options for allowing a person to register himself or herself on a list or database that prohibits the person from being able to purchase a firearm. The department shall recommend an approach to allow a person to prohibit himself or herself from purchasing a firearm.”

The Tennessee bill\(^\text{25}\) would require the Tennessee Bureau of Investigation (TBI) to develop and launch a secure internet-based platform that allows any person in the United States to voluntarily indicate that they do not wish to purchase a firearm.
States to register to add their own name to the Tennessee Do Not Sell List. This information is reflected in the NICS Index and conveyed to any other state that adopts an analogous “Do Not Sell List.” A person can subsequently request that their name be removed from the registry and wait 21 days for removal. Following removal from the registry, TBI must notify any other participating state registries to and purge all records related to the registration process. Whether a person is on the list or has requested removal is confidential with respect to matters involving employment, education, housing, insurance, government benefits, and contracting, and registrants can bring a private civil action for breaches of confidentiality.

The Massachusetts and Wisconsin bills would also allow voluntary suspension of gun purchase ability. However, those two bills differ from the Do Not Sell List model in several significant respects, including more onerous removal provisions.

V. ABA Policy

The American Bar Association (ABA) has a longstanding tradition of being at the forefront of policymaking to curb gun deaths. For instance, in 2017 the ABA passed policy urging “state, local, territorial, and tribal governments to enact statutes, rules, or regulations authorizing courts to issue gun violence restraining orders, including ex parte orders,” that include a provision that “a petitioner with documented evidence that a respondent poses a serious threat to himself or herself or others may petition a court for an order temporarily suspending the respondent’s possession of a firearm or ammunition.” 26 California, Connecticut, Indiana, and Washington have enacted laws whereby a law enforcement officer or a family member may seek a court order for the temporary removal of guns from a potentially dangerous persons pending a full hearing. 27 In fact, a 2016 study of the Connecticut Gun Violence Restraining Order statute estimates that it has prevented up to 100 suicides. 28

Also, in 2012 the ABA adopted policy opposing “governmental actions and policies that limit the rights of physicians and other health care providers to inquire of their patients whether they possess guns and how they are secured in the home or to counsel their patients about the dangers of guns in the home and safe practices to avoid those dangers.” 29 Health care practitioners play a key role in counseling patients about the risks of injuries and best practices to minimize those risks as part of the practice of preventive care. 30 The Centers for Disease Control and Prevention (CDC) highlight the important role health care systems can play in providing high-quality, ongoing care focused on

30 Id.
patient safety and suicide prevention. There is widespread agreement that good medical care includes conversations about the safe storage of firearms, as responsible storage can prevent suicide by children and teens. A majority of adults in the United States, including gun owners, believe it is appropriate for physicians to talk to their patients about firearms. Gun owners who receive counseling are more likely to store their guns responsibly.

Further, in 2011 the ABA enacted policy urging “applicable governmental entities to take all appropriate measures to ensure that the National Criminal Instant Background Check System (NICS) is as complete and accurate as possible, so that all persons properly categorized as prohibited persons under 18 U.S.C. § 922(g), are included in the NICS system.” In states that go beyond federal law and require background checks on all handgun sales, including guns sold by unlicensed sellers, there are 47 percent fewer gun suicides. For example, Connecticut’s background check law led to an estimated 15 percent reduction in the state’s gun suicide rate.

This proposed resolution builds on the current policies, seeking to curb firearm suicide deaths by allowing individuals to voluntarily restrict their own access to firearms.

VI. Low-Cost Implementation

The cost-per-life-saved of this proposal would be very low. The federal background check system (NICS) has been granted its requested appropriation and is operational. All licensed gun dealers are already required to check the confidential federal database before selling a firearm. All that is needed to implement the proposal at the federal level is a mechanism for securely adding and subtracting names. After an initial start-up investment, the process could be more or less automated.

Implementation at the state level would also be cost-effective. The federal background check system allows states to add to the federal database the names of individuals who are barred from purchasing a firearm by state law but not federal law. Each state could implement the proposal by creating its own sign-up mechanism for its own residents, then sending those names to the federal system. Each state has control over its own state disqualifier database in NICS, so states could implement the proposal without relying on

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31 CDC, supra note 1.
32 Betz, Public opinion regarding whether speaking with patients about firearms is appropriate, Ann IM. 2016; 165:543-550.
33 Albright TL, Burge SK, Improving firearm storage habits: impact of brief office counseling by family physicians, J Am Board Fam Pract. 2003; 16(1); 40-46.
34 ABA Resolution 11A10a, at https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_10a.authcheckdam.pdf
36 CK Crifasi et al., Effects of changes in permit-to-purchase handgun laws in Connecticut and Missouri on suicide rates, 79 PREVENTIVE MED. 43-49 (October 2015).
37 Registrants of an enacting state would be precluded from purchasing a weapon from a gun dealer anywhere in the country. However, because one state’s law only applies to its residents, each state would need its own registry system. That would be more expensive than a single federal system.
FBI processes or formal NICS appeal procedures.

Of course, people must know about the program in order to take advantage of it. For example, the bill introduced and passed out of committee in Alabama provides for “publicity and advertising campaign . . . that at a minimum provides the public with information about the list, how an individual may register to be added to the list, and contacts for additional information regarding the list.”

VII. The Proposal Would Not Violate the Second Amendment

The Second Amendment case closest on the facts to the proposal is Silvester v. Harris.38 Plaintiffs in Silvester argued that California’s 10-day waiting period to purchase a firearm violated the Second Amendment. The Ninth Circuit rejected that argument, ruling that the waiting period imposed a burden on Second Amendment rights, but not so great a burden as to justify more than intermediate scrutiny.39 The court held that the waiting period passed intermediate scrutiny because it provided a cooling-off period to deter violence and suicide.40

Based on Silvester, one can persuasively argue that restricting an individual’s own ability to purchase a firearm with an automatic, but delayed revocation option is functionally equivalent to a self-imposed waiting period. If a mandatory waiting period does not violate the Second Amendment, as Silvester squarely holds, then neither does a less restrictive, optional waiting period.

The next closest line of cases involves firearm restrictions based on dangerousness. Restrictions of this kind have been upheld time and time again.41 An optional and temporary measure is less restrictive than a mandatory restriction premised on someone else’s judgment that the restricted party is “dangerous.” In other words, the proposal’s constitutionality follows a fortiori from the constitutionality of waiting periods and dangerousness restrictions.

A third argument in favor of constitutionality rests on the proposition that “the Second Amendment’s guarantee of an individual right to keep or bear arms in self-defense should include the freedom not to keep or bear them at all.”42 Firearm self-restriction would

38 843 F.3d 816, 821 (9th Cir. 2016).
39 Id. at 827.
40 Id. at 827-29.
41 See, e.g., Baer v. Lynch, 636 Fed. Appx. 695, 698 (7th Cir. 2016) (“As to violent felons, the statute does survive intermediate scrutiny, we have concluded, because the prohibition on gun possession is substantially related to the government’s interest in keeping those most likely to misuse firearms from obtaining them.”) (citations omitted); United States v. Chovan, 735 F.3d 1127, 1139-41 (9th Cir. 2013) (persons convicted of domestic violence misdemeanors); United States v. Stegmeier, 701 F.3d 574 (8th Cir. 2012) (fugitive felon); United States v. Carter, 669 F.3d 411 (4th Cir. 2012) (unlawful user of a controlled substance); Hope v. State, 163 Conn. App. 36, 43 (2016) (the challenged statute “does not implicate the Second Amendment, as it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes. It restricts for up to one year the rights of only those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others after affording due process protection to challenge the seizure of the firearms.”).
provide a tool to strengthen this right not to bear arms—by binding oneself against impulsively buying arms in the future. The animating principle of the Second Amendment is self-defense.\textsuperscript{43} One ought to be able to defend oneself against suicide.\textsuperscript{44}

Finally, an individual who restricts their own ability to purchase firearms generally waives their Second Amendment rights. Waivers of constitutional rights “not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”\textsuperscript{45} Sign-up systems should include clear and prominent explanations that the individual is waiving such rights.

VIII. Conclusion

This resolution will further existing ABA policy aimed at curbing firearm deaths by focusing on suicide, which comprises nearly two-thirds of all firearm deaths in the United States. Giving individuals who are at risk of suicide the opportunity to voluntarily prohibit themselves from buying a firearm is a modest and inexpensive approach that could save lives. The ABA should advocate strongly for this legal step to combat this public health crisis.

Respectfully submitted,

Joshu Harris
Chair, Standing Committee on Gun Violence
January 2019

\textsuperscript{43} See McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (explaining that “individual self-defense is ‘the central component’ of the Second Amendment right”).

\textsuperscript{44} Vars, supra note 1.

\textsuperscript{45} Brady v. United States, 397 U.S. 742, 748 (1970).
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Gun Violence

Submitted By: Joshu Harris, Chair

1. **Summary of Resolution(s).** To reduce the risk of suicides and other deadly incidents, this resolution urges that individuals be allowed to: 1) voluntarily submit their names into databases used for gun background checks, and 2) remove themselves from those systems.

2. **Approval by Submitting Entity.** Approved by Committee at its November 13, 2018 business conference call.

3. **Has this or a similar resolution been submitted to the House or Board previously?** The Resolution was submitted to the House for the 2018 Annual meeting, but was subsequently withdrawn to address concerns raised by the Commission on Disability Rights. Those concerns have been addressed and the Commission is now a co-sponsor.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** Numerous policies relate to categories of persons who should mandatorily be included in background check systems for firearm purchases, such as felons, fugitives, persons under indictment, persons adjudicated mentally incompetent, and minors (1965 and reaffirmed since), as well as felons and persons convicted of violent misdemeanors, spousal or child abuse, and persons subject to a protective order. 94A10E. Additionally, the ABA supports full implementation of the National Criminal Instant Background Check System so that it is accurate and complete. 11A10A. Most recently, the ABA endorsed gun violence restraining orders, whereby someone may petition a court to have a person deemed dangerous to oneself or others temporarily be barred from possessing a firearm and having the restraining order entered into federal and state background check systems. 17A118B. The proposed policy does not conflict with, but complements, these existing policies. Indeed, it is unique because of its voluntary nature.

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

6. **Status of Legislation.** (If applicable) None pending on the federal level. Washington State recently enacted such a law. California has a bill to study the idea that passed its Assembly (AB-1927), but was subsequently vetoed. The governor explained that
the idea could be studied without new statutory authorization.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** Implementation will be done through training, sharing of this and related information with civil society groups that address gun violence, and advocacy through the Government Affairs Office where opportunities (e.g. related proposed legislation introduced) arise.

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

9. **Disclosure of Interest.** (If applicable) NA

10. **Referrals.**

    Commission on Disability Rights: co-sponsored
    Commission on Domestic & Sexual Violence: co-sponsored
    Commission on Law and Aging
    Commission on Sexual Orientation and Gender Identity: co-sponsored
    Commission on Youth at Risk: supported
    Criminal Justice Section: co-sponsored
    Government & Public-Sector Lawyers Division
    Health Law Section
    Judicial Division
    Section of Civil Rights and Social Justice: co-sponsored
    Section of Family Law
    Section of Litigation
    Section of State and Local Government Law
    Senior Lawyers Division
    Solo, Small Firm and General Practice Division
    Tort Trial & Insurance Practice Section
    Young Lawyers Division

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

    Joshu Harris, Chair
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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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106B

EXECUTIVE SUMMARY

1. Summary of the Resolution

To reduce the risk of suicides and other deadly incidents, this resolution urges that individuals be allowed to: 1) voluntarily submit their names into databases used for gun background checks, and 2) remove themselves from those systems.

2. Summary of the Issue that the Resolution Addresses

Roughly two thirds of gun related deaths are suicides. Most suicides are impulsive acts and most successful suicides involve a firearm. This resolution allows persons who self-identify as being at risk of harming themselves (or in many cases others) to take proactive steps to lessen this likelihood.

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

This resolution sets general standards, and provides wide latitude to states to enact laws to help a portion of an at-risk population insulate themselves against further harm.

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

None identified.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal courts and legislatures to develop policies and protocols as to who may carry firearms in courthouses, courtrooms, and judicial centers that allow only those persons necessary to ensure security have weapons in the courthouse, courtroom, or judicial center, including common areas within the buildings as well as the grounds immediately adjacent to the justice complex, and that require training for those who are permitted to carry firearms.
Throughout the United States of America, the courthouses and justice centers are symbols of our constitutional system of justice. As a nation of laws the public expects to be able to safely seek redress from wrongs and resolve disputes within the court system.

Courtroom proceedings may sometimes become contentious and emotional, creating concerns for the safety of the litigants, as well as judges, lawyers, support staff, and law enforcement. Increasingly there have been occurrences where violence has erupted and firearms are used inside and outside of the courtroom. When the litigants and the court personnel “believe their courthouses and court facilities are not safe integrity of the entire judicial process is compromised and undermined.”¹ “Beyond mere access [to courthouses], people require a safe and secure environment free from fear or intimidation. Judges, employees, and members of the general public need to feel safe if they are to conduct themselves impartially and decorously.”²

In 2012, Timm Fautsko, Principal Staff, National Center for State Courts wrote:

The number of threats and violent incidents targeting the judiciary has increased dramatically in recent years. At the federal level, the U.S. Marshals Service’s Center for Judicial Security reports the number of judicial threat investigations has increased from 592 cases in fiscal year 2003 to 1,258 cases by the end of fiscal year 2011. At the state and local levels, the most informative data about state courts comes from studies conducted by the Center for Judicial and Executive Security (CJES). Their data shows that the numbers of violent incidents in state courthouses has gone up every decade since 1970.

It is a central tenet of each state’s constitution to provide for the safety and wellbeing of its people. All three branches of our governments should work together to promulgate, promote, and provide for responsible firearm regulations in courthouses, judicial centers, and court facilities.³

There is no uniformity among the state laws as to who may carry a firearm in a courtroom or a courthouse, nor to what extent or areas a judge may exercise discretion in limiting the possession of firearms. The National Center for State Courts did an exhaustive survey that examined the laws of all the states.⁴ While the majority of the states restrict firearm possession in the courtroom, only a small number restrict firearms in the courthouse. Additionally, most states allow so many exemptions as to make any ban of firearms useless.

² Don Hardenbergh, Protecting America’s Courthouses, 44 No. 3 Judges’ J. 14 (Summer 2005).
William Rafferty of the National Center for State Courts notes that interest in allowing guns in the courtroom is nothing new.

“The recent uptick in interest can be traced back to two items: the U.S. Supreme Court decision in *Heller*, holding that the Second Amendment included an individual right to keep and bear arms, coupled with several high-profile courthouse shootings. These events have prompted efforts to redefine who can carry a firearm in a courthouse and where firearm bans may be imposed. For the most part, such efforts have been designed to expand the ability of individuals to carry guns into courthouses and, in some instances, directly into courtrooms.”

In *Heller*, the Supreme Court held the Second Amendment protects “an individual right to keep and bear arms,” 554 U.S. at 595, but not a right “to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,” id. at 626. More specifically, the Court held unconstitutional the District's “ban on handgun possession in the home,” as well as its “prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense,” id. at 635 (emphasis added), noting “the inherent right of self-defense [is] central to the Second Amendment right,” id. at 628.

In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the second amendment right recognized in *Heller* is fully applicable to the states through the due process clause of the Fourteenth Amendment. In so holding, the Court reiterated that “the Second Amendment protects the right to keep and bear arms for the purpose of self-defense,” id. at 750, and that "individual self-defense is ‘the central component’ of the Second Amendment right,” id. at 767.

Thus, neither *Heller* nor *McDonald* would prohibit restrictions on carrying firearms in to buildings which house court facilities or the grounds immediately surrounding the courtroom facilities. Additionally, it is not especially surprising that research data indicates that more liberal rules regarding gun possession, such as right-to-carry (RTC) laws, do not reduce crime. “Supporters of the idea that such an effect occurs assume that the laws reduce crime because prospective criminal offenders are deterred by a greater perception of risk of confronting an armed victim, which supposedly results from either the enactment of RTC laws or the issuance of large numbers of carry permits to potential crime victims.”

Unfortunately, some state legislatures seek to expand the class which would be permitted to carry firearms not only in to the courthouse, but the courtroom as well. In April 2014, the Georgia legislature enacted, and the governor, signed The Safe Carry Protection Act, a new gun law that, among other things, will allow Georgians to legally...

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carry firearms into churches, schools, airport common areas, bars, courtrooms, and
government buildings.

When Iowa Chief Justice Mark Cady issued on June 19, 2017, a supervisory order
directing "all weapons are prohibited from courtrooms, court-controlled spaces and public
areas of courthouses," the county supervisors, claimed that was an "over-reach" by the
court and conflicted with the new gun law. A new supervisory order by the Iowa Supreme
Court, issued on December 19, 2017, will enable individual counties to seek to allow
weapons in public areas of floors of a courthouse that are not totally occupied by the court
system.

On July 1, 2011, a Mississippi law that enhanced concealed carry permit holders
“shall also be authorized to carry weapons in courthouses except in courtrooms during a
judicial proceeding [.]” Miss. Code Ann. § 97-37-7(2) (Rev. 2014). On November 28, 2011,
the chancellors of the Fourteenth District issued an order prohibiting those permit holders
from carrying weapons within 200 feet of any door to any courtroom. On June 7, 2018 the
Mississippi Supreme Court in a divided opinion\(^8\) ruled that local judges can't restrict
conceal carrying at courthouses.

The chancellors may have good and noble intentions, and their concerns
are well founded. However, their personal fears and opinions do not trump,
and cannot negate, constitutional guarantees. The ultimate outcome of
today’s issue is reserved for the Legislature, not to be commandeered by
unilateral local judicial proclamations. Courts must give more than lip
service to the rule of law; they must insist upon its lawful application. Judges
cannot allow their sense of superior knowledge, perceptions, or
understandings to justify open defiance of the very laws that they are called
upon to uphold. Indeed, we have held repeatedly that courts are guardians
of the Constitution, not guardians of the courthouse. Without question, the
orders defy existing law and seek to exercise a power that plainly is
reserved for the other branches of government. The orders contain no
authority to suggest otherwise. The law of Mississippi is clear: enhanced-
carry licensees are permitted to possess a firearm in courthouses. No
matter how well-intentioned, judges are without the power to limit enhanced
concealed-carry licensees’ right to carry a firearm beyond courtrooms in the
State of Mississippi. The orders are vacated.

In a well-reasoned dissent, Justice Leslie D. King noted,

The judiciary, and access thereto, implicates numerous constitutional rights.
The safety of those compelled to be at the courthouse is necessary for the
fair administration of justice; keeping safe and free from threat those people
necessary to the judicial process, such as parties, criminal defendants,
 witnesses, and jurors, is crucial for the administration of justice, the integrity

\(^8\) NO. 2016-M-01072-SCT RICKY W. WARD v. DOROTHY WINSTON COLOM
of the judicial system, and the preservation of the constitutional rights implicated at the courthouse.

While most statutes and court decisions recognize the right of judges to restrict who may carry a firearm into the courtroom the reality is that the firearms in the courthouse and the immediate areas surrounding the court facility pose the greatest danger. Trained courtroom security provide protection for the court personnel and litigants while inside the courtroom. However, once in the hallways or elevators or parking lots, those who were constrained within the courtroom now are free to act out their hostilities. And if one is prohibited from carrying a firearm into the courtroom, the weapon must be stored somewhere in a safe place. If courthouse security does not include gun boxes, the owner is likely to give the weapon to another family member or friend who is not as well trained or security conscious as the owner.

The American Bar Association should urge state legislatures to follow the example of the federal government, which prohibits the possession of firearms or dangerous weapons by any person in either a federal facility or federal court facility except those engaged in “the lawful performance of official duties by an officer, agent, or employee of the United States, a State, or a political subdivision thereof, who is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of law.” The term “Federal facility” is defined as “a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties.” The term “Federal court facility” means the courtroom, judges’ chambers, witness rooms, jury deliberation rooms, attorney conference rooms, prisoner holding cells, offices of the court clerks, the United States attorney, and the United States marshal, probation and parole offices, and adjoining corridors of any court of the United States.

In a society that has become increasingly volatile and where civility has diminished, the time has come for firearms to be banned from the courtroom, courthouses and court facilities except for those persons properly trained and charged with providing security at these locations. Where permitted, only a limited number of exemptions should be allowed. The judges and the law enforcement agency charged with providing security in the courthouse or judicial center should collaborate and decide who should be permitted to carry a firearm.

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9 Many courts are housed within buildings with multiple functions. For example, many court buildings also house non-judicial government offices, including law enforcement offices. In such multi-function buildings, judges and other building occupants are encouraged to collaborate to develop firearm policies and gun safety protocols that appropriately reflect the unique circumstances of the building as a whole, including its security needs.

Shooter Kills Man Outside Mississippi Courthouse. USA Today August 3, 2015
Man Given Life Term for Shooting Lawyer. Los Angeles Times, March 18, 2006
12 1 Deputy Dead, 1 Critical After Being Shot Outside County Courthouse. Oklahoma’s News 4, June 15, 2018
Respectfully submitted,

Joshu Harris  
Chair, Standing Committee on Gun Violence  
January 2019
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Gun Violence
Submitted By: Joshu Harris, Chair

1. Summary of Resolution(s).

Urges that the possession of firearms in and around courthouses be limited to persons with an official role in security. Also urges that such persons be required to complete annual training in firearm safety.


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

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

   The ABA has approved a number of policies regarding state and federal regulation of firearms. These include: Gun Violence Restraining Orders (17A118B), Court adoption of protocols, guidelines, and policies to protect the safety of domestic violence victims and court employees (96A120). The ABA also has policy expressly supporting the right of employers and private property owners to exclude firearms from their places of business or other private property (7M107).

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

6. Status of Legislation. (If applicable) NA

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

   If adopted this policy can be the basis of advocacy at the federal and state level and possible amicus brief applications. It will also be incorporated into trainings and educational materials that the Gun Violence Committee offers.
8. **Cost to the Association.** (Both direct and indirect costs) None

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

Referrals.

Commission on Domestic & Sexual Violence: co-sponsored
Commission on Youth at Risk: supported
Criminal Justice Section: co-sponsored
Government & Public-Sector Lawyers Division
Health Law Section
Judicial Division
Section of Civil Rights and Social Justice: co-sponsored
Section of Family Law
Section of Litigation
Section of State and Local Government Law
Standing Committee on Pro Bono and Public Service
Tort Trial & Insurance Practice Section
Young Lawyers Division

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

   Joshu Harris, Chair
   1239 Crease St
   Philadelphia, PA 19125-3901
   (646) 621-4164

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

   Monte Frank
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EXECUTIVE SUMMARY

1. Summary of the Resolution

Urges that the possession of firearms in and around courthouses be limited to persons with an official role in security. Also urges that such persons be required to complete annual training in firearm safety.

2. Summary of the Issue that the Resolution Addresses

Increasingly, there have been occurrences where violence has erupted and firearms are used inside and outside of the courtroom as well as areas in the surrounding justice complex. When parties and court personnel believe court facilities are not safe, the integrity of the entire judicial process is compromised. Courtrooms and the judicial complex should be perceived as safe and secure environments.

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

Limiting firearm possession in and around courthouses to personnel with an official security role will reduce the likelihood that interpersonal conflicts in courthouses, where criminal and civil complaints are adjudicated, would escalate into an armed confrontation. Moreover, it will reduce the likelihood of suicide or accidental death or injury.

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

None at this time.
RESOLVED, That the American Bar Association urges legal employers not to require pre-dispute mandatory arbitration of claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status, or status as a victim of domestic or sexual violence.
Introduction

In August 2018, this House of Delegates passed Resolution and Report 300 (“Resolution 300”), urging legal employers not to require mandatory arbitration of sexual harassment claims. The report detailed the perception among employees that mandatory pre-dispute agreements to arbitrate sexual harassment claims contribute to the perpetuation of an atmosphere of fear and isolation in the workplace.

Resolution 300 tracks the trend among many legal employers, including Munger, Tolles & Olson; Orrick, Herrington & Sutcliffe; and Skadden Arps Slate Meagher & Flom, to eliminate mandatory pre-dispute arbitration agreements. Its report details the many times that this House of Delegates has voted to limit mandatory pre-dispute arbitration in a variety of contexts.

However, Resolution 300 is limited both in the wrongs that it covers and who it protects. First, while it covers sexual harassment, it does not cover discrimination or retaliation, the two other wrongs encompassed within Title VII of the Civil Rights Act of 1964, and parallel state statutes. This proposed resolution covers all three basic wrongs in this area: discrimination, harassment and retaliation. Though different in proof and legal theory, these serious categories of misconduct often, though not always, occur together. Accordingly, all three should be subject to the same arbitration rule as matter of policy and practicality.

Secondly, while Resolution 300 covers illegal harassment on the basis of sex, it does not cover the other categories encompassed within the major Federal Statutes (Title VII, Age Discrimination in Employment Act of 1967 (ADEA), Americans with Disabilities Act (ADA) of 1990, Violence Against Women Act of 1994 (VAWA)) and/or in parallel state statutes: race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status and status as a victim of domestic or sexual violence.

Therefore, this proposed resolution begins with the text of Resolution 300 regarding sexual harassment and broadens it to cover illegal discrimination, harassment or retaliation, on the basis of the above-referenced categories that are already protected by law.

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3 Cf, California Fair Employment and Housing Act (“FEHA”), CAL. GOV’T CODE §§ 12940 et seq.
Victims of Unlawful Employment Discrimination Deserve the Same Access to Justice As Victims of Harassment

The last two years have seen an increased focus on sexual harassment, and rightfully so. However, discrimination is the wrong at which these employment statutes first took aim and remains a serious issue today.

Unlawful discrimination is often defined as a refusal to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment because of a category protected by law.

Different from harassment, employment discrimination is unequal job opportunity, compensation, assignment and the like, because one is female, or a person of color, or has a disability or is otherwise in a legally protected class.

One of the greatest legislative achievements of the modern civil rights era, Title VII was devised to outlaw discrimination in the workplace on the basis of race, color, religion, sex and national origin. Arguing the need for Title VII, President Kennedy stressed that “the relief of [African American] unemployment required … eliminating racial discrimination in employment.” This was central to the objectives of Title VII, but the legislative history emphasized that discrimination in employment needed to be eradicated on all grounds.

The wage gap by which women make 82 percent of the wages of men, and women of color make far less, constitutes discrimination. According to the Equal Employment Opportunity Commission (EEOC), “[d]espite longstanding prohibitions against compensation discrimination under the federal EEOC laws, pay disparities persist between workers in various demographic groups. Other studies find that, women earn, on average, about 75 cents for every dollar that men earn.”

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This Resolution does not expand the scope of substantive legal protections as it only covers unlawful discrimination, harassment or retaliation. If there is no substantive wrong, there is nothing to arbitrate.

Economic Advisors found that after taking factors like education, family responsibilities and experience into consideration, the pay gap between men and women is still disproportionate and could be the result of discrimination.  

The ABA Diversity and Inclusion Center, in its own research, found that “[w]omen lawyers of color were eight times more likely than white men to report that they had been mistaken for janitorial staff, administrative staff, or court personnel.” As ABA President Hilarie Bass wrote last year, “Women have to work just a little harder than their male colleagues to get recognition for their achievements . . . [and] when it comes to becoming an equity partner or managing partner — the highest levels of law firm leadership — it’s still much less common for women to reach that level of success.” These are examples of employment discrimination.

Discrimination charges are statistically more common than harassment charges. In 2017, the EEOC received 6,696 charges of employment harassment and obtained $46.3 million in relief. That same year 84,254 workplace discrimination claims were filed with the agency, which secured $398 million in relief for the charging parties.

As The New Yorker reported on November 20, 2017, women make up only a quarter of employees and eleven percent of executives in the technology industry. In a survey of 200 senior level women in Silicon Valley, eighty-four percent of the participants reported that they had been told they were “too aggressive” in the office, sixty-six percent said that they had been excluded from important events because of their “gender.”

For the past five years, Google has responded to reports that it hires few women and fewer people of color, especially in leadership and engineering roles. After five years of progress, Google reported in June 2018 that the U.S. workforce is 2.5 percent African American and 3.6 percent Latino; globally, black women comprise barely one percent of the workforce, and Latina women less than two percent.

In FY 2017, the EEOC received approximately 84,000 total charges for any type of discrimination. Of those, approximately 29,000 were race-based charges; 27,000, disability-based charges; and 26,000, sex-based charges. From FY 1997 to FY 2017,
charges of discrimination based on retaliation (all statutes) and retaliation (Title VII only) have increased.\(^\text{18}\)

The failure to assign clients and cases to people of color, the reality that they must outperform their colleagues in order to get an equal shot at success, and the failure to be treated equally in partnership evaluation and decisions are all examples of unlawful discrimination.\(^\text{19}\)

On February 12, 2018, the National Association of Attorneys General wrote to Congressional leadership noting that “access to the judicial system … is a fundamental right of all Americans”, but that mandatory arbitration imposes relief from decision makers who are not trained as judges, are not qualified to act as courts of law” and a “veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief.” In the words of the Attorneys General, ending mandatory pre-dispute arbitration of these important claims “would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.” Just as the House found that sexual harassment ought to be removed from the shadows and given the light of day, that is no less true of unlawful categorical discrimination.

Claims of Unlawful Retaliation Deserve the Same Public Airing As Claims of Unlawful Discrimination or Harassment

Unlawful retaliation provides the fertile ground required for unlawful employment discrimination and harassment to flourish. Much of what has been labeled sexual harassment is actually unlawful retaliation. The implicit or explicit threat that rejection of a sexual overture would be a career ending act is retaliation, rather than pure harassment.

Retaliation occurs when an employer unlawfully takes action against an individual in punishment for exercising rights protected by any of the EEO laws. The EEO anti-retaliation provisions apply to ensure that individuals are free to raise complaints of potential EEO violations or engage in other EEO activity without retribution or punishment.\(^\text{20}\)

The fear of retaliation prevents victims from complaining and coworkers from speaking out. As The New Yorker wrote on October 23, 2017, “Multiple sources said that [Harvey] Weinstein frequently bragged about planting items in media outlets about those who


\(^{19}\) American Bar Association, Bias Interrupters, supra note 14; EEOC, DISCRIMINATION BY TYPE, https://www.eeoc.gov/laws/types/.

spoke against him; these sources feared similar retribution.”21 Without that fear of retaliation, unlawful discrimination and harassment would be far easier to eliminate.

While retaliation is often closely connected with unlawful discrimination and harassment, it is often a separate act, which must be addressed separately. A supervisor who warns a victim not to file a complaint of harassment to protect a powerful superior, or who fires her for having done so, engages in retaliation, rather than harassment. Indeed, serious instances of retaliation often occur in the absence of actionable harassment, for example, when a vindicated supervisor punishes an employee for raising a good faith complaint.

The EEOC tracks the total number of retaliation charges filed and resolved under all statutes alleging retaliation-based discrimination, and retaliation claims have increased significantly from FY 1997 to FY 2017; it is the most frequently alleged basis for a federal employment law charge, followed by race and disability.22 In FY 1997, there were 18,198 new charges received, and $41.7 million dollars paid in monetary benefits. In FY 2017, there were 41,097 new charges received, and $192 million paid in monetary benefits.23

In a retaliatory atmosphere, discrimination and harassment run rampant. In some ways, retaliation may be the most serious unlawful employment practice of all, as it is an intentional misuse of power designed to chill and prevent the exercise of important legal rights. It is no less deserving of access to the courts than is harassment itself.

The Same Protections Should Extend to All Protected Categories Covered by ABA Model Rule 8.424

In August 2018, the ABA House of Delegates wisely recommended that law firms should not require, as a condition of employment or continued employment, that sexual harassment claims be forced into arbitration. The same protections should extend to the other groups protected by the major federal civil rights in employment acts, and in the general scope of Model Rule of Professional Conduct 8.4: Misconduct25—race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, and marital status. Some jurisdictions prohibit discrimination, harassment or retaliation on the basis of status as a victim of domestic or sexual violence (e.g., Cal. Lab. Code § 230) and

23 EEOC, RETALIATION-BASED CHARGES (Charges filed with EEOC), FY 1997 - FY 2017, available at https://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm (noting that the monetary benefits in millions does not include benefits obtained through litigation).
24 This Resolution does not expand the scope of substantive legal protections as it only covers unlawful discrimination, harassment or retaliation. If there is no substantive wrong, there is nothing to arbitrate.
House Resolution urges those protections as a matter of ABA policy. They are each subject to venal harassment, discrimination, and retaliation.

**This Proposal Covers Only Pre-Dispute Arbitration**

This proposal recognizes the value of voluntary arbitration of disputes. In many instances, two parties to a dispute will want to arbitrate it for a variety of good reasons. This Resolution does not address any such post-dispute agreement to arbitrate. It addresses only mandatory pre-dispute agreements to arbitrate claims of unlawful categorical discrimination, harassment or retaliation. Such agreements are often required as a condition of employment. The report to Resolution 300, pp. 8-9, catalogues the House’s concern with agreements to arbitrate in several contexts, including “a condition of initial or continued employment.” The proposed resolution is consistent with current House policy, and is supportive of informed post-dispute agreements to arbitrate.

**This Proposal Calls Only for Voluntary Compliance**

The proposed resolution does not propose new laws or legal obligations, but rather urges all legal employers to forego mandatory pre-dispute agreements to arbitrate claims of unlawful categorical discrimination, harassment or retaliation. Compliance is fully voluntary, with the only enforcement mechanism being the competition of the legal marketplace and the respect of one’s peers. The ABA is urging, not mandating, legal employers not to require such pre-dispute arbitration agreements.

**Conclusion**

This resolution represents the logical extension of Resolution 300 urging legal employers not to require arbitration of sexual harassment claims; it broadens the same protection to discrimination and retaliation claims, and to legally protected classes other than sex. This resolution is in furtherance of the ABA’s goal of ensuring justice for all. We are committed to eliminating illegal employment discrimination, harassment or retaliation based upon legally protected characteristics—because of who an employee is, not what he or she does—in our profession and in our society. Following Justice Louis Brandeis’ maxim that “Sunlight is … the best of disinfectants; … light the most efficient policeman,”

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27 *.... [I]n the case of pre-employment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement.” (Ramos v. Superior Court (Cal. Ct. App., First Dist., Div.1) Slip Opinion, p.0 14 (Nov. 2, 2018) (quoting Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal.4th 83, 115 (Cal. 2000)).
28 Louis D. Brandeis, Other People’s Money and How the Bankers Use It (1914).
claims of those unlawful job actions should not be forced unilaterally out of the courts and into the privacy of arbitration.

Respectfully submitted,

Wilson Adam Schooley  
Chair, Section of Civil Rights and Social Justice  
January 2019
107B

GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice
Submitted By: Wilson Adam Schooley, Chair, Section of Civil Rights and Social Justice

1. Summary of Resolution(s).
This resolution urges legal employers not to require pre-dispute mandatory arbitration of claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status or status as a victim of domestic or sexual violence.

2. Approval by Submitting Entity.
Approved by Section of Civil Rights and Social Justice on October 13, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously?
This builds upon Resolution 300 passed by the House in August 2018, which prohibited mandatory arbitration in sexual harassment cases.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?
In 2018, the ABA passed a resolution urging legal employers not to require mandatory arbitration of claims of sexual harassment. ABA Resolution, 18A300, https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/300.pdf.

This proposed resolution represents the logical extension of Resolution 300 urging legal employers not to require arbitration of sexual harassment claims; it broadens the same protection to discrimination and retaliation claims, and to legally protected classes other than sex: race, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status and status as a victim of domestic or sexual violence.

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


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

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

9. Disclosure of Interest. (If applicable) None

10. Referrals.
   • Commission on Domestic and Sexual Violence
- Commission on Disability Rights
- Commission on Homelessness and Poverty
- Commission on Sexual Orientation and Gender Identity
- Commission on Hispanic Rights and Responsibilities
- Commission on Racial and Ethnic Diversity in the Profession
- Section of State and Local Government Law
- Entities that Comprise the Center for Public Interest Law
- Section of Alternative Dispute Resolution
- Commission on Women in the Profession
- Tort Trial & Insurance Practice Section
- Section of Litigation
- Solo, Small Firm and General Practice Division
- Section of Labor and Employment Law

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

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12. Contact Name and Address Information. Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution
This resolution urges legal employers not to require pre-dispute mandatory arbitration of claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status or status as a victim of domestic or sexual violence.

2. Summary of the Issue that the Resolution Addresses
The legal community is currently discussing the propriety of mandatory pre-dispute agreements to arbitrate employment disputes in general, and disputes over statutory protections in particular. Many law students and recruiting offices are requesting that requirement to be dropped, and many law firms are considering that change. This policy urges that, with respect to unlawful categorical discrimination, harassment and retaliation, an applicant or employee should not be forced to give up the right to a jury trial as a condition of employment.”

3. Please Explain How the Proposed Policy Position will address the issue
Adoption of this policy will allow the ABA to oppose mandatory pre-dispute arbitration agreements as a condition of employment in the legal profession. It will apply to claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status, or status as a victim of domestic or sexual violence. It does not bear on voluntary agreements to arbitrate after the dispute arises.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
None as of this writing.
RESOLUTION

RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal legislatures to enact legislation, and correctional and detention facilities to enact policies, to provide all women prisoners in all forms of detention, both adult and juvenile, with unrestricted access, on housing units, to free toilet paper and a range of free feminine hygiene products, including both tampons and sanitary pads, in sufficient quantities to address their needs.
This resolution urges federal, state, local, territorial, and tribal governments to enact legislation, and correctional and detention facilities to enact policies, to provide all women prisoners in all forms of detention with unrestricted access to free toilet paper and a range of free feminine hygiene products, including both tampons and sanitary pads, in sufficient quantities to address their needs.

**The growing number of incarcerated women and young women**

Over 200,000 women are confined in state and federal prisons, local jails, territorial facilities, and Indian Country jails. Women prisoners comprise the fastest growing segment of the incarcerated population. In addition, young women constitute 15 percent of the total confined juvenile population and are most prevalent in detention (19 percent) and residential treatment programs (29 percent). Between 1980 and 2015, the rate of women’s imprisonment has outpaced that of men by over 50%. Despite this alarming growth rate, women comprise only 10% of our nation's prisoners. Women therefore enter correctional systems designed for, and based on the needs of men. Policies written for men rarely meet women’s unique needs, which are consequently overlooked or ignored. Nowhere is this more apparent than in how facilities distribute and provide access to feminine hygiene products related to menstruation – specifically, sanitary pads and tampons.

Too often, women prisoners do not have access to sufficient feminine hygiene supplies. Facilities may provide women with some sanitary pads, but often in insufficient quantities. Access to even these limited supplies is often severely restricted, and supplies are often not available when women need them. Women who have the financial means to do so must purchase tampons and additional sanitary pads through a commissary, but unfortunately, not all women have this option.

Several departments of corrections have developed policies to provide free sanitary pads and tampons to women prisoners. However, access to basic hygiene products should extend to all women prisoners, both adult and juvenile, regardless of the facility in which they are confined. All women prisoners deserve access to sufficient hygiene products.

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1 Wendy Sawyer, *The Gender Divide: Tracking Women’s State Prison Growth*, Prison Policy Initiative (January 9, 2018). Between 2000 and 2015, the women’s jail population grew 40%, while the overall jail population grew 17%; and the women’s prison population increased 22% compared to a 7% increase in the total prison population. *See also Overlooked: Women and Jails in an Era of Reform*, the Vera Institute (August 2016).


feminine hygiene supplies to meet their menstrual needs, and both legislative bodies and correctional and detention facilities should ensure that they have that access.

Women prisoners typically do not have access to sufficient basic feminine hygiene supplies.⁵

Feminine hygiene products, including tampons, sanitary pads, and toilet paper are fundamental, basic necessities for women prisoners who need them. Women should have free access to these supplies — yet they rarely do. Facilities will generally provide prisoners with some basic sanitary supplies, including toilet paper and feminine hygiene products. However, the quantity and variety of these supplies are often severely limited, and access needlessly restricted.

Many facilities limit the quantity of sanitary napkins they provide to women prisoners. Until recently, the New York state issued women 24 sanitary pads each month, which the vast majority of prisoners reported was inadequate.⁶ The state-issued sanitary pads were so thin that women reported needing to wear up to four pads at a time to adequately control their menstrual flow.⁷ Women had the option of requesting additional pads through the medical unit, but often faced degrading and unrealistic requirements when they did. One facility required women to be screened for anemia before being authorized to receive additional pads.⁸ Far worse, however, was the requirement for women at New York’s Bayview Correctional Facility. There, the Medical Director demanded concrete evidence that a woman needed additional supplies: “We need her to bring in a bag of used sanitary napkins to show that she actually has used them and needs more.”⁹

Prisoners in other states face similar problems with inadequate hygiene supplies.¹⁰ Prisoners in California jails describe being forced to reuse pads and to beg for hygiene supplies.¹¹ Prisoners in Connecticut describe receiving five pads per week to split

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⁵ ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS (3d ed. 2011), Standard 23-3.5(c).
¹⁰ ACLU of California, Reproductive Health Behind Bars in California at 20-21 (2016).
¹¹ ACLU of California, Reproductive Health Behind Bars in California at 20 (2016)
between two women in a cell. ¹² The low-quality pads often fell out of women’s pantlegs when the adhesive failed to adequately keep the pads in place.¹³ Women who could afford to buy additional supplies in a commissary could avoid that fate by using up to six pads at once. Women in Texas receive 30 sanitary pads and 6 tampons per month, and women routinely exhaust this supply.¹⁴

In Michigan, women in the Muskegon County Jail filed a lawsuit based in part on inadequate access to feminine hygiene products and toilet paper.¹⁵ Women described delays of up to two days in receiving sanitary napkins, causing them to bleed through their clothes despite their repeated requests. Women were forced to wear bloody clothes until the next available laundry day, which occurred once per week.

Women prisoners who need additional supplies may purchase them through a commissary, but often lack the means to do so. The vast majority of women prisoners are indigent and cannot purchase additional supplies.¹⁶ Even prisoners who work will be forced to spend much or all of their earnings on sanitary supplies – average wages for regular (non-industry) prison jobs range from an average of $0.14 per hour to an $0.63 per hour, and some states do not pay prisoners for their work.¹⁷ Tampons and pads are often sold in prison commissaries at significantly inflated prices. In New York, single tampons are offered for 12 cents, 17 cents, or 24 cents; and single pads cost 21 cents or 22 cents, depending on the facility.¹⁸ In Arizona, a woman would need to work for 21 hours to purchase a box of 16 pads, and 27 hours for a box of 20 tampons.¹⁹

The same problems that arise with insufficient quantities of menstrual supplies also arise with insufficient quantities of toilet paper. The Correctional Association of New York found that New York provided women prisoners with the same quantities of toilet paper

¹³ Id.
¹⁴ The Treatment of Women in Texas’ Criminal Justice System at 10, Texas Criminal Justice Coalition (April 2018).
¹⁵ Semelbauer v. Muskegon County, 1:14-cv-01245 (W.D. Mich.)
¹⁶ Experts estimate that 80% of prisoners are indigent. Eisen, Lauren-Brooke, Charging Inmates Perpetuates Mass Incarceration. Brennan Center for Justice (2015). This figure is not broken down by gender and includes both men and women.
¹⁷ How Much Do Incarcerated People Earn in Each State? Prison Policy Initiative, (April 10, 2017) www.prisonpolicy.org/blog/2017/04/10/wages. Seven states do not pay prisoners for their work. Wages for jobs in “Correctional Industries” are higher – averaging between $0.33 and $1.41 per hour – but women’s prisons frequently do not offer industry jobs, or have limited spaces available.
as they provided men prisoners, even though women routinely need more toilet paper than men.\textsuperscript{20} Not surprisingly, women routinely reported running out of toilet paper and resorting to using "magazines, newspaper, lined paper and washcloths" instead.\textsuperscript{21}

The type of feminine hygiene products offered is crucial. Tampons are rarely provided free of charge to women prisoners. Some women will prefer tampons to pads, especially to the low-quality state-issued pads they often receive. In prison, any desired item – whether it is a necessity, a luxury, or even something illegal – becomes a part of the prison economy.\textsuperscript{22} Feminine hygiene products are no exception. Without access to the amount or type of sanitary supplies that they need, women are often forced to resort to the underground economy to obtain these basic necessities.\textsuperscript{23}

In some facilities, however, lack of access to tampons can have far worse consequences. Many women prisoners must use group showers, where menstruating prisoners without access to tampons face the impossible choice of either not bathing for the five to seven days of menstruation, or of visibly bleeding while showering in full view of other prisoners, or even correctional staff. Unfortunately, unscrupulous correctional staff can take advantage of these women’s desperation, even demanding sexual acts in return for tampons.\textsuperscript{24}

Women prisoners can safely be provided with unrestricted access to free tampons, sanitary pads, and toilet paper.

External organizations that evaluate women’s prisons routinely conclude that women prisoners should have access to sufficient quantities of tampons, pads, and toilet paper.\textsuperscript{25} Notably, several states and the Federal Bureau of Prisons have instituted


\textsuperscript{22} B. Owens, J. Wells, J. Pollock: \textit{In Search of Safety: Confronting Inequality in Women’s Imprisonment} at 75 (2017).

\textsuperscript{23} B. Owens, J. Wells, J. Pollock: \textit{In Search of Safety: Confronting Inequality in Women’s Imprisonment} at 75 (2017).

\textsuperscript{24} Letter from Acting Assistant Attorney General Jocelyn Samuels to Governor Robert Bentley, January 17, 2014. A consent decree resolving this case requires Alabama’s Tutwiler Prison for Women to provide free, unlimited tampons and pads to their women prisoners – and they have been doing so since March 2016. \textit{See} State of Alabama Department of Corrections Standard Operating Procedure 8-27 (March 8, 2016). Currently, all housing unit bathrooms have open cabinets containing toilet paper, maxi pads, and tampons. The same supplies are available on the segregation unit and medical unit, although outside of the cells.

\textsuperscript{25} \textit{Women and Imprisonment: The Handbook for Prison Managers and Policy-Makers}, United Nations (2015); Task Force on Correctional Health Care Standards, \textit{Standards for Health Services in Correctional Institutions}, American Public Health Association at 150 (3\textsuperscript{rd} ed. 2003)(“Toilet paper must be provided to all prisoners and all female prisoners must be issued sanitary napkins and/or tampons when they are needed.”); Rachel Ramirez, \textit{Reentry
policies to provide women prisoners with sufficient sanitary supplies. For example, the Federal Bureau of Prisons issued an Operations Memorandum on August 1, 2017 to provide women prisoners, at no cost, with tampons (regular and super size); maxi pads with wings (regular and super size), and panty liners.\textsuperscript{26} Julia Tutwiler Prison for Women in Alabama has provided free toilet paper, sanitary napkins, and tampons (regular and super size) to women since March 2016.\textsuperscript{27} The Nebraska Department of Corrections took the initiative in January 2018 to provide free tampons and pads to women prisoners after legislation that would have mandated free tampons and pads for women prisoners failed.\textsuperscript{28}

When agencies do develop policies to provide appropriate, free menstrual supplies to women prisoners, it is critical to specifically provide for meaningful access to the products, and policies must explicitly address distribution methods. The U.S. Department of Justice’s Office of Inspector General evaluated federal women prisoners’ access to menstrual supplies in its September 2018 Review of the Federal Bureau of Prisons’ Management of its Female Inmate Population.\textsuperscript{29} The Bureau of Prisons’ policy had simply required that “products for female hygiene needs shall be available,” but did not address any method of distributing the supplies.”\textsuperscript{30} Although each of the 29 federal institutions that house women were following the identical policy, distribution methods varied across facilities, even of the same security level, and negatively impacted the availability of sanitary supplies.\textsuperscript{31} The OIG recommended that the BOP modify its current policy to “[c]larify guidance on the distribution of feminine hygiene products to ensure sufficient access to the amount of products inmates need free of charge.”\textsuperscript{32} The BOP agreed to do so.\textsuperscript{33}

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Considerations for Justice Involved Women, National Resource Center on Justice Involved Women; Gender Responsive Policy and Practice Assessment, National Institute of Corrections.
\end{flushright}

\textsuperscript{26} Federal Bureau of Prisons Operations Memorandum 001-2017, Provision of Feminine Hygiene Products (August 1, 2017)(re-issued August 1, 2018).
\textsuperscript{27} State of Alabama Department of Corrections, Standard Operating Procedure 8-27, Hygiene Item Issuance, (March 8, 2016).
\textsuperscript{28} New Tampon Policy Provides Them Free to Nebraska Prisoners, Oklahoma World-Herald (January 19, 2018). Like most other states, Nebraska had previously provided free pads, with tampons available at the commissary for inflated prices.
\textsuperscript{30} Office of the Inspector General, U.S. Department of Justice, Review of the Federal Bureau of Prisons’ Management of its Female Inmate Population at p. 29. The investigation occurred prior to the revised Operations Memorandum for the Provision of Feminine Hygiene Products, and therefore evaluated the earlier policy. Neither the earlier policy nor the current policy addresses distribution.
\textsuperscript{31} \textit{id.} at 29.
\textsuperscript{32} \textit{id.} at 44.
\textsuperscript{33} \textit{id.} at 50.
The Alabama Department of Corrections, in contrast, provides clear guidance on access to the free tampons, pads, and toilet paper that it provides to women prisoners at Julia Tutwiler Prison for Women.\textsuperscript{34} The policy requires hygiene items to be readily available in bathroom areas, assigns specific inventory and distribution responsibilities to the Housekeeping Officer, and designates an Administrative Lieutenant to ensure that the hygiene items are provided as required. An Independent Monitor has evaluated women prisoners’ access to these supplies under a 2015 Consent Decree.\textsuperscript{35} All six compliance reports that the Monitor has filed with the court reflects that Tutwiler is following their policy, and that women prisoners have unrestricted access to free tampons, pads, and toilet paper.

Potential problems with unrestricted access to hygiene supplies can be addressed without restricting access to all women.

Perceived and actual problems with providing unrestricted access to free pads and tampons can be adequately addressed without depriving women of basic sanitary supplies. Facilities often worry that women will use feminine hygiene products for reasons other than they are intended, such as for cleaning supplies or to address other basic housekeeping issues in the prison. And that does happen. Women have reportedly used pads to clean housing units, “to quiet squeaky doors, steady uneven tables and chairs,”\textsuperscript{36} as toilet covers for stainless steel toilets, or to pad blisters on their feet.\textsuperscript{37} However, as the Correctional Association of New York recommended, the problem of women using sanitary supplies for housekeeping can be easily alleviated by providing women with appropriate cleaning supplies.\textsuperscript{38} Other problems reflect basic supervision issues, which can be resolved without restricting all prisoners’ access to pads and tampons.\textsuperscript{39}

The most commonly reported problem with unrestricted access to feminine hygiene supplies is that women tend to hoard the supplies, at least initially. However,
once women come to trust that they will continue to have access to the supplies, they no longer hoard them because there is no reason to do so.40

Significantly, no security issues related to unrestricted access to feminine hygiene have been identified. The Office of Inspector General’s report on the federal facilities noted that “no BOP staff member told us that feminine hygiene products were misused in a manner that presented a security concern.”41 The Administrator of the Women and Special Populations Branch concurred that making feminine hygiene products freely accessible could not be a security concern.42

Women prisoners in both juvenile and adult systems deserve unrestricted access to necessary basic feminine hygiene supplies. Women should not be forced to forfeit their dignity, their health, or their safety to obtain tampons, sanitary pads, or toilet paper. All legislatures and correctional facilities should take action to ensure that women have the necessary supplies to meet their biological needs.

Respectfully submitted,

Lucien Dervan
Chair, Criminal Justice Section
January 2019

40 See also Office of the Inspector General, U.S. Department of Justice, Review of the Federal Bureau of Prisons’ Management of its Female Inmate Population, Evaluation and Inspection Report 18-05 at 30. (State official explained that an initial hoarding issue stopped when prisoners realized that they would continue to have access to hygiene products.).
41 Id. at p. 30 n. 65.
42 Id.
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Lucian Dervan, Chair

1. Summary of Resolution(s).

This resolution urges federal, state, local, tribal and territorial governments to enact legislation, and correctional and detention facilities to enact policies, to provide all women prisoners in all forms of detention, both adult and juvenile, with unrestricted access to a free toilet paper and a range of free feminine hygiene products, including both tampons and sanitary pads in sufficient quantities to address their needs.

2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Council at the Fall Meeting in Washington, DC, on November 3, 2018.

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

No.

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

The Criminal Justice Standards for the Treatment of Prisoners, Standards 23-3.5c and 23-6.1(iv), state generally that correctional authorities should ensure that special health care protocols are used for female prisoners. This resolution is very specific because institutions have failed to understand exactly what female prisoners, both adult and juvenile, need in order to adequately respond to their monthly menstrual cycles.

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

Not applicable.

6. Status of Legislation. (If applicable)

Not applicable.

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

This policy will be used as a basis of advocacy in federal, state, local, territorial and tribal correctional systems.
8. Cost to the Association. (Both direct and indirect costs)

No cost to the Association.

9. Disclosure of Interest. (If applicable)

Not applicable

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

Commission on Veteran’s Legal Services
Legal Aid & Indigent Defense
Commission on Disability Rights
Special Committee on Hispanic Legal Rights & Responsibilities
Commission on Homelessness and Poverty
Commission on Women
Center for Human Rights
Commission on Immigration
Racial & Ethnic Diversity
Racial & Ethnic Justice
Commission on Youth at Risk
Young Lawyer’s Division
Civil Rights and Social Justice
Government and Public Sector Lawyers
International Law
Federal Trial Judges
State Trial Judges
Law Practice Division
Science & Technology
Health Law
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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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges federal, state, local, tribal and territorial governments to enact legislation, and correctional and detention facilities to enact policies, to provide all women prisoners in all forms of detention with unrestricted access to a free toilet paper and a range of free feminine hygiene products, including both tampons and sanitary pads in sufficient quantities to address their needs.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the need for all correctional facilities to provide women prisoners with appropriate hygiene products.

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

The resolution urges all correctional facilities to provide feminine hygiene products in sufficient quantities and to make them available free of charge.

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

Some correctional facilities have expressed concerns about women hoarding supplies, or using sanitary napkins to clean cells or housing units, quiet squeaky doors, stabilize uneven chairs or tables, to protect blisters, or to pad cold metal toilet seats.
RESOLVED, That the American Bar Association urges federal, state, local, tribal and territorial governments to amend existing laws or enact new laws to clearly define child torture and make child torture a felony offense regardless of whether a serious physical injury occurs; and

FURTHER RESOLVED, That the American Bar Association urges governments to promote training for judges, prosecutors, physicians, law enforcement, child protection authorities, and victim-witness advocates on emerging evidence-based, victim-centered and effective practices, and to utilize the Child Advocacy Care (CAC) model of collaboration and providing services to improve government responsiveness to severe cases of child abuse.
**Executive Summary**

Child abuse is a significant problem in the United States. In fiscal year 2016 (the latest year for which there is national data), 50 states, the District of Columbia, and the Commonwealth of Puerto Rico substantiated 676,000 children as victims of child abuse and neglect. The U.S. Department of Health and Human Services estimated that for the same year at least 1,750 children died from child abuse and neglect.

Child torture is a documented subset of severe child abuse. Child torture includes a combination of two or more cruel inhuman degrading treatments occurring for protracted periods of time, such as:
- intentionally starving the child,
- forcing the child to sit in urine or feces,
- binding or restraining the child,
- repeatedly physically injuring the child,
- exposing the child to extreme temperatures without adequate clothing,
- locking the child in closets or other small spaces, and
- forcing the child into stress positions or exercise.

resulting in prolonged suffering, permanent disfigurement/dysfunction, or death.

In a number of states, some cases of child torture do not result in a category of serious physical injury that is required for a felony charge. Amending or enacting criminal codes to include a felony charge for these cases will protect child survivors.

Furthermore, promoting education of judges, law enforcement, child protection authorities, prosecutors, and victim advocates on emerging evidence-based and effective practices to improve government responsiveness to severe cases of child abuse will also help protect child victims.

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2 Id at 53; see U.S. Gov’t Accountability Office, *Child Maltreatment: Strengthening National Data on Child Fatalities Could Aid in Prevention*, GAO-11-599, at 9 (2011) (“More children have likely died from maltreatment than are reflected in the national estimate. . . . A major reason for the likely undercounting of child maltreatment fatalities is that nearly half of states report to NCANDS data only on children already known to CPS agencies—yet not all children who die from maltreatment were previously brought to the attention of CPS”), https://www.gao.gov/assets/330/320774.pdf.


4 Id.

5 See, e.g., Sadie Gurman, *Woman Pleads Guilty In Denver Child Abuse Case*, Coloradoan: A Part of the USA Today Network (Aug. 8 2014) (“Prosecutors said . . . the case was among the most horrific they had ever seen, but the state’s child abuse laws kept them from pursuing harsher penalties because the children, ages 2 to 6, did not suffer serious physical injuries”), https://www.coloradoan.com/story/news/local/colorado/2014/08/08/woman-pleads-guilty-denver-child-abuse-case/13800793/.
Existing American BA Resolutions and/or Standards

The American Bar Association (ABA) has a history of advocating for the importance of investigating and prosecuting those who perpetrate crimes against children.

In 2013, the ABA adopted a policy urging states to review their child abuse and neglect laws to potentially strengthen/adjust:

a) Mandatory reporting requirements for child abuse and neglect;
b) Sanctions for failure to report child abuse and neglect, and for the making of a maliciously false report;
c) Penalties for endangering a child’s life through physical abuse, sexual abuse, and severe neglect; and

d) Whether and how to extend civil immunity to those who in good faith participate or assist in child protective investigations and other child protective actions.

Scope of the Problem

According to the U. S. Department of Health and Human Services (HHS), in fiscal year 2016, state Child Protective Service ("CPS") agencies received 4.1 million referrals of suspected child abuse involving approximately 7.4 million children. In 2016, 50 states, the District of Columbia, and the Commonwealth of Puerto Rico substantiated 676,000 children as victims of child abuse and neglect. The majority of victims consisted of three races or ethnicities – White (44.9%), Hispanic (22.0%), and African-American (24.9%). Forty-nine states reported 1,700 child fatalities due to abuse and neglect. HHS estimates that at least 1,750 children died due to abuse and neglect across the U.S. In 2016, more children died from child abuse and neglect than from all childhood cancers combined.

For the child victims that survive, consequences can last lifetimes. Such long-term consequences may be:

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8 Id. at 18.
9 Id. at 20.
10 Id. at 53.
11 Id.
• Physical (e.g., impaired brain development, poor health including cancer);
• Psychological (e.g., depression, anxiety, relationship difficulties);
• Behavioral (e.g., juvenile delinquency, adult criminality, teen pregnancy, low academic achievement, alcohol and drug use, mental health problems, abusive behavior); and
• Societal (e.g., direct costs associated with maintaining a child welfare system to investigate and respond to allegations of child abuse and neglect, as well as expenditures by the judicial, law enforcement, health, and mental health systems, and indirect costs associated with juvenile and adult criminal activity, mental illness, substance abuse, domestic violence, loss of productivity due to unemployment and underemployment, the cost of special education services, and increased use of the health care system).  

**Child Torture as a Form of Child Abuse**

Child torture is a medical subcategory of child abuse including unique clinical features which require specific child assessment, diagnostic, and treatment approaches.  

Child torture includes a combination of two or more cruel inhuman degrading treatments for protracted periods of time, such as:

- intentionally starving the child,
- forcing the child to sit in urine or feces,
- binding or restraining the child,
- repeatedly physically injuring the child,
- exposing the child to extreme temperatures without adequate clothing,
- locking the child in closets or other small spaces, and
- forcing the child into stress positions or exercise.

resulting in prolonged suffering, permanent disfigurement/dysfunction, or death.  

An estimated 1-2% of children evaluated for child maltreatment fall into the category of child torture. Not all cases of child torture result in an instantly life-threatening or serious physical injury.

**Review of Criminal Codes**

Courts have defined torture as used in child-endangering statutes as the infliction of severe pain or suffering of body or mind.  

Some state codes lack a felony charge for

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14 Id. at 2-6.
15 Knox et al., supra note 3, at 38.
16 See Id.
17 Id.
cases of child torture not resulting in a serious physical injury as defined by statute. In cases where the child survives without serious physical injuries, the only charges that fit the elements of the crime in these states may be misdemeanors.

For example, some states have recognized the problem and have adopted statutes to explicitly address the issue. The South Dakota statute § 26-10-1 states, “Any person who abuses, exposes, tortures, torments, or cruelly punishes a minor in a manner which does not constitute [a felony], is guilty of a Class 4 felony.”

Thirty-seven state codes contain some form of a child torture statute. Criminal child torture statutes in the U.S. fall into one of the following categories, as applied to children:

1. the state code explicitly prohibits “torture” or an analogous element such as “unusual cruelty” or “unjustifiable suffering;”

2. the state prohibits causing a mental or physical injury, and further defines that injury to include torture, pain, or synonymous element such as “unusual cruelty” or “unjustifiable suffering;” or

3. the state code bans repeated pattern of injuries that result in torture.

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19 See Ann Ratnayake Macy, U.S. 50 State Study: A Precarious Gap in U.S. Criminal Codes Exists for Cases of Child Torture, JJ. of Child and Youth Review (to be published 2019). (Eg. Alaska, Arkansas, Hawaii, Illinois, Indiana, Maryland, Maine, Massachusetts, Montana, New Hampshire, New York, Oregon, Pennsylvania, and West Virginia); see, e.g., Del. Code Ann. tit. 11 § 222 (26) (defining “serious physical injury” as “physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ, or which causes the unlawful termination of a pregnancy without the consent of the pregnant female”).

20 See, e.g., Sadie Gurman, Woman Pleads Guilty In Denver Child Abuse Case, Coloradoan: A Part of the USA Today Network (Aug. 8 2014) (“Prosecutors said . . . the case was among the most horrific they had ever seen, but the state’s child abuse laws kept them from pursuing harsher penalties because the children, ages 2 to 6, did not suffer serious physical injuries”) (Colo. Rev. Stat. §18-6-401 includes a serious bodily injury limitation in the sentencing scheme).


22 See Ratnayake, supra note 17.


24 Id. (The term torture is also cited in the following other contexts: animal cruelty, sentencing enhancements to murder, capital/non-capital punishment sentencing guidelines, obscenity statutes, sadomasochist statutes, human trafficking statutes, and pararenal termination/reunification determinations statutes. These statutes were purposefully excluded from the analysis due to relevance and application to limited circumstances.)
The statutes are wide ranging and heterogenous. The maximum penalties vary from five years in jail to a lifetime in prison. Some child torture statutes only apply if the perpetrator of the acts has legal custody of the child. Others criminalize all acts of torture against children regardless of whether the perpetrator had legal custody of the child, or range in between legal custody and at least an informal custody agreement. Additionally, in certain states, the application of the child torture statute is limited by a serious bodily injury requirement. Lastly, while a child is usually considered a person under the age of eighteen years, some state statutes limit the application of the child torture provisions to only younger children.

For states that lack a felony charge for cases of child torture not resulting in serious bodily injury or for states with significant loopholes within their child torture statutes, the Michigan statute, Mich. Comp. Laws § 750.85, is an example of an effective statute. Furthermore, it not only protects child victims, but also other vulnerable populations such as the elderly, disabled, and domestic violence victims.

**Mich. Comp. Laws Serv. § 750.85 Torture; Felony**

(1) A person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture and is guilty of a felony punishable by imprisonment for life or any term of years.

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27 E.g., N.M. Stat. § 30-6-1 Abandonment Or Abuse Of A Child (2018).


30 E.g., Del. Code State Tit. 11 § 1103B Cruelty To Children Definition (2018).

(2) As used in this section: (a) “Cruel” means brutal, inhuman, sadistic, or that which torments. (b) “Custody or physical control” means the forcible restriction of a person's movements or forcible confinement of the person so as to interfere with that person's liberty, without that person's consent or without lawful authority. (c) "Great bodily injury" means either of the following: (i) Serious impairment of a body function as that term is defined in section 58c of the Michigan vehicle code, 1949 PA 300, MCL 257.58c. (ii) One or more of the following conditions: internal injury, poisoning, serious burns or scalding, severe cuts, or multiple puncture wounds. (d) "Severe mental pain or suffering" means a mental injury that results in a substantial alteration of mental functioning that is manifested in a visibly demonstrable manner caused by or resulting from any of the following: (i) The intentional infliction or threatened infliction of great bodily injury. (ii) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt the senses or the personality. (iii) The threat of imminent death. (iv) The threat that another person will imminently be subjected to death, great bodily injury, or the administration or application of mind-altering substances or other procedures calculated to disrupt the senses or personality. (3) Proof that a victim suffered pain is not an element of the crime under this section. (4) A conviction or sentence under this section does not preclude a conviction or sentence for a violation of any other law of this state arising from the same transaction.

**Education for Multidisciplinary Professionals**

Multidisciplinary child protection professionals such as judges, pediatricians, prosecutors, law enforcement, child protection authorities, victim-witness advocates will better protect children from severe abuse and neglect if educated on emerging evidenced-based or effective practices, and collaborate using the Child Advocacy Care (CAC) model.

Common barriers to an effective government response include lack of a multidisciplinary team approach to dealing with child abuse, inadequate or non-existent protocols for child fatalities, inadequate training in the collection and presentation of forensic evidence, and lack of understanding of latest social research related to trauma and childhood development 32 lack of understanding of the latest medical research such as child torture,33 lack of understanding of the latest case law such as Ohio v. Clark,34 and lack of training in emerging areas such as legally securing digital evidence from computers, smart phones, tablets, and other electronic devices.

32 See U.S. Cent. For Disease Control and Prevention, Adverse Childhood Experiences (ACEs) (Apr. 1, 2016), https://www.cdc.gov/violenceprevention/acesstudy/index.html (children with high ACEs score may have PTSD).

33 See Barbara L. Knox et al., Child Torture As A Form Of Child Abuse, 7 J. Child Adolescent Trauma, 38 (2014) (CPS had not substantiated abuse for half of the study’s participants due to lack of understanding of dynamics of child torture).

34See Ohio v. Clark, 135 S. Ct. 2180, 2182 (2015) (statements made by a very young child are rarely if ever testimonial: “young children have little understanding of prosecution . . . [and] it is extremely unlikely that a 3-year-old child . . . would intend his statements to be a substitute for trial testimony. . .[A] young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all. [In fact,] “[s]tations by very young children will rarely, if ever, implicate the Confrontation Clause”).
Children are unable to protect themselves and will always need highly trained and competent investigators, prosecutors, victim/witness specialists, social workers, forensic interviewers, child protective service workers, doctors, sexual assault nurse examiners, psychologists, psychiatrists, scientific forensic experts, and computer forensic examiners to protect them.

In addition to training to enhance government responsiveness to child abuse, the ABA also urges governments to adopt the Child Advocacy Center (CAC) model, and seek accreditation by the National Children’s Alliance. CACs are community-based, child-friendly, multidisciplinary services for children and families affected by sexual abuse or severe physical abuse, and provide a hub for collaborating on child abuse cases. CACs bring together, often in one location, child protective services investigators, law enforcement, prosecutors, and medical and mental health professionals to provide a coordinated, comprehensive response to victims and their caregivers, and lead to better outcomes.35

**Conclusion**

To improve government responsiveness to cases of severe child abuse, the ABA urges governments to take the following actions. First, jurisdictions should amend existing laws or enact new laws to ensure that a felony charge exists for cases of child torture that does not result in a severe physical injury. In addition, jurisdictions should educate judges, prosecutors, law enforcement, child protection authorities, and victim-witness advocates on emerging evidence-based and effective practices to address child abuse and encourage the implementation of the Child Advocacy Care (CAC) model of collaboration.

Respectfully submitted,

Lucian Dervan  
Chair, Criminal Justice Section  
January 2019

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1. Summary of Resolution(s).

This resolution urges federal, state, territorial and tribal legislatures to amend existing laws or enact new laws to clearly define child torture and make child torture a felony offense regardless of whether a serious physical injury occurs, and to promote training for all court and medical personnel in these cases on emerging evidence-based, victim centered and effective practices, and to utilize the Child Advocacy Care (CAC) model of collaboration and providing services to improve government responsiveness to severe maltreatment of children that does not inflict serious bodily injury.

2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Council at the Fall Meeting in Washington, DC, on November 3, 2018.

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

No.

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

In 2013, the ABA adopted a policy 113C urging states to review their child abuse and neglect laws to potentially strengthen/adjust:
   a) Mandatory reporting requirements for child abuse and neglect;
   b) Sanctions for failure to report child abuse and neglect, and for the making of a maliciously false report;
   c) Penalties for endangering a child’s life through physical abuse, sexual abuse, and severe neglect; and
   d) Whether and how to extend civil immunity to those who in good faith participate or assist in child protective investigations and other child protective actions.36

This resolution builds on subsection (c) urging states to strengthen/adjust penalties for child torture which endangers a child’s life through severe abuse.

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

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

A number of states have successfully enacted statutes that appropriately penalize child torture, but many states have not and there is no law in those states that protect children from acts of child torture.

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

The Section would advocate enactment of appropriate legislation across the country.

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

None

9. **Disclosure of Interest.** (If applicable)

10. **Referrals.** Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

    **Standing Committees**
    Ethics and Professional Responsibility

    **Special Committees and Commissions**
    Center on Children and the Law
    Commission on Civic Education in the Nation’s Schools
    Commission on Domestic and Sexual Violence
    Commission on Lawyer Assistance Programs
    Commission on Youth at Risk

    **Sections, Divisions**
    Civil Rights and Social Justice
    Family Law
    Health Law
    Judicial Division
    Litigation
    Senior Lawyers Division
    State and Local Government Law
    Young Lawyers Division
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges federal, state, territorial and tribal legislatures to amend existing laws or enact new laws to clearly define child torture and make child torture a felony offense regardless of whether a serious physical injury occurs, and to promote training for all court and medical personnel in these cases on emerging evidence-based, victim-centered, using the Child Advocacy Care (CAC) model of collaboration to improve government responsiveness to severe maltreatment of children that does not inflict serious bodily injury.

2. Summary of the Issue that the Resolution Addresses

Child abuse is a significant problem in the United States. In fiscal year 2016 (the latest year for which we have national data), 50 states, the District of Columbia, and the Commonwealth of Puerto Rico substantiated 676,000 children as victims of child abuse and neglect. The U.S. Department of Health and Human Services estimated that for the same year at least 1,750 children died from child abuse and neglect.

Child torture is a documented subset of severe child abuse. Child torture includes a combination of two or more cruel inhuman degrading treatments occurring for protracted periods of time, such as:

- intentionally starving the child,
- forcing the child to sit in urine or feces,
- binding or restraining the child,
- repeatedly physically injuring the child,
- exposing the child to extreme temperatures without adequate clothing,
- locking the child in closets or other small spaces, and
- forcing the child into stress positions or exercise.

resulting in prolonged suffering, permanent disfigurement/dysfunction, or death.

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38 Id at 53; see U.S. Gov’t Accountability Office, Child Maltreatment: Strengthening National Data on Child Fatalities Could Aid in Prevention, GAO-11-599, at 9 (2011) (“More children have likely died from maltreatment than are reflected in the national estimate. . . . A major reason for the likely undercounting of child maltreatment fatalities is that nearly half of states report to NCANDS data only on children already known to CPS agencies—yet not all children who die from maltreatment were previously brought to the attention of CPS”), https://www.gao.gov/assets/330/320774.pdf.
39 See Barbara L. Knox, et al., Child Torture As A Form Of Child Abuse, 7 J. Child Adolescent Trauma 38, 44-46 (2014), https://pdfs.semanticscholar.org/2d88/139a3af0775d9a20333b03bb8f356cbeh615.pdf?_ga=2.7318258.1186776278.1539534964-179640352.1539534964.
40 Id.
In a number of states, a felony abuse charge requires a serious physical injury. Some cases of child torture do not result in a category of serious physical injury required by these statutes. Amending or enacting criminal codes to include a felony charge for these cases will protect child survivors. Furthermore, promoting education of judges, law enforcement, child protection authorities, prosecutors, and victim advocates on emerging evidence-based, victim-centered and effective practices, and to utilize the Child Advocacy Care (CAC) model of collaboration to improve government responsiveness to severe cases of child abuse will also help protect child victims.

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

The resolution urges these jurisdictions to enact laws that clearly define torture and make child torture a felony regardless of whether serious physical injury occurs. The resolution will close the gap in certain state criminal codes which allow cases of severe child abuse to be potentially treated as a misdemeanor, and urges jurisdictions to improve government responsiveness to child abuse by providing training on emerging issues in child protection, and by utilizing the Child Advocacy Care (CAC) model of collaboration and providing services.

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

N/A

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41 See, e.g., Sadie Gurman, Woman Pleads Guilty In Denver Child Abuse Case, Coloradoan: A Part of the USA Today Network (Aug. 8 2014) (“Prosecutors said . . . the case was among the most horrific they had ever seen, but the state’s child abuse laws kept them from pursuing harsher penalties because the children, ages 2 to 6, did not suffer serious physical injuries”), https://www.coloradoan.com/story/news/local/colorado/2014/08/08/woman-pleads-guilty-denver-child-abuse-case/13800793"/.
RESOLVED, That the American Bar Association opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches; and

FURTHER RESOLVED, That the American Bar Association opposes, and urges federal, state, local, territorial, and tribal jurisdictions to oppose, laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.
REPORT

I. Introduction

Given the ongoing and contemporary discussions around sexual violence and consent in our society, recognition that consent to sexual activity may not be inferred from the absence of resistance is long past due.

Survivors of sexual violence experience profound violations of their autonomy that shatter the “very foundation of their identity.” As scholar Sarah Deer recognized: “If our sexuality is part of that which defines who and what each of us is, then it is at the very core of our self-identity...[T]his is because the very nature of sexuality represents the best of humanity—the creation of new life, or the sharing of deep mutual affection and attraction. When this manifestation of our humanity is violated, it has life-changing ramifications for one’s feelings about self, others, justice, and trust. In consequence, rape damages something critical to our being and personhood.”

Similarly, the American Law Institute has noted: Basing liability on lack of consent [...] is consistent with the social recognition that the criminal law must protect individuals against violations of their sexual autonomy, not merely against sex obtained by physical force or coercion. The decision to share sexual intimacy with another, whether made spontaneously or with great deliberation, is a core feature of our humanity. The decision must always be a matter of individual choice. A person who seeks sexual intimacy with another must heed the other person’s right to decide whether to engage in, refuse, or defer sexual acts, including penetration or oral sex.

The ALI goes on to document the current state of the law globally, recognizing the shift away from centering sexual assault inquiries on the victim’s supposed responsibility to resist forcible assault, to focus instead on the the perpetrator’s responsibility to know they are acting with consent.

Well over half of American jurisdictions currently treat penetration without consent as a crime, even in the absence of other aggravating circumstances. This is the prevalent trend, not only nationally but elsewhere around the world.

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1 Sarah Deer, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA xvi (University of Minn. Press 2015).
3 See generally Stephen J. Schulhofer, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998) (discussing authorities that document the emergence of autonomy as the principal interest to be protected by the law of sexual assault). See also M.C. v. Bulgaria, [2003] ECHR 39272/98, ¶ 106, ¶¶ 163-165 (canvassing legal systems worldwide and concluding that “[t]he basic principle which is truly common to [the reviewed] legal systems is that serious violations of sexual autonomy are to be penalized.” (internal quotation marks omitted)).
4 American Law Institute, Model Penal Code: Sexual Assault and Related Offenses Revision Project, Reporters’ Notes to Section 213.6 (forthcoming).
In 2012, the FBI amended the rape definition used for its national crime statistics to include any act of “penetration, no matter how slight, of the vagina or anus . . ., or oral penetration by a sex organ of another person, . . . without the consent of the victim.” In 2003, the European Court of Human Rights observed that “[e]ven where the definition of rape [in European countries] contains references to the use of violence or threats of violence . . ., in case-law and legal theory lack of consent, not force, is seen as the constituent element of the offence. [T]he prosecution of non-consensual sexual acts [even in the absence of force] is sought in practice by means of interpretation of the relevant statutory terms . . . and through a context-sensitive assessment of the evidence. [T]here is a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse . . .” In 2011, the Council of Europe adopted the Istanbul Convention, which requires member states to criminalize all “non-consensual acts of sexual nature” and stipulates that “[c]onsent must be given voluntarily as the result of the person’s free will as assessed in the context of the surrounding circumstances.” The convention, signed by 45 of the Council’s 47 member nations, entered into force in 2014, in consequence a number of European states have recently revised their domestic legislation to make sexual penetration and oral sex without consent the equivalent of a serious felony.


“Parties shall take the necessary legislative or other measures to ensure that the following intentional conduct are criminalised: (a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; (b) engaging in other non-consensual acts of a sexual nature with a person; … Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.”


This recognition that sexual penetration and oral sex without consent should be treated as serious criminal offenses, even in the absence of force or other coercion, is widespread and growing. Popular press reports on the FBI's new definition of rape did not describe it as an outlier or on the vanguard in defining rape, but rather as harmonizing with existing law,\(^\text{10}\) and several states have recently updated their codes to make absence of consent sufficient for conviction of a sexual offense.\(^\text{11,12}\)

II. The Requirement of Resistance Effectively Authorizes the Use of Force, Coercion, and Abuse to Secure Sexual Access

The history of rape law is both shameful and brutal.\(^\text{13}\) As originally defined under the law, rape prohibited only "[c]arnal knowledge of a woman forcibly and against her will" outside of a martial relationship with her husband\(^\text{14}\) and was considered a crime perpetrated against the property of fathers and husbands.\(^\text{15}\) Historically, the law imposed unique obstacles for rape victims that other crime victims did not have to overcome:

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10 See, e.g., Charlie Savage, U.S. to Expand Its Definition of Rape in Statistics, N.Y. Times (Jan. 6, 2012) ("Many states have long since adopted a more expansive definition of rapes in their criminal laws, and officials said that local police departments had been breaking down their numbers and sending only a fraction of the reported rapes to the F.B.I. to comply with outdated federal standards."); Kevin Johnson, FBI changes definition of rape to include men as victims, USA Today (Jan. 6, 2012) (reporting that "a survey of major city police chiefs found that 80% believed the old definition was ‘not adequate’"). See also, e.g., 2015 La. Sess. Law Serv. Act 256 (S.B. 117) (West) (amending state’s third-degree rape law, which carries up to 25 years of imprisonment, to include a consent-based subsection, namely "(4) When the offender acts without the consent of the victim," now codified as La. Stat. Ann. § 14:43(A)(4)).


12 American Law Institute, Model Penal Code: Sexual Assault and Related Offenses Revision Project, Reporters’ Notes to Section 213.6 (forthcoming).

13 See e.g. Susan Estrich, Rape, 95 YALE L.J. (1986).


15 Sarah Deer, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 17 (University of Minn. Press 2015).
Derived from English common law and applicable in most jurisdictions until the mid
to late 1970s, these formal rules embodied clear presumptions against women who
complained of having been raped. These rules included absolute exemptions from
criminal liability for men who raped their wives. They included requirements that
the victim establish that she resisted her attacker to the utmost, freshly complained
of having been raped and corroborated her testimony with other evidence.16

Courts routinely failed to prohibit the use of force or threats by perpetrators and
instead placed the burden of resistance on female victims before they could secure the
law’s protections—which they often could not17: “coercive, aggressive, overbearing and
even frightening actions, if not physically brutal, were legally permissible.”18 This left
countless victims unprotected by criminal law over the centuries and created an appalling
norm that allowed sexual aggression to go unchecked in the majority of cases.

As a product of its time, it is not surprising that the 1962 Model Penal Code on
Sexual Assault and Related Offenses (“MPC”) codified this distressing history and
continued to impose legal burdens on rape victims of demonstrating more than “token
initial resistance.” Unfortunately, many jurisdictions followed the example of the MPC and
“require at least ‘reasonable resistance’” to be demonstrated19.

Despite the modern legal trend towards the removal of force and resistance as
essential elements of sexual assault, many current codes and pending legislative
proposals, including the 2018 draft of the MPC Sexual Assault and Related Offenses
Revision Project, still allow both “inaction” and the lack of “verbal or physical resistance”
to serve as evidence of consent. This is contrary to the FBI Uniform Crime Reports (UCR)
which, in 2012, re-defined rape simply as “any sexual penetration without consent.”20 The
incorporation of resistance into the very definition of consent contradicts contemporary
notions of consent. It also ignores significant scientific research on the neurobiology of

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16 Michelle J. Anderson, “Women Do Not Report the Violence They Suffer: Violence Against Women and
the State Action Doctrine,” 46 Villanova L. Rev. (No. 5) 924-25 (2001).
17 “In an 1880 case, the Wisconsin Supreme Court reversed a rape conviction despite the complainant’s
testimony that “He had my hands tight, and my feet tight and I couldn’t move…I got so tired out. I tried to
save me as much as I could, but…he held me, and…I worked so much as I could, and I gave up.” The
court reversed the conviction, holding that “she ought to have continued [resisting] to the last... [T]he
testimony does not show that the threat of personal violence overpowered her will.” Whittaker v. State
50 Wis. 519, 520, 522 (1880). In a similar 1906 case, typical for the period, the court reversed a rape
conviction because the victim had failed to make “the most vehement exercise of every physical means or
faculty within the woman’s power.” Brown v. States, 127 Wis. 193 (1906); id. at 199–200 (explaining “[a]n
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.”).
18 American Law Institute, Model Penal Code Preliminary Draft No. 3 (October 30, 2013).
19 ALI MPC Preliminary Draft No. 3 (October 30, 2013) (citing Michelle J. Anderson, Reviving Resistance
in Rape Law, 1998 U. Ill. L. Rev. 953 (1999)).
Definition of Rape (Jan. 6, 2012), available at https://www.justice.gov/opa/pr/attorney-general-eric-holder-
anounces-revisions-uniform-crime-report-s-definition-rape. See also ABA House of Delegates
Resolution 12M114 (“urging the Federal Bureau of Investigation to implement expeditiously the expanded
definition of rape in the Uniform Crime Reporting Summary Reporting Program”).
trauma, which shows that resistance by a sexual assault victim is often impossible, and is evidence of disabling fear rather than consent.

III. Research on the Varying and Individualized Responses by Victims of Sexual Violence Should Preclude Any Consent Definition that Relies on Inaction or a Lack of Resistance

Common myths persist about sexual violence victim behavior and veracity, such as whether they failed to physically resist the attacker, did not sustain significant injury, failed to report the assault immediately, continued to associate with the offender, recanted an initial report, or provided a statement or testimony in support of the offender. When a victim's behavior may appear to be "counterintuitive," and the reasons for the behavior are not adequately explained, our system of justice is compromised and supplanted by the court of popular (and uninformed) opinion.

The impact of rape myths and a misunderstanding of "counterintuitive" victim behavior was revealed in a study undertaken by British researchers. The study involved presentation of mock testimony in a sexual assault trial in which the victim had delayed her report of the assault, displayed a flat emotional affect on the witness stand, and suffered no physical injury beyond the act of penetration. The researchers observed jurors' deliberations when they received no expert instruction, as well as when they received education in the form of either expert testimony or a detailed jury instruction. In *State v. Obeta*, 796 N.W.2d 282 (Minn. 2011), the Minnesota Supreme Court described in its opinion the findings of the study as follows:

Drs. Ellison and Munro examined the deliberations of the groups that did not receive any educational information to determine whether the mock jurors subscribed to rape myths. Ellison & Munro, *Reacting to Rape, supra*, at 206. They found that mock jurors' "commitment to the belief that a 'normal' response to sexual attack would be to struggle physically was, in many cases, unshakeable." *Id.* Additionally, jurors harbored "strong, but unfounded, convictions that vaginal tissues are easily torn, that pelvic muscles can be rigidified at will and that intercourse without trauma only occurs where a

21 Behavior may seem "counterintuitive" when the actual experiences and behaviors of victims of sexual violence clash with the expectations of jurors, whose notions about rape and sexual assault have been unconsciously influenced by widespread societal myths concerning how someone becomes a victim of sexual violence, how victims respond during the assault itself, the resulting physical injury (or lack of injury) as a result of the assault, the victim's behavior following the assault, and the ability of the victim later to recall and recount details of the assault.

22 Even victims themselves are not immune to the effects of rape myths. Victims may blame themselves for the assault or—realizing that police, prosecutors, and jurors may be influenced by those erroneous beliefs—become convinced that they will never receive justice for the violence and indignity they have suffered.

woman is aroused, which, in the jurors’ minds, was wholly inconsistent with rape.” *Id.* at 207. The study also yielded support for the proposition that jurors view delayed reporting as indicative of a fabricated report, although the jurors were receptive to the idea that a victim may delay reporting for other reasons. *Id.* at 209–10. [Obeta, 796 N.W.2d at 285.]

Many jurisdictions stress the importance of understanding victim behavior in crimes of sexual violence, including the need for expert testimony on the subject, in their benchbooks on crimes of sexual violence.24 Pennsylvania’s Benchbook has devoted many pages to the contrast between rape myths and reality, as borne out by studies and statistics.25 The PA Benchbook also discusses the physical, emotional, and psychological effects of sexual assault on victims and their behavior during and after the assault, including the traumatic effects of testifying in court.26

Authorities and experts responsible for training law enforcement officers investigating these cases, prosecutors who must try them, and medical personnel responsible for treating victims of sexual violence also emphasize the need to understand the traumatic effects of violence on the ability of victims to recount what has happened to them, as essential knowledge required for these professionals to properly perform their duties.27

When the need to educate judges, police officers, prosecutors, and medical professionals about victim behavior and the effects of traumatic victimization is so widely and universally recognized, it is clear that a legal definition of consent must reflect the realities of sexual victimization—rather than perpetuate myths that victims should be required to physically resist their attacker.

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26 *Id.* at 1-17 to 26.

IV. Affirmative Consent Better Protects Sexual Autonomy than Resistance Requirements

The criminal law has too often failed to fully recognize that “no means no”—to the “great surprise of many lawyers, law students, and members of the general public.”28 For example, jurisdictions like New York (and until recently Maryland)29 require something in excess of express unwillingness to sexual contact before the law protects against sexual violence.30 In juxtaposition, states like Wisconsin and Colorado represent the modern view of sexual autonomy within American criminal law, recognizing not only that “no means no,” but also that “yes means yes”.31 Specifically, the codification of affirmative consent, which requires an individual to indicate willingness through words or action before another may engage in sexual contact or activity with them, is the proper, and increasingly common, legal and policy requirement to address sexual violence.32

Affirmative consent offers greater protection against sexual violence because it avoids a requirement that victims take some action before the law will protect them, or that, absent a clear “no”, sexual access may be inferred. An affirmative consent rule begins to reverse the unacceptable history of burdening victims rather than constraining perpetrators of sexual violence, and recognizes the significant scientific research on the neurobiology of trauma.33

V. Conclusion

The appalling history of sexual violence, and of the status of women as the sexual property of men, should no longer form the basis of the law governing sexual assault. No longer should the law countenance consent to sexual activity being inferred absent resistance. Rather, as is the case in all other human relationships, freely given consent should not be inferred, but sought. The ABA should recognize every individual’s inherent right of sexual autonomy, acknowledging that victims have no prior burden of

28 ALI Prospectus for a Project Revision (May 14, 2012).
30 N.Y. Penal Law § 130.05(2)(d) (2011); MD
31 Wis. Stat. § 940.225(4) (2011) (“Consent…means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse…”); Colo. Rev. Stat. Ann. § 18-3-401 (West 2011). (“Consent” means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent under the provisions of this part. Submission under the influence of fear shall not constitute consent.”)
demonstrating resistance, and oppose laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.

Respectfully submitted,

Mark I. Schickman
Chair, Commission on Domestic & Sexual Violence
January 2019
1. **Summary of Resolution(s).** The resolution opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches, and calls upon all jurisdictions to oppose any laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.

2. **Approval by Submitting Entity.** The CDSV approved this resolution at its Fall Business meeting, October 19, 2018.

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

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** There are no ABA policies related to the burden of demonstrating resistance to sexual assault, or to the principle that consent to sexual activity may not be inferred from inaction or lack of resistance.

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

6. **Status of Legislation.** (If applicable) Changes in the definitions of consent in the Model Penal Code are currently being considered by the ALI.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** Following adoption, this policy will be presented to model code drafters and legislative bodies to support widespread adoption.

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

9. **Disclosure of Interest.** (If applicable) n/a

10. **Referrals.** Criminal Justice Section; Civil Rights and Social Justice Section; Commission on Women in the Profession; Commission on Youth at Risk; Family Law Section; Young Lawyers Division; Law Student Division; Judicial Division; Tort Trial & Insurance Practice Section; Solo, Small Firm and General Practice Division; Litigation Section.

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address) Vivian Huelgo, Chief Counsel, Commission on Domestic & Sexual Violence, 1050 Connecticut Ave. NW, Washington, DC 20036, 202-662-8637, vivian.huelgo@americanbar.org
12. **Contact Name and Address Information.** (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*) Mark Schickman, Chair, Commission on Domestic & Sexual Violence, [schickman@freelandlaw.com](mailto:schickman@freelandlaw.com)
EXECUTIVE SUMMARY

1. **Summary of the Resolution**
The resolution opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches, and calls upon all jurisdictions to oppose any laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.

2. **Summary of the Issue that the Resolution Addresses**
The resolution opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches, and calls upon all jurisdictions to oppose any laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.

3. **Please Explain How the Proposed Policy Position Will Address the Issue**
The ABA’s adoption of the proposed policy will provide the proper policy rule regarding consent to sexual conduct, and the platform to seek change to or rejection of conflicting policy.

4. **Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**
None.
RESOLVED, That the American Bar Association opposes the withholding by the Executive Branch of funds previously appropriated by Congress for disaster relief and recovery, or their diversion for other purposes, including but not limited to construction of a border wall with Mexico.

FURTHER RESOLVED, That the American Bar Association reaffirms its support for the Principles of Rule of Law in Time of Major Disaster, including the principle that government assistance authorized by law should be distributed in an expeditious and efficient manner consistent with principles of equal treatment, due process and transparency.
REPORT

In 2017, numerous natural disasters impacted the United States. Hurricanes Harvey, Irma, and Maria have devastated the southern United States as well as the American territories of Puerto Rico and the U.S. Virgin Islands, resulting in thousands of deaths and approximately $265 billion in total damage. Wildfires in the western states, as well as tornados, droughts, and other severe weather events throughout the country, resulted in additional deaths, as well as a combined $41 billion in damage. These disasters caused 2017 to become the most expensive year on record for disasters in the United States.¹

On February 9, 2018, the President of the United States signed Public Law 115-123 into law, known as the Bipartisan Budget Act of 2018. Among its provisions, the Act provided for nearly $90 billion in disaster relief for the U.S. Virgin Islands, Puerto Rico, Florida, Texas, California, and other jurisdictions affected by the 2017 Atlantic hurricane season and the 2017 western wildfires. This $90 billion relief package includes $23.5 billion to the Federal Emergency Management Agency for recovery and repair programs, $28 billion for block grants to rebuild housing and essential infrastructure, and $2 billion to improve the power grid in the U.S. Virgin Islands and Puerto Rico. It also included a $17.398 billion supplemental appropriation to the U.S. Army Corps of Engineers (USACE) to fund numerous disaster recovery and repair projects, including, but not limited to: construction of 60 flood and storm damage reduction projects in 16 states and one territory; repair and construction of levee and channel improvements in 10 states; completion of flood and coastal storm damage reduction studies in 14 states and two territories; repair damages to 69 USACE projects resulting from natural disasters in 18 states and one territory; and repair 81 locally-owned flood risk management projects in 16 states and one territory.²

A federal government shutdown began on December 22, 2018, due to the failure of Congress and the President to agree on an appropriations bill to continue to fund the government’s operations. The shutdown stems from an impasse with respect to funding for a proposed border wall between the United States and Mexico projected to cost $5.6 billion.³ As of the date of this report, the shutdown continues and has become the longest federal government shut down to date, and attempts to reach a compromise have been


unsuccessful.\textsuperscript{4}

On January 9, 2019, the President, through Twitter, stated that

Billions of dollars are sent to the State of California for Forest fires that, with proper Forest Management, would never happen. Unless they get their act together, which is unlikely, I have ordered FEMA to send no more money. It is a disgraceful situation in lives & money!\textsuperscript{5}

Although not directly referencing the federal government shutdown, political analysts interpreted the tweet as a threat to the Speaker of the House of Representatives, who hails from California.\textsuperscript{6}

The day after the President's tweet, media outlets began to report that the President was considering ending the impasse by declaring the situation at the Mexican border to be a national emergency and divert approximately $13.9 billion of the disaster relief funds that had been appropriated to the USACE through Public Law 115-123, but had not yet been encumbered, to pay for the border wall.\textsuperscript{7} In the days that followed, Democratic and Republican leaders in Congress and the affected states and territories have almost universally condemned reallocating disaster funds in such a manner.\textsuperscript{8}

Although a White House spokesperson has announced that "there are no plans to take money from disaster relief funding to pay for any potential projects," the President emphasized that he would not issue an emergency designation "right now," implying that the decision may be revisited in the future.\textsuperscript{9} Moreover, it was subsequently reported that


\textsuperscript{5} Donald J. Trump, @realDonaldTrump, http://twitter.com/realDonaldTrump/status/1083022011574747137 (Jan. 9, 2019).


this was not the first time the President had considered diverting or withholding Congressionally-appropriated disaster recovery and relief funds, with one administration official even resigning in protest over a previous attempt to withhold disaster funds from Puerto Rico.10

It is the mission of the American Bar Association to increase public understanding of and respect for the rule of law, to hold governments accountable under law, and to work for just laws, including human rights, and a fair legal process.11 To that end, the ABA House of Delegates has already urged Congress to adequately fund the departments and entities charged with responding to and assisting disaster survivors, particularly with respect to agencies that provide assistance to disadvantaged or vulnerable populations, and to honor the rule of law during times of disaster.12 This includes the principle that “[g]overnment assistance authorized by law should be distributed in an expeditious and efficient manner consistent with principles of equal treatment, due process and transparency.”13

In appropriating nearly $90 billion in disaster relief funds through Public Law 115-123, Congress specifically intended to both provide direct assistance to the states and territories affected by the natural disasters that occurred in 2017, and to make needed improvements to infrastructure to reduce the effects of future disasters. The jurisdictions designated to receive this funding were not arbitrarily chosen; they are the same states and territories for which a disaster had been declared by the President in accordance with the Stafford Act, 42 U.S.C. §§ 5127-5207. Therefore, in addition to these funds being appropriated by Congress, the President approved the provision of federal disaster relief to each jurisdiction twice: when the original Presidnetially-approved disaster declaration was made, and when the President signed Public Law 115-123 into law.

The states and territories affected by Hurricanes Harvey, Irma, and Maria, the western wildfires, and other disasters are still reeling from the negative effects of those disasters. The disaster aid funds appropriated through Public Law 115-123 provide a much needed lifeline for the impacted states and territories to continue the rebuilding process. Even now, approximately a year-and-a-half later, many communities in the affected areas remain without power and even without roofs. This is particularly true in the U.S. Virgin Islands and Puerto Rico, where hospitals, schools, and other important institutions have still not been rebuilt.

For much of this country’s history, providing relief to parts of the United States affected by a natural disaster or other tragedy has not been a partisan issue. No state or


11 AM. BAR ASSOC. GOAL IV.

12 See ABA Resolution 110 (Midyear 2015); ABA Resolution 102B (Annual 2009); ABA Resolution 113 (Annual 2007).

13 ABA Resolution 113 (Annual 2007) (Principle 8).
territory is immune from natural disasters. Whether the disaster comes in the form of a hurricane, wildfire, flood, tornado, nor’easter, bomb cyclone, typhoon, earthquake, or some other event, any American living in any part of the country may suddenly find themselves homeless, without food, water, or power, without sufficient medical care, or worse, due to natural events completely out of their control. To quote one former member of Congress, the norm was that “you deal with the emergency first, and you figure out how to pay for it later,” regardless of the partisan make-up of Congress, which party controls the White House, or the partisan leanings of the area where the disaster occurred.14

The recent proposals to divert Congressionally-appropriated disaster relief and recovery funds for a different purpose, or to withhold such funds from certain states or territories for what appears to be political reasons, have been rightly condemned by leaders of both major political parties. Regardless of one’s views on border security or the circumstances that led to the federal government shutdown, it is inappropriate to use the disbursement of disaster relief funds as leverage in an unrelated political dispute. As the voice of the legal profession of the United States, the American Bar Association urges the Executive Branch to honor the clear will of Congress and permit the disaster relief and recovery funds appropriated by Public Law 115-123 to be used for their intended purpose in the designated states and territories.

Respectfully submitted,

Chivonne A.S. Thomas, Esq.
President, Virgin Islands Bar Association
January 2019

GENERAL INFORMATION FORM

1. **Summary of Resolution**

   Opposes the withholding of funds previously appropriated by Congress for disaster relief and recovery, or their diversion for other purposes, including but not limited to construction of a border wall with Mexico, and reaffirms support for the Principles of Rule of Law in Time of Major Disaster.

2. **Approval by Submitting Body**

   January 23, 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 following previously-enacted policies are relevant to this Resolution:

   Resolution 110 (Midyear 2015), which among other provisions urges Congress to adequately fund departments and entities charged with responding to and assisting disaster survivors, particularly those who serve the unique needs of vulnerable populations.

   Resolution 102B (Annual 2009), which among other provisions urges the federal government to provide additional funding to address the unmet legal needs of low-income residents of communities affected by major disasters.

   Resolution 113 (Annual 2007), adopting the Principles of Rule of Law in Time of Major Disaster.

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

   N/A.

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

   The Supplemental Appropriations Act of 2019 (H.R. 268) passed the House of Representatives on January 16, 2019, and contains a provision that disaster funds appropriated to the Army Corps of Engineers or the Department of Homeland Security may not be used to plan, develop, or construct the border wall. The measure has not been taken up by the Senate.
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

Transmittal of resolution to the President and Congress. If disaster funds are actually withheld or diverted and litigation results, the policy may also be implemented by the filing of an *amicus curiae* brief in an appropriate action, consistent with the Association’s procedures in that regard.

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

None.

9. **Disclosure of Interest.**

None.

10. **Referrals**

ABA Coalition on Racial and Ethnic Justice  
ABA Commission on Hispanic Legal Rights & Responsibilities  
ABA Government & Public Sector Lawyers Division  
ABA Section on Civil Rights & Social Justice  
ABA Section on State & Local Government Law  
ABA Standing Committee on Disaster Response and Preparedness  
ABA Young Lawyers Division

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

Anthony M. Ciolli  
Immediate Past President, Virgin Islands Bar  
PO Box 590  
St. Thomas, VI 00804  
340-774-2237  
aciolli@gmail.com

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

Anthony M. Ciolli  
Immediate Past President, Virgin Islands Bar  
PO Box 590  
St. Thomas, VI 00804  
340-774-2237  
aciolli@gmail.com
EXECUTIVE SUMMARY

1. **Summary of Resolution.**
   
   Opposes the withholding of funds previously appropriated by Congress for disaster relief and recovery, or their diversion for other purposes, including but not limited to construction of a border wall with Mexico, and reaffirms support for the Principles of Rule of Law in Time of Major Disaster.

2. **Summary of the Issue which the Resolution addresses.**
   
   Although Public Law 115-123 appropriated approximately $90 billion in disaster relief funds for the U.S. Virgin Islands, Puerto Rico, Florida, Texas, California, and other jurisdictions affected by the 2017 Atlantic hurricane season and the 2017 western wildfires, on several occasions in January 2019 the President has indicated an intent to withhold funds from certain jurisdictions, or to divert disaster relief funds to construct a border wall with Mexico.

3. **An explanation of how the proposed policy position will address the issue.**
   
   This resolution addresses this issue by urging that disaster relief funds not be withheld or diverted.

4. **A summary of any minority views or opposition internal and/or external to the ABA which have been identified.**
   
   No minority or opposing views have been identified.