ABA Supports National Disaster Relief Efforts

See What’s Happening Now in Washington

Hurricane season is upon us, and with it the devastating effects of such natural disasters that threaten lives and property. Year-round events like flooding, wildfires, earthquakes, and others have been increasing in intensity and threatening people’s safety and livelihood. The American Bar Association provides support to victims of these events and advocates for measures designed to help people prepare for and recover from natural disasters.

Through the Disaster Legal Services Program, the ABA Young Lawyers Division (ABA YLD) and the Federal Emergency Management Agency (FEMA) provide immediate temporary legal assistance to disaster survivors at no charge. In addition to providing and coordinating legal services for disaster survivors, the ABA also advocates for more funding for the Legal Services Corporation (LSC) so it can serve survivors’ legal needs.

Natural disasters have a particularly devastating effect on low-income people as they struggle to find affordable housing, food, and safety for their families. They are forced to confront new challenges when disasters strike, highlighting their particular vulnerabilities and emphasizing the need for legal assistance. Many Americans, especially those in low-income communities, are unprepared for potential disasters and have not developed a plan for securing important documents, medication, and living arrangements, nor have they planned for alternative ways to access critical resources and information.

In the immediate wake of a disaster or crisis, survivors often need help obtaining copies of important documents such as birth certificates, driver’s licenses, and Social Security cards to apply for or restore benefits.

To increase support to low-income survivors and its impact nationwide, LSC is organizing a disaster task force composed of LSC grantees, business leaders, emergency management experts and other stakeholders to take a more comprehensive approach to its disaster work. The goals of the Disaster Task Force include educating the business and emergency management communities about the importance of civil legal aid in preparing for and responding to disasters and partnering with legal aid providers to develop a systematic approach to respond to the legal needs of low-income Americans who have experienced a disaster.

On September 17th, 2019, LSC Board members released their Disaster Task Force Report on Capitol Hill. More information about the Task Force can be found here.
The ABA is also monitoring several disaster related bills being contemplated in Congress including legislation to provide more funding for victims and reform the National Flood Insurance Program (NFIP).

The NFIP is a federal program, managed by the Federal Emergency Management Administration (FEMA) within the Department of Homeland Security. The NFIP will expire on September 30, 2019, unless extended. If the program expires, new flood insurance policies cannot be sold, potentially delaying or cancelling some real estate transactions. The program has been temporarily extended several times as Congress deliberates reforms to the program. NFIP reform legislation has been introduced in the House and Senate. However, disagreements remain not along party lines, but geographic ones, with those from flood-prone areas wanting to strengthen NFIP and those from drier areas wanting to limit or even eliminate the program.

Mindful of the potential links between climate change and the increasing frequency and severity of some natural disasters, the ABA adopted policy during its Annual meeting in August urging policymakers to recognize their obligation to address climate change. See the resolution here.

Congress is currently deliberating its appropriations bills and the ABA will continue to fight for increased funding for the Legal Services Corporation and its disaster relief efforts. If you would like to join us in this effort, please visit our Grassroots Action Center here.
Competing for Jobs Despite a Criminal History

Fair Chance Act May Finally Get a Fair Chance

Despite bicameral, bipartisan support in the 114th and 115th Congresses, the ABA and other backers of the Fair Chance Act were unable to overcome opposition. The bill has now returned in the 116th Congress where three times may be the proverbial charm for the Act and for the millions of people it could help.

The Fair Chance Act makes a simple proposition to federal agencies and contractors: Evaluate job applicants on their merits rather than solely on whether they ever had a run in with the law. In other words, unless hiring for a law enforcement or other sensitive job, the Act would require employers to refrain from conducting criminal background checks on job candidates until a conditional offer of employment has been extended. An employer would not have to hire a candidate with a record but now must consider whether that person’s criminal history is disqualifying for the position.

And it’s a bigger issue than you might think—more than 70 million American adults have an arrest or conviction that would show up in a routine background check. Economists estimate that blanket disqualification for people with criminal histories costs our economy billions of dollars, and having a job is a leading predictor as to whether a person will commit another crime in the future.

So, given how the Act helps support sentencing and correction reforms enacted at the end of last Congress, a committed group of people took matters into their own hands. A bipartisan group of lawmakers, supported by a coalition of organizations of different ideologies, worked successfully to have the Fair Chance Act amended to the House Defense Authorization bill, H.R. 2500, just prior to its passage on the House floor. The Senate had already completed its version of the Defense bill, S.1790, but it does not include the Fair Chance Act.

Lawmakers are now coming together to reconcile the differences between the two defense bills. There has been bipartisan support from key Senators to include the First Chance Act, and the coalition of organizations continues its push, but historical opposition still remains. Hopefully, once lawmakers have had the chance to first consider the legislation on its merits, the Fair Chance Act will finally be enacted.

To stay up to date on the Fair Chance Act, follow us on Twitter @ABAGrassroots.
Access to Court Records

Will it soon be completely free for the public?

Legislation has been introduced in both the House of Representatives and the Senate this Congress that requires free public access to federal court records through the Public Access to Court Electronic Records (PACER) system and instructs the federal judiciary to institute one uniform electronic filing system for all federal courts.

In operation for more than 30 years, PACER is an online portal that provides access to virtually all documents filed since 1999 by a judge or parties in all U.S. courts of appeals, district courts and bankruptcy courts. There are approximately 2.5 million registered users, and the system contains more than one billion case documents.

As permitted by Congress in 2002, the Administrative Office of the U.S. Courts (AO) imposes user fees to finance the system. Currently, access to case information through PACER costs $.10 per page. The fee is capped at $3.00 for access to case-specific documents, but the cap does not apply to transcripts of court proceedings, audio files, or non-specific case research.

PACER users who incur charges of $15 or less in a three-month period do not pay anything that quarter. This results in 66% of the active users each quarter not paying a bill. Federal courts also routinely waive fees for unrepresented defendants, pro bono attorneys, academic researchers, and not-for-profit organizations. The federal courts collect approximately $140 million annually in user fees from the PACER system. According to the AO, approximately 87% of all PACER revenue is attributable to 2% of corporate users, such as large financial institutions and major commercial enterprises that aggregate data for analysis and resale.

Representative Doug Collins (R-GA) and Senator Rob Portman (R-OH) introduced the Electronic Courts Record Reform Act of 2019 (H.R. 1164 and S. 2064) in response to concerns that the PACER system is outdated and unnecessarily expensive. Upon introduction, Rep. Collins, Ranking Member of the House Judiciary Committee, said that Americans deserve a justice system that is transparent and accessible and his bill would remove fee-for-access barriers that technology has rendered unnecessary. The bills are nearly identical except that the Senate bill authorizes the collection of filing fees (with exceptions for low-income and pro-se litigants) in amounts to be determined by the AO to cover the cost of maintaining the PACER system. It also directs the Department of Justice,
which currently pays several million dollars in user fees annually, to continue to pay PACER access fees.

In 1995, before the federal PACER system debuted, the ABA adopted policy urging courts at all levels to provide access to court and docket information at no direct cost to the user. In 2011 the ABA adopted policy supporting the ongoing efforts of the AO to update and enhance its electronic case filing system. Upon introduction of H.R. 1164, the ABA wrote the bill's sponsors, expressing support for eliminating PACER access fees. It is unclear whether legislative efforts to eliminate user fees will be successful this Congress.

In response to concerns from the public and Congress, the AO continues to engage in a multi-year effort to overhaul its electronic case filing system and to expand free access to, and correct problems with, the PACER system. Most recently, on September 17, 2019, the Judicial Conference of the United States adopted policy doubling the quarterly fee waiver for users of the PACER system from $15 to $30. According to the AO, this will result in more than 75% of the system’s users paying no fee in a given quarter.

In a separate action, a class action lawsuit against the federal government that is wending its way through the court system alleges that the judiciary has violated federal law by charging more for access to the PACER system from 2010 - 2016 than statutorily permissible. The Court of Appeals for the Federal Circuit is expected to rule on this case next year.

To learn more developments on PACER when they happen, follow us on Twitter @ABAGrassroots.
Recent Court Cases Question Rights of State Bars

Fleck v Wetch -- one of many challenges to mandatory state bars

Does requiring lawyers to join a state bar as a condition of licensure violate their First Amendment rights to freedom of speech and association? This question is increasingly under consideration by the courts, and recent decisions are noteworthy.

In Keller v. State Bar of California (1990), the Supreme Court said no, provided it is done correctly. State bars would not violate the First Amendment by requiring association membership and using the dues collected to fund activities germane to regulating the legal profession and improving legal services. The bars could not, however, use mandatory dues to fund activities of a political or ideological nature that fall outside those areas of activity.

For the past 30 years, state bars have scrutinized their educational programs, publications, and advocacy to ensure they comply with Keller. They have also established ways for members to opt out of paying dues for expenses unrelated to the profession or quality of legal services.

Unsatisfied by the holding in Keller, advocates continued to challenge mandatory bar membership and dues in various states, but to no avail. Then, in 2018, their efforts appeared to get a boost by the Supreme Court in Janus v. AFSCME. The Janus case did not involve mandatory state bar dues, but rather it involved the practice by public-sector unions of charging fees to workers who did not belong to the union. Such fees were to help the union to recover costs associated with their efforts to improve wages and working conditions for all workers, even those who were not members—a practice that was upheld by the Supreme Court in Abood v. Detroit Board of Education (1977). But in Janus, the Court overturned Abood, invalidating the union fee-charging practice. That outcome was of concern to state bars because Keller had relied in part on Abood.

So, did Janus overturn Keller, too? The majority opinion in Janus did not address the question, although dissenting opinions distinguished unions from state bars. To address the issue, the Supreme Court granted a writ of certiorari in Fleck v. Wetch, a case challenging mandatory bar dues to the State Bar Association of North Dakota; summarily vacated the 8th Circuit's ruling in favor of the bar; and in January of this year remanded the case to the 8th Circuit for reconsideration in light of the Janus decision.
On August 30, 2019, the 8th Circuit Court of Appeals issued its decision saying that Keller was still valid and therefore controlling, and ruling in favor of the State Bar Association of North Dakota. The 8th Circuit’s decision was not just significant for which side they came down on—the case was going to be appealed back to the Supreme Court no matter who prevailed. The opinion was noteworthy for the legal analysis the court used in affirming the status of Keller post-Janus. Mr. Fleck is expected to appeal.

Fleck v. Wetch is just the tip of the proverbial iceberg, as it is merely the first federal case to make it to the Supreme Court. Five additional suits involving different mandatory state bars (OK, OR, TX, WA, and WI) were filed in four separate federal circuits. Advocates against mandatory state bar membership and dues may hope that these cases result in split decisions among the circuits, which would allow them to select their strongest case for appeal to the Supreme Court. Unless those cases advance quickly, Keller's future may rest solely on Fleck, and if the 8th Circuit Court of Appeals was correct in affirming Keller, Fleck may be the only case the Supreme Court needs to decide.

To follow this issue, follow us on Twitter @ABAGrassroots.
Fines and Fees

ABA makes headway on reducing the impact on indigent people

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Fines and fees are a necessary part of any judicial system, but in some cases this method of funding can itself cause injustice. American Bar Association policy development has given new life to the debate about the appropriate use of fines and fees, and states are using our policy to help inform their efforts.

The Problem

Fines and fees are one way a government can offset the cost of services provided by the courts, which remain chronically underfunded. However, impoverished people faced with governmental fines for minor offenses often suffer undue burdens when presented with these fees. For families living paycheck to paycheck, an unexpected fine can prove impossible to balance with other living expenses. For example, when someone fails to pay a parking ticket or a speeding ticket, they incur late fees. These late fees can become a significant burden on indigent families who already can’t pay off the original fine for the ticket. These fees compound over time, and they also disproportionately affect people of color.

When these fines and fees aren’t fully paid, some states impose nonmonetary punishment. One of the most common forms of nonmonetary punishment is revoking a citizen’s driver’s license. Indigent individuals may find themselves in the untenable position of either driving with a suspended license or losing their jobs. Driving with a suspended license may be sanctioned with incarceration. Losing a job can hinder the timely repayment of a fine and fees. Suspending a driver’s license for nonpayment is therefore out of proportion to the purpose of ensuring payment and destructive to that end. The ABA denounces the use of such punishments.

ABA Action

The ABA adopted The ABA Ten Guidelines on Fines and Fees as policy in August 2018 to facilitate the conversation that fines and fees should not place undue burdens on indigent people. In these guidelines, the ABA emphasizes the limits to fees and the ability-to-pay standards. The limits-to-fees standard considers the economic situation of a defendant and apportions their fees fairly. The ability-to-pay standard uses a universal metric to determine how much a person should reasonably pay to avoid undue hardship. The guidelines also assert that courts should not revoke voting rights or impose jailtime for unpaid fees.
The ABA Guidelines explain that nonmonetary punishment for civil offenses, such as revoking a driver’s license, can reinforce the poverty cycle and cause reincarceration. There are alternatives to these sanctions: courts can reassess the amount of money owed, or they can place an extension on the fee. Fees are largely in place to offset the services provided by the justice system, but fees should only be implemented in cases where an individual can pay without significant hardship.

So far, the ABA has shared its Ten Guidelines with five states in support of their efforts to prevent revocation or suspension of an indigent defendant's driver’s license or other nonmonetary punishments for failing to pay fees. Several states have already legislated changes, with others are still debating the issue. The American Bar Association will continue to fight against disproportionate sanctions for indigent people in our continued efforts to build public trust in the American justice system.
Reducing Gun Violence

Is there legislative hope on the horizon?

More and more people are describing gun violence in the United States as an epidemic and a public health crisis. A report released on September 18th by the U.S. Congress Joint Economic Committee shows that almost 40,000 people were killed by a gun in 2017, 60% of whom died by suicide and 36% by firearm homicide. About 2,500 of these deaths involved school-age children. In addition to this staggering death toll, the report estimates the substantial economic cost of gun violence at $229 billion a year nationally, and compiles state-by-state cost estimates of the impact on health care, law enforcement efforts, employers, and family income and spending.

But what actions are being taken to reduce the gun violence epidemic?

Members of both parties in the 116th Congress continue to express strong legislative interest in reducing gun violence and congressional leaders recognize the need to act. However, there is still no bipartisan consensus on what that action should be or indication of what the President will support.

Since returning from August recess, Democratic leaders renewed their demands that the Senate consider the two background check expansion bills that passed the House with bipartisan support in February 2019. The Bipartisan Background Checks Act of 2019 (H.R. 8) would extend the requirement of a background check on the sale of all firearms to unlicensed sellers. The Enhanced Background Checks Act of 2019 (H.R. 1112) would extend the initial background check review period for the sale of a firearm from three to ten days, thereby closing the loophole in the current law that allows a gun to be sold if a background check is not completed within three days.

Early in August, Senate Majority Leader Mitch McConnell indicated that an assault weapons ban or other gun controls “would certainly be one of the front and center issues” when the Senate returned. Since then, speculation about what bills might be acceptable to the White House have included background checks and red flag laws (sometimes called extreme risk protection orders) to allow courts to take away firearms from suspected dangerous people after receiving warnings from police officers or family members. Senator McConnell is still waiting for guidance from the White House on what might be acceptable. “If and when that happens, then we’ll have a real possibility of actually changing the law and hopefully making some progress.”
On September 18, Attorney General Barr reportedly circulated a proposal to senators for expanding unlicensed commercial sale background checks for gun purchases, including at gun shows, but lawmakers still don’t know where the President stands on the issue. This draft proposal would expand the current background check system, but does not go nearly as far as the House bills would.

For over 25 years, the ABA has strongly supported a national approach to preventing and reducing gun violence, with a focus on evidence-informed, constitutionally sound policy, education, and advocacy. This November, the ABA Standing Committee on Gun Violence, along with a number of other ABA entities, will be convening a summit to build consensus across professional communities on ways to reduce gun violence and to create practical tools and templates to be used at the state and local levels to effect change in their communities. Invitees will include members of the medical community, law enforcement, social workers, and other related stakeholders.

Need more information? Visit the Standing Committee on Gun Violence website here or follow us on Twitter @ABAGrassroots to watch for further developments.
Supreme Court Update

The Court says US can implement rule that bans most asylum applications at southern border

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This article was originally published in the ABA Journal on 9/12/19. Click here to see the original article.

The U.S. Supreme Court on Wednesday evening allowed a Trump administration rule to take effect that effectively bans asylum applications by most immigrants at the southern border.

The high court stayed a nationwide injunction barring implementation that had been imposed by U.S. District Judge Jon Tigar of San Francisco, report the Associated Press, the Washington Post and the New York Times. The stay remains in effect pending appeal.

Justice Sonia Sotomayor issued a dissent that was joined by Justice Ruth Bader Ginsburg.

The new rule says immigrants at the southern border must apply for and be denied asylum in at least one country they enter while on their way to the United States. An exception to the rule applies for victims of human trafficking. The rule effectively ends asylum for immigrants at the southern border who aren't from Mexico.

Sotomayor and Ginsburg said the government was not entitled to a stay.

“Once again the executive branch has issued a rule that seeks to upend longstanding practices regarding refugees who seek shelter from persecution,” Sotomayor wrote. “Although this nation has long kept its doors open to refugees—and although the stakes for asylum seekers could not be higher—the government implemented its rule without first providing the public notice and inviting the public input generally required by law.”

The New York Times notes that the Supreme Court action follows its July decision to allow the Trump administration to go forward with plans to use $2.5 billion in military money to build the border wall.

In the latest case, Solicitor General Noel Francisco had argued the government could bypass notice and comment requirements for new rules under exceptions for foreign affairs and good cause. Francisco said there is good cause for immediate implementation to avoid a surge of immigrants at the border.
Tigar had twice imposed nationwide injunctions in the case. The San Francisco-based 9th U.S. Circuit Court of Appeals narrowed the reach of the first injunction last month to states within the circuit. On remand, Tigar heard additional evidence and restored the nationwide injunction on Monday, spurring the 9th Circuit to issue an administrative stay that once again limited the injunction to states within the circuit while it considered the broader injunction.

Sotomayor argued the case should be allowed to play out in the lower courts. “Granting a stay pending appeal should be an ‘extraordinary’ act,” Sotomayor wrote. “Unfortunately, it appears the government has treated this exceptional mechanism as a new normal. Historically, the government has made this kind of request rarely; now it does so reflexively.”

The case is *Barr v. East Bay Sanctuary Covenant*. 