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House of Delegates adopts major new policies at association’s Annual Meeting in Chicago

The ABA House of Delegates approved an array of new policies Aug. 6-7 during the association’s Annual Meeting in Chicago.

Policies adopted by the delegates include a call for an end to separation of families at the U.S. border, support for actions to eliminate gender-based violence in the workplace, support for access to technology for those with disabilities, and opposition to discrimination against transgender members of the military. The delegates also amended the ABA’s dues structure and identified steps the association will take to provide ABA members with access to more and better content, including hundreds of free continuing legal education programs.

During the House of Delegates meeting, outgoing ABA President Hilarie Bass passed the gavel to Montana lawyer Robert M. Carlson, who began his one-year term as the association’s president (see article, page 5). Judy Perry Martinez, of New Orleans, will serve as president-elect before assuming the presidency in August 2019.

Other highlights of the meeting included a speech by Deputy Attorney General Rod J. Rosenstein, who said that lawyers should be united in the goal of advancing the rule of law throughout the United States and around the world. “You are the guardians of the rule of law, a concept that developed over many centuries and today is fundamental to human liberty,” he said.

In addition, Bryan Stevenson, founder and executive director of the Equal Justice Initiative, received the ABA Medal, which recognizes exceptionally distinguished service by a lawyer or lawyers to the cause of American jurisprudence. He urged ABA members to do more “to create opportunities for people who feel marginalized and excluded.”

The following is a summary of major policy resolutions approved by the delegates.

Administrative Law

State Administrative Law Judges. Adopts the ABA Model Code of Judicial Conduct for State Administrative Law Judges, dated August 2018, and urges state, local and territorial governments to enact and adopt ethical principles in accordance with the Model Code.

Civil Rights

Law Enforcement Equipment. Urges Congress to enact legislation or regulations that implement the federal interagency “Law Enforcement Equipment Working Group Recommendations Pursuant to Executive Order 13688” to ensure that law enforcement agencies receive only military equipment that is appropriate for community and campus policing and provide proper training in the use of the equipment that includes the protection of civil rights and civil liberties.
## LEGISLATIVE BOXSCORE

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<td>House passed H.R. 38 on 5/16/17.</td>
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<td>Senate failed to pass several proposals to address the DACA program.</td>
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<td>Judiciary subc. held a hearing on the immigration court system on 4/18/18.</td>
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<td>S. 3036 was referred to the Judiciary Cmte. on 6/8/18.</td>
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DOL final rule rescinds previous “Persuader Rule” changes

In a victory for the ABA, the Department of Labor published a final rule on July 18 rescinding previous changes to the “Persuader Rule” adopted in 2016 that would have required management-side labor lawyers to report confidential client information to the government.

The department cited the ABA’s previous comments extensively, especially those warning that the Persuader Rule changes would have seriously undermined the confidential attorney-client relationship.

The 2016 changes to the Persuader Rule, which were blocked by a permanent nationwide injunction issued by a U.S. district court in Texas in November 2016 before they could go into effect, were intended to narrow the department’s longstanding interpretation of the “advice” exemption under Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).

Section 203 requires employers and their labor consultants, including lawyers, to file extensive periodic disclosures with the department when they engage in certain activities or enter into agreements or arrangements to persuade employees on union formation or membership issues. However, Section 203(c) of the act has long been interpreted to exempt lawyers from the rule’s reporting requirements when they merely provide advice or other legal services directly to their employer clients on these unionization issues but have no direct contact with the employees.

The 2016 rule would have required lawyers who provide both legal advice to employer clients and engage in any persuader activities to file periodic disclosure reports even if they have no direct contact with the employees. These reports would have included disclosure of a substantial amount of confidential information, including the existence of the lawyer-client relationship and the identity of the client, the general nature of the legal representation, and a description of the legal tasks performed. The reports also could have compelled disclosure of a great deal of confidential financial information about clients that is unrelated to persuader activities that the LMRDA is intended to monitor.

In a letter sent to the department in August 2017, ABA Governmental Affairs Director Thomas M. Susman reiterated the association’s opposition to the 2016 rule and referenced both the ABA’s 2011 comment letter to the department and its statement to the House Education and the Workforce Subcommittee on Health, Employment, Labor and Pensions.

Susman emphasized that the ABA was not taking sides on a union-versus-management dispute, but had the sole objective of “defending the confidential client-lawyer relationship by reversing a rule that imposes unjustified and intrusive burdens on lawyers, law firms and their clients.”

ABA recommends ways to reform guardianship

The ABA conveyed recommendations July 20 to the Senate Special Committee on Aging on ways to improve guardianship policy and practice and to address guardianship abuse and exploitation.

“The American Bar Association, through its Commission of Law and Aging, has played a leadership role in adult guardianship reform over the past three decades,” ABA Governmental Affairs Principal Deputy Director Holly O’Grady Cook wrote to committee Chairman Susan M. Collins (R-Maine) and Ranking Member Robert P. Casey Jr. (D-Pa.). She explained that the association has sought to improve adult guardianship laws and practices through major national consensus conferences, research studies, legislative analyses, and advocacy efforts.

The ABA’s comments set out two basic premises about adult guardianship in the United States.

First, because there is not a national system for guardianship, the first front of reform is at the state level, where 25 states passed 49 guardianship bills in 2017 and other bills have been approved or are pending this year. She described reform as steps to promote less restrictive options instead of guardianship, to improve guardianship procedures that afford protection yet protect rights; and to address abuses in guardianship through court oversight and other means.

She said that federal action also can make a difference, and ABA policy adopted in 2009 “encourages the federal government to provide funding and support for training, research, exchange of information on practices, consistent collection of data, and development of state, local and territorial standards regarding adult guardianship.”

The second premise is that there is a pronounced gap between guardianship law and practice. Federal guidance and incentives, Cook wrote, could have an important impact on improving the practices of judges, attorneys professional and lay guardians, and other stakeholders.

She suggested three overarching actions the federal government could take to prompt change at the state level.

see “Guardianship,” page 8
Affordable Care Act. Supports an interpretation of Section 1557 of the Affordable Care Act, 42 U.S.C. §1811(a), that its prohibition on sex discrimination by covered health programs or activities includes, but is not limited to, discrimination on the basis of sexual orientation and gender identity, sex stereotyping, pregnancy, and pregnancy-related medical conditions (including false pregnancy, termination of pregnancy, childbirth, and recovery). Urges reinstatement by the U.S. attorney general of a guidance letter concerning interpretation of Title IX of the Education Amendments of 1972 to prohibit discrimination against LGBTQ individuals, and urges withdrawal of a Department of Justice interpretation of Title VII of the Civil Rights Act that does not protect transgender citizens against discrimination.

Gender-based Violence. Urges governments and international institutions to adopt and implement legislation and regulations to eliminate, prevent, and provide remedies for gender-based violence in the workplace, including sexual harassment, by virtue of their actual or perceived sex (including pregnancy), family responsibilities, sexual orientation, gender identity, gender expression, or status as a victim of domestic or sexual violence.

Military Service. Urges the federal government to recognize that service by persons who otherwise meet the standards for accession or retention, as applicable, in the United States Armed Forces should not be restricted, and transgender persons should not be discriminated against based on gender identity.

Courts/Judiciary Fines and Fees. Adopts the black letter and commentary to the ABA Ten Guidelines on Court Fines and Fees, dated August 2018, and urges governmental agencies to promulgate law and policy consistent with the guidelines.

Criminal Justice Legal Assistance. Urges bar associations, law schools and other stakeholders to develop and increase educational initiatives, clinics, and experiential courses through which law students provide legal assistance to pre-trial detainees, immigration detainees, and incarcerated individuals reentering society.

Unanimous Juries. Urges Louisiana and Oregon to require unanimous juries to determine guilt in felony criminal cases and to reject the use of non-unanimous juries where currently allowed in felony cases.

Disability Rights Alternatives to School Expulsion. Urges governments to enact law and adopt policies that prohibit the use of out-of-school suspension and expulsion of pre-kindergarten through second grade students, except when a student poses an imminent threat of serious physical harm to self or others; require ongoing training of teachers, administrators, and other school staff on alternatives to school exclusion; and provide sufficient funding and resources to ensure the provision of alternatives to school exclusion.

Access to Technology. Urges all courts and other appropriate government entities to interpret Titles II and III of the Americans with Disabilities Act (ADA) to apply to technology, and goods and services delivered thereby, regardless of whether the technology exists solely in virtual space or has a nexus to a physical space (subject to all statutory requirements, limitation, exceptions, exemptions and defenses). Urges that Titles I and III of the ADA be interpreted to ensure that technology is accessible to and usable by all persons, including those with visual, hearing, manual
and other disabilities, and that all technology relating to the provision of legal services be equally accessible to people with a wide range of abilities and disabilities.

**Dispute Resolution**

*Discretion.*** Urges providers of domestic and international dispute resolution to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities ("diverse neutrals"), and to encourage the selection of diverse neutrals.

**Sexual Harassment Claims.*** Urges legal employers not to require mandatory arbitration of claims of sexual harassment.

**Domestic Violence**

*Emergency Training.*** Urges all emergency management agencies to provide proper training to staff and volunteers to respond to unique needs of intimate partner violence and sexual violence victims during and after a disaster.

**Elder Law**


**Family Law**

*Alimony.*** Urges Congress to enact former Sections 215 and 682 of the Internal Revenue Code that, before their repeal in the Tax Cuts and Jobs Act of 2017, allowed payors of alimony to deduct the payments and required payees to treat alimony payments as taxable income.

*Leave Policies.*** Urges governments to enact legislation providing employees with job-guaranteed paid sick days and job-guaranteed paid family and medical leave.

**Immigration Law**

*Unaccompanied Immigrant Children.*** Adopts the black letter ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States, dated August 2018, to replace the original 2004 version of the standards.

*Family Separations at the Border.*** Urges executive branch and congressional action to ensure that the federal immigration policies and practices of separating minor children from their parents at the border immediately cease and not be reinstated, and that children who have already been separated from their parents under such policies have a safe and expedited procedure for being reunited with their parents while ensuring that parents’ children are protected.

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**Robert M. Carlson assumes ABA presidency**

Montana lawyer Robert M. Carlson, assuming the ABA presidency this month at the ABA Annual Meeting in Chicago, vowed to do everything in his power every single day “to advance our association and fight for America’s lawyers and the public we serve.”

In his speech to the ABA House of Delegates, Carlson – a shareholder with Corette Black Carlson & Mikelson in Butte - emphasized the ABA’s four goals: serve ABA members; improve the legal profession; eliminate bias and enhance diversity; and advance the rule of law.

He said the ABA will always be there “to protect and ensure an independent, impartial and adequately funded judiciary.”

“Without the rule of law, there is no justice, and without justice there is no freedom,” he said.

Carlson’s numerous ABA leadership positions include serving as chair of the ABA House of Delegates and the ABA Day in Washington Planning Committee. He also served on the Commission on Ethnic and Racial Diversity in the Profession and on the Council of the Section of International Law. He is a patron fellow and past state chair of the Fellows of the American Bar Foundation.

He is a past president of the State Bar of Montana and has served as a member of the Executive Council of the National Conference of Bar Presidents.

Carlson earned his B.A. from the University of Montana and his J.D. from the University of Montana School of Law. His civil trial and mediation practice primarily involves insurance defense, product liability, and insurance coverage.

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*see “Annual Meeting,” page 8*
ABA urges that FFPSA Clearinghouse highlight legal-assistance role

The ABA and its Center on Children and the Law recommended July 20 that the Department of Health and Human Services (HHS) include programs that incorporate legal assistance to help prevent children from entering foster care as part of its Family First Prevention Services Act (FFPSA) Clearinghouse.

The FFPSA, enacted in 2018 as part of the Bipartisan Budget Act, reforms the federal child welfare financing system to provide services to families who are at risk of entering the child welfare system. The Clearinghouse, established as part of the FFPSA, will include a list of evidence-based programs and service delivery models that are rated as “promising,” “supported,” or “well-supported” for substance abuse prevention and treatment programs, in-home parent skill-based programs, and kinship navigator programs appropriate for children who are candidates for foster care, those who are pregnant, individuals who are parenting foster youth, and the parents of kin caregivers of those children and youth.

“Families whose risk of child welfare involvement increases because of mental health, substance abuse, and parenting challenges often also have unmet legal needs,” ABA Governmental Affairs Principal Deputy Director Holly O’Grady Cook wrote in comments submitted to Naomi Goldstein, deputy assistant secretary for planning, research and evaluation in the HHS Administration for Children and Families.

Cook pointed out that medical-legal partnerships, which leverage skills from both health care providers and attorneys, identify and address simultaneous legal and medical pressures on families. These efforts may help the families gain access to benefits and educational services for which a child may be eligible and help families procure insurance benefits for needed medical care for mental health and substance abuse treatment.

Another successful approach features multidisciplinary legal teams that include an attorney, a social worker, and a peer advocate to work together to reduce the need for foster care by keeping children safely with birth parents or by supporting kin caregivers. The lawyer’s role on the team addresses unmet legal needs revolving around issues that include guardianship, custody, housing, paternity, public benefits, domestic violence, and power of attorney.

Other potential program priority areas for the Clearinghouse, Cook wrote, include services to populations with co-occurring needs in the areas of domestic violence, housing and disabilities. Such services include assistance by recovery coaches who can integrate support for parents whose children entered child welfare due to substance abuse as well as domestic violence and mental health needs.

The problems of maintaining access to safe and secure housing that stem from substance abuse may be addressed by model programs such as the Residential Treatment for Pregnant and Postpartum Women that is operated through the federal Substance Abuse and Mental Health Administration.

To support parents and children with disabilities, the ABA recommends that the Clearinghouse include program evaluations that provide in-home services encompassing respite care for parents who care for children with disabilities or other special needs.

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Judicial Vacancies/Confirmations—115th Congress*
(as of 8/20/18)

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<tr>
<td>US Courts of Appeals (179 judgeships)</td>
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<td>US District Courts (678 judgeships)</td>
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<tr>
<td>Court of International Trade (9 judgeships)</td>
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<tr>
<td><strong>Totals</strong></td>
<td><strong>140</strong></td>
<td><strong>84</strong></td>
<td><strong>53</strong></td>
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*Includes territorial judgeships
HOMELESS CHILDREN: The House Financial Services Committee voted 39-18 on July 24 to approve legislation that would, among other things, harmonize eligibility for federal homelessness programs to ensure that children and youth experiencing homelessness are able to access federally supported stable housing. H.R. 1511, the Homeless Children and Youth Act, would amend the McKinney-Vento Homeless Assistance Act to align the Department of Housing and Urban Development’s (HUD) definition of homelessness with that of other agencies and allow case-workers to determine on a case-by-case basis whether a child who is considered homeless for another federal program may also be eligible for HUD assistance. HUD’s definition of homelessness for eligibility for its programs includes people living in shelters, transitional housing, on the streets, or in other outdoor locations. The more expansive Department of Education (ED) definition includes children and youth who lack a fixed, regular and adequate night-time residence. This includes those living in shelters, transitional housing, cars, campgrounds, motels, or temporarily sharing the housing of others. In addition to determining eligibility for ED programs, the department’s definition is used by the Head Start program, federally funded child care programs, child nutrition programs, and numerous other federal family and youth programs. In a June 8 letter to the Subcommittee on Housing and Insurance, then ABA President Hilarie Bass applauded Reps. Steve Stivers (R-Ohio) and Dave Loebsack (D-Iowa) for introducing H.R. 1511. “At a time when an estimated 4.2 million American youth experience homelessness each year, it confounds common sense that all but one federal homeless program may consider a child to be eligible for assistance, yet leave that child exposed to dangerous living conditions because he or she is not somehow homeless enough,” Bass wrote.

PARENTAL REPRESENTATION: The ABA expressed support Aug. 16 for the objectives of the New York State Commission on Parental Legal Representation, which is holding a series of hearings this fall. The commission is gathering information on steps to ensure quality representation for those eligible for assigned counsel in family law matters. Governmental Affairs Director Thomas M. Susman, in comments submitted to commission Chair Karen Peters, said the ABA Center on Children and the Law has partnered with other members of the legal community to define and implement models of high-quality representation for parents in child welfare cases. These efforts resulted in the 2006 Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases and the 2007 Attributes of High Quality Representation for Children and Parents. Pointing out that, historically, parents who are involved in the child-welfare system have received sub-par, and sometimes no, legal representation, Susman emphasized that family outcomes improve when all parties have high-quality representation. Susman described the details of some of the most crucial elements needed to establish a system of high-quality representation: reasonable caseloads; timely appointment; interdisciplinary support; and a strong oversight structure. “Child welfare cases are fundamentally different from other civil family cases and criminal cases,” he said, adding that separating a child from his or her parents causes harm and trauma and “should only occur when the safety of the child is compromised.” He concluded that parents’ lawyers play a “unique and essential role” in ensuring that families thrive.

SENTENCING GUIDELINES: The ABA urged the U.S. Sentencing Commission Aug. 7 to include, in its 2019 priorities, proposals to address the impact of mandatory minimum sentences and to study whether current guidelines effectively encourage the use of compassionate release when “extraordinary and compelling reasons” exist. In comments submitted to the Sentencing Commission’s acting chair, William H. Pryor Jr., ABA Governmental Affairs Director Thomas M. Susman emphasized the ABA’s “lengthy and robust opposition to mandatory minimum sentences dating back 50 years.” ABA policy adopted in 2017 reinforced the ABA’s position, pointing out that such sentences, according to the report accompanying the policy, are “detrimental to society because they lead to excessive sentences, result in sentencing disparities, undermine the discretion of the judiciary, and punish minority defendants disproportionately.” Susman also outlined the ABA’s longstanding support for development of standards for reduction or modification of sentences based on exceptional circumstances, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering. The association also urged the commission to promulgate policy guidance for sentencing courts and the Bureau of Prisons to use when considering reduction of sentences.
and children’s individual and independent legal claims are protected.

**Intellectual Property**  
*Copyright Office.* Urges Congress to approve appropriations to the Library of Congress necessary to enable the U.S. Copyright Office to adequately staff, maintain, modernize, and enhance its services, facilities, databases, studies, and digital projects.

**Human Rights.** Recognizes the important role that non-lawyer human rights defenders, journalists and others play in protecting justice and the rule of law, and deplores attacks on those professions, as well as on individuals, aimed at silencing or intimidating human rights voices.

**Legal Education**  
*Standards.* Concurring with several actions of the Council of the Section of Legal Education and Admissions to the Bar, including expansion of the opportunity for online legal education under the ABA Standards and Rules of Procedure for Approval of Law Schools.

**Legal Profession**  
*Lawyer Advertising.* Amends Model Rules 7.1 through 7.5 and related comments of the ABA Model Rules of Professional Conduct regarding lawyer advertising and lawyer communication with clients.

**ABA Dues.** Amends the dues structure for the ABA effective on Sept. 1, 2019, and takes steps to provide ABA members with access to more and better content, including hundreds of free continuing legal education programs and information curated and delivered according to members’ individual interests.

**Maritime Law**  
*Jones Act.* Urges Congress to permanently exempt Puerto Rico from the Jones Act, which requires that all goods shipped between U.S. ports be transported by U.S. vessels operated primarily by U.S. citizens and permanent residents.

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**Save the Date**

**ABA Midyear Meeting**  
**January 23-29, 2019**  
Las Vegas, Nevada
ABA opposes proposed Title X family planning restrictions

The ABA is urging the Department of Health and Human Services (HHS) to eliminate proposed restrictions on abortion counseling and referral services that are included in regulations proposed July 1 regarding family planning clinics under Title X of the Public Health Service Act.

“The proposed regulations are premised on the assertion that counseling regarding pregnancy-termination options or referral to abortion providers upon request violates the statute’s prohibition against using Title X funds to encourage or promote abortion as a method of family planning,” ABA Governmental Affairs Director Thomas M. Susman wrote July 30 to ADM Brett Giroir, M.D., assistant secretary for health at HHS.

Susman explained that this is a “significant departure from the current longstanding regulatory interpretation of this core prohibition,” under which Title X clinics currently offer patients medically accurate counseling and referrals for all pregnancy options, including prenatal care, adoption, and abortion. The proposed regulations seek to reinstate short-lived regulations from the 1990s that were known as the domestic “gag rule” because they prevented Title X recipients from providing information to their patients on any abortion-related service.

The ABA comments focused on Sections 59.5 and 59.14 of the proposed regulations. Proposed changes to Section 59.5 would eliminate the current requirement that Title X clinics offer pregnant women the opportunity to receive information and nondirective counseling and referrals for all pregnancy options, including prenatal care, adoption, and abortion. The proposed regulations seek to reinstate short-lived regulations from the 1990s that were known as the domestic “gag rule” because they prevented Title X recipients from providing information to their patients on any abortion-related service.

The proposal has also elicited concern from members of Congress. In a July 31 letter to HHS Secretary Alex Azar II, more than 40 senators emphasized that the proposed regulations, rather than seeking to ensure that qualified providers can offer the reproductive health care and family planning services that are needed in this country, prioritize “ideology and ignore the goal and intent of Congress in establishing a nationwide family planning program.”