

AMERICAN BAR ASSOCIATION

**COMMISSION ON WOMEN IN THE PROFESSION
COMMISSION ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION
COMMISSION ON SEXUAL ORIENTATION & GENDER IDENTITY
SECTION OF CIVIL RIGHTS & SOCIAL JUSTICE**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges legal employers not to
- 2 require mandatory arbitration of claims of sexual harassment.

REPORT

Introduction

Use of mandatory arbitration agreements and policies has steadily grown over the past two decades. Today, such agreements are in place at more than half of non-union, private-sector employers in the United States. Intended as an efficient, less time-consuming and less-expensive process for dispute resolution, arbitration is often an excellent choice for resolving disputes when it is voluntary and the subject of agreement, with effective consent, by both the employee and the employer.

The ongoing flood of courageous victims coming forward about their experiences of sexual harassment has led to questions, from such sources as state governments, companies, institutions, and lawyers, about certain existing procedures in the context of sexual harassment. The all too frequent stories about victim experiences, regressive workplace cultures, feelings of isolation and fear, and the robust reforms needed to help shift the balance of power between perpetrators and their victims has made us all aware that some current approaches to prevent or redress sexual harassment may be a part of the problem, by silencing women and perpetuating harassment.

The #MeToo movement has emphasized the critical importance of accountability in workplaces, not simply for the benefit of a specific victim but also for the benefit of other employees in that workplace.¹ The movement has also led victims and their employers to look anew at the methods for adjudicating and resolving cases of sexual harassment. Policies of the American Bar Association articulate many positive reasons why arbitration of disputes can add great value for all parties to a dispute in many different contexts. But those policies also suggest the problems when the parties do not agree that dispute resolution through a private process makes the most sense.

Importantly, Resolution 300 does not seek to eliminate arbitration when it is a voluntary choice made at the time of the dispute by both employee and employer. The Resolution gives all legal professionals the right to bring sexual harassment claims in a forum that is mutually chosen. The Resolution thereby enforces a meaningful value of arbitration, that the parties mutually agree to it. Nothing in the Resolution would stop arbitration when all parties wish to arbitrate.

Sexual harassment is an expression of power. It is used to reinforce cultural norms about appropriate roles, behavior, and work for women and men, and to exert control over people with less power and status in society, and in the workplace.² Studies show that sexual harassment pervades all industries and occupations, particularly those with a high

¹<https://www.americanprogress.org/issues/women/news/2018/01/31/445669/politics-policy-turning-corner-sexual-harassment/>

² See Badgett, M.V., The Williams Institute, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination* (2007).

percentage of low-wage workers—the majority of whom are women.³ In fact, at least 25%, and as many as 85%, of women surveyed report having experienced sexual harassment at work.⁴ While most employers have policies and procedures that address sexual harassment in the workplace, employees face many impediments to enforcing their rights.

The legal profession, sadly, is not exempt from sexual harassment.⁵ The American Bar Association's own research, under the auspices of the 2017-2018 Presidential Initiative, has begun to roll out the results of its national surveys of men and women lawyers in the workplace. The ABA's studies show an astounding 49% of women lawyers in the nation's 350 largest law firms who "received unwanted sexual contact" at work; and 28% of women lawyers who "avoided reporting sexual harassment."⁶ Research from bar groups across the country makes clear that the problem of sexual harassment still exists in many legal settings.⁷

³ Jocelyn Frye, Center for American Progress, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers* (2017).

⁴ <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Budget-Sears-Lau-Bias-in-the-Workplace-Jun-2007.pdf> (16 to 68 percent of lesbian, gay or bisexual respondents reported experiencing employment discrimination, and seven to 41 percent of lesbian, gay or bisexual workers were verbally/physically abused or had their workplace vandalized as a result of their sexual orientation); Grant J. Motet, L. & Tanis, J., Nat'l Ctr. for Transgender Equal. & Nat'l Gay & Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 51 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf (78% of transgender workers have encountered some form of harassment or mistreated at work).

⁵ See, e.g., Chang and Chopra, "Where Are All the Women Lawyers?", FORUM, Sept./Oct. 2015 at pp. 15-20 (reporting that 2005 survey of California lawyers found that 50% of women respondents reported sexual harassment). <https://www.360advocacy.com/wp-content/uploads/2015/10/ChangChopraArticle-1.pdf>. See also Results of the 2015 YLD Survey on Women in the Legal Profession, The Florida Bar, at 9 (17% of the respondents stated they had experienced harassment). <https://www.floridabar.org/wp-content/uploads/2017/04/results-of-2015-survey.pdf>; Report of The Florida Bar Special Committee on Gender Bias, May 26, 2017 at 1 (one out of every seven female lawyer respondents stated they had experienced harassment or bullying due to their gender within last three years, and only 23% of those who reported the incident to a supervisor stated that the complaint was resolved satisfactorily). <https://www.floridabar.org/wp-content/uploads/2017/06/Special-Committee-on-Gender-Bias-Report-2017.pdf>; Women Lawyers of Utah, *The Utah Report: The Initiative on the Advancement and Retention of Women in Law Firms* (Oct. 2010), http://ms-jd.org/files/wlu_report_final.pdf ("37% of women in firms responded that they experienced verbal or physical behavior that created an unpleasant or offensive work environment[, and] 27% of the 37% indicated that the situation became serious enough that they felt they were being harassed (approximately 10% of women in firms). The vast majority (86%) of those reporting harassment identified sex as the basis for the harassment."); ABA Commission on Women in the Profession, *The Unfinished Agenda: Women and the Legal Profession* 18-19 (2001) (citing survey results indicating that one-half to two-thirds of women lawyers experienced or observed sexual harassment); Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 Val. U. L. Rev. 859, 894 (2005); Martha Neil, *Hidden Harassment: Law Firms and Disciplinary Authorities Look For Ways to Fight Sexual Misconduct*, 92-MAR A.B.A. J. 43 (2006); Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 Fla. St. U. L. Rev. 785, 837 (2004) ("Female lawyers around the country report a significant incidence of gender-based discrimination and incivility against them by judges, court personnel, other lawyers, and clients.").

⁶ American Bar Association, Presidential Initiative on Long-Term Careers for Women in Law, Data Presented on August 3, 2018 (Chicago, IL).

⁷ *Id.*

Sexual harassment thus takes place in law firms in much larger numbers than many people assume. In the wake of the #MeToo movement, we have all become much more aware that how disputes are resolved should be compatible with how victims of sexual harassment wish to pursue their claims.

As an organization representing legal professionals, the ABA is committed to pursuing laws and procedures that positively impact the legal profession. Therefore, the Commission is asking the ABA to pass this resolution to secure for all legal professionals the right to bring sexual harassment claims in a forum that is mutually chosen.

Overview of the Resolution

The focus of Resolution 300 is sexual harassment and instances where arbitration is required rather than desired by both sides. Resolution 300 stems from the marked social changes that are occurring through the #MeToo movement--along with many other public and private initiatives--to sexual harassment in the workplace. In February 2018, the House unanimously passed Resolution 302, which spoke to policies for eliminating sexual harassment at work. It did not speak, however, to one critical component: the use of mandatory arbitration. Resolution 300 addresses that issue. It recognizes the benefits that arbitration generally provides and simply focuses on cases of sexual harassment where both parties do not wish to proceed in arbitration.

The legal profession today has the opportunity to take the lead on the issue of sexual harassment and to make clear that it is only mandatory arbitration of sexual harassment claims – when the process is not desired by all parties – that should not be required by legal employers. The Commission does not believe that this is a topic where a 'wait and see' approach is the best course. Some legal employers have already made substantial changes in the arena of sexual harassment (e.g., have eliminated mandatory arbitration for employees); and many major firms have eliminated mandatory arbitration for summer associates under pressure from law schools. But the vast majority of legal employers need guidance, which the Resolution provides in the narrow sphere in which it urges action.

ARGUMENT

This Resolution Will Strengthen Resolution 302, Which Urges Legal Employers to Review and Effectively Enforce Policies That Prohibit and Prevent Harassment

Resolution 302, introduced by the Commission on Women in the Profession, urged all employers to adopt and enforce policies that prohibit, prevent and redress “harassment and retaliation based on sex, gender, gender identity, sexual orientation and intersectionality of sex with race and/or ethnicity.” The ABA House of Delegates adopted it, after amendment, by unanimous voice vote, in February of 2018.⁸

Further, an amendment to Rule 8.4 of the ABA Model Rules of Professional Conduct was adopted in 2016 which states that harassment or discrimination related to the practice of law “on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socio-economic status” amounts to professional misconduct.

It is timely to strengthen these protections for those employed in the legal profession by allowing victims of sexual harassment to choose the forum for resolving their claims.

States Are Acting to Eliminate Mandatory Arbitration in Sexual Harassment Cases.

A number of States have expressed a public policy to exclude sexual harassment from mandatory arbitration agreements. In New Jersey, Maryland, New York, Vermont, and Washington, for example, lawmakers are seeking or have already passed laws to limit an employer’s ability to condition continued employment or settle a claim of workplace harassment on the employee’s agreement for private resolution. In South Carolina, lawmakers are proposing to eliminate an employer’s ability to require mandatory arbitration for workplace sexual harassment claims.

On February 12, 2018, the National Association of Attorneys General from every state, the District of Columbia, and the U.S. territories, issued a letter to the U.S. Congressional and Senate Leadership, asking for support in enacting needed legislation to protect victims of sexual harassment in the workplace.⁹ Specifically, the Attorneys General do not favor arbitration of sexual harassment claims, for several reasons. Confidentiality requirements of arbitration clauses are in conflict with the

⁸ See 18M302. <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/302.pdf>

⁹ Letter dated Feb. 12, 2018, from National Association of Attorneys General, to Hon. Paul Ryan, Nancy Pelosi, Mitch McConnell, Charles Schumer, Kevin McCarthy, Steny Hoyer, John Cornyn, and Richard Durbin, supporting legislation to protect victims of sexual harassment in the workplace (National Association of Attorneys General Letter).

public interest, and “then prevents other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief.”¹⁰ The Attorneys General particularly emphasized that ending mandatory arbitration of sexual harassment claims would help “put a stop to the culture of silence that protects perpetrators at the cost of their victims.”¹¹

This Resolution Is Consistent with the Federal Arbitration Act.

The Federal Arbitration Act (FAA) was enacted in 1925, 43 U.S. Stat. 883, then reenacted and codified in 1947 as Title 9 of the United States Code. As stated in *Gilmer v. Interstate/Johnson Lane Corp.*,¹² its purpose was to reverse the longstanding judicial hostility to arbitration agreements and to place them on equal footing with other contracts. The FAA, and such Supreme Court decisions as *Epic Systems v. Lewis*,¹³ allow employers to exclude sexual harassment claims from mandatory arbitration agreements.

Some Law Firms Are Already Abandoning Mandatory Arbitration, and Compliance with This Resolution Facilitates Recruiting, Diversity and Female Retention and Leadership in the Profession

A recent article in the ABA Journal, “Times Up” (June 2018), encourages self-regulation by the legal profession in light of the fact that the justice system has been slow to support victims of sexual harassment or assault and the profession continues to lose female talent at every level.

Several large national law firms publicly ended the use of mandatory arbitration clauses in their employment agreements including Munger, Tolles & Olson, Orrick, Herrington & Sutcliffe, and Skadden Arps Slate Meagher & Flom.¹⁴

In May 2018, dozens of U.S. law schools sent surveys to 374 major law firms seeking information on their mandatory arbitration policies.¹⁵ The surveys were sent following an outcry from law students who discovered that new associates were often required to sign mandatory arbitration agreements for all employment-related disputes.¹⁶ The 186 respondents overwhelmingly (180 to 6) confirmed that they would not require summer associates/interns to sign mandatory arbitration agreements for employment-related disputes.¹⁷ With 97% of firms (according to that survey) rejecting mandatory arbitration altogether (for summer associates), it is clear that extending that protection from summer associates to all employees would be consistent, and solidify the legal profession’s leadership on this issue.

¹⁰ *Id.*

¹¹ *Id.*

¹² 500 U.S. 20 (1991).

¹³ http://www.abajournal.com/news/article/the_enforceability_of_arbitration_agreements.

¹⁴ ABA Journal June 2018: “Why 3 BigLaw Firms Ended Use of Mandatory Arbitration Clauses,” Angela Morris.

¹⁵ <https://biglawbusiness.com/many-big-law-firms-wont-disclose-arbitration-policy/>.

¹⁶ *See id.*

¹⁷ *See* <https://www.dropbox.com/s/1dyukyzavvy1zk4/Employer%20Survey%20XC.xlsx?dl=0>.

Major Companies Are Implicitly Adopting This Resolution by Abandoning Arbitration for Sexual Harassment Claims

The push to eliminate mandatory arbitration agreements from cases of sexual harassment exists in the corporate arena, as well. Several prominent companies recently announced their compliance with the concept proposed in this Resolution, stating that they will not enforce mandatory arbitration against those who complain of sexual harassment. Microsoft ended the practice of mandatory arbitration for sexually related claims in December 2017, affecting hundreds of mostly senior executives.¹⁸ In March 2018, Uber announced that it was ending its practice of mandatory arbitration for claims of sexual harassment and assault.¹⁹ Shortly after Uber made its announcement, its competitor company, Lyft, announced that it, too, would waive mandatory arbitration for survivors of sexual assault and harassment.²⁰

Potential Concerns

This Resolution Does Not Seek to Eliminate Arbitration and is Fully Consistent with Existing ABA Policy on Arbitration.

As described above, the proposed Resolution is fully consistent with the use of arbitration in the many different contexts in which it is the desired means for resolving disputes. This Resolution simply focuses on cases of sexual harassment and the use of voluntary arbitration agreements.

The current Resolution builds on and is consistent with ABA existing policies concerning sexual harassment and mandatory arbitration and would be a timely melding of both those issues. Regarding ABA policies on arbitration, including mandatory arbitration, the the ABA has previously opposed use of mandatory arbitration, especially when concerns about rights and due process may arise, and when statutory employment remedies may be undermined.

None of the previous resolutions, however, spoke directly to the situation of sexual harassment – which is why this Resolution is needed. Previous resolutions include:

- Resolution 114 (1989). Advocated that dispute resolution techniques, including arbitration, should assure that every disputant's constitutional and other legal rights and remedies were protected.

¹⁸ <https://www.wsj.com/articles/uber-ends-mandatory-arbitration-clauses-for-sexual-harassment-claims-1526378400>.

¹⁹ *Id.*

²⁰ <https://www.recode.net/2018/5/15/17357148/uber-lyft-arbitration-sexual-assault-lawsuit>.

- Resolution 10F (1994) and later Resolutions Adopting Reports 305 (1995) and 112 (1997) focused on the need for ADR techniques like arbitration to be “voluntary but not mandatory.”

- Resolution 101 (1997): Focused on employment disputes, and that “any agreement to mediate and/or arbitrate disputes should be informed, voluntary, and not a condition of initial or continued employment.”

- Resolutions Opposing Mandatory Arbitration in specific contexts, including: lawyer malpractice claims, HMO coverage decisions, claims involving nursing homes, disputes arising under the Uniformed Services Employment and Reemployment Rights Act of 1994.

Resolution 300 reinforces ABA policy, in the context of sexual harassment, that an arbitration should be voluntary but not mandatory,

Conclusion

For the foregoing reasons, the Commission on Women in the Profession urges the House to pass Resolution 300.

Respectfully submitted,

Stephanie Ann Scharf
Chair, American Bar Association Commission on Women in the Profession
August 2018

GENERAL INFORMATION FORM

Submitting Entity: Commission on Women in the Profession

Submitted By: Stephanie Scharf, Chair

1. Summary of Resolution(s). This Resolution urges the ABA and all employers in the legal profession, to support the elimination of mandatory arbitration in cases of sexual harassment.
2. Approval by Submitting Entity. The ABA Commission on Women in the Profession voted its initial approval on May 18, 2018. The revised language was approved by vote of the Commission on July 27, 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 several resolutions relevant to the issue of sexual harassment and arbitration. They are summarized as follows:

ABA Policy on Sexual Harassment

92M117: This 26-year-old recommendation recognized that sexual harassment was a problem in all types of workplace settings, including the legal profession. It recommended education of the profession about the scope and harm of sexual harassment in the workplace, called upon members of the legal profession to provide leadership and education in eradicating sexual harassment, and resolved that the American Bar Association should endeavor to ensure that its staff work in a professional atmosphere prohibiting sexual harassment.

18M302: In addition, ABA Resolution 302, adopted by the House of Delegates in February 2018, urges all employers to adopt and enforce policies that prohibit, prevent, and redress harassment and retaliation based on sex, gender, identity, sexual orientation, and intersectionality of sex with race and/or ethnicity.

16A109: Finally, in 2016, the American Bar Association House of Delegates adopted an amendment to Rule 8.4 of the ABA Model Rules of Professional Conduct which states that harassment or discrimination in the practice of law on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socio-economic status amounts to professional misconduct.

ABA Policy on Arbitration, Including Mandatory Arbitration

In addition, there have been past resolutions by the ABA regarding the use of arbitration in a variety of contexts. Those with general applicability or applicability to employment disputes are set forth below.

While supporting use of alternative dispute resolution (ADR) mechanisms like mediation, the ABA has opposed use of mandatory arbitration in contexts when rights and remedies are not sufficiently protected and specifically has opposed use of mandatory or “forced” arbitration by courts and recommended voluntary, not mandatory, arbitration in contexts when there are indications of an unfair balance of power (e.g., lawyer malpractice claims, no pre-dispute agreements to arbitrate HMO coverage decisions and claims involving nursing homes, disputes arising under the Uniformed Services Employment and Reemployment Rights Act of 1994), The ABA in 1995 adopted the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of Employment Relationships. These policies confirm ABA policy opposing mandatory arbitration when there is an imbalance of power, when concerns about rights and due process may arise, and when statutory employment remedies may be undermined.

89A114: In 1989, to support the growing field of dispute resolution, the then ABA Standing Committee on Dispute Resolution, proposed Resolution 114, which was adopted and had the ABA support the continued use of an experimentation with “alternative” dispute resolution techniques, both before and after suit is filed, as a necessary and welcome component of the U.S. justice system. Resolution 114 further advocated that such dispute resolution techniques including early evaluation, mediation, arbitration, summary jury trials and mini-trials, should assure that every disputant’s constitutional and other legal rights and remedies were protected.

The Report to the ABA on Resolution 114 specifically requested that the ABA assure that ADR techniques be carefully crafted and studied by legislatures, the bench, and the bar so that: 1) litigants’ due process, equal protection and other constitutional rights are fully protected; 2) adjudicators’ decisional independence and neutrality are assured; 3) conflicts of interest of arbitrators are scrupulously avoided; 4) openness and accountability of ADR proceedings are guaranteed; 5) ADR is an option for litigants to use freely; and 6) ADR does not force litigants into making uninformed decisions adversely affecting their constitutional and legal rights and remedies. This resolution and report are completely consistent with the current proposed resolution eliminating mandatory arbitration for sexual harassment claims.

94A10F and later 95A305 and 97M112: In August, 1994, the ABA House of Delegates adopted the recommendation from the Arkansas Bar Association opposing the enactment by the United States Congress of any legislation authorizing the installation of any mandatory arbitration program in the U.S. District Courts where involuntary participation in such programs is made a condition precedent to the right of litigants in civil cases to a trial before a jury or federal judge. In August

1995, the House of Delegates adopted a resolution (305) supporting the Long-Term Plan for the Federal Courts, which, among other things, encouraged use of ADR techniques, subject to the ABA's previous ADR policies, including Resolution 10F. In February 1997, the House of Delegates adopted Resolution 112 supporting legislation and programs in federal, state, territorial and tribal courts promoting ADR "such as voluntary, but not mandatory, arbitration."

The policy set forth in these resolutions remains consistent with the proposed resolution which would eliminate the same involuntary action in a mandatory arbitration proceeding prior to the right to a trial by jury or judge as it pertains to a sexual harassment claim.

97M101: At the ABA Midyear Meeting in 1997, the House of Delegates approved Resolution 101, which was proposed by the Section on Labor and Employment, and recommended adoption of the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of Employment Relationships, dated May 9, 1995. Endorsed by the National Academy of Arbitration, American Arbitration Association, Society of Professionals in Dispute Resolution, National Employment Lawyers Association, Federal Mediation and Arbitration Service, and the American Civil Liberties Union, Resolution 101 supports the use of mediation and arbitration for employment disputes involving statutory rights so long as such arbitration is conducted under proper due process. These safeguards include:

Employers should be able to create mediation and/ or arbitration systems to resolve statutory claims but any agreement to mediate and/or arbitrate disputes should be informed, voluntary, and not a condition of initial or continued employment.

This Task Force that drafted the Due Process Protocol had disagreeing views on the timing of mediation or arbitration enforcement but did agree that no matter when the decision is made by an employer it did agree that all such disputes must be knowingly made (See Report 97M101).

The Due Process Protocol was designed to help ensure due process in the resolution of (among other things) arbitrations of employment disputes involving statutory rights. The resolution adopting the Due Process Protocol is consistent with the objectives of the current resolution to eliminate mandatory arbitration in sexual harassment claims.

Resolutions Opposing Mandatory Arbitration (92M119, 06M111B, 11A120): The ABA has on a number of occasions adopted resolutions opposing use of mandatory arbitration in situations in which there could be an imbalance of power and a potential for unfairness between the two sides (e.g., lawyer malpractice claims, no pre-dispute agreements to arbitrate HMO coverage decisions and claims involving nursing homes, disputes arising under the Uniformed Services Employment and

Reemployment Rights Act of 1994). These situations all involve disputes potentially pitting individuals against institutional defendants, who were “repeat players” in arbitration and those with a disproportionate experience in the process and with potential decisions-makers not possessed by the claimant. For example, in 1977, the ABA House of Delegates approved use of arbitration to resolve medical malpractice claims, but only if the parties had agreed to use arbitration after the dispute had arisen. In February 1992, the ABA House of Delegates adopted Resolution 119, recommending use of mandatory arbitration for disputes over legal fees, but voluntary arbitration of lawyer malpractice claims. In February 2006, the ABA House of Delegates adopted Resolution 111B which opposed use of mandatory, pre-dispute arbitration agreements to resolve disputes between nursing homes and their residents or agents. The Resolution also supported legislation and regulations invalidating such arbitration agreements. Similarly, in August 2011, the ABA House of Delegates voted to adopt Resolution 120 supporting amendments to the Unformed Services Employment and Reemployment Rights Act of 1994 (Act) which, among other things, made unenforceable any agreement between an employer and employee that requires arbitration of a dispute arising under the Act.

Resolutions Addressing Commercial, International, and Government Arbitration (77A118, 78M102.2, 90M113A, 04M107, 04A116, 89A104C, 90M113A, 88A103A):

The ABA has adopted numerous resolutions endorsing or facilitating the adoption use of commercial, international, and government arbitration. E.g., Resolutions 118 in August 1977, 113A in February 1990, 107 in February 2004, 116 in August 2004 adopting or revising the Code of Ethics for Arbitrators in Commercial Disputes; February 1978, and Resolution 104C in August 1989, Resolution 113A in February 1990 relating to United Nations and other conventions and rules relating to international arbitration; Resolution 103A in August 1988 supporting increased use of ADR, including but not limited to arbitration, by federal agencies.

The current Resolution will not affect these other ABA policies which relate to arbitration between commercial, international, and government parties.

5. Is this a late report, what urgency exists which requires action at this meeting of the House? At the specific request of President Hilarie Bass and in light of changing social reactions to sexual harassment, the Commission voted in May 2018 to pursue this resolution even though the deadline for submission had passed. The commission then had to prepare, review and finalize a full report, with a strong and sustainable basis for the Resolution. The Resolution speak to the marked social changes that are occurring through the #MeToo movement and other public and private initiatives to combat sexual harassment keep growing. These activities are not fixed in time and continue to grow and expand their focus, including about what types of policies are needed to eliminate sexual harassment. While Resolution 302 in February 2018 spoke to many such policies, it did not speak to one critical component: the elimination of mandatory arbitration. The legal profession should be taking the lead, and not fall behind. Given the schedule of ABA meetings, we should not miss the opportunity to present and adopt this necessary policy in this fast-

changing milieu, rather than wait and fall behind the trends that are happening now. Some legal employers have already made substantial changes in the arena of sexual harassment (e.g., a few have eliminated mandatory arbitration for employees; and a larger number of firms have eliminated mandatory arbitration for summer associates). But the vast majority of legal employers need guidance, which the Resolution and report provide.

6. Status of Legislation. The Resolution tracks new state legislation, such as in Maryland, Washington, Vermont, and New York; and responds to many other states where bills are being proposed.
7. Brief explanation regarding plans for implementation of the policy, is adopted by the House of Delegates. The Commission on Women in the Profession plans to create and implement a number of programs regarding sexual harassment and the elimination of a mandatory arbitration requirement that is not mutually agreed to. The Commission plans to coordinate its efforts with other entities within the ABA with an interest in this topic. The Resolution will allow the ABA President to participate in the national debate by citing official ABA policy.
8. Cost of the Association (Both direct and indirect costs). There is not expected to be a cost to the Association. Programs are not expected to be paid for by the Association and will instead be paid for by those participating in the programs or purchasing material.
9. Disclosure of Interest. (If applicable) N/A.
10. Referrals.
Section of Labor and Employment Law
Section of Litigation
Section of Civil Rights and Social Justice
Health Law Section
Young Lawyers Division
Section of Dispute Resolution
Commission on Racial & Ethnic Diversity
Commission on Sexual Orientation and Gender Identity
Commission on Hispanic Legal Rights & Responsibilities
Commission on Disability Rights
11. Contact Name and Address Information. (Prior to the meeting). Please include name, address, telephone number and e-mail address) Stephanie Scharf, Scharf Banks Marmor LLC, 333 W. Wacker Dr., Ste. 450. Chicago, IL 60606; Phone: 312.662.6999; E-mail: sscharf@scharfbanks.com.

12. Contact Name and Address Information. (On-site at the Meeting)
Stephanie Scharf, Scharf Banks Marmor LLC, 333 W. Wacker Dr., Ste. 450.
Chicago, IL 60606; Phone: 312-662-6999; E-mail: sscharf@scharfbanks.com.

EXECUTIVE SUMMARY1. Summary of the Resolution.

This Resolution urges all employers in the legal profession to be leaders in the support of eliminating mandatory arbitration in claims of sexual harassment.

2. Summary of the Issue That the Resolution Addresses.

The focus of Resolution 300 is sexual harassment and instances where arbitration is required rather than desired by both sides. Resolution 300 stems from the marked social changes that are occurring through the #MeToo movement--along with many other public and private initiatives--to sexual harassment in the workplace. In February 2018, the House unanimously passed Resolution 302, which spoke to policies for eliminating sexual harassment at work. It did not speak, however, to one critical component: the use of mandatory arbitration. Resolution 300 resolves that gap. It recognizes the benefits that arbitration generally provides and simply focuses on cases of sexual harassment where both parties do not wish to proceed in arbitration.

The legal profession today has the opportunity to take the lead on the issue of sexual harassment and to make clear that it is only mandatory arbitration of sexual harassment claims – when the process is not desired by all parties – that should not be required by legal employers. The Commission does not believe that this is a topic where a ‘wait and see’ approach is the best course. Some legal employers have already made substantial changes in the arena of sexual harassment (e.g., have eliminated mandatory arbitration for employees); and many major firms have eliminated mandatory arbitration for summer associates under pressure from law schools. But the vast majority of legal employers need guidance, which the Resolution provides in the narrow sphere in which it urges action.

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

Adoption of the Resolution would put the American Bar Association in the forefront of eliminating mandatory arbitration or arbitration that is not mutually agreed to, in cases of sexual harassment in the legal profession and acting as a prominent resource for guidance in preventing sexual harassment in the workplace and provide a set of key principles which has the imprimatur of accepted national guidance.

By setting forth policies and procedures to combat sexual harassment, including the elimination of mandatory arbitration, the Resolution will assist the Association, its members, other affiliated organizations, to eliminate mandatory arbitration for sexual harassment claims from the legal profession and its workplace.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified. The revised report is responsive to some informal internal commentary that the Commission received, although no entity has as of the date of this revised submission officially opposed the Resolution.