

AMERICAN BAR ASSOCIATION

YOUNG LAWYERS DIVISION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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 made within a reasonable time after
6 learning the basis for the continuance unless: (1) substantial prejudice to another party
7 is shown; or (2) the criminal defendant's speedy trial rights are prejudiced.

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,¹ 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.”² Parental leave provides long-term benefits that improve a child’s brain development, social development, and overall well-being.³ It “results in better prenatal and postnatal care and more intense parental bonding over a child’s life.”⁴ And it “improves the chance that a child will be immunized; as a result, it is associated with lower death rates for infants.”⁵

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.⁶ She was a solo practitioner and did not have anyone in her office who could assist her, so her request was seemingly reasonable.⁷ 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.”⁸

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.

² “Expecting Better: A State-by-State Analysis of Parental Leave Programs,” Jodi Grant, Taylor Hatcher & Nirali Patel, NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, at 3 (2005), at https://www.leg.state.nv.us/App/NELIS/REL/79th2017/ExhibitDocument/OpenExhibitDocument?exhibitId=29512&fileDownloadName=0330ab266_ParentalLeaveReportMay05.pdf (last visited Oct. 29, 2018).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Staci Zaretsky, *Judge Refuses To Postpone Hearing Because Maternity Leave Isn’t A Good Enough Excuse*, ABOVE THE LAW Blog (Oct. 15, 2014), at <https://abovethelaw.com/2014/10/judge-refuses-to-postpone-hearing-because-maternity-leave-isnt-a-good-enough-excuse/?rf=1> (last visited Oct. 29, 2018).

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).

101B

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.⁹ 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.¹⁰

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.¹¹ She was a solo practitioner without family nearby to care for her child for her.¹² 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.¹³

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 qualify for leave under the FMLA,¹⁴ junior associates, or other young lawyers who are neither first-chairing 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

⁹ See Zaretsky, *supra* note 11.

¹⁰ See Zaretsky, *supra* note 11 (quoting the subject complaint).

¹¹ The U.S. Department of Health & Human Services advises that it takes approximately six weeks for a woman's body to recover physically after giving birth vaginally. See *Recovering From Birth*, OFFICE OF WOMEN'S HEALTH, U.S. DEPT. OF HEALTH & HUMAN SERVICES (June 6, 2018), at <https://www.womenshealth.gov/pregnancy/childbirth-and-beyond/recovering-birth> (last visited Oct. 29, 2018).

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.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.¹⁶ This is because the leave that men are offered is typically more limited than it is for women.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.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.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.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.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.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

¹⁵ Jacob Alex Klerma, et al. 2012. *Family and Medical Leave in 2012: Technical Report*. (Prepared for U.S. Department of Labor.) Cambridge: Abt Associates, at <https://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf>.

¹⁶ See generally *Paternity Leave: Why Parental Leave For Fathers Is So Important For Working Families*, DOL Policy Brief, U.S. DEPT. OF LABOR, at <https://www.dol.gov/asp/policy-development/paternitybrief.pdf> (last visited Oct. 30, 2018).

¹⁷ See *id.*

¹⁸ *Id.* at 5 n.3.

¹⁹ *Id.* at 5 n.3.

²⁰ See Joan C. Williams et al., *You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession* (Am. Bar Ass'n Commission on Women & Minority Corp. Counsel Ass'n, 2018), at http://www.abajournal.com/files/Bias_interrupters_report-compressed.pdf.

²¹ See *supra* note 21.

²² Brad Harrington, et al., *The New Dad: Take Your Leave*, Boston College Ctr. for Work & Family, at http://www.thenewdad.org/yahoo_site_admin/assets/docs/BCCWF_The_New_Dad_2014_FINAL.157170735.pdf

101B

the justice system by all persons.”²³ The risk of having to threat of having 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.²⁴

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.²⁵ 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.²⁶ 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.²⁷ That rule will be considered by the

²³ See ABA Mission and Goals, AMERICAN BAR ASSOCIATION, at https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited Oct. 30, 2018).

²⁴ Barbara Busharis. *The Rules of the Game*, 36 No. 1 Trial Advoc. Q. 4 (Winter 2017).

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); MD. 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. 8-506 (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 2019.²⁸ The Florida Bar is presently in the process of soliciting comments from all interested persons on the subject of the proposed parental-leave rule.²⁹ 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.³⁰ 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.³¹

²⁸ See *id.*

²⁹ *Proposed Parental-Leave Continuance Rule*, The Florida Bar News, FLORIDA BAR (Oct. 15, 2018), at <https://www.floridabar.org/news/tfb-news/?durl=%2Fdivcom%2Fjn%2Fjnnews01.nsf%2F8c9f13012b96736985256aa900624829%2Ff2885d1289ecc2d885258314004af6de> (last visited Oct. 31, 2018).

³⁰ *Trial Date v. Due Date: Courts Make Rule For Parental Leave*, Bloomberg Law (July 31, 2018), at <https://news.bloomberglaw.com/daily-labor-report/trial-date-v-due-date-courts-make-room-for-parental-leave> (last visited Oct. 31, 2018).

³¹ See *Standing Order on Continuances Based on the Birth or Adoption of a Child*, <https://www.justex.net/JustexDocuments/7/STANDING%20ORDER%20ON%20CONTINUANCE%20BASED%20ON%20THE%20BIRTH%20OR%20ADOPTION%20OF%20A%20CHILD.pdf> (July 26, 2018).

101B

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.”).

GENERAL INFORMATION FORM

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.

6. Status of Legislation (if applicable).

N/A.

101B

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.

9. Disclosure of Interest.

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.)

Stefan M. Palys
ABA YLD Representative to the ABA House of Delegates
Stinson Leonard Street LLP
1850 N. Central Avenue, Suite 2100
Phoenix, AZ 85004-4584
602-212-8523
stefan.palys@stinson.com

Dana M. Hrelc
ABA YLD Representative to the ABA House of Delegates
ABA YLD Immediate Past Chair
Horton, Dowd, Bartschi & Levesque, P.C.
90 Gillett Street
Hartford, CT 06105
860-522-8338
dhrelc@hdblfirm.com

Lacy L. Durham
ABA YLD Representative to the ABA House of Delegates
ABA YLD Past Chair
Deloitte Tax LLP
2200 Ross Ave, Suite 1600
Dallas, TX 75201-6703
(214) 840-1926
lacydurhamlaw@yahoo.com

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

Lacy L. Durham
ABA YLD Representative to the ABA House of Delegates
ABA YLD Past Chair
Deloitte Tax LLP
2200 Ross Ave, Suite 1600
Dallas, TX 75201-6703
(214) 840-1926
lacydurhamlaw@yahoo.com

101B

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.