

**AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION
REPORT TO THE HOUSE OF DELEGATES**

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and
2 tribal courts to adopt a policy supporting oral arguments made by junior attorneys,
3 specifically those who drafted or significantly contributed to the item presented to the court
4 for adjudication, by allowing two attorneys for a party to participate in oral argument,
5 particularly where one of the lawyers is in their first ten years of practice.

REPORT

Generally, a litigation matter is handled by at least two attorneys: a senior, leading attorney and a junior, supporting attorney. Practically, a junior attorney plays a large role in the factual review and discovery in a matter and in drafting legal arguments. The senior attorney interfaces with the client and argues issues presented to a court for adjudication. While not always the case, more often than not, the economic considerations of litigation dictate that the junior attorney on a case is a new or young lawyer. As a result, new and young lawyers in these junior attorney roles receive fewer opportunities for meaningful courtroom experience.

In 2017, the Section of Litigation and the Judicial Division championed a resolution, ultimately adopted by the ABA, that urged courts to “implement plans that welcome opportunities for new lawyers to gain meaningful courtroom experience and urges law firms and clients to take advantage of those plans.” (17A116). Similarly, the New York State Bar Association championed a resolution, ultimately adopted by the ABA, that “encourage[d] members of the judiciary to take steps to ensure that women lawyers have equal opportunities to participate in the courtroom.” (18M10A). Finally, in 2021, the ABA YLD Litigation Committee and ABA YLD Practice Services Team championed a resolution, ultimately adopted by the ABA YLD, urging “all courts, state and federal, to implement procedures to encourage younger lawyers to take on speaking roles in the court room” and urging YLD members “to encourage under-represented populations in the legal community to take on speaking roles in the courtroom and to create opportunities for them to do so when appropriate.” (21-5YL).

Building upon these resolutions, this new resolution provides a specific proposal for the opportunity for new and young lawyers, defined by the ABA YLD as lawyers within their first ten years of practice or thirty-six years old or younger,¹ to gain meaningful courtroom experience by increasing their opportunities to participate in oral argument. Also, this specific proposal will beneficially impact women and people of color, who make up larger proportions of the populations of new and young lawyers than populations of senior lawyers, and who similarly are not often enough provided with opportunities for courtroom experience. While the issue of new and young lawyers and under-represented populations having less courtroom experience has been well documented,² this report again highlights their continued struggle for meaningful courtroom participation.

I. A Lack of Opportunity for New And Young Lawyers to Participate in the Courtroom Is a Well-Established And Documented Phenomenon.

It has long since been acknowledged that new and young lawyers, particularly those who are women and people of color, receive few opportunities to meaningfully participate in

¹ American Bar Association Young Lawyers Division Bylaws (August 2021), Section 2.1.

² See reports for 17A116, 17A10, 21-5YL.

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court proceedings.³ “New lawyers have long faced a classic dilemma: No client wants to entrust them with court arguments unless they have experience, but they can’t get experience unless clients entrust them with court arguments.”⁴

The Honorable Janet L. Sanders remarked that she was “struck” when she noticed that “the ‘speaking’ part for [an] appearance invariably went to the oldest member of the legal team—and that person was usually a white male.”⁵ Consider the judge’s perspective, “[t]hat person was often not the lawyer who wrote the brief on the legal issue before the court” and inevitably “the older partner would have to confer with the young (usually female) associate beside him in order to respond to a question from the court.”⁶ “Federal district court judges across the country were noticing the same thing, and taking action.”⁷

In general, because of the decline in numbers of trials, “opportunities for junior attorneys to participate meaningfully in trial advocacy have evaporated.”⁸ “Prior to the global pandemic, obtaining in-person court experience was becoming increasingly difficult. Developing attorneys in all practice areas were familiar with being shut out of significant courtroom experiences because of lack of opportunity or reluctance by carriers, clients, or senior counsel to assign them.”⁹ With the COVID-19 pandemic increasing the amount of online court proceedings,¹⁰ the time is right for increased participation by new and young lawyers.

II. Judicial Policies Promoting New And Young Lawyer Participation in Court Proceedings Are Effective.

“Clients are often cited as a reason for demanding senior counsel’s participation at all stages. However, it is the senior counsel’s job to point out the benefits of other approaches to the client’s case. That’s an important part of the role as counselor.”¹¹ Judicial orders that encourage junior attorney participation in addition to the senior attorney help those senior attorneys make the case to clients that junior attorneys should

³ *Id.*

⁴ Jenna Greene, *Partners step aside. It’s time to let associates shine in Court.*, REUTERS, Aug. 3, 2021.

⁵ Hon. Janet L. Sanders, *Extending Opportunities to Junior Lawyers in the Courtroom*, BOSTON BAR JOURNAL, Aug. 22, 2018.

⁶ *Id.*

⁷ *Id.*

⁸ Michael N. Rader, *Rising to the Challenge: Junior Attorneys in the Courtroom*, NEW YORK LAW JOURNAL, Apr. 27, 2017.

⁹ YOUNG LAWYER ADVISORY BOARD, *Young Lawyers Feel Ripple Effect of Judicial Vacancies and Case Delays*, NEW JERSEY LAW JOURNAL, May 28, 2021.

¹⁰ *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, The Pew Charitable Trusts, Dec. 1, 2021, <https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations> (last visited Dec. 14, 2022)

¹¹ Douglas H. Wilkins & Daniel I. Small, *Who’s Next? Junior lawyers and trial practice, Part 3*, MASSACHUSETTS LAWYERS WEEKLY, Feb. 22, 2019.

have an active role in courtroom proceedings. “[S]uch orders are often key in persuading clients to let new lawyers play a stand-up role in court.”¹²

One such policy can be seen in the United States District Court, Eastern District of Louisiana. Magistrate Judge Janis van Meerveld has the following language at the bottom of her orders setting oral argument:

****The Court strongly encourages argument by junior attorneys, particularly where the junior attorneys drafted or contributed significantly to the underlying motion or response. Accordingly, if a junior attorney (i.e., a lawyer practicing for less than seven years) argues a motion or opposition for a party, the Court will allow multiple attorneys to argue for that party so that issues can be split between attorneys or a more senior attorney can offer clarification, if necessary.*

Judge van Meerveld explains that this practice serves two purposes: 1) encouraging argument by the junior attorney who otherwise is unlikely to handle the oral argument, gaining court experience, and 2) encouraging the lawyer who is likely more familiar with the facts and details of the argument (particularly on discovery motions)—the junior attorney—to be available for any questions from the court. When the judge allows multiple attorneys to present on a given issue, the senior attorney is more likely to allow the junior attorney to handle part of the argument. This is because the senior attorney still has the opportunity to clarify or correct any argument made by the junior attorney. This offers an opportunity not otherwise available to new and young lawyers and thereby promotes their participation.

Encouragingly, Judge van Meerveld is neither the first nor the only judge to adopt such a policy.¹³ Similar language can be seen in standing court procedures, such as the following from the Southern District of Texas:

5. Young Lawyers

The Court strongly encourages litigants to be mindful of opportunities for young lawyers (i.e., lawyers practicing for fewer than seven (7) years) to conduct hearings before the Court, particularly when the young lawyer drafted or contributed significantly to the underlying motion or response. The Court believes that it is crucial to provide substantive speaking opportunities to young lawyers and that the benefits of doing so will accrue

¹² Jenna Greene, *Partners step aside. It's time to let associates shine in Court.*, REUTERS, Aug. 3, 2021.

¹³ See *Summary of Judicial Orders Promoting Next Gen*, <https://nextgenlawyers.com/judicial-orders-promoting-next-gen/> (last visited Jan. 8, 2022).

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to young lawyers, to clients, and to the profession generally. Thus, the Court encourages all lawyers practicing before it to keep this goal in mind.¹⁴

Additionally, Judge Alison J. Nathan of the Southern District of New York addresses junior attorney participation in courtroom procedures, stating:

8. Encouraged Participation of Junior Members of Legal Teams

Junior members of legal teams representing clients are invited to argue motions they have helped prepare and to question witnesses with whom they have worked. Firms are encouraged to provide this opportunity to junior attorneys for training purposes. This Court is amenable to permitting a number of lawyers to argue for one party if this creates an opportunity for a junior lawyer to participate. The ultimate decision of who speaks on behalf of the client is for the lawyer in charge of the case, not for the Court.¹⁵

Many federal judges with reported orders or policies favoring junior attorney participation. Indeed, “Judge Denise Casper of the District of Massachusetts observed that earlier standing orders from judges in her district ‘had the desired effect of having more well-prepared junior attorneys attend status conferences, argue motions to the Court, and, under appropriate supervision, examine witnesses at trial.’”¹⁶

Also, junior attorney participation is beneficial for the client. “Eager to gain trial experience, young lawyers invariably bring an outstanding level of preparation to the task.”¹⁷ The Hon. Janet L. Sanders summarized some of the obvious client benefits as follows:

If a junior lawyer has researched the matter and written the brief, he or she is well positioned to argue that matter effectively before a judge or jury. Associates “hungry” for courtroom experience are often better prepared than their seniors. Moreover, billing rates of the junior lawyers are lower than those of more senior lawyers.¹⁸

¹⁴ United States District Court, Southern District of Texas, *Court Procedural and Practices*, Hon. Alfred H. Bennett, Aug. 26, 2021, https://www.txs.uscourts.gov/sites/txs/files/Judge%20Alfred%20H.%20Bennett%20Proc%20revised%2082621_0.pdf (last visited Jan. 8, 2022).

¹⁵ United States District Court, Southern District of New York, Hon. Alison J. Nathan, , *Individual Practices in Civil Cases*, May 4, 2020, https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AJN%20Nathan%20Individual%20Rules%20of%20Practice%20in%20Civil%20Cases.pdf (last visited Jan. 8, 2022) (emphasis added).

¹⁶ Rader, *supra* note 8.

¹⁷ *Id.*

¹⁸ Sandres *supra* note 5.

Importantly, “less experienced lawyers are able to hone their skills while they are still under the supervision of more seasoned litigators” when they participate in court proceedings.¹⁹

III. Judicial Policies Promoting New And Young Lawyer Participation Also Promote Diversity in the Profession.

“Shouldn’t we wonder what the jury is thinking when one or two senior lawyers do all the speaking at trial while one or more associates sit there without saying anything? One could argue that it appears ungenerous, at the least.”²⁰ “Obviously, the impression is much worse when the silent associates are female or persons of color, and the attorney who speaks is not.”²¹

“The legal profession has been very slow to diversify by race and ethnicity over the past decade. . . . [L]eadership of most U.S. law firms is overwhelmingly white and male.”²² In 2020, the average age for lawyers was 47.1 years, which is in part because many lawyers work past the age of 65.²³ “[B]ecause senior lawyers tend to be a more homogeneous group, a policy that creates opportunities for younger lawyers will promote diversity in the profession.”²⁴ With senior attorneys having such long careers, there is little room for new, diverse attorneys to take on lead roles and courtroom opportunities.

Lawyers of color are twice as likely to leave U.S. law firms during a typical year as white lawyers, and female lawyers are slightly more likely to leave law firms than male lawyers.²⁵ “Regardless of why gaps persist among different groups of lawyers, however, diversity in the higher echelons of the legal profession should be a goal of both the bench and the bar. A policy that encourages greater courtroom participation by those still climbing the law firm ladder may help further that goal.”²⁶

The late Judge Jack. B. Weinstein of the Eastern District of New York implemented a policy encouraging junior attorneys “to argue motions they have helped prepare and to question witnesses with whom they have worked” after reading a report that females held senior lead counsel roles only about 25% of the time.²⁷ Indeed, the New York State Bar Association has since followed up on Kathryn Rubio’s 2017 report and in 2020 reported that only 26.7% of attorney appearances in civil and criminal cases in New York were by

¹⁹ *Id.*

²⁰ Wilkins & Small, *supra* note 10.

²¹ *Id.*

²² American Bar Association, *Profile of the Legal Profession Report* 18, 25 (2021).

²³ *Id.* at 22.

²⁴ Sandres, *supra* note 5.

²⁵ American Bar Association, *supra* note 21, at 26.

²⁶ Sandres, *supra* note 5.

²⁷ Kathryn Rubino, *Hero Federal Judge Takes Steps to Increase Meaningful Experience for Diverse Lawyers*, ABOVE THE LAW, Aug. 24, 2017.

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female attorneys. Female attorneys held the lead counsel role only 25.3% of the time.²⁸ Yet, the report also found that females had a higher percentage of court appearances in federal court.²⁹ This is a testament to the impact of the judicial policies advocated for by this Resolution.

IV. Conclusion

By adopting this Resolution, the American Bar Association will be urging court systems to take a proactive role in the legal education, training, and experience of the next generation of lawyers. Policies furthering the participating and retention of young and diverse attorneys are “a good thing, not just for the young lawyer but for the legal profession generally.”³⁰ Therefore, we respectfully urge the passage of this Resolution.

Respectfully submitted,

Josephine Bahn, Chair
Young Lawyers Division
February 2023

²⁸ NEW YORK STATE BAR ASSOCIATION COMMERCIAL AND FEDERAL LITIGATION SECTION, *THE TIME IS NOW: Achieving Equality for Women Attorneys in the Courtroom and in ADR* 5 (2020).

²⁹ *Id.* at 6-7.

³⁰ Sandres, *supra* note 5.

GENERAL INFORMATION FORM

Submitting Entity: Young Lawyers Division

Submitted By: Josephine Bahn, Chair

1. Summary of the Resolution(s).

This Resolution federal, state, local, territorial, and tribal courts to adopt a policy supporting oral arguments made by junior attorneys, specifically those who drafted or significantly contributed to the item presented to the court for adjudication, by allowing two attorneys for a party to participate in oral argument, particularly where one of the lawyers is in their first ten years of practice.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

1-Serve our Members by recommending changes in our profession that would create opportunities for members to gain valuable professional experience. 2-Improve our profession by ensuring that the lawyers most familiar with the facts and law of the case are making the arguments and ensuring that junior lawyers have opportunities to hone their skills. 3-Eliminate bias and enhance diversity by facilitating opportunities for a more diverse set of attorneys to participate in oral arguments.

3. Approval by Submitting Entity.

Approved February 2022 by ABA Young Lawyers Division Assembly.

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

Yes, 17A116 and 18M10A have been submitted to the ABA House of Delegates. However, those resolutions, as discussed in the report, are more general. This Resolution offers a specific course of action consistent with the ideas presented by those prior resolutions.

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

See the answer to the previous question. This Resolution is consistent with both 17A116 and 18M10A. The effect of this Resolution on 17A116 and 18M10A would be to clarify a way to further the objectives of those prior resolutions.

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

Not Applicable

7. Status of Legislation. (If applicable)

Not Applicable

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

If this Resolution is approved by the House of Delegates, it would be promulgated as ABA policy and support judicial policies which strive to increase court participation for young lawyers. After adoption, the Young Lawyers Division will work with the ABA Governmental Affairs Office (GAO) to distribute the resolution and to advocate for the idea within it.

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

No known costs.

10. Disclosure of Interest. (If applicable)

Not Applicable

11. Referrals.

Judicial Division

Judicial Division

Section of Litigation

Government Public Sector and Military Lawyers

Solo, Small Firm and General Practice Division

Tort Trial & Insurance Practice Section

Labor and Employment Law Section

Section of Family Law

Real Property, Trust and Estate Law Section

12. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

Rene Morency

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13. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

This Resolution urges federal, state, local, territorial, and tribal courts to adopt a policy supporting oral arguments made by junior attorneys, specifically those who drafted or significantly contributed to the item presented to the court for adjudication, by allowing two attorneys for a party to participate in oral argument, particularly where one of the lawyers is in their first ten years of practice.

2. Summary of the issue that the resolution addresses.

The Resolution seeks to address the issue of the lack of meaningful opportunities for new and young lawyers to gain court room experience, particularly for oral arguments, and the impact that has on their ability to succeed in the profession.

3. Please explain how the proposed policy position will address the issue.

This Resolution urges members of the judiciary to implement policies supporting the participation of junior lawyers in courtroom proceedings, including junior lawyers who contributed to drafting, by allowing multiple attorneys to argue for a party. This Resolution will thus facilitate those meaningful opportunities currently lacking for new and young lawyers. The Resolution is modeled on a judicial policy that has proven successful in addressing the identified issue.

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

None at this time.