

## REPORT

### THE UPDATED CIVIL TRIAL PRACTICE STANDARDS

#### **Introduction**

The civil jury trial lies at the foundation of the American system of justice, constitutionally protected in the Seventh Amendment. Promoting improvements in the jury trial is a core mission – and one of the highest priorities – of the American Bar Association, and is reflected in existing ABA standards. *See* ABA Principles for Juries and Jury Trials.

The American Bar Association adopted the original Civil Trial Practice Standards in February 1998 to standardize and promote the use of the innovative trial techniques included therein. The Standards were drafted by a Task Force of the ABA Section of Litigation that included four past and present Chairs of the Section of Litigation; distinguished plaintiffs' and defense counsel from around the country — from firms with as few as two lawyers to firms of several hundred; highly respected state and federal judges; and representatives of the Judicial Division of the ABA and the American College of Trial Lawyers. Before they were finalized, drafts of the Standards were distributed for public comment to every state and major local bar association; all sections of the ABA; other bar organizations; and hundreds of state and federal judges, and trial lawyers, across the country.

The Standards fill an important gap. They recommend procedures and otherwise furnish guidance that is not available elsewhere and are designed to foster and ensure a fair trial in both state and federal court. Critics of the jury trial have questioned the ability of jurors to decide complex cases fairly. The procedures recommended in the Civil Trial Practice Standards are particularly useful in complex cases and provide jurors the tools they need to come to fair decisions in all cases.

In light of the passage of time since the Civil Trial Practice Standards were adopted as official ABA policy, a Task Force of the ABA Section of Litigation was formed for the sole purpose of reviewing and updating the Civil Trial Practice Standards. Consistent with the work of the original task force that drafted what became the Civil Trial Practice Standards, the Update Task Force reviewed and evaluated the Original Standards to consider whether they continued to address practical aspects of trial that were not fully addressed by rules of evidence or procedure and consider potential new Standards that would supplement and operate consistently with those rules.

A development of huge proportions in the updating of the original Civil Trial Practice Standards was the adoption in 2005 by the American Bar Association of the Principles for Juries and Jury Trials created by the American Jury Project. As noted in the preamble to the ABA Principles:

The American Bar Association recognizes the legal community's ongoing need to refine and improve jury practice so that the right to jury trial is preserved and juror participation enhanced. What follows is a set of 19 Principles that define our fundamental aspirations for the management of the jury system.

Significant core concepts included within Original Standards 1-10 were evaluated, refined and integrated into the aforementioned 19 Principles that comprise the ABA Principles for Juries and Jury Trials. As a result, in the Updated Standards that follow, five of the initial 10 Original Standards have been deleted and the remaining five have been revised consistent with the ABA Principles. In addition, based on the work of the Update Task Force, three additional revised and four new standards have been integrated into the Updated Civil Trial Practice Standards.

The revised and/or new standards integrated into the Updated Standards were unanimously adopted by the Council of the Section of Litigation in June 2004, September 2006 and/or June 2007. The revised and/or new Standards which are the subject of the Recommendation address the following topics.

1. Juror Notebooks
2. Juror Note-Taking
3. Juror Questions for Witnesses
4. Instructing the Jury
5. Exhibit Availability During Jury Deliberations
6. Methodology to Measure Limits on Trial Presentation
7. “Qualifying” Expert Witnesses
8. Electronic Filing
9. Use of Tutorials to Assist the Court
10. Summary Exhibits and Witnesses
11. Organizing the Complex Case for trial
12. Judicial Involvement with Settlement

The first eight topics represent revisions of pre-existing Standards. The next four topics are new. A more complete description of these Updated Standards is set forth in the discussion below.

### **Purpose and Scope of the Updated Standards**

Since the middle of the 20th Century, trials have been characterized by increasing complexity and transformed by accelerating technology, new causes of action, novel fields of expertise, and the adoption of vastly liberalized codes of evidence. As trials have become more complicated, state and federal courts have developed a multitude of innovative techniques to enhance juror comprehension.

Consistent with the Original Standards, The Updated Standards have been developed as guidelines to assist judges and lawyers who try civil cases in state and federal court. They are not a substitute for existing evidentiary or procedural rules but rather were drafted to supplement and operate consistently with those rules. They are advisory only, and they expressly provide that, while they have been drafted to operate consistently with existing law, in the event of any conflict, the law governing in the jurisdiction prevails.

Similarly, the Updated Standards, like the Original Standards, do not reflect any substantive legal doctrines. They are not mandatory, but purely discretionary in application. They suggest a variety of approaches but recognize that ultimately the trial court must exercise its discretion in light of the circumstances before it, and nothing in these Updated Standards limits that discretion. They were developed to serve as a resource for court and trial counsel when confronted with the recurring issues that they address.

Other than as modified as explained below, the Updated Civil Trial Practice Standards remain in the same form as was approved by the ABA House of Delegates in February, 1998.

### **Description of the Updated Standards**

Updated Standard 1 pertaining to Juror Notebooks is a revision of Original Standard 2 which has been modified to supplement Principle 13B of the ABA Principles for Juries and Jury Trials and elaborates on the appropriate contents of Juror Notebooks and the procedures for using them.

Updated Standard 2 pertaining to Juror Note-Taking, which is a revision of Original Standard 3, is taken from Principle 13A(1-5) of the ABA Principles for Juries and Jury Trials and provides recommended cautionary instructions for the jury.

Updated Standard 3 pertaining to Juror Questions for Witnesses is a revision of Original Standard 4 and sets forth the elements the court should include in its cautionary instructions on juror's written questions consistent with Principle 13C of the ABA Principles for Juries and Jury Trials.

Updated Standard 4 pertaining to Instructing the Jury is a revision of Original Standard 5 which supplements Principles 6 and 14A-D of the ABA Principles for Jury and Jury Trials and provides guidance regarding notice to the parties and conferral requirements prior to the court's delivering any instructions to the jury.

Updated Standard 5 pertaining to Exhibit Availability During Jury Deliberations is a revision of Original Standard 7 and describes several steps that may facilitate juror's use of exhibits during deliberations consistent with Principle 15B of the ABA Principles for Jury and Jury Trials.

Updated Standard 7 regarding the Use of Tutorials to Assist the Court is a new standard. It is premised on the fact that tutorials have been recognized to be helpful in understanding

complex subjects. *See, Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1093 (9<sup>th</sup> Cir. 2005) (Rymer, J., concurring).

Procedures for a “chess clock”-like methodology to measure limits on trial presentation are now included at 8g in Updated Standard 8. This revision provides guidance for the developing practice by judges to measure the time limits on trial presentation imposed by the Court.

Updated Standard 12 covers the topic of Summary Exhibits and Witnesses. This new standard is derived from substantial case law addressing the use, for illustrative purposes, of summary exhibits and witnesses.

Updated Standard 14 regarding Qualifying Expert Witnesses provides, “The Court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask for the Court to do so.” The prior version of the Standard included the introductory phrase, “except in ruling on an objection.” The Standard has been modified in furtherance of the objective of avoiding judicial rulings in the presence of a jury to the effect that an expert rendering testimony is “qualified.”

Updated Standard 18 addresses Electronic Court Filings. The Updated Standard is consistent with the filing processes recommended by the American Bar Association in its Standards Relating to Court Organization, Standard 1.65, “Court Use of Electronic Filing Processes” adopted as ABA policy on February 9, 2004.

Updated Standard 22 pertains to Organizing the Complex Case for Trial. This new standard is designed to provide guidance in the application and implementation of Fed. R. Civ. P. 16 in furtherance of organizing the complex case for trial. The Updated Standard stresses the importance of cooperative efforts between the Court, the attorneys and their clients to prepare the complex case for trial consistent with case law and the Manual for Complex Litigation. *See, Newton v. A.C. & S., Inc., et al.*, 918 F.2d 1121, 1126 (3<sup>rd</sup> Cir. 1990), Federal Judicial Center, *MANUAL FOR COMPLEX LITIGATION*, 4<sup>th</sup> § 1013 (2004).

Finally, Updated Standard 23 addresses Judicial Involvement with Settlement and is another new standard. Such judicial involvement provides guidance for a process that is explicitly contemplated by Fed. R. Civ. P. 16, but for which there are no clearly developed processes and procedures.

As the above illustrates, the revised and/or new standards integrated into the Updated Standards fill an important gap. They recommend procedures and otherwise furnish guidance that is not available elsewhere and that are designed to foster and ensure a fair trial. The procedures contemplate voluntary party efforts at resolving issues before burdening the court, failing which they assure parties of a timely opportunity to be heard prior to judicial resolution. That opportunity is necessary because trial rulings almost invariably involve enormous judicial discretion and, in the heat of trial, the right to be heard in a timely fashion can sometimes be honored in the breach.

## **Conclusion**

The Updated Civil Trial Practice Standards are premised on, and further advance, existing ABA policies, including the Association's core value of promoting improvements in the system of justice generally and the jury trial in particular. The Updated Standards provide needed guidance for both bench and bar, particularly in complex jury trials. The Updated Standards explicitly reflect that they neither limit judicial discretion nor attempt to supersede governing law. The Updated Civil Trial Practice Standards stand in the highest traditions of the Association in the service of the courts, both state and federal, and the civil jury system.

Respectfully submitted,

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