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Resolution with Report on Archiving
RESOLVED, That the American Bar Association urges applicable governmental entities to take all appropriate measures to ensure that the National Criminal Instant Background Check System (NICS) is as complete and accurate as possible, so that all persons properly categorized as prohibited persons under 18 U.S.C. § 922(g), are included in the NICS system;

FURTHER RESOLVED, That the American Bar Association urges the United States Department of Justice to immediately rescind its memorandum that advises other federal agencies that they need not report to the Federal Bureau of Investigation (FBI), for inclusion in the NICS system, persons who fail voluntary drug tests, including applicants to the military who are rejected for military service because they have been deemed to be drug abusers, and likewise urges the United States Department of Defense and any other federal agencies to immediately rescind any similar policies they have in effect;

FURTHER RESOLVED, That the American Bar Association urges the United States Department of Justice, and its Bureau of Alcohol, Tobacco, Firearms and Explosives, to revise existing policy to extend to up to five years the time period that drug abusers and addicts should remain on the NICS prohibited list;

FURTHER RESOLVED, That the American Bar Association supports the rights of persons who are listed in the NICS system to administratively challenge and seek judicial review of any such listing;

FURTHER RESOLVED, That the American Bar Association urges applicable governmental entities to devote adequate resources to fund complete and accurate implementation of the NICS system.
EXECUTIVE SUMMARY

SUMMARY OF THE RESOLUTION

The Resolution urges applicable governmental entities to take all appropriate measures to ensure that the National Criminal Instant Background Check System (NICS) is as complete and accurate as possible, so that all persons properly categorized as persons prohibited from possessing firearms under federal law are included in the NICS system. The Resolution would also adopt for the first time as ABA policy the principle that persons who are listed in the NICS system should have a right to administratively challenge and seek judicial review of any such listing, and would call upon all applicable governmental entities to devote adequate resources to fund complete and accurate implementation of the NICS system.

SUMMARY OF THE ISSUE WHICH THE RESOLUTION ADDRESSES

The NICS instant background check system, passed as a part of the Brady Handgun Prevention Act in 1993, requires Federal Firearms License holders to utilize the NICS system maintained by the FBI to determine if it is legal to sell a firearm to a prospective purchaser. Unfortunately, the NICS system contains serious gaps, as various records flagging individuals as prohibited persons have not properly been forwarded to the FBI for inclusion in the NICS database. In particular, many records of illegal drug abuse or addiction are missing, in part because of a U.S. Department of Justice memorandum adopted in the 1990s, which advised federal agencies that positive drug test results need not be forwarded to the FBI if the testing was voluntary. Under current Justice Department regulations, many drug abusers and addicts are also automatically removed from the NICS database after a period of only one year. Since this DOJ policy’s adoption, the number of illegal drug abusers and addicts in the NICS system has plummeted, from over 65,000 in the 1990s to only 2,072 today. This allowed Jared Lee Lochner, the assailant who shot Rep. Gabrielle Giffords and 18 others, to buy a firearm without being in the NICS database, even though the U.S. Army had rejected him for illegal drug abuse.

In addition, despite Congress’ adoption of the NICS Improvement Act in the wake of the 2007 Virginia Tech massacre – legislation that was designed to improve state and other governments’ reporting of mental health-disqualifying records for inclusion in the NICS database – recent studies show that this process has been hampered by underfunding and delays. Only 5.3% of the authorized funds have been appropriated, and 10 states have yet to provide any mental health records to the FBI for inclusion in the NICS database, while 18 other states have provided less than 100 names. Moreover, concerns have recently arisen that the U.S. House of Representatives may cut NICS Improvement Act funding altogether in the current fiscal year.
EXPLANATION OF HOW THE PROPOSED POLICY POSITION WILL ADDRESS THE ISSUE

The instant Resolution would reiterate as ABA policy that federal, state and local governments should take steps as needed to ensure that the NICS database is as complete and accurate as possible, and declare that all persons prohibited by federal law from possessing firearms should be included in the NICS database. The Resolution also would also specifically urge the Justice Department to rescind its memorandum advising federal agencies that they need not report voluntary drug test failures, and urge other federal agencies such as the Department of Defense to rescind their regulations adopted as a result of that memorandum. The Resolution also would extend ABA policy by specifically urging the Justice Department to reconsider its policy of automatically removing illegal drug abusers and addicts from the NICS database after only one year, and support the rights of persons to administratively and judicially challenge their inclusion in the NICS database. And it would reiterate that governments at all levels should devote adequate resources to fund complete and accurate implementation of the NICS system.

SUMMARY OF ANY MINORITY VIEWS OR OPPOSITION WHICH HAVE BEEN IDENTIFIED

The Bar Association of the District of Columbia is not currently aware of any objections to this resolution. A previous version of the Resolution filed shortly before the 2011 ABA Midyear Meeting in Atlanta was withdrawn, following objections received by the Bar Association of the District of Columbia from Delegates who believed they had not had adequate time to evaluate that version of the Resolution.
SPONSOR: Edward Haskins Jacobs

PROPOSAL: Amends §1.2 of the Constitution to include the following language as one of the purposes of the Association: “to defend the right to life of all innocent human beings, including all those conceived but not yet born.”

Amends §1.2 of the Constitution to read as follows:

§1.2 Purposes. The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government; to defend the right to life of all innocent human beings, including all those conceived but not yet born; to advance the science of jurisprudence; to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the profession and of the public.

(Legislative Draft - - Additions underlined; deletions struck-through)

§1.2 Purposes. The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government; to defend the right to life of all innocent human beings, including all those conceived but not yet born; to advance the science of jurisprudence; to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the profession and of the public.

PROPOSAL: Amends §2.2 of the Constitution to provide that the following territories shall have one seat in the House of Delegates: American Samoa, Guam and the Commonwealth of the Northern Mariana Islands. The Virgin Islands will continue to have one seat in the House. Also the proposal amends §§6.2, 6.4, 6.9, 6.10, 6.11 of the Constitution and §§42.2 and 49.1 of the House Rules of Procedure to reflect that each territory, as defined, shall have a seat in the House of Delegates.

Amends §§2.2, 6.2, 6.4, 6.9, 6.10 and 6.11 of the Constitution and §§42.2 and 49.1 of the House Rules of Procedure to read as follows:

§2.2 General Provisions. For the purposes of this Constitution, the Bylaws, and any rules of the House of Delegates:

(a) The Commonwealth of Puerto Rico and the District of Columbia shall be treated as if they were states.

(b) Divisions shall be treated as if they were sections unless otherwise specified.

(c) Notice that is required to be given to members may be given by a special mailing or it may be given in any publication of the Association that is sent to every member. In either case notice is given upon deposit in the mail or when sent by facsimile transmission or electronic means.

(d) Nominating petitions may be in parts.

(e) Except as provided in Section 3.3(a), a resignation must be in writing and submitted to the Secretary and is irrevocable. It is effective on the date stated in the resignation, or the prospective date received if no date is specified in the resignation.

(f) Minority means African American, Asian, Hispanic, Native American or Pacific Islander.

(g) Territory or Territories means American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the United States Virgin Islands.

§6.2 Composition. (a) The House of Delegates, which is designed to be representative of the legal profession of the United States, is composed of the following members of the Association:

... 

(13) The delegates from each of the Territories.
§6.4(e) A state, territorial or local bar association or affiliated organization may not be represented in the House if its governing documents discriminate with respect to membership because of race, sex, religion, creed, color, national origin, ethnicity, age, sexual orientation or persons with disabilities.

§6.9 Delegates from the Territories. The delegates from each of the Territories shall be selected in a manner determined by the respective bar associations. The term is two Association years ending with the adjournment of the annual meeting in an even-numbered year. The bar associations shall certify to the House of Delegates the name and address of its delegate. If a vacancy occurs, the bar association shall select and certify a successor to serve for the unexpired term.

§6.10 Certification of Delegates. Each state, territorial and local bar association, section, or affiliated organization represented in the House of Delegates shall certify to the House the names and addresses of its delegates. However, any of those entities may certify to the Secretary the name and address of an alternate delegate to serve during the absence of any of its delegates at a meeting of the House. The alternate delegate’s service is: (a) limited to that meeting of the House for which certified; (b) not counted in determining length of service in the House; and (c) not considered a lapse in service for the elected delegate.

§42.2 Seating. A delegate shall be seated with the state or territory to which his or her Association membership is accredited. Nondelegates may not be seated in areas of the House of Delegates that are reserved for delegates. Separate space on the floor may be provided for the chairs of sections or committees.

§49.1 Appointment and Terms. The Chair of the House of Delegates shall appoint the chair and members of each Committee of the House, unless the House directs otherwise in the case of a particular Committee. Except as otherwise provided by the House, the term of a Committee chair or member is one Association year and until a successor is appointed. The Chair and the Secretary are members ex-officio.

(Legislative Draft – Deletions struck through; Additions underlined)

§2.2 General Provisions. For the purposes of this Constitution, the Bylaws, and any rules of the House of Delegates:
(a) The Commonwealth of Puerto Rico and the District of Columbia shall be treated as if they were states.
(b) Divisions shall be treated as if they were sections unless otherwise specified.
(c) Notice that is required to be given to members may be given by a special mailing or it may be given in any publication of the Association that is sent to every member. In either case notice is given upon deposit in the mail or when sent by facsimile transmission or electronic means.
(d) Nominating petitions may be in parts.
(e) Except as provided in Section 3.3(a), a resignation must be in writing and submitted to the Secretary and is irrevocable. It is effective on the date stated in the resignation, or the prospective date received if no date is specified in the resignation.

(f) Minority means African American, Asian, Hispanic, Native American or Pacific Islander.

(g) Territory or Territories means American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the United States Virgin Islands.

§6.2 Composition. (a) The House of Delegates, which is designed to be representative of the legal profession of the United States, is composed of the following members of the Association:

…

(13) The delegates from each of the Territories.

(14) The delegate from Guam and the Commonwealth of the Northern Mariana Islands.

§6.4 (e) A state, territorial or local bar association or affiliated organization may not be represented in the House if its governing documents discriminate with respect to membership because of race, sex, religion, creed, color, national origin, ethnicity, age, sexual orientation or persons with disabilities.

§6.9 Delegates from the United States Virgin Islands Territories. The delegates from each of the United States Virgin Islands Territories shall be selected in a manner determined by the Virgin Islands Bar Association respective bar associations. The term is two Association years ending with the adjournment of the annual meeting in an even-numbered year. The Virgin Islands Bar Association respective bar associations shall certify to the House of Delegates the name and address of its delegate. However, the Virgin Islands Bar Association may certify to the Secretary the name and address of an alternate delegate to serve during the absence of its delegate at a meeting of the House. The alternate delegate’s service is: (a) limited to that meeting of the House for which certified; (b) not counted in determining length of service in the House; and (c) not considered a lapse in service for the elected delegate. If a vacancy occurs, the Virgin Islands Bar Association respective bar association shall select and certify a successor to serve for the unexpired term.

§6.10 Delegate from Guam and the Commonwealth of the Northern Mariana Islands. The delegate’s term shall be shared equally between the two bar associations, alternating annually, as determined by the associations. The delegate shall be selected in a manner determined by the bar association of each jurisdiction. In the year of its representation in the House of Delegates, each bar association shall certify to the House the name and address of its delegate. However, in the year of its representation in the House of Delegates, that bar association may certify to the Secretary the name and address of an alternate delegate to serve during the absence of its delegate at a meeting of the House. The alternate delegate’s service is: (a) limited to that meeting of
the House for which certified; (b) not counted in determining length of service in the House; and (c) not considered a lapse in service for the elected delegate. If a vacancy occurs, the bar association affected shall select and certify a successor to serve for the unexpired term.

§6.11 Certification of Delegates. Each state bar association, territorial and local bar association, section, or affiliated organization represented in the House of Delegates shall certify to the House the names and addresses of its delegates. However, any of those entities may certify to the Secretary the name and address of an alternate delegate to serve during the absence of any of its delegates at a meeting of the House. The alternate delegate’s service is: (a) limited to that meeting of the House for which certified; (b) not counted in determining length of service in the House; and (c) not considered a lapse in service for the elected delegate.

§42.2 Seating. A delegate shall be seated with the state or territory to which his or her Association membership is accredited. Nondelegates may not be seated in areas of the House of Delegates that are reserved for delegates, except that (a) in each even numbered year the representative of the Northern Mariana Islands Bar Association may be seated without a voice or vote, next to the delegate from the Guam Bar Association; (b) in each odd numbered year the representative from the Guam Bar Association may be seated without voice or vote next to the delegate from the Northern Mariana Islands Bar Association. Separate space on the floor may be provided for the chairs of sections or committees.

§49.1 Appointment and Terms. The Chair of the House of Delegates shall appoint the chair and members of each Committee of the House, unless the House directs otherwise in the case of a particular Committee. Except as otherwise provided by the House, the term of a Committee chair or member is one Association year and until a successor is appointed. The Chair and the Secretary are members ex-officio. The representatives of the Northern Mariana Islands Bar Association and the Guam Bar Association may each serve as members of House Committees during their shared two-year term of office.

PROPOSAL: Amends §7.2 of the Constitution and §§21.7(b)(2) and 26.1(c) of the Bylaws to change the Law Student Division member-at-large from a non-voting member of the ABA Board of Governors to a voting member.

Amends §7.2 of the Constitution and §§21.7(b)(2) and 26.1 (c) of the Bylaws to read as follows:

§7.2 By Number and Composition. Except as hereinafter provided, the Board of Governors is composed of 38 members of the Association. The House of Delegates shall elect one member from each of the eighteen districts, six sections members-at-large, one judicial member-at-large, two young lawyer members-at-large, one law student member-at-large, and until the conclusion of the annual meeting in 2015, two women members-at-large and two minority members-at-large. The President, the Chair of the House of Delegates, the President-Elect, the immediate past President, the Secretary and the Treasurer shall serve as ex-officio members. In every third year, as provided in §8.2 (c), the board of Governors is composed of 40 members of the Association and shall include as additional ex-officio members the Secretary-Elect and the Treasurer-Elect.

§21.7 Law Student Members.

…

(b) A law student member:

1. may not participate in electing a State Delegate for a Delegate-at-Large.
2. may not participate in nominating a member of the Board or an officer of the Association, and may not serve as an officer of the Association;
3. may not vote in Association elections other than while serving as a delegate in the House;
4. may not sign a petition for or vote in an Association referendum; and
5. may participate in other activities of the Association as authorized by the House.

…
§26.1 Terms and Election.

... (c) In 1985 two section members-at-large shall be elected for a one-year term, two section members-at-large shall be elected for a two-year term, and two section members-at-large shall be elected for a three-year term. In 1985 and each succeeding third year, a young lawyer member-at-large and the judicial member-at-large shall be elected for a three-year term. In 1986 and each succeeding third year, two section members-at-large shall be elected. In 1987 and each succeeding third year, two section members-at-large and a young lawyer member-at-large shall be elected. In 1988 and each succeeding third year, two section members-at-large, a young lawyer member-at-large, and the judicial member-at-large shall be elected. In 2012 and in each succeeding year, a law student member-at-large shall be elected to serve a one-year term.

... 

(Legislative Draft – Additions underlined; deletions struck-through)

§7.2 By Number and Composition. Except as hereinafter provided, the Board of Governors is composed of 38 members of the Association. The House of Delegates shall elect one member from each of the eighteen districts, six sections members-at-large, one judicial member-at-large, two young lawyer members-at-large, one non-voting law student member-at-large, and until the conclusion of the annual meeting in 2015, two women members-at-large and two minority members-at-large. The President, the Chair of the House of Delegates, the President-Elect, the immediate past President, the Secretary and the Treasurer shall serve as ex-officio members. In every third year, as provided in 8.2 (c), the board of Governors is composed of 40 members of the Association and shall include as additional ex-officio members the Secretary-Elect and the Treasurer-Elect.

§21.7 Law Student Members.

... (b) A law student member:

1. may not participate in electing a State Delegate or a Delegate-at-Large.
2. may not participate in nominating a member of the Board or an officer of the Association, and may not serve as a voting member of the Board or an officer of the Association;
3. may not vote in Association elections other than while serving as a delegate in the House;
4. may not sign a petition for or vote in an Association referendum; and
5. may participate in other activities of the Association as authorized by the House.

...
26.1 Terms and Election.

(c) In 1985 two section members-at-large shall be elected for a one-year term, two section members-at-large shall be elected for a two-year term, and two section members-at-large shall be elected for a three-year term. In 1985 and each succeeding third year, a young lawyer member-at-large and the judicial member-at-large shall be elected for a three-year term. In 1986 and each succeeding third year, two section members-at-large shall be elected. In 1987 and each succeeding third year, two section members-at-large and a young lawyer member-at-large shall be elected. In 1988 and each succeeding third year, two section members-at-large, a young lawyer member-at-large, and the judicial member-at-large shall be elected. In 2005 and in each succeeding year, a law student member-at-large shall be elected to serve a non-voting one-year term.
SPONSORS: Lynne Barr (Principal Sponsor), Linda Rusch, Martin Lybecker, Dixie Johnson, Paul Chip Lion, Nathaniel Doliner, Renie Grohl, Marsha Simms, Mary Beth Clary, Elizabeth S. Stong, Maury Poscover, Salli Swartz

PROPOSAL: Amends §30.5 of the Bylaws to provide that non-U.S. lawyer associate members may serve as Officers of the Section of Business Law.

Amends §30.5 of the Bylaws to read as follows:

§30.5 Officers and Council. A section shall have a chair. It may also have a chair-elect and such other officers as its bylaws may provide. It shall also have a council consisting of the officers and such other members as its bylaws may provide. Notwithstanding any provisions of this section, non-members may serve on the Council of the Section of Legal Education and Admissions to the Bar as its bylaws may provide, non-U.S. lawyer associate members may serve on the Council and in the leadership of the Section of International Law and the Section of Business Law as their respective bylaws may provide, and non-U.S. lawyer associate members may serve on the Council of the Section of Law Practice Management as its bylaws may provide.

(Legislative Draft – Deletions Struck Through; Additions Underlined)

§30.5 Officers and Council. A section shall have a chair. It may also have a chair-elect and such other officers as its bylaws may provide. It shall also have a council consisting of the officers and such other members as its bylaws may provide. Notwithstanding any provisions of this section, non-members may serve on the Council of the Section of Legal Education and Admissions to the Bar as its bylaws may provide, non-U.S. lawyer associate members may serve on the Council and in the leadership of the Section of International Law and the Section of Business Law as their respective bylaws may provide, and non-U.S. lawyer associate members may serve on the Council of the Section of Law Practice Management as its bylaws may provide and non-U.S. lawyer associate members may serve on the Council of the Section of Business Law.
Amends §32.1 of the Bylaws to read as follows:

§32.1 Forum Committees. (a) The House of Delegates may, by a majority vote, create a forum committee to carry out, in a specified field, a responsibility that is principally to educate its members in that field, is within the purposes of the Association, and is not otherwise served within the Association. The forum committee shall also investigate and study the matters within its responsibilities.

(b) During each Association year, a forum committee shall hold one or more educational meetings, open to any member of the Association.

(c) A forum committee is unlimited in number and indefinite in duration. Any member of a section of the Association may be a member. Each forum committee shall adopt bylaws not inconsistent with the Constitution and Bylaws. The bylaws become effective when approved by the House.

(d) Each forum committee shall have a governing committee selected in accordance with that committee’s bylaws. Non-U.S. Lawyer Associates may serve on the Governing Committee of the Forum on the Construction Industry as its bylaws may provide.

(e) In carrying out its responsibilities under this section, a forum committee shall coordinate its activities with those of each section or other committee of the Association that is concerned with a matter that is also within the committee’s responsibilities.

(f) To cover its expenses, a forum committee may impose such dues as the Board of Governors approves.

(g) The House may discontinue or change the name of a forum committee. The House shall discontinue a forum committee if, for any Association year, its expenditures exceed the dues received and advance provision has not been made to cover the excess.

PROPOSAL: Amends §31.7 of the Bylaws to eliminate the Standing Committee on Environmental Law.

Amend §31.7 to delete the paragraph headed Environmental Law.

§31.7 Designation, Jurisdiction, and Special Tenures of Standing Committee.

The designation, jurisdiction, and special tenures of standing committees are as follows:

Environmental Law. The Standing Committee on Environmental Law, which consists of not more than 11 members, shall facilitate liaison among the several committees, sections and agencies of the Association concerned with environmental matters, and shall undertake special projects in the field of environmental law.
RESOLUTION

RESOLVED, That the American Bar Association grant approval to DeKalb Technical College, Paralegal Studies Program, Covington and Clarkston, GA; Methodist University, Legal Studies Program, Fayetteville, NC; National College Dayton Area, Paralegal Studies Program, Dayton, OH; and National College Roanoke Valley, Paralegal Studies Program, Salem, VA.

FURTHER RESOLVED, That the American Bar Association reapprove the following paralegal education programs: Faulkner University, Legal Studies Program, Montgomery, AL; MTI College, Paralegal Studies Program, Sacramento, CA; San Francisco State University, Paralegal Studies Program, San Francisco, CA; Florida State College at Jacksonville, Paralegal Studies Program, Jacksonville, FL; Morehead State University, Paralegal Studies Program, Morehead, KY; Mississippi University for Women, Legal Studies Program, Columbus, MS; Central Piedmont Community College, Paralegal Technology Program, Cato and Central locations, Charlotte, NC; Fayetteville Technical Community College, Paralegal Technology Program, Fayetteville, NC; Montclair State University, Paralegal Studies Program, Montclair, NJ; Finger Lakes Community College, Paralegal Studies Program, Canandaigua and Victor, NY; Monroe Community College, Paralegal Studies Program, Rochester, NY; Rockland Community College, State University of New York, Paralegal Studies Department, Suffern, NY; College of Mount St. Joseph, Paralegal Studies Program, Cincinnati, OH; Columbus State Community College, Paralegal Studies Program, Columbus, OH; Northampton Community College, Paralegal Program, Bethlehem, PA; and University of Tennessee at Chattanooga, Legal Assistant Studies Program, Chattanooga, TN.

FURTHER RESOLVED, That the American Bar Association withdraw the approval of Lincoln College of New England f/k/a Briarwood College, Legal Assistant/Paralegal Program, Southton, CT, and Lake Superior State University, Legal Assistant Studies Program, Sault Ste. Marie, MI at the request of the institutions, and of Minnesota Paralegal Institute, Paralegal Program, Minnetonka, MN because the institution has ceased operations, as of the adjournment of the 2011 Annual Meeting of the House of Delegates.

FURTHER RESOLVED, That the American Bar Association extend the terms of approval until the February 2012 Midyear Meeting of the House of Delegates for the following programs: South University, Paralegal/Legal Studies Program, Montgomery, AL; Cuyamaca College, Paralegal Studies Program, El Cajon, CA; Georgetown
University, Paralegal Studies Program, Washington, DC and Arlington, VA; St. Petersburg College, Paralegal Studies Program, St. Petersburg, Clearwater, Downtown, and Health Education locations, Clearwater, FL; South University, Paralegal/Legal Studies Program, Savannah, GA; Maryville University, Legal Studies Program, St. Louis, MO; Bucks County Community College, Paralegal Studies Program, Newtown, PA; South University, Paralegal/Legal Studies Program, Columbia, SC; and Lee College, Legal Assistant Program, Baytown, TX.
EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

The Standing Committee on Paralegals recommends that the House of Delegates grants approval to four paralegal education program, grants reapproval to sixteen programs, withdraws the approval of three programs, and extends the term of approval of nine programs.

2. Summary of the Issue which the Resolution(s) Address

The programs recommended for approval and reapproval in the enclosed report meet the Guidelines for the Approval of Paralegal Education Programs.

3. An Explanation of How the Proposed Policy Position Will Address the Issue

The programs recommended for approval and reapproval in this report have followed the procedures required by the Association and are in compliance with the Guidelines for the Approval of Paralegal Education Programs.

4. A Summary of any Minority Views or Opposition which have been Identified

No other positions on this recommendation have been taken by other Association entities, affiliated organizations or other interested groups.
RESOLVED, That the American Bar Association adopts the Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, dated August, 2011.
ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings ¹
(August 2011)

SECTION 1. DEFINITIONS. In this [act]:

(a) “Abuse and neglect proceeding” means a court proceeding under [cite state statute] for protection of a child from abuse or neglect or a court proceeding under [cite state statute] in which termination of parental rights is at issue.² These proceedings include:

(1) abuse;
(2) neglect;
(3) dependency;
(4) child in voluntary placement in state care;
(5) termination of parental rights;
(6) permanency hearings; and
(7) post termination of parental rights through adoption or other permanency proceeding.

(b) A child is:

(1) an individual under the age of 18; or
(2) an individual under the age of 22 who remains under the jurisdiction of the juvenile court.

(c) “Child’s lawyer” (or “lawyer for children”) means a lawyer who provides legal services for a child and who owes the same duties, including undivided loyalty, confidentiality and competent representation, to the child as is due an adult client, subject to Section 7 of this Act.³

(d) “Best interest advocate” means an individual, not functioning or intended to function as the child’s lawyer, appointed by the court to assist the court in determining the best interests of the child.

¹ This Model Act was drafted under the auspices of the ABA Section of Litigation Children’s Rights Litigation Committee with the assistance of the Bar-Youth Empowerment Program of the ABA Center on Children and the Law and First Star. The Act incorporates some language from the provisions of the NCCUSL Representation of Children in Abuse, Neglect, and Custody Proceedings Act.
² NCCUSL, 2006 Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings, Sec. 2(2) [Hereinafter NCCUSL Act]
³ Id., Sec. 2(6); American Bar Association, Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases, Part I, Sec A-1, 29 Fam. L. Q. 375 (1995). The standards were formally adopted by the ABA House of Delegates in 1996. [Hereinafter ABA Standards].
“Developmental level” is a measure of the ability to communicate and understand others, taking into account such factors as age, mental capacity, level of education, cultural background, and degree of language acquisition.4

Legislative Note: States should implement a mechanism to bring children into court when they have been voluntarily placed into state care, if such procedures do not already exist. Court action should be triggered after a specific number of days in voluntary care (not fewer than 30 days, but not more than 90 days).

Commentary:

Under the Act, a “child’s lawyer” is a client-directed lawyer in a traditional attorney-client relationship with the child. A “best interests advocate” does not function as the child’s lawyer and is not bound by the child’s expressed wishes in determining what to advocate, although the best interests advocate should consider those wishes.

The best interest advocate may be a lawyer or a lay person, such as a court-appointed special advocate, or CASA. The best interests advocate assists the court in determining the best interests of a child and will therefore perform many of the functions formerly attributable to guardians ad litem, but best interests advocates are not to function as the child’s lawyer. A lawyer appointed as a best interest advocate shall function as otherwise set forth in state law.

SECTION 2. APPLICABILITY AND RELATIONSHIP TO OTHER LAW.

(a) This [act] applies to an abuse and neglect proceeding pending or commenced on or after [the effective date of this act].

(b) The child in these proceedings is a party.

SECTION 3. APPOINTMENT IN ABUSE OR NEGLECT PROCEEDING.

(a) The court shall appoint a child’s lawyer for each child who is the subject of a petition in an abuse and neglect proceeding. The appointment of a child’s lawyer must be made as soon as practicable to ensure effective representation of the child and, in any event, before the first court hearing.

(b) In addition to the appointment of a child’s lawyer, the court may appoint a best interest advocate to assist the court in determining the child’s best interests.

(c) The court may appoint one child’s lawyer to represent siblings if there is no conflict of interest as defined under the applicable rules of professional conduct. The court may appoint additional counsel to represent individual siblings at a child’s lawyer’s request due to a conflict of interest between or among the siblings.

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4 ABA Standards, Part I, Sec A-3.
5 NCCUSL Act, Sec. 4(c); see also ABA Standards, Part I, Sec B-1
(d) The applicable rules of professional conduct and any law governing the obligations of lawyers to their clients shall apply to such appointed lawyers for children.

(e) The appointed child’s lawyer shall represent the child at all stages of the proceedings, unless otherwise discharged by order of court.\(^6\)

(f) A child’s right to counsel may not be waived at any court proceeding.

Commentary:

This act recognizes the right of every child to have quality legal representation and a voice in any abuse, neglect, dependency, or termination of parental rights proceeding, regardless of developmental level. Nothing in this Act precludes a child from retaining a lawyer. States should provide a lawyer to a child who has been placed into state custody through a voluntary placement arrangement. The fact that the child is in the state’s custody through the parent’s voluntary decision should not diminish the child’s entitlement to a lawyer.

A best interest advocate does not replace the appointment of a lawyer for the child. A best interest advocate serves to provide guidance to the court with respect to the child’s best interest and does not establish a lawyer-client relationship with the child. Nothing in this Act restricts a court’s ability to appoint a best interest advocate in any proceeding. Because this Act deals specifically with lawyers for children, it will not further address the role of the best interest advocate.

The child is entitled to conflict-free representation and the applicable rules of professional conduct must be applied in the same manner as they would be applied for lawyers for adults. A lawyer representing siblings should maintain the same lawyer-client relationship with respect to each child.

SECTION 4. QUALIFICATIONS OF THE CHILD’S LAWYER.

(a) The court shall appoint as the child’s lawyer an individual who is qualified through training and experience, according to standards established by [insert reference to source of standards].

(b) Lawyers for children shall receive initial training and annual continuing legal education that is specific to child welfare law. Lawyers for children shall be familiar with all relevant federal, state, and local applicable laws.

(c) Lawyers for children shall not be appointed to new cases when their present caseload exceeds more than a reasonable number given the jurisdiction, the percent of the lawyer’s practice spent on abuse and neglect cases, the complexity of the case, and other relevant factors.

Legislative Note: States that adopt training standards and standards of practice for

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children’s lawyers should include the bracketed portion of this section and insert a reference to the state laws, court rules, or administrative guidelines containing those standards. Jurisdictions are urged to specify a case limit at the time of passage of this Act.

Commentary:

States should establish minimum training requirements for lawyers who represent children. Such training should focus on applicable law, skills needed to develop a meaningful lawyer-client relationship with child-clients, techniques to assess capacity in children, as well as the many interdisciplinary issues that arise in child welfare cases.

The lawyer needs to spend enough time on each abuse and neglect case to establish a lawyer-client relationship and zealously advocate for the client. A lawyer’s caseload must allow realistic performance of functions assigned to the lawyer under the [Act]. The amount of time and the number of children a lawyer can represent effectively will differ based on a number of factors, including type of case, the demands of the jurisdiction, whether the lawyer is affiliated with a children’s law office, whether the lawyer is assisted by investigators or other child welfare professionals, and the percent of the lawyer’s practice spent on abuse and neglect cases. States are encouraged to conduct caseload analyses to determine guidelines for lawyers representing children in abuse and neglect cases.

SECTION 5. ORDER OF APPOINTMENT.

(a) Subject to subsection (b), an order of appointment of a child’s lawyer shall be in writing and on the record, identify the lawyer who will act in that capacity, and clearly set forth the terms of the appointment, including the reasons for the appointment, rights of access as provided under Section 8, and applicable terms of compensation as provided under Section 12.

(b) In an order of appointment issued under subsection (a), the court may identify a private organization, law school clinical program or governmental program through which a child’s lawyer will be provided. The organization or program shall designate the lawyer who will act in that capacity and notify the parties and the court of the name of the assigned lawyer as soon as practicable. Additionally, the organization or program shall notify the parties and the court of any changes in the individual assignment.

SECTION 6. DURATION OF APPOINTMENT.

Unless otherwise provided by a court order, an appointment of a child’s lawyer in an abuse and neglect proceeding continues in effect until the lawyer is discharged by court order or the case is dismissed. The appointment includes all stages thereof, from removal from the home or initial appointment through all available appellate proceedings. With the permission of the court, the lawyer may arrange for supplemental or separate counsel.

7 ABA Standards, Part II, Sec L-1-2.
8 NCCUSL Act, Sec. 9
9 Id., Sec. 10(a)
Commentary:
As long as the child remains in state custody, even if the state custody is long-term or permanent, the child should retain the right to counsel so that the child’s lawyer can deal with the issues that may arise while the child is in custody but the case is not before the court.

SECTION 7. DUTIES OF CHILD’S LAWYER AND SCOPE OF REPRESENTATION.
(a) A child's lawyer shall participate in any proceeding concerning the child with the same rights and obligations as any other lawyer for a party to the proceeding.
(b) The duties of a child’s lawyer include, but are not limited to:
(1) taking all steps reasonably necessary to represent the client in the proceeding, including but not limited to: interviewing and counseling the client, preparing a case theory and strategy, preparing for and participating in negotiations and hearings, drafting and submitting motions, memoranda and orders, and such other steps as established by the applicable standards of practice for lawyers acting on behalf of children in this jurisdiction;
(2) reviewing and accepting or declining, after consultation with the client, any proposed stipulation for an order affecting the child and explaining to the court the basis for any opposition;
(3) taking action the lawyer considers appropriate to expedite the proceeding and the resolution of contested issues;
(4) where appropriate, after consultation with the client, discussing the possibility of settlement or the use of alternative forms of dispute resolution and participating in such processes to the extent permitted under the law of this state;¹¹
(5) meeting with the child prior to each hearing and for at least one in-person meeting every quarter;
(6) where appropriate and consistent with both confidentiality and the child's legal interests, consulting with the best interests advocate;
(7) prior to every hearing, investigating and taking necessary legal action regarding the child’s medical, mental health, social, education, and overall well-being;
(8) visiting the home, residence, or any prospective residence of the child, including each time the placement is changed;
(9) seeking court orders or taking any other necessary steps in accordance with the child’s direction to ensure that the child’s health, mental health, educational, developmental, cultural and placement needs are met; and

¹¹ NCCUSL Act, Sec. 11 Alternative A..
(10) representing the child in all proceedings affecting the issues before the court, including hearings on appeal or referring the child’s case to the appropriate appellate counsel as provided for by/mandated by [inset local rule/law etc].

Commentary:

The national standards mentioned in (b)(1) include the *ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases.*

In order to comply with the duties outlined in this section, lawyers must have caseloads that allow realistic performance of these functions.

The child’s lawyer may request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. Such ancillary matters include special education, school discipline hearings, mental health treatment, delinquency or criminal issues, status offender matters, guardianship, adoption, paternity, probate, immigration matters, medical care coverage, SSI eligibility, youth transitioning out of care issues, postsecondary education opportunity qualification, and tort actions for injury, as appropriate. The lawyer should make every effort to ensure that the child is represented by legal counsel in all ancillary legal proceedings, either personally, when the lawyer is competent to do so, or through referral or collaboration. Having one lawyer represent the child across multiple proceedings is valuable because the lawyer is better able to understand and fully appreciate the various issues as they arise and how those issues may affect other proceedings.

(c) When the child is capable of directing the representation by expressing his or her objectives, the child’s lawyer shall maintain a normal client-lawyer relationship with the child in accordance with the rules of professional conduct. In a developmentally appropriate manner, the lawyer shall elicit the child's wishes and advise the child as to options.

Commentary:

The lawyer-client relationship for the child’s lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client’s decision about

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12 ABA Standards, Part I, Section D-12.
13 *Id.*
14 ABA Model Rules of Professional Responsibility (hereinafter M.R.) 1.2
15 M.R. 1.6
16 M.R. 1.3
17 M.R. 1.1
18 M.R. 1.7
19 M.R. 1.4
20 M.R. 2.1
the objectives of the representation. In order for the child to have an independent voice in abuse
and neglect proceedings, the lawyer shall advocate for the child’s counseled and expressed
wishes. Moreover, providing the child with an independent and client-directed lawyer ensures
that the child’s legal rights and interests are adequately protected.

The child’s lawyer needs to explain his or her role to the client and, if applicable, explain in what
strictly limited circumstances the lawyer cannot advocate for the client’s expressed wishes and in
what circumstances the lawyer may be required to reveal confidential information. This
explanation should occur during the first meeting so the client understands the terms of the
relationship.

In addition to explaining the role of the child’s lawyer, the lawyer should explain the legal
process to the child in a developmentally appropriate manner as required by Rule 1.4 of the ABA
Model Rules of Professional Conduct or its equivalent. This explanation can and will change
based on age, cognitive ability, and emotional maturity of the child. The lawyer needs to take the
time to explain thoroughly and in a way that allows and encourages the child to ask questions
and that ensures the child’s understanding. The lawyer should also facilitate the child’s
participation in the proceeding (See Section 9).

In order to determine the objectives of the representation of the child, the child’s lawyer should
develop a relationship with the client. The lawyer should achieve a thorough knowledge of the
child’s circumstances and needs. The lawyer should visit the child in the child’s home, school,
or other appropriate place where the child is comfortable. The lawyer should observe the child’s
interactions with parents, foster parents, and other caregivers. The lawyer should maintain
regular and ongoing contact with the child throughout the case.

The child’s lawyer helps to make the child’s wishes and voice heard but is not merely the child’s
mouthpiece. As with any lawyer, a child’s lawyer is both an advocate and a counselor for the
client. Without unduly influencing the child, the lawyer should advise the child by providing
options and information to assist the child in making decisions. The lawyer should explain the
practical effects of taking various positions, the likelihood that a court will accept particular
arguments, and the impact of such decisions on the child, other family members, and future legal
proceedings. The lawyer should investigate the relevant facts, interview persons with
significant knowledge of the child’s history, review relevant records, and work with others in the
case.

(d) The child’s lawyer shall determine whether the child has diminished capacity
pursuant to the Model Rules of Professional Conduct. {STATES MAY CONSIDER
INSERTING THE FOLLOWING TWO SENTENCES:} [Under this subsection a child
shall be presumed to be capable of directing representation at the age of ___. The
presumption of diminished capacity is rebutted if, in the sole discretion of the lawyer, the

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21 ABA Standards, commentary A-1
22 M.R. 1.4
23 M.R. 2.1
child is deemed capable of directing representation.] In making the determination, the
lawyer should consult the child and may consult other individuals or entities that can
provide the child’s lawyer with the information and assistance necessary to determine the
child’s ability to direct the representation.

When a child client has diminished capacity, the child’s lawyer shall make a good
faith effort to determine the child’s needs and wishes. The lawyer shall, as far as
reasonably possible, maintain a normal client-lawyer relationship with the client and fulfill
the duties as outlined in Section 7(b) of this Act. During a temporary period or on a
particular issue where a normal client-lawyer relationship is not reasonably possible to
maintain, the child’s lawyer shall make a substituted judgment determination. A
substituted judgment determination includes determining what the child would decide if he
or she were capable of making an adequately considered decision, and representing the
child in accordance with that determination. The lawyer should take direction from the
child as the child develops the capacity to direct the lawyer. The lawyer shall advise the
court of the determination of capacity and any subsequent change in that determination.

Commentary:

A determination of incapacity may be incremental and issue-specific, thus enabling the child’s
lawyer to continue to function as a client-directed lawyer as to major questions in the
proceeding. Determination of diminished capacity requires ongoing re-assessment. A child may
be able to direct the lawyer with respect to a particular issue at one time but not another.
Similarly, a child may be able to determine some positions in the case, but not others. For
guidance in assessing diminished capacity, see the commentary to Section (e). The lawyer shall
advise the court of the determination of capacity and any subsequent change in that
determination.

In making a substituted judgment determination, the child’s lawyer may wish to seek guidance
from appropriate professionals and others with knowledge of the child, including the advice of
an expert. A substituted judgment determination is not the same as determining the child’s best
interests; determination of a child’s best interests remains solely the province of the court.
Rather, it involves determining what the child would decide if he or she were able to make an
adequately considered decision.24 A lawyer should determine the child’s position based on
objective facts and information, not personal beliefs. To assess the needs and interests of this
child, the lawyer should observe the child in his or her environment, and consult with experts.25

In formulating a substituted judgment position, the child’s lawyer’s advocacy should be child-
centered, research-informed, permanency-driven, and holistic.26 The child’s needs and interests,
not the adults’ or professionals’ interests, must be the center of all advocacy. For example,

24 Massachusetts Committee For Public Counsel Services, Performance Standards Governing The Representation
Of Children And Parents in Child Welfare Cases, Chapter Four: Performance Standards and Complaint Procedures
4-1, Section 1.6(c) (2004).
25 Candice L. Maze, JD, Advocating for Very Young Children in Dependency Proceedings: The Hallmarks of
Effective, Ethical Representation, ABA Center on Children and the Law, October, 2010.
26 Id.
lawyers representing very young children must truly see the world through the child’s eyes and formulate their approach from that perspective, gathering information and gaining insight into the child’s experiences to inform advocacy related to placement, services, treatment and permanency.27 The child’s lawyer should be proactive and seek out opportunities to observe and interact with the very young child client. It is also essential that lawyers for very young children have a firm working knowledge of child development and special entitlements for children under age five.28

When determining a substituted judgment position, the lawyer shall take into consideration the child’s legal interests based on objective criteria as set forth in the laws applicable to the proceeding, the goal of expeditious resolution of the case and the use of the least restrictive or detrimental alternatives available. The child’s lawyer should seek to speed the legal process, while also maintaining the child’s critical relationships.

The child’s lawyer should not confuse inability to express a preference with unwillingness to express a preference. If an otherwise competent child chooses not to express a preference on a particular matter, the child’s lawyer should determine if the child wishes the lawyer to take no position in the proceeding, or if the child wishes the lawyer or someone else to make the decision for him or her. In either case, the lawyer is bound to follow the client’s direction. A child may be able to direct the lawyer with respect to a particular issue at one time but not at another. A child may be able to determine some positions in the case but not others.

(e) When the child’s lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a best interest advocate or investigator to make an independent recommendation to the court with respect to the best interests of the child.

When taking protective action, the lawyer is impliedly authorized under Model Rule 1.6(a) to reveal information about the child, but only to the extent reasonably necessary to protect the child’s interests.29 Information relating to the representation of a child with diminished capacity is protected by Rule 1.6 and Rule 1.14 of the ABA Model Rules of Professional Conduct. [OR ENTER STATE RULE CITATION]

Commentary:

Consistent with Rule 1.14, ABA Model Rules of Professional Conduct (2004), the child’s lawyer should determine whether the child has sufficient maturity to understand and form an attorney-
client relationship and whether the child is capable of making reasoned judgments and engaging
in meaningful communication. It is the responsibility of the child’s lawyer to determine
whether the child suffers from diminished capacity. This decision shall be made after sufficient
contact and regular communication with the client. Determination about capacity should be
grounded in insights from child development science and should focus on the child’s decision-
making process rather than the child’s choices themselves. Lawyers should be careful not to
conclude that the child suffers diminished capacity from a client’s insistence upon a course of
action that the lawyer considers unwise or at variance with lawyer’s view.30

When determining the child’s capacity the lawyer should elicit the child’s expressed wishes in a
developmentally appropriate manner. The lawyer should not expect the child to convey
information in the same way as an adult client. A child’s age is not determinative of diminished
capacity. For example, even very young children are regarded as having opinions that are
entitled to weight in legal proceedings concerning their custody.31

Criteria for determining diminished capacity include the child’s developmental stage, cognitive
ability, emotional and mental development, ability to communicate, ability to understand
consequences, consistency of the child’s decisions, strength of wishes and the opinions of others,
including social workers, therapists, teachers, family members or a hired expert.32 To assist in
the assessment, the lawyer should ask questions in developmentally appropriate language to
determine whether the child understands the nature and purpose of the proceeding and the risks
and benefits of a desired position.33 A child may have the ability to make certain decisions, but
not others. A child with diminished capacity often has the ability to understand, deliberate upon,
and reach conclusions about matters affecting the child’s own well-being such as sibling visits,
kinship visits and school choice and should continue to direct counsel in those areas in which he
or she does have capacity. The lawyer should continue to assess the child’s capacity as it may
change over time.

When the lawyer determines that the child has diminished capacity, the child is at risk of
substantial harm, the child cannot adequately act in his or her own interest, and the use of the
lawyer’s counseling role is unsuccessful, the lawyer may take protective action. Substantial harm
includes physical, sexual and psychological harm. Protective action includes consultation with
family members, or professionals who work with the child. Lawyers may also utilize a period of
reconsideration to allow for an improvement or clarification of circumstances or to allow for an
improvement in the child’s capacity.34 This rule reminds lawyers that, among other things, they
should ultimately be guided by the wishes and values of the child to the extent they can be
determined.35

“Information relating to the representation is protected by Model Rule 1.6. Therefore, unless

31 M.R. 1.14 cmt. 1
32 M.R. 1.14, cmt. 1
33 Anne Graffam Walker, Ph.D.  *Handbook on Questioning Children: A Linguistic Perspective* 2nd Edition ABA Center on Children and the Law Copyright 1999 by ABA.
34 M.R. 1.14 cmt. 5
35 M.R. 1.14 cmt. 5
authorized to do so, the lawyer may not disclose such information. When taking protective
action pursuant to this section, the lawyer is impliedly authorized to make necessary disclosures,
even when the client directs the lawyer to the contrary.”36 However the lawyer should make
every effort to avoid disclosures if at all possible. Where disclosures are unavoidable, the lawyer
must limit the disclosures as much as possible. Prior to any consultation, the lawyer should
consider the impact on the client’s position, and whether the individual is a party who might use
the information to further his or her own interests. “At the very least, the lawyer should
determine whether it is likely that the person or entity consulted with will act adversely to the
client’s interests before discussing matters related to the client.”37 If any disclosure by the
lawyer will have a negative impact on the client’s case or the lawyer-client relationship, the
lawyer must consider whether representation can continue and whether the lawyer-client
relationship can be re-established. “The lawyer’s position in such cases is an unavoidably
difficult one.”38

A request made for the appointment of a best interest advocate to make an independent
recommendation to the court with respect to the best interests of the child should be reserved for
extreme cases, i.e. where the child is at risk of substantial physical harm, cannot act in his or her
own interest and all protective action remedies have been exhausted. Requesting the judge to
appoint a best interest advocate may undermine the relationship the lawyer has established with
the child. It also potentially compromises confidential information the child may have revealed
to the lawyer. The lawyer cannot ever become the best interest advocate, in part due to
confidential information that the lawyer receives in the course of representation. Nothing in this
section restricts a court from independently appointing a best interest advocate when it deems the
appointment appropriate.

SECTION 8. ACCESS TO CHILD AND INFORMATION RELATING TO THE
CHILD.

(a) Subject to subsections (b) and (c), when the court appoints the child’s lawyer, it
shall issue an order, with notice to all parties, authorizing the child’s lawyer to have access to:

(1) the child; and

(2) confidential information regarding the child, including the child's
educational, medical, and mental health records, social services agency files, court records
including court files involving allegations of abuse or neglect of the child, any delinquency
records involving the child, and other information relevant to the issues in the proceeding,
and reports that form the basis of any recommendation made to the court.

(b) A child’s record that is privileged or confidential under law other than this [act]
may be released to a child’s lawyer appointed under this [act] only in accordance with that
law, including any requirements in that law for notice and opportunity to object to release of
records. Nothing in this act shall diminish or otherwise change the attorney-client

36 M.R. 1.14, cmt. 8
37 M.R. 1.14, cmt. 8
38 M.R. 1.14, cmt 8
privilege of the child, nor shall the child have any lesser rights than any other party in regard to this or any other evidentiary privilege. Information that is privileged under the lawyer-client relationship may not be disclosed except as otherwise permitted by law of this state other than this [act].

(c) An order issued pursuant to subsection (a) shall require that a child’s lawyer maintain the confidentiality of information released pursuant to Model Rule 1.6. The court may impose any other condition or limitation on an order of access which is required by law, rules of professional conduct, the child’s needs, or the circumstances of the proceeding.

(d) The custodian of any record regarding the child shall provide access to the record to an individual authorized access by order issued pursuant to subsection (a).

(e) Subject to subsection (b), an order issued pursuant to subsection (a) takes effect upon issuance. 39

SECTION 9. PARTICIPATION IN PROCEEDINGS.

(a) Each child who is the subject of an abuse and neglect proceeding has the right to attend and fully participate in all hearings related to his or her case.

(b) Each child shall receive notice from the child welfare agency worker and the child’s lawyer of his or her right to attend the court hearings.

(c) If the child is not present at the hearing, the court shall determine whether the child was properly notified of his or her right to attend the hearing, whether the child wished to attend the hearing, whether the child had the means (transportation) to attend, and the reasons for the non-appearance.

(d) If the child wished to attend and was not transported to court the matter shall be continued.

(e) The child’s presence shall only be excused after the lawyer for the child has consulted with the child and, with informed consent, the child has waived his or her right to attend.

(f) A child’s lawyer appointed under this [act] is entitled to:

(1) receive a copy of each pleading or other record filed with the court in the proceeding;

(2) receive notice of and attend each hearing in the proceeding [and participate and receive copies of all records in any appeal that may be filed in the proceeding];

(3) receive notice of and participate in any case staffing or case management conference regarding the child in an abuse and neglect proceeding; and

(4) receive notice of any intent to change the child’s placement. In the case of

39 NCCUSL Act, Sec. 15
an emergency change, the lawyer shall receive notice as soon as possible but no later than 48 hours following the change of placement.

(g) A child’s lawyer appointed under this [act] may not engage in ex parte contact with the court except as authorized by the applicable rules of professional conduct, court order, or other law.

(h) Subject to court approval, a party may call any best interest advocate as a witness for the purpose of cross-examination regarding the advocate’s report, even if the advocate is not listed as a witness by a party.

[i] In a jury trial, disclosure to the jury of the contents of a best interest advocate’s report is subject to this state’s rules of evidence.\(^{40}\)

Commentary:

Courts need to provide the child with notification of each hearing. The Court should enforce the child’s right to attend and fully participate in all hearings related to his or her abuse and neglect proceeding.\(^{41}\) Having the child in court emphasizes for the judge and all parties that this hearing is about the child. Factors to consider regarding the child’s presence at court and participation in the proceedings include: whether the child wants to attend, the child’s age, the child’s developmental ability, the child’s emotional maturity, the purpose of the hearing and whether the child would be severely traumatized by such attendance.

Lawyers should consider the following options in determining how to provide the most meaningful experience for the child to participate: allowing the child to be present throughout the entire hearing, presenting the child’s testimony in chambers adhering to all applicable rules of evidence, arranging for the child to visit the courtroom in advance, video or teleconferencing the child into the hearing, allowing the child to be present only when the child’s input is required, excluding the child during harmful testimony, and presenting the child’s statements in court adhering to all applicable rules of evidence.

Courts should reasonably accommodate the child to ensure the hearing is a meaningful experience for the child. The court should consider: scheduling hearing dates and times when the child is available and least likely to disrupt the child’s routine, setting specific hearing times to prevent the child from having to wait, making courtroom waiting areas child friendly, and ensuring the child will be transported to and from each hearing.

The lawyer for the child plays an important role in the child’s court participation. The lawyer shall ensure that the child is properly prepared for the hearing. The lawyer should meet the child in advance to let the child know what to expect at the hearing, who will be present, what their roles are, what will be discussed, and what decisions will be made. If the child would like to address the court, the lawyer should counsel with the child on what to say and how to say it. After the hearing, the lawyer should explain the judge’s ruling and allow the child to ask

\(^{40}\) NCCUSL Act, Sec. 16
\(^{41}\) American Bar Association Youth Transitioning from Foster Care August 2007; American Bar Association Foster Care Reform Act August 2005
questions about the proceeding.

Because of the wide range of roles assumed by best interest advocates in different jurisdictions, the question of whether a best interest advocate may be called as a witness should be left to the discretion of the court.

SECTION 10. LAWYER WORK PRODUCT AND TESTIMONY.

(a) Except as authorized by [insert reference to this state’s rules of professional conduct] or court rule, a child’s lawyer may not:

(1) be compelled to produce work product developed during the appointment;
(2) be required to disclose the source of information obtained as a result of the appointment;
(3) introduce into evidence any report or analysis prepared by the child’s lawyer; or
(4) provide any testimony that is subject to the attorney-client privilege or any other testimony unless ordered by the court.

Commentary:

Nothing in this act shall diminish or otherwise change the lawyer-work product or attorney-client privilege protection for the child, nor shall the child have any lesser rights than any other party with respect to these protections.

If a state requires lawyers to report abuse or neglect under a mandated reporting statute, the state should list that statute under this section.

SECTION 11. CHILD’S RIGHT OF ACTION.

(a) The child’s lawyer may be liable for malpractice to the same extent as a lawyer for any other client.

(b) Only the child has a right of action for money damages against the child’s lawyer for inaction or action taken in the capacity of child’s lawyer.

SECTION 12. FEES AND EXPENSES IN ABUSE OR NEGLECT PROCEEDINGS.

(a) In an abuse or neglect proceeding, a child’s lawyer appointed pursuant to this [act] is entitled to reasonable and timely fees and expenses in an amount set by [court or state agency to be paid from (authorized public funds)].

(b) To receive payment under this section, the payee shall complete and submit a
written claim for payment, whether interim or final, justifying the fees and expenses
charged.

(c) If after a hearing the court determines that a party whose conduct gave rise to a
finding of abuse or neglect is able to defray all or part of the fees and expenses set pursuant
to subsection (a), the court shall enter a judgment in favor of [the state, state agency, or
political subdivision] against the party in an amount the court determines is reasonable.\textsuperscript{43}

SECTION 13. EFFECTIVE DATE. This [act] takes effect on __________.

\textsuperscript{43} NCCUSL Act, Sec. 19.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution calls upon the ABA to adopt the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, dated August, 2011.

2. Summary of the Issue which the Resolution Addresses

The Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings focuses on the representation of children in abuse and neglect cases to ensure that states have a model of ethical representation for children that is consistent with the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (adopted by the House of Delegates in 1996), ABA Policy, and the ABA Model Rules of Professional Conduct.

Many states now require that a lawyer be appointed to a child in an abuse and neglect proceeding. The level to which children are entitled to and involved with their legal representation in court varies not only from state to state, but from case to case, and all too often, from hearing to hearing. The proposed Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (hereinafter “ABA Model Act”) includes a mandate which requires that a lawyer be appointed for each child who is the subject of a petition in an abuse, neglect, dependency, termination of parental rights or post termination of parental rights proceeding and that, consistent with the ABA Model Rules, the child’s lawyer should form an attorney-client relationship which is fundamentally indistinguishable from the attorney-client relationship in any other situation. This attorney-client relationship would include the duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to advise.

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

These standards will seek to establish standards of required ethical conduct so that lawyers and judges will have a common understanding of what is expected from lawyers for children in abuse and neglect cases. The Model Act provides states with a legislative framework for providing lawyers for children and will ensure consistency within the state and from state to state.

4. Summary of Minority Views or Opposition

None of which we are aware.
RESOLUTION

RESOLVED, That the American Bar Association adopts the Standards of Conduct For Experts Retained By Lawyers, dated August 2011.

FURTHER RESOLVED, That the American Bar Association urges counsel to incorporate the Standards of Conduct For Experts Retained By Lawyers in attorney engagement agreements with experts.
ABA STANDARDS OF CONDUCT
FOR EXPERTS RETAINED BY LAWYERS
(AUGUST 2011)

INTRODUCTION

The ABA Section of Litigation Task Force on Expert Code of Ethics was appointed by Section of Litigation Chair Hilarie Bass to explore the creation of a code of ethics or standards of conduct for experts who are retained by lawyers on behalf of their clients. While many experts have ethical codes applicable to their chosen professions, there are no uniform standards that apply to the retention and employment of experts that separately address the issues presented when experts are retained by lawyers on behalf of their clients in connection with litigated or transactional matters. The lack of consistent standards has led to (a) inconsistent expectations of experts’ required conduct, (b) unnecessary surprises that have negatively impacted the lawyer-expert relationship, and (c) disqualification motions challenging the conduct of certain experts. At a minimum, such problems have distracted both lawyers and experts from focusing on the matters for which the experts were retained, have delayed proceedings and have added unnecessary expense.

The Standards of Conduct that follow are an effort to create uniform minimum standards of what lawyers should seek from experts who are retained by lawyers on behalf of their clients. It is hoped that the Standards will be promulgated to the legal profession for use in connection with retaining experts. Thereafter, lawyers will be able to refer to the Standards in retainer letters, thereby obtaining the agreement of experts to adhere to the Standards in the engagement for which they are being retained. By setting forth standards of conduct it is hoped that lawyers, experts and clients will have a common understanding of what is expected and as a result that future problems can be minimized or avoided.

These Standards of Conduct are not intended to impose a professional obligation on lawyers to use them and a failure to seek to incorporate them into retainer agreements is not intended to be deemed a professional lapse. Moreover, to the extent they are incorporated into retainer agreements, they then would govern only the relationship between the retaining lawyer and the expert, and, therefore, they are not intended to create any duties to the adverse party or its counsel. Accordingly, compliance with them or a failure to do so should not be the subject of discovery by the adverse party. The Standards are also not intended to create standards for disqualification, which are a matter for continuing development by the courts.

PREAMBLE

These Standards apply to lawyers’ retentions of experts in connection with services provided to assist the lawyer’s client, whether in connection with an engagement regarding a litigated matter, or otherwise. Experts are also subject to the applicable ethical codes of conduct of their professions or professional associations. These Standards supplement and are in addition to any such codes or standards and are not intended to create any lesser standards of conduct that otherwise govern the expert’s profession.
The purpose of these Standards is to set forth minimum ethical standards that should apply to every engagement by a lawyer of an expert on behalf of a client. They apply to all litigated matters, whether civil or criminal, whether the expert is proposed as a testifying expert or simply retained as a consulting expert, and apply to matters to be resolved in court, by arbitration, mediation or through any other recognized ADR procedure. They also are intended to apply to other matters in which lawyers retain experts on behalf of clients, including matters involving commercial transactions and internal investigations.

The range of expertise required in connection with legal matters is obviously quite broad and experts may have ethical requirements governing their chosen profession or field of expertise. These Standards are not intended to supplant any such ethical requirements or create any lesser standards of conduct. They are intended to create a set of minimum requirements that lawyers should seek to apply to the conduct of all experts retained by lawyers on behalf of their clients. In so doing, it is hoped that clients, retaining lawyers and experts, will have a clear and common understanding of the expert’s required conduct.

I. INTEGRITY/PROFESSIONALISM

An expert shall act with integrity and in a professional manner throughout an engagement.

Lawyers and their clients are entitled to expect all experts to act with integrity and in a professional manner in any engagement and maintain the highest standards of ethical conduct. This set of standards will not be able to address every possible area of concern in the lawyer-client-expert relationship, but certain minimum requirements seem not only essential but also obvious. An expert should not knowingly violate these Standards, knowingly assist or induce another to do so, or do so through the acts of another. An expert should not commit any act that reflects adversely on the expert’s honesty, trustworthiness or fitness to serve as an expert. An expert should not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. An expert should disclose to the retaining lawyer any facts or actions bearing upon the above conduct, including pending investigations, indictments or criminal charges, and any disciplinary action taken against the expert by any credentialing, licensing, accrediting, or other professional organization.

II. COMPETENCE

An expert shall not undertake an engagement unless the expert is competent to do so.
An expert should: (1) be competent to perform the entire scope of an engagement; (2) be capable of acquiring any additional necessary competencies to perform the engagement; or (3) decline, withdraw from, or circumscribe the engagement.

**Being Competent**

Prior to accepting an engagement the expert should determine whether he or she can perform the engagement competently. Competency requires:

1. The ability to properly identify the problems or issues to be addressed;
2. The specialized knowledge, training or experience to complete the entire scope of the engagement in a professional manner; and
3. Recognition of and compliance with the laws and regulations that apply to the expert and/or the engagement.

Competency may apply to factors such as the expert’s familiarity with a specific field of endeavor, specific laws, rules and regulations, an analytical method, or an industry, if such factors are necessary for an expert to develop credible and objective conclusions, opinions or observations. The expert is responsible for having the competency to address those factors or for following steps to supplement the expert’s current level of knowledge through additional reliable sources including the use of other experts.

**Acquiring Competency**

If an expert determines that he or she is not competent to complete an entire engagement, either at the outset, or during the course of the engagement, then the expert should:

1. Disclose to the retaining lawyer the area or areas in which he or she may lack knowledge, training or experience;
2. Take all steps necessary or appropriate to complete the engagement competently; and
3. Disclose to the retaining lawyer the steps the expert undertook to complete the engagement competently, including the identification of all sources relied on for completing the engagement.

Competency can be acquired in various ways including association with another expert or other person whom the retained expert reasonably believes has the necessary knowledge, education, training or experience. If the engagement cannot be completed competently, then the expert must decline the engagement or withdraw from the engagement.
III. CONFIDENTIALITY

The expert shall treat any information received or work product produced by the expert during an engagement as confidential, and shall not disclose any such information except as required by law, as retaining counsel shall determine and advise, or with the consent of the client.

Comment

This standard requires all information received and work product produced during an engagement to be treated as confidential except as required by law or with the consent of the client.

The common law has long recognized that client confidences shared with legal counsel must be protected from disclosure to third parties. Confidentiality “contributes to the trust that is the hallmark of the client-lawyer relationship.” Comments, ABA Model Rules of Professional Conduct, Rule 1.6 “Confidentiality of Information,” Comment 2.

Similarly, expert witnesses who are engaged on behalf of clients in legal matters must generally protect confidential information from disclosure to third parties. Disclosure of confidential information can serve as grounds for disqualification of an expert witness. See, e.g., Northbrook Digital LLC v. Vendio Services, Inc., 2009 WL 5908005, at *1 (D. Minn. Aug. 26, 2009); Koch Refining Co. v. Jennifer L. Boudreaux M/V, 85 F.3d 1178, 1182-83 (5th Cir. 1996). “Courts have inherent power to disqualify expert witnesses both to protect the integrity of the adversary process and to promote public confidence in the legal system,” BP Amoco Chemical Co. v. Flint Hills Res., Inc., 500 F. Supp.2d 957, 959 (N.D. Ill. 2007). Disqualification of experts, nonetheless, is viewed as a drastic measure not to be taken lightly. Id. at 960.

A two-part test is generally followed when a court determines whether an expert should be disqualified because he or she has improperly disclosed confidential information: (1) the retaining party and the expert must have had a relationship that permitted the retaining party to have a reasonable expectation that its communication with the expert would remain in confidence; and (2) confidential information must have been provided to the expert by the party seeking disqualification. Koch Refining, 85 F.3d at 1182-1183. See also Northbrook Digital LLC, 2009 WL 5908005, at *1. This test also is employed when an expert has a prior relationship with an opposing party. See Ascom Hasler Mailing Systems, Inc. v. United Stated Postal Service, 267 F.R.D. 9, 12 (D.D.C. 2010).

The determination of whether a party has a reasonable expectation of a confidential relationship with an expert depends on a wide range of factors, including “whether the expert met once or several times with the moving party; was formally retained or asked to prepare a particular opinion; or was asked to execute a confidentiality agreement.” Northbrook Digital LLC, 2009 WL 5908005, at *2. The conduct standard set forth above concerning confidentiality reinforces and is consistent with the rules generally applied by courts.
Lawyers should remind experts, preferably in writing, of their obligation to maintain the confidentiality of confidential information by incorporating these Standards in the retainer agreement. Experts should acknowledge their obligation to preserve confidentiality. And lawyers and/or clients should identify information as confidential at the time it is provided so there can be no confusion as to an expert’s obligations.

Because confidentiality is so important to a lawyer’s relationship with his or her client, as well as to the integrity of the judicial process as a whole, information regarding the engagement should only be disclosed to third parties when explicit consent is provided by the client or when disclosure is otherwise required by law. Requests for such information by third parties, either informal or by legal process, should be referred to retaining counsel or the client so that confidentiality may be protected. Certain engagements may never become public and the expert should not be placed in the position of making determinations regarding what documents or information should be deemed confidential. It is preferable that a client’s consent to the disclosure be provided in writing, although this is not required.

Certain matters are required by law to be disclosed in certain experts’ reports. Federal Rule of Civil Procedure 26 requires certain disclosures regarding expert testimony in the form of written expert reports, and in other circumstances, in lawyer disclosures. Written reports are to include the identity of the expert, all opinions the witness will express and the basis and reasons for them, the facts or data considered by the witness in forming them, exhibits that will be used to summarize or support them, the witness’s qualifications, including a list of all publications authored in the previous ten years, a list of cases in which the witness testified at trial or by deposition in the past four years, and a statement of expert compensation. Fed. R. Civ. P. 26(a)(2)(B). Many state courts have similar requirements. Certain other lawyer disclosures must be made with respect to testifying experts not required to provide written reports. Fed. R. Civ. P. 26(a)(2)(C). Examples of situations in which disclosure to a third party may be required by law include direct court orders requiring disclosure and ethical rules imposed on experts under the law, such as an engineer's obligation to notify authorities of conditions that may put human life in jeopardy. Other examples may exist as well. The expert should be advised that the expert should not be making the decision of what is required by law to be disclosed, but should refer all requests for information and defer all decisions on what to disclose to retaining counsel.

IV. CONFLICTS OF INTEREST AND DISCLOSURE

Unless the client provides informed consent, an expert shall not accept an engagement if the acceptance would create a conflict of interest, i.e., that the expert’s provision of services will be materially limited by the expert’s duties to other clients, the expert’s relationship to third parties, or the expert’s own interests. To facilitate a determination of whether a conflict of interest exists, the expert shall disclose to the client or retaining lawyer all present or potential conflicts of interest. Among the matters that shall be disclosed are the following:

1. Financial interests or personal or business relationships with lawyers, clients, or parties involved or reasonably likely to be involved in the matter.
2. Communications or contacts with any adverse party or lawyer.

3. Prior testimony, writings or positions of the expert in the last 10 years in other matters that bear on the subject matter of the engagement.

4. Determinations in the last 10 years in which a judge has opined adversely on the expert’s qualifications or credibility, or in which any portion of an expert’s opinion was excluded on substantive grounds going to the soundness of the opinion or its credibility.

The duty to disclose is a continuing obligation. Therefore, the expert should supplement all these disclosures as needed.

Comment

Although there are no studies available to document the frequency of conflict of interest problems arising with respect to expert witnesses, the concern is raised by anecdotal evidence, as well as numerous court decisions treating expert disqualification issues in particular cases.

The recommended Standards are not intended to prescribe criteria to determine whether and when experts should be disqualified, a subject that the evolving case law will continue to address. Nor are the proposed Standards intended to supplant standards that some professions have defined for their own members concerning conflicts of interest and disclosure issues. To the extent this Standard contains more expansive disclosure obligations than the expert’s profession requires, it should be followed. Instead, the Standards require disclosure so that conflicts can be addressed by clients and lawyers based on sufficient disclosure of the issues prior to any engagement.

Many of the disqualification controversies have arisen when experts are consulted by one side but later hired by another. In general, “side-switching” disputes turn upon factors such as whether there was an objectively reasonable expectation of confidentiality and whether confidential information was disclosed to the expert who was later retained by the opposing party. See Paul v. Rawling Sporting Goods Co., 123 F.R.D. 271 (S.D. Ohio 1988). Another scenario occurs with respect to an expert who, prior to the conclusion of the engagement, joins or is affiliated with an organization that also has members working for the opposing side. The Standards take no position concerning the extent to which one professional's knowledge would be imputed to another member of the same firm. Should such problems arise, and irrespective of whether disqualification is requested or granted, any such organization should build a firewall between any professional, with past or present involvement on one side of an engagement, and those with any such involvement on an opposing side. Whether this will be sufficient protection to prevent disqualification is an issue for the courts.

Relationships that should be disclosed include financial interests, and personal or business relationships with adverse or other lawyers, clients or other parties, all of which have the potential for creating conflicts of interest. To the extent these relationships are covered by
confidentiality agreements, that fact should be disclosed along with enough information that may properly be disclosed to allow the retaining lawyer to make an informed judgment. This disclosure requirement not only pertains to relationships with the existing parties but also relates to relationships with other parties who are reasonably likely to become involved. Thus, for example, if the expert has an ongoing relationship with a manufacturer of a given product and the engagement relates to an action against another manufacturer of the same type of product, the relationship with the first manufacturer is one that should be disclosed.

Communications with the adverse party or its lawyer are another area of required disclosure. The adverse party might have contacted the expert to explore retention of that expert before the expert was approached by the current retaining lawyer. Or the expert may be approached by the adverse party to retain the expert for another matter during the course of an engagement. These contacts should be promptly disclosed so that they may be fully explored by the retaining lawyer.

The Federal Rules of Civil Procedure currently require the disclosure of all matters in which the expert testified in the past four years and a list of all publications authored in the past ten years. But the disclosure obligation to retaining lawyers and their clients must go beyond those required disclosures. The lawyer is entitled to know about all prior testimony, writings or positions taken by an expert, at least in the last 10 years that bear on the subject matter of the engagement. Inconsistent positions, whether in testimony, writings, speeches, or otherwise, to the extent discovered by the adverse party, will likely be the subject of cross-examination by the adverse party. The retaining lawyer should be aware of these positions from the outset of the engagement. Surprises are never helpful. To the extent positions were not necessarily inconsistent but bear on the subject matter of the engagement, those differences may also have the potential to impact the expert’s credibility. Accordingly, these positions also should be disclosed to the retaining lawyer.

Court rulings that reflect unfavorably upon the expert’s earlier testimony should also be disclosed. These include determinations by a court that an expert was not qualified in a field of engagement. Retaining lawyers should also be advised of prior rulings in which all or part of an expert’s opinion was excluded on substantive grounds going to the soundness of the opinion or its credibility or in which a judge commented adversely on an expert’s qualification or credibility. These disclosures would not be required if an expert witness were excluded because the testimony was cumulative or not a proper subject for expert testimony, reasons which do not challenge the underlying soundness of the expert’s opinion or expertise. Adverse court determinations may not be insurmountable obstacles but the retaining lawyer should be informed of such facts from the outset so that the lawyer can make the required evaluation.

These disclosure obligations are continuing throughout the engagement. Relationships may change during the course of an engagement or contacts by an adverse party may occur with respect to a new potential matter. Accordingly, all of the above disclosures should be supplemented as needed.
V. CONTINGENT COMPENSATION OF EXPERTS IN LITIGATED MATTERS

The expert shall not accept compensation that is contingent on the outcome of litigation.

Comment

Compensation of experts in litigated matters should be determined at the outset of an engagement and should be structured to preserve the integrity of the expert’s opinion. The arrangement for a contingent fees has the great potential to undercut the options to be offered and interfere with the objectivity of the expert. Contingent fees are so universally rejected that many codes that govern particular fields of expertise already prohibit compensation dependent upon or contingent on the outcome of the matter.

The ABA Model Rules of Professional Conduct prohibit offering an inducement to a witness that is prohibited by law. Rule 3.4(b). Comment 3 explains that, under the common law in most jurisdictions, it is improper to pay an expert a contingent fee. As the Annotated Model Rules explain, the expert’s fees may not be contingent on the outcome “because of the improper inducement this might provide to an expert to testify falsely to earn a higher fee. See New England Tel. & Tel. Co. v. Bd. of Assessors, 468 N.E.2d 263 (Mass 1984) (majority rule ‘is that an expert witness may not collect compensation which by agreement was contingent on the outcome of a controversy’).” Annotated Model Rules at 329 (6th Ed. 2007). The prior Code of Professional Responsibility expressly prohibited contingent fees for expert witnesses. DR7-109.

While some cases have permitted contingent fees to consulting experts, such as those who located testifying experts, see Ojeda v. Sharp Cabrillo Hospital, 10 Cal. Rptr. 2d 230 (Ct. App. 1992); Schackow v. Medical-Legal Consulting Service, Inc., 416 A.2d 1303 (Md. Ct. Spec. App. 1980), the better view is expressed in those cases finding such fees against public policy. See, e.g., First Nat’l Bank v. Malpractice Research, 688 N.E.2d 1179 (Ill. 1997) (against public policy to permit a consulting firm to be paid pursuant to a contingency fee arrangement where the firm would locate and retain expert witnesses as well as act as a consultant); Dupree v. Malpractice Research, Inc., 445 N.W.2d 498 (Mich. 1989) (against public policy to pay a consulting firm on a contingency fee basis where that firm provided “access to several medical experts….and provided considerable advice on trial techniques with suggested supporting expert testimony”); see also Polo by Shipley v. Gotchel, 542 A.2d 947 (N.J. Super. Ct. Law Div. 1987) (contingent fee consulting contract inconsistent with court rules, statutes and public policy).

In addition, it is unethical for lawyers to share legal fees with experts. Rule 5.4 of the ABA Model Rules of Professional Conduct dictates that a lawyer or law firm shall not share legal fees with a non-lawyer. Similarly, Rule 1.5 of the Model Rules of Professional Conduct addresses fees. Subsection (e) describes the requirements for the division of fee between lawyers who are not in the same firm may be made. None of those requirements could be met by a fee arrangement with an expert witness.

Furthermore, other professions bar contingent fees to experts. For example, Opinion 9.07 (medical testimony) from the American Medical Association states as follows:
Physician testimony must not be influenced by financial compensation; for example, it is unethical for a physician to accept compensation that is contingent upon the outcome of litigation.

Similarly, Opinion 6.01 (contingent physician fees) states as follows:

If a physician's fee for medical service is contingent on the successful outcome of a claim, such as a malpractice or worker's compensation claim, there is the ever-present danger that the physician may become less of a healer and more of an advocate or partisan in the proceedings. Accordingly, a physician fee for medical services should not be based on the value of the service provided by the physicians of patient and not on the uncertain outcome of a contingency that does not in any way relate to the value of the medical service.

A physician's fee should not be made contingent on the successful outcome of medical treatment. Such arrangements are unethical because they imply that successful outcomes from treatment are guaranteed, thus creating unrealistic expectations of medicine and false promises to consumers.

The American Society of Appraisers recently revised their Principles of Appraisal Practice and Code of Ethics. Section 7 addresses unethical and unprofessional appraisal practices. The first area they addressed under unethical and unprofessional practices are contingent fees (Section 7.1). The wording of Section 7.1 is somewhat similar to the way that the American Medical Association has dealt with doctors’ acting as expert witnesses. Section 7.1 concludes by stressing that “[t]he Society declares that the contracting for or acceptance of any such contingent fee is unethical and unprofessional.”

The American Society of Questioned Document Examiners has a code of ethics for their members. Each member of the Society is to abide by certain rules of conduct. One of the rules of conduct is that “no engagement shall be undertaken on a contingent fee basis.” There are other groups that have adopted similar language.

Contingent fees should be contrasted to other fee arrangements which are certain or fixed at the outset of an engagement but payment is deferred to the conclusion of the matter. Such arrangements, however, should not make payment of the arranged fee dependent on the success or outcome of the matter. In addition, this Standard is limited to experts retained in litigated matters in recognition of the fact that certain experts in transactional matters, such as investment bankers, commonly have fee arrangements which provide that a portion of their compensation is contingent on the completion of the transaction.
CONCLUSION

It is hoped that these Standards of Conduct for Experts Retained by Lawyers will be a helpful step in creating common expectations and consistent conduct governing the relationship between experts and lawyers who hire experts for client matters. By agreeing to follow these Standards, lawyers and experts will avoid many potential pitfalls that can destroy or diminish the lawyer-client-expert relationship. In many respects they reflect the best practices that already are observed by those who currently enter into lawyer–expert engagements on a regular basis. The disclosure obligations will provide a framework for informed judgments to be made regarding retention at the outset of an engagement so that experts and lawyers can thereafter focus on the assignments at hand and avoid the unnecessary distractions, costs and delay that inevitably occur when ethical issues arise. In addition, it is hoped that the system will be improved as a whole when clear standards are established for required conduct.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Standards set forth five basic standards that govern the lawyer-expert relationship. They require: Integrity/Professionalism, Competence, Confidentiality, Avoiding Conflicts of Interest and Avoiding Contingent Compensation of Experts. Conflicts of interest are sought to be avoided by requiring disclosure to the hiring lawyer in four basic areas: those addressing (1) financial or personal or business relationships; (2) communications or contacts with an adverse party or lawyer; (3) prior testimony on positions in other matters that bear on the subject matter of the engagement; and (4) prior court determinations that an expert was not qualified or not credible. The disclosure obligations seek to provide a framework for informed judgments to be made by retaining lawyers at the outset of engagements to avoid future ethical issues. It is also hoped that the system will be improved as a whole when clear standards are established for required ethical conduct.

2. Summary of the Issue that the Resolution addresses

The Report establishes Ethical Standards for Experts retained by lawyers on behalf of their clients. While many experts have ethical codes applicable to their chosen professions, there are no uniform ethical standards that apply to all experts or that separately address the issues presented when experts are retained by lawyers on behalf of their clients in connection with litigated or transactional matters.

The lack of consistent standards has led to inconsistent expectations of required conduct, to unnecessary surprises that have negatively impacted the lawyer-expert relationship, and to disqualification motions challenging the conduct of experts, which has, at a minimum, distracted lawyers and experts from focusing on the substantive matter and caused delay and unnecessary expense. These Standards seek to establish standards of required ethical conduct so that lawyers, experts and clients will have a common understanding of what is expected and so that future problems can be minimized or avoided.

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

These standards will seek to establish standards of required ethical conduct so that lawyers, experts and clients will have a common understanding of what is expected and future problems can be minimized or avoided. It will serve as a guide for lawyers in retaining experts and making sure that the proper questions are asked to avoid potential conflicts of interest. By incorporating these standards in retainer letters, lawyers will also be able to contractually require their experts to comply with these ethical standards.

4. Summary of Minority Views

None of which we are aware.
RESOLUTION

RESOLVED, That the American Bar Association adopts as best practices the Protocol on Court-to-Court Communications in Canada-U.S. Cross-Border Class Actions and Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings (together, the “Protocols”), dated August 2011.

FURTHER RESOLVED, That the American Bar Association urges courts and counsel in cross-border class action cases involving the United States and Canada to adopt the Protocols.
1. Where a court intends to apply this Protocol (with or without modifications), counsel in that case shall be given notice and an opportunity to be heard on the sections of this Protocol to be employed. Following such a hearing, the adoption of part or all of this Protocol should, wherever possible, be set forth in orders or minutes or other notice to counsel in the case before it is applied. The Protocol, as and to the extent adopted by the court, shall thereafter be maintained on the docket of the court for the case. (Guideline 1)  

2. All counsel should advise the court of any other class actions involving or arising out of (in whole or in part) the same claims or events as in the case before it (a “Related Class Action”) of which they or their client(s) are aware.  

3. If a court has been apprised of a Related Class Action and this Protocol has been adopted, wherever there is commonality among substantive or procedural issues in the proceedings, the court should communicate with the other court(s) in the manner prescribed by this Protocol with the goal of coordinating proceedings before it with proceedings in other jurisdiction(s). (Guidelines 2 and 16; Article 25)  

4. Arrangements contemplated under this Protocol do not constitute:  

   a. (i) a relinquishment, compromise, waiver, abridgement or extension by the court of any in personam or subject matter jurisdiction, powers, responsibilities or authority;  

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1 This Protocol has been drafted by judges, practitioners and academics from Canada and the United States. Thus, it was written in consideration of issues and best practices in cross-border cases involving U.S. federal courts and Canadian courts. Courts and litigants in cross-border cases involving other jurisdictions are nonetheless encouraged to adopt (or adapt) this protocol to assist in their particular circumstances, including the “mass action” context.  

2 “Guideline” references are to the ALI Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (http://www.ali.org/doc/Guidelines.pdf), which informed certain sections of this Protocol as indicated. Protocol sections do not adopt all of the Guidelines or quote individual Guidelines verbatim.  

3 “Counsel” includes parties who are self-represented.  

4 “Substantive or procedural issues” include conduct of discovery.  

5 “Article” references are to the UNCITRAL Model Law on Cross-Border Insolvency (http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html), which informed certain sections of this Protocol as indicated. Protocol sections do not adopt all of the Articles or quote individual Articles verbatim.
or (ii) a determination of any procedural or substantive matter in controversy before the court or before any other court(s); or

b. a relinquishment, compromise, waiver or abridgement by any of the parties of any of their jurisdictional, substantive or procedural rights, claims or defenses, or a diminution of the effect of, or their rights with respect to, any of the orders made by the court or the other court(s). (Guideline 17)

5. Prior to a communication with another court, the court should be satisfied that the proposed communication is consistent with the applicable rules of procedure or other governing law in its jurisdiction. (Guideline 1)

6. Each court should designate a Liaison Counsel for plaintiffs and a Liaison Counsel for defendants in the proceedings before it to whom, in the first instance, materials from the other court(s) should be provided by e-mail, facsimile or other specified means and who should be responsible for providing materials to the other court(s). (Guideline 12; Article 14)

7. Courts may communicate without parties present, provided:
   a. such communication pertains solely to procedural, coordination or other non-substantive matters;
   b. counsel for all affected parties are given advance notice of the communication; and,6
   c. following the communication, counsel are given a summary of the communication.7 (Guidelines 8 and 9)

8. Communications from a court to another court or court(s) may take place by or through the court:
   a. sending or transmitting copies of formal orders, judgments, opinions, reasons for decision or endorsements, other than documents under seal, directly to the other court(s); and/or,
   b. participating in two-way communications with the other court(s) by correspondence, telephone or video conference call or other electronic means. (Guideline 6)

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6 This Protocol is an attempt to suggest best practices and is not intended to limit a court’s authority. As such, while “advance notice” is intended to give counsel an opportunity to be heard (or object), this does not affect a court’s ability to act in whatever way it sees fit pursuant to the law in its jurisdiction, including after hearing such an objection.

7 A “summary” is intended merely to be a general overview of the substance of the communication and therefore to be informal and amount to much less than a transcript.
9. A court may conduct a joint hearing with another court or court(s). The following should apply to any joint hearing unless the parties agree otherwise:

a. each court and counsel for all parties should be able to hear the proceedings simultaneously in the other court(s);

b. courts and counsel should be alert to privilege and immunity-related issues, including where the law\(^8\) may differ from one jurisdiction to another, and arrangements should be made on a case-by-case basis to address these issues; and,

c. submissions or applications by the representative of any party should be made only to the court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other court to make submissions to it. (Guideline 9)

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\(^8\) The “law” includes the existence, conditions for and/or waiver of a privilege or immunity.
Protocols of General Application

1. **Compliance.** The Form of Notice must satisfy applicable constitutional, statutory and procedural requirements of each relevant jurisdiction.

2. **Plain Language.** Any notice given to class members should use plain and clear language, and not be overly technical or legalistic. Laypersons reading the notice should be able to understand how the class proceeding will affect their rights.

**Commentary: Demographics of Notice Recipients.** In devising the content of and means by which notice is given, the parties and the courts should consider the demographic composition of the class (including age, physical or mental disability, language, literacy, geographical setting or culture). In particular, if any of the class members reside in Canada, notice should be provided in French and English. Notice to French-speaking class members should include publications that will reach French-speaking Canadians outside Québec.

3. **Purpose.** The purpose of the notice is to provide information to class members. The notice should not be an advocacy piece for class or defence counsel, nor should it contain opinions regarding the likelihood of success of the action.

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1. Currie v. McDonald’s Restaurants of Canada Ltd. et al. (2005), 74 O.R. (3d) 321 (C.A.) [Currie]; Fed. R. Civ. P. 23(c)(2)(B) [FRCP] (“the notice must concisely and clearly state in plain, easily understood language…”); Québec’s Code of Civil Procedure, R.S.Q. c. C-25, Book IX, art. 1046 [Québec CCP] (“Every notice that must be given to the members must be written in plain language that will be easily understood by the persons to whom it is addressed…”).


4. **Adapt Notice to Medium.** Where notice is given in multiple media, the content of each notice should be adapted to be appropriate to that medium; however, there should be at least one “long-form” of notice available to class members that complies with section 5 of this Protocol.

**Protocols Applicable to Class Certification**

5. **Contents.** A long-form notice given in respect of certification of a class proceeding should generally contain:

   (a) a description of the proceeding, including the names of the representative plaintiffs, the names of opposing parties and counsel, a summary of the nature of the action and the parties’ claims and defences, the class definition, the common issues to be determined and the damages or other relief sought, the events giving rise to the case, and relevant procedural history;

   (b) a description of any other class actions of which counsel or their client(s) are aware involving or arising out of (in whole or in part) the same claims or events as in the case before the Court and in which an alleged or certified class's membership includes some or all of the members of the class in the case that is the subject of the notice (a “Related Class Action”);

   (c) whether a right to opt out of the proceeding is available and, if so, a statement about the manner and timeframe in which class members may opt out of the proceeding;

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5 FRCP, supra note *Error! Bookmark not defined.* at r. 23(c)(2)(B)(i)-(iii); Ontario Class Proceedings Act, 1992, S.O. 1992, c. 6, at s. 17(6)(a) [Ontario CPA]; Alberta Class Proceedings Act, S.A. 2003, c. C-16.5 at s. 20(6)(a) [Alta. CPA]; British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50 at s. 19(6)(a) [B.C. CPA]; Manitoba Class Proceedings Act, C.C.S.M., c. C130 at s. 19(6)(a) [Manitoba CPA]; New Brunswick Class Proceedings Act, S.N.B. 2006, c. C-5.15 at s. 21(6)(a) [N.B. CPA]; Newfoundland Class Actions Act, S.N.L. 2001, c. C-18.1 at s. 19(6)(a) [Nfld. CAA]; Nova Scotia Class Proceedings Act, N.S. 2007, c. 28 at s. 22(6)(a) [N.S. CPA]; Saskatchewan, Class Actions Act, S.S. 2001, c. 12.01 at s. 22(1)(a) [Sask. CAA]; Québec CCP, supra note 1 at art. 1006 (a) & (b); Federal Court Rules, SOR/98-106 at r. 334.32(5)(a) [FCR].

6 “Counsel” includes parties who are self-represented.

7 *Canada Post v. Lépine*, [2009] 1 S.C.R. 549, 2009 SCC 16 at para. 45 (inadequate notice of certification and settlement where “Those who prepared it did not concern themselves with the situation resulting from the existence of a parallel class proceeding…”).

8 FRCP, *ibid.* at r. 23(c)(2)(B)(v)-(vi); Ontario CPA, supra note *Error! Bookmark not defined.* at s. 17(6)(b); Alta. CPA, supra note *Error! Bookmark not defined.* at ss. 20(6)(b); B.C. CPA, supra note *Error! Bookmark not defined.* at ss. 19(6)(b) and (c); Manitoba CPA,
(d) if applicable, a description of the potential financial consequences of the proceeding to class members;

(e) a summary of any agreements or understandings with class counsel regarding fees and disbursements, including contingency fee arrangements;

(f) a description of any counterclaims being asserted and relief sought;

(g) a statement that the judgment on the common issues for the class, whether favourable or not, will bind all class members who do not opt out of the proceeding.

supra note Error! Bookmark not defined. at s. 19(6)(b); N.B. CPA, supra note Error! Bookmark not defined. at ss. 21(6)(b) and (c); Nfld. CAA, supra note Error! Bookmark not defined. at ss. 19(6)(b) and (c); N.S. CPA, supra note Error! Bookmark not defined. at s. 22(6)(b); Sask. CAA, supra note Error! Bookmark not defined. at s. 22(1)(b); Québec CCP, supra note Error! Bookmark not defined. at art. 1006(e); and FCR, supra note Error! Bookmark not defined. at r. 334.32(5)(b).

9 The narrower adjective “potential” was chosen to describe the financial consequences that ought to be disclosed, although the following Canadian legislation requires the disclosure of “possible financial consequences”: Ontario CPA, supra note Error! Bookmark not defined. at s. 17(6)(c); Alta. CPA, supra note Error! Bookmark not defined. at s. 20(6)(f); B.C. CPA, supra note Error! Bookmark not defined. at s. 19(6)(d); Manitoba CPA, supra note Error! Bookmark not defined. at s. 19(6)(e); N.B. CPA, supra note Error! Bookmark not defined. at s. 21(6)(f); Nfld. CAA, supra note Error! Bookmark not defined. at s. 19(6)(f); N.S. CPA, supra note Error! Bookmark not defined. at s. 22(6)(c); Sask. CAA, supra note Error! Bookmark not defined. at s. 22(1)(f); Québec CCP, supra note Error! Bookmark not defined. at art. 1006(f); and FCR, supra note Error! Bookmark not defined. at r. 334.32(5)(c).

10 Ontario CPA, supra note Error! Bookmark not defined. at s. 17(6)(d); Alta. CPA, supra note Error! Bookmark not defined. at s. 20(6)(e); B.C. CPA, supra note Error! Bookmark not defined. at s. 19(6)(e); Manitoba CPA, supra note Error! Bookmark not defined. at s. 19(6)(d); N.B. CPA, supra note Error! Bookmark not defined. at s. 21(6)(e); Nfld. CAA, supra note Error! Bookmark not defined. at s. 19(6)(e); N.S. CPA, supra note Error! Bookmark not defined. at s. 22(6)(d); Sask. CAA, supra note Error! Bookmark not defined. at s. 22(1)(e); and FCR, supra note Error! Bookmark not defined. at r. 334.32(5)(d). See also T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director), 2009 ABQB 96.

11 Ontario CPA, supra note Error! Bookmark not defined. at s. 17(6)(e); Alta. CPA, supra note Error! Bookmark not defined. at s. 20(6)(d); B.C. CPA, supra note Error! Bookmark not defined. at s. 19(6)(f); Manitoba CPA, supra note Error! Bookmark not defined. at s. 19(6)(e); N.B. CPA, supra note Error! Bookmark not defined. at s. 21(6)(d); Nfld. CAA, supra note Error! Bookmark not defined. at s. 19(6)(d); N.S. CPA, supra note Error! Bookmark not defined. at s. 22(6)(e); Sask. CAA, supra note Error! Bookmark not defined. at s. 22(1)(d); and FCR, supra note Error! Bookmark not defined. at r. 334.32(5)(e).
(h) a description of class members’ right to participate in the proceeding or appear through an attorney if they desire;\(^\text{13}\) and

(i) an address to which class members may direct inquiries about the proceeding.\(^\text{14}\)

6. **Timing.** Notice of certification of a class proceeding should ordinarily be given to class members as soon as practicable, following certification.\(^\text{15}\)

\(^\text{12}\) FRCP, *supra* note Error! Bookmark not defined. at r. 23(c)(2)(B)(vii); Ontario CPA, *supra* note Error! Bookmark not defined. at s. 17(6)(f); Alta. CPA, *supra* note Error! Bookmark not defined. at ss. 20(6)(g) and (h); B.C. CPA, *supra* note Error! Bookmark not defined. at ss. 19(6)(g) and (h); Manitoba CPA, *supra* note Error! Bookmark not defined. at ss. 19(6)(f) and (g); N.B. CPA, *supra* note Error! Bookmark not defined. at ss. 21(6)(g) and (h); Nfld. CAA, *supra* note Error! Bookmark not defined. at ss. 22(6)(f) and (g); Sask. CAA, *supra* note Error! Bookmark not defined. at ss. 22(1)(g) and (h); FCR, *supra* note Error! Bookmark not defined. at r. 334.32(5)(f).

\(^\text{13}\) FRCP, *supra* note Error! Bookmark not defined. at r. 23(c)(2)(B)(iv); Ontario CPA, *supra* note Error! Bookmark not defined. at s. 17(6)(g); Alta. CPA, *supra* note Error! Bookmark not defined. at s. 20(6)(i); B.C. CPA, *supra* note Error! Bookmark not defined. at s. 19(6)(i); Manitoba CPA, *supra* note Error! Bookmark not defined. at s. 19(6)(h); N.B. CPA, *supra* note Error! Bookmark not defined. at s. 19(6)(i); Nfld. CAA, *supra* note Error! Bookmark not defined. at s. 21(6)(i); N.S. CPA, *supra* note Error! Bookmark not defined. at s. 22(6)(g); Sask. CAA, *supra* note Error! Bookmark not defined. at s. 21(1)(i); Québec CCP, *supra* note Error! Bookmark not defined. at art. 1006(c); and FCR, *supra* note Error! Bookmark not defined. at r. 334.32(5)(g).

\(^\text{14}\) Ontario CPA, *supra* note Error! Bookmark not defined. at s. 17(6)(h); Alta. CPA, *supra* note Error! Bookmark not defined. at s. 20(6)(j); B.C. CPA, *supra* note Error! Bookmark not defined. at s. 19(6)(i); Manitoba CPA, *supra* note Error! Bookmark not defined. at s. 20(6)(j); N.B. CPA, *supra* note Error! Bookmark not defined. at s. 19(6)(i); N.B. CPA, *supra* note Error! Bookmark not defined. at s. 21(6)(j); Nfld. CAA, *supra* note Error! Bookmark not defined. at s. 21(6)(j); N.S. CPA, *supra* note Error! Bookmark not defined. at s. 22(6)(j); and FCR, *supra* note Error! Bookmark not defined.. at r. 334.32(5)(h).

\(^\text{15}\) FRCP, *supra* note Error! Bookmark not defined. at r. 23(c)(2)(B); *Hoy v. Medtronic* (2002), 97 B.C.L.R. (3d) 109 (S.C.); MCL 4th, *supra* note Error! Bookmark not defined., §21.311 at 288 (“notice to class members should be given promptly after the certification order is issued. When the parties are nearing settlement, however, a reasonable delay in notice might increase incentives to settle and avoid the need for separate class notices of certification and settlement”).
7. **Content.** Notice given in respect of settlement of a class proceeding which, if approved, is intended to bind class members in more than one jurisdiction should generally:

(a) summarize the claims, relief sought and defences, and any relevant procedural history (e.g. motions for summary judgment, motions for certification, etc.);

(b) define the class and any subclasses, including any settlement class, and include estimates of the size of the class and any subclasses;

(c) describe any Related Class Actions pending, including any settlements, of which counsel or their client(s) are aware;

(d) describe the essential terms of the proposed settlement, including the nature and amount of relief, the procedures for allocating and distributing settlement funds, including the method for filing a proof of claim;

(e) provide information about where class members can obtain a copy of or examine the settlement agreement and other relevant materials;

(f) if practical, provide information that will enable class members to calculate or at least estimate the range of their individual recoveries;

(g) describe clearly the options open to the class members and the implications of each option (including, if applicable, opting out, participating, objecting, submitting a claim or doing nothing), along with the deadlines for taking any action;

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18 *Supra* note *Error! Bookmark not defined.*

19 *Supra* note *Error! Bookmark not defined.*

20 MCL 4th, *supra* note *Error! Bookmark not defined.*, §21.312 at 295; Québec CCP, *supra* note *Error! Bookmark not defined.* at art. 1025(b) and (c).


(h) explain the nature of and basis for any valuation of nonmonetary benefits, if the settlement includes them;\textsuperscript{24}

(i) disclose any compensatory or other benefits payable to or requested by the class representatives;\textsuperscript{25}

(j) provide information regarding the maximum amounts sought by class counsel for fees, including disbursements, reimbursement of expenses and applicable taxes and the bases for which those amounts are claimed;\textsuperscript{26}

(k) state the time and place of the hearing to consider approval of the settlement;\textsuperscript{27}

(l) describe the method for objecting to (or, if permitted, for opting out of) the settlement, including that class members have the right to object to the settlement, and/or application for fees and/or the distribution of any remaining balance of funds;\textsuperscript{28}

(m) state that the settlement will bind all class members who have not opted out (if it is an opt-out class action); and\textsuperscript{29}

(n) prominently display the address and phone number of class counsel and the appointed Claims Administrator and explain how to make inquiries of either.\textsuperscript{30}

Where “short-form” notice is provided to the class in the first instance (e.g., for cost reasons), such notice should include information explaining how individual class members can obtain the long-form notice or other information about the settlement, whether via website, telephone call-in center or other means approved by the Court.

8. **Single Notice to Class Members.** Where class proceedings have been commenced in more than one jurisdiction and a global settlement of all proceedings has been achieved, the parties to the various proceedings and the respective courts with jurisdiction should, at minimum, endeavour to co-ordinate the approval of the contents of a single notice of

\textsuperscript{24} Ibid., §21.312 at 295.

\textsuperscript{25} Ibid., §21.312 at 295.

\textsuperscript{26} Ibid., §21.312 at 295.

\textsuperscript{27} Ibid., §21.312 at 295; Québec CCP, supra note Error! Bookmark not defined. at art. 1025(a).

\textsuperscript{28} MCL 4th, ibid., §21.312 at 295; Québec CCP, ibid. at art. 1025(d).

\textsuperscript{29} MCL 4th, ibid., §21.312 at 294.

\textsuperscript{30} Ibid., §21.312 at 295.
the proposed settlement to class members, wherever resident. If notice by more than one
form is to be provided (e.g., mail, internet or other publication) the parties and courts
should endeavour to coordinate the approval of a single form of each.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution adopts the Protocol on Court-to-Court Communications in Canada-U.S. Cross-Border Class Actions (the “Communications Protocol”) and the Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings (the “Notice Protocol”, and collectively, the “Protocols”) as “best practices” to assist courts and litigants in cross-border class action cases involving United States federal courts and Canadian courts. The Protocols are not intended to, and do not, interfere with or attempt to limit any court’s authority or discretion, or supersede the rules of procedure or other governing law, or adversely affect any rights of any parties or class members. This resolution urges counsel and courts to adopt the Protocols to assist in cross-border class action cases.

2. Summary of the Issue that the Resolution Addresses

Increasingly, simultaneous class actions, involving overlapping [a] substantive and procedural issues, [b] factual issues and [c] class membership, have been filed, litigated and sometimes settled in courts of both the U.S. and one or more provinces in Canada. There have been significant inconsistencies, duplication and even outright disagreements involving such issues as discovery, class certification, adequacy of notice and binding effect or enforceability of settlements and judgments. Individual judges have struggled to develop ad hoc approaches to deal with these often complex issues.

In a 2007 decision addressing a settlement of multiple class actions in Canada and the United States, a leading Canadian judge noted the problems with this “ad hoc” approach and called for the development of protocols to deal with these problems. The Section of Litigation convened a Working Group to develop such protocols. The Working Group was composed of leading Canadian and U.S. jurists, academics and practitioners (from plaintiffs' and defense bars), who undertook to identify and analyze the "real world" issues and practices in multi-jurisdictional class actions, to assess what had and had not worked, and to develop protocols that addressed the issues. It identified "communication, cooperation and coordination" -- the "Three C's" -- as the key drivers. It then devised these protocols to address these issues in a manner that promotes comity and the just, speedy and inexpensive determination of simultaneous multi-jurisdictional litigation while respecting, accommodating and not interfering with the jurisdiction, rights, laws, authority and practical needs of the courts, counsel, parties and class members in both countries (including the Canadian provinces).
3. **Please Explain How the Proposed Policy Position Will Address the Issue**

The Communications Protocol embodies the basic idea that courts hearing cross-border class actions involving or arising out of the same or overlapping claims, events or classes should be made aware of the existence and progress of related cases in order to consider and, where feasible, achieve cooperation and coordination. Among other things, mechanisms providing for liaison counsel to transmit orders, pleadings and like material to interested courts, and, where feasible and appropriate, joint notices or hearings, foster these ends and judicial comity.

The Notice Protocol emphasizes the need to provide class members with meaningful, comprehensible and timely information about their own and related class actions and their effect upon class members’ rights, in order to ensure due process and preserve the *res judicata* effect of judgments and settlements, while expressly preserving flexibility.

4. **Summary of Minority Views**

None of which we are aware.
RESOLUTION

RESOLVED, That the American Bar Association urges the Law School Admissions Council and ABA-approved law schools to require additional information from individuals who indicate on their applications for testing or admission that they are Native American including Tribal citizenship, Tribal affiliation or enrollment number, and/or a “heritage statement.”
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges the Law School Admissions Council and ABA-approved law schools to require additional information for individuals who indicate on their applications for testing or admission that they are Native American, including requesting their Tribal citizenship, Tribal affiliation or enrollment number, and/or a “heritage statement” in order to avoid ethnic and identification misrepresentation and to provide more accurate statistics regarding “Native American” test takers and applicants for law school admission.

2. Summary of the Issue that the Resolution Addresses

It is widely believed within the Native American legal community that a large percentage of individuals in law school who identified themselves on their law school application as “Native American”, are not of Native American heritage and have no affiliation either politically, racially, or culturally with the Native American community. This phenomenon is so pervasive it is commonly understood and referred to within the Native American community as “box-checking.”

Because of this problem, the number of actual Native American law students and lawyers is likely dramatically less than that as self-reported by ABA accredited law schools. The 1990 Census report shows 1,502 American Indian lawyers. In 2000, that number increases to 1,730.1 An increase in American Indian lawyers of only 228 in ten years. That is an overall growth of 15%. Nonetheless, during the same time period between 1990 and 2000, ABA-accredited law schools claimed to have graduated approximately 2,610 Native American lawyers.2 Even controlling for a variety of factors, there is a vast disparity between 2,610 and 228.

The difference between the ABA graduation rate and the Census numbers, i.e., the grads to growth rate, is about 8.7% for Native Americans. With respect to the grads-to-growth rates for other racial groups, these rates are so far out of line with the rate for Native Americans that it makes the statistical case even more compelling. This is comparable to disparate impact cases in employment discrimination cases whereby courts have held that sometimes the statistical disparity is so overwhelming that the statistics alone prove discrimination.

3. Please Explain How the Proposed Policy Position will address the issue

The resolution urges the Law School Admissions Council and ABA-approved law schools to require additional information for individuals who indicate on their applications for testing or admission that they are Native American, including requesting their Tribal citizenship, Tribal affiliation or enrollment number, and/or a “heritage statement” in order to avoid ethnic and identification misrepresentation and to provide more accurate statistics regarding “Native American” test takers and applicants for law school admission.

4. Summary of Minority Views

None.
RESOLVED, That the American Bar Association urges state, tribal, and territorial legislatures to aid minors who are victims of human trafficking by:

a) Prohibiting arrest and/or charging children under the age of 18 with the crimes of prostitution, solicitation, or loitering (or other offenses including status offenses that are incident to their trafficking situation), and instead permitting their immediate protective custody as dependent children in suitable residential environments;

b) Amending juvenile dependency laws by:
   1) Making suspicion of trafficking victim status a basis for mandated reporting to child protective services agencies and requiring their services, for both citizen and non-citizen children, through specialized child trafficking victim units; and
   2) Requiring screening and risk assessment for trafficking victimization whenever a youth enters a runaway or homeless youth facility, juvenile justice system, or child welfare agency custody;

c) Establishing programs of specialized short and long term safe housing, residential care facilities, and other services for prompt access by law enforcement, public health officials, and child protective services;

d) Authorizing courts to issue and enforce protective orders prohibiting harassment or intimidation of child trafficking victims; and

e) Providing a civil cause of action for child victims to receive reparations and services.

FURTHER RESOLVED, That the American Bar Association urges state, tribal, territorial and local governments to ensure:

a) Law enforcement, child protective services, and family and juvenile court training to address identification and risk assessment of child trafficking victims and the process of obtaining aid for the victims;

b) Prompt health, mental health, substance abuse treatment, educational and vocational training, residential care, and other victim services;

c) Those providing health, mental health, substance abuse treatment, education and vocational training, residential care, and other victim services report aggregate data on victims served to a designated state agency;

d) When a child is missing from foster care or residential placement, immediate notification to federal, state, and local law enforcement, with annual aggregate reporting of this data; and

e) Special attention in the development of programs to provide services for the unique needs of girls, boys, and gay and transgendered youth.
FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation that:

a) Enhances state, tribal, territorial, and local efforts to combat trafficking of minor children through supporting legal services to victims, shelter and rehabilitative care, and prosecution of adults who are trafficking in minor children; and

b) Treats non-citizen children who have been exploited for labor, services or commercial sex acts as victims of a severe form of trafficking in persons and:

1) Prohibits their being charged, under federal law, with a prostitution-related offense or with other crimes incident to their trafficking situation;

2) Mandates data collection and reporting on their immigration relief eligibility and status;

3) Requires their prompt referral to local child protective services and other suitable provider(s) for services and support, identification of immigration relief options, and prompt notification to their national consulate;

4) Reimburses government entities for foster care costs related to services to children who are victims of human trafficking; and

5) Assures that their cross-border repatriation is only accomplished through application of recognized best practices.
EXECUTIVE SUMMARY

1. Summary of the Resolution:

This resolution encourages state and federal authorities to treat exploited children as victims rather than criminals, and to help assure they receive the services they need. The recommendation calls for the prohibition of the arrest or charging of children under the age of 18 with the crimes of prostitution, solicitation, or loitering as well as other offenses, including status offenses that are incident to their trafficking situation. These children are exploited for their labor and services, or have been forced into commercial sexual activity, and thus should be placed in immediate protective custody, as dependent children, in a suitable residential environment.

2. Summary of the issue which the Resolution addresses:

“Trafficking of children” is the recruitment, transportation, transfer, harboring, or receipt of minors who are exploited for their labor or services or forced to engage in commercial sexual activity. Although more public policy attention has been given to women and children brought to the United States for the purposes of trafficking, many individuals, including citizen children, are trafficked within the United States, and experts estimate at least 100,000 annually are child victims of prostitution. Trafficked children endure horrific and inhumane treatment. They are frequently raped, beaten, denied food and sleep, and isolated from the outside world. Given the lasting physical, emotional, and psychological effects of such treatment, it is imperative that state and federal legislation be enacted to support and encourage legal and social services for minor victims of human trafficking.

3. Explanation of how the proposed policy position will address the issue:

This resolution would have the ABA encourage states and the federal government to treat exploited children as victims rather than criminals. Specifically, the recommendation calls for the prohibition of the arrest or charging of children under the age of 18 with the crimes of prostitution, solicitation, or loitering as well as other offenses, including status offenses that are incident to their trafficking situation. This policy also seeks to ensure that minor child victims of trafficking are placed in immediate protective custody as dependent children, in appropriate and residential environments. In addition to urging policy change that would help better identify these child victims, the resolution seeks establishment of programs for specialized short and long term safe houses, residential care facilities, and other services for prompt referral of these child trafficking victims by law enforcement and child protective services. Finally, this policy would help call attention to the non-citizen child victims of trafficking who need to receive improved treatment and services by both federal and state authorities.

4. Summary of any minority views or opposition which have been identified:

We are unaware of any minority views or opposition to this Resolution.
RESOLVED, That the American Bar Association urges Congress to enact legislation, and the
Department of Homeland Security to adopt policies, that:

a) Assure information pertaining to location and transfer either of immigration detainees
who are parents, legal guardians or primary caregivers of minor children, or of the minor
children themselves, or of changes of placement of those minor children, is shared among
immigration authorities, state and local child welfare agencies, and state courts;
b) Assure the length of one’s status as an immigration detainee, or one’s removal from the
country, can not be the sole basis for a state not to provide legally mandated reasonable
efforts to reunify children with their parent, legal guardian, or primary caretaker; and
c) Mandate the Department of Homeland Security to collect and report aggregate annual
data on U.S. citizen children impacted by the detention or deportation of a parent, legal
guardian, or primary caregiver.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution ("B") urges coordination between immigration authorities and state and local child welfare agencies and courts to provide notice of changes in detention or child placement. Additionally, the resolution urges amendment of federal law so that the status of a parent, legal guardian, or primary caregiver’s immigration case or detention can never be the sole basis for failure to make reasonable efforts to reunify. Finally, the resolution mandates collecting and reporting annual data on U.S. citizen minor children impacted by a parent’s detention or deportation.

2. Summary of the Issue that the Resolution Addresses

This resolution ("B") is the first of three proposed resolutions (118 B, C, and D) that address the impact on children of the detention and deportation of their parent, legal guardian, or primary caregiver. This resolution makes specific recommendations for improving the immigration laws and procedures to take into account the best interests of the children who are caught up in the system through no fault of their own. Current immigration laws and policies do not take into account the fundamental importance of family and the deleterious effects of a parent, legal guardian, or primary caregiver’s placement in detention or removal proceedings. Children of immigrant parents represent 8.6% of all children who come to the attention of the child welfare system; more than 80% of the children are U.S. born citizens. The ability of a noncitizen parent, legal guardian, or primary caregiver to reunify or even communicate with his or her child is made difficult due to detention, immigration proceedings, and child welfare procedures that can reinforce separation from parents. These difficulties are compounded by lack of access to counsel for the parents and failure of the immigration authorities and state and welfare agencies to coordinate. Even if the courts consider the intricacies of the situation, an immigration judge may be powerless under current law to provide remedies appropriate to the family situation.

3. Please Explain How the Proposed Policy Position will address the Issue

The ABA supports improvement of the custody, care, and legal representation of unaccompanied minor children and opposes the detention of noncitizens in removal proceedings except in extraordinary circumstances. This recommendation builds on existing policies by providing guidelines of specific application to detained parents, legal guardians, and primary caregivers of minor children; and requiring that immigration law and policy address the complex situation of detained parents that arises when immigrant parents are separated from their children.

4. Summary of Minority Views

None to date.
RESOLVED, That the American Bar Association urges the Department of Homeland Security to revise its policies with respect to detained parents, legal guardians and primary caregivers of children to incorporate the following:

a) Access to an attorney to help them understand legal issues related to children who had been in their care;

b) Referral to an attorney who can represent their interests in state court custody, dependency, and other legal actions related to their children; and

c) Opportunity for their meaningful participation in all state judicial proceedings involving their children’s custody and welfare, as well as the opportunity to access court-mandated services related to their parenting.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution (“C”) supports granting detained parents, legal guardians, and primary caregivers access to attorneys to help them understand the legal issues related to their minor children. Additionally, the resolution urges that detained parents, legal guardians, and primary caregivers be referred to an attorney who can represent their interests in state court custody, dependency, and other legal actions related to their children. Finally, the resolution recommends that parents, legal guardians, and primary caregivers be provided an opportunity for meaningful participation in judicial proceedings involving their children’s custody and welfare.

2. Summary of the Issue that the Resolution Addresses

This resolution recommends improvements to proceedings involving child custody and welfare when a child’s parent, legal guardian, or primary caregiver is in immigration proceedings or detention. As of March 2009, an estimated 5.1 million children in the United States lived in households with at least one noncitizen parent, of that total approximate 4 million of the children were U.S. citizens. Positive child welfare outcomes require a child welfare workforce and judicial system that understands the issues affecting immigrant children and families.

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

The ABA supports providing timely legal rights presentations to all detained and non-detained persons in removal proceedings and screening immigrants for referral to attorneys, including appointed counsel in appropriate cases. This resolution builds on existing policy, requiring that attorneys be provided unrestricted access to help detained parents, legal guardians, and primary caregivers understand the legal issues related to their minor children, and to represent their interest in state court custody, dependency, and other legal actions related to the children. This resolution also requires that procedures adapt to and reflect the unique circumstances of detained parents, legal guardians, and primary caregivers of minor children, and requires mandatory education and training be provided to judges, attorneys, and guardians on the connections between state child welfare laws and immigration laws and relief. This resolution will further current ABA policy and enhances the likelihood of positive child welfare outcomes by requiring that both the child welfare workforce and judicial system understand the issues affecting immigrant children and families.

4. Summary of Minority Views

None to date.
RESOLVED, That the American Bar Association urges federal and state governments to enact legislation for the protection of unaccompanied and undocumented immigrant children (“such children”) and U.S. citizen children of undocumented parents (“citizen children”) that would require:

a) Such children be screened promptly upon apprehension by immigration authorities or placement in foster care, to determine whether the child is eligible for immigration relief because he or she is a victim of crime, abuse, neglect, or abandonment;

b) Repatriations of such children include formal intercountry child welfare agency involvement and adherence to intercountry protocols designed to address concerns regarding the safety of such children during the repatriation process and the process of returning a child to a stable family environment; and

c) Citizen children have full access to their birth certificates, paternity documents, and other vital government records without regard to the noncitizen status of a parent or guardian.

FURTHER RESOLVED, That the ABA urges the revision of federal laws to ensure federal support for training of state and local judges, and for attorneys who work with both unaccompanied and undocumented immigrant children and with citizen children of undocumented parents, regarding the intersection of state child welfare laws, immigration laws, applicable international conventions and standards, and intercountry protocols that affect children who are detained, separated from, or removed from their adult caretakers.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution (“D”) urges prompt screening of unaccompanied and undocumented immigrant children by independent experts in order to determine if the children are victims of trafficking or other crimes, or of abuse, neglect, or abandonment that could be a basis for immigration relief. The resolution also urges that children only be repatriated with formal intercountry child welfare agency support and through use of intercountry protocols, to assure that the child’s dignity and safety during and after the process of returning the child to a family environment. Finally, the resolution urges federal support of training for judges and attorneys in state and local courts on connections between child welfare law and federal immigration law, as well as on international conventions and standards related to children detained or separated or removed from their adult caretakers.

2. Summary of the Issue that the Resolution Addresses

Every year nearly 8,000 children enter the United States unaccompanied by parents or other guardians. The current processing of unaccompanied and undocumented immigrant children does not address the particular vulnerability of these children to trafficking, abuse, rape, neglect, and abandonment. Children under 18 comprise nearly one-half of trafficking victims globally, and in the U.S., Canada, and Mexico approximately 33% of unaccompanied children over age 10 are victims of sexual exploitation. Existing ABA policy does not require or provide guidance on appropriate and prompt screening of unaccompanied and undocumented immigrant children to determine whether they have been victimized, or require obedience to intercountry protocols to ensure child safety in the transportation and services provided when returning a child to a family environment. ABA policy also currently does not address the denial of services that directly impact unaccompanied and undocumented immigrant children because of the immigration status of the parent, legal guardian, or primary caregiver.

3. Please Explain How the Proposed Policy Position will address the issue

The ABA already supports the implementation of standards regarding the repatriation of unaccompanied minor children and opposes efforts to restrict or deny any child in the United States the right to public education, health care, foster care, or social services on the basis of the citizenship or immigration status of the child or the child’s parent. This recommendation supplements the previous policies by requiring and providing guidance regarding the prompt and appropriate screening of unaccompanied minor children; mandating the use of intercountry protocols to assure safe transportation and services during and after the return of a child to a family environment; and opposing efforts to restrict any and all services and support that directly impact the children because of the immigration status of the child’s legal guardian, or primary caregiver.

4. Summary of Minority Views

None to date.
RESOLVED, That the American Bar Association supports application of the Immigration and Nationality Act to allow persons outside the United States to pursue motions to reopen or motions to reconsider removal (deportation) proceedings on the same basis and subject to the same restrictions that apply to persons who file such petitions from within the United States.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution addresses the adjudication of motions to reopen and motions to reconsider removal (deportation) proceedings. The Department of Justice currently maintains that agency adjudicators lack jurisdiction to reopen or to reconsider a case after the individual subject to a removal order has departed the United States. Therefore, even when recognized grounds exist for reopening or reconsideration, most deportees have no means to seek rectification of an error. Circumstances in which deportees have been denied reopening or reconsideration pursuant to the “departure bar” include changed country conditions that bear on the merits of an asylum claim; vacatur of a conviction that forms the basis for a removal order; and recognition by the Supreme Court that a legal theory used to justify deportation was incorrect. This departure bar creates an arbitrary distinction in the adjudication of motions to reopen and motions to reconsider. Any number of circumstances might keep a person from physically departing the United States following the entry of a final removal order. A person who remains in the United States may file a motion to reopen or to reconsider, while a person who happens to have departed may not. This Resolution supports the elimination of the departure bar.

2. Summary of the Issue that the Resolution Addresses

One of the most serious questions determined by immigration law is whom the government may deport. The consequences of deportation (officially termed “removal”) are dramatic, particularly for long-time U.S. residents who are uprooted from their families and communities and relocated to an unfamiliar country. In cases where an individual fears persecution in the country designated for removal, the consequences of removal can include mistreatment, imprisonment, torture, or even death. The seriousness of these consequences highlights the importance of the adjudication system that determines removability and eligibility for relief from removal, and the importance of an opportunity to ask the agency to reopen or to reconsider. Also, the opportunity to ask for reopening or for reconsideration is especially important in immigration law because of concerns about the state of the administrative adjudication system and because the Supreme Court has consistently mandated new interpretations of deportation statutes.

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

The proposed policy position advocates for the elimination of the post-departure bar to asking the agency to reopen or reconsider a deportation case. Those outside the United States would be treated uniformly as those filing such motions from within the United States.

4. Summary of Minority Views or Opposition

None to date
RESOLVED, That the American Bar Association urges Congress to:

(1) Amend the Lobbying Disclosure Act (LDA) by:

(a) eliminating the current threshold language under which a lobbying firm or organization need not register under the LDA unless it employs a person whose lobbying activities constitute twenty percent or more of the time that he or she spends in working for a particular client during a quarterly period;

(b) requiring LDA registrants and their clients to disclose in quarterly reports the lobbying support activities in which they have engaged, as well as the lobbying support activities performed by firms that they have retained, including strategy, polling, coalition building, and public relations activities;

(c) requiring on quarterly reports the identification of (i) individuals principally involved in lobbying support activities, as well as (ii) individuals with any level of involvement in such activities who have recently served as high-ranking federal officials; and

(d) requiring LDA registrants to disclose on quarterly reports all congressional offices, congressional committees, and federal agencies and offices contacted by lobbyists employed by those registrants.

(2) Provide that a federally registered lobbyist may not:

(a) lobby a member of Congress for whom he or she has engaged in campaign fundraising during the past two years;

(b) engage in campaign fundraising for a member of Congress whom he or she has lobbied during the past two years;

(c) make or solicit financial contributions to the reelection campaign of a member of Congress whom the lobbyist has been retained to lobby for an earmark or other narrow financial benefit; or

(d) enter into a contingent fee contract with a client to lobby for an earmark or other narrow financial benefit for that client.
(3) Transfer authority to enforce the LDA to a suitable administrative authority and empower that agency to utilize appropriate tools such as rulemaking, investigation, and imposition of civil or administrative penalties.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

The resolution urges Congress to update and strengthen federal lobbying laws by requiring fuller reporting of lobbying activities, forbidding certain conflicts of interest, and providing for more effective enforcement of the Lobbying Disclosure Act of 1995 (LDA).

2. **Summary of the Issue that the Resolution Addresses**

Statutory limits on the scope of the LDA leave much lobbying activity unreported. Moreover, the practice of lobbying is often intertwined with fundraising for political campaigns or other conflicts of interest. In addition, the enforcement structure of the LDA is inadequate to ensure broad compliance with the Act.

3. **Please Explain How the Proposed Policy Position will address the issue**

The resolution urges Congress to amend the LDA so that more lobbyists will be obliged to register and their reports will be more informative. It also seeks to separate the practice of lobbying from solicitation of political contributions, as well as to forbid political contributions and contingent fee contracts when a lobbyist seeks an earmark or other narrow financial benefit for a client. In addition, the resolution urges Congress to entrust enforcement of the LDA to an administrative agency and to confer appropriate powers upon that agency.

4. **Summary of Minority Views**

No minority or opposing views are known to exist. An earlier version of the resolution was revised to address concerns voiced from within the Tax Section.
RESOLVED, That the American Bar Association urges the U.S. Sentencing Commission to complete a comprehensive assessment of the guidelines for child pornography offenses to ensure that those guidelines are proportional to offense severity, and adequately take into consideration individual culpability and circumstances.
EXECUTIVE SUMMARY

A. Summary of Resolution.

The recommendation calls for a rigorous assessment to the sentencing guidelines used in cases involving child pornography charges, to ensure proportionality between the offence committed and the guideline sentence.

B. Issue Resolution Addresses.

The recommendation addresses the need for the United States Sentencing Commission to perform a rigorous and comprehensive assessment of the federal guidelines related to child pornography cases.

The goal of the recommended assessment is to uncover and address any and all issues relating to the proportionality of sentencing between cases involving simple possession of child pornography and cases involving for profit production, distribution and trafficking of child pornography.

C. How Proposed Policy Will Address the Issue.

The recommendation would hopefully lead to reform of the guidelines to better reflect true culpability factors and to eliminate unwarranted disparity in the form of treating all offenders with extreme severity without regard to the individual circumstances of their offenses.

D. Minority Views or Opposition.

There is no known opposition.
RESOLVED, That the American Bar Association adopts the “Key Requirements for the Certification of Correctional Accrediting Entities,” dated August 2011.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial, and local governments to require that public and private facilities in which adults or juveniles are confined for violations or alleged violations of criminal, juvenile, or immigration laws be accredited by one or more federally-certified accrediting entities.

FURTHER RESOLVED, That the American Bar Association urges the federal government to:

1. enact legislation requiring a prohibition on the use of federal funds or the awarding of federal contracts to support, in whole or in part, public and private facilities in which adults or juveniles are confined for violations or alleged violations of criminal, juvenile, or immigration laws unless those facilities have been accredited by a federally certified accrediting entity;

2. grant certification to correctional accrediting entities only if they meet specified criteria, including those set forth in the “Key Requirements for the Certification of Correctional Accrediting Entities;” and

3. provide technical assistance and training to facilitate the establishment of certified accrediting entities that meet the above requirements.
KEY REQUIREMENTS FOR THE CERTIFICATION
OF CORRECTIONAL ACCREDITING ENTITIES
(August 2011)

1. Accreditation standards must, at a minimum, ensure correctional and detention facilities’
compliance with constitutional and other legal requirements, protect the life, health,
safety, and human dignity of prisoners and correctional staff, protect and promote public
safety by facilitating prisoners’ successful reintegration into their communities, and
comply with the related ABA Standards designed to achieve these objectives.

2. Accreditation standards must require that a facility’s policies, procedures, and practices
comply with the standards.

3. The accrediting entity must have adequate safeguards in place to ensure that its
accreditation standards meet and continue to meet the minimum thresholds for
certification and that there is transparency, accountability, and public input in the process
through which accreditation standards are established and revised. These safeguards
must include, at a minimum, the following:

   a. A requirement that correctional officials constitute no more than half of the
      members of the committee that approves and defines the accrediting entity’s
      accreditation standards.

   b. A requirement that proposed changes to accreditation standards undergo a
      rigorous internal and external review to ensure that they comport with legal
      requirements, do not jeopardize the life, health, safety, or human dignity of
      prisoners or correctional staff, do not impede prisoners’ successful reintegration
      into their communities, and comply with the related ABA Standards designed to
      achieve these objectives.

   c. A requirement that the public be notified of, and have an opportunity to comment
      on, proposed standards and standard revisions. Proposed changes to accreditation
      standards must be publicly posted on the accrediting entity’s website at least
      ninety days before a scheduled meeting to deliberate on the proposed changes.

   d. A requirement that notification about proposed standards and standard revisions is
      also disseminated to entities and individuals who register with the accrediting
      entity. This notification must occur at least ninety days before a scheduled
      meeting to deliberate on the proposed changes.

   e. A requirement that written comments received regarding a proposed change to
      accreditation standards be posted publicly on the accrediting entity’s website and
      be distributed to the members of the standards-setting committee at least two
      weeks before the scheduled meeting to deliberate on the proposed change.
f. A requirement that adequate time be reserved at meetings of the standards-setting committee for interested parties to appear in person and provide comments regarding proposed changes to accreditation standards.

4. The accrediting entity must have adequate safeguards in place to protect its independence when auditing facilities and the reliability of preliminary audit findings and to ensure that there is transparency and accountability in the auditing process. These safeguards must include, at a minimum, the following:

a. Accreditation auditors must be well-trained by the accrediting entity to assess accurately a facility’s compliance with the accreditation standards, committed to enforcing the accreditation standards, free of conflicts of interest, and certified as auditors by the accrediting entity upon meeting defined criteria designed to ensure that they meet the above requirements.

b. Audit teams should be composed of a sufficient number of auditors, appropriate to the size and complexity of the facility being audited, to complete an accurate and thorough assessment of a facility’s compliance with the accreditation standards. At least one member of an audit team should not be, or have ever been, employed by a correctional agency.

c. The accreditation auditors must use a variety of means to gather and substantiate facts, including, but not limited to, observations, confidential interviews with line staff and inmates selected by the auditors, other mechanisms to receive confidential feedback from line staff and inmates, document and record reviews, reports, statistics, court findings, and performance-based outcome measures.

d. Accreditation audits must last long enough to permit auditors to produce accurate and complete preliminary factual findings regarding a facility’s compliance with each accreditation standard. Accreditation audit reports should not include recommendations regarding whether a facility should be accredited.

e. Accreditation audit reports must include the dissenting findings of auditors who disagree with the reported factual findings of a majority of the audit team.

f. Subject to reasonable security requirements as determined by the accrediting entity, accreditation audit reports must be made public and be accessible through the accrediting entity’s website at least forty-five days before the hearing regarding a facility’s accreditation or reaccreditation. The audited facility must be afforded an opportunity to review and respond to the audit findings prior to their release, and the facility’s response must be publicly posted with the audit findings.

g. The accrediting entity must have a mechanism in place that enables other written comments to be submitted to the accrediting entity about an audit report and the accuracy of its findings a minimum of two weeks before an accreditation hearing
and must require consideration of those comments by the accreditation decisionmaker.

5. The accrediting entity must have adequate safeguards in place to protect its independence and the reliability of its accreditation-related decisions and ensure that there is transparency and accountability in the process through which accreditation decisions are made. These safeguards must include, at a minimum, the following:

a. A requirement that correctional officials constitute no more than half of the members of any panel of accreditation decision-makers.

b. A requirement that the accreditation decision-makers be well-trained by the accrediting entity to assess accurately a facility’s compliance with the accreditation standards, committed to enforcing those standards, and free of conflicts of interest.

c. A requirement that accreditation hearings last long enough, and adhere to the procedures needed, to produce accurate and complete final findings regarding a facility’s compliance with accreditation standards and its eligibility for accreditation.

d. The adoption of steps to enforce the obligation of facility and other officials to provide the accrediting entity with the facts needed to make accurate accreditation-related findings and decisions.

e. Protection of individuals from retaliation and threats of retaliation for submitting information to the accrediting entity.

f. A requirement that the accreditation-related decisions of the accrediting entity regarding a particular facility be made public and be accessible through the accrediting entity’s website no later than thirty days after the accreditation hearing. This published report must include the findings and decisions regarding a facility’s compliance with particular accreditation standards; the decision whether to accredit and, if so, on what, if any, conditions; and any dissenting findings and conclusions.

g. A three-year limit on an accreditation award’s duration.

h. The adoption of steps and maintenance of records to verify an accredited facility’s continued compliance with accreditation requirements during the accreditation cycle.

i. A requirement that the accrediting entity conduct interim inspections of an accredited facility during the accreditation cycle when the accrediting entity has reasonable grounds to believe that the facility is in noncompliance with a standard
designed to protect the life, health, or safety of prisoners or correctional staff.

j. The adoption of steps to ensure that documentation regarding a facility’s compliance or noncompliance with accreditation requirements is preserved for ten years.

6. The accrediting entity must be adequately funded and staffed.
EXECUTIVE SUMMARY

1. Summary of the resolution
   The resolution urges:
   (1) adoption of a set of “Key Requirements for the Certification of Correctional Accrediting Entities;
   (2) governments to require that public and private facilities confining adults or juveniles for violations or alleged violations of criminal, juvenile, or immigration laws be accredited by federally certified accrediting entities;
   (3) Congress to condition federal funding and federal contracts for such facilities on accreditation by federally certified accrediting entities that meet specified “Key Requirements for the Certification of Correctional Accrediting Entities;” and to facilitate the creation of eligible accrediting entities.

2. Summary of the issue which the resolution addresses
   Prisons, jails, juvenile detention centers, and other facilities in which individuals are confined for violations or alleged violations of criminal, juvenile, or immigration laws are singular in terms of their insulation from public view. This results in complacency and even indifference about correctional operations and conditions which in many instances fall well below minimal standards recognized by correctional, health, legal, and human rights experts.

3. How the proposed policy position will address the issue
   Requiring meaningful accreditation of correctional facilities by federally-certified accrediting agencies is expected to bring transparency and accountability to correctional facilities and result in addressing deficiencies impacting on the life, health, safety, and human dignity of correctional staff and prisoners. To ensure that the accreditation is meaningful, certification would only be granted to accrediting entities that themselves meet certain safeguards and standards regarding development of accreditation criteria, the independence of audits, and the independence and accuracy of accreditation-related decisions. Tying federal funding to accreditation by a certified accrediting entity is expected to encourage facilities to seek accreditation and meet its requirements.

4. Minority views or opposition
   None known
RESOLVED, That the American Bar Association urges the Bureau of Prisons, the U.S. Marshals Service, Immigration and Customs Enforcement, and state, tribal and local correctional authorities to develop and implement gender-responsive needs assessments that account for women’s specific needs, including parenting responsibilities, the importance of their relationships, their histories of domestic violence and abuse, and their distinctive patterns and prevalence of mental health issues.

FURTHER RESOLVED, That the American Bar Association urges that these needs assessments link women to appropriate gender-responsive programming, including programs targeted to address parenting responsibilities, women’s histories of domestic violence and abuse, their distinctive patterns and prevalence of mental health issues, substance abuse and its co-occurrence with trauma and mental health issues.

FURTHER RESOLVED, That the American Bar Association urges that correctional authorities revise security risk assessments to avoid overclassification of women and to reflect actual security risk by using only predictive static and dynamic gender-neutral risk factors, setting scale cut-off points, and designing custody classification systems that fit agency missions.

FURTHER RESOLVED, That the American Bar Association urges that correctional authorities address additional causes of female overclassification, where present, by training correctional officers on how to work with female inmates, redefining the meaning of “maximum custody” for female prisoners, and transitioning the majority of female inmates to a community correctional paradigm.
EXECUTIVE SUMMARY

1. Summary of the Resolution
Urges governments to develop and implement in their correctional systems gender-responsive needs assessments and programming that recognize women’s strengths and needs, histories of domestic violence and abuse, and mental health issues. It also urges correctional authorities to revise security risk assessments to reflect actual security risks of females and to take specified steps to address additional causes of female over-classification.

2. Summary of the Issue that the Resolution Addresses
The resolution addresses problems in correctional classification, risk assessments, and programming particular to female inmates.

3. Please Explain How the Proposed Policy Position will Address the Issue
By identifying characteristics and needs of female inmates that vary from those of their male counterparts and urging that these characteristics and needs be recognized by correctional facilities, the resolution will encourage appropriate classification, risk assessments, and programming of women in the traditionally male-focused correctional system.

4. Summary of Minority Views
None known.
RESOLVED, That the American Bar Association urges federal, state, territorial and tribal
governments to adopt disclosure rules requiring the prosecution to seek from its agents and to
timely disclose to the defense before the commencement of trial all information known to the
prosecution that tends to negate the guilt of the accused, mitigate the offense charged or
sentence, or impeach the prosecution’s witnesses or evidence, except when relieved of this
responsibility by a protective order.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and
tribal governments to adopt disclosure rules requiring the prosecution to make timely disclosure
to the defense before a guilty plea of all information, which may include impeachment evidence,
known to the prosecution that tends to negate the guilt of the accused or mitigate the offense
charged or sentence, except when relieved of this responsibility by a protective order.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges state and federal legislation and/or codification of disclosure rules in state and federal courts to require:

(3) the prosecution to seek from its agents and to make timely disclosure to the defense before the commencement of a trial, all information known to the prosecution that tends to negate the guilt of the accused, mitigate the offense charged or sentence, or impeach the prosecution’s witnesses or evidence, except when relieved of this responsibility by a protective order.

(4) the prosecution to make timely disclosure to the defense before a guilty plea of all information, which may include impeachment evidence, known to the prosecution that tends to negate the guilt of the accused or mitigate the offense charged or sentence, except relieved of this responsibility by a protective order.

2. Summary of the Issue that the Resolution Addresses

The Department of Justice does not have a uniform practice as to the timing or scope of Brady and Giglio disclosures. There are wildly different policies in the local United States Attorney Offices and, on occasion, amongst Assistant United States Attorneys in a particular office. Over the years, scholars have identified three major areas of disparities in disclosure policies: (1) the timing of disclosure, (2) the scope of disclosure and (3) the understanding of the materiality requirement. These disparities exist in both the federal and various states’ criminal justice systems.

The varied definitions of a prosecutor’s disclosure obligations have resulted in confusing and differing disclosure practices rather than a uniform standard for the scope of disclosure. While some jurisdictions impose a legal obligation to provide “exculpatory and impeachment evidence,” others impose an obligation to provide “favorable” evidence or favorable “information.” Nearly fifteen states require the prosecution to disclose “favorable” evidence or information regardless of whether the defense has filed a request or motion. Most of these states define “favorable” as some form of evidence that “tends to negate guilt” – a standard echoed in the rules of professional conduct for prosecutors. Some local and state jurisdictions interpret “favorable” more broadly than exculpatory or impeaching evidence, leaving the disclosure decision to individual prosecutors.

In addition, the absence of reported Brady violations does not prove they are infrequent. The absence of published Brady violations has no necessary empirical correlation with the number of Brady violations that actually occur. Rather, the absence of published Brady violations could just as easily be cited to prove that most Brady violations remain undiscovered. Defendants have generally no idea that their rights have been violated. The only situation in which a Brady violation is discovered is when the buried evidence
somewhat resurfaces through “alternate channels.” In that sense, *Brady* violations may not be rare; rather, they may just be secret.

3. **Please Explain How the Proposed Policy Position will Address the Issue**

In the absence of a clear definition of what constitutes *Brady* material, prosecutors around the country have utilized a myriad of different policy judgments about the nature and extent of favorable information to be disclosed to defendants. The varied definitions of a prosecutor’s disclosure obligations have resulted in confusing and differing disclosure practices rather than a uniform standard for the scope of disclosure. Even rare violations of *Brady* are intolerable. The stakes in a criminal case are simply too high to sanction even one isolated occurrence of *Brady* violation.

A clearly defined and codified disclosure standard would help eliminate the pitfalls of the current system where there is a multiplicity of disparate interpretations of the *Brady* obligation by both state and federal prosecutors.

4. **Summary of Minority Views**

The Department of Justice’s recurring justifications for opposing any amendment to Rule 16 is that Brady Violations are too “anecdotal” to justify such a significant change. Alternative to the codification of law or an amendment to Rule 16, the Department urges training of their prosecutors based on the revised United States Attorney Manual (“USAM”) that took effect on October 19, 2006. The revised USAM, through adding a new disclosure section entitled, “Policy Regarding Disclosure of Exculpatory and Information,” mandates disclosure of exculpatory and impeachment evidence and information. Intending to address many of the proposed Rule 16 amendment’s concerns, the Department of Justice urges a required training based on this policy which could better create uniform practice as to the timing or scope of *Brady* and *Giglio* disclosures.
RESOLUTION

RESOLVED, That the American Bar Association urges the President and the Department of Defense to assure that there is an opportunity for public notice and comment with respect to the issuance of the rules for the periodic review of continued law of war detention cases required by the President’s Executive Order No. 13567, 76 Fed. Reg. 13277 (2011).
1. Summary of the Resolution

The resolution urges President Obama and the Department of Defense to assure that there is an opportunity for public notice and comment with respect to the issuance of the rules for the periodic review of continued law of war detention cases required by Executive Order No. 13567, 76 Fed. Reg. 13277 (2011).

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the rule for the periodic review of continued law of war detention cases.

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

The proposed policy position will address the issue in assuring that there is an opportunity for public notice and comment with respect to the issuance of the rules for the periodic review of continued law of war detention cases.

4. Summary of Minority Views

None identified.
RESOLVED, That the American Bar Association urges Congress, and all federal, state and territorial administrative bodies to continue efforts to expand the availability of home and community based services (HCBS) as a viable long term option by:

1. Making HCBS a mandatory service under Medicaid available to anyone who would otherwise qualify for institutional long-term care.
2. Providing comparable financial eligibility standards and procedures for nursing home care and HCBS.
3. Permanently mandating Medicaid spousal impoverishment protections for spouses of HCBS enrollees, as already exist for spouses of institutional long-term care.
4. Allowing Medicaid enrollees to retain sufficient income to pay their reasonable living expenses in the community.
5. Initiating and expanding other HCBS efforts to help people with disabilities of all ages to live with dignity in the community.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges all federal, state and territorial administrative bodies to continue efforts to expand the availability of home and community based services (HCBS) as a viable long term care option by:

- Making HCBS a mandatory service under Medicaid available to anyone who would otherwise qualify for institutional long-term care.
- Providing comparable financial eligibility standards and procedures for nursing home care and HCBS.
- Permanently mandating Medicaid spousal impoverishment protections for spouses of HCBS enrollees, as already exist for spouses of institutional long-term care
- Allowing Medicaid enrollees to retain sufficient income to pay their reasonable living expenses in the community.
- Initiating and expanding other HCBS efforts to help people with disabilities of all ages to live with dignity in the community.

2. Summary of the Issue that the Resolution Addresses

In 1999 the US Supreme Court in Olmstead v., L.C., et al., (527 US 581 (1999)), ruled that under the ADA Medicaid beneficiaries who desired it, had a right to receive home and community based care as an alternative to institutional care, as long as the request could be reasonably accommodated. Studies show that the majority of Americans prefer to receive care in their home. While progress has been made in making home and community based care available, significant obstacles persist limiting access to HCBS by low income Americans.

- First among the obstacles is the status of HCBS as an “optional waiver service” while institutional care is a mandatory core service that all participating states must provide under Medicaid to all eligible beneficiaries. As an optional waiver services states can and do impose capacity limits on HCBS, forcing persons needing long term care to enter inpatient long term care institutions, or forgo needed care while on waiting lists.
- Inconsistent financial rules result with persons with higher incomes being eligible for nursing home coverage under Medicaid, while being denied coverage for home and community based care.
- Medicaid spousal impoverishment provisions, applicable to nursing home care, protect the well spouse of a beneficiary by allowing the spouse to retain a higher level of savings and income than basic Medicaid eligibility rules require in order to prevent impoverishing the well spouse. This same protection is not uniformly available to beneficiaries receiving home and community based long term care services.
• Medicaid long term care beneficiaries pay a significant portion of their income toward the cost of care. The formulas used to calculate the patient liability in many states make it impossible for a home and community based services beneficiary to maintain a home in which to receive community-based care. While residents in inpatient settings may be able to meet personal needs with a tiny amount of their income, residents in the community need to be allowed to retain sufficient income to maintain a home and provide basic food, clothing and basic utilities. States are protected against excessive costs by the reasonableness analysis in the Olmstead decision allowing states to take the overall cost of care into consideration in determining the feasibility of providing community based care.

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

The proposed policy will make it possible for the ABA to urge continuation and improvements in programs and policies aimed at leveling the playing field between institutional long term care and home HCBS initiatives, by treating both forms of care equally in access and availability of services, eligibility for services, providing limited financial protections to spouses of HCBS that are equal to those of the spouses of institutional care recipients and allowing home and community based recipients to retain enough of their income to maintain a home in which to receive home and community based services.

4. Summary of Minority Views

None have been identified.
RESOLVED, That the American Bar Association urges the United States Department of Health and Human Services (‘the Department’), to ensure that all health care providers that participate in Medicare and Medicaid (hereafter “providers”) refrain from providing treatment not wanted by patients and seeking reimbursement for such treatment. Action by the Department should include:

1. Notice to (1) all state and federal entities that process or review Medicare or Medicaid claims or that regulate, monitor or enforce program utilization and quality, and (2) all health care providers that participate in Medicare or Medicaid, to explain providers’ legal obligations and limitations in providing treatment to adult patients, specifically that reimbursement cannot be requested for treatment in contravention of the expressed wishes of a competent adult, or the instructions in that person’s advance directive, or the lawful directions of that person’s legally authorized decision-maker.

2. A requirement that providers have procedures in place to ensure that the goals and wishes expressed by a competent adult patient regarding that patient’s treatment be respected.

3. Investigation of alleged provider violations of the above requirements and enforcement of corrective actions and sanctions as warranted.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls on the United States Department of Health and Human Services (through the Centers for Medicare and Medicaid Services or CMS) to take preventive and corrective action in response to evidence that some institutional and individual health care providers are violating their obligations under the Medicare and Medicaid Conditions of Participation (CoPs), thwarting the treatment wishes expressed by terminally ill patients, and seeking reimbursement for these practices.

2. Summary of the Issue that the Resolution Addresses

Evidence suggests that the above type of violation of the Medicare and Medicaid Conditions of Participation (CoPs) are due to both providers’ and institutions’ belief that their legal obligations to provide the standard of care and honor the expressed wishes of patients may be ignored without jeopardizing federal reimbursement for services provided contrary to patient wishes. Yet, insistence in providing unwanted treatment violates the conditions of participation, should not be deemed medically necessary, and is contrary to the intent of Patient Self-Determination Act.

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

Three steps are called for in the resolution:

- The first is the provision of a clarifying notice by the Department of Health and Human Services to both providers and those responsible for survey and certification and enforcement of the law to elucidate the legal obligations and limitations upon providers in delivering medical treatment to seriously or terminally ill patients, specifically with respect to reimbursement.
- The second step calls on the Department of Health and Human Services to establish a requirement that hospitals have procedures in place to ensure that the expressed wishes of terminally ill patients regarding care be respected. How best to do this is within the discretion of DHHS Centers for Medicare and Medicaid Services (CMS).
- The third step calls on the Department of Health and Human Services to investigate alleged violations of this rule and to enforce corrective actions and sanctions as warranted.

4. Summary of Minority Views

None have been identified.
RESOLVED, That the American Bar Association urges the United States Department of State and the United Nations and its member states to support the ongoing processes at the United Nations and the Organization of American States to strengthen protection of the rights of older persons, including the efforts and consultations towards an international and regional human rights instrument on the rights of older persons.
1. **Summary of the Resolution**
   This resolution calls on the U.S State Department and the United Nations and its members to support efforts towards strengthening the protections and rights of older persons, including consideration of an international and regional human rights instrument. As background and justification for this resolution, the report traces the movement toward an international convention on the rights of the older persons, and the recent national, international, and U.N. activities evaluating and promoting the need for such a convention.

2. **Summary of the Issue that the Resolution Addresses**
   In the first half of the 21st century, the number of persons over age 60 will increase from 10% to over 20% of the world’s population. Older persons in large numbers around the world too often are kept on the margins of society because of discriminatory views on aging. While there are a number of existing human rights conventions and mechanisms that offer some potential to promote and protect the rights of older persons, this potential is diluted by the lack of focus, depth, and consistency. Existing international instruments applicable to older persons generally address economic, social and cultural rights of populations in general and are interpretive and aspirational in nature, calling for progressive implementation. As such, they are “soft law”—that is, they lack sanctions for non-compliance or infringements. There is no comprehensive international instrument that adequately addresses the specific protections required for an aging society.

3. **Please Explain How the Proposed Policy Position will Address the Issue**
   The resolution supports a growing number of activities (described in the report) by member nations of the United Nations and non-governmental organizations supporting consideration of an international and regional human rights instrument on the rights of older persons. The American Bar Association brings a valuable set of skills and human rights values that can help guide upcoming developments.

4. **Summary of Minority Views**
   None have been identified.
RESOLVED, That the American Bar Association urges states to establish clearly articulated procedures for:

A. Judicial disqualification determinations; and

B. Prompt review by another judge or tribunal, or as otherwise provided by law or rule of court, of denials of requests to disqualify a judge.

FURTHER RESOLVED, That the American Bar Association urges states in which judges are subject to elections of any kind to adopt:

A. Disclosure requirements for litigants and lawyers who have provided, directly or indirectly, campaign support in an election involving a judge before whom they are appearing.

B. Guidelines for judges concerning disclosure and disqualification obligations regarding campaign contributions.

FURTHER RESOLVED, That the Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Professional Discipline should proceed on an expedited basis to consider what amendments, if any, should be made to the ABA Model Code of Judicial Conduct or to the ABA Model Rules of Professional Conduct to provide necessary additional guidance to the states on disclosure requirements and standards for judicial disqualification.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges states to establish clearly articulated procedures for judicial disqualification determinations and prompt review of denials of requests to disqualify. These procedures should be designed to produce prompt and transparent resolutions of judicial disqualification issues to include interlocutory reviews where appropriate.

2. Summary of the Issue that the Resolution Addresses

This Resolution addresses one of the most significant issues impacting the public’s trust and confidence in a fair, impartial and independent judiciary: the disqualification of a judge when the impartiality of the judge might reasonably be questioned either through specific conduct or the appearance of impropriety.

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

The proposed policy position will provide state judiciaries and legislatures with guidance and up-to-date information on a variety of options for improving judicial disqualification and recusal practices.

4. Summary of Minority Views

The Standing Committee on Judicial Independence continues a dialogue with the Standing Committee on Ethics and Professional Responsibility, the Standing Committee on Professional Discipline and the Judicial Division with regard to a few issues addressed in the Resolution and Report.
RESOLVED, That the American Bar Association affirms the principle of civility as a foundation for democracy and the rule of law and urges lawyers to set a high standard for civil discourse as an example for others in resolving differences constructively and without disparagement of others.

FURTHER RESOLVED, That the American Bar Association urges all lawyers, ABA member entities and other bar associations to take meaningful steps to enhance the constructive role of lawyers in promoting a more civil and deliberative public discourse.

FURTHER RESOLVED, That the American Bar Association urges all government officials and employees, political parties, the media, advocacy organizations, and candidates for political office and their supporters, to strive toward a more civil public discourse in the conduct of political activities and in the administration of the affairs of government.

FURTHER RESOLVED, That the American Bar Association supports governmental policies, practices, and procedures that promote civility and civil public discourse consistent with federal and state constitutional requirements.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution expresses the Association’s support for the principle of civility as a foundation for democracy and the rule of law, and encourages lawyers to set a high standard for, and to take “meaningful steps” to promote, a more civil public discourse. The resolution is composed of four parts: a statement of the principle of civil public discourse, a call to action for the legal profession, an appeal to those who work with government and the political process, and an authorization for ABA participation in the development of legal standards and practices that promote civil public discourse and are consistent with federal and state constitutional requirements.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the current state of our political discourse that has spiraled to unprecedented levels of acrimony and venom, thereby endangering not only the quality of decision making about important public issues, but also the very lives and safety of public servants and citizens. A true and free democratic society cannot long endure in such a toxic environment. It is time for lawyers as leaders in our society, and the ABA as the leader of leaders, to stand and take action.

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

The lack of civil discourse is a problem that lawyers are particularly well suited to help address. Lawyers are leaders throughout our society, and as such have a unique capacity to influence the character of public discourse through our own actions and the advice we give our clients and others who seek it. In its call to action, the resolution encourages all ABA entities, and all state, local, and specialty bar associations, and individual lawyers, to do what they can to elevate the level of political discourse by taking “meaningful steps” toward that end. By keeping the request general rather than specific, the resolution unleashes creativity, variety, and appropriateness in answering this call. While the resolution is no panacea, as lawyers we can make a difference, and a resolution by the ABA – as the largest lawyer association in the United States and the national voice of the legal profession – will encourage lawyers across the country to take leadership on this vital issue.

4. Summary of Minority Views

None at this time.
RESOLVED, That the American Bar Association urges federal, state, territorial, local, and tribal governments to enact legislation and support appropriate funding to protect sexual crime victims' rights by eliminating the substantial backlog of rape kits collected from crime scenes and convicted offenders; and

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial, local, and tribal governments to adopt policy and/or legislation supporting efforts to test every rape kit booked into police evidence, where testing may identify the unknown assailant, can confirm the presence of a known suspect's DNA, corroborate a victim's complaint or testimony, or exonerate innocent suspects.
EXECUTIVE SUMMARY

1. Summary of the resolution

The Recommendation supports authorization and funding of legislation that promotes protection of sexual crime victims’ rights by eliminating the substantial backlog of DNA samples collected from crime scenes and convicted offenders.

2. Summary of the issue which the resolution addresses

Sexual violence is an epidemic in our society with dramatic, negative effects on individuals, families and communities. Through the use of DNA technology and rape kit testing, law enforcement and prosecutors can gain forensic evidence to convict perpetrators of sexual abuse and exonerate persons wrongfully accused of such crimes. The authorization and funding of federal legislative grant programs will assist states in eliminating rape kit backlog by providing regimented timelines and increased personnel.

3. Explanation of how the proposed policy position will address the issue.

The proposed policy position will allow the ABA to act in support of authorization and funding of legislation, which will in turn provide essential leadership and resources to the national effort to eliminate the backlog of DNA rape kits.

4. Summary of any minority views or opposition which have been identified.

None to date.
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association approves the Revised Uniform Law on
2 Notarial Acts, promulgated by the National Conference of Commissioners on Uniform State
3 Laws in 2010, as appropriate legislation for those states desiring to adopt the specific substantive
4 law suggested therein.
EXECUTIVE SUMMARY

1. Summary of the resolution

That the ABA approves the Revised Uniform Law on Notarial Acts promulgated by the National Conference of Commissioners on Uniform State Laws in 2010, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the issue which the resolution addresses

The 2010 Revised Uniform Law on Notarial Acts (RULONA) comprehensively revises and replaces the earlier, 1982 Uniform Law on Notarial Acts (ULONA). Since the original promulgation of ULONA, society and technology have advanced considerably, requiring notarial officers and their practice to adapt. In particular, RULONA recognizes the ascendance of electronic commerce and transactions in the public and private sectors, and brings the law governing electronic notarial acts on par with laws governing other forms of electronic transactions. RULONA continues to focus on preservation of the integrity of the notarial transaction, whether tangible or electronic. References to the notarial seal are replaced with an “official stamp”, and RULONA provides for affixing an official stamp to a notarial certificate for tangible documents or logically associating it with an electronic one. RULONA provides minimal standards for commissioning notarial officers, and handles recognition of notarial acts from other states and certain foreign equivalents. Finally, the revised act addresses deceptive and fraudulent practices and advertising, transactions in which the notary or a spouse is a party or has an interest, and prohibitions on unauthorized practice of law.

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

Approval of the Revised Uniform Law on Notarial Acts by the House of Delegates would indicate to states that the Act is an appropriate mechanism for addressing the issues described above.

4. Summary of any minority views or opposition which have been identified

None known.
RESOLUTION

RESOLVED, That the American Bar Association approves the Uniform Collaborative Law Rules/Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2010, as appropriate legislation or rules for those states desiring to adopt the specific substantive law suggested therein.
EXECUTIVE SUMMARY

1. Summary of the resolution

That the ABA approves the Uniform Collaborative Law Rules/Act promulgated by the National Conference of Commissioners on Uniform State Laws in 2010, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the issue which the resolution addresses

The Uniform Collaborative Law Rules/Act, promulgated by the Uniform Law Commission in 2009 and amended in 2010, standardizes the most important features of collaborative law practice, mindful of ethical concerns as well as questions of evidentiary privilege. In recent years, the use of collaborative law as a form of alternative dispute resolution has expanded from its origin in family law to other areas of law, including insurance and business disputes. As the practice has grown it has come to be governed by a variety of statutes, court rules, formal, and informal standards. A comprehensive statutory framework is necessary in order to guarantee the benefits of the process and to further regulate its use. The Rules/Act encourages the development and growth of collaborative law as an option for parties that wish to use it as a form of alternative dispute resolution.

The Rules/Act mandates the essential elements of disclosure and discussion between prospective parties in order to guarantee that all parties enter into the collaborative agreement with informed consent. The need for attorneys to provide clear and impartial descriptions of the options available to the party prior to deciding upon a course of action is stressed throughout the Rules/Act. Additionally, the Rules/Act mandates that the collaborative agreement contains the disqualification provisions that are essential to the collaborative process. The disqualification requirements create incentives for cooperation and settlement. By standardizing the collaborative process, the Rules/Act secures the benefits of collaborative law for the parties involved while providing ethical safeguards for the lawyers involved.

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

Approval of the Uniform Collaborative Law Rules/Act by the House of Delegates would indicate to states that the Act is an appropriate mechanism for addressing the issues described above.

4. Summary of any minority views or opposition which have been identified

This Resolution and Report are substantively the same as those filed for the February 2011 meeting of the House of Delegates. Representatives of the ABA Section on Litigation and the Tort Trial and Insurance Practice Section previously expressed opposition to the UCLR/A in the prior presentations to the House. Other sections and divisions expressed concerns, including representatives of the Judicial and Young Lawyers divisions. While it is anticipated that the 2010 amendments will address many of the stated concerns, we are unsure of the current position of these and other entities with respect to the Rules/Act as revised.
AMERICAN BAR ASSOCIATION

YOUNG LAWYERS DIVISION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges Congress to enact legislation that assists individuals who are experiencing financial hardship due to excessive levels of student loan debt but are not covered by the provisions of the student loan overhaul passed into law on March 30, 2010, by:

(1) Extending federal student-loan repayment terms and federal student-loan programs to individuals who borrowed from commercial lenders to fund their education in whole or in part;
(2) Establishing repayment terms for federal student loans that allow individuals to qualify for income-based repayment, consolidation, and other forms of loan repayment assistance;
(3) Creating loan forgiveness programs for public service lawyers similar to the Direct Loan Public Service Loan Forgiveness Program authorized by Congress for health care professionals in the Higher Education Opportunity Act (P.L. 110-315); and
(4) Raising or eliminating the income level associated with the federal income tax deduction for interest paid on qualifying student loans.

FURTHER RESOLVED, That the American Bar Association urges Commercial Lenders to assist individuals experiencing financial hardship due to excessive levels of student loan debt, by developing and implementing programs that:

(1) Extend federal student-loan repayment terms and federal student-loan programs (or comparable programs with comparable terms) to individuals who borrowed from commercial lenders to fund their education in whole or in part;
(2) Develop repayment terms for federal student loans that allow individuals to qualify for income-based repayment, consolidation, and other forms of loan repayment assistance;
(3) Provide loan forgiveness to public service lawyers similar to the Direct Loan Public Service Loan Forgiveness Program authorized by Congress for health care professionals in the Higher Education Opportunity Act (P.L. 110-315).
EXECUTIVE SUMMARY

1. Summary of the Resolution

Resolution 111A focuses on student loan reform and student loan repayment terms for federal student loan programs and private student loan programs. Resolution 111A seeks to extend federal student loan repayment terms to privately originated student loans. Moreover, Resolution 111A seeks greater opportunities for income based repayment terms, loan consolidation and other loan repayment assistance for private and federally based student loans. It also encourages loan forgiveness programs for public service lawyers and also encourages the elimination of the income level associated with the federal income tax deduction for interest paid.

2. Summary of the Issue that the Resolution Addresses

Resolution 111A addresses the underlying problems arising from excessive student loan debt which has plagued law students and former law students for the past ten to fifteen years. Excessive student loan debt has a major impact on graduates from law school. This debt can impact a graduate’s ability to enter public service, start a family, meet his or her basic financial needs and can even have an impact on the character and fitness criteria for admission to practice law. The use of student loans to finance education has become so pervasive that there is now more student loan debt than credit card debt in the United States. This debt has an extremely negative impact on a lawyer’s life and an overall reform is necessary to correct the situation.

3. Please Explain How the Proposed Policy Position will address the issue

To accomplish these objectives Resolution 111A encourages the American Bar Association to lobby Congress for federal loan reforms and to work directly with commercial lenders to provide meaningful and comprehensive student loan reform. The student loan system itself is fraught with confusion often resulting in terms and obligations on the part of the student. The resolution seeks an opportunity to work with Congress for federal loan reforms and to work directly with commercial lenders to provide reform. The resolution itself makes minimal specific revisions preferring however to allow some room for input to achieve student loan reform from Congress, other stockholders, students and other commercial lenders. The resolution is designed to require that the ABA continue to lobby on student loan issues until a more systematic and meaningful student loan reform is achieved.
4. **Summary of Minority Views**

The only dissenting opinion the American Bar Association Young Lawyers Division has encountered is concern that Resolution 111A does not go far enough to solve overall student loan debt issues. Concerns were raised by other ABA YLD members that Resolution 111A does not address system-wide problems which the minority felt would include, but not be limited to, reforming law school practices concerning student loans, capping law school tuition increases and other related issues which a minority felt were significant contributors to excessive student loan debt. Ultimately it was determined by the ABA YLD that this was a positive step towards meaningful student loan reform that could be accomplished independently of a greater system wide approach.
RESOLUTION

RESOLVED, That the American Bar Association urges all ABA-Approved Law Schools to report employment data that identifies whether graduates have obtained full-time or part-time employment within the legal profession, whether in the private or public sector, or whether in alternative professions and whether such employment is permanent or temporary.

FURTHER RESOLVED, That the American Bar Association urges all ABA-Approved Law Schools to include the above-referenced employment data, data on the actual cost of law school education on a per credit basis, and data on the average cost of living expenditures incurred while attending law school on their websites, in their catalogues, and in their acceptance notices sent to applicants for admission; alternatively, to include in each of these locations a prominently displayed notice of where one can obtain such data.

FURTHER RESOLVED, That the American Bar Association urges all ABA-Approved Law Schools to display data regarding graduates’ salaries on their websites that includes the median salaries for the state and region for graduates of all law schools, in a manner which protects the privacy of the graduates.

FURTHER RESOLVED, That the American Bar Association urges the Section of Legal Education and Admissions to the Bar to consider revising the Standards for Approval of Law Schools to require law schools to provide on their websites, and in other reasonable methods of communication, more data on employment and placement of graduates.

FURTHER RESOLVED, That the American Bar Association urges the Section of Legal Education and Admissions to the Bar to consider incorporation of the various provisions of this resolution in the Section’s Annual Questionnaires currently distributed to all ABA-Approved Law Schools.
EXECUTIVE SUMMARY

Summary of the Resolution.

This resolution is the first step towards achieving the goal of having law schools provide each and every potential and current law student with information that will accurately reflect the employment and financial realities that they will face upon graduation from law school. Those individuals entering our profession should have an accurate understanding of the employment opportunities and salaries available to recent law school graduates. There is a greater need for publicly available and accessible facts for prospective law school students, so that these individuals are able to make an informed decision regarding their futures.

Summary of the Issue(s) that the Resolution Addresses.

The ABA YLD strongly believes that there is a disconnect between law school students’ “perception” of their employment prospects upon completion of their law school education, and the “reality” of what law students will realistically achieve. The employment data reported by law schools should accurately identify the employment status of graduates, including whether such employment is full-time or part-time, whether the job is within the legal profession and whether such employment is permanent or temporary. This resolution calls for increased transparency in reporting employment data, graduate salaries and the “actual” cost of law school education, which includes tuition, books and living expenses.

Please Explain How the Proposed Policy will address the issue(s).

The proposed policy position will address the issues by urging all ABA-approved law schools to provide prospective and current law school students with detailed information regarding employment data, graduate salaries and the “actual” cost of law school education. This information will also be accessible on the law school’s website and publications, in addition to being included in acceptance notices sent to applicants for admission. Therefore, any prospective law school student will be able to make an informed decision on their law school education.

The resolution urges the Section of Legal Education and Admissions to the Bar to consider revising the Standards for Approval of Law Schools to require law schools to provide more data on employment, and information on placement of graduates on their websites. The resolution also urges the Section of Legal Education and Admissions to the Bar to incorporate the provisions of this resolution into the Section’s Annual Questionnaires currently distributed to all ABA-approved law schools.

Summary of Minority Views.

The ABA YLD has not identified any minority view or opposition to this resolution.
RESOLVED, That the American Bar Association urges the United States government to ensure that federally-recognized Indian tribes (Tribes) listed pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a, may participate fully (including, e.g. consideration for membership on United States delegations) in policy discussions on the issue of climate change domestically and in international fora;

FURTHER RESOLVED, That the American Bar Association urges the United States government to consult on a government-to-government basis with Tribes on climate change; and

FURTHER RESOLVED, That the American Bar Association urges the United States government to provide adequate and equitable financial and other support for Tribes to:

1. carry out measures such as mitigating climate change, reducing greenhouse gases, and promoting renewable energy and energy efficiency; and

2. adapt to direct impacts from climate and sea-level changes to their territorial and reservation land bases and resources, including, with the free, prior, and informed consent of Alaska Native villages imminently threatened by erosion and flooding, the development and implementation of plans for permanent relocation.
EXECUTIVE SUMMARY

1. Summary of the Resolution.

The American Bar Association (ABA) urges the United States to ensure that federally-recognized Indian tribes are heard on the issue of climate change. The ABA also urges the government to consult on a government-to-government basis with tribes on climate change and to provide financial and other support to tribes for carrying out mitigation and adaptation measures, including, with consent of the tribes, developing and implementing plans for relocating affected villages.

2. Summary of the Issue Which the Resolution Addresses.

Climate change is a global issue. Due to their location as well as their use of fish and other natural resources for subsistence and cultural and traditional practices, the 565 federally recognized Tribes in the United States are being disproportionately impacted by climate change. Unlike other environmental justice communities, Tribes possess inherent sovereignty, are self-governing entities, and have a special political status obligating the United States to deal with them on a government-to-government basis. The United States also has a trust responsibility to Tribes and must consult with Tribes on government-to-government basis on matters with tribal implications such as climate change.


Through this policy, the ABA will be able to play a more effective role in helping Tribes’ voices be heard on climate change domestically and in international climate change fora. The resolution will help ensure that Tribes and, perhaps in turn other Indigenous Peoples, have equitable opportunities to participate in international climate change fora. The resolution also will help ensure that Tribes receive equitable federal financial support and assistance for coping with climate change, including carrying out programs to reduce emissions of greenhouse gases and to promote energy efficiency and renewable energy and adapting to impacts of climate change being experienced by many tribal communities.

4. Summary of Any Minority Views or Opposition that Have Been Identified.

The resolution was circulated and discussed within the substantive committees and the Council of the Section of Environment, Energy, and Resources. Changes have been made in response to numerous comments and suggestions.
AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association opposes federal or state laws imposing blanket prohibitions on consideration or use by courts or arbitral tribunals of foreign or international law.

2 FURTHER RESOLVED, That the American Bar Association opposes federal or state laws imposing blanket prohibitions on consideration or use by courts or arbitral tribunals of the entire body of law or doctrine of a particular religion.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This Resolution opposes federal or state laws imposing blanket prohibitions on consideration or use of foreign or international law and the entire body of law or doctrine of a particular religion.

2. **Summary of the Issue that the Resolution Addresses**

   Over the last year or so, an increasing number of state constitutional amendments and legislative bills have been proposed seeking to restrict or prohibit, in varying degrees, state courts’ use of laws or legal doctrines arising out of international, foreign, or religious law or legal doctrines. Some such provisions have already been enacted, such as Tennessee’s “American and Tennessee Laws for Tennessee Courts” bill, which was signed into law on May 13 2010, and Oklahoma’s “Save Our State Amendment,” which was approved by a majority of the state’s voters on November 2, 2010, but which has not yet been certified due to a federal court’s preliminary injunction based on the likelihood of its unconstitutionality. In approximately 20 states, some form of legislation that would impact the use or consideration of international, foreign or religious law has been introduced or is being considered for introduction in the state legislatures.

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

   Legislation that bars courts from considering foreign or international law or the entire body of law of a particular religion impose unconstitutional burdens on various constitutional rights, threaten to impinge American commercial interests, and are unnecessary additions to existing law. The Policy would oppose the enactment of such laws.

4. **Summary of Minority Views**

   Many of these legislative initiatives are aimed, either explicitly or implicitly, at Islamic or Sharia law. Some well-publicized decisions have understandably raised concerns. For instance, a trial court in New Jersey ruled that a husband, who was a Muslim, lacked the criminal intent to commit sexual assault upon his wife because “his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited.” Others have observed that certain Sharia rules governing divorce, child custody, and inheritance, as applied in certain jurisdictions or interpreted in certain schools of Islamic thought, may discriminate against women in ways that would not be sanctioned by -- and indeed would often be illegal under -- the laws of this country.
Yet that very fact highlights the point that these anti-Sharia initiatives are duplicative of safeguards that are already enshrined in federal and state law. American courts will not apply Sharia or other rules (real or perceived) that are contrary to our public policy, including, in particular, rules that are incompatible with our notions of gender equality. Indeed, the New Jersey trial court decision referenced above was reversed by the Superior Court of New Jersey, which “soundly rejected” the lower court’s “perception that, although defendant's sexual acts violated applicable criminal statutes, they were culturally acceptable and thus not actionable.” S.D. v. M.J.R., 417, 2 A.3d 412 (N.J. Super. 2010). In so ruling, the Court relied on long-standing precedent that the government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, “cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.” Id. at 437 quoting Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 885, 110 S.Ct. 1595, 1603, 108 L.Ed.2d 876, 889-90 (1990) (holding that the Free Exercise Clause did not require Oregon to exempt the sacramental ingestion of peyote by members of the Native American Church from Oregon's criminal drug laws).

While legislative initiatives that target specified conduct may be proper even if they run counter to the principles of a particular religion, such initiatives that target an entire body of religious doctrine or stigmatize an entire religious community, such as those explicitly aimed at “Sharia law,” are inconsistent with the core principles and ideals of American jurisprudence.
RESOLUTION

RESOLVED, That the American Bar Association urges Congress to fund U.S. participation in capital increases and replenishments for the World Bank, the Inter-American Development Bank, the African Development Bank, and the European Bank for Reconstruction and Development.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This recommendation urges Congress to fund U.S. participation in capital increases and replenishments for the World Bank, the Inter-American Development Bank, the African Development Bank, and the European Bank for Reconstruction and Development.

2. Summary of the Issue that the Resolution Addresses

While the increased lending, technical assistance, and grants the multilateral development banks provided to developing countries during the global recession have facilitated the recovery of the world economy, they have also depleted the capital reserves of the World Bank, Inter-American Development Bank, African Development Bank, and European Bank for Reconstruction and Development. In order to safeguard their achievements in economic development and the rule of law, the ABA urges Congress to fund U.S. participation in capital increases and replenishments for these multilateral development banks.

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

If the general capital reserves of these multilateral development banks are not replenished, the ability of the World Bank, the Inter-American Development Bank, the African Development Bank, and the European Bank for Reconstruction and Development to maintain pre-crisis levels of development lending will be severely jeopardized. Each general capital increase request has been accompanied by a comprehensive reform strategy to ensure more efficient, transparent, and accountable use of funds. As the largest stakeholder in all but one of the multilateral development banks, the United States is uniquely positioned to leverage its efforts to support the rule of law and economic expansion and stability around the world through support for these capital increases and replenishments.

4. Summary of Minority Views

None of which we are aware.
RESOLVED, That the American Bar Association urges states and territories to provide that predictive and diagnostic medical genetic testing provided on-line, via the telephone, or by any other direct-to-consumer means constitutes the practice of medicine and are held to the same standards of care as that provided in traditional medical settings; and

FURTHER RESOLVED, That the American Bar Association urges states and territories to take steps to protect their citizens from the potential adverse effects of direct-to-consumer medical genetic testing. Such steps should include, at a minimum, requiring web sites that offer medical genetic tests such as those purporting to predict adverse reactions to medications, estimate susceptibility to various genetic and multifactorial disorders, and diagnose genetic or predominantly genetic conditions to document that:

1. Patients are fully informed of the scientific evidence on which the test is based, the clinical utility of the test results, if any, and what the test is likely to disclose – and not disclose—regarding the health status of the patient and his or her family members;

2. Tests are performed only upon the order of an appropriately licensed and knowledgeable physician who has a physician-patient relationship with the patient and has obtained informed consent, and results are reported only to that physician or an appropriately-trained genetics professional;

3. Tests are conducted only in licensed laboratories certified under the Clinical Laboratory Improvement Amendments of 1988 to perform the specific tests requested;

4. Tests performed and the results disclosed adhere to professional standards of medical care;

5. Patients are advised regarding potential disclosure of their medical and other personal information; and

6. Appropriate security measures are in place to protect patient privacy.

FURTHER RESOLVED, That the American Bar Association urges the Federal Trade Commission and the Food and Drug Administration to develop guidelines to ensure that the claims made and information provided by direct-to-consumer medical genetic testing companies are truthful and not misleading, and to take action against companies that make false or misleading claims about direct-to-consumer medical genetic testing.
EXECUTIVE SUMMARY

1. Summary of the Resolution:

The Resolution calls for the American Bar Association to urge all states and territories to enact legislation and promulgate regulations requiring that genetic tests must be ordered by, and the test results disclosed to, the patient’s physician; patients are fully informed of the potential medical information that will and will not be provided; tests are conducted by licensed laboratories appropriately certified to perform the tests; all testing policies and procedures conform to applicable standards of medical care; and specific patient authorization is required prior to disclosure of patient test results or other personal medical information. It also calls for the Association to urge the appropriate federal agencies to develop and enforce regulations prohibiting false and misleading claims by direct-to-consumer genetic testing providers.

2. Summary of the issue which the resolution addresses:

A growing number of web-based companies are offering to provide consumers with medical genetic test results that “predict” their risk of developing genetic diseases as well as more common and multi-factorial disorders such as asthma, diabetes, heart disease and various types of cancer. Recent reports, however, including a report by the GAO, have documented that these test results and the predictions based on them are often unreliable, overstated, or simply wrong. Moreover, medical genetic information provided to consumers without interpretation by knowledgeable clinicians can cause anxiety, lead to undertaking unnecessary medical procedures or foregoing necessary therapy, and use up valuable health care resources.

3. An explanation of how the proposed policy position will address the issue:

The proposed policy will encourage states and territories, as well as the federal government, to develop and enforce laws regulating direct to consumer medical genetic testing as the practice of medicine.

4. A summary of any minority views or opposition which have been identified:

None have been identified.
RESOLVED, That the American Bar Association supports federal, state, territorial and local laws that give law enforcement authorities broad discretion to determine whether a permit or license to engage in concealed carry should be issued in jurisdictions that allow the carrying of concealed weapons, and opposes laws that limit such discretion by mandating the issuance of a concealed carry permit or license to persons simply because they satisfy minimum prescribed requirements.

FURTHER RESOLVED, That the American Bar Association opposes federal legislation that would force states to recognize permits or licenses to carry concealed weapons issued in other states.
EXECUTIVE SUMMARY

1. Summary of the Resolution:

This resolution urges jurisdictions that allow the carrying of concealed weapons to grant broad discretion to law enforcement authorities to determine whether a permit or license should be issued and opposes legislation that would limit such discretion by requiring issuance of a license or permit to persons simply because they satisfy minimum prescribed requirements. The resolution also opposes federal legislation that would force states to recognize permits or licenses to carry concealed weapons issued in another state.

2. Summary of the issue which the resolution addresses:

The issue is whether law enforcement authorities should have the authority to reject an application for a permit or license to carry a concealed weapon by a person who poses a threat to society. Over the last 20 years, many states that allow the carrying of concealed weapons have shifted from a discretionary standard that gave law enforcement this authority, consistent with various statutory factors, to a more mandatory scheme. Under the latter approach, law enforcement authorities must issue permits to anyone who meets minimal statutory authority, making permits dangerously easy to acquire. Witness, for example, the Tucson shooting where the perpetrator was, under state law, a legal carrier of a concealed weapon notwithstanding his previous threatening behavior that caused him to be expelled from a local community college and be rejected for military service. This change from discretionary to mandatory issuance of permits poses a threat to public safety which is addressed by this resolution.

3. An explanation of how the proposed policy position will address the issue:

This Resolution is consistent with previous ABA polices related to gun control. It does not propose a ban on gun ownership and possession but focuses on reasonable regulations to promote public safety. Under the Resolution, the ABA is urging all jurisdictions that currently have, or are considering, carrying concealed weapon legislation to provide law enforcement discretion in issuance of permits or licenses. Similarly, the Resolution opposes any federal law that would force one jurisdiction to recognize a license or permit to carry a concealed weapon issued in another state. To do so would undermine an individual state’s authority to regulate the carrying of concealed weapons based upon its public safety concerns.

4. A summary of any minority views or opposition which have been identified:

No minority views or opposition have been identified.
RESOLUTION

RESOLVED, That the American Bar Association urges all lawyers to regularly assess their practice environment to identify and address risks that arise from any natural or manmade disaster that may compromise their ability to diligently and competently protect their clients’ interests, and maintain the security of their clients’ property.

FURTHER RESOLVED, That the American Bar Association urges state, territorial, local, tribal, and specialty bar associations to create committees dedicated to emergency management planning and response.
EXECUTIVE SUMMARY

1. Summary of the Resolution:

This policy urges lawyers to regularly assess their environments to determine risks that may arise from natural or manmade disasters, and to take steps to address or ameliorate them so that they may diligently and competently protect their clients’ interests and maintain the security of their clients’ property.

The resolution further urges state and local bar associations to create standing or permanent committees to address disaster planning and response and to work collaboratively with federal, state, regional and local legal institutions, social services, and emergency management agencies as part of a community wide effort to prepare for, mitigate, respond to and recover from disasters.

2. Summary of the issue which the resolution addresses:

Throughout the country there is a general failure of individuals and business to prepare for disasters, and lawyers and law firms are no exception. Such failures, as a practical matter, may have devastating consequences on a lawyer/firm’s survival should a significant disaster strike. But even if the disaster is small and contained, it may adversely affect a lawyer’s ability to diligently and competently represent a client and preserve the client’s property. Accordingly, this resolution urges lawyers to proactively assess risks that may arise from a disaster and take steps to address.

Increasingly, throughout the emergency management community, there is recognition that disaster planning, response and recovery can not be done by the public sector alone. There is a general calling by the U.S. Department of Homeland Security, and others, for more private sector involvement, and this resolution urges state and local bar associations to be part of a community wide effort to plan for, respond to, and recover from disasters.

3. An explanation of how the proposed policy position will address the issue:

The policy will address this issue by directly appealing to all lawyers to assess and prepare for disasters. Whereas disasters are an ever present fact of life this effort must be done regularly; it is not a one time event. Accordingly, the policy urges the creation of standing or permanent disaster committees by bar associations so that it may share information with its members and participate in community wide planning, response, and recovery efforts.

4. A summary of any minority views or opposition which have been identified:

None have been identified.
RESOLVED, That the American Bar Association supports the continued application by courts of the following legal principles to determine if an issued patent claim meets the definiteness requirement under 35 U.S.C. section 112, second paragraph—

(1) A claim meets the requirement if a person of ordinary skill in the art would understand what is claimed;

(2) The determination of definiteness depends on whether the issued patent claim in question can be construed by a court to the extent necessary to resolve any real and concrete dispute between the parties regarding infringement or invalidity.

(3) That use of relative language or words of degree in an issued patent claim does not itself render a patent claim indefinite;

(4) That application of different definiteness standards in the Patent Office for determining patentability and in the courts for determining validity do not conflict given the different nature of proceedings involving issued patents as compared with pending applications; and

(5) That an issued patent claim that is amenable to more than one reasonable construction is not indefinite if a court, by applying established principles of claim construction, can reasonably choose one of those possible constructions to resolve any real and concrete dispute between the parties regarding infringement or invalidity.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution calls for the Association to adopt policy supporting the continued application by courts of certain enumerated legal principles to determine if an issued patent claim meets the legal requirements for definiteness as set out in section 112 of title 35, United States Code.

2. Summary of the Issue that the Resolution Addresses

Federal courts, in particular the U.S. Court of Appeals for the Federal Circuit to which all patent appeals are directed, have developed detailed rules for determining if a patent is described in sufficient detail and definiteness in a patent claim to meet the statutory requirements set out in the Patent Act. (section 112 of title 35, United States Code.). Accused infringers frequently defend against suits for infringement by asserting that a claim in a patent issued by the U.S. Patent and Trademark Office (USPTO) is invalid by reason of being described in insufficient definiteness in a claim or claims of the patent. The litigation that prompts this resolution involves such a challenge to long-standing patent law jurisprudence.

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

The policy identifies and supports the continued application by courts of principles for determining if a claim in an issued patent is stated with sufficient definiteness to serve the purposes of (1) providing notice to the public of scope of the claimed invention and what constitutes infringement of the patent, and (2) providing a sufficient measure of the claimed invention to allow the USPTO to determine if a patent should be granted. The principles include recognition that the analysis for definiteness to be employed by the Patent Office in reviewing an application for patent may be different than that employed by courts in reviewing a challenge to an issued patent claim, that a claim meets the requirements if a person of ordinary skill in the art would understand what is claimed, and that an issued claim that is capable of more than one construction is not indefinite if a court can reasonably choose a construction that will lead to the resolution of the issues of infringement and invalidity involved in the suit.

4. Summary of Minority Views

None known at this time.
RESOLVED, That the American Bar Association supports measures to improve access to
counsel for individuals in immigration removal proceedings and urges the Department of
Justice's (DOJ's) Executive Office for Immigration Review (EOIR) to:

(a) Develop regulations to strengthen the eligibility requirements for attorneys and agencies
that wish to be included on the EOIR pro bono service provider lists, and encourage
participation in pro bono services by qualified agencies and individuals;

(b) Conduct outreach to agencies in underserved locations to encourage them to seek
recognition and their qualified staff to seek accreditation from the Board of Immigration
Appeals (BIA), in order to provide competent legal services to meet the needs of the
immigrant populations.

FURTHER RESOLVED, That the American Bar Association urges the BIA to require that BIA-
recognized agencies:

(a) Provide free or low cost services based on the financial need of the individual receiving
services;

(b) Obtain IRS tax-exempt and “non-profit” corporate status;

(c) Employ an attorney and/or establish a mentoring/technical support relationship with a
legal support agency or a qualified attorney to provide adequate supervision and/or
support;

(d) Demonstrate that a meaningful portion of the agency’s budget comes from non-fee
sources of support;

(e) Require each of the agency’s accredited representatives to participate in a minimum of
two trainings on immigration law each year; and

(f) Ensure that individual accredited representatives are assigned only to those cases
appropriate to their level of skill and experience.

FURTHER RESOLVED, That the American Bar Association supports measures to combat the
unauthorized practice of immigration law (UPIL) and immigration practitioner fraud.
FURTHER RESOLVED, That the American Bar Association encourages federal, state, and local governments to adopt laws that:

(a) Create a private right of action for victims of UPIL or immigration practitioner fraud.

(b) Provide criminal penalties for engaging in UPIL or immigration practitioner fraud that would give federal and state authorities the right to investigate and prosecute those engaging in UPIL or immigration practitioner fraud.

FURTHER RESOLVED, That the American Bar Association urges the Department of Homeland Security (DHS) and Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) to make accommodations for victims of immigration practitioner fraud, including:

(a) Allowing the withdrawal without prejudice of submissions in cases in which a noncitizen can establish that his or her immigration filings were created or submitted by an individual engaged in UPIL or immigration fraud or alternatively, developing a means for submitting corrected filings which will supersede the documents previously filed.

(b) Allowing the U non-immigrant visa to be available for victims of immigration fraud who cooperate with federal, state, or local law enforcement, as well as state bars or EOIR, in the prosecution of those engaging in UPIL or immigration fraud.

(c) Developing a waiver of inadmissibility for individuals who face a bar to reentry after leaving the U.S. based on the erroneous advice of an individual engaged in UPIL or immigration fraud.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution, sponsored by the Commission on Immigration, addresses the issue of expanding and assuring the quality of representation for indigent noncitizens in immigration proceedings. It seeks to ensure the legitimacy and competence of service providers, while deterring fraud committed on this vulnerable population through the establishment of a private right of action and enhanced criminal penalties against those perpetrating immigration practitioner fraud. In addition, it would ameliorate the harm caused by fraud by allowing for withdrawal of improperly filed forms, pursuit of U visas for injured fraud victims, and allowing those people who have left the country due to incompetent advice to pursue immigration relief.

2. Summary of the Issue that the Resolution Addresses

The American Bar Association is deeply committed to ensuring fair treatment and access to justice under the nation’s immigration laws. ABA policy has consistently recognized the importance of representation in immigration cases where a lawyer can help a noncitizen understand and effectively navigate the complexities of the U.S. immigration system, a process that can be especially daunting and difficult where language and cultural barriers are present. Representation in immigration cases is often hindered by improperly trained advocates, and fraudulent representation. Actions can not only defraud this vulnerable population of their money, but fraudulent and incompetent filing can also cost individuals the right to pursue immigration relief to which they would have been entitled.

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

This resolution expands on the prior policy of enhanced representation and fairness by increasing the number of pro bono lawyers available, enhancing the competency of Board of Immigration Appeals (“BIA”)–recognized agencies; deterring the incidents of the Unauthorized Practice of Law (UPIL); and providing remedies for victims of immigration practitioner fraud including notario fraud. These changes will improve access to quality representation promises greater institutional legitimacy, smoother proceedings for courts, reduced costs to government associated with pro se litigants, and more just outcomes for noncitizens.

4. Summary of Minority Views

None to date.
RESOLVED, That the American Bar Association House of Delegates concurs in the action of
the Council of the Section of Legal Education and Admissions to the Bar in making amendments
dated August 2011, to the ABA Standards and Rules of Procedure for Approval of Law Schools:

1. Standard 512. STUDENT COMPLAINTS
2. Standard 306. DISTANCE EDUCATION
3. Standard 105. MAJOR CHANGE IN PROGRAM OR STRUCTURE
4. Rule 20. Major Change in the Organizational Structure of a Provisionally or
   Fully Approved Law School
5. Rule 24. Complaints Concerning Law School Non-Compliance with the
   Standards

Standard 512. STUDENT COMPLAINTS

(a) A law school shall establish, publish, and comply with policies with respect to handling
student complaints.
(b) A law school shall maintain a record of student complaints submitted during the most recent
accreditation period that directly implicate the school’s program of legal education and its
compliance with the Standards. The record shall include the resolution of the complaints.

Interpretation 512-1
A law school’s policies on student complaints must address, at a minimum, complaint
procedures, appeal rights and timelines.

Standard 306. DISTANCE EDUCATION

(a) A law school may offer credit toward the J.D. degree for study offered through distance
education consistent with the provisions of this Standard and Interpretations of this Standard.
Such credit shall be awarded only if the academic content, the method of course delivery, and the
method of evaluating student performance are approved as part of the school’s regular
curriculum approval process.
(b) Distance education is an educational process characterized by the separation, in time or
place, between instructor and student. It includes courses offered principally by means of:
technological transmission, including Internet, open broadcast, closed circuit, cable, microwave, or satellite transmission;

(2) audio or computer conferencing;

(3) video cassettes or discs; or

(4) correspondence.

(c) A law school may award credit for distance education and may count that credit toward the 45,000 minutes of instruction required by Standard 304(b) if:

(1) there is ample interaction with the instructor and other students both inside and outside the formal structure of the course throughout its duration; and

(2) there is ample monitoring of student effort and accomplishment as the course progresses.

(d) A law school shall not grant a student more than four credit hours in any term, nor more than a total of 12 credit hours, toward the J.D. degree for courses qualifying under this Standard.

(e) No student shall enroll in courses qualifying for credit under this Standard until that student has completed instruction equivalent to 28 credit hours toward the J.D. degree.

(f) No credit otherwise may be given toward the J.D. degree for any distance education course.

(g) A law school shall establish a process that is effective for verifying the identity of students taking distance education courses and protects student privacy. If any additional student charges are associated with verification of student identity, students must be notified at the time of registration or enrollment.

Interpretation 306-10
Methods to verify student identity as required in 306(g) include, but are not limited to: (i) a secure login and pass code; (ii) proctored examinations; and (iii) new or other technologies and practices that are effective in verifying student identity.

Standard 105. MAJOR CHANGE IN PROGRAM OR STRUCTURE

Before a law school makes a major change in its program of legal education or organizational structure it shall obtain the acquiescence of the Council for the change. Subject to the additional requirements of subsections (1) and (2), acquiescence shall be granted only if the law school establishes that the change will not detract from the law school’s ability to meet the requirements of the Standards.

(1) If the proposed major change is the establishment of a degree program other than the J.D. degree, the law school must also establish that it meets the requirements of Standard 308.
(2) If the proposed major change involves instituting a new full-time or part-time division, merging or affiliating with one or more approved or unapproved law schools, acquiring another law school or educational institution, or opening a Branch or Satellite campus, the law school must also establish that the law school is in compliance with the Standards or that the proposed major change will substantially enhance the law school’s ability to comply with the Standards.

**Interpretation 105-1**

Major changes in the program of legal education or the organizational structure of a law school include:

1. Instituting a new full-time or part-time division;
2. Changing from a full-time to a part-time program or from a part-time to a full-time program;
3. Establishing a two-year undergraduate/four-year law school or similar program;
4. Establishing a new or different program leading to a degree other than the J.D. degree;
5. A change in program length measurement from clock hours to credit hours;
6. A substantial increase in the number of clock or credit hours that are required for graduation;
7. Merging or affiliating with one or more approved or unapproved law schools;
8. Merging or affiliating with one or more universities;
9. Materially modifying the law school’s legal status or institutional relationship with a parent institution;
10. Acquiring another law school, program, or educational institution;
11. Acquiring or merging with another university by the parent university where it appears that there may be substantial impact on the operation of the law school;
12. Transferring all, or substantially all, of the academic program or assets of the approved law school to another law school or university;
13. Opening of a Branch campus or Satellite campus;
14. A change in control of the school resulting from a change in ownership of the school or a contractual arrangement; and
15. A change in the location of the school that could result in substantial changes in the faculty, administration, student body, or management of the school;
16. Contracting with an educational entity that is not certified to participate in Title IV, HEA programs, that would permit a student to earn 25 percent or more of the course credits required for graduation from the approved law school;
17. The addition of a permanent location at which the law school is conducting a teach-out for student’s at another law school that has ceased operating before all students have completed their program of study;
18. A significant change in the mission or objectives of the law school; and
19. The addition of courses or programs that represent a significant departure from existing offerings or method of delivery since the last accreditation period.

…

**Interpretation 105-6**

The Council has delegated to the Accreditation Committee the authority to grant acquiescence in the types of major changes listed in Interpretations 105-1 (4), (5), and (6), and 16.
Rule 20. Major Change in the Organizational Structure of a Provisionally or Fully Approved Law School

(a) This Rule governs consideration of applications for acquiescence in a major change in the organizational structure of an approved law school, including, without limitation:

(1) Materially modifying the law school’s legal status or institutional relationship with a parent institution;

(2) Merging or affiliating with one or more approved or unapproved law schools;

(3) Acquiring another law school, program, or educational institution;

(4) Acquiring or merging with another university by the parent university where it appears that there may be substantial impact on the operation of the law school;

(5) Transferring all, or substantially all, of the academic program or assets of the approved law school to another law school or university;

(6) Opening of a Branch campus or a Satellite campus at which a student could take the equivalent of 16 or more semester credit hours toward the law school’s J.D.;

(7) Merging or affiliating with one or more universities;

(8) A change in the control of the school resulting from a change in the ownership of the school or a contractual arrangement;

(9) A change in the location of the school that could result in substantial changes in the faculty, administration, student body or management of the school;

(10) Contracting with an educational entity that is not certified to participate in Title IV, HEA programs, that would permit a student to earn 25 percent or more of the course credits required for graduation from the approved law school;

(11) The addition of a permanent location at which the law school is conducting a teach-out for student's at another law school that has ceased operating before all students have completed their program of study;

(12) A significant change in the mission or objectives of the law school; or

(13) The addition of courses or programs that represent a significant departure from existing offerings or method of delivery since the last accreditation period.

(b) For purposes of this Rule:
(1) Any of the changes in organizational structure listed in Rule 20(a) may amount to the closure of an approved law school and the opening of a different law school. If the Accreditation Committee determines, after written notice and an opportunity for written response, that such a change does amount to the closure of an approved law school and the opening of a different law school, it shall so notify the law school(s). If the Committee determines that any proposed structural change constitutes the creation of a different law school, it shall recommend to the Council that any acquiescence in the proposed structural change be accompanied by a requirement that the school apply for provisional approval under the provisions of Standard 102 and Rule 4.

(2) Factors that shall be considered in making the determination of whether the events listed in subsection (1) above constitute the closure of an approved law school and the opening of a different law school include, without limitation, whether such events are likely to result in (a) significant reduction in the financial resources available to the law school; (b) significant change, present or planned, in the governance of the law school; (c) significant change, present or planned, in the overall composition of the faculty and staff at the law school; (d) significant change, present or planned, in the educational program offered by the law school; or (e) significant change, present or planned, in the location or physical facilities of the law school.

(3) Opening of a Branch campus by an approved law school is treated as the creation of a different law school. After the law school has obtained prior acquiescence of the Council in the major change caused by the opening of a Branch campus, the Branch campus also shall apply for provisional approval under the provisions of Standard 102 and Rule 4 no later than October 15 of the second academic year of operation of the Branch campus. A law school seeking to establish a Branch campus shall submit to the Consultant, as part of its application, a business plan that contains the following information concerning the proposed Branch campus: a description of the educational program to be offered; projected revenues, expenditures and cash flow; and the operational, management and physical resources of the proposed Branch campus.

(4) After written notice and an opportunity for a written response, the Accreditation Committee shall determine whether any other proposed structural change constitutes the creation of a different law school. If the Accreditation Committee determines that any proposed structural change constitutes the creation of a different law school, it shall recommend to the Council that any acquiescence in the proposed structural change be accompanied by a requirement that the school apply for provisional approval under the provisions of Standard 102 and Rule 4.

(c) If a different school will be created as a result of the major structural change, the different school may apply for approval pursuant to provisions of Rule 4. If the different school demonstrates that it is in full compliance with the Standards as provided in Standard 103, the Committee shall recommend that it be fully approved. Such recommendation may be conditioned upon further site evaluation visits or other requirements. If the different school is not in full compliance with the Standards, but it substantially complies with each of the Standards as provided in Standard 102, the Committee shall recommend that it be provisionally approved. The Committee may also recommend that the school will be allowed to seek full approval in a period of time shorter than that provided in Standard 103.
(d) Whether or not the Accreditation Committee determines that the proposed change will create a different law school, the law school’s request for acquiescence by the Council in the proposed major change in organizational structure shall be considered under the provisions of Rule 21, and will become effective upon the decision of the Council.

**Rule 24. Complaints Concerning Law School Non-Compliance with the Standards**

…

(b) Any person may file with the Consultant on Legal Education a written complaint alleging non-compliance with the Standards for the Approval of Law Schools by an approved law school.

(i) Except in extraordinary circumstances, the complaint must be filed within one calendar year of the facts on which the allegation is based. Pursuit of other remedies does not toll this one calendar year limit.

(ii) Complaints must be in writing using the form "Complaint Against an ABA-Approved Law School" and must be signed. The form is available online and from the Office of the Consultant on Legal Education.

(iii) Anonymous complaints will not be considered.

(iv) A complaint that has been resolved will not be subject to further review or reconsideration unless subsequent complaints about the school raise new issues or suggest a pattern of significant noncompliance with the Standards not evident from the consideration of the previously resolved complaint.

(v) The Consultant or designee may, with the concurrence of the chairperson of the Accreditation Committee, defer the complaint proceedings if a party to the proceedings files or has filed a claim in another forum.

…
EXECUTIVE SUMMARY

A. Summary of Resolution

RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2011, to the ABA Standards and Rules of Procedure for Approval of Law Schools:

1. Standard 512. STUDENT COMPLAINTS
2. Standard 306. DISTANCE EDUCATION
3. Standard 105. MAJOR CHANGE IN PROGRAM OR STRUCTURE
4. Rule 20. Major Change in the Organizational Structure of a Provisionally or Fully Approved Law School
5. Rule 24. Complaints Concerning Law School Non-Compliance with the Standards

B. Issue Resolution Addresses

The resolution addresses compliance with United States Department of Education requirements for accrediting agencies.

C. How Proposed Policy Will Address the Issue

The proposed changes will bring the Section of Legal Education and Admissions to the Bar into compliance with United States Department of Education requirements for accrediting agencies.

D. Minority Views or Opposition

Not that the Section is aware of.
RESOLUTION

RESOLVED, That the American Bar Association urges Congress to amend the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA" or "the Act"), 38 U.S.C. §§ 4301–4335, by adding provisions to require employers to provide certain reasonable accommodations for returning veterans with combat injuries that may not manifest themselves until after a return to work.

FURTHER RESOLVED, That the American Bar Association urges Congress to amend the USERRA to provide authority for the award of comprehensive attorney’s fees, costs, and damages to redress violations of the Act.

FURTHER RESOLVED, That the American Bar Association urges Congress to amend the USERRA to make unenforceable any clause of any agreement between an employer and an employee that requires arbitration of a dispute under the Act.

FURTHER RESOLVED, That the American Bar Association urges Congress to authorize the U.S. Department of Labor to initiate investigation and prosecution of appropriate claims to address patterns and practices of USERRA violations that rise to the level of a nationally-compelling interest.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

The Resolution seeks amendment of the Uniformed Services Employment and Reemployment Rights Act of 1994 by adding provisions to:

- require employers to provide certain reasonable accommodations for returning veterans with combat injuries that may not manifest themselves until after a return to work;
- create statutory attorney fee authority and provide comprehensive damages provisions for plaintiffs prevailing in actions brought under the Act;
- make unenforceable any clause of any agreement between an employer and an employee that requires arbitration of a dispute under the Act; and
- authorize the U.S. Department of Labor to initiate investigation and prosecution of appropriate claims to address patterns and practices of USERRA violations that rise to the level of a nationally-compelling interest.

2. **Summary of the Issue that the Resolution Addresses**

With thousands of National Guard and Reserve component servicemembers returning from extended overseas deployments to their civilian places of employment, the USERRA is the primary federal protection available to them to ensure that they are able to return to work without suffering any adverse effects due to their military service. Based upon issues identified in the 2004 *Report of the Working Group on Protecting the Rights of Service Members*. Ongoing discussions with the Department of Labor’s Veterans’ Employment and Training Service have helped to identify additional shortcomings in the protections afforded by the Act. Combined with federal court decisions construing the Act more narrowly than similar anti-discrimination in employment statutes like Title VII, all of these factors have prompted the Standing Committee to put forward the proposed Resolution to address the most serious needs for enhancement of the USERRA.

3. **Please Explain How the Proposed Policy Position will address the issue**

The proposed Resolution urges Congress to amend the USERRA to address the most pressing shortcomings in the Act’s protections for servicemembers.

4. **Summary of Minority Views**

None have yet been expressed, though the Standing Committee continues to reach out to interested constituent groups to solicit input and feedback on the proposed Resolutions.
RESOLVED, That the American Bar Association supports efforts to improve voter registration practices by:

1) Ensuring the accuracy of voter registration rolls using existing government lists or databases.

2) Streamlining the procedures whereby changes in voter rolls and voter registration information are made.

FURTHER RESOLVED, That the American Bar Association urges commitment by states and local election jurisdictions to develop the necessary technology and resources to improve their voter registration practices.

FURTHER RESOLVED, That the American Bar Association urges federal legislation or administrative action creating incentives to encourage election jurisdictions to adopt the above improvements.
EXECUTIVE SUMMARY

Summary of Resolution:
This resolution supports efforts to improve voter registration practices. The resolution also urges commitment by states and local election jurisdictions to develop the necessary technology and resources to improve their voter registration practices, as well as federal legislation or administrative action creating incentives to encourage election jurisdictions to adopt the above improvements.

Summary of the Issue Which the Resolution Addresses:
This resolution addresses the need for improvements in our nation’s voter registration systems in order to ensure the integrity of the system.

Explanation of How the Proposed Policy Position Will Address the Issue:
This resolution would allow the Association to engage in the debate in Congress and federal agencies regarding reform of the electoral process.

Summary of Any Minority Views or Opposition Which Have Been Identified:
None to date.
RESOLVED, That the American Bar Association adopts the *ABA Standards for Language Access in Courts*, dated August 2011;

FURTHER RESOLVED, That the American Bar Association urges that courts and other tribunals give high priority to the prompt implementation of these Standards; and

FURTHER RESOLVED, That the American Bar Association urges federal and state legislative and executive branches to take prompt action to provide adequate funding to courts and other tribunals to fully implement language access services.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls for adoption as ABA policy of Standards for Language Access in Courts, including the Introduction and Commentary. The Standards and extensive commentary thereto provide clear guidance to courts in designing, implementing, and enforcing a comprehensive system of language access services that is suited to the need in the communities they serve. A system of language access services is required as a fundamental principle of law, fairness, and access to justice, and to promote the integrity and accuracy of judicial proceedings, so that persons needing to access the court are able to do so in a language they understand, and are able to be understood by the court. The Standards were developed as a joint project of 5 ABA entities, and with the guidance of a large advisory group comprised of judges, court administrators, advocates and others.

2. Summary of the Issue that the Resolution Addresses

People who have limited English proficiency are especially ill-equipped to protect their legal interests in the courts. The language proficiency required for meaningful participation in court proceedings is high because of the use of legal terms, the structured nature of court proceedings, and the stress normally associated with a legal proceeding when important interests are at stake. Courts lack guidance on their obligations to provide language access, on steps necessary to create appropriate language access systems, and on resources available to assist them in such endeavors.

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

The Standards and commentary will provide courts with extensive guidance on provision of language access.

4. Summary of Minority Views

None are known.
RESOLVED, That the American Bar Association adopts the *Model Time Standards For State Courts*, dated August 2011; and

FURTHER RESOLVED, That the American Bar Association urges state judicial systems to adopt and implement the *Model Time Standards For State Courts*. 
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<td></td>
<td>Misdemeanor</td>
<td>75% within 60 days, 90% within 90 days, 98% within 180 days</td>
</tr>
<tr>
<td>CIVIL</td>
<td>General Civil</td>
<td>75% within 180 days, 90% within 365 days, 98% within 540 days</td>
</tr>
<tr>
<td></td>
<td>Summary Matters</td>
<td>75% within 60 days, 90% within 90 days, 98% within 180 days</td>
</tr>
<tr>
<td>FAMILY</td>
<td>Dissolution/ Divorce/ Allocation of Parental Responsibility</td>
<td>75% within 120 days, 90% within 180 days, 98% within 365 days</td>
</tr>
<tr>
<td></td>
<td>Post Judgment Motions</td>
<td>98% within 180 days</td>
</tr>
<tr>
<td></td>
<td>Domestic Violence</td>
<td>98% within 10 days</td>
</tr>
<tr>
<td>JUVENILE</td>
<td>Delinquency &amp; Status Offenses</td>
<td>75% within 60 days, 90% within 90 days, 98% within 150 days</td>
</tr>
<tr>
<td></td>
<td>Neglect and Abuse</td>
<td>Disposition 98% within 90 days of removal Permanency Plan: 75% within 120 days of removal; 98% within 360 days</td>
</tr>
<tr>
<td></td>
<td>Termination of Parental Rights</td>
<td>98% within 120 days</td>
</tr>
<tr>
<td>PROBATE</td>
<td>Administration of Estates</td>
<td>75% within 120 days, 98% within 360 days</td>
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<tr>
<td></td>
<td>Guardianship/ Conservator of Incapacitated Adults</td>
<td>98% within 90 days</td>
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<tr>
<td></td>
<td>Civil Commitment</td>
<td>98% within 15 days</td>
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<tr>
<td>POST-CONVICTION</td>
<td>Post-conviction proceedings</td>
<td>98% within 180 days</td>
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Commentary to the Model Time Standards for State Courts

Felony Case Standards: 75% within 90 days; 90% within 180 days; 98% within 365 days

Definition. Felony cases are those criminal cases involving “an offense punishable by incarceration for a year or more.” In the preparation of these time standards, consideration was given to whether capital murder cases should be designated as a separate case category with different time standards. Because some capital cases are disposed by plea, however, it was concluded that those requiring a trial can be better accommodated simply as a “top tier” of one-two percent of all felony cases that require more time to reach disposition. The standards run from the filing of the initial complaint through disposition (e.g., dismissal or sentencing). Thus, in jurisdictions with a limited and general jurisdiction court, the standard would run from the filing of the complaint in the lower trial court except in those few cases filed directly in the general jurisdiction court.

Earlier National Time Standards. In 1983, Council of State Court Administrators (COSCA) provided a 180-day time standard for felony cases, while the 1992 ABA Time Standards provided that 90 percent of felony cases should be disposed within 120 days after arrest, 98 percent within 180 days, and 100 percent within 365 days.

Time Standards in State Court Systems. At least 39 states and the District of Columbia have overall felony time standards, and two states have separate time standards for capital cases. There is considerable variation from state to state, however. For example:

- Ten states have adopted the COSCA time standard of 180 days, with six specifying that all cases are to be disposed within that time, and with five having the 180-day time standard run from filing of or arraignment on an indictment or information rather than arrest or initial appearance.
- As suggested in the ABA time standard, ten other states have adopted one year, 12 months, 365 days or 360 days as the longest time, although four do not have a 100 percent time standard and contemplate that from one to ten percent of all felonies may take longer to be disposed.
- Maximum times to disposition in other states range from 120 days to 22 months.
- The most common approach (14 states) is to provide simply that cases must be decided within a given time period. There are 13 states where the maximum specified duration is for fewer than 100 percent of all cases, assuming that there may always be some cases that might understandably take longer. The next most common approach (five states) is to provide times within which 90 percent, 98 percent and 100 percent of all cases must be disposed. In all, there are at least 17 different configurations for felony time standards.
- In at least 11 states, time standards do not run from arrest or initial appearance, but rather from the filing of an indictment or information, general-jurisdiction arraignment on that charging document, or some other event other than arrest or initial appearance.
At least ten states have time standards for one or more intermediate case-processing stages.

**Overall Felony Case Time Standards.** It is critically important to note, however, that the time standard for felony cases is not a “speedy trial rule” requiring dismissal of the case if the standard is not met. These standards are intended as measures of the overall performance of a court, not as a rule governing individual cases or creating rights for individual criminal defendants. Moreover, speedy trial rules generally run from the date of arrest (or sometimes the date of arraignment on the indictment) to the start of trial. These standards are based on the period between the date on which the case is first filed with a court to the entry of the dispositional order (e.g., a dismissal, sentence).

The adoption here of a 365-day maximum rather than one of 180 days is based on the real experience of urban courts. After the adoption in 1983 of the COSCA time standard for felony cases, large-scale studies of felony case processing times in large urban trial courts were undertaken by the National Center for State Courts (NCSC). In those studies, no court met the COSCA 180-day time standard for all cases disposed in 1987, and even the fastest courts in the study had eight percent of their cases taking longer. In the slowest court, 81 percent took longer than 180 days. In a subsequent study of felony case disposition times in nine state criminal trial courts, even the fastest court saw 14 percent of its 1994 disposed cases taking longer than 180 days, and disposition times exceeded 180 days in 48 percent of the cases for all courts combined.

For all the courts in these NCSC studies, even a 365-day time standard was difficult to achieve. For all courts for which 1987 felony dispositions were studied, 11.7 percent took longer than a year; and in the study of 1994 felony dispositions, about 11 percent took longer than a year. Yet in each study, there were courts that were able to dispose of at least 95 percent of their cases within a year – eight of 39 of the courts in the study of 1987 dispositions, and two of nine courts in the study of 1994 dispositions. Contemporary court data indicates that courts in several states are able to dispose of the overwhelming number of felony cases in a year or less. For example: Missouri is able to dispose of 85 percent of its felony cases and New Jersey is able to dispose of 90 percent of its felony cases within 301 days; Colorado concludes 90 percent of its felony cases within 325 days; Minnesota disposes of more than 92 percent of its felony cases and Utah disposes of 93 percent of its felony cases within a year.

Empirical evidence from urban trial courts thus demonstrates two things. First, a time standard of 365 days, while still difficult to attain for almost all courts, is far more realistic than a time standard of 180 days. Second, a standard of 98 percent of all felonies is more realistic than one of 100 percent. This is especially true for capital murder and other more serious cases that go to jury trial; while some may be disposed by plea within a year after case initiation, others can predictably be expected to take longer.

**Intermediate Time Standards.** In order for overall time standards to be met, it is important for a court and its criminal justice partners to hold meaningful interim court events in a timely manner. For felony cases:
In most if not all state court systems, there must be a prompt initial court appearance for preliminary arraignment, determination of eligibility for pretrial release, and determination of eligibility for defense representation at public expense. The elapsed time within which such a first court event must occur is typically within 24-72 hours after arrest. The time standards offered here acknowledge the need for such a prompt initial court event. The suggested interim standards urge that it be held in all cases within the time requirements of state law.

Although only a handful of states have intermediate time standards for felonies, virtually all of them give particular attention to the elapsed time from arrest to general-jurisdiction arraignment on a felony indictment or information. Many states require prompt filing of an indictment or information for felony defendants not released from pretrial detention pending adjudication, but they may not provide such strict expectations for the large majority of defendants who have been released on bail or recognizance. Emphasizing a need for timely commencement of general-jurisdiction felony proceedings, the time standards here provide an indicator for the time within which arraignment on an indictment or information should be held for virtually all felony cases. The provision of this interim time standard also has the effect of prompting early involvement of a public defender or appointed counsel, early discovery exchange, and early commencement of plea discussions between prosecution and defense.

Since the time standards here run from filing of the initial complaint to imposition of a sentence, trial commencement is considered an interim court event rather than the end-point of caseflow management. Consequently, the third interim time standard here has to do with the elapsed time after the initial complaint was filed within which there should be an actual trial start. Having firm and credible trial dates is a fundamental feature of successful caseflow management, and large-scale research of factors affecting the pace of felony litigation has shown that courts with a higher percentage of firm trial dates consistently have shorter times to felony disposition.

It should be noted that achievement of the goals set by these time standards involves the performance of more than one level of court, e.g., a limited jurisdiction court that hears the early stages of criminal proceedings and a general jurisdiction court that obtains jurisdiction only after an indictment or information is filed. Accordingly, any analysis of the performance of an individual court must be measured against the events which that court controls.

**Misdemeanor Standard: 75% within 60 days; 90% within 90 days; 98% within 180 days**

**Definition.** Misdemeanors involve “an offense punishable by incarceration for less than one year and/or fines.” The time standard for misdemeanors recognizes that many moving traffic infractions and other comparable violations of public order have either been formally
decriminalized or are treated without the procedural requirements for criminal cases. As a result of these matters now being handled administratively, they are not included in these time standards.

**Earlier National Time Standards.** In 1983, COSCA provided a 90-day time standard for misdemeanors and the 1992 ABA Time Standards provided that 90 percent of all misdemeanors should be disposed within 30 days after arrest and 100 percent within 90 days.

**Time Standards in State Court Systems.** Court systems in at least 32 states and the District of Columbia have misdemeanor time standards. Some states distinguish DUI, traffic, or motor-vehicle cases from other misdemeanors. Others make distinctions according to differentiated case management (DCM) “track assignments.” As with felony cases, there is considerable variation in standards from one state to another. For example:

- Only seven agree with the COSCA and ABA standards that all or most (99 percent in one state) can or should be disposed within 90 days or less after case initiation.
- In the remaining 25 states and the District of Columbia, the maximum time standards range from 120 to 360 days.
- Only 12 states have a single flat time standard (which may or may not be 100 percent) for misdemeanors, with no percentile gradations.
- While 20 court systems provide a maximum time within which all misdemeanors must be disposed, 13 set the maximum time standard at a level assuming that some cases may unavoidably take longer to be disposed.
- In ten states, the maximum time standard for disposition of all or most misdemeanors is identical to that for felonies.

**Overall Misdemeanor Case Time Standards.** The time standards offered here for misdemeanors reflect agreement with the drafters of the COSCA and ABA time standards that most misdemeanors can and should be disposed within a short time after case initiation. In fact, the great majority of all misdemeanors (90 percent) can and should be concluded within three months as those earlier standards suggest.

Yet almost all states now treat high-volume speeding cases and other moving traffic violations, along with other comparable ordinance violations, as non-criminal or quasi-criminal matters for which there is little or no likelihood of jail sanctions, and for which many of the procedural safeguards of criminal procedure are absent or can be waived. These cases, though voluminous, were normally quickly resolved. With such matters removed from the category of criminal misdemeanors, the actual experience in most states that have adopted misdemeanor time standards is that a number of these cases cannot be justly disposed within 90 days, and indeed that some must take longer than six months to be disposed. For example, Colorado’s County Courts dispose of 75 percent of filed misdemeanors within 128 days and 90 percent within 231 days. Missouri concludes 84% of its misdemeanors within 180 days and 91 percent within 240 days. For this reason, the standard presented here sets a maximum time of 180 days for misdemeanors and recognizes that as many as two percent may understandably take longer than that to be concluded.
Intermediate Time Standards.

- In 100% of cases, the initial appearance should be held within the time set by state law.
- In 98% of cases, trials should be initiated or a plea accepted within 150 days.

The intermediate standards provided here follow the rationale presented above for felony cases, except that no interim standard associated with bind over and felony arraignment is required. As with felonies, there is a need to assure that a court arraigns the defendant on initial charges, reviews the need for pretrial detention, and sees that an early determination is made on eligibility for defense representation at public expense.

Once there has been an initial court hearing, it is important for compliance with time standards that the court exercise control over case progress to disposition by providing an early and firm trial date. The interim time standard here for time from case initiation to misdemeanor trial start provides a measurement tool for the court to exercise such control.

General Civil Standard: 75 percent within 180 days; 90 percent within 365 days; 98 percent within 540 days

Definition. Civil cases are a broad category of cases in which “a plaintiff requests the enforcement or protection of a right or the redress or prevention of a wrong.” They include automobile torts and other personal injuries, contract disputes, product liability issues, malpractice matters, infringements of intellectual property, and requests for injunctions among other types of cases. As with capital felony cases, consideration was given to whether complex civil cases should be designated as a separate civil case category with different time standards. Because some complex civil cases are settled relatively quickly, however, no specific category for complex civil cases is required. Those complex cases that proceed to trial or settle late in the process can be accommodated simply as a “top tier” of two percent of all general civil cases that require more time to reach disposition.

In these standards, foreclosure cases are included in the category of general civil cases. This is because the new procedures required by the mortgage crisis commencing in 2007 have substantially increased the time needed to dispose of these cases. In fact, foreclosure cases are not the only civil matters that may be considered neither “major” cases nor “summary” cases. Several state-level court systems have separate time standards for a broad category of “limited” civil cases that they distinguish from “summary” civil cases. Such “limited” cases typically include tort and contract cases that may be tried by a jury but involve claims below a certain dollar threshold but above that for small claims cases. In the time standards offered here, these “limited” civil cases are included in the category of “general” civil cases.

Earlier National Time Standards. The 1983 COSCA time standards for general civil matters provided that all non-jury cases should be tried or otherwise disposed within 12 months after initial filing, and that all jury cases should be tried or otherwise disposed within 18 months after
filing. The ABA time standards did not distinguish between jury and non-jury cases, providing instead that 90 percent of all general civil cases should be tried or disposed within 12 months after filing; 98 percent within 18 months; and 100 percent within 24 months. Neither the COSCA standards nor the ABA standards distinguished “major” civil cases from “limited” non-summary civil cases.

**Time Standards in State Court Systems for Major Civil Cases.** There are statewide time standards for major civil cases in at least 35 states and the District of Columbia. As with the standards for criminal cases, there are substantial differences among them:

- Only two states have adopted the COSCA time standards, and they are the only states that provide different time expectations for jury cases and non-jury cases.
- Only six states have exactly copied the ABA time standards.
- Nine states have a single standard of time within which all general civil matters must be disposed, while five others have a single standard of time within which a percentage lower than 100 percent (from 75 percent to 98 percent) must be disposed.
- In addition to the six states that have exactly copied the ABA time standards, there are eight other states with three “tiers.” Each of these eight states has a slightly different tier configuration, however.
- Two states and the District of Columbia distinguish among different case types within the category of general civil cases; another three states distinguish among differentiated case management (DCM) tracks.
- In 11 states, the maximum time standard is for fewer than 100 percent of all general civil cases.
- The most common maximum duration (which may be fewer than 100 percent of all cases) is 24 months or its equivalent in days (15 states). The next most common maximum is 18 months or its equivalent in days (9 states). One state provides that all cases should be disposed within 180 days. At the other end of the continuum, two states provide that all cases should be disposed within 36 months.
- Two states have a separate time standard for what they define as complex cases.
- Seven states have time standards for one or more intermediate stages of case progress to disposition.

**Time Standards in State Court Systems for “Limited Non-Summary” Civil Cases.** In addition to “general civil” time standards, courts in six states and the District of Columbia have “limited civil” time standards that do not distinguish between summary and non-summary matters. In addition, there are ten states that have three categories of civil time standards, generally calling them “general,” “limited,” and “summary.” Regarding the time standards for non-summary civil cases in these 17 jurisdictions, the following distinctions can be noted:

- The most common upper time limit is 180 days (six states), although only four of those states require that all such cases be disposed within that time period.
- The upper time limit in the other 11 jurisdictions ranges from 250 days to 730 days.
- In two states, the time standards run not from filing, but from service or return of service.
- In 12 states, the upper time limit is the time within which 100 percent of the cases must be disposed. In the remaining five states, the upper time limit is for fewer than 100 percent.
As in the ABA time standards, there are four states providing time limits within which 90 percent, 98 percent and 100 percent of all cases must be disposed. Three other states have three tiers at a different percentage level, and one state has only two tiers. Eight states have just one tier – the time within which all or a specified percentage of cases must be disposed.

Overall General Civil Time Standards. Although the COSCA time standards urge that all civil cases should be disposed within 18 months, the ABA time standards suggest that one should expect only 98 percent of all general civil cases to be disposed that quickly, while the remaining two percent should require no more than an additional six months.

Studies of civil case processing times in large urban trial courts have shown how difficult it is to meet either time standard. In a 1991 study of the pace of civil litigation in 37 urban trial courts, researchers found one court that was able in 1987 to dispose of 99 percent of all civil cases within 24 months and another that was able to do so for 97 percent of all civil cases. For all civil cases in all 37 courts, only 78 percent were disposed within 24 months. Only two of the 37 courts were able to dispose as many as 90 percent of all civil cases in less than 18 months.

In 1995, a similar study was done of tort and contract litigation in the 45 largest counties in the U.S. For tort cases, in 1992 the five fastest courts were able to dispose of 92-95 percent within 24 months; for contract cases, the five fastest courts were able to dispose of 96-99 percent within 24 months; and only one court disposed of more than 80 percent of its jury trial cases within 24 months. Only 63 percent of all tort cases and 79 percent of all contract cases were disposed within 18 months; in fact, eight percent of all tort cases and four percent of all contract cases took longer than four years to be disposed. More recent data confirms these findings. Utah is able to dispose of 95 percent of its civil cases within 24 months and 87 percent of general civil cases within 12 months. Minnesota disposes of 92.3 percent of its major civil cases within 12 months and 97 percent within 18 months.

Every state requires its courts to give priority to the processing of criminal cases over civil cases. This clearly has an effect on speedy disposition of civil cases. However, the 1991 study showed that courts that were able to dispose of felony cases more expeditiously were typically able to dispose of civil cases more promptly as well. This likely reflects a court culture favoring timely case dispositions for all types of cases.

The time standards offered here reflect a continuing effort to balance the litigants’ desire for prompt case disposition with the reality of current court case processing experience. Thus, the upper time limit follows the COSCA time standards at 18 months/540 days, while expressing agreement with position in the ABA time standards that not all cases can be justly disposed within that time period. In recognition of the time justifiably needed to resolve such matters as contract fraud and toxic torts, however, it does away with the expectation that all cases should properly be expected to reach disposition within 24 months.

Intermediate Time Standards. The time standards offered here for intermediate stages of general civil proceedings reflect the key points in case processing that should be monitored by a court and addressed to assure that litigation proceeds to conclusion at a suitable pace.
A threshold consideration is whether the defendants have been served. A key feature of due process in civil litigation is that there can be no case resolution unless actual or constructive notice has been given to a defendant. Service of a summons and a copy of the complaint start the clock running for the filing of a responsive pleading that will join the issues in the case. Failure to complete service leaves a civil case in limbo. Service of process is a particularly daunting step for plaintiffs who are representing themselves. Setting an interim time standard for completion of service of process encourages courts to monitor the performance of this critical procedural step and to take action — such as setting an early hearing for self-represented litigants who have not filed a return of service or sending the plaintiff’s attorney a notice that the case will be dismissed for failure to prosecute — when it has not been completed timely. There are exceptional cases in which defendants evade service or service by publication becomes necessary; service in these cases will often not be completed within 45 days.

The next consideration is whether a defendant has filed a responsive pleading. In their study of civil cases decided in 1992 in 45 large trial courts, researchers found that an answer was filed by a defendant in only 51 percent of all tort cases in one court, and that answers were filed in only 87 percent of all tort cases in the court with the highest percentage of cases with answers filed. For contract cases, the filing of an answer was even less common, ranging from 21 percent of all such cases in one court to 69 percent in the court with the highest portion of defendant responses.

To avoid having cases lay fallow for months or even years without being at issue, the second intermediate time standard thus offers a suggested elapsed time within which there should either be a responsive pleading by a defendant or a plaintiff request for default judgment. This intermediate time standard embodies a suggestion that the trial court should monitor cases to determine whether a responsive pleading has been filed within a reasonable passage of time after case commencement. The exercise of early court control in this fashion has been found to have a statistically significant correlation with shorter times to disposition in civil cases.

Civil cases vary in the amount of discovery they require, with tort cases being more likely to have discovery than contract, real property or other civil cases. Court management of discovery promotes expedition and helps conserve court resources. Research has shown that civil practitioners support direct court involvement and control over discovery through such means as holding an early discovery conference or establishing a discovery plan, through consistent application of the rules, and through the imposition of costs and sanctions for abuse. Having an intermediate time standard like that presented here for completion of discovery can serve as an important tool for the court to exercise ongoing control of case progress.
The fourth intermediate stage in these time standards has to do with having timely and credible trial date scheduling. To help make better use of their time, many civil attorneys prefer to have trial date predictability, and having credible trial dates is a means for the court to prompt the attorneys to give early attention to whether a matter can be resolved by negotiation rather than by trial. Having actual trial commencement within 16 months in most cases where it is needed can serve as a helpful means to assure that almost all cases are concluded within 18 months.

**Summary Civil Matters Standard: 75% within 60 days; 90% within 90 days; 98% within 180 days**

**Definition.** Small claims and landlord/tenant matters are the most common cases in this category. Other kinds of matters that might be included are harassment, garnishment, and civil infractions. For foreclosure cases and other limited non-summary civil cases, see the commentary above on standards for general civil matters.

**Earlier National Time Standards.** The COSCA time standards have no provision for summary civil matters. The ABA time standards do include a specific provision for summary matters, suggesting that 100 percent be disposed within 30 days.

**Time Standards in State Court Systems.** There are specific time standards for summary civil matters in 21 states and the District of Columbia. No court system agrees with the ABA 30-day standard. Highlights of the variations among states include the following:

- The state with the shortest time expectation calls for all unlawful detainer matters to be disposed within 45 days, but allows up to 95 days for all small claims.
- The two jurisdictions with the longest time expectation allows up to 12 months for all cases. No other state has an upper limit longer than six months.
- In 18 states, the upper limit is from three to six months.
- In 11 states, there is a single specific time within which all cases must be disposed.
- Nine states have tiers giving times within which specified percentages must be disposed.
- In five states, the upper time limit is for a percentage lower than 100 percent, reflecting an expectation that some cases will unavoidably need more time to be disposed.

**Overall Time Standards for Summary Civil Matters.** In 1992, a study was published about times to disposition in 1990 for small claims cases in 12 courts. The researcher found that only one court was able to dispose of as many as 75 percent of its small claims cases within the ABA 30-day time standard. In fact, eight of the 12 courts took longer than 30 days to dispose of just 25 percent of their cases. On the other hand, only four courts needed more than 125 days to dispose of 90 percent of all their small claims cases.

The time standards offered here for summary civil matters are premised on the actual experience of courts in summary matters. They suggest that most summary civil cases be disposed within two or three months. Yet they also show an appreciation for the fact that contested matters actually going to trial may need more time.
Intermediate Time Standards.

- In 98% of cases, service of process should be completed within 30 days.
- In 98% of cases, responsive pleadings should be filed or default judgments entered within 60 days.
- In 98% of cases, trials should be initiated within 120 days.

As with other trial court matters, providing prompt and affordable justice in summary civil matters calls for the court to exercise early and continuous control of case progress. It may be even more important in summary matters than in general civil cases that the court finds an efficient way to monitor service on a defendant and the filing of an answer. The time standards offered here consequently provide an expected elapsed time within which an answer or a request for default judgment has been filed. Sixty days is a reasonable time period for summary civil cases because the time periods for service of process and for filing a responsive pleading are generally shorter than for general civil matters. Further, service is performed by the court using certified mail in a number of states.

By their very nature, summary civil matters do not usually require a substantial amount of time for the completion of discovery. It is therefore important that the court set an early and credible date for trial commencement, as suggested here.

Family Dissolution/Divorce/Allocation of Parental Responsibility Standard: 75% within 120 days*; 90% within 180 days*; 98% within 365 days*

* Not including a statutorily imposed waiting period if any.

Definition. This case category includes custody, visitation, and spousal and child support matters that are subsumed as part of a dissolution/divorce proceeding. It also includes cases involving custody, visitation, or support of the children of unmarried couples who may be dissolving their relationship, and paternity/parentage or non-divorce custody, support or visitation proceedings. It does not include post-decree proceedings to enforce or modify court orders on custody, visitation and support.

Earlier National Time Standards. The 1983 COSCA time standards for domestic relations matters distinguish between uncontested cases, which are to be tried or otherwise disposed within three months after filing, and contested cases, which are to be disposed within six months after filing. The 1992 ABA time standards do not make such a distinction. Instead, they provide that 90 percent of all domestic relations cases should be tried or otherwise disposed within three months after filing; 98 percent within six months; and 100 percent within 12 months.

Time Standards in State Court Systems. At least 27 states and the District of Columbia have overall time standards for Family Dissolution/Divorce cases. The standards for the great majority of these states exceed the COSCA time standard of six months and are more in line with the proposed standard of 98 percent within 12 months.
Five states have separate standards for contested and uncontested matters, but only two states have adopted the COSCA standards as promulgated. In the other three states, the upper time limit for contested cases is 12 or 14 months, and one of them provides that two percent might take longer.

In two states, a difference in time expectations is based not on whether a matter is contested, but on whether there are children involved.

No state has adopted the ABA standards as promulgated. Two states come close: one provides that 90 percent of all cases should be disposed within three months, 95 percent within six months, and 99 percent within 12 months; and the other provides that 90 percent should be disposed within three months, 95 percent within nine or ten months (depending on whether there are children), and 100 percent within 12 months.

In nine states, the maximum time standard is 12 months, like that of the ABA standard, while six states set the maximum time at 18 months. Only one state has a maximum time standard longer than 18 months.

A common approach (adopted in nine states) is simply to indicate how long it should take for 100 percent of all cases to be disposed, with no provision for the percentage of cases that should be disposed within a shorter time. Ten states allow that a small percentage of cases (from one percent to ten percent) may take longer than the stated maximum.

Only one state has a separate time standard for complex cases.

**Overall Time Standards.** Compared to the prior COSCA standard, the proposed time standard allows for additional time for the final disposition of dissolution/divorce cases. It is comparable to the current ABA standard and is in line with standards established by the state courts, based on their experience of the length of time needed to resolve the complex financial and parenting issues present in some of these cases.

A 1992 national study of case processing and the pace of litigation in urban trial courts hearing divorce matters supports the ABA 12-month maximum time standard as an achievable goal for divorce cases. In that study, researchers found that three of the 16 courts in the study were within four percent of meeting the 12-month time standard, and six courts came within ten percent. Yet only two courts were able to come close to the six-month time standard (100 percent of all cases for COSCA and 98 percent for ABA). In fact, 14 of 16 courts had less than 75 percent of their cases disposed within six months.

Although there are no more recent multi-jurisdiction assessments of disposition times for divorce cases in American trial courts, there has been a recent analysis of case processing times of divorce cases in Canadian courts, with results very similar to those in the 1992 study in American courts. While common law court practices in Canada are not identical to those in the US, the data tend to support the time standards offered here. For 2008/2009 divorce cases in four provinces and three territories, 77 percent reached initial disposition within six months after case initiation; 92 percent within 12 months; and 99 percent within 24 months.

The proposed standard takes into account that statutes and court rules in most states reflect the state’s policy that spouses, and particularly those with children, must wait for a period of time to reflect on the consequences of their actions before their divorce may become final. These waiting periods are generally between 30 to 90 days, although in some states they are as short as 20 days.
and in others as long as six, 12, and 18 months. The existence of a waiting period should not deter courts from moving a case as far along in the process as expeditiously as possible before the waiting period concludes.

The proposed standard also takes into account the statutes and court rules in some states that require mediation/arbitration and/or parenting classes as preconditions to a trial and/or issuance of judgment.

**Intermediate Time Standards.** Only two states have time standards for intermediate stages in dissolution cases. One has established a standard of three months for the issuance of a temporary/interim order, even in complex cases involving children, in order to establish stability and financial support for the children. The other provides that a case management order for custody and visitation is to be filed within 90 days after the return date.

Four intermediate time standards for family dissolution/divorce cases are proposed:

<table>
<thead>
<tr>
<th>Time Standard</th>
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<tbody>
<tr>
<td>In 98% of cases, service of process should be completed within 45 days.</td>
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<tr>
<td>In 98% of cases, temporary orders should be issued within 60 days.</td>
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<tr>
<td>In 98% of cases, responsive pleadings should be filed or a default judgment entered within 90 days.</td>
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<tr>
<td>In 98% of cases, trials should be initiated within 300 days.</td>
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</table>

Especially when children may be involved, courts should be vigilant to ensure that the early stages of dissolution cases do not fall prey to party-caused delay. This includes timely service of process. As suggested with regard to general civil cases, setting an interim time standard for completion of service of process encourages courts to monitor the performance of this critical procedural step and to take action — such as setting an early hearing for self-represented litigants who have not filed a return of service or sending the plaintiff a notice that the case will be dismissed for failure to prosecute — when it has not been completed in a timely fashion.

In many instances, the most important pre-trial step is the issuance of a temporary order to stabilize the financial and parenting situation pending final judgment. For the safety and security and well-being of the spouses and children, it is important that an order be established early on addressing child support, spousal support (maintenance), custody (parental rights and responsibilities), and visitation (parent/child contact). Other matters that may need to be resolved early include possession of the dwelling, and, if not resolved through a domestic violence proceeding, orders to protect the safety of either spouse. Sixty days should be considered the maximum amount of time for issuance of a temporary order in all or nearly all cases.

An intermediate standard of 90 days for the issuance of a default judgment is established for those cases in which there are no contested issues. This would be evident to the court by a failure of a party, properly served, to respond to the complaint. It would also be evident by parties filing a stipulation to judgment that resolves all issues to the satisfaction of the judge.
A standard of 300 days for the start of the trial is needed for the overall time standard to be met. Many cases that go to trial contain complex issues that require extensive findings by the judicial officer. As is the case with the overall time standards, states should take into account the waiting period, if any, prescribed in their statutes or court rules in setting their specific standard.

Post Judgment Motions (Domestic Relations) Standard: 98% within 180 days

Definition. This category includes motions for modification of child support, spousal support, visitation and custody, and other requests for review of matters determined during a divorce, dissolution, or allocation of parental responsibility proceeding.

Earlier National Time Standards. Neither the 1983 COSCA nor 1992 ABA time standards specifically address post judgment motions in domestic relations cases.

Time Standards in State Court Systems. Only four states directly address disposition of post judgment domestic relations matters.

- Two use a three-tiered standard with all but one or two percent of the cases to be disposed in 180 days or 365 days respectively and at least 75 percent of the cases disposed within 60 to 90 days.
- One state employs a COSCA type standard calling for 100 percent of post judgment matters to be disposed within 180 days.
- One state differentiates the amount of time by the subject matter of the proceeding: child support enforcement and modification of parental contact motions – 60 days; child support contempt, child support modification, and parental role and responsibility – 90 days; spousal maintenance – 120 days.

Overall Time Standards. Post judgment motions constitute a significant portion of the caseload of any court hearing domestic relations matters and often address issues of great significance to parties or their children. Hence, they should be resolved as quickly as is possible. These motions range from clarifying some aspect of the initial divorce, child support, or custody order; to modifying an order because of changed circumstances; to, in essence, re-litigating the entire case. Little data is currently available regarding how long these motions take to resolve in practice. Thus, rather than establishing tiers, the proposed standard urges that nearly all post judgment motions be disposed of within six months, with the expectation that the vast majority will be resolved much more quickly.

Intermediate Time Standards. The intermediate time standards for post judgment motions, like those for other types of proceedings are intended to facilitate the ability of courts to decide these matters within the overall time limits.

- In 98% of cases, service of process should be completed within 30 days.
- In 98% of cases, responsive pleadings should be filed or a default judgment entered within 75 days.
- In 98% of cases, hearings should be initiated within 150 days.
Domestic Violence Cases Standard: 98% within 10 days

Definition. This time standard applies only to cases involving a civil protection order or a restraining order issued by the court to limit or eliminate contact between two or more individuals. It does not apply to criminal proceedings involving charges of domestic violence.

Earlier National Time Standards. The COSCA time standards and the ABA time standards do not include provisions relating to domestic violence cases.

Time Standards in State Court Systems. At least ten jurisdictions have time standards for family domestic violence cases. The shortest time standard is that 99 percent of domestic violence cases be disposed within ten days. Five states call for all domestic violence cases to be concluded within 21 – 30 days. Two jurisdictions have a 60-day standard; one a 120-day standard. Three have adopted time standards that include tiers with the top tier setting the disposition time for less than 100 percent of the cases.

Overall Time Standards. The proposed standard comports with national and state policy that domestic violence will not be tolerated in this country and that victims of domestic violence need to be able to access the courts to receive orders protecting them from their abuser as quickly as possible.

Intermediate Time Standards.

- In 100% of cases, ex parte hearings should be concluded within the period specified by state law.

All states and territories in the US have adopted legislation to protect victims from domestic violence. Some states require that courts be available to accept the filing of domestic violence complaints 24 hours-a-day and seven days-a-week and to issue orders within hours of the filing of the complaint. Other states require that states accept complaints and issue orders within 24 hours. The proposed standard calls for 100 percent of ex parte hearings to be held and orders issued in compliance with state law.

Delinquency and Status Offense Cases Standard: 75% within 60 days; 90% within 90 days; 98% within 150 days

Definition. This case type includes both delinquency cases (i.e., cases involving an act committed by a juvenile, which, if committed by an adult, would result in prosecution in criminal court and over which the juvenile court has been statutorily granted original or concurrent jurisdiction), and status offense cases (i.e., non-criminal misbehavior by a juvenile such as a curfew violation, running away, truancy, or incorrigibility). In some jurisdictions, status offense cases are called CHINS or CINS cases (child or children in need of supervision), PINS cases (person in need of supervision), or JINS cases (juvenile in need of supervision). The time period begins with the filing of the complaint or petition and runs through the issuance of the dispositional order.
Earlier National Time Standards. The 1983 COSCA time standards did not address juvenile delinquency cases. The 1992 ABA time standards specify that 90 percent of delinquency cases should be disposed within three months; 98 percent within six months; and 100 percent within 12 months. The National Advisory Committee on Juvenile Justice and Delinquency Prevention (NACJJDJP) standards issued in 1980 recommend 30 days from filing to disposition for juveniles in custody, and 45 days for juveniles who are not detained. The most recent set of recommendations are contained in the 2005 Guidelines issued by the National Council of Juvenile and Family Court Judges (NCJFCJ). Those Guidelines distinguish between youth who are detained and those who are not detained, setting a maximum time of 30 calendar days between arrest and disposition for detained youth, and 58 calendar days for juveniles who have been released.

Time Standards in State Court Systems. At least 27 states and the District of Columbia have overall time standards for juvenile delinquency cases. Two offer standards for Status Offense cases. All but one set of state standards exceed the NCJFCJ Guidelines; however, all but four specify a maximum time to disposition for all cases well below the ABA’s one year limit. Six jurisdictions make a distinction between the time period for cases in which the youth is detained and those in which the juvenile has been released, with two making an additional differentiation between secure and non-secure detention. All but three set the end point as the disposition rather than adjudication. The beginning point, if stated, varies from arrest, to filing, to first appearance. One jurisdiction sets separate time periods for the most serious cases and another has established different time standards for jury and non-jury cases. While eight jurisdictions have established tiers of time standards, no state has adopted the ABA standards as promulgated. Both the percentages and prescribed time maximums vary widely. The most frequent maximum time limits are 90 days (five states), 180 days (five states) and 270 days (four states). Only one state’s standard exceeds one year; one sets a time limit of 37 days for detained youths. Seven states provide for a percentage of cases to exceed the maximum time limit – two percent (three states); one percent (two states); five percent (one state); and 25 percent (one state).

Overall Time Standards. As stated in the National Council of Juvenile and Family Court Judges Guidelines: . . . [T]imeliness throughout the juvenile justice process is critical for two reasons: One purpose of the juvenile justice process is to teach offenders that illegal behavior has consequences and that anyone who violates the law will be held accountable. A youth who must wait a significant period of time between offense and consequence may not be able to sufficiently connect the two events. . . . If the juvenile justice process is not timely, many youth will experience prolonged uncertainty [which] can negatively impact trust and a sense of fairness. If a youth does not perceive the juvenile justice system to be predictable and fair, then the system’s goal of changing behavior is less likely to be achieved. The most comprehensive information regarding the time required to dispose of delinquency cases is reported in a 2009 study of juvenile courts in 392 counties by Butts, Cusick, and Adams.
In 2004, 71 percent of the delinquency cases were disposed within 90 days of filing. Cases in which the youth was not detained proceeded slightly more slowly than those involving detention (67 percent disposed within 90 days vs. 71 percent). A report of 2007 caseload information in one state revealed that only 32 percent of contested juvenile delinquency cases were disposed within 30 days, about 78 percent were concluded within 90 days, and approximately 90 percent within 180 days. However, the report points out that there is no data available on uncontested cases which are generally “too short” to make data collection worthwhile. Data on total delinquency dispositions in 2009 is available from three other states. One reported that 74 percent of juvenile delinquency cases were disposed within 90 days, 88 percent within 150 days, and over 92 percent within 180 days. The second reported that 80.6 percent were concluded within 90 days, 92.5 percent within 150 days, and 95 percent within 180 days. The third reported that 75 percent of the delinquency cases were concluded within the time standards (180 days for non-jury cases; 240 days for jury cases).

**Intermediate Time Standards.** Only three states establish interim time standards for delinquency and status offense cases. Two include a standard for holding the detention hearing (one 24 hours, the other 48 hours); one has a standard for the filing of trial briefs (30 days); all three set a standard for holding the adjudication hearing or making a decision; and one establishes a time limit for holding a dispositional hearing after adjudication.

- **In 98% of cases, detention hearings should be held within 48 hours.**
- **In 98% of cases, waiver hearings, if needed, should be held within 45 days.**
- **In 98% of cases, the trial/adjudication hearing or acceptance of an admission should be held within 120 days after the detention hearing if the juvenile is detained.**
- **In 98% of cases, the trial/adjudication hearing or acceptance of an admission should be held within 120 days after detention hearing if the juvenile is not detained.**

Effective case management is essential if the time standards for disposition of juvenile delinquency cases are to be met. Setting and enforcing intermediate time standards are part of an effective case management strategy. Three intermediate time standards are proposed. The first is for holding the detention hearing, i.e., the initial appearance of an alleged delinquent youth before the judge to advise the juvenile of the charges and her or his rights; ensure that the juvenile has counsel; determine whether there is probable cause to proceed; and decide custody status. Frequently at these hearings, the court is advised whether the prosecution is seeking to transfer the youth to the criminal court and the youth will be asked whether he/she denies or admits the allegations. It has long been accepted that when the juvenile is being detained, this initial hearing must be held within a day or two days at most. Difficulty in notifying the parents of the need to appear…should be the only reason to delay the detention hearing….”

The second proposed intermediate standard addresses the timing of the hearing to determine whether the juvenile court will waive jurisdiction and transfer the case to the criminal court. Because transfer of jurisdiction has significant short-term and long-term consequences if the youth is ultimately convicted, time is required by both the state and defense to prepare. On the other hand, because the standard of proof is generally low (usually probable cause), the preparation time can be less than that required for a full-scale trial or adjudication hearing.
The third intermediate standard is for the adjudication hearing or trial. It sets the time for the adjudication hearing sufficiently before the expiration of the overall standard to permit a determination of what services and level of supervision are needed following a finding that the youth is delinquent.

Neglect and Abuse Disposition Standard: 98% within 90 days of removal
Permanency Plan Standard: 75% within 120 days of removal; 98% within 360 days of removal
Termination of Parental Rights Standard: 98% within 120 days

Definition. Neglect and abuse cases are actions brought by the state alleging that a child has been hurt or maltreated or that the person legally responsible for a child’s care has failed to provide the child with suitable food, shelter, clothing, hygiene, medical care, or parental supervision. In each of these circumstances, it is usually required that the maltreatment or omission threatens to cause lasting harm to the child. Some jurisdictions characterize these matters as dependency cases. Termination of parental rights matters result from the filing of a petition by the state to sever the parent-child relationship due to allegations of abandonment by a parent, child abuse, or unfitness of a parent.

Earlier National Time Standards. The 1983 COSCA time standards did not address juvenile delinquency cases. The 1992 ABA time standards specify that 90 percent of neglect and abuse cases and terminations of parental rights should be disposed within three months; 98 percent within six months; and 100 percent within 12 months. The federal Adoption and Safe Families Act (ASFA) (P.L.105-89) requires that in order for states to receive funds under Titles IV-B and IV-E of the Social Security Act, they conduct a permanency hearing for a neglected or abused child no later than 12 months after the child has entered foster care. A child is considered to have entered foster care upon a judicial finding that the child has been subjected to abuse or neglect or 60 days after the child has been removed from her/his home, whichever occurs earlier. A permanency hearing is the proceeding at which a court determines:

…the final plan in a neglect or abuse case that will move the child out of temporary foster care and into a safe, nurturing and permanent home. At the permanency hearing, the judge must order one of the following permanent plans for the child and specify the date that the plan will be implemented:

- Return to the parent
- …[A]doption …with the state filing a petition to terminate parental rights, if necessary;
- …[L]egal guardianship;
- …[P]ermanent placement with a relative, foster parent or other non-relative; or
- …[A]nother specified permanent living arrangement….

Termination proceedings under ASFA must be initiated, in most instances, if “a child… has been in foster care under the responsibility of the state for 15 of the most recent 22 months.”
**Time Standards in State Court Systems.** Fourteen states have standards addressing neglect and abuse cases, termination of parental rights proceedings, or both. The four that specifically address the permanency hearing are all consistent with ASFA.

- Four states set overall time limits covering the time to a permanent placement with 18 months as the most frequently used goal. Eight address only the hearing to determine that a child has been neglected or abused. These standards vary from 33 to 180 days, with four in the 88 to 120-day range. One state has standards for both achievement of permanency and adjudication hearings.

- Five jurisdiction’s standards distinguish between the time limits that should apply to cases in which a child has not been removed from her/his home and those in which removal has occurred. One also sets different time limits for standard and complex cases in each category.

- Six jurisdictions have specific time standards for termination proceedings (two at 180 days, two at 360 or 365 days, and one each at 120 and 150 days respectively). Four states address both neglect and abuse cases and termination cases.

- Three states provide for a percentage of cases to exceed the maximum time limit – one percent (one state); five percent (one state); 25 percent (one state).

**Overall Time Standards.** The proposed time standard is based upon the federal ASFA requirements leavened with a recognition that because of the difficulty in securing a safe permanent placement, a small percentage of cases will exceed the federal timeframe. Accordingly, the proposed standard sets a goal of holding three-quarters of permanency hearings within four months, leaving only the most difficult cases to be heard in the eight remaining months until the one year deadline. It is important that the exceptions that take more than one year be kept to an absolute minimum. As noted in the NCJFCJ Guidelines, uncertainty over placements and frequent transitions from one home to another “can seriously and permanently damage a child’s development of trust and security.”

States around the nation, inspired by the three National Judicial Leadership Summits for the Protection of Children, enabled by the grant funds provided through the federal Court Improvement Program, and challenged by the federal Child and Family Services Reviews have been striving to meet the prescribed timeframes. Based on 2008 data submitted by the more than 40 states participating in Summit III:

- The average mean time from filing of the protection order to the adjudication hearing was 137.2 days.
- The average median time from filing of a complaint to permanent placement was 627.1 days.
- The average mean time from notice of appeal to the final appellate decision was 197.9 days.58

Comparable data was not collected regarding disposition of termination of parental rights proceedings.
The proposed intermediate time standards address key decision points in the process. For neglect and abuse proceedings, the first point of concern to the parties is the initial hearing to determine whether removal was appropriate. If it is determined that removal was required to protect the child, then the court should set the timetable for further proceedings and assure that permanency planning is undertaken from the start. If it is determined that removal was not appropriate or is no longer appropriate, immediate action should be taken to safely reunite the family. The second interim point is the adjudication hearing. In order to achieve the goal of concluding 98 percent of adjudications within 90 days, the bulk of the hearings must occur well before that date to accommodate both the evidentiary process and time required to make a decision and craft an order. Four states have established standards for both adjudication and permanency hearings, with the time set for the adjudication hearing ranging from 33 to 153 days.

With regard to termination proceedings, ASFA requires that a termination of parental rights petition must be filed for any child who has been in foster care for 15 of the most recent 22 months unless timely services were not provided to the family, the child is being cared for by a relative, or other compelling circumstances. This requirement is intended to avoid “the documented substantial and unjustified delays in many states in legally freeing children for adoption.” An intermediate standard is not included because the filing of the petition is not a matter directly within a court’s control. The second intermediate standard seeks to balance the need for a prompt determination with the recognition of the time required to perfect service and prepare for a proceeding at which a fundamental right is at issue. It calls for the vast majority of hearings to take place within 60 days so that the overall 120 day to disposition goal can be met. The NCJFCJ Guidelines recommend that all termination proceedings that require a trial begin within 90 days, with a decision no later than 14 days after conclusion of the trial. The Guidelines also encourage use of mediation and other settlement techniques to achieve voluntary terminations and settlement of related issues so as to avoid as many trials as possible. The one state that includes an interim standard for termination cases calls for hearings within 60 days and all dispositions within 150 days.

**Administration of Estates Cases Standard: 75% within 120 days; 98% within 360 days**

**Definition.** Cases of this type involve the estate of a deceased person, including the determination of the validity and proper execution of a will or, in the absence of a will, the disposition of the decedent’s estate. Also included is the adjudication of disputes over a will and the oversight of actions by an executor, administrator, or personal representative.
Earlier National Time Standards. The COSCA time standards and the ABA time standards do not include provisions on administration of decedents’ estates. Although it emphasizes that probate proceedings, in general, and estate administration, in particular, should proceed in a timely manner, the National Probate Court Standards do not prescribe specific time standards.

Time Standards in State Court Systems. At least 12 jurisdictions have time standards for cases involving the administration of decedents’ estates. They vary considerably:

- Two states have a time standard only for contested estates, while two others have one time standard for uncontested estates and another for contested estates.
- One jurisdiction has separate time standards for small and large estates, while another separates the time requirement for estates with a federal estate tax from that for all others.
- Two states have one time standard for cases with no formal administration and another for those with full administration.
- Maximum times vary from three months to three years, with the most common expected duration (five states) being 360 days.
- All 12 states expect that a substantial portion of the estates should be settled within 12 months or less.

Overall Time Standards. The 360-day time standard offered here is reasonably consistent with the estate administration norms for all of the court systems with time standards. In some states, however, current experience may be that the portion of all decedents’ estates taking longer than a year to reach conclusion may be greater than two percent.

Intermediate Time Standards. Time standards are suggested here for two intermediate steps in the administration of a decedent’s estate.

- In 98% of cases, letters of administration should be issued within 90 days.
- In 98% of cases, accountings should be filed within 270 days.

The first critical step in a probate estate case is when the court “issues letters” – that is, when it gives formal approval for an executor or administrator to gather the estate and prepare for its distribution to beneficiaries. Since most estates are uncontested and may require little or no active and formal probate court supervision, the intermediate time standard from filing to issuance of letters is short.

The second critical point has to do with the filing of an accounting – a report by the executor or administrator on the receipts and income to the estate; debt and tax payments and other disbursements; and the balance of assets in the estate at the time of the report. After this accounting to the court on behalf of the beneficiaries, the executor or administrator is typically in a position to distribute the remaining assets of the estate in keeping with the law or the terms of the will, in order to close out the estate.

Guardianship/Conservatorship of Incapacitated Adults Cases Standard: 98% within 90 days
**Definition.** This case type includes matters involving the establishment of a fiduciary relationship between a person charged with taking care of either the personal rights of an adult who is found by the court to be unable to care for himself or herself (guardianship) or the property of an adult found by the court to be unable to manage his or her own affairs (conservatorship). It includes both full and limited guardianship and/or conservatorship for adults, but does not include guardianship of a minor or elder abuse cases.

**Prior National Time Standards.** The COSCA time standards and the ABA time standards do not include provisions for this case type. The National Probate Court Standards call for early court control and expeditious case processing, with hearings set at the earliest date possible, but do not offer specific time standards. The terms of the Uniform Guardianship and Protective Proceedings Act (UGPPA 1997) provide simply that the court should set a date and a time for a hearing.

**Time Standards in State Court Systems.** There appear to be only two state court systems with time standards specifically for guardianship and conservatorship cases. One calls for all such cases to be disposed within eight months after filing; the other specifies that 75 percent of guardianship/conservatorship cases should be disposed within six months, 90 percent within nine months, and 100 percent within 12 months. At least three states have a statutory requirement for how soon a court hearing should be held after the filing of a petition for guardianship and conservatorship. One requires that a hearing be held within 120 days after filing; the other two within 60 days after filing.

**Overall Time Standards.** The time standard offered here addresses the time from the filing of the petition to denial of the petition or issuance of a court order appointing a fiduciary on a non-temporary basis. It is premised on two considerations. First, there should be a prompt court decision balancing the due process rights of a disabled person with the need to protect that person or her or his estate. Moreover, in most such cases there is no dispute over either the disabled person’s capacity or the suitability of the individual proposed to be his or her fiduciary.

**Intermediate Time Standards.**

- In 98% of cases, temporary appointments should be ordered within 72 hours.
- In 98% of cases, trials/hearings regarding a permanent appointment should be started within 75 days.

In some circumstances, it is important for quick action to be taken to protect a disabled person or the estate. For this purpose there should be provision for prompt temporary appointment of a fiduciary. A requirement for temporary appointment in most circumstances within 72 hours allows time for notice and the scheduling of a court hearing while still assuring prompt action. Holding a hearing in most cases within 75 days should provide sufficient time for an investigation and also for possible mediation if there is a dispute.
Civil Commitment Cases Standard: 98% within 15 days

**Definition.** In terms of court statistical definitions, civil commitments are “mental health cases” in which a court is requested to make a legal determination whether a person is a danger to him or her or others due to mental illness or incompetency and “should be placed, or should remain, under care, custody and/or treatment.” This case type does not include court determination of competency to stand trial, nor does it include proceedings for civil commitment of sexually violent predators.

**Earlier National Time Standards.** Neither COSCA time standards nor ABA time standards include provisions relating to civil commitments. The National Guidelines for Involuntary Civil Commitment urge that a court hearing should be held no more than three days after a respondent was taken into custody or a petition was filed. More recently, the Model Law for Assisted Treatment provides that on any petition a court does not dismiss, the court should schedule a hearing to be held within ten calendar days after the petition was filed.

**Time Standards in State Court Systems.** Two state-level court systems have promulgated time standards relating to civil commitment proceedings. One provides that 80 percent of mental health cases should be disposed within 30 days, 90 percent within 45 days, and 99 percent within 60 days; the other specifies that 90 percent of civil commitment matters should be disposed within 14 days, and 100 percent within 28 days. Some states have statutory requirements for the timing of court hearings. In Florida, for example, “Baker Act” hearings on involuntary treatment must be held within five days, unless a continuance is granted; and in North Carolina, a court hearing must be held within ten days after a respondent has been taken into custody, with the court authorized to grant a continuance of up to five additional days.

**Overall Time Standards.** Since the 1986 recommendation by the Task Force on Guidelines for Involuntary Civil Commitment that there be a court hearing on involuntary treatment within three days after custody or petition, there has been time to observe whether so expeditious a process is workable. The 2009 Model Act allows a longer elapsed time – ten days. The statutory provisions relating to the timing of a court hearing in both Florida and North Carolina explicitly allow for the hearing to be continued. The time standard offered here for civil commitment proceedings seeks to balance the need for a prompt court determination of the need for involuntary treatment with the practical problem of completing an evaluation and scheduling the court event with adequate prior notice.

**Intermediate Time Standards.**

- In 98% of cases, assessment reports should be filed within ten days.

In order to protect the legal rights of a respondent while addressing a possible need for prompt care, the critical intermediate event is the completion and submission of the assessment report regarding the need for care and treatment. The timing for such a report should give sufficient
time for it to be reviewed by the respondent and his or her representatives prior to the hearing by
the court.

Post-conviction proceedings (following a criminal conviction) Standard: 98% within 180
days

Definition. This case type involves petitions for collateral review of a criminal conviction,
whether under statutory post-conviction review provisions or through proceedings on common
law habeas corpus or coram nobis petitions. It does not include direct appeals or proceedings on
motions for new trial or in arrest of judgment.

Prior National Time Standards. The COSCA time standards and the ABA time standards do
not include provisions for such proceedings. ABA standards relating to post-conviction review
call for there to be a “prompt response” by the prosecution and court assignment of “suitable
calendar priority” if there is reason for expedition, but they do not provide any specific time
standard within which such proceedings should be concluded.

Time Standards in State Court Systems. One state has established time standards for post-
conviction review proceedings -- 100 percent be disposed within 3 months after the filing of a
petition.

Overall Time Standards. Many petitions for post-conviction relief may be decided by a court
without need for an evidentiary hearing. The time standard offered here recognizes that, while
allowing time for prosecution and petitioner to prepare for hearing if one is required.

Intermediate Time Standards.

- In 98% of cases, responses with affidavits should be filed by the
  prosecution within 120 days.

Given the nature of a petition for collateral review, it is important that the prosecution respond
with reasonable expedition. Statutes in some states indicate a time within which a prosecutor
must file a response to a post-conviction petition.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution asks the ABA to adopt new standards modifying the standards set by the House in 1976 and amended 1992. The resolution sets standards for all types of cases including civil, criminal, juvenile, family, probate and post adjudication hearings. It also urges State judicial systems to either adopt and implement the Model Time Standards for State Courts, or to use them as a guide in conjunction with their drafting of their own set of statewide standards.

2. Summary of the Issue that the Resolution Addresses

The Time to Disposition Standards set forth in these documents are based on a project of over two years by the Trial Court Standards Committee of the National Conference of State Trial Judges/Judicial Division and over eighteen months work by a nation-wide Steering Committee. For the courts, the standards are intended to set forth achievable performance goals. For the lawyers, the standards establish a time framework within which to conduct their fact-gathering, preparation, and advocacy activities. For the public, the standards are intended to define what can be expected of their courts. They are intended as measures of the overall performance of a court, not as a rule governing individual cases or creating rights for individual criminal defendants.

In order to meet these standards courts are urged to use established measures for court performance to make certain that time standards are being met and to educate judges, lawyers and the public on the standards and their use. It urges local courts to use proven case management techniques to meet the standards including: monitoring status of cases and dockets; early and continuous court control of case progress; use of differentiated case management; having meaningful court events and prospects for non-trial disposition; and, credible trial dates among others.

3. Please Explain How the Proposed Policy Position will address the Issue

If adopted, this policy will allow the ABA to take steps to urge state judicial systems to adopt these Model Time Standards for State Courts and to assist them in doing so.

4. Summary of Minority Views

None known.
RESOLVED, That the American Bar Association urges the President, Congress, and the Equal Employment Opportunity Commission (“EEOC”) to adopt measures to provide that employment discrimination hearings conducted by the EEOC comply with the Administrative Procedure Act (“APA”).
a) Summary of the Resolution.

Litigants are entitled to a fair hearing with an opportunity to be heard before an impartial and well qualified adjudicator. The resolution would provide that hearings before the Equal Employment Opportunity Commission (“EEOC”) on employment discrimination claims brought by federal employees, applicants and former employees, be conducted pursuant to the Administrative Procedure Act (“APA”).

b) Summary of the issue which the Resolution addresses.

EEOC hearings are not conducted pursuant to the APA, so that the parties to those cases are not guaranteed that the proceeding will be decided on the facts and the law, rather than non-judicial factors; do not have the ability to subpoena information from third parties; and are not assured that the judge deciding their cases will have the same independence and the same qualifications as administrative law judges throughout the federal government.

c) An explanation of how the proposed policy position will address the issue.

Current legislation authorizes EEOC to hire administrative law judges pursuant to the APA. The Resolution recommends that the full protections of the APA be applied to EEOC hearings, and that any additional legislative and regulatory changes which are necessary for the APA to apply to those hearings be made.

d.) Minority Views or Opposition.

No opposition to this resolution is known to exist at this time.
RESOLUTION

RESOLVED, That the American Bar Association opposes federal, state, territorial and tribal laws that would alter the duty of care owed to victims of a natural or manmade disaster by relief organizations and health care practitioners;

FURTHER RESOLVED, That the American Bar Association supports programs to educate relief organizations and health care practitioners about their duty of care owed to victims of a natural or manmade disaster.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges the Association to oppose legislation that would alter the duty of care owed to victims of a natural or manmade disaster by relief organizations and health care practitioners, and to support programs to educate relief organizations and health care practitioners about their duty of reasonable care owed to victims of a natural or manmade disaster.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the legal duty of care owed by relief organizations and health care professionals to disaster victims. Proposals to eliminate or alter the duty of reasonable care are being presented to legislatures in connection with disaster preparedness activities. Such proposals are unnecessary, because current law already protects practitioners from being held to standards of conduct that are not reasonable under all the circumstances, including the severe constraints in disasters. They are also unwise, because they could result in harm to disaster victims.

3. Explanation of How the Proposed Policy Position Will Address the Issue

The resolution provides specific guidance on which legislative proposals to support and oppose to carry out more general principles contained in other Association policies and resolutions. It also encourages public education to eliminate confusion about the meaning of the legal duty of care, which confusion is reflected in proposals to remove or alter the legal duty of care. Educational programs should make clear that the legal duty of care does not prescribe how to practice medicine or any other health profession, but instead requires simply that health care practitioners exercise that degree of knowledge and skill that a qualified practitioner would exercise in the same or similar circumstances, which takes all circumstances, including the exigencies of disaster situations, into account. Explaining and supporting the existing legal duty of care will help protect disaster victims from additional harm and preserve fundamental principles of fairness.

4. Summary of Minority Views

No minority views or opposition have been identified.
RESOLVED, That the Association policies set forth in Attachment 1 to Report 400 dated August, 2011, are archived and no longer considered to be current policy of the American Bar Association and shall not be expressed as such.

FURTHER RESOLVED, That policies which have been archived may be reactivated at the request of the original sponsoring entities. If the original sponsoring entities no longer exist, requests may be brought to the Secretary to be placed on a reactivation list for action by the House of Delegates. Such reactivated policies shall be considered current policy for the Association and shall be expressed as such.

FURTHER RESOLVED, That the Board of Governors may act to reactivate policies when the House of Delegates is not in session.
35. Protocol to the Madrid Agreement for the International Registration of Trademarks
Intellectual Property
August, 2001

The Section’s third recommendation (Report No. 116C), urging the United States to adhere to the Protocol to the Madrid Agreement for the International Registration of Trademarks and amendments of the Lanham Act 15 U.S.C. §1051 et. seq., to the minimum extent required for U.S. adherence, was approved. It reads:

EXECUTIVE SUMMARY

1. Summary of the resolution
This recommendation archives Association Policies that are 10 years old or older. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA.

2. Summary of the issue which the resolution addresses
The archiving project, mandated by the House of Delegates in 1996, will improve the usefulness of the catalogued Association positions on issues of public policy. Many of the Association’s positions were adopted decades ago and are no longer relevant or effective.

3. An explanation of how the proposed policy will address the issue
The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

4. A summary of any minority views or opposition which have been identified
None at this time.