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* Pursuant to §45.5 of the House Rules of Procedure, this late report will be considered by the House of Delegates if the Committee on Rules and Calendar recommends a waiver of the time requirement and that recommendation is approved by a two-thirds vote of the delegates voting.
RESOLVED, That the American Bar Association reaffirms the following policy, adopted July 2000:

The sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession. The law governing lawyers that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law should not be revised.
EXECUTIVE SUMMARY

A. Summary of Resolution

The resolution urges the American Bar Association (“ABA”) to reaffirm existing ABA policy adopted in July, 2000 (Report No. 10F) that: (1) sharing legal fees with nonlawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession; and (2) prohibitions against lawyers sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law should not be revised.

B. Issue Resolution Addresses

Should the ABA reaffirm and re-adopt its policy adopted in 2000 that the sharing of legal fees with nonlawyers and ownership or control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.

C. How Proposed Policy Will Address the Issue

The resolution will address the issue by reaffirming existing ABA policy providing that sharing legal fees with nonlawyers and/or allowing nonlawyer ownership and control of law firms is inconsistent with core principles of the legal profession.

D. Minority Views or Opposition

The Commission on Ethics 20/20 has recommended or may recommend proposals which are a violation of and in contravention of current ABA policy. No specific opposition to the proposed resolution is known at this time. There are a variety of views both pro and con from interested individuals and entities in regard to amending Model Rules 1.5 and 5.4 that have been presented to the Commission during its deliberation and study of these issues.
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.
Amends Article 3 of the Constitution, and Article 21 and §31.7 of the Bylaws regarding membership issues.

Amends §3.3 (a) of the Constitution to read as follows: (additions underlined; deletions struck-through):

§3.3 Termination of Membership. (a) A member may resign from the Association at any time effective upon receipt of the member's written resignation at Association headquarters.

Comment: As a practical matter, the ABA receives terminations by way of multiple channels, including in-person and by telephone. We wish to update the language to accommodate all notification methods.

Amends §21.1 of the Bylaws to read as follows: (additions underlined; deletions struck-through):

§21.1 Application for Membership. Any eligible person may file with the Secretary an application for membership in the Association in the form prescribed by the Board of Governors. The Board may require the applicant to furnish additional information and may otherwise inquire into the applicant's qualifications. A willful and material misstatement by the applicant is cause for rejecting the application or, if the applicant has been admitted to membership, for expulsion.

Comment: The Secretary no longer receives applications for membership.

Amends §21.7 of the Bylaws to read as follows: (additions underlined; deletions struck-through):

§21.7 Law Student and Law School Graduate Members. (a) A law student who is otherwise ineligible for Association membership may
apply for law student membership under rules prescribed by the Board of Governors in consultation with the Council of the Section of Legal Education and Admissions to the Bar and the Law Student Division. Dues for law student members must be paid as prescribed by the House of Delegates Board of Governors.

(b) A law school graduate who is otherwise ineligible for Association membership because that person has not yet been admitted to the bar of a state, territory or possession may apply for law school graduate membership under rules prescribed by the Board of Governors in consultation with the Council of the Section of Legal Education and Admissions to the Bar. Dues for law school graduate members must be paid as prescribed by the Board of Governors.

(c) Both A law student members and law school graduate members:

(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 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.

(c) A law student member who is admitted to the bar of a state, territory or possession of the United States is entitled to the full privileges of membership in the Association without payment of dues accruing during the twelve-month period beginning with the date of enrollment as a member of the Association.

Comment: The Membership Committee proposes to clarify the existing definition of law student category to encompass both current law students and those that have recently graduated from an ABA accredited law school but have not yet been admitted to practice.

Amends §21.9 of the Bylaws to read as follows: (additions underlined; deletions struck-through):

§21.9 Default in Payment of Dues. A person whose dues are six months in default delinquent by a period set by the Board of Governors shall ceases to be a member of the Association.
Comment: The current policy of carrying unpaid members for 6 months has financial implications for the ABA. The Membership Committee believes that a shorter delinquency period would reduce costs and preserve ABA benefits for those that pay for them. We propose that the Board of Governors set the delinquency period.

Amends §21.10 of the Bylaws to read as follows: (additions underlined; deletions struck-through):

§21.10 Reinstatement of Members. A person whose membership has terminated may be reinstated only upon a new application and admission, payment of all delinquent dues.

Comment: In practice, those members recently dropped for non-payment of dues may pay all delinquent dues and retain their original ABA join date.

Amends §21.11 of the Bylaws to read as follows: (additions underlined; deletions struck-through):

§21.11 Certificate of Membership. Each member shall be given a certificate of membership in the Association.

§21.12 Associates. Persons who are ineligible to be members or Law Student members of the Association may qualify as associates if they are in one of the following classifications, have never been disbarred or suspended from the practice of law in any jurisdiction, are of good moral character, and satisfy such further eligibility requirements as may be approved by the Board:

…

Comment: Membership certificates are no longer provided as a general rule.

Amends §31.7 of the Bylaws to read as follows: (additions underlined; deletions struck-through):

§31.7 Designation, Jurisdiction, and Special Tenures of Standing Committees. The designation, jurisdiction, and special tenures of standing committees are as follows:
Membership. (a) The Standing Committee on Membership, which consists of ten members, shall encourage applications for membership in the Association and formulate plans for maintaining and increasing membership.

(b) In making appointments to the Committee, the President shall consider diversity in geographical area.

(c) The President shall also appoint one or more Association members in each state as state chair of membership to conduct the membership program of the Association in that state in coordination with the Standing Committee on Membership. The term of each person so appointed ends with the adjournment of the third annual meeting after appointment, except that the term of an appointment of a person to fill a vacancy ends with the end of the term in which the vacancy occurred. A state chair may serve for two three successive three-year terms and no longer, except that earlier service under an appointment to fill a vacancy shall not be counted.

(d) The Committee may invite the chair or co-chair for membership of the Young Lawyers Division and the national chair for membership of the Law Student Division to attend any of its meetings, and reimburse their incurred expenses as if they were members of the Committee.

Comment: The Standing Committee on Membership seeks to clarify the policy regarding state membership chairs. As some state delegates currently serve as state membership chairs, we propose changing the term length from two to three terms to be consistent with the term length of state delegates.

PROPOSAL: Amends §6.2(a)(5), 6.7(g) and 10.1(a) of the ABA Constitution and Bylaws to reflect the name change of the General Practice, Solo and Small Firm Division to the Solo, Small Firm and General Practice Division.

Amend §6.2(a)(5) of the Constitution to read as follows (additions underlined; deletions struck-through):

§6.2(a) 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:

(5) The delegates representing the respective sections of the Association, at least two for each section. For divisions, five for the Young Lawyers Division (including the Young Lawyers Division representative on the Nominating Committee), two for the Government and Public Sector Lawyers Division, two for the Senior Lawyers Division, three for the Law Student Division and three for the General Practice, Solo and Small Firm, Solo, Small Firm and General Practice Division.

Amend §6.7(g) of the Constitution to read as follows (additions underlined; deletions struck-through):

§6.7 Division or Conference Delegates. (g) At the annual meeting in 2005, the General Practice, Solo and Small Firm Solo, Small Firm and General Practice Division shall elect three delegates to the House of Delegates in the manner prescribed by its bylaws with staggered terms ending in Association years, 2006, 2007 and 2008. At the end of those respective terms and in each succeeding third year, each delegate position shall then be elected for a term of three Association years.

Amend §10.1(a) of the Constitution to read as follows (additions underlined; deletions struck-through):

§10.1(a) The convention of members of the Association shall be held annually at such place and time as the Board of Governors shall determine and shall be open to all members of the Association, or to such members as the Board of Governors shall designate. The convention of members shall commence on the Thursday following Thanksgiving and shall conclude on the first Monday thereafter.
§10.1 Sections and Divisions. (a) There are within the Association the following sections and divisions for carrying on its work:

General Practice, Solo and Small Firm Division
SPONSORS: Min K. Cho, Elizabeth K. Acee, Kelly-Anne Clarke, Michael Pellicciotti, Ethan Tidmore, and David Wolfe

PROPOSAL: Amends § 6.4 of the Constitution to change the requirement that if the bar associations of a state are entitled to four or more delegates, at least one delegate "must be less than 35 years old," to now require that that delegate "have been admitted to practice in his or her first bar within the past five years, or be less than 36 years old."

Amends §6.4 (a) of the Constitution to read as follows (additions underlined; deletions struck-through):

§6.4 State Bar and Local Bar Association Delegates. (a) A state bar association is entitled to at least one delegate in the House of Delegates, except that if there is more than one state bar association in a state the House shall determine which associations may select delegates. A state bar association in a state that has more than 4,000 lawyers is entitled to an additional delegate for each additional 2,500 lawyers above 4,000 until it is entitled to four delegates. A state bar association in a state that has more than 14,000 lawyers and not more than 20,000 lawyers is entitled to five delegates. If it has more than 20,000 lawyers, it is entitled to six delegates. If the bar associations of a state are entitled to four or more delegates, at least one delegate representing the state bar or a local bar association in that state must have been admitted to practice in his or her first bar within the past five years, or must be less than 36 years old at the beginning of the term. It is the responsibility of the state bar association to ensure that this requirement is satisfied. However, a state bar association is entitled to at least as many delegates as it was entitled to certify at the 1990 annual meeting.
SPONSORS: J. Anthony (Tony) Patterson, Jr., (Principal Sponsor), M. Joe Crosthwait, Jr., Sharon Stern Gerstman and Estelle H. Rogers, Members of the Committee on Scope and Correlation of Work; Governor Mark I. Schickman, ex officio to Scope; and Ginger Busby, Chair, Section Officers Conference.

PROPOSAL: Amends the Bylaws to dissolve the Standing Committee on Substance Abuse.

Amend §31.7 to delete the paragraph headed Substance Abuse.

Substance Abuse. The Standing Committee on Substance Abuse shall collaborate with other American Bar Association entities; federal, state and local public/private organizations; and state and local bars to address issues of substance abuse. In carrying out its function, the Committee shall:

(a) Encourage state and local bar associations to actively develop and foster lawyer and public participation in community anti-drug coalitions as an effective means of addressing substance abuse;

(b) Encourage, support, and initiate discussion and examination by ABA entities of exemplary methods that address substance abuse;

(c) Develop, after consultation with other appropriate ABA entities, and then implement a communications strategy to inform and educate lawyers and the public on exemplary programs which address substance abuse; and

(d) Make appropriate recommendations to develop and promote practices and policies that support prevention, education, and treatment of substance abuse.
SPONSORS: Palmer Gene Vance, Alice Bruno, Nathaniel Cade, Tracy Giles, and Mary T. Torres

PROPOSAL: Amends §42.6 of the Rules of Procedure of the House of Delegates to provide that the 11th Edition of Robert’s Rules of Order Newly Revised shall govern the House in parliamentary situations that are not covered by the Constitution, the Bylaws or the House Rules.

Amend §42.6 of the Rules of the Procedure of the House of Delegates to read as follows:

§42.6 Parliamentary Authority. Robert’s Rules of Order Newly Revised (11th edition) shall govern the House in parliamentary situations that are not covered by the Constitution, the Bylaws, or these Rules of Procedure, unless the House otherwise directs.

(Legislative Draft – Deletions Struck Through; Additions Underlined)

§42.6 Parliamentary Authority. Robert’s Rules of Order Newly Revised (11th edition) shall govern the House in parliamentary situations that are not covered by the Constitution, the Bylaws, or these Rules of Procedure, unless the House otherwise directs.

REPORT

This amendment to the House Rules of Procedure is being proposed by the members of the Committee on Rules and Calendar due to the recent publishing of the 11th Edition of the Robert’s Rules of Order Newly Revised. In parliamentary situations that are not covered by the Constitution, the Bylaws, or the Rules of Procedure, §42.6 provides that Robert’s Rules of Order shall govern the House. This proposal simply provides that the most recent version of Robert’s Rules of Order be used.
AMERICAN BAR ASSOCIATION

TORT TRIAL AND INSURANCE PRACTICE SECTION
COMMISSION ON DISABILITY RIGHTS
SAN DIEGO COUNTY BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges all state, territorial, and local legislative bodies and governmental agencies to adopt comprehensive breed-neutral dangerous dog/reckless owner laws that ensure due process protections for owners, encourage responsible pet ownership and focus on the behavior of both dog owners and dogs, and to repeal any breed discriminatory or breed specific provisions.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This Recommendation calls for state, territorial, and local legislative bodies and governmental agencies to enact comprehensive breed neutral dangerous dog laws based on behavior and to repeal any breed discriminatory provisions.

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

   The Resolution is intended to address problems that arise when dangerous dog laws do not meet due process requirements.

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

   This resolution sets forth actions that legislative bodies and governmental agencies can take to pass effective dangerous dog laws.

4. **Summary of Minority Views or Opposition Which Have been Identified**

   Some political subdivisions have enacted breed discriminatory ordinances because they believe they can identify the heritage of a dog by physical characteristics and that the heritage of a dog controls the dog’s behavior.
RESOLUTION

RESOLVED, That the American Bar Association adopts the Guidelines for Retention of Experts By Lawyers, dated August 2012.

FURTHER RESOLVED, That the American Bar Association urges counsel to consider utilization of the Guidelines in retaining experts for client matters.
ABA GUIDELINES FOR RETENTION OF
EXPERTS BY LAWYERS

INTRODUCTION

An ABA Section of Litigation Task Force was appointed by Section of Litigation Chair Hilarie Bass to explore the creation of guidelines for retention of experts by lawyers on behalf of their clients. While many experts have ethical codes applicable to their chosen professions, there are no uniform guidelines that apply to the retention and employment of experts. As a result, there are issues presented when experts are retained by lawyers on behalf of their clients in connection with litigated or contested matters. The lack of consistent guidelines has led to (a) inconsistent expectations of experts’ 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 Guidelines that follow are an effort to create uniform best practices of what lawyers should seek from experts who are retained by lawyers on behalf of their clients for litigated or contested matters. It is hoped that the Guidelines will be promulgated to the legal profession for use in connection with retaining experts. Thereafter, lawyers will be able to refer to the Guidelines in their discussions with experts regarding the type of conduct they expect. Lawyers may even seek to incorporate them into their retainer letters, if appropriate. By utilizing these Guidelines 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 Guidelines are not intended to impose a professional obligation on lawyers to use them and a failure to do so is not intended to be deemed a professional lapse. If a retaining lawyer chooses to use them in discussions with experts, they would govern only the relationship between the retaining lawyer and the expert, and, therefore, will not create any duties to or rights for the adverse party or its counsel. Accordingly, whether the Guidelines are followed or not should not be the subject of discovery by the adverse party. If a lawyer practices in a jurisdiction in which there is a risk of discovery relating to the use of the Guidelines, that risk should be taken into account in determining the extent to which the lawyer will seek to formalize the use of the Guidelines in his or her relationship with the expert. The Guidelines are also not intended to create standards for disqualification, which are a matter for continuing development by the courts.

PREAMBLE

These Guidelines apply to lawyers’ retentions of experts in connection with services provided to assist the lawyer’s client, in connection with an engagement regarding a litigated or contested matter. Experts are also subject to the applicable ethical codes of conduct of their professions or professional associations. These Guidelines 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. They are also intended
to address proceedings that take place in the United States or under United States law. They do not intend to address obligations that experts may have to foreign tribunals. They also do not govern the relationship between tribunals and experts hired by those tribunals, but we would expect them to be helpful to tribunals as well, for example, as a guide to the disclosures that may be required to be made to the tribunal or to counsel for the parties. They are intended to be interpreted with a rule of reason and with common sense.

Comment

The purpose of these Guidelines is to set forth appropriate guidelines for engagements by a lawyer of an expert on behalf of a client in litigated or contested matters. The intent is for them to apply where appropriate to all litigated matters, whether the expert is proposed as a testifying expert or simply retained as a consulting expert, and whether the matters are to be resolved in court, by arbitration, mediation or through any other recognized ADR procedure. They also are intended to apply to matters involving internal investigations but not to commercial transactions. The extent to which the lawyer chooses to ask the expert to agree to follow them will depend upon the nature of the engagement and the jurisdiction or jurisdictions in which the engagement will be performed.

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 Guidelines are not intended to supplant any such ethical requirements nor create any lesser standards of conduct. They are intended to create a set of best practices that lawyers should seek where appropriate with respect to experts retained by lawyers on behalf of their clients for the applicable matters. In so doing, it is hoped that clients, retaining lawyers and experts, will have a clear and common understanding of the expert’s expected conduct.

I. INTEGRITY/PROFESSIONALISM

The lawyer should seek an expert who will act with integrity and in a professional manner throughout an engagement.

Comment

Lawyers and their clients are entitled to expect all experts to act with integrity and in a professional manner in any engagement and to maintain the highest standards of ethical conduct. This set of guidelines will not be able to address every possible area of concern in the lawyer-client-expert relationship, but certain minimum expectations seem not only essential but also obvious. If the expert has accepted some or all of these Guidelines, the expert should not knowingly violate them, 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

The lawyer should take appropriate steps to assure that the expert is not undertaking an engagement unless the expert is competent to do so.

Comment

The lawyer must assure herself that the expert: (1) is competent to perform the entire scope of an engagement or (2) be capable of acquiring any additional necessary competencies to perform the engagement; failing that the lawyer should not retain the expert or if already retained, terminate the retention.

Being Competent

Prior to accepting an engagement the lawyer and expert together should determine whether the expert 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 lawyer should not retain the expert or cause the expert retention to be terminated.

III. CONFIDENTIALITY

The lawyer must assure that the expert treats any information received or work product produced by the expert during an engagement as confidential, and secure an understanding from the expert that he or she 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 Guideline requires that the lawyer take steps to ensure that 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 *I (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 *I. 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 guideline set forth above concerning confidentiality reinforces and is consistent with the rules generally applied by courts.

Lawyers should secure the agreement of experts, preferably in writing, to recognize their obligation to maintain the confidentiality of confidential information. 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. Lawyers should require that requests for such information directed to the expert 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, the lawyer should take steps to assure that the expert’s acceptance of the engagement will not 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
101 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 lawyer should ascertain from the expert all present or potential conflicts of interest. Among the matters that need be determined 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 public testimony, published writings or opinions of the expert in the last 7 years in other matters that directly bear on the subject matter of the engagement.

4. Determinations in the last 7 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.

Since the lawyer needs to be advised of any changes in this information throughout the engagement, the expert should be asked to 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 Guidelines 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 Guidelines intended to supplant standards that some professions have defined for their own members concerning conflicts of interest and disclosure issues. To the extent this Guideline contains more expansive disclosure obligations than the expert’s profession requires, the Guidelines should be followed. The Guidelines 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 Guidelines 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, the expert should be asked to agree that the
expert’s organization will 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. These Guidelines do not suggest that the same issues would be presented in an academic
setting or by memberships in professional societies of experts.

Relationships that should be determined 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. This of course would not require disclosure of
casual contact in professional settings but if there is doubt as to whether the relationship is
sufficiently casual, the expert should err on the side of disclosure. 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 the one
that should be disclosed.

Communications with the adverse party or its lawyer are another area of essential
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 should go beyond
those required disclosures. The retaining lawyer is entitled to know about all prior public
testimony, published writings or opinions of an expert, at least in the last 7 years, that directly
bear on the subject matter of the engagement. This of course would not require disclosure of
testimony, unpublished writings or opinions protected by confidentiality orders or agreements or
require the expert to search materials not accessible to the expert. The goal is to inform the
retaining lawyer of materials that may be useful to the other side in cross examination.
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 directly 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. By referring to opinions that directly bear on the subject
matter of the engagement, the Guideline again refers to opinions that could be used in cross
examination.
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. Again, the goal is to make the lawyer aware of materials reasonably likely to be discovered by the adverse lawyer. It is not intended to require experts to retain materials they would not ordinarily retain or to breach any confidential relationships. 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.

The need for disclosure continues 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 LITGATED MATTERS

No lawyer may offer 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 opinions 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
(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 Guideline 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.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Guidelines set forth five basic guidelines that seek to 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 requesting 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 public testimony or opinions in other matters that directly 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 guidelines are established for required ethical conduct.

2. Summary of the Issue that the Resolution addresses

The Report establishes Guidelines for Retention of Experts by Lawyers 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 guidelines 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 Guidelines seek to establish guidelines for expected 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 Guidelines will seek to establish guidelines for the retention of experts by lawyers, 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.

4. Summary of Minority Views

None of which we are aware. Other Sections shared views with respect to a prior versions. The prior proposed Standards were changed to Guidelines and many other changes were made to meet the concerns of other Sections.
Certain Sections had concerns about the ABA setting standards for other professions. First, while the Standards only sought to set expectations for what lawyers should expect from their experts when hired for client matters, to address the concerns of others, the Standards were changed to Guidelines, and the revised Guidelines were restructured to be a guide for lawyers in hiring experts. Second, the scope of applicability has been greatly narrowed to litigated or contested matters in the United States or under United States law. They do not purport to govern obligations that experts may have to foreign tribunals, they do not govern the relationship between tribunals and experts hired by those tribunals, and they do not apply to commercial transactions or criminal matters. Third, we added explicit references to construing the Guidelines with flexibility, common sense and a rule of reason so the explicit language does not cause unintended problems. We believe that by changing the focus to what lawyers should seek from their experts rather than suggesting what experts should or should not do, and by greatly narrowing the scope of the Guidelines, we have met the principal concerns of other Sections.
RESOLVED, That the American Bar Association adopts the *ABA Civil Immigration Detention Standards*, dated August 2012.
ABA Civil Immigration Detention Standards

August 2012

I. Introduction

The immigration detention and removal system is, by law, a civil system. The persons within this system are not awaiting criminal trials or serving prison sentences. Rather, most are in removal (deportation) proceedings that are presided over by immigration judges from the Department of Justice’s (DOJ’s) Executive Office for Immigration Review (EOIR). Others have not yet been placed in removal proceedings; or have been ordered removed and are awaiting removal from the nation; or will never be placed in formal removal proceedings because they are subject to administrative removal by the US Department of Homeland Security (DHS). The detention of immigrants serves to ensure court appearances and effect removal. It is not intended to serve a punitive purpose. By law, DHS must detain broad categories of noncitizens, and it has the discretion to detain all others in removal proceedings. A substantial percentage of persons in its custody do not have criminal records, and only a small percentage have criminal records based on violent conduct or pose a national security threat.

Despite DHS’s civil legal authority, the management of the US immigration detention system is based on a criminal detention model. Most persons in DHS custody—both those held by Immigration and Customs Enforcement (ICE) and the shorter-term detainees held by Customs and Border Protection (CBP)—are housed in jails and jail-like facilities, which are mostly administered according to American Correctional Association (ACA)–based standards that apply to persons awaiting criminal trials.

DHS/ICE has recently made it a priority to transform the immigration detention system from a criminal model into one that reflects its civil detention authority. The American Bar Association (ABA) civil immigration detention standards set forth below are intended to provide a tool that will guide DHS in the transition to a comprehensive civil detention system that does not primarily make use of jails and jail-like facilities to house the persons in its custody. Although the ABA recognizes the logistical and financial challenges involved in the expeditious and complete transformation to a civil detention system, it nonetheless urges DHS to adopt these standards quickly and to begin to reconstitute its infrastructure and reform its system based upon these standards.

In 2008, DHS/ICE released extensive performance-based national detention standards (PBNDS) based on ACA standards for pre-trial detention. In February 2012, ICE released its revised PBNDS 2011, which continue to be based on ACA standards for pre-trial detention. In addition, DHS/ICE has developed civil detention principles (not standards), which have been incorporated into its statements of objectives (SOOs) used in soliciting bids for select new detention facilities.

The ABA civil immigration detention standards are not intended to be an exhaustive compilation of all the standards that might apply to persons subject to DHS custody. Rather, they are intended to provide DHS with a blueprint for developing civil detention standards, particularly those that implicate access to justice and other ABA priorities. The ABA standards are intended to assist
DHS/ICE in its “real time” efforts to reform the US immigration detention system. The ABA standards should be used by DHS/ICE to update the PBNDS and to guide its comprehensive transition to a civil detention system.

The ABA standards are meant to apply to persons subject to DHS custody, while recognizing the need to take more restrictive measures for the limited percentage of residents who may represent a danger to others or to themselves. The ABA offers these standards in order to minimize the risk of civil and human rights violations against immigration detainees. Facilities that do not meet the standards should not house DHS detainees.

II. GUIDING PRINCIPLES

The principles below should guide DHS/ICE’s development of civil detention standards, and underlie the non-exhaustive list of ABA standards that follow:

A. The ABA civil immigration detention standards should exceed the constitutional protections guaranteed to other populations in custody, and should not be interpreted, in any particular, to provide less generous standards or protections than those set forth in the detailed DHS/ICE PBNDS and other standards set forth in the laws, regulations and sections of model standards referenced in this document. The ABA civil immigration detention standards incorporate by reference the following, with supplemental provisions incorporated by reference within the standards:

1. Part VI of the ABA Standards on the Treatment of Prisoners, which addresses health care.

2. Part X of the ABA Standards on the Treatment of Prisoners, which addresses facility administration and staffing.


B. The ABA civil immigration detention standards should apply to all residents in DHS custody, with the recognition that it will be necessary to classify residents based on the risk they present to others and to take more restrictive measures for persons (subject to appropriate procedural protections) who may represent a present danger to others or to themselves.

C. Any restrictions or conditions placed on noncitizens — residents or others — to ensure their appearance in immigration court or their actual removal should be the least restrictive, non-punitive means necessary to further these goals, and decisions to continue to detain should be regularly revisited.¹

¹The continuum of strategies and programs used to achieve these core goals should range from release on recognizance or parole, to release on bond, to community-based supervised release programs, to “alternative to
D. Residents should not be held in jails or jail-like settings. DHS/ICE should normalize living conditions in all detention facilities to the greatest extent possible. Civil detention facilities might be closely analogized to “secure” nursing homes, residential treatment facilities, domestic violence shelters, or in-patient psychiatric treatment facilities. Such facilities should have ample common space, freedom to move within the facility, extended access to indoor and outdoor recreation, and abundant opportunities to relate to other residents and to persons outside the facility. The level of security should be commensurate with propensity to institutional violence and any security or safety concerns related to the residents in individual facilities.

E. Access to legal services is critical to a fair and efficient immigration removal and detention system. Authorities should facilitate access to legal and consular services, legal materials and information, correspondence, and legal orientation presentations.

F. Facilities should allow for residents to seek and receive legal advice and medical and psycho-social care; conduct legal research and otherwise participate in the preparation of their cases; wash and wear their own clothes; and practice their faith(s).

G. A noncitizen should only be detained based upon an objective determination that he or she presents a threat to national security or public safety or a substantial flight risk that cannot be mitigated through parole, bond, or a less restrictive form of custody or supervision. As a general rule, minors and pregnant or nursing women should not be detained by DHS/ICE. References to these groups in the standards should not be interpreted to mean otherwise.

H. DHS/ICE should vigorously oversee its contractors and its own staff, and should bear ultimate responsibility for ensuring adherence to these standards, for safeguarding and protecting the rights of all residents, and for decisions related to release, classification, and detention of persons subject to its jurisdiction.

I. All facilities in which persons are detained should be subject to direct review and oversight by DHS. In addition, independent observers should be permitted to monitor conditions in facilities, to assess compliance with these standards, and to issue public reports with findings and recommendations.

J. Facilities should respect the rights and dignity of all residents. No resident should be subject to cruel, inhuman, or degrading treatment or conditions.

K. Congress should enact legislation to implement and fund compliance with these standards.

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detention” programs with various levels of supervision, to home detention (with strict conditions) that represent an alternative “form” of detention, to detention in civil detention facilities.
III. CLASSIFICATION AND PLACEMENT PROCESS

A. Least Restrictive Alternative

1. The intake, classification, and placement process should be used by DHS/ICE to determine whether a noncitizen should be released, placed in an alternative-to-detention (ATD) program or detained.

2. These standards presume use of the least restrictive means available to prevent flight and otherwise to meet the limited underlying purpose of detention.

B. Classification and Placement

1. If detention is necessary, DHS/ICE should consider all of the residents’ relevant circumstances, risks, and needs, including but not limited to the following, in determining custody classification and detention location:
   a. Location of the resident’s family, social and cultural support systems, and legal counsel;
   b. Prior criminal history and demonstrated propensity for institutional violence, risk of flight, and security needs;
   c. Medical requirements, mental health needs, and handicapping conditions;
   d. Other special conditions or vulnerabilities, e.g., if a resident is pregnant or has custody of minor children; and
   e. Availability of special programming.

2. The classification process should be systematized and should be validated by experts independent of DHS.
   a. Assessment of residents for placement within the system should be performed prior to assigning the resident to a specific facility.
   b. The assessment should be reviewed by facility staff within 24 hours of the resident’s arrival at the receiving facility.
   c. Whenever it is determined that the placement is inappropriate, DHS/ICE should be notified immediately and should place the resident in a more appropriate facility.

3. DHS/ICE should rate and classify all facilities used to house those in its custody based on their appropriateness and ability to accommodate residents of different classifications. Facilities should be rated according to their suitability to house persons with different security and safety classifications, medical and mental health needs, and other relevant factors like age and gender.
4. Noncitizens should not be presumed to be dangerous or prone to flight in the absence of credible information establishing objective risk factors.

C. Facility Intake Process

1. The intake process should include an initial medical, dental, and mental health screening that occurs prior to placement of the resident in a detention facility, and in no event more than 12 hours after arrival. This screening should be performed by a qualified medical professional.

2. Each resident should receive a comprehensive medical and mental health evaluation by qualified professionals no later than 14 days after admission to a facility, and a thorough medical and mental health assessment periodically thereafter, in accord with community health standards. Unless a dental emergency requires more immediate attention, an examination by a dentist or trained personnel directed by a dentist should be conducted within 90 days of admission.

3. All facilities should follow a uniform, validated protocol for screening and assessing residents that is designed to identify any issues requiring immediate or special attention, such as:
   a. Any physical illness, substance withdrawal, or communicable or chronic disease that could require medical treatment;
   b. Any mental health conditions that require treatment, make the resident a risk to himself or herself or to others, or make the resident especially vulnerable in a detention setting.

4. Should a screening or assessment indicate that fuller medical or mental health evaluation is required, such evaluation should be conducted in a facility that can provide comprehensive medical and mental health services.

5. Upon arrival at the facility, residents should be provided with a DHS/ICE Handbook and a facility-specific handbook that describe rules and procedures as well as resident rights under these standards, each in a language the resident understands. In-person assistance should be provided to persons who are illiterate or have disabilities. In addition to written materials, residents should be instructed on key points in the handbooks in a language they can understand.

D. Review of Placements

1. In addition to assessing individuals in the initial intake process, DHS/ICE should regularly review its placement and classification decisions to ensure that residents are:
   a. Detained for the minimum time necessary;
   b. Not detained indefinitely;
   c. Reclassified and, if appropriate, transferred to another kind of facility; and
   d. Released if detention is no longer appropriate.
2. The initial review of a resident’s classification and placement should be performed no more than four weeks after a resident has entered a facility. An earlier review of classification and placement should be triggered by factors including a change in flight risk (such as eligibility for relief, attainment of legal counsel, or ability to post bond) or a change in risk of harm to the resident due to classification and placement.

3. Whenever it is determined that the placement is no longer appropriate, DHS/ICE should be notified immediately and should place the resident in a more appropriate facility.

IV. PHYSICAL PLANT AND ENVIRONMENT

A. Location of Facilities

Facilities should be located near the following:

1. Medical facilities capable of providing primary and secondary medical treatment;
2. The resident’s family, social and cultural support systems;
3. A transportation hub; and
4. Adequate non-profit, pro bono, or low-cost legal services.

B. Physical Plant

The physical plant of a facility should:

1. Be clean and well-maintained.
2. Be equipped with appropriate heating, air conditioning, and ventilation systems: residents at risk of heat-related illness or harm should be provided necessary access to cooled environments during heat emergencies;
3. Allow for privacy, freedom of movement, and access to outdoor recreation;
4. Be constructed and maintained so as to minimize noise to residents and maximize access to natural light;
5. Be smoke-free and compliant with the Americans With Disabilities Act;
6. Be regularly inspected to ensure compliance with all relevant health, safety, and building codes;
7. Include sufficient and appropriate space to support the programs and services referenced in these standards; and
8. Be secured by controlled access and perimeter walls if necessary, but not by traditional prison-like towers, fences, or barbed or concertina wire. A more secure perimeter may be necessary for facilities or portions of facilities that detain populations classified as having a propensity for institutional violence or otherwise presenting a security or safety risk.
Each facility should provide private, safe, secure and sanitary facilities to residents.

A. Privacy, Personal Possessions, and Physical Space

1. The physical dimensions of residential quarters should be adequate to ensure compliance with fire and safety codes.

2. Facilities should provide each resident with access to:
   a. A bed and mattress raised off the floor;
   b. Blankets and fans, as appropriate;
   c. Sufficient storage with a lock controlled by the resident to afford access to personal possessions in the living area;
   d. Private showers and toilets, where practicable and appropriate, based on security levels;
   e. Adequate light and control over lighting, i.e., residents should be able to turn on a light in their sleeping quarters at will and turn off lights that might impede sleep; and
   f. Abundant natural light and views of the outdoors.

3. An inventory of personal property should be provided at intake and a copy of the inventory should be provided to the resident. Additionally, the resident should be provided with copies of identity documents, including passports. Otherwise lawful contraband that is taken from a resident should be stored securely and immediately returned upon transfer or release. Residents should be permitted to retain in their possession non-contraband personal property.

4. Residents should have access to copies of all materials required for legal proceedings, including passports and other official documents, held by DHS/ICE.

5. Facility staff should provide storage for medications or special dietary needs, and should monitor compliance with prescription and other medication regimens. There should be a presumption that residents are permitted to keep their medications in their possession.

6. Residents should be allowed to wear their own clothing and should not be subject to clothing restrictions apart from those deemed strictly necessary for security.

7. If the resident does not have clean or adequate clothing, the facility should provide him or her with clean, gender-appropriate, well-fitting civilian clothing and underwear, in good condition, with some variety (i.e., not uniforms) and suited to the season and to the facility temperature.

2 Modifications or accommodations for vulnerable populations, as defined in the glossary, may be warranted where appropriate.

3 This standard should not be construed to preclude appropriate security precautions such as night lights to facilitate safety.
Residents should be afforded uninterrupted quiet time after a certain hour.

Facility staff should not conduct more than three headcounts of residents per day, except where warranted for special populations such as violent, mentally ill, or elderly residents or in extraordinary circumstances. Headcounts should be organized as check-ins and should not involve a lock-down of all residents in their sleeping quarters.

Residents should be afforded access to their personal funds and banking services, as appropriate.

**B. Communal Space**

1. Communal areas should be reasonably accessible for most of each day, although there may be additional restrictions on access to dining areas and libraries.

2. Areas designated for dining should be separate from areas designated for sleeping.

3. Non-private “living” areas should provide space for activities that are communal (e.g., television viewing) as well as “quiet” (e.g., reading). “Quiet” areas should be measured by decibels to ensure that the area is indeed quiet.

4. Sufficient private space should be set aside for the provision of services that cannot or will not be provided off-site, including medical and counseling services.

5. There should be substantial outdoor space for recreation, with grass unless the climate makes it impossible, and shelter from sun or rain, including for aerobic activities and organized events, as well as indoor recreation space for use in the event of inclement weather.

6. There should be fair and equal access to all communal space.

7. Space should be sufficient to meet the needs of all residents.

8. A fair process should be established to allow residents, on an equal basis, to reserve limited space or resources.

9. The facility should provide access to a commissary so that residents can purchase non-essential items — including certain food and clothing — at a reasonable price that is competitive with prices in local stores.

10. Residents should be able to work for compensation.

11. Residents should be permitted to order items through the mail, subject to screening for contraband and safety purposes.

12. Toilets and common areas should be cleaned on a regular and frequent schedule, and as necessary.

**C. Food Service**

1. Residents should be provided adequate and nutritionally balanced diets.

   a. Diets should be reviewed at least quarterly by food service personnel and at least annually by a qualified dietician.

   b. Diets should meet U.S. recommended daily allowances as certified by a qualified dietician.
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c. Residents should be served three meals every day, at least two of which should be hot meals.
d. The dining schedule should provide for no more than 14 hours between the evening meal and breakfast.
e. Clean drinking water should be available at all times.
f. The diverse nutritional needs of residents of different ages, levels of activity, physical condition, gender, religious affiliation, and medical needs (including pregnant women and nursing mothers) should be met.
g. The facility should accommodate the ethnic and religious diversity of the facility’s population when preparing menus.

2. Residents, staff and others should be protected from harm by the application of sound security practices in all aspects of food service and dining room operations.

3. Residents, staff and others should be protected from injury and illness by adequate food service training and the application of sound safety and sanitation practices in all aspects of food service and dining room operations.

4. Food should be served at appropriate temperatures.

5. Food service areas should be clean and well lighted.

6. Dining room facilities and operating procedures should provide sufficient space and time for residents to eat meals in a relatively relaxed, unregimented atmosphere.

a. The table arrangements should provide for unassigned seating and ease of movement.

b. The dining room should have the capacity to permit each resident a minimum of 40 minutes dining time for lunch and dinner, and 30 minutes for breakfast.

c. Residents should retain sufficient access to dining room facilities outside of regular meal times to enable cleaning and/or disposal of food-related items consumed outside of dining areas.

7. Food service facilities and equipment should meet established governmental health and safety codes, as documented by relevant agencies and experts independent of DHS.

8. Food service areas should be continuously inspected by food service staff and other assigned personnel in accordance with established health and safety guidelines.

9. Therapeutic medical diets and supplemental food should be provided as prescribed by appropriate medical personnel at no cost to the residents.

10. Special diets and ceremonial meals should be provided at no cost to the residents for residents whose religious beliefs require adherence to religious dietary laws.
11. Where practicable, the facility should permit the private storage of food for religious or medical needs, and should permit residents to prepare meals for special cultural and religious occasions.

12. Food should never be used for reward or punishment.

13. The food service areas should be subject to regular inspection by independent and licensed entities.

D. Freedom of Movement and Recreation

1. Residents should be permitted the maximum amount of freedom of movement within the facility, both indoors and outdoors, consistent with the safety and security of residents and staff.

   a. Except where necessary to ensure safety and security, residents should be able to move freely and without escort during daylight hours within and between the areas designated for housing and recreation.

   b. Reasonable access should be afforded to general reading and law libraries in accordance with Standard VII. Access to Legal Services.

   c. Access to medical facilities and medical treatment should be available upon request in accordance with Standard VIII. Access to Health Care Services.

   d. Restraints should not be applied to residents when medically contraindicated, including during labor and postpartum.

2. Residents should be permitted extended access to indoor and outdoor recreational and exercise activities on a daily basis.

   a. Indoor recreational space should permit aerobic activities and games such as table tennis and other organized events.

   b. The outdoor recreation area should be located outside a building, and should include grass, shade and shelter from rain, sitting areas, exercise equipment, and space for sports. Exercise equipment should be maintained in a safe condition.

   c. Residents should have free access to outdoor recreation throughout the day, weather permitting.

   d. Residents participating in outdoor recreational activities should have access to drinking water and toilet facilities.

   e. All residents, including residents in administrative or disciplinary separation, should have access to outdoor and indoor recreation.
f. Common rooms should offer and be large enough to accommodate board games, television, and opportunities for residents to engage in independent and small-group recreational activities.

g. Facilities should provide residents with opportunities to access programmatic activities consistent with their length of stay. Residents in custody for 14 days or more should be able to access educational, skills-development, English language, programs required for compliance with court orders or family reunification case plans, and other programs.

h. Facility staff should provide monitoring of the recreational areas to the extent necessary to ensure the residents’ safety.

i. Access to outdoor recreation should not be denied as a disciplinary measure.

VI. COMMUNICATIONS

A. Correspondence and Other Mail

1. Residents should be permitted to correspond with families, friends, legal personnel, the news media, and US and foreign government and consular officials.

2. The amount and content of correspondence that residents send at their own expense should not be limited, except to protect public and facility safety and security.

3. The facility should provide writing paper, writing implements, and envelopes at no cost to the residents.

4. Indigent residents should receive

   a. A postage allowance for personal correspondence; and

   b. Necessary postage for special or legal correspondence.

5. The facility should provide a postage allowance to all residents if the facility does not have a system for residents to purchase stamps.

6. Incoming and outgoing mail, except for special or legal correspondence, should be opened by facility staff only for purposes of inspection for contraband.

7. Incoming and outgoing mail, except for special or legal correspondence, should be read or withheld by staff only with the permission of the director of the facility and as necessary to protect public and facility safety and security. Residents should be promptly notified in writing when mail is withheld in whole or in part. The facility should provide a process by which a resident may appeal to federal officials a decision by the facility to withhold mail.

8. Special or legal correspondence should be opened by facility staff only in the presence of the resident, and should not be read by facility staff.
9. Residents should be permitted to receive packages, including items ordered through the mail, except as necessary to protect safety and security. Facility staff should open packages only for purposes of inspection for contraband.

10. The facility should process incoming and outgoing mail as expeditiously as possible, and in no event less than once per day.

11. Legal personnel should be permitted to deliver documents to residents other than by regular mail in accordance with Standard VII.C.2.

B. Telephonic and Other Real-Time Communications

1. This subsection applies to telephones and non-telephonic forms of real-time communication, such as videoconferencing and e-mail.

2. Residents should have reasonable and equitable access to modestly priced telephone services. Charges imposed for phone use should be competitive with rates charged to the public.

3. Residents with hearing or speech disabilities should be accommodated in order to permit reasonable access to telephone services, e.g., with a TTY device or accessible telephone. Residents with speech or hearing disabilities should be permitted extra time for calls.

4. Residents should be able to make no-cost calls and send e-mail (if the receiving entity allows), and receive e-mail from the following as necessary:
   a. The EOIR (including the BIA), and immigration courts;
   b. Federal, state, and family courts in which the resident is or may become involved in a legal proceeding (including proceedings involving parental rights);
   c. Legal representatives and personnel;
   d. Embassy and consular officials;
   e. DHS Office of Inspector General (OIG);
   f. The UNHCR for asylum-seekers and stateless residents;
   g. Federal, state, and local government offices to obtain documents relevant to the resident’s immigration case or documents necessary to comply with court orders or arrangements for their children;
   h. Family members or other individuals assisting with the resident’s immigration proceedings;
   i. Immediate family or others in personal or family emergencies or where a compelling need arises; and
   j. DHS, including its Joint Intake Center and the ICE Public Advocate.

5. Residents should have access to telephone services for a minimum of 30 minutes per resident per day, at reasonable and appropriate times, including during regular business hours as necessary. Residents with speech or hearing disabilities should be provided with sufficient
extra time to use the telephone. In addition to this 30-minute minimum, residents should also be permitted to make calls to and receive calls from legal counsel without time restriction, unless such restriction is deemed necessary for reasons of heightened security.

6. Indigent residents should be provided with a telephone allowance for calls to persons other than those identified in Standard VI.B.4.

7. Telephones should be located in convenient and private areas sufficiently distanced from television and other activities that might be distracting.

8. Telephone calls should be presumptively private and should be monitored or recorded only as necessary to assure safety and security. Telephone calls with legal representatives and personnel should be treated as confidential and should not be monitored or recorded, and should otherwise be subject to the provisions in Standards VII and XV, relating to communications with legal personnel and confidential communications with external monitoring agencies.

9. Residents should be informed as part of a comprehensive orientation and shown (thereafter) in-person how to request private areas for telephone calls and other confidential communications with legal representatives, caseworkers, or family courts.

10. Telephones should be maintained in good working order. Facility staff should inspect the telephones daily, promptly report out-of-order telephones to the repair service, and ensure that repairs are completed quickly. Out-of-order telephones should not excuse the facility from providing telephone access required by other provisions of these Standards.

11. Residents who are held separately from others should not be denied access to telephone services.

12. Residents should have access to the internet for at least one hour every three days, with sufficient, additional time for legal research, and should have access to e-mail in order to communicate with legal personnel and their families, subject to reasonable security-related restrictions and limitations. The confidentiality of legal communications should be respected.

13. Residents should have access to a telephone and corresponding telephone number, where they can receive incoming calls from criminal or family courts in order to comply with required telephonic appearances.

14. Residents should have easy access to notaries public. A notary should be available to residents every day.

VII. ACCESS TO LEGAL SERVICES

A. Access to Legal Services

1. Residents should be able to meet with current or prospective legal representatives and other legal personnel, court personnel, witnesses, translators, family members and others who can assist them in the preparation of their cases (including the UNHCR), and embassy and consular officials.
2. Residents should also have access to the legal system including access to
criminal, family, and juvenile courts; parole and probation hearings; and administrative
processes and proceedings in which they have an interest.

3. No resident with legal representation should be unwillingly transferred to another
facility except in extremely limited circumstances related to the security, safety, health or well-
being of the resident, other residents, or facility staff. DHS/ICE should document the necessity
for the transfer beforehand and provide concurrent notice of the reassignment to the attorney of
record. Such notice should include contact information for resident at the new facility, as well as
description of the mode of transfer (e.g., bus, airplane, etc.) and expected time of arrival.

4. There should be meaningful and timely access to legal personnel, including but
not limited to the following:

   a. Legal personnel should have the ability to visit, call via phone or web- or
      videoconference, or communicate electronically with residents at a minimum of
      12 hours a day, including in the evening and on weekends. Residents should be
      notified of the hours and rules for legal visitation; and information should be
      posted in the waiting areas, visiting areas, and housing areas. Facility staff should
      consider requests for legal visitation outside of normal hours.

   b. Legal counsel should not be required to provide advance notice of meetings, and
      any restrictions on advance notice for meetings should be minimal and based
      solely on maintaining facility security. The time between the arrival at the facility
      of a legal representative or translator and a scheduled meeting with a resident
      should not exceed 30 minutes.

   c. Sufficient private rooms should be set aside (including on short notice) to
      accommodate private communications, including video and telephonic
      communications between residents and legal personnel. These meeting rooms
      should allow legal counsel to review written documents with resident clients, and
      should not include Plexiglas or other barriers separating legal counsel from the
      residents, except in extraordinary cases involving safety risks.

   d. Meetings should take place in a setting where conversation cannot be overheard
      or recorded by staff or other residents. Facility staff should not be present in the
      confidential area during the meeting unless legal personnel so request. In such
      cases, the meeting should be afforded the greatest degree of privacy possible,
      including through visual but not auditory monitoring.

   e. Post-meeting searches may take place according to the provisions in Standard X.
      Visitation.

5. Legal personnel should be permitted to take laptops and smartphones into the
courtroom and to visits with clients. The facility may opt to provide its own equipment to legal
representatives upon an individualized determination of risk.
6. Facilities should house or be located near immigration court rooms to the greatest extent possible in order to allow in-person court hearings. In no event should videoconferencing should be used for merits hearings. Facilities should provide transportation to residents to allow for in-person merits hearings at the relevant immigration court.

a. If the facility houses a courtroom, it should comply with requirements set forth by EOIR, and should enable residents to have private hearings outside the presence of other residents.

7. Residents should have no-cost access to telephones, e-mail and video technology in order to communicate with legal representatives, according to the provisions under this section and Standard VI.B Telephonic and Other Real-Time Communications. Legal communications may not be monitored or recorded. Legal personnel should be able to leave messages for residents, which should be delivered promptly.

8. Access to interpreters, translators or other services required to provide meaningful access to legal services should be provided on the same basis as access to legal personnel. Telephonic and video access to interpreters should be permitted for residents who speak less common languages and for whom local interpretation services are not readily available. Legal personnel should be permitted to bring interpreters of their choice to meet with residents, including interpreters from the law office who may or may not be on a facility-approved list.

9. ICE should ensure that each facility posts the list of local free legal services providers, updated regularly by EOIR. The list should be posted in resident housing units, near telephones, and in other appropriate areas, and copies should be made available upon request.

B. Access to Legal Materials and Information

1. Residents should have access to updated legal materials including current relevant codes, regulations, court rules, self-help materials, and legal forms. Sufficient private space should be set aside to enable residents to conduct legal research.

2. Each facility should maintain a law library that includes computer terminals with access to legal materials. The latter may be provided via on-line services like LexisNexis or Westlaw. Instruction on how to use computers, including on-line services, should also be provided. The law library should include updated editions (in hardcopy) of the relevant codes, regulations, operating instructions, case reporters, treatises, self-help materials, model pleadings, court procedures, and other legal materials.

3. Residents who are unable to access legal resources or prepare for immigration or other proceedings because of language or reading limitations should have access to alternative services, including confidential translation services.

4. Officials should not read, alter, or destroy a resident’s legal materials. Officials may inspect legal materials for physical contraband.
C. Access to Legal Correspondence

1. Residents should be permitted to send and receive special and legal correspondence confidentially, including by mail, facsimile, and e-mail (with reasonable limitations), and be provided access to copy machines, postage and notary services, according to this Standard and Standard VI.A Correspondence and Other Mail.

2. Facility staff should provide for the privacy of correspondence between residents and legal representatives. Facilities should afford the means for secure delivery of materials and documents from legal personnel to residents, including by mail, personal visits, and drop-off.

3. Under no circumstances should legal mail be read by anyone other than the intended recipient. Legal mail may be searched only for physical contraband, and searches should be conducted only in the presence of the resident to or from whom the letter is addressed.

D. Legal Orientation Presentations

1. Facilities should permit representatives from non-governmental organizations (NGOs) and nonprofit legal services organizations to conduct confidential legal orientation presentations, including group presentations and meetings with one or more residents, upon request. Legal orientation presentations may be pre-representational or take place after representation has been secured. They should include information regarding immigration laws and processes, child custody matters, obtaining travel documents, and arranging for a child to join a parent in the event of deportation. Legal orientation presentations should be afforded the same confidentiality as legal meetings under this Standard.

2. Legal orientation presentations should be permitted to take place in person or via web-or videoconference. Facilities should provide adequate meeting space for in-person presentations.

3. Legal orientation presentations should be scheduled multiple times per week as needed to accommodate residents. Requests for presentations should be granted to the greatest extent practicable. Facility staff should publicize legal orientation presentations in advance, with accurate information about the content and provider of the presentations, and permit residents to participate as often as is practicable.

4. Presenting organizations should be permitted to provide written materials regarding immigration court procedures and the availability of legal information, relief from removal, and other relevant information, in accordance with Standard VII.B Access to Legal Materials and Information.

5. Facilities should regularly show the ABA Know Your Rights video on video monitors, and also make it available in the law library on demand.

6. Facility staff should also provide a comprehensive orientation to all new residents, covering, inter alia, the programs, physical plant, rules, procedures, and policies of the facility.
This section incorporates by reference the standards in Part VI of the ABA Standards on the Treatment of Prisoners. The subsections below supplement the standards in Part VI. In cases where the contents of Part VI conflict with the subsections below, the subsections below should be followed.

1. Health care screening should be performed only by medical professionals, not security staff. Healthcare providers should be fluent in the languages predominant among the resident population.

2. Residents should not be sedated in order to facilitate their cooperation with removal from the country.

3. Restraints should not be used for patients in labor or post-partum, or when medically contraindicated. Residents should not be examined while they are in restraints.

4. A standard DHS/ICE electronic medical record will be used at all detention facilities.

5. Female health and hygiene needs should be fully met. Provision for these needs should include a choice of feminine hygiene products.

6. Residents should not be charged fees for necessary health care services. Required medications should be included in the facility formulary, whether or not they are available for purchase by residents, to assure access to necessary medical care.

7. Residents should always be told the name and the dosage of any medication they are given, and should be permitted access to a written record of the same, which residents can, if they so choose, permit legal personnel to see.

8. No resident should be allowed to provide health care evaluation or treatment to any other resident.

IX. ACCESS TO RELIGIOUS SERVICES

A. Right to Practice Religion

1. Residents of all faiths should have reasonable and equitable opportunities to attend religious services and engage in practices consistent with their faith traditions. In accordance with the Religious Freedom Restoration Act of 1993 and the Religious Land Use and Institutionalized Persons Act of 2000, DHS/ICE and facility policies should avoid imposing a substantial burden on residents’ religious exercise except where the “least restrictive means available” is employed to serve a “compelling government interest.”

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2. No matter where residents are held they should be afforded the protections of federal law. In the event that a resident is held temporarily in a hospital or a separate unit because of a health emergency or security-related incident, he or she should continue to have access to religious activities and practices to the extent compatible with medical and security requirements.

3. Attendance at all religious activities should be voluntary and religious personnel at the facility should employ a non-proselytizing model of pastoral care.

4. All religions represented in a detention population should have equal status without discrimination based on the resident’s race, ethnicity, religion, national origin, gender, sexual orientation, disability or health status.

5. Religious service providers should have reasonable access to facilities and residents. Residents of faiths not represented by religious services staff should be assisted at their request in contacting external clergy or religious service providers. Facilities should allow entry of religious services providers’ interpreters. Visits from religious personnel should not count against a resident’s visitor quota.

6. With respect to religious headwear, these standards incorporate by reference the standards contained in the DHS Office Civil Rights and Civil Liberties’ (CRCLs’) Guidance for Accommodating Religious Beliefs in DHS Policies Requiring Fingerprinting or Photographic Identification.

B. Religious Services Coordinator

1. Each facility should have a professional Religious Services Coordinator — a position that should be held by non-security personnel — or a chaplain who should facilitate arrangements for religious services and for pastoral visits by clergy and other representative of the residents’ faith(s).

2. The Religious Services Coordinator should have a basic knowledge of different religions and should ensure equal status and protection for all religions. A chaplain should have the minimum qualifications of clinical pastoral education or specialized training, and endorsement by the appropriate religious-certifying body.

3. In lieu of these qualifications, the facility administrator may accept adequate documentation of the recognized religious or ministerial position in the chaplain’s faith community.

4. Religious Services Coordinators and chaplains should have the necessary training to connect residents with a broad range of religious services and be willing and able to arrange religious services for multiple faith traditions.

C. General Requirements for Access to Religious Services

1. Adequate space, equipment and staff (both clerical and security) should be provided for conducting and administering religious programs in areas of the facility that are not used as a cafeteria or for concurrent programs.
2. Upon entry to a facility, residents should be informed of the availability of religious services, and how to request and access those services. Each resident should be asked to designate any religious preference, or none, during intake processing.

3. Staff, contractors and volunteers should not disparage the religious beliefs of residents, nor coerce or harass residents to change religious affiliation.

4. A resident should be permitted to change his or her religious preference designation at any time by notifying the chaplain or religious services coordinator in writing. The change should be effected in a timely fashion.

5. Residents should not be required to remove their religious headwear for intake pictures, where the headwear does not obscure facial features.

6. Residents should be permitted to maintain their hair, including beards and facial hair, according to their faith practices and should be provided with personal hygiene items necessary for the practice of their religion(s).

7. Facility records should reflect the reasons for any limitation or discontinuation of a religious practice. A resident may submit a request for information concerning the reason for the denial of access to religious activities, facilities or meals. A copy of the request and a response to the request and the reason for denial should be placed in the detention file.

8. The ceremonial use of items and legal substances such as sacramental wine or incense that would otherwise be considered contraband inside a civil detention environment should be permitted under strict supervision. These substances should be dispensed under strict supervision for the sole and specific purpose of a religious ritual. The Religious Services Coordinator or chaplain should inform the facility staff of the procedures for procuring, storing, and using the substance or item in authorized services. The use of such items should be accomplished in a manner that avoids unnecessary and potentially disruptive confiscation of essential sacred elements.

9. Facilities should devote sufficient resources to purchasing and soliciting donations of religious texts and literature from multiple faith traditions, including but not limited to Korans and Bibles in versions acceptable to different Christian and Jewish groups (including the Hebrew Bible). This literature should be available in diverse languages. Residents should have access to multi-lingual religious libraries provided by the religious services program, as well as access to electronically available religious resources.

10. Facilities should accept religious materials such as rosaries, prayer shawls, prayer rugs or kurda provided by outside sources. The religious services coordinator will review all donated materials in light of need, safety and security considerations prior to their use or distribution.

11. Religious volunteers’ background checks should be completed within two weeks. DHS should aim to clear religious personnel who are stationed inside facilities within one month.

D. Marriage, Illness, and Death Issues

1. Residents who have applied to and received approval from the ICE Field Office to marry should be permitted to do so. On-site marriage facilities should conform to relevant state law requirements.
2. The Religious Services Coordinator should ensure that during intake residents indicate whether they have religious preferences regarding health care choices and disposition of remains.

3. The Religious Services Coordinator should coordinate appropriate religious ceremonies and rituals at the time of a resident’s serious illness or death in accordance with the resident’s preferences, and following discussion with the resident’s family. The coordinator should advise the facility administrator regarding religious factors that may influence decisions concerning the performance of autopsies and proper disposition of remains. See Standard XII.G Serious Illness and Death in Custody.

X. VISITATION

A. In-facility Visitation

1. Residents should be housed within a reasonable distance of their family, social and cultural support systems, or usual residence. ICE should promote regular visitation by family members and friends.

2. In the absence of security concerns, residents should be permitted to contact family members to arrange for visitation and in advance of a transfer to a remote detention facility.

3. When more than one family member is held in immigration custody, DHS/ICE should facilitate visitation between them and, if requested by the residents, should reunite them.

4. Facilities should permit contact visitation. Glass partitions, tables, or other physical barriers should not prevent contact between residents and visitors during contact visits. For example, handshaking, embracing, and kissing should be permitted at least at the beginning and end of the visit. Non-contact visits may be required only following an individualized determination that a contact visit poses a danger to security or safety. Such non-contact visits should ordinarily be in person absent an individualized determination that an in-person visit would pose a danger. Residents or visitors may request non-contact visits. Each restriction of visits should be documented.

5. Videoconferencing is not an acceptable substitute for contact visitation. Videoconferencing may be used to enable contact with family and friends who are distant or have difficulty traveling to the facility, but should not be used as the form of visitation provided to visitors who are physically at the facility.

6. Visitors should be permitted to visit every day including holidays, and during early morning, evening, and weekend hours. Visiting hours and rules should be standardized and communicated to residents in a language or manner they understand. Visiting hours and rules should be made available to the public including by phone, TTY, and internet, in English, Spanish, and other languages commonly spoken by residents and visitors.

7. Time limits for visits should be generous, at least two hours ordinarily, with additional time for visitors who must travel significant distances or are unable to visit frequently. Visitors should not be required to wait for protracted periods before a visit.
8. Facility visiting areas and visitor waiting areas should be comfortable and pleasant, with water and food items available, and with easy access to restrooms. Space should be provided for secure storage of visitors’ coats, handbags, and personal items.

9. Facilities should not screen visitors’ immigration status, or require visitors to provide a Social Security number. Visitor identification may include documents issued by foreign states, and identification without photographs if photographic identification is unavailable for religious or other acceptable reasons. Minors should not be required to produce identification. Visitors should not be excluded based solely on a prior conviction.

10. Visitors may be subject to personal search using nonintrusive screening techniques such as patdown, metal detector–aided searches, and visual inspection of handbags and other containers.

11. Verbal consent of residents should be sufficient to see visitors.

12. Visits to consenting residents from community volunteers should be accommodated.

13. Visitors should be permitted to leave money or property for residents, and should be provided with a receipt. Property may include religious items, reading material, pictures, legal documents, eyeglasses, dentures, personal address books, correspondence, wedding rings, and telephone calling cards.

14. Residents who are separated for administrative or disciplinary reasons should retain visiting privileges.

B. External Visits

1. Residents should be permitted to visit family members detained at the same facility as well as family members detained at another facility.

2. Residents who are detained for more than 30 days should be permitted to request to be transferred to a facility that is more conducive to visits by family and friends.

3. Residents who are detained for more than 90 days, particularly those with US citizen family members and minor children, should be eligible to leave a facility for home visits. DHS/ICE may impose reasonable conditions, including electronic monitoring and/or an escort, to ensure a resident’s continued custody and return.

4. Residents should be permitted to leave a facility for compelling humanitarian reasons such as a visit to critically ill family members, to attend funerals or wakes, or to attend family court proceedings, criminal proceedings, or probation meetings. DHS/ICE may impose reasonable conditions, including an escort, to ensure the resident’s return. If in-person attendance is not possible, attendance through videoconferencing or telephone should be arranged.

XI. Administration and Staffing

This section incorporates by reference the standards in Part X of the ABA Standards on the Treatment of Prisoners. The subsections below supplement the standards in Part X. In cases
where the contents of Part X conflict with the subsections below, the subsections below should be followed.

A. Professionalism

1. In their interactions with residents, facility staff should model fair, respectful, and constructive behavior; engage in preventive problem solving; and rely upon effective communication.

   a. Staff should address individual residents by the name(s) that they choose to be addressed.

   b. Residents should be referred to as “residents” or by their chosen name, and should not be referred to as “prisoners,” “inmates,” or any other term connoting incarceration.

   c. Staff should not wear prison-type uniforms or be referred to as “guards.”

   d. If facility staff learns of a threat or actual harm to a resident or to staff, he or she should report that information promptly to a supervisor. Staff should also report any information relating to corrupt or criminal conduct by other staff directly to the facility administrator and to an independent government official with responsibility to investigate staff misconduct. Staff should provide investigators with full and candid information about observed misconduct.

2. DHS/ICE should collect, update, and make readily accessible to the appropriate officials and staff (through its standard information systems) all resident information that is necessary to comply with its civil detention standards and custody review and release procedures.

B. Staffing and Recruitment

Facilities should be appropriately staffed to promote safety for all residents and staff, allow the full operation of all programs and services, and provide reasonable work schedules for staff.

1. Facility staffing should be sufficient to enable staff to engage in direct supervision in communal spaces during hours not designated for quiet and sleep.

2. Facility staffing should be sufficient to enable staff to be present in sufficient numbers to minimize the need for imposing restrictions on freedom of movement and to facilitate access to different sections of the facility.

C. Training

1. All facility staff should be adequately trained. Facility administrators should require all staff to participate in a comprehensive pre-service training program and a regular program of in-service training and specialized training when appropriate. Training programs should equip staff to:

   a. Understand the constitutional and other legal rights of residents relevant to the staff’s professional duties;

   b. Understand and ensure compliance with these standards;
c. Maintain order while treating residents with respect;

d. Possess multicultural awareness and understand cultural differences;

e. Communicate effectively with residents, including residents from different cultures;

f. Use non-force techniques for avoiding and resolving conflicts;

g. Identify and respond to medical and mental health emergencies, recognize and report the signs and symptoms of mental disability and suicide risk, and secure appropriate medical and mental health services in response;

h. Detect and respond to signs of threatened and actual physical and sexual assault and sexual pressure against residents;

i. Avoid inappropriate relationships, including any sexual contact, with residents;

j. Facilitate resident use of the grievance process, and understand the grievance process’s benefits for staff and facilities;

k. Maintain appropriate records, including clear and accurate reports; and

l. Maintain their professional qualifications and credentials through regular training and recertification.

2. Staff should have ready access to copies of these standards, and written policies and procedures related to operation of the facility.

3. DHS/ICE and facility administrators should provide specialized training to staff who work with specific types of residents to address the physical, social, and psychological needs of such residents, including women, persons who face language or communication barriers, persons with physical or mental disabilities, persons who are under the age of 18, elderly persons, lesbian, gay, bisexual or transgender (LGBT) persons, torture survivors, asylum seekers, and others.

D. Privately Owned or Administered Civil Detention Facilities

1. DHS/ICE should be able to move residents from privately owned or operated facilities to alternative civil facilities if termination of the contract proves necessary. DHS/ICE should develop a comprehensive plan, in advance of entering into any contract, to ensure that it can meet this responsibility. Housing in county jails is not an acceptable alternative to civil detention.

2. Decisions relating to the length and location of a resident’s confinement, discipline, transfer, and temporary or permanent release, should never be delegated to a private entity.

3. DHS/ICE should implement procedures to monitor compliance with its detention contracts and these standards systematically, regularly, and using a variety of on- and off-site monitoring techniques, including reviewing files and records, physically inspecting facilities, and interviewing staff and residents.
XII. PERSONAL SECURITY AND MANAGEMENT OF RESIDENTS

A. Personal Security

1. DHS/ICE and facility administrators should implement procedures to identify residents who are vulnerable to physical or sexual abuse, manipulation, or psychologically harmful verbal or other abuse by residents or by staff, and to protect these and other residents who request and need protection.

2. DHS/ICE and facility administrators should take all practicable actions to reduce violence and the potential for violence in facilities and during transport. DHS/ICE should promptly and thoroughly investigate and make a record of all incidents involving violence, and should take appropriate remedial and disciplinary action.

3. DHS/ICE and facility administrators should exercise reasonable care with respect to the property that residents lawfully possess or have a right to reclaim. DHS/ICE should provide a remedy for residents whose property is lost by facility staff or is stolen.

B. Prevention of and Response to Sexual Assault and Abuse

This subsection incorporates by reference the provisions of 28 C.F.R. § 115, which implement the Prison Rape Elimination Act of 2003 (PREA, P.L. 108-79, codified at 42 U.S.C. §§ 15601-15609), directing how facilities should prevent and report sexual abuse or harassment perpetrated against residents. The subsections below supplement the above referenced law and regulations. In cases where the contents of that law and regulations conflict with the subsections below, the subsections below should be followed.

1. DHS/ICE and facility staff should protect all residents from sexual assault by other residents, as well as from pressure by other residents to engage in sexual acts.

2. DHS/ICE and facility staff should protect all residents from any sexual contact with or sexual exploitation by staff, including volunteers and employees of any governmental or private organizations who work in the facility.

3. DHS/ICE and facility administrators should establish and publicize the means by which residents and staff may easily and confidentially report to DHS/ICE, facility administrators, and appropriate outside entities that a resident has been sexually assaulted, is being pressured to engage in sexual acts with another resident or staff, or there has been sexual contact or exploitation involving a resident and staff.

4. Facility administrators should promptly relay any such report, or any other information they obtain regarding such conduct, to DHS/ICE.

5. DHS/ICE should implement a policy of prompt and thorough investigation of any credible allegation of the threat or commission of sexual assault, or any sexual contact between a resident and staff. DHS/ICE and facility administrators should take all appropriate steps to protect the resident from further sexual assaults, contacts, or exploitation.
6. Medical treatment and testing, and psychological counseling, should be made immediately available to victims of sexual assault or sexual exploitation by staff or other residents. DHS/ICE and facility staff, including health care staff, should be trained to identify and document signs of sexual assault and should implement a protocol for providing victims with a thorough forensic medical examination performed by an appropriately trained and qualified medical professional.

7. DHS/ICE and facility staff, including health care staff, should not disclose information about any incident of resident sexual abuse, except to other staff or law enforcement personnel who need to know about the incident in order to make treatment, investigation, or other security or management decisions, or to appropriate external oversight officials or agencies.

C. Prevention of Harm

1. DHS/ICE and facility administrators should take all practicable actions to reduce violence and the potential for violence in civil detention facilities and during transport. DHS/ICE and facility administrators should promptly and thoroughly investigate and make a record of all incidents involving violence, and should take appropriate remedial action.

2. DHS/ICE and facility administrators should implement procedures for identifying residents who are vulnerable to physical or sexual abuse, manipulation, or psychologically harmful verbal or other abuse by residents or by staff, and for protecting these and other residents who request and need protection.

3. DHS/ICE and facility administrators should implement procedures to identify residents at risk of suicide and to intervene to prevent suicides. When an initial mental health screening or any subsequent observation identifies a risk of suicide, the resident should be placed in a safe setting and be promptly evaluated by a qualified mental health professional, who should determine the degree of risk, required level of supervision, and appropriate course of mental health treatment.

D. Searches

1. Searches of a resident’s body, living quarters, and possessions should follow written protocols that implement this Standard.

2. Pat-down searches and other clothed body searches should be conducted only after contact visits or upon individualized, reasonable suspicion of wrongdoing or a threat. Pat-down searches should be conducted by staff of the same gender as the resident; should be brief; and should avoid unnecessary force, embarrassment, and indignity to the resident.

3. Visual searches of a resident’s private bodily areas should be conducted only upon entry into the facility or upon probable cause to believe the resident is carrying contraband. Such searches should be conducted by trained personnel of the same gender in a private place out of the sight of other residents and of staff not involved in the search, except that a resident should be permitted to request that more than one staff member be present.

4. Facility staff should conduct all searches of resident living quarters and possessions so as to minimize damage to or disorganization of resident property and unnecessary
invasions of privacy. A resident should be permitted to observe a search of his or her living
quarters or possessions. The invasiveness of a search into a resident’s sleeping area, possessions,
or clothing should be proportionate to the grounds for the search.

5. Legal materials should be searched only for contraband, and should not be read,
reviewed, altered, or destroyed during the course of a search.

6. DHS/ICE and facility administrators should keep records of all facility searches. The
records should identify the circumstances of the search, the persons conducting the search,
staff and residents who were witnesses, and contraband or other confiscated materials. The
resident should be given written confirmation of the property confiscated.

E. Discipline

1. All decisions to administer discipline should be approved by DHS/ICE.

2. Disciplinary procedures should provide residents with a meaningful opportunity
to contest alleged violations and to appeal disciplinary determinations.

3. Disciplinary measures should be incremental and proportionate to violations.

4. In no case should disciplinary measures, including disciplinary separation, deny
or limit:

   a. Access to sufficient light to permit reading in the resident’s housing area,
      and access to reasonable darkness during sleeping hours;

   b. Adequate ventilation, heat or air conditioning as necessary;

   c. Opportunity to sleep;

   d. Access to medication, medical devices, or other forms of healthcare;

   e. Nutrition, including access to water;

   f. Visits or communication with counsel, clergy, or family members; or

   g. Access to outdoor recreation.

F. Use of Force

1. Facility administrators should authorize the use of force against a resident only:

   a. To protect and ensure the safety of staff, residents, and others; to prevent
      serious property damage; or to prevent escape;

   b. If facility administrators reasonably believe the benefits of force outweigh
      the risks to other residents and staff; and

   c. As a last alternative after other reasonable efforts to resolve the situation
      have failed.

2. In no case should staff use force against a resident:

   a. To enforce an institutional rule or an order unless the disciplinary process
      is inadequate to address an immediate security need;
b. To gratuitously inflict pain or suffering, punish past or present conduct, deter future conduct, intimidate, or gain information; or
c. After the risk that justified the use of force has passed.

3. Restraints should only be used in emergencies: if a resident’s behavior poses an immediate risk to the safety of others or to the resident, or poses an immediate risk of serious property damage; and if less restrictive means have been determined to be ineffective. When restraints are necessary, authorities should use the least restrictive forms of restraints that are appropriate and should use them only as long as the need exists, not for a predetermined period of time. Restraints should not be applied to residents when medically contraindicated, including during labor and postpartum.

G. Serious Illness and Death in Custody

This section incorporates by reference ICE PBNDS 2011 Standard 4.7 Terminal Illness, Advance Directives and Death Standard, including the ICE Directive on “Notification and Reporting of Detainee Deaths,” Directive 7.9-0, October 1, 2009. The subsections below supplement that Standard. In cases where the contents of that Standard conflict with the subsections below, the subsections below should be followed.

1. DHS/ICE and facility staff should establish and comply with clear procedures involving the proper manner to notify residents and their families in cases of serious illness or death of either residents or their family members.

2. When a resident dies, DHS/ICE should promptly notify family members, consular officials, and the appropriate medical examiner of the death and its circumstances.

3. An autopsy should be performed whenever a resident dies in ICE custody.

4. All deaths of residents, including their circumstances, should be immediately reported to DHS/ICE headquarters and to other federal agencies that collect data on deaths in custody.

5. In the event of serious illness or death, religious preferences expressed by residents should be followed to the extent possible.

XIII. ADMINISTRATIVE AND DISCIPLINARY SEPARATION

This section incorporates by reference all protections afforded by the ABA Standards on the Treatment of Prisoners Standard23-2.7 (“Rationales for long-term segregated housing”), and Standard23-2.9 (“Procedures for placement and retention in long-term segregated housing”). The subsections below supplement those Standards. In cases where the provisions of those Standards conflict with the subsections below, the subsections below should be followed.

A. Separation Generally

1. DHS/ICE should ensure that facilities have the capacity to separate residents from the general population for administrative and disciplinary reasons.
2. The due process protections available to residents should be proportionate to their anticipated time in separation.

B. Administrative Separation

1. Administrative separation status is a nonpunitive status in which restricted conditions of confinement are required only to ensure the safety of residents or others, the protection of property, or the security or good order of the facility.

2. Residents in administrative separation should not be commingled with residents in disciplinary separation.

3. DHS/ICE should develop and follow written procedures, consistent with this standard, governing the separation of residents. Facilities should provide detailed reasons for placement of an individual in administrative separation. Residents and their attorneys should be provided prompt written notice of administrative separation decisions.

4. Prior to the resident’s placement in administrative separation, a facility supervisor should review the case in order to determine whether administrative separation is warranted.

5. Reasons for Placement in Administrative Separation

a. A resident should be placed in administrative separation when the resident’s continued presence in the general population poses a threat to life, property, self, staff, or other residents; for medical reasons; or under other circumstances set forth below. Examples of incidents warranting a resident’s assignment to administrative separation may include, but are not limited to, the following:

i. A resident is awaiting an investigation or a hearing for a violation of facility rules, but only as necessary to protect the security and orderly operation of the facility.

ii. A resident is a threat to the security of the facility.

iii. A resident requires protection. Separation may be initiated at the resident’s request or by staff in order to protect the resident from harm. DHS/ICE should develop procedures for separation of residents in these circumstances, as well as to reintegrate them into the general population post-separation.

6. Review of Resident Status in Administrative Separation

a. DHS/ICE should develop written procedures for the regular review of all residents held in administrative separation, consistent with the procedures specified below.

b. A facility supervisor should conduct a review within 24 hours of the resident’s placement in administrative separation to determine whether
separation is still warranted. The review should include an interview with the resident.

c. A written record should be made of the decision and its rationale.
d. A supervisor should conduct an identical review after the resident has spent seven days in administrative separation, and every week thereafter, at a minimum.
e. The review should include an interview with the resident, and a written record should be made of the decision and its rationale.
f. A copy of the decision and rationale for each review should be provided to the resident unless, in exceptional circumstances, this provision would jeopardize the facility’s safety, security, or orderly operations. The resident should also be afforded an opportunity to appeal a review decision to DHS/ICE. The appeal should take into account the resident’s views and should result in a written record of the decision and its rationale.
g. A daily report should be kept and reviewed monthly by DHS/ICE that explains decisions to keep a resident in administrative separation.
h. When a resident has been held in administrative separation for more than 30 days cumulatively, the facility should notify DHS/ICE in writing.

C. Disciplinary Separation

1. A resident may be placed in disciplinary separation only by order of the facility administrator, after a hearing in which the resident has been found to have committed a crime or a serious violation of a facility rule, and when alternative dispositions would inadequately regulate the resident’s behavior.

2. Duration
a. The maximum stay in disciplinary separation is 30 days, except in extraordinary circumstances. If facility staff wishes to separate a resident for more than 30 days, staff should send a written justification to a DHS/ICE supervisor.

3. Review of Resident Status in Disciplinary Separation
a. DHS/ICE should implement written procedures for the regular review of all disciplinary separation cases, consistent with subsection b:
b. A security supervisor, or the equivalent, should interview the resident and review his or her status in disciplinary separation every seven days to
determine whether the resident is provided showers, meals, visitation, recreation, law library access, and appropriate treatment in accordance with these standards.

4. The supervisors should document his or her findings after every review.

5. The supervisor should recommend the termination of disciplinary separation upon finding that it is no longer necessary to regulate a resident’s behavior.

6. The supervisor may shorten, but not extend, the original term of separation.

7. All review documents should be placed in the resident’s detention file.

8. After each formal review, the resident and his or her attorney should be given a written copy of the reviewing officer’s decision and the basis for his or her finding, unless this step would compromise institutional security. If a written copy cannot be delivered, the resident should be advised of the decision orally, and the detention file should so note, identifying the reasons why the notice was not provided in writing.

D. Requirements for Administrative and Disciplinary Separation

1. Requirements generally

   a. Conditions of separation should be based on the amount of supervision required to control a resident and to safeguard the resident, other residents and facility staff.

   b. Residents should be evaluated by a medical professional, including for mental health, prior to placement in separation.

   c. Separated residents should be permitted as much time out of their rooms as possible, consistent with good security practices.

   d. In every instance, any exceptions to these requirements should be:

      i. Made only for the purpose of ensuring resident and staff safety (i.e., not for purposes of punishment);

      ii. Approved by a DHS/ICE supervisor;

      iii. On a temporary and situational basis, continued only for as long as is justified by threat to the safety or security of the facility, its staff, or resident population; and

      iv. Documented in both the facility’s records and the individual resident’s detention file.
2. Special Needs

   a. Separated residents should be provided appropriate accommodations and professional assistance for special conditions as needed (e.g., translation and interpretation services; and medical, therapeutic, or mental health treatment), on an equal basis as residents in the general population.

3. Rooms

   a. Rooms used for purposes of separation must be appropriately sized, well ventilated, adequately lit, heated/cooled as necessary, and maintained in a sanitary condition at all times in accordance with the standards for general population.

   b. Residents should be able to exercise control over lighting in their rooms and should have access to natural light, if the physical plant allows it.

4. Privileges

   a. Administrative Separation

      i. Residents in administrative separation should receive the same privileges available to residents in the general population, consistent with safety and security considerations for residents and facility staff. They should be provided opportunities to spend time outside their rooms (in addition to the required recreation periods), in order to socialize, watch television and pursue other activities.

   b. Disciplinary Separation

      i. Residents in disciplinary separation may be subject to more stringent controls, particularly as relates to personal property.

E. Supervisory and Staff Visits

In addition to the direct supervision performed by facility staff:

1. Shift supervisors should review each unit in which separated residents are held and see each resident on a daily basis, including on weekends and holidays.

2. Program staff may visit a separated resident upon the resident’s request.

F. Health Care

This subsection incorporates by reference the provisions of the ABA Standards on the Treatment of Prisoners Standard 23-2.8 (“Segregated housing and mental health”) that pertain to the monitoring of the mental health of residents in segregated housing.

1. Health care personnel should conduct face-to-face medical assessments at least once each day for separated residents. When an assessment creates cause for concern, it should
be followed up with a complete evaluation by a qualified medical or mental health professional, and indicated treatment.

2. Residents with serious mental illness should be placed in a setting within or outside of the facility in which appropriate treatment can be provided.

3. Separation should not be viewed or used as treatment for mental health issues.

4. Residents with serious mental illness should not be placed in prolonged solitary confinement.

5. Residents with serious mental illness who are separated should be evaluated outside of their cells by a mental health provider at least once every seven days for routine care as well as to determine whether or not continued separation is or will be detrimental to their mental health.

6. Medical visits should be recorded, and any action taken should be documented in a separate logbook and in the individual resident’s detention file.

G. Communications

1. Separated residents should be permitted to write, send and receive letters and other correspondence, in a manner similar to those housed in the facility’s general population.

2. Separated residents should have access to telephones in a manner that is consistent with safety and security requirements. They should be permitted to place calls to attorneys, other legal representatives, courts, embassies, consulates, and government offices, including the DHS OIG, DHS CRCL, ICE Joint Intake Center, and ICE’s Public Advocate. Telephone access may be denied only as necessary to protect the security of the resident, other residents, or the security or orderly operation of the facility. Denials of telephone use should be documented.

H. Access to Legal Services

1. Separated residents should have access to legal services in accordance with Standard VII. Access to Legal Services, subject only to restrictions necessary to ensure the safety and security of the resident, visitor, or facility staff. A resident’s attorney of record should be notified of any separation within 24 hours.

2. Residents segregated for their own protection should be provided access to legal research tools and materials. Such residents may be required to use the law library at separate times from the general population. If such residents do not have equal or equivalent access to the law library, legal materials should be brought to them upon request.
3. Denial of access to the law library should be supported by compelling security concerns; for the shortest period required for security; and fully documented in the facility logbook.

4. The facility administrator should notify DHS/ICE every time access is denied, and documentation, including the rationale for denial, should be placed in the detention file.

5. DHS/ICE and facility staff should notify separated residents in advance of legal orientation presentations and provide these residents an opportunity to attend, except when a particular resident’s attendance poses a security risk. If a separated resident cannot attend for this reason, designated facility staff should make alternative arrangements to offer a separate presentation and individual consultation to the resident.

I. Visitation

1. Separated residents should retain visiting privileges.

2. Separated residents should ordinarily be able to use the visiting room during normal visiting hours. The facility may restrict or disallow visits for separated residents only as necessary to protect the security of the resident or to ensure the security or orderly operation of the facility.

3. When visits are restricted or disallowed, a report should be filed with the facility administrator and DHS/ICE, and made part of the resident’s file.

4. Separated residents in need of protection, as well as violent and disruptive residents, may be prohibited from using the visitation room during normal visitation hours as necessary to protect the resident(s) or the security or orderly operation of the facility. Visits may be disallowed only as necessary to protect the security of the resident(s) or the security or orderly operation of the facility.

J. Access to Religious Services

Separated residents should be permitted to participate in religious practices in accordance with Standard IX. Access to Religious Services, subject to restrictions necessary to protect the safety and security of the resident, visitor, or facility staff, or to ensure the orderly operation of the facility.

K. Reading Materials (Non-Legal)

Separated residents should have access to reading materials, including religious materials.
L. Recreation

1. Separated residents should be offered at least two hours of recreation and exercise per day, outside their rooms and with other residents, scheduled at a reasonable time, at least seven days per week. Such residents should also have access to radio and television.

2. Separated residents should be provided with weather-appropriate equipment and attire where cover is not provided to mitigate inclement weather.

3. Recreation should be denied or suspended only if the resident’s recreational activity may unreasonably endanger safety or security.

4. When a separated resident is deprived of recreation (or any usual authorized items or activity), a written report of the action should be forwarded to the facility administrator. Denial of recreation must be evaluated daily by a shift supervisor.

5. A resident in disciplinary separation may temporarily lose recreation privileges upon a written determination that he or she poses an unreasonable risk to the facility, to himself or herself, or to others.

6. When recreation privileges are suspended, the disciplinary panel or facility administrator should provide the resident with written notification, including the reason(s) for the suspension, any conditions that must be met before restoration of privileges, and the duration of the suspension provided the requisite conditions are met for its restoration.

7. The denial of recreation privileges should be included as part of the regular reviews required for all separated residents. The reviewer(s) should state, in writing, whether the resident continues to pose a threat to self, others, or facility security and, if so, how.

8. Recreation privileges should be denied for more than seven days only in extreme circumstances and with the written concurrence of the facility administrator and a health care professional.

9. The facility should notify DHS/ICE in writing when a resident is denied recreation privileges for more than seven days.

XIV. GRIEVANCES

A. Establishing and Notification of Procedures

1. The facility should provide meaningful and timely procedures for residents to submit grievances against staff and other residents, as well as in response to facility conditions, failure to comply with these standards, or the non-provision or deficient provision of medical care.

2. Facility staff and residents should be fully informed of grievance procedures.
3. Residents should be able to bring grievances in a confidential manner, through a formal process, to facility administrators and to DHS/ICE officials.

4. DHS/ICE should be the final arbiter of grievances.

B. No Retaliation

Retaliation for filing grievances should be strictly prohibited.

C. Records and Reporting

1. Records of grievance submissions and their resolution should be maintained at the facility and by DHS/ICE.

2. Records of grievance submissions and their resolution should be available for review by DHS/ICE, inspectors and facility administrators.

3. Grievances in each facility should be aggregated in a monthly report to DHS/ICE headquarters that includes information about the types of complaints, their resolution, and the time for completion. These monthly reports should be available through open records requests.

4. DHS/ICE and facility administrators should routinely review grievances for patterns in complaints, including complaints about particular staff members, particular parts of the facility, or failure to comply with these standards.

XV. ACCOUNTABILITY AND OVERSIGHT

This Part incorporates by reference ABA Standards on the Treatment of Prisoners Standards 23-11.4 (“Legislative oversight and accountability”) and 23-11.5 (“Media access to correctional facilities and prisoners”), which pertain to legislative oversight and media access.

A. Internal accountability

1. DHS oversight units, including CRCL, should review all facility inspection reports, and should prepare reports that summarize the facility inspection reports, highlight findings and recommend improvements at least twice annually. These biannual reports should be promptly released to the public.

2. If DHS/ICE contracts for provision of any services or programs, it should ensure that the contract requires the provider to comply with all civil detention standards and to meet the related performance outcomes. DHS/ICE should implement a system to monitor compliance with its contracts, to hold the contracted providers accountable for any deficiencies, and to terminate its use of facilities that do not perform critical activities or meet required outcomes.

3. Accreditation agencies should develop standards for civil detention facilities and DHS/ICE should ensure that facilities meet these standards.

4. DHS/ICE and facility administrators should regularly review use of force reports, serious incident reports, separation reports, and grievances, and take any necessary remedial action to address facility or system-wide problems.
5. DHS/ICE should routinely collect, analyze, and publish statistical information on detention operations, including attorney visits, family visits, security incidents, sexual assaults, resident grievances, uses of force, health and safety, spending on programs and services, program participation and outcomes, staffing, and employee discipline.

6. DHS/ICE should develop uniform national definitions and methods of defining, collecting, and reporting accurate and complete data.

7. Congress or state or local government authorities should not exempt DHS/ICE or detention contractors from the Administrative Procedure Act, Freedom of Information Act, or Public Records Act.

B. External regulation and investigation

1. Independent governmental bodies responsible for such matters as fire safety, sanitation, environmental quality, food safety, education, and health should regulate, inspect, and enforce regulations in facilities.

2. Facilities should be subject to the same enforcement penalties and procedures, including abatement procedures for noncompliance, as are applicable to other institutions.

3. Independent observers, including NGOs, should be permitted to monitor compliance with these standards and to issue public reports. DHS/ICE and detention administrators (including contract or jail employees) should allow observers complete access to the facility and should cooperate as fully as possible with observer requests, including by international organizations.

4. DHS/ICE and facility administrators should encourage and accommodate visits by judges and lawmakers and by members of faith-based groups, the business community, institutions of higher learning, and other groups interested in immigration detention issues.

C. Access to Facility by Non-Governmental Organizations

1. NGOs, other stakeholders, and the press should be authorized upon request to tour facilities and to conduct interviews with staff and consenting residents, and to issue public reports.

2. Denial of tour requests or of access to any part of a facility or to particular staff or residents should be explained in writing.

3. DHS/ICE may require that access requests include names of tour participants and be submitted as many as 10 business days in advance of the requested tour date.

4. Tour participants should be able to pre-identify consenting residents with whom they wish to meet, and ask that consenting residents sign up for meetings on site. Consistent with ICE’s Stakeholder Procedures for Requesting a Detention Facility Tour and/or Visitation, participants should not be required to pre-identify residents in order to meet with them during a tour.

5. Residents should be informed that speaking with tour participants is voluntary, and that tour participants are not government representatives and that residents should not solicit legal representation from them.
6. Tours should ordinarily include housing units, medical facilities, libraries, recreation areas, dining facilities, kitchens, visitation areas, separation units, and other areas of interest to the tour participants.

7. Residents should be permitted to meet with tour participants in a setting where their conversation cannot be overheard or recorded by staff or other residents. Communication should not be through a glass or other barrier.

D. Access to Facility by Foreign Government Officials and Supranational Organizations

1. DHS/ICE should inform residents of their right to have embassy and consular officials notified that they are in custody.

2. Upon request by the detainee, embassy and consular officials should be allowed to visit privately with any resident who is a citizen of their country.

3. Embassy and consular officials should be given the opportunity to visit with residents on short notice and outside of usual visiting hours, and to exchange confidential documents with the residents.

4. Representatives of international and intergovernmental organizations should be allowed to visit civil detention facilities and speak confidentially with residents and staff.

5. Consular officials should be able to visit, converse and communicate with, and otherwise have full access to their nationals who are in DHS/ICE custody, unless the resident declines the visit, consistent with the Vienna Convention on Consular Relations.

XVI. Glossary of Terms

Administrative Separation – see Separation.

Assessment is the process conducted at intake in which an individual’s legal, medical, family and other circumstances are considered and measured against categories employed by DHS/ICE to determine the resident’s classification.

Classification is the decision made based on the assessment process as to whether a person subject to DHS custody should be detained, where (geographic), at what manner of facility, and subject to what special conditions.

Detainee (Immigration Detainee) is a person held in DHS custody due to a potential or confirmed violation of civil immigration laws. Since “detainee” may connote criminal and short-term custody, these standards typically use the term “resident” to refer to persons in DHS/ICE and DHS/CBP custody. See “Resident” below.
Direct Supervision is an approach to detention management that seeks to maintain a staff presence in communal areas at all times. This approach is intended to allow for significant freedom of movement for residents, while also making staffing more cost-effective.5

Disciplinary Separation – see Separation.

Executive Office for Immigration Review or EOIR is the US Department of Justice (DOJ) agency that administers the immigration court system and the appellate Board of Immigration Appeals (BIA).

Facility (Detention Facility) is any building or structure that houses immigration detainees. Detention facilities currently include federal Bureau of Prisons (BOP) facilities; state and local jails, where immigration detainees are sometimes housed with individuals serving sentences for criminal convictions, and which are sometimes operated by private contractors under agreements with state or local governments; Service Processing Centers, which are owned and operated by DHS/ICE; and Contract Detention Facilities, which are owned and operated by private contractors under agreements with DHS/ICE.

Family member includes biological and adopted family members, as well as spouses (including common law spouses), domestic partners, stepparents and stepsiblings, foster family, and in-laws.

Force means offensive or defensive physical contact with a resident, including blows, pushes, or defensive holds, whether or not involving batons or other instruments or weapons; discharge of chemical agents; discharge of electronic weaponry; and application of restraints such as handcuffs, chains, irons, Straitjackets, or restraint chairs.

Immigration and Customs Enforcement or ICE is the US Department of Homeland Security (DHS) agency with custody over most immigration detainees. DHS’s Customs and Border Protection (CBP) agency has short-term custody over persons who (typically) are arrested at or near US land borders.

Indigent means without funds, or with only nominal funds.

Intake is the process through which a detainee is registered either with DHS/ICE or with a particular facility where the individual will be housed. Intake involves recording various points of information about the individual, including medical status, legal status, and other information important to the administration of the individual’s detention.

Joint Intake Center (JIC) is the entity within DHS responsible for recording and tracking salient information about all individuals in ICE’s custody. JIC creates and maintains current files for all detainees, and also receives complaints about the implementation of ICE policies.

Legal personnel refers to a legal representative or an individual (other than an interpreter) working under the direction and supervision of an attorney, who assists with group legal presentations and in representing individual residents. Legal personnel may interview residents, assist them in completing forms, and deliver case-related papers to them without the supervisory attorney being present.

Legal representative means an attorney or person who is otherwise legally permitted to represent another in a matter of law, including law students; law graduates not yet admitted to the bar; “reputable individuals”; accredited representatives; and accredited officials and attorneys outside the United States (See 8 CFR § 292.1).

Medical evaluation means a comprehensive assessment of a detainee’s medical and mental status, intended to capture information about current illness, ongoing treatment regimens, and risk factors for various forms of illness while in custody.

Normalized environment means a combination of floor plans, fixtures, amenities, procedures and programs that allow for living circumstances that approximate normal life outside the facility. Such an environment should more closely resemble a secure college dormitory than a jail.

Performance-Based National Detention Standards (PBNDS) are the standards developed and promulgated by ICE to govern the treatment of persons subject to ICE custody pending immigration proceedings and removal. The PBNDS set forth the outcomes and performance measures that must be met in order to satisfy particular standards. They are based on American Correctional Association standards for pre-trial criminal detention.

Resident refers to an individual who is detained in the civil immigration detention system. It is the term that ICE and facility staff should use to refer to persons in their custody.

Separation means to hold a resident apart from the general population, when the resident’s continued presence would pose a threat to other residents, staff, or the security of the facility. Separation may also be appropriate for residents who pose a threat to themselves; require protection; are en route to another facility; are awaiting a hearing before a disciplinary panel; have received a separation order from a disciplinary panel; or should be separated for medical reasons. The standards use the term “separation,” rather than “segregation” because the latter connotes criminal custody. Administrative separation of a resident is undertaken in the interest of the safety, security, and wellbeing of that resident, and not for disciplinary reasons.

Disciplinary separation is undertaken in response to actions by a resident that call for response by facility staff in order to maintain the safety and security of residents and staff.

Serious Mental Illness means a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality or cope with the ordinary demands of life within the detention facility environment and is manifested by substantial pain or disability. It includes the status of being actively suicidal; severe cognitive disorders that result in significant functional impairment; and severe personality disorders that result in significant functional impairment and are marked by frequent episodes of psychosis, depression, or self-
injurious behavior. (See ABA Standards on the Treatment of Prisoners Standard 23-1.0, “Definitions.”)

Special or legal correspondence refers to a resident’s written communications to or from the following non-exhaustive list of individuals and entities: legal personnel; government attorneys; judges; courts; embassies and consulates; White House officials; DHS (including its Office for Civil Rights and Civil Liberties, its Office of the Inspector General, its Joint Intake Center, and ICE’s Public Advocate); the DOJ (including EOIR and the DOJ Office of the Inspector General); U.S. Public Health Service (including the Division of Immigration Health Services); administrators of grievance systems; representatives of the news media; representatives of oversight bodies, Congress or other legislative bodies; internal affairs representatives; government Ombudsmen; law enforcement personnel; the United Nations High Commissioner for Refugees (UNHCR); other relevant international agencies; and human rights agencies and others that can assist in documenting legal claims.

Staff (Facility Staff) means all full- and part-time staff whose employment entails work at a detention facility, whether as a DHS employee, an employee of a private corporation, or an employee of a state or local correctional facility.

Vulnerable populations (individuals) include children and minors under age 18; elderly persons; survivors of torture or violence; persons with mental or physical disabilities; pregnant women; persons with serious medical conditions and mental illness; transgender persons; and persons likely to be subject to physical or sexual abuse, manipulation, or severe verbal abuse in a facility.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution supports the adoption of the ABA Civil Immigration Detention Standards, dated August 2012, which are standards to govern the treatment of persons in the US immigration detention system.

2. Summary of the Issue that the Resolution Addresses

The ABA Civil Immigration Detention Standards arise from the American Bar Association’s (ABA’s) longstanding leadership in ensuring access to justice for immigrant detainees, and in promoting fair and humane treatment for persons in custody.

The US Department of Homeland Security’s (DHS’s) Immigration and Customs Enforcement (ICE) agency primarily detains persons who are in removal (deportation) proceedings. Persons in DHS/ICE custody are not facing criminal trials or serving prison sentences. Under the law, removal proceedings are civil in nature and the detention of immigrants serves to ensure their appearance at court and to effectuate their removal, not to punish them. The average number of persons detained by DHS/ICE each day exceeded 33,000 in 2011. DHS/ICE detained a total of 363,000 persons in FY 2010.

Despite DHS/ICE’s civil legal authority, the US immigration detention system has traditionally held detainees in jails and in jail-like facilities that are administered according to American Correctional Association (ACA)–based standards for persons awaiting criminal trials. While DHS/ICE has initiated a process to reform its detention system, it has not adopted or crafted detention standards that reflect its civil immigration authority. The ABA Commission on Immigration has developed the civil immigration detention standards in order to promote access to justice and fair and humane treatment of persons in the immigration detention system.

The ABA has worked for many years to ensure that foreign nationals in the US detention system are treated humanely. Although updated several times in the intervening years, DHS/ICE’s detention standards originated through a process of collaboration between the ABA, the US Department of Justice (DOJ), and DOJ’s former Immigration and Naturalization Service (INS). The ABA worked closely with DOJ over the course of several years to craft the first meaningful set of standards to govern treatment of persons in immigration detention, focusing on four legal access standards: visitation, telephone access, group presentations on legal rights, and access to legal materials. The DHS/ICE detention standards, which have undergone several revisions, have not been codified in a statute or regulation.
Despite the DHS/ICE standards, immigration detainees continue to struggle with lack of access to representation and legal materials, inadequate medical care, and other issues.

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

The continued problems with immigration detention require new, civil immigration detention standards, and more rigorous enforcement of those standards. The ABA’s expertise on immigration detention and on developing standards is widely acknowledged. In adopting these civil immigration detention standards, the ABA would make a further contribution to the rule of law, access to justice, and rights-respecting treatment of those in custody.

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 2012, to the ABA Standards and Rules of Procedure for Approval of Law Schools:

1. Standard 509. CONSUMER INFORMATION
2. Rule 16. Sanctions
Standard 509. **BASIC CONSUMER INFORMATION** *(redlined to existing Standards)*

(a) All consumer information that a law school reports, publicizes or distributes shall be complete, accurate and not misleading to a reasonable law school student or applicant. Schools shall use due diligence in obtaining and verifying consumer information. Violations of these obligations may result in sanctions under Rule 16 of the Rules of Procedure for Approval of Law Schools.

(b) A law school shall publish publicly disclose on its website basic consumer information in the following categories: The information shall be published in a fair and accurate manner reflective of actual practice.

1. admissions data;
2. tuition, fees, living costs, financial aid, conditional scholarships and refunds;
3. enrollment data and attrition/graduation rates;
4. composition and number of full-time and part-time faculty and administrators;
5. curricular offerings, academic calendar, and academic requirements;
6. library resources;
7. physical facilities; and
8. employment outcomes placement rates and bar passage data.

(c) A law school must publicly disclose on its website, in a readable and comprehensive manner, its policies regarding the transfer of credit earned at another institution of higher education. The law school’s transfer of credit policies must include, at a minimum:

1. A statement of the criteria established by the law school regarding the transfer of credit earned at another institution; and
2. A list of institutions, if any, with which the law school has established an articulation agreement.

(d) A law school shall publicly disclose the employment outcomes of its J.D. graduates on its website.

1. The employment outcomes shall be posted on the school’s website each year by March 31 or such other date as the Council may establish.
(2) The employment outcomes posted must be accurate as of February 15th for persons who graduated with a JD degree between September 1 one calendar year prior and August 31 two calendar years prior and August 31 one calendar year prior.

(3) The employment outcomes posted shall remain on the school’s website for at least three years, so that at any time at least three graduating classes’ data are posted.

(4) The employment outcomes shall be gathered and disclosed in accordance with the form, instructions and definitions approved by the Council.

(e) A law school shall publicly disclose on its website, in the form designated by the Council, its conditional scholarship retention data. A law school shall also distribute this data to all applicants being offered conditional scholarships at the time the scholarship offer is extended.

(f) Interpretation 509-6 If a law school elects to make a public disclosure of its status as a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association, it shall do so accurately and shall include the name, address and contact information telephone number of the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association.

Interpretation 509-1
The following categories of consumer information are considered basic:
(moved into Standard)

Interpretation 509-2
To comply with its obligation to publish basic consumer information under the first sentence of this Standard, a law school may either provide the information to a publication designated by the Council or publish the information in its own publication. If the school chooses to meet this obligation through its own publication, the basic consumer information shall be published in a manner comparable to that used in the Council-designated publication, and the school shall provide the publication to all of its applicants.

Interpretation 509-3
In addition to the publication of information required by Interpretations 509-1 and 509-2, a law school shall publish its academic calendar in its own catalog or similar publication and on its website.

Interpretation 509-4
Standard 509 requires a law school fairly and accurately to report basic consumer information whenever and wherever that information is reported or published. A law school’s participation in the Council-designated publication referred to in Interpretation 509-2 and its provision of fair and accurate information for that book does not excuse a school from the obligation to report fairly and accurately all basic consumer information published in other places or for other purposes.
Interpretation 509-5
All law schools shall have and make publicly available a student tuition and fee refund policy.
This policy shall contain a complete statement of all student tuition and fees and a schedule for
the refund of student tuition and fees.

Interpretation 509-6
(moved into Standard)

Interpretation 509-71
A law school that lists in its course offerings a significant number of courses that have not been
offered during the past two academic years and that are not being offered in the current
academic year is not in compliance with this Standard.

Interpretation 509-2
Subject to the requirements of subsection (a) above, a law school may publicize or distribute
additional information regarding the employment outcomes of its graduates.

Interpretation 509-3
Any information, beyond that required by the Council, regarding graduates’ salaries that a law
school reports, publicizes or distributes must clearly identify the number of salaries and the
percentage of graduates included in that information.

Interpretation 509-4
A conditional scholarship is any financial aid award, the retention of which is dependent upon
the student maintaining a minimum grade point average or class standing, other than that
ordinarily required to remain in good academic standing.
Rule 16. Sanctions

(a) Conduct for which sanctions may be imposed upon a law school includes, without limitation:

(1) Substantial or persistent noncompliance with one or more of the Standards;

(2) Failure to present a reliable plan to bring the law school into compliance with the Standards;

(3) Failure to provide information or to cooperate in a site evaluation as required by the Standards;

(4) Making misrepresentations or engaging in misleading conduct in connection with consideration of the school’s status by the Committee or the Council, or in public statements concerning the school’s approval status; and/or

(5) Initiating a major change or implementing a new program without having obtained the prior approval or acquiescence required by the Standards; and/or

(6) Provision of incomplete, inaccurate or misleading consumer information in violation of Standard 509.

(b) Sanctions other than probation or removal from the list of approved law schools may be imposed even if a school has, subsequent to the actions that justify sanctions, ceased those actions or brought itself into compliance with the Standards.

(c) Sanctions that may be imposed include, without limitation:

(1) A monetary penalty proportionate to the violation;

(2) A requirement that the law school refund part or all of the tuition and/or fees paid by students in such a program;

(3) Censure, which may be either private or public;

(4) Required publication of a corrective statement;

(5) Prohibition against initiating new programs;

(6) Probation; and/or

(7) Removal from the list of approved law schools.

(d) In the course of a sanctions proceeding, the Committee or the Council may also direct a law school to take remedial action to bring itself into compliance with the Standards.
(e) If a law school is placed on probation, the Council shall establish the maximum period of time that the school may remain on probation and shall establish the conditions that the law school must meet in order to be removed from probation. The Committee may make recommendations to the Council concerning the period and conditions of probation.

(f) The Committee has the power to impose upon a school any sanction other than probation or removal from the list of approved law schools. A school may appeal a decision of the Committee to impose a sanction to the Council. The Committee also may recommend to the Council that a school be placed on probation or removed from the list of approved law schools.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The proposed revised Standard 509 mandates that all consumer information that a law school reports, publicizes or distributes must be complete, accurate and not misleading to a reasonable law school student or applicant, and specifically states that violations of the Standard may result in sanctions under Rule 16 of the Rules of Procedure for Approval of Law Schools. The proposal delineates information that schools must disclose on their websites concerning employment outcomes of graduates. In addition, the proposal requires schools to disclose conditional scholarship retention data on their websites and to distribute this information to all applicants being offered conditional scholarships.

The proposed revision to Rule 16 of the Rules of Procedure for Approval of Law Schools provides that the sanctions of probation and removal from the list of approved law schools may be imposed even where a school is in compliance with the Standards at the time sanctions are imposed.

2. Summary of the Issue that the Resolution Addresses

The proposed changes clarify for law schools the reporting requirements regarding consumer information, especially with regard to employment outcomes of graduates, as well as the sanctions for failure to report accurate information.

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

The resolution proposes changes in the ABA Standards and Rules of Procedure for Approval of Law Schools.

4. Summary of Minority Views

Not that the Section is aware of.
RESOLVED, That the American Bar Association urges the federal courts to clarify the standards for finding direct infringement under 35 U.S.C. §271(a) for a patent directed to a multiple-step process, as follows—

(1) the law does not require the finding of an agency relationship or other contractual relationship between separate entities who collectively, but not individually, perform the steps of the patented process, and

(2) where two or more separate entities collectively but not individually perform the process steps, direct infringement may exist if they are performed either under the control or direction of a single "mastermind" or, in view of the totality of the circumstances, are performed based upon the separate entities' common design or purpose of carrying out the patented process.

FURTHER RESOLVED, That the American Bar Association urges the federal courts to maintain the common law principle that indirect infringement, through active inducement of infringement under 35 U.S.C. §271(b) or contributory infringement under 35 U.S.C. §271(c), requires direct infringement as a predicate.

FURTHER RESOLVED, That the American Bar Association urges the federal courts to recognize that the predicate for indirect infringement may be direct infringement that is based upon the collective acts of two or more entities.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution calls for the Association to adopt policy relating to determinations of patent infringement in cases with patent claims for methods or processes that require multiple steps and multiple participants to complete.

2. Summary of the Issue that the Resolution Addresses

Electronically operated, computer-implemented, and Internet-delivered innovations are growing exponentially, and are frequently embodied in patented processes. Inventions that enable online interactive communication and commerce between merchants and service providers and their customers are prime examples.

Recent decisions of the U.S. Court of Appeals for the Federal Circuit unduly circumscribe the circumstances that can support a determination that a claim to such a multiple-step, multiple-actor process patent has been infringed. These panel decisions have ruled that joint infringement liability can only be found if all the acts required to constitute infringement are attributable to one entity who “controls or directs” the others, and that such control or direction can be found only if the entities act together pursuant to an agency relationship or a contractual commitment of one to act on behalf of the other.

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

The Resolution urges federal courts to expand the circumstances for finding patent infringement in these cases by recognizing that joint infringement can be found if the separate entities act with a common design or purpose of carrying out the patented process.

The Resolution urges courts to also recognize that the requirement that direct infringement be established as a predicate for indirect infringement can be met by a showing of direct infringement based upon the collective act of two or more entities.

4. Summary of Minority Views

None known at this time.
RESOLVED, That the American Bar Association amends the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding lawyers’ use of technology and confidentiality as follows (insertions underlined, deletions struck through):

(a) the black letter and Comments to Model Rule 1.0 (Terminology);
(b) the Comments to Model Rule 1.1 (Competence);
(c) the Comments to Model Rule 1.4 (Communication);
(d) the black letter and Comments to Model Rule 1.6 (Confidentiality of Information); and
(e) the black letter and Comments to Model Rule 4.4 (Respect for Rights of Third Parties).

Rule 1.0 Terminology

(a) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.
(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and e-mail electronic communications. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

... Screened

... [9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement,
reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate
for the firm to undertake such procedures as a written undertaking by the screened lawyer to
avoid any communication with other firm personnel and any contact with any firm files or other
materials information, including information in electronic form, relating to the matter, written
notice and instructions to all other firm personnel forbidding any communication with the
screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or
other materials information, including information in electronic form, relating to the matter, and
periodic reminders of the screen to the screened lawyer and all other firm personnel.

...  

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation
requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for
the representation.

Comment

...  

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of
changes in the law and its practice, including the benefits and risks associated with relevant
technology, engage in continuing study and education and comply with all continuing legal
education requirements to which the lawyer is subject.

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to
which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's
objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's
conduct when the lawyer knows that the client expects assistance not permitted by the
Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the
client to make informed decisions regarding the representation.

Comment

...  

Communicating with Client

...  

[4] A lawyer's regular communication with clients will minimize the occasions on which
a client will need to request information concerning the representation. When a client makes a
reasonable request for information, however, paragraph (a)(4) requires prompt compliance with
the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged. A lawyer should promptly respond to or acknowledge client communications.

...
employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer’s duties when sharing information with nonlawyers outside the lawyer’s own firm, see Rule 5.3, Comments [3]-[4].

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

...
information original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been wrongfully inappropriately obtained by the sending person. For purposes of this Rule, “document or electronically stored information” includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is email or other electronic modes of transmission subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.  

[3] Some lawyers may choose to return a document or electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.
EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

Resolution 105a: Technology and Confidentiality

- The Commission is proposing to amend Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to make clear that a lawyer has an ethical duty to take reasonable measures to protect a client’s confidential information from inadvertent disclosure, unauthorized disclosure, and unauthorized access, regardless of the medium used. The Commission concluded that technological change has so enhanced the importance of this duty that it should be identified in the black letter and described in more detail in Comment [16]. The proposal identifies various factors that lawyers need to take into account when determining whether their precautions are reasonable, but makes clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.

- Rule 4.4(b) of the ABA Model Rules of Professional Conduct (Respect for Rights of Third Persons) currently provides that a “lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.” The Commission is proposing to amend Rule 4.4(b) of the Model Rules and its Comment [2] to make clear that electronically stored information, in addition to information existing in paper form, can trigger the notification requirements of Rule 4.4(b) if the lawyer concludes that the information was inadvertently sent. Moreover, the Commission is proposing to define the phrase “inadvertently sent” in Comment [2] to help lawyers understand when the notification obligations in Rule 4.4(b) arise.

- The screening of individual lawyers from access to certain information in a firm must address not only documents, but also electronic information. For this reason, the Commission is proposing to amend Comment [9] of Rule 1.0 of the Model Rules of Professional Conduct (Terminology) to make clear that, when establishing screens to prevent the sharing of information within a firm, the screens should prevent the sharing of both tangible and electronic information. The Commission is also proposing to amend the existing definition of a “writing” in paragraph (n) of Model Rule 1.0 by replacing the word “e-mail” with the phrase “electronic information.”

- The Commission is proposing an amendment to Comment [6] of Rule 1.1 of the Model Rules of Professional Conduct (Competence) to make clear that a lawyer’s duty of competence, which requires the lawyer to stay abreast of
changes in the law and its practice, includes understanding relevant technology’s benefits and risks. Comment [6] already implicitly encompasses such an obligation, but it is important to make this duty explicit because technology is such an integral – and yet, at times invisible – aspect of contemporary law practice.

- The last sentence of Comment [4] of Rule 1.4 of the Model Rules of Professional Conduct (Communication) instructs lawyers to respond promptly to client telephone calls. The Commission proposes to update the Comment so that it instructs lawyers to “promptly respond to or acknowledge client communications.”

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

The ABA’s last “global” review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) and the ABA Commission on Multijurisdictional Practice (“MJP Commission”). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

Resolution 105a addresses the ethical issues associated with technology and confidentiality of client information. Advances in technology have enabled lawyers in all practice settings to provide more efficient and effective legal services. Some forms of technology, however, present certain risks, particularly with regard to clients’ confidential information. Resolution 105a provides lawyers with more guidance regarding their ethical obligations when using this technology and updates the Model Rules of Professional Conduct to reflect the realities of a digital age. Resolution 105a offers this guidance in a manner that is consistent with the principles that then-ABA President Lamm directed the Commission to follow: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

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

Resolution 105a updates the Model Rules of Professional Conduct to reflect a lawyer’s ethical duties in a digital age. For example, the black letter of Model Rule 1.6(a) does not currently describe what, if any, ethical obligations lawyers have to prevent unauthorized or inadvertent disclosure of, or unauthorized
access to, confidential client information. Rather, the Rule only instructs lawyers not to “reveal” that information. Thus, the black letter of the Rule does not offer lawyers any guidance regarding their ethical obligations when using technology (e.g., smart phones, laptops, or other mobile devices) to store or transmit confidential information. New paragraph (c) in Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) and new language in Comment [16] will help lawyers understand their ethical duty to take reasonable measures to protect a client’s confidential information. New Comment language would identify various factors that lawyers need to take into account when determining whether their precautions are reasonable but make clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.

Resolution 105a also updates Model Rules 1.0 (Terminology), 1.1 (Competence), 1.4 (Communication), and 4.4 (Respect for Rights of Third Persons) so that lawyers understand how technology is transforming their ethical obligations. For example, the Commission’s proposal to amend the Comment to Model Rule 1.1 makes explicit that which has been long implicit in the Rules. Namely, the duty of competence, which requires a lawyer to stay abreast of developments in the law and its practice, encompasses staying abreast of the risks and benefits associated with relevant technology (e.g., how technology used by a lawyer impacts the duty to protect confidential client information).

4. **Summary of Minority Views**

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105a as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105a relating to Technology and Confidentiality: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral
comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission’s website (click here). Moreover, the Commission created and maintained a listserv for interested persons to keep them apprised of the Commission’s activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission’s process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission’s final proposals were shaped by those who participated in this feedback process.
RESOLVED, That the American Bar Association amends the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding lawyers’ use of technology and client development as follows (insertions underlined, deletions struck through):

(a) the black letter and Comments to Model Rule 1.18 (Duties to Prospective Client);  
(b) the Comments to Model Rule 7.1 (Communications Concerning a Lawyer’s Services);  
(c) the Comments to Model Rule 7.2 (Advertising);  
(d) the title, black letter, and Comments to Model Rule 7.3 (Direct Contact with Prospective Clients); and  
(e) the Comments to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).

Rule 1.18: Duties to Prospective Client

(a) A person who discusses consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.  
(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with learned information from a prospective client shall not use or reveal that information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.  
(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates such information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client," within the meaning of paragraph (a). Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

...
person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer’s subsequent use of information received from the prospective client.

...  

Rule 7.1 Communications Concerning a Lawyer’s Services  

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT  

...  

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public, a prospective client.  

...  

Rule 7.2 Advertising  

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.  

(b) A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may  

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;  

(2) pay the usual charges of a legal services plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;  

(3) pay for a law practice in accordance with Rule 1.17; and  

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if  

(i) the reciprocal referral agreement is not exclusive, and  

(ii) the client is informed of the existence and nature of the agreement.  

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.
Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange initiated by the lawyer, that is not initiated by the prospective client.

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for channeling professional work recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's
Communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral. See also Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers; Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).Who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public prospective clients. See, e.g., the American Bar Association’s Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals prospective clients to lawyers who own, operate or are employed by the referral service).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer’s professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

...
(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer’s communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with someone a prospective client known to need legal services. These forms of contact subject the layperson a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyers have advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded In particular, communications, can which may be mailed or autodialed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's a person’s judgment.
The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct-in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication prospective client may violate the provisions of Rule 7.3(b).

This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves, a prospective client. Rather, it is usually addressed to an an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.
Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

1. except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
2. hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

1. are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
2. are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
3. are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
4. are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

1. are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Comment
...

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.
EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

Resolution 105b: Technology and Client Development

- The Commission proposes to clarify when electronic communications give rise to a prospective client-lawyer relationship under Rule 1.18 of the Model Rules of Professional Conduct (Duties to Prospective Client). Model Rule 1.18 currently requires a “discussion” and thus does not capture various Internet-based communications that can, in some situations, give rise to a prospective client relationship. The Commission proposes to replace the word “discussion” with the word “consults” and to include in new Comment [3] language that would give lawyers and clients more guidance as to when a “consultation” occurs under Rule 1.18.

- The Commission is proposing changes to Rule 7.2 of the Model Rules of Professional Conduct (Advertising) to clarify when the prohibition against paying for a “recommendation” is triggered. This prohibition has unclear implications for new forms of Internet-based client development tools, such as pay-per-lead or pay-per-click services. To address this ambiguity, the Commission is proposing amendments to Comment [5] to Model Rule 7.2 of the Model Rules of Professional Conduct that would define a “recommendation” to include communications that endorse or vouch for a lawyer’s credentials, abilities, competence, character, or other professional qualities. This definition, along with additional Comment language, would enable lawyers to use new client development tools, while ensuring that the public is not misled and that the restrictions on fee sharing with nonlawyers are observed.

- The Commission proposes to clarify when a lawyer’s online communications constitute the type of “solicitations” that are governed by Rule 7.3 of the Model Rules of Professional Conduct (Direct Contact with Prospective Clients). The Commission concluded that lawyers would benefit from a clearer definition of what kinds of communications constitute a “solicitation” and thus fall within the scope of the Rule.

- The Commission is proposing technical changes to a Comment to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and a Comment to Model Rule 7.1 (Communications Concerning a Lawyer’s Services) that would remove references to “prospective clients.” That phrase is a defined term in Model Rule 1.18 and includes a narrower category of people than the Comments to Model Rules 5.5 and 7.1 are intended to cover.
2. **Summary of the Issue that the Resolution Addresses**

The ABA’s last “global” review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) and the ABA Commission on Multijurisdictional Practice (“MJP Commission”). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

Resolution 105b offers lawyers guidance regarding their ethical obligations when using new technology to market their services. The Resolution offers this guidance in a manner that is consistent with the principles that then-ABA President Lamm directed the Commission to follow: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

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

The Commission determined that, although no new restrictions on lawyer advertising are necessary, the existing Rules do not have clear implications for new forms of client development. Proposed Resolution 105b, if adopted, will provide lawyers with more guidance about how they can use new forms of marketing to disseminate information about themselves and their services, while protecting the public from false or misleading communications.

For example, the Commission proposes to clarify when electronic communications give rise to a prospective client-lawyer relationship under Rule 1.18 of the Model Rules of Professional Conduct (Duties to Prospective Client). Model Rule 1.18 currently requires a “discussion” and does not capture various Internet-based communications that can, in some situations, give rise to a prospective client relationship. The Commission proposes to replace the word “discussion” with the word “consults” and to include in new Comment [3] language that would give lawyers and clients more guidance as to when a “consultation” occurs under Rule 1.18.

The Resolution also updates several other Model Rules to reflect the changing nature of the technology that lawyers use for client development. Currently, Model Rule 7.2(b) of the Model Rules of Professional Conduct (Advertising) provides that a lawyer typically cannot provide anything of value to someone for recommending the lawyer’s services. This prohibition has unclear implications...
for new forms of Internet-based client development tools, such as pay-per-lead or pay-per-click services. To address this ambiguity, the Commission is proposing amendments to Comment [5] to Rule 7.2 of the Model Rules of Professional Conduct that would define a “recommendation” to include communications that endorse or vouch for a lawyer’s credentials, abilities, competence, character, or other professional qualities. This definition, along with additional Comment language, would enable lawyers to use new client development tools, while ensuring that the public is not misled and that the restrictions on fee sharing with nonlawyers are observed.

The Commission is also proposing amendments to Rule 7.3 of the Model Rules of Professional Conduct (Direct Contact with Prospective Clients) to clarify when a lawyer’s online communications constitute “solicitations” and are thus governed by the Rule.

4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105b as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105b relating to Technology and Confidentiality: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission’s website (click here). Moreover, the Commission created and maintained a listserve for interested persons to
keep them apprised of the Commission’s activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission’s process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission’s final proposals were shaped by those who participated in this feedback process.
RESOLVED, That the American Bar Association amends the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding the ethical implications of retaining lawyers and nonlawyers outside the firm to work on client matters (i.e. outsourcing) as follows (insertions underlined, deletions struck through):

(a) the Comments to Model Rule 1.1 (Competence);
(b) the title and Comments to Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants); and
(c) the Comments to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).

Client-Lawyer Relationship
Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment
...

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer’s own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6
(confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer’s own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[6-8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Law Firms And Associations

Rule 5.3 Responsibilities Regarding Nonlawyer Assistancets

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[21] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with the professional obligations of the lawyer, with the Rules of Professional Conduct. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer, such nonlawyers within or outside the firm. Paragraph
(c) specifies the circumstances in which a lawyer is responsible for the conduct of a nonlawyer such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

**Nonlawyers Within the Firm**

[42] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

**Nonlawyers Outside the Firm**

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

**Law Firms And Associations**

**Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer’s direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person’s jurisdiction.

...
EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

Resolution 105(c): Outsourcing

- The Commission is proposing new Comments to Rule 1.1 of the Model Rules of Professional Conduct (Competence) to identify the factors that lawyers need to consider when retaining lawyers in a different firm to assist on a client’s matter. The factors emphasize the importance of ensuring that the retained lawyers contribute to the competent and ethical representation of the client.

- The Commission is proposing amendments to the title of, and Comments to, Rule 5.3 of the Model Rules of Professional Conduct to address issues relating to the retention of nonlawyers outside the firm. To reflect the increasingly important role of automated nonlawyer assistance, such as “cloud computing” services, the title of the Rule will change from “Responsibilities Regarding Nonlawyer Assistants” to “Responsibilities Regarding Nonlawyer Assistance.” Moreover, the Comments will emphasize that lawyers should make reasonable efforts to ensure that nonlawyers outside the firm provide their services in a manner that is compatible with the lawyer’s own professional obligations, including the lawyer’s obligation to protect client information.

- The Commission is proposing amendments to Comment [1] of Rule 5.5 of the Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) to make clear that lawyers cannot engage in outsourcing in a manner that would facilitate the unauthorized practice of law.

2. Summary of the Issue that the Resolution Addresses

The ABA’s last “global” review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) and the ABA Commission on Multijurisdictional Practice (“MJP Commission”). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.
Technology and globalization are transforming the practice of law. One aspect of this transformation is that legal and nonlegal work can be, and often is, disaggregated. The outsourcing of work, both domestically and internationally, as a means to provide clients with competent and cost-effective services is not new, but it is occurring with greater frequency due to technological change and increased globalization.

The Commission found that the Model Rules currently offer lawyers limited guidance regarding their ethical obligations in this increasingly important context. Resolution 105c, if adopted, will provide that guidance and do so in a manner that is consistent with the principles that then-ABA President Lamm directed the Commission to follow: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

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

Resolution 105c, if adopted, will give lawyers who decide to engage in outsourcing more guidance regarding their ethical obligations.

The Commission’s proposed new Comments [6] and [7] to Rule 1.1 of the Model Rules of Professional Conduct (Competence) identify the factors that lawyers need to consider when retaining lawyers in another firm to assist on a client’s matter. The factors emphasize the importance of ensuring that the retained lawyers contribute to the competent and ethical representation of the client.

The Commission’s proposed amendments to Rule 5.3 are designed to give lawyers more guidance regarding the retention of outside nonlawyers. The proposed new Comments identify the factors that lawyers need to consider when outsourcing work to nonlawyers and emphasize that lawyers should make reasonable efforts to ensure that those nonlawyers provide their services in a manner that is compatible with the lawyer’s own professional obligations, including the lawyer’s obligation to protect client information.

The last sentence of Comment [3] emphasizes that lawyers have an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers and that the lawyer’s instructions must be reasonable under the circumstances.

Comment [4] recognizes that clients frequently direct lawyers to use particular nonlawyer service providers. In such situations, Comment [4] provides that lawyers ordinarily should consult with their clients to determine how the outsourcing arrangement should be structured and who will be responsible for monitoring the performance of the nonlawyer services.
Finally, the Commission is proposing amendments to Comment [1] to Rule 5.5 of the Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) that would make clear that lawyers cannot engage in outsourcing in a manner that would facilitate the unauthorized practice of law.

4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105c as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105c relating to Technology and Confidentiality: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission’s website (click here). Moreover, the Commission created and maintained a listserv for interested persons to keep them apprised of the Commission’s activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission’s process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The
Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission’s final proposals were shaped by those who participated in this feedback process.
RESOLVED, That the American Bar Association adopts the Model Rule on Practice Pending Admission as follows:

ABA Model Rule on Practice Pending Admission

1. A lawyer currently holding an active license to practice law in another U.S. jurisdiction and who has been engaged in the active practice of law for three of the last five years, may provide legal services in this jurisdiction through an office or other systematic and continuous presence for no more than [365] days, provided that the lawyer:

   a. is not disbarred or suspended from practice in any jurisdiction and is not currently subject to discipline or a pending disciplinary matter in any jurisdiction;
   b. has not previously been denied admission to practice in this jurisdiction or failed this jurisdiction’s bar examination;
   c. notifies Disciplinary Counsel and the Admissions Authority in writing prior to initiating practice in this jurisdiction that the lawyer will be doing so pursuant to the authority in this Rule;
   d. submits within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction a complete application for admission by motion or by examination;
   e. reasonably expects to fulfill all of this jurisdiction’s requirements for that form of admission;
   f. associates with a lawyer who is admitted to practice in this jurisdiction;
   g. complies with Rules 7.1 and 7.5 of the Model Rules of Professional Conduct [or jurisdictional equivalent] in all communications with the public and clients regarding the nature and scope of the lawyer’s practice authority in this jurisdiction; and
   h. pays any annual client protection fund assessment.
2. A lawyer currently licensed as a foreign legal consultant in another U.S. jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence for no more than [365] days, provided that the lawyer:

a. provides services that are limited to those that may be provided in this jurisdiction by foreign legal consultants;
b. is a member in good standing of a recognized legal profession in the foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;
c. submits within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction a complete application for admission to practice as a foreign legal consultant;
d. reasonably expects to fulfill all of this jurisdiction’s requirements for admission as a foreign legal consultant; and
e. meets the requirements of paragraphs 1(a), (b), (c), (f), (g), and (h) of this Rule.

3. Prior to admission by motion, through examination, or as a foreign legal consultant, the lawyer may not appear before a tribunal in this jurisdiction that requires pro hac vice admission unless the lawyer is granted such admission.

4. The lawyer must immediately notify Disciplinary Counsel and the Admissions Authority in this jurisdiction if the lawyer becomes subject to a disciplinary matter or disciplinary sanctions in any other jurisdiction at any time during the [365] days of practice authorized by this Rule. The Admissions Authority shall take into account such information in determining whether to grant the lawyer’s application for admission to this jurisdiction.

5. The authority in this Rule shall terminate immediately if:

a. the lawyer withdraws the application for admission by motion, by examination, or as a foreign legal consultant, or if such application is denied, prior to the expiration of [365] days;
b. the lawyer fails to file the application for admission within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction;
c. the lawyer fails to remain in compliance with Paragraph 1 of this Rule;
d. the lawyer is disbarred or suspended in any other jurisdiction in which the lawyer is licensed to practice law; or
e. the lawyer has not complied with the notification requirements of Paragraph 4 of this Rule.

6. Upon the termination of authority pursuant to Paragraph 5, the lawyer, within [30] days, shall:

a. cease to occupy an office or other systematic and continuous presence for the practice of law in this jurisdiction unless authorized to do so pursuant to another Rule;
b. notify all clients being represented in pending matters, and opposing counsel or co-counsel of the termination of the lawyer’s authority to practice pursuant to this Rule;

c. not undertake any new representation that would require the lawyer to be admitted to practice law in this jurisdiction; and

d. take all other necessary steps to protect the interests of the lawyer’s clients.

7. Upon the denial of the lawyer’s application for admission by motion, by examination, or as a foreign legal consultant, the Admissions Authority shall immediately notify Disciplinary Counsel that the authority granted by this Rule has terminated.

8. The Court, in its discretion, may extend the time limits set forth in this Rule for good cause shown.

Comment

[1] This Rule recognizes that a lawyer admitted in another jurisdiction may need to relocate to or commence practice in this jurisdiction, sometimes on short notice. The admissions process can take considerable time, thus placing a lawyer at risk of engaging in the unauthorized practice of law and leaving the lawyer’s clients without the benefit of their chosen counsel. This Rule closes this gap by authorizing the lawyer to practice in this jurisdiction for a limited period of time, up to 365 days, subject to restrictions, while the lawyer diligently seeks admission. The practice authority provided pursuant to this Rule commences immediately upon the lawyer’s establishment of an office or other systematic and continuous presence for the practice of law.

[2] Paragraph 1(f) requires a lawyer practicing in this jurisdiction pursuant to the authority granted under this Rule to associate with a lawyer who is admitted to practice law in this jurisdiction. The association between the incoming lawyer and the lawyer licensed in this jurisdiction is akin to that between a local lawyer and a lawyer practicing in a jurisdiction on a temporary basis pursuant to Model Rule of Professional Conduct 5.5(c)(1).

[3] While exercising practice authority pursuant to this Rule, a lawyer cannot hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction. See Model Rule of Professional Conduct 5.5(b)(2). Because such a lawyer will typically be assumed to be admitted to practice in this jurisdiction, that lawyer must disclose the limited practice authority and jurisdiction of licensure in all communications with potential clients, such as on business cards, websites, and letterhead. Further, the lawyer must disclose the limited practice authority to all potential clients before agreeing to represent them. See Model Rules 7.1 and 7.5(b).

[4] The provisions of paragraph 5 (a) through (d) of this Rule are necessary to avoid prejudicing the rights of existing clients or other parties. Thirty days should be sufficient for the lawyer to wind up his or her practice in this jurisdiction in an orderly manner.

FURTHER RESOLVED, That the American Bar Association amends the black letter and Comment to Rule 5.5 of the ABA Model Rules of Professional Conduct dated August 2012, as follows (insertions underlined, deletions struck through):
Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that provide legal services in this jurisdiction that:

(1) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

Comment

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which
includes statute, court rule, executive regulation or judicial precedent. See, e.g., The ABA Model Rule on Practice Pending Admission.

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.
EXECUTIVE SUMMARY

1. **Summary of the Resolution(s)**

   **Resolution 105d: Model Rule on Practice Pending Admission**

   - The Commission’s proposal recognizes that, in today’s legal marketplace, a lawyer licensed in one U.S. jurisdiction may need to relocate to a new U.S. jurisdiction, sometimes on short notice, and that the admissions process in the new jurisdiction may take considerable time. Subject to numerous restrictions designed to protect clients and the public, the proposed new Model Rule on Practice Pending Admission will permit the relocating lawyer to practice in the new jurisdiction in the interim, thus affording clients their choice of counsel and giving lawyers the ability to practice without the risk of engaging in the unauthorized practice of law.

   - The Commission is also proposing conforming amendments to Rule 5.5 of the ABA Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) that are designed to alert lawyers to the practice authority afforded by the new Model Rule on Practice Pending Admission.

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

   The ABA’s last “global” review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) and the ABA Commission on Multijurisdictional Practice (“MJP Commission”). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

   Technology and globalization are transforming the legal marketplace, with more clients confronting legal problems that cross jurisdictional lines and more lawyers needing to respond to those clients’ needs by crossing borders (including virtually) or relocating to new jurisdictions. Lawyers also must relocate their practices to a new jurisdiction for other reasons, including employment opportunities for themselves or for a family member. For this reason, in February 2012, the ABA House of Delegates adopted new policies designed to ease
admissions barriers for lawyers who are the spouses of deployed military personnel.

Resolution 105d builds on that recent House action and responds to similar changes affecting all lawyers and their clients by proposing a new Model Rule on Practice Pending Admission. The various protections and limitations identified in the Model Rule ensure that the new practice authority is consistent with the principles that have guided the Commission’s work: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

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

Technological and economic changes have produced an increase in cross-border practice, revealing an important gap in the practice authority granted by Model Rule of Professional Conduct 5.5(d) (Unauthorized Practice of Law; Multijurisdictional Practice of Law). That gap affects an increasing number of lawyers who have found it necessary to establish a practice in a jurisdiction where they are not otherwise admitted. The Commission found and heard that, despite the increasing need to relocate, the admissions process for these lawyers can take considerable time. The Commission found that this time consuming process can adversely affect lawyers’ ability to represent their existing clients effectively and can have unnecessary adverse consequences on lawyers’ careers in a marketplace that requires an increasing amount of cross-border practice.

The proposed Model Rule on Practice Pending Admission, if adopted, will address this gap by providing a framework, replete with safeguards to protect clients and the public, that allows lawyers to establish a continuous and systematic presence for the practice of law in a new jurisdiction for a limited time (not to exceed 365 days) while diligently pursuing formal admission there.

Numerous safeguards are built into the Model Rule. For example, in order to qualify to practice pursuant to this new Model Rule, the lawyer must have been engaged in the active practice of law for three of the last five years and cannot have been disbarred or suspended or currently be the subject of a pending disciplinary proceeding in any jurisdiction. The lawyer also must not have previously been denied admission in the new jurisdiction and must submit an application for admission in the new jurisdiction within [45] days of first providing legal services. Other protections include, but are not limited to, a requirement that the lawyer associate with a lawyer licensed to practice in the jurisdiction and that the lawyer notify the Disciplinary Counsel and Bar Admissions Authority that the lawyer intends to practice there pursuant to this limited authority.

The proposed new Model Rule on Practice Pending Admission also includes a separate section that allows a foreign lawyer already licensed in one U.S.
jurisdiction as a foreign legal consultant to continue practicing as a foreign legal consultant in another U.S. jurisdiction while an application to become a foreign legal consultant is pending in that new U.S. jurisdiction. This provision does not create any practice authority for foreign lawyers beyond what the Model Rules and ABA policy have already long allowed (e.g., rules relating to licensing and practice by foreign legal consultants and their limited scope of practice requirements, and rules governing whether foreign lawyers can sit for a particular jurisdiction’s bar examination). The section merely provides (subject to important limitations) that a foreign lawyer who is already admitted in a U.S. jurisdiction as a foreign legal consultant may continue to practice as such while their application for that form of admission is pending in another U.S. jurisdiction.

The Commission’s proposal in this regard is not without precedent. The District of Columbia allows out-of-state lawyers to practice law from a principal office located in the District of Columbia for a period not to exceed 360 days during the pendency of a person’s first application for admission to the District of Columbia Bar. Missouri also has a similar Rule for Temporary Practice by Lawyers Applying for Admission to the Missouri Bar.

The Commission is also proposing conforming amendments to the Comment to Model Rule 5.5 of the ABA Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law). If the House of Delegates adopts the new Model Rule on Practice Pending Admission, this new policy will need to be referenced in the Comment to Model Rule 5.5 to alert lawyers to the practice authority it authorizes.

4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105d as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105d relating to Technology and Confidentiality: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and
roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission’s website (click here). Moreover, the Commission created and maintained a listserv for interested persons to keep them apprised of the Commission’s activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission’s process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.
RESOLVED, That the American Bar Association amends the *ABA Model Rule for Admission by Motion*, dated August 2012, as follows (additions underlined, deletions struck through):

ABA Model Rule on Admission by Motion

1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction. The applicant shall:

   (a) have been admitted to practice law in another state, territory, or the District of Columbia;
   (b) hold a J.D. or LL.B. degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the applicant matriculated or graduated;
   (c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed;
   (d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;
   (e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction;
   (f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and
   (g) designate the Clerk of the jurisdiction’s highest court for service of process.

2. For purposes of this Rule, the “active practice of law” shall include the following activities, if performed in a jurisdiction in which the applicant is admitted and authorized to practice, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted in that jurisdiction; however, in no event shall any activities that were performed
pursuant to the Model Rule on Practice Pending Admission or in advance of bar admission in
some state, territory, or the District of Columbia be accepted toward the durational requirement:

(a) Representation of one or more clients in the private practice of law;
(b) Service as a lawyer with a local, state, territorial or federal agency, including military
   service;
(c) Teaching law at a law school approved by the Council of the Section of Legal
   Education and Admissions to the Bar of the American Bar Association;
(d) Service as a judge in a federal, state, territorial or local court of record;
(e) Service as a judicial law clerk; or
(f) Service as in-house counsel provided to the lawyer’s employer or its organizational
   affiliates.

3. For purposes of this Rule, the active practice of law shall not include work that, as
   undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was
   performed or in the jurisdiction in which the clients receiving the unauthorized services were
   located.

4. An applicant who has failed a bar examination administered in this jurisdiction within five
   years of the date of filing an application under this Rule shall not be eligible for admission
   on motion.

FURTHER RESOLVED: That the American Bar Association urges jurisdictions that have not
adopted the Model Rule on Admission by Motion to do so, and urges jurisdictions that have
adopted admission by motion procedures to eliminate any restrictions that do not appear in the
Model Rule on Admission by Motion.
EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

Resolution 105e: Admission by Motion

- The ABA Model Rule on Admission by Motion, which was adopted in 2002, allows a lawyer licensed in one U.S. jurisdiction to seek admission in another U.S. jurisdiction without sitting for that jurisdiction’s bar examination. In order to qualify for admission by motion, the Model Rule currently requires a lawyer to have engaged in the active practice of law for 5 of the last 7 years. The Commission proposes to reduce this “time in practice” requirement so that a lawyer can qualify for admission by motion after practicing for 3 of the last 5 years.

- The Commission also proposes to amend the Model Rule on Admission by Motion to ensure that the definition of the “active practice of law” does not include time spent practicing pursuant to the proposed Model Rule on Practice Pending Admission (Resolution 105d). The Commission determined that this restriction is necessary to prevent lawyers from qualifying for admission by motion after fewer than three years of active practice in a jurisdiction where the lawyer is actually licensed. The restriction also will prevent lawyers from serially relocating to new jurisdictions under the Model Rule on Practice Pending Admission in order to accumulate the necessary practice experience to qualify for admission by motion.

- Finally, a number of jurisdictions have not yet adopted an admission by motion process or have processes with unnecessary restrictions and requirements. The Commission’s Resolution encourages the eleven jurisdictions that have not adopted the Model Rule to do so and urges jurisdictions with admission by motion procedures to eliminate restrictions that do not appear in the Model Rule.

2. Summary of the Issue that the Resolution Addresses

The ABA’s last “global” review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) and the ABA Commission on Multijurisdictional Practice (“MJP Commission”). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of
globalization and technology on the legal profession and propose changes to ABA policies.

The ABA Model Rule on Admission by Motion was adopted in 2002, as part of the package of resolutions unanimously adopted by the House of Delegates to address increased cross-border practice. At the time of its adoption, the Model Rule required that lawyers could qualify for admission by motion only if they had been engaged in the active practice of law for 5 of the last 7 years.

Much has changed in the last decade, resulting in increased lawyer mobility. For example, lawyers regularly need to move to, or establish a regular practice in, another jurisdiction in order to serve clients who are relocating there or who regularly do business in that jurisdiction. Resolution 105e responds to this need, thus benefitting both lawyers and their clients, by reducing the time in practice requirement in the Model Rule for Admission by Motion to 3 of the last 5 years. The Commission’s research revealed that the Model Rule has produced no problems in the jurisdictions that have adopted it and no problems in the jurisdictions that already allow admission by motion after only three years of practice.

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

A reduction of the time in practice requirement in the ABA Model Rule on Admission by Motion will facilitate the cross-border practice that clients demand in a 21st century legal marketplace.

The Commission’s research revealed that there is no reason to believe that lawyers who have spent 3 of the last 5 years engaged in law practice will be any less able to practice law responsibly and competently in a new jurisdiction. The Commission found no evidence that lawyers admitted by motion are more likely to be subject to discipline, disciplinary complaints, or malpractice suits than lawyers admitted by examination. The Commission also found no evidence that the admission by motion process has produced any risks to clients or the public. To the contrary, it has enabled lawyers to relocate with greater ease and given clients more freedom to select their lawyers. Finally, the Commission found that the five jurisdictions that already have a duration-of-practice requirement of three years have not encountered any problems.

Resolution 105e also adds language to make clear that time spent practicing pursuant to the proposed ABA Model Rule on Practice Pending Admission does not count toward the Model Rule of Admission by Motion’s active practice requirement.

Additionally, given the increasing importance of lawyer mobility and the success of the Model Rule on Admission by Motion, the ABA should encourage the adoption of the Model Rule for Admission by Motion in the eleven jurisdictions
that have not yet adopted such a process. The ABA also should encourage jurisdictions that have an admission by motion process to eliminate restrictions that do not appear in the Model Rule and that pose unnecessary obstacles to using the process.

The Commission has concluded that these changes will facilitate lawyer mobility in a manner that is consistent with the principles that have guided the Commission’s work: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105e as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105e relating to Admission by Motion: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission’s website (click here). Moreover, the Commission created and maintained a listserv for interested persons to keep them apprised of the Commission’s activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission’s process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.
The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.
RESOLVED, That the American Bar Association amends the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding the detection of conflicts of interest when lawyers move from one firm to another, firms merge or there is a sale of a law practice, as follows (insertions underlined, deletions struck through):

(a) the black letter and Comments to Model Rule 1.6 (Confidentiality); and
(b) the Comments to Model Rule 1.17 (Sale of Law Practice).

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy
between the lawyer and the client, to establish a defense to a criminal charge or civil
claim against the lawyer based upon conduct in which the client was involved, or to
respond to allegations in any proceeding concerning the lawyer's representation of
the client; or

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest between lawyers in different
firms, but only if the revealed information would not compromise the attorney-
client privilege or otherwise prejudice the client.

Comment

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose
limited information to each other to detect and resolve conflicts of interest, such as when a
lawyer is considering an association with another firm, two or more firms are considering a
merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17,
Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose
limited information, but only once substantive discussions regarding the new relationship have
occurred. Any such disclosure should ordinarily include no more than the identity of the persons
and entities involved in a matter, a brief summary of the general issues involved, and information
about whether the matter has terminated. Even this limited information, however, should be
disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that
might arise from the possible new relationship. Moreover, the disclosure of any information is
prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client
(e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been
publicly announced; that a person has consulted a lawyer about the possibility of divorce before
the person's intentions are known to the person's spouse; or that a person has consulted a lawyer
about a criminal investigation that has not led to a public charge). Under those circumstances,
paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A
lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring
an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further
disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7)
does not restrict the use of information acquired by means independent of any disclosure
pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information
within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a
lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve
conflicts of interest that could arise in connection with undertaking a new representation.

[15] A lawyer may be ordered to reveal information relating to the representation of a
client by a court or by another tribunal or governmental entity claiming authority pursuant to
other law to compel the disclosure. Absent informed consent of the client to do otherwise, the
lawyer should assert on behalf of the client all nonfrivolous claims that the order is not
authorized by other law or that the information sought is protected against disclosure by the
attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer
must consult with the client about the possibility of appeal to the extent required by Rule 1.4.
Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's
order.

[164] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes
the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the
lawyer should first seek to persuade the client to take suitable action to obviate the need for
disclosure. In any case, a disclosure adverse to the client’s interest should be no greater than the
lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made
in connection with a judicial proceeding, the disclosure should be made in a manner that limits
access to the information to the tribunal or other persons having a need to know it and
appropriate protective orders or other arrangements should be sought by the lawyer to the fullest
extent practicable.

[175] Paragraph (b) permits but does not require the disclosure of information relating to
a client’s representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6).
In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the
nature of the lawyer’s relationship with the client and with those who might be injured by the
client, the lawyer’s own involvement in the transaction and factors that may extenuate the
conduct in question. A lawyer’s decision not to disclose as permitted by paragraph (b) does not
violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require
disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b),
8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of
whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[186] A lawyer must act competently to safeguard information relating to the
representation of a client against inadvertent or unauthorized disclosure by the lawyer or other
persons who are participating in the representation of the client or who are subject to the
lawyer’s supervision. See Rules 1.1, 5.1 and 5.3.

[197] When transmitting a communication that includes information relating to the
representation of a client, the lawyer must take reasonable precautions to prevent the information
from coming into the hands of unintended recipients. This duty, however, does not require that
the lawyer use special security measures if the method of communication affords a reasonable
expectation of privacy. Special circumstances, however, may warrant special precautions.
Factors to be considered in determining the reasonableness of the lawyer’s expectation of
confidentiality include the sensitivity of the information and the extent to which the privacy of
the communication is protected by law or by a confidentiality agreement. A client may require
the lawyer to implement special security measures not required by this Rule or may give
informed consent to the use of a means of communication that would otherwise be prohibited by
this Rule.

Former Client

[2048] The duty of confidentiality continues after the client-lawyer relationship has
terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such
information to the disadvantage of the former client.
Rule 1.17 Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:
   
   (1) the proposed sale;
   
   (2) the client's right to retain other counsel or to take possession of the file;

   and

   (3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

Comment

... Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to client-specific detailed information relating to the representation, and to such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

...
EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

Resolution 105(f): Conflicts Detection

- The Commission is proposing to amend Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to codify ABA Formal Opinion 09-455. This codification will provide lawyers with limited authority to disclose discrete categories of information to another firm to ensure that conflicts of interest are detected before the lawyer is hired or two firms merge. The proposal reflects the reality that these disclosures are already taking place and need to be properly regulated. By providing that regulation, the proposal provides more, rather than less, protection for client confidences and addresses an important issue that is arising with increasing frequency in a modern legal marketplace.

- The Commission is also proposing a change to Comment [7] to Rule 1.17 of the Model Rules of Professional Conduct (Sale of Law Practice) because that Comment addresses conceptually similar issues.

2. Summary of the Issue that the Resolution Addresses

The ABA’s last “global” review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) and the ABA Commission on Multijurisdictional Practice (“MJP Commission”). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002, such as by facilitating lawyer mobility. The Commission found that this increased mobility has produced a number of ethics-related questions, including the following: To what extent can lawyers in different firms disclose confidential information to each other to detect conflicts of interest that might arise when lawyers consider an association with another firm, two or more firms consider a merger, or lawyers consider the purchase of a law practice? Although there are ethics opinions, including a Formal Opinion of the ABA’s Standing Committee on Ethics and Professional Responsibility that
address this question, the Commission concluded that the Model Rules of Professional Conduct do not clearly address this issue and that lawyers and firms would benefit from more guidance in this important area.

Resolution 105f provides a doctrinal basis for, and places appropriate limitations on, disclosures of confidential information that are made to detect and resolve conflicts of interest. The Resolution ensures that these disclosures occur in a manner that is consistent with the principles that have guided the Commission's work: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

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

Resolution 105f, if adopted, would codify what has long been common practice and acknowledged as essential in ethics opinions and seminal scholarly writings on the subject: Lawyers must have the ability to disclose limited information to lawyers in other firms in order to detect and prevent conflicts of interest. By codifying existing authority and practices, and by expressly regulating and carefully limiting the scope of these disclosures, the proposed amendments would ensure that the legal profession provides more, rather than less, protection for client confidences. Moreover, the proposed changes would offer valuable guidance to lawyers and firms regarding an issue that they are increasingly encountering due to changes in the legal marketplace.

The Commission concluded that the proposed authority to disclose information in new black letter Model Rule 1.6(b)(7), although necessary, must be carefully limited and regulated to ensure client protection. For example, new language in Comment [13] of the Rule would make clear that any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited disclosure, however, is not permissible, absent informed client consent, if it would “compromise the attorney-client privilege or otherwise prejudice the client.” Comment [13] further explains that any disclosures should occur only after substantive discussions regarding the possible new relationship have occurred and reminds lawyers that they must not use or reveal the information that they receive pursuant to a conflicts-checking process, except to determine whether a conflict would arise from the possible relationship. All of these limitations are drawn from Formal Opinion 09-455.

New Comment language also reminds lawyers that they may have fiduciary duties to their current firms that are independent of the ethical responsibilities described in the Model Rules of Professional Conduct.
Proposed amendments to Comment [7] of Model Rule 1.17 (Sale of a Law Practice) address conceptually similar ethical obligations that arise during the sale of a law practice. The Commission concluded that, in light of the proposed changes to Model Rule 1.6 described above, Comment [7] to Rule 1.17 should be updated to reflect the content of the Rule 1.6 proposal and that Comment [7] should contain a cross-reference to the proposed new Model Rule 1.6(b)(7).

4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 1056f as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105f relating to Conflicts Detection: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission’s website (click here). Moreover, the Commission created and maintained a listserv for interested persons to keep them apprised of the Commission’s activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission’s process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as
complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission’s final proposals were shaped by those who participated in this feedback process.
RESOLVED, That the American Bar Association urges Congress to amend the Patient-Self Determination Act (PSDA) provisions of the Medicare and Medicaid law to require that:

1. Every patient or patient’s authorized representative be given an opportunity to discuss issues relating to advance care planning with an appropriately trained professional within a reasonable time after the patient’s admission to a facility covered by the PSDA;

2. Health insurance exchanges developed pursuant to the Patient Protection and Affordable Care Act of 2010 be required under the PSDA to provide advance care planning information and resource options for follow-up assistance; and

3. In the absence of a validly executed advance directive, any clear, undisputed expression of a person’s wishes with respect to health care should be honored.

FURTHER RESOLVED, That the American Bar Association urges Congress and the United States Department of Health and Human Services to require the annual Medicare wellness examination, or other periodic doctor-patient interactions, to include both an opportunity to engage in and assistance with advance care planning for health decisions.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**
   The resolution has four elements. The first three points address Congress, urging it to amend the provisions of the Patient Self-Determination Act of 1990 to require:
   (a) That every patient or patient’s authorized representative be given an opportunity to discuss issues relating to advance care planning with an appropriately trained professional.
   (b) That Health Insurance Exchanges developed pursuant to the Patient Protection and Affordable Care Act of 2010 be required to provide advance care planning information and resource options for follow-up assistance.
   (c) That in the absence of a validly executed state advance directive, any clear and undisputed expression of a person’s wishes with respect to health care should be honored by health care providers. Some 70 percent of the adult population do not have a formal advance directive, but many of those adults have expressed their wishes in a variety of other ways, both orally and in writing.

   The fourth part addresses both Congress and the U.S. Department of Health and Human Services, through its Centers for Medicare and Medicaid Services (CMS), calling on them:
   (d) To require that the annual Medicare wellness examination, or other periodic doctor-patient interactions, include an opportunity and assistance to engage in advance care planning for health decisions.

2. **Summary of the Issue that the Resolution Addresses**
   This resolution addresses a serious need for stronger mechanisms and protocols to ensure that patients their families, especially those who rely on Medicare and Medicaid, receive the counseling and assistance they need to plan adequately for medical decisions that will inevitably face them. Some 70 percent of the adult population do not have a formal advance directive, and federal lack lacks sufficient systemic prompts and supports to make advance care planning a normal and expected part of health care for persons on Medicare and Medicaid.

3. **Please Explain How the Proposed Policy Position will address the issue**
   The resolution addresses the problem by calling on Congress to strengthen the only federal law that seeks to encourage the use and recognition of advance directives, the Patient Self-Determination Act of 1990, which the ABA strongly supported at the time of its enactment. The resolution also calls on the Department of Health and Human Services to exercise its own authority to require voluntary advance care planning to be included in the annual Medicare wellness exam. While amendments to strengthen the Act have been introduced in every Congress since 1990, none have been enacted. The ABA’s disinterested, patient’s rights perspective on these issues can carry considerable influence in securing patient-centered changes in the law.

4. **Summary of Minority Views**
   Currently none.
RESOLVED, That the American Bar Association adopts the *Third National Guardianship Summit Standards and Recommendations*, dated August 2012, and urges courts, as well as national, state, local, tribal and territorial policy-making bodies to implement them.
Third National Guardianship Summit Standards and Recommendations  
(August 2012)

Standards

#1. Core Standards

Standard #1.1  
The guardian shall develop and implement a plan setting forth short-term and long-term goals for meeting the needs of the person.
- Plans shall emphasize a “person-centered philosophy”.

Standard #1.2  
The guardian shall treat the person with dignity.

Standard #1.3  
The guardian shall make a good faith effort to cooperate with other surrogate decision-makers for the person.
- These include where applicable, any other guardian, conservator, agent under a power of attorney, health care proxy, trustee, VA fiduciary and representative payee.

Standard #1.4  
The guardian shall promptly inform the court of any change in the capacity of the person that warrants an expansion or restriction of the guardian’s authority.

Standard #1.5  
The guardian shall promptly report to the appropriate authorities abuse, neglect, and/or exploitation, as defined by state statute.

#2. Guardian’s Relationship to the Court

Standard #2.1  
The guardian shall seek ongoing education concerning:
- Person-centered planning
- Surrogate decision-making
- Responsibilities and duties of guardians
- Legal processes of guardianship
- State certification of guardians.

Standard #2.2  
The guardian and conservator shall keep the court informed about the well-being of the person and the status of the estate through personal care and financial plans, inventory and appraisals, and annual reports and accountings.

Standard #2.3  
The guardian shall seek assistance as needed to fulfill responsibilities to the person.

Standard #2.4  
The guardian shall use available technology to:
- File the general plan, inventory and appraisal, and annual reports and accountings
#3. Fees

Standard #3.1

The guardian, as a fiduciary, shall:

- Disclose in writing the basis for fees (e.g., rate schedule) at the time of the guardian’s first appearance in the action
- Disclose a projection of annual fiduciary fees within 90 days of appointment
- Disclose fee changes
- Seek authorization for fee-generating actions not contained in the fiduciary’s appointment
- Disclose a detailed explanation for any claim for fiduciary fees.

Standard #3.2

A guardian shall report to the court any likelihood that funds will be exhausted and advise the court whether the guardian intends to seek removal when there are no longer funds to pay fees.

A guardian may not abandon the person when funds are exhausted in cases in which the spend-down occurred over several reporting periods and the guardian failed to address the probability of exhaustion with the court and failed to make appropriate succession plans.

Standard #3.3

A guardian may seek payment of fiduciary fees from the income of a person receiving Medicaid services only after the deduction of the personal needs allowance, spousal allowance and health care insurance premiums.

#4. Financial Decision-Making

Standard #4.1

The conservator, as a fiduciary, shall manage the financial affairs in a way that maximizes the dignity, autonomy, and self-determination of the person.

Standard #4.2

The conservator shall consider current wishes, past practices, reliable evidence of likely choices, and best interests of the person.

Standard #4.3

A conservator shall, consistent with court order and state statutes, promote the self-determination of the person and exercise authority only as necessitated by the limitations of the person.

Standard #4.4

The conservator shall encourage and assist the person to act on his or her own behalf and to participate in decisions.

Standard #4.5
When possible, the conservator shall assist the person to develop or regain the capacity to manage the person’s financial affairs. The conservator’s goal shall be to manage but not necessarily eliminate risk.

Standard # 4.6
The conservator shall value the well-being of the person over the preservation of the estate.

Standard # 4.7
The conservator shall avoid all conflicts of interest and self-dealing, and all appearances of conflicts of interests and self-dealing.

- The conservator shall become fully educated as to what constitutes a conflict of interest and self-dealing, and why they should be avoided.
- The conservator may enter into a transaction that may be a conflict of interest or self-dealing only when necessary, or when there is a significant benefit to the person under the conservatorship, and shall disclose such transactions to interested parties and obtain prior court approval.

Standard # 4.8
The conservator shall, when making decisions regarding investing, spending, and management of the income and assets, including asset recovery:

- Give priority to the needs and preferences of the person
- Weigh the costs and benefits to the estate
- Apply state law regarding prudent investment practices.

Standard # 4.9
The conservator shall take all steps necessary to obtain a bond to protect the estate, including obtaining a court order.

Standard #4.10
The conservator shall use reasonable efforts to:

- Ascertain the income, assets, liabilities of the person
- Ascertain the needs and preferences of the person
- Coordinate with the guardian and consult with others close to the person
- Prepare a plan for the management of income and assets
- Provide oversight to any income and assets under the control of the person.

Standard # 4.11
The conservator shall obtain and maintain a current understanding of what is required and expected of the conservator, statutory and local court rule requirements, and necessary filings and reports.

Standard # 4.12
The conservator shall, as appropriate for the estate, implement best practices of a prudent conservator, including responsible consultation with and delegation to people with appropriate expertise.

Standard # 4.13
The conservator shall become educated about the nature of any incapacity, condition and functional capabilities of the person.

Standard # 4.14
The conservator shall consider mentoring new conservators.

#5. Health Care Decision-Making

Standard #5.1
The guardian, in making health care decisions or seeking court approval for a decision, shall maximize the participation of the person.

Standard #5.2
The guardian, in making health care decisions or seeking court approval for a decision, shall:
(a) Acquire a clear understanding of the medical facts
(b) Acquire a clear understanding of the health care options and risks and benefits of each
(c) Encourage and support the individual in understanding the facts and directing a decision.

Standard #5.3
To the extent the person cannot currently direct the decision, the guardian shall act in accordance with the person’s prior directions, expressed desires, and opinions about health care to the extent actually known or ascertainable by the guardian; or, if unknown and unascertainable,
(a) Act in accordance with the person’s prior general statements, actions, values and preferences to the extent actually known or ascertainable by the guardian; or, if unknown and unascertainable,
(b) Act in accordance with reasonable information received from professionals and persons who demonstrate sufficient interest in the person’s welfare, to determine the person’s best interests, which determination shall include consideration of consequences for others that an individual in the person’s circumstances would consider.

In the event of an emergency, the guardian shall grant or deny authorization of emergency health care treatment based on a reasonable assessment of the criteria listed in Standard 5.2.

Standard #5.4
The guardian shall monitor, promote, and maintain the person’s health and well-being and shall seek to ensure that the person receives appropriate health care consistent with person-centered health care decision-making.

Standard #5.5
The guardian shall seek to ensure that appropriate palliative care is incorporated into all health care.

Standard #5.6
The guardian shall keep persons who are important to the individual reasonably informed of important health care decisions.

#6. Residential Decision-Making

Standard #6.1
The guardian shall identify and advocate for the person’s goals, needs, and preferences. Goals are what are important to the person about where he or she lives, whereas preferences are specific expressions of choice.
- First, the guardian shall ask the person what he or she wants.
Second, if the person has difficulty expressing what he or she wants, the guardian shall do everything possible to help the person express his or her goals, needs, and preferences.

Third, only when the person, even with assistance, cannot express his or her goals and preferences, the guardian shall seek input from others familiar with the person to determine what the individual would have wanted.

Finally, only when the person’s goals and preferences cannot be ascertained, the guardian shall make a decision in the person’s best interest.

Standard #6.2
The guardian shall fully identify, examine, and continue to seek information regarding options that will fulfill the person’s goals, needs, and preferences.

- Guardians shall take full advantage of professional assistance in identifying all available options.
- These include but are not limited to area agencies on aging, centers for independent living, protection and advocacy agencies, long-term care ombudsmen, and developmental disabilities councils, aging and disability resource centers, and community mental health agencies.

Standard #6.3
The guardian shall have a strong priority for home or other community-based settings, when not inconsistent with the person’s goals and preferences.

Standard #6.4
The guardian shall make and implement a person-centered plan that seeks to fulfill the person’s goals, needs, and preferences. The plan shall emphasize the person’s strengths, skills, and abilities to the fullest extent in order to favor the least restrictive setting.

Standard #6.5
The guardian shall wherever possible, seek to ensure that the person leads the residential planning process; and at a minimum to ensure that the person participates in the process.

Standard #6.6
The guardian shall attempt to maximize the self-reliance and independence of the person.

Standard #6.7
The guardian shall seek review by a court or other court-designated third party with no conflict of interest before a move to a more restrictive setting.

Standard #6.8
The guardian shall monitor the residential setting on an ongoing basis and take any necessary action when the setting does not meet the individual’s current goals, preferences, and needs including but not limited to:

- Evaluating the plan; enforcing residents’ rights, legal and civil rights; ensuring quality of care and appropriateness of the setting in light of the feelings and attitudes of the person; and
- Exploring alternative opportunities for long-term services and supports where necessary to better fulfill the person’s goals and preferences.
Standard #6.9
The guardian shall promote social interactions and meaningful relationships consistent with the preferences of the person.

- The guardian shall encourage and support the person in maintaining contact with family and friends as defined by the person unless it will substantially harm the person.
- The guardian shall not interfere with established relationships unless necessary to protect the person from substantial harm.

Standard #6.10
The guardian shall consider the proximity of the setting to those people and activities that are important to the person when choosing a residential setting.

Standard #6.11
The guardian shall make reasonable efforts to maintain the person’s established social and support networks during the person’s brief absences from the primary residence.

Recommendations

#1. Overview of Guardian Standards

Recommendation #1.1
State statutes should set forth the mandatory duties of guardians. Court or administrative rules should set forth guardian standards.

Recommendation #1.2
The National Guardianship Association, in conjunction with state guardianship associations and state WINGS (Working Interdisciplinary Networks of Guardianship Stakeholders) should promote standards to improve guardian practices and enhance public confidence in guardianship.

- Materials should be developed to educate guardians about statutory duties, court rules, aspirational codes of conduct, and best practices.

Recommendation #1.3
State statutes should clearly express guardian duties and apply the duties to all guardians.

- These duties should be enumerated in a clear and succinct statement supplied to guardians at time of appointment.
- These duties should be enumerated in guardian training materials.
- The guardian must acknowledge, in writing, receipt of the information.

Recommendation #1.4
Every guardian should be held to the same standards, regardless of familial relationship, except a guardian with a higher level of relevant skills shall be held to the use of those skills.

Recommendation #1.5
States should adopt by statute a decision-making standard that provides guidance for using substituted judgment and best interest principles in guardian decisions.

- These standards should emphasize self-determination and the preference for substituted judgment.
The Uniform Guardianship and Protective Proceedings Act should be revised to embody these objectives.

Recommendation #1.6
A template should be created for developing a person-centered plan.

Recommendation #1.7
Where possible, the term person under guardianship should replace terms such as incapacitated person, ward, or disabled person.

#2. Guardian’s Relationship to the Court

Recommendation #2.1
The court or responsible entity should ensure that guardians, court and court staff, evaluators, and others involved in the guardianship process receive sufficient ongoing, multi-faceted education to achieve the highest quality of guardianship possible.

Recommendation #2.2
The court should issue orders that implement the least restrictive alternative and maximize the person’s right to self-determination and autonomy.

- The court should develop a protocol to obtain an accurate and detailed assessment of the person’s functional limitations.
- The court should conduct a factual investigation and review the assessment to determine the rights to be retained by the person and the powers to be granted to the guardian.
- The factual investigation may include contact with the person, interviews with interested persons and family members, and discussions with court-appointed attorneys and court evaluators or any other court representative.

Recommendation #2.3
The court should monitor the well-being of the person and status of the estate on an on-going basis, including, but not limited to:

- Determining whether less restrictive alternatives will suffice
- Monitoring the filing of plans, reports, inventories and accountings
- Reviewing the contents of plans, reports, inventories and accounting
- Independently investigating the well being of the person and status of the estate
- Ensuring the well-being of the person and status of the estate, improving the performance of the guardian, and enforcing the terms of the guardianship order.

Recommendation #2.4
The court should provide continuing assistance to the guardian about guardianship law and procedures, the guardian’s duties and responsibilities, community resources and the rights of the person. This may include assistance in:

- Completion of guardianship plan and reports
- Guidance on facility transfer or placement
- Providing for care at home
- Financial and health care decision-making
- What to do when the person dies or disappears
- Burial and funeral planning
- Mental health services
Recommendation #2.5
The court should use available technology to:
- Assist in monitoring guardianships
- Develop a database of guardianship elements, including indicators of potential problems
- Schedule required reports
- Produce minutes from court hearings
- Generate statistical reports
- Develop online forms and/or e-filing
- Provide public access to identified non-confidential, filed documents.

#3. Fees

Recommendation #3.1
The court should promote sound administrative practices relating to guardianship fees by:
- Encouraging the continuity of judicial experience and expertise on the probate bench, and encouraging specialization of probate courts in accordance with the National Probate Court Standards
- Actively monitoring the reasonableness of fiduciary fees
- Creating and maintaining training programs for participants in the guardianship process
- Collecting data regarding fiduciary fees and costs
- Promoting timely review and approval of fees
- Promoting electronic filing.

Recommendation #3.2
Guardians should be entitled to reasonable compensation for their services. The court should consider these factors in determining the reasonableness of guardian fees:
- Powers and responsibilities under the court appointment
- Necessity of the services
- The request for compensation in comparison to a previously disclosed basis for fees, and the amount authorized in the approved budget, including any legal presumption of reasonableness or necessity
- The guardian's expertise, training, education, experience, professional standing, and skill, including whether an appointment in a particular matter precluded other employment
- The character of the work to be done, including difficulty, intricacy, importance, time, skill, or license required, or responsibility undertaken
- The conditions or circumstances of the work, including emergency matters requiring urgent attention, services provided outside of regular business hours, potential danger (e.g., hazardous materials, contaminated real property, or dangerous persons), or other extraordinary conditions
- The work actually performed, including the time actually expended, and the attention and skill-level required for each task, including whether a different person could have better, cheaper or faster rendered the service
The result, specifically whether the guardian was successful, what benefits to the person were derived from the efforts, and whether probable benefits exceeded costs.

Whether the guardian timely disclosed that a projected cost was likely to exceed the probable benefit, affording the court an opportunity to modify its order in furtherance of the best interest of the estate.

The fees customarily paid, and time customarily expended, for performing like services in the community, including whether the court has previously approved similar fees in another comparable matter.

The degree of financial or professional risk and responsibility assumed.

The fidelity and loyalty displayed by the guardian, including whether the guardian put the best interests of the estate before the economic interest of the guardian to continue the engagement.

The need for and local availability of specialized knowledge and the need for retaining outside fiduciaries to avoid conflict of interest.

Recommendation #3.3
To ensure the right of access to guardianship services, states should provide public funding for:

- Guardianship services for those unable to pay
- Services to coordinate alternatives to guardianship, and the obligation to make such services available to all vulnerable persons.

Recommendation #3.4
In the event estate funds are exhausted and the guardian has failed to address the anticipated exhaustion, the court is justified in requiring the guardian to remain serving at least until a succession plan is in place.

Recommendation #3.5
The court and court-appointed counsel should actively and timely monitor fiduciary fees.

Recommendation #3.6
The court should support any rejection or reduction of fees with a statement of explanation.

Recommendation #3.7
The court and all parties should respect the privacy and dignity of the person when disclosing information regarding fees.

Recommendation #3.8
The court should resolve fee disputes through a process that is fair, expeditious, and economical, for example, through:

- A court-ordered alternative dispute resolution or mediation process;
- A referral to a regulatory body responsible for reviewing fees; or
- A master or a special judicial resolution process.

#5. Health Care Decision-Making

Recommendation #4.1
State guardianship statutes should provide that valid health care directives that appoint a health care agent shall remain in effect unless the court determines that the agent is unable, unwilling, or unsuitable to perform the agent’s duties under the directive.
#7. State Interdisciplinary Guardianship and Alternatives Committees

Recommendation #5.1
State courts and National Guardianship Network organizations should collaborate to establish Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) to advance adult guardianship reform and implement the recommendations adopted by the Third National Guardianship Summit.

Recommendation #5.2
A state steering committee should establish the scope, goals and mission of WINGS. The steering committee should:
- Conduct needs assessments
- Review the guardianship process, court rules and statutes
- Identify, recruit and include stakeholders with sufficient expertise and authority.
- Stakeholders may include, but are not limited to, judges, court administrators, agencies on aging, adult protective services, Attorneys General, state mental health association, state hospital associations, legal service providers, AARP, state guardianship associations and agencies, Alzheimer's Association, financial institutions, service providers, disability advocates, long-term care ombudsman programs, medical professionals and associations, bar associations, family members of persons under guardianship, and members of the public who have experienced the guardianship process
- Encourage inclusivity considering local realities, non-traditional partners, and underserved populations
- Establish a clear process for setting priorities and developing feasible timelines.

Recommendation #5.3
WINGS should develop an agenda to accomplish its goals and objectives. The agenda should include implementation of the standards and recommendations adopted by the Third National Guardianship Summit. Additional projects may:
- Encourage and support court monitoring and data collection
- Evaluate court procedures
- Expand the use of technology, standardized forms, and web site development
- Conduct education and cross-training
- Recommend improvements and best practices
- Advocate for funds to support court systems and guardianship programs.

Recommendation #5.4
WINGS should aim to procure tangible and in-kind resources necessary to achieve its mission.
- Financial resources may include budgetary allocations, donations and grants.
- Human resources may include administrative, logistical, research and technical support provided by paid staff or volunteers.

Recommendation #5.5
WINGS should develop a plan to ensure sustainability, including:
- Leadership development and committee member terms
- Recruitment and orientation of new members
- Measurable outcomes with ongoing self-evaluation
- Maintenance and development of resources.
EXECUTIVE SUMMARY

1. **Summary of the Resolution.** The proposed resolution requests the ABA to adopt the Third National Guardianship Summit Standards and Recommendations, and urges courts and all levels of policy-making bodies to implement them.

2. **Summary of the Issue that the Resolution Addresses.** The need for guardianship of incapacitated adults will grow as the population ages and the number of individuals with dementia, intellectual disabilities, mental illness and brain injury increases. The last 25 years has seen significant guardianship reform focused on procedural protections, determination of capacity, limited orders and court monitoring, with less attention to the post-appointment performance of the guardian. When the court appoints a guardian for an adult, what is the expectation of how the guardian will fulfill this daunting and powerful role on behalf of vulnerable at-risk individuals? Despite some degree of guidance in state laws and court rules, as well as some existing standards, nowhere is there a universally recognized set of standards defining how a guardian should perform and make decisions. While research is scant, anecdotal evidence, governmental reports and press accounts indicate guardian practice is markedly uneven.

   Thus, the National Guardianship Network in 2011 convened a landmark Summit to examine what standards should guide guardians. The Summit focused on post-appointment performance across several key areas of guardianship practice. The Summit included the active participation of three ABA entities (Commission on Law and Aging, Section on RPTE, and Commission on Disability Rights), among others, and builds on prior consensus conferences with important recommendations for which the ABA has approved policy.

3. **How the Proposed Policy Position Will Address the Issue.** The Summit resulted in 43 standards for guardians and 21 additional recommendations for action by legislatures, courts and others, as shown in the Report for the proposed ABA Resolution. The Resolution would endorse the Summit Standards and Recommendations, thus creating ABA policy in areas where the Association has no policy; as well as reinforcing existing policy, often quite old, and making it more specific to the responsibilities of guardians. The Summit provided a durable guide for guardians and a solid blueprint for continuing reform. The ABA should have a strong role in the implementation of the Summit Standards and Recommendations.

4. **Summary of Minority Views**

   None identified.
RESOLVED, That the American Bar Association urges state, territorial, tribal, and local courts and community organizations to collaborate in establishing court-focused elder abuse initiatives that serve victims or potential victims of elder abuse through either a court or a court-based program, or a program conducted in partnership with a court.

FURTHER RESOLVED, That the American Bar Association urges such court-focused elder abuse initiatives to, as appropriate for each initiative and each jurisdiction, implement the following principles:

(1) Foster improved handling of elder abuse cases by the court and enhancements in the criminal justice response to elder abuse cases;

(2) Have a positive impact on victims and a positive or neutral impact on the agencies involved;

(3) Strengthen intra-court coordination of cases involving elder abuse;

(4) Be vigilant in assessing and addressing conflicts of interest and other ethical issues;

(5) Foster judicial leadership in the community’s response to elder abuse;

(6) Create professional and public awareness of the initiative’s services and of elder abuse; and

(7) Strive to institutionalize the initiative within the court or community organization.

FURTHER RESOLVED, That the American Bar Association urges all courts and community organizations involved in court focused elder abuse initiatives to develop deliberate and proactive plans for collecting data for purposes of program administration and evaluation, with the goal of analyzing the impact and outcomes on courts, elder abuse victims, other organizations participating in the initiative, and other community organizations or groups.
EXECUTIVE SUMMARY

1. Summary of the Resolution.

This resolution urges state, territorial, tribal, and local courts and community organizations to collaborate in establishing court-focused elder abuse initiatives that, as appropriate for each initiative and each jurisdiction, implement seven principles that mirror the findings of a study conducted by the Commission on Law and Aging with funding from the U.S. Department of Justice. The resolution also urges the courts and community organizations involved in these initiatives to develop deliberate and proactive plans for collecting and analyzing data to demonstrate the initiatives’ impact and outcomes. Court-focused elder abuse initiatives serve victims or potential victims of elder abuse through either a court or a court-based program, or a program conducted in partnership with a court.

2. Summary of the Issue that the Resolution Addresses.

The older adult population is growing and the incidence of elder abuse is rising. State legislative action and growing emphasis on legal remedies are expanding the number of elder abuse cases in the state courts. The Commission on Law and Aging recently studied what were then the only five court-focused elder abuse initiatives in the country and concluded that these initiatives are beneficial and should be replicated.

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

This policy supports the development of court-focused elder abuse initiatives that improve the justice system’s response to victims of elder abuse. These initiatives have a positive impact on victims and either a positive or neutral impact on the courts and other agencies involved in them.

4. Summary of Minority Views

No minority views have been identified.
RESOLVED, That the American Bar Association urges federal, state, territorial, and tribal
governments to review child sexual abuse statutes of limitations to determine whether special
factors including the age of the victim, inability to report, and abuse of trust, warrant extending
the statute of limitations applicable to said crimes.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**
The resolution urges governments to review their child sexual abuse statutes and applicable statutes of limitations and consider whether extending the statutes of limitations is warranted.

2. **Summary of the Issue that the Resolution Addresses**
The very nature of child sexual abuse and the immaturity of its victims often present unique obstacles to the effective application of statutes of limitation. Among these is the inherent inequality of power and social stature between child victims and adult perpetrators. Offenders often implicitly or explicitly threaten child victims or assure them that the abuse is not wrong, both of which are disincentives to timely reporting. Often the perpetrator is a parent or other family member and even victims who are not afraid of personal retaliation may fear that reporting may break up or cause tension within the family.

3. **Please Explain How the Proposed Policy Position will address the issue**
The resolution will encourage reviews of statutes of limitations as they apply to child sexual abuse statutes with a view toward extending the statutes of limitations as warranted.

4. **Summary of Minority Views**
None known.
RESOLVED, That the American Bar Association urges federal, state, local and territorial prosecutors to:

1. continue or develop programs designed to protect crime victims and witnesses from threats, intimidation, and injury by securing and enforcing orders of protection, vigorously prosecuting any instances of intimidation, and implementing plans for witness safety;

2. mitigate, whenever feasible and appropriate, any adverse collateral consequences to crime victims and witnesses that may result from their participation in the criminal justice process, including those related to immigration, housing, and employment;

3. support the development and application of evidence-based diversion, probation and re-entry programs based upon information objectively proven to increase public safety, reduce recidivism and provide restorative justice and restitution to victims and thereby promote public confidence that the criminal justice system is fair and effective;

4. collaborate with members of the community and community-based social service providers to develop and implement crime-prevention and other pro-active initiatives targeted at youth and other at-risk groups who pose a risk to community security;

5. consider and, when appropriate, utilize a variety of remedies designed to reduce crime and promote justice, including the issuance of grand jury and analytic reports, proposals for legislative reform, civil suits seeking monetary and injunctive relief, and requests for court-mandated trusteeships or monitors for corrupt institutions; and

6. utilize the latest advancements in science and technology to seek to identify and convict guilty defendants and to assure that innocent individuals are neither prosecuted nor wrongly convicted;

7. implement new technologies to improve data collection and analysis, and sharing information, when it is appropriate to do so, with other agencies and the public to demonstrate that decision-making is based on sound concepts of fairness, justice and ethics and on sound information and data; and
(8) seek to ensure that all pleas of guilty or nolo contendere are knowingly, intelligently and voluntarily entered in conformity with constitutional requirements by informing a court before whom such plea is entered of any perceived procedural defects or omissions and asking the court to take corrective action before accepting a plea.

FURTHER RESOLVED, That the American Bar Association urges governments, foundations, and other funders of legal services to support, with increased funding, prosecutors who develop and implement a broad range of strategies to fulfill their responsibilities.
EXECUTIVE SUMMARY

1. Summary of Resolution
   The resolution urges federal, state, local and territorial prosecutors to fulfill their traditional prosecutorial functions and further protect the public through the use of a broad spectrum of strategies, including efforts to assist crime victims and witnesses, prevent crime in general and recidivism in particular, use science and technology to hold the guilty accountable for their actions and protect the innocent, and further to ensure the integrity of guilty pleas. The resolution also urges funding to achieve its objectives.

2. Summary of the Issue that the Resolution Addresses
   The resolution addresses a number of victim and witness-related issues and crime reduction strategies that fall outside the traditional prosecutorial function of the prosecutor but which prosecutors are in a unique position to influence.

3. Please Explain How the Proposed Policy Position will address the issue
   The proposed policy encourages prosecutors to look beyond their traditional role of prosecuting those accused of crime and take affirmative measures to help crime victims’ deal with the consequences of criminal activity, facilitate their role as witnesses in the criminal justice system, and reduce future criminal activity and protect the public.

4. Summary of Minority Views
   None known.
RESOLVED, That the American Bar Association urges defender organizations, and
criminal defense lawyers to:

1) Establish and facilitate criminal defense lawyers’ linkages and collaborations with civil
practitioners, civil legal services organizations, social service program providers and other non
lawyer professionals who can serve, or assist in serving, clients in criminal cases with civil legal
and non-legal problems related to their criminal cases, including the hiring of such professionals
as experts, or where infrastructure allows, as staff;

2) Authorize and encourage criminal defense lawyers to provide re-entry and reintegration
services to clients in criminal cases including expungement, reestablishment of rights and
certificates of reliefs of civil disabilities; and

3) Create and implement training programs, tools and resources for criminal defense lawyers
and their staff regarding how best to serve clients with civil legal and non-legal problems related
to their criminal cases.

FURTHER RESOLVED, That the American Bar Association urges governments, foundations, and other
fundrs of legal services to support, with increased funding, defenders in their efforts to effectively
address clients’ inter-related criminal, civil and non-legal problems.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**
The resolution urges defender organizations and criminal defense lawyers to address clients' inter-related criminal, civil and non-legal problems by: collaborating with civil practitioners, legal services organizations, and social service program providers; providing re-entry and reintegration services; and facilitating training of criminal defense lawyers and their staff on addressing clients' civil legal and non-legal problems related to the criminal case. The resolution also urges funding for these purposes.

2. **Summary of the Issue that the Resolution Addresses**
Clients represented by criminal defense attorneys often have underlying problems that relate directly or indirectly to their criminal behavior and, without attention, are likely to result in future criminal conduct. Examples include lack of (or insufficient) housing, education, and employment; mental or physical health issues; drug addiction; and family-related issues. Connecting their clients with civil and non-legal resources that can help them deal with such issues is expected to reduce the likelihood of the clients' future involvement with the criminal justice system.

3. **Please Explain How the Proposed Policy Position will address the issue**
The proposed policy would encourage defense attorneys to look beyond their traditional role of representing clients in criminal cases to assisting them in dealing with issues that are conducive to future criminal conduct.

4. **Summary of Minority Views**
None
RESOLVED, That the American Bar Association urges Congress to amend 28 U.S.C. §2254(d) to permit a federal district court to review de novo, based on the record made in the federal court, claims of ineffective assistance of counsel by petitioners under sentence of death.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges Congress to amend 28 U.S.C. 2254(d) to permit a federal district court to review *de novo*, based on the record made in the federal court, claims of ineffective assistance of counsel by petitioners under sentence of death.

2. Summary of the Issue that the Resolution Addresses

Restrictions imposed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), have dramatically reduced the scope of the Great Writ so that it can no longer correct the failure of local governments to provide effective indigent defense services. The Act has been interpreted by the U. S. Supreme Court to deprive defendants of the ability to obtain federal habeas relief from state court decisions unless there is a U.S. Supreme Court precedent that is precisely on point.

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

The Resolution urges Congress to enact amending legislation to remove the AEDPA restrictions in cases in which the death penalty has been imposed and the defendant has alleged he or she received ineffective assistance of counsel.

4. Summary of Minority Views

None known.
RESOLUTION

RESOLVED, That the American Bar Association grant approval to American River College, Legal Assisting Program, Sacramento, CA; and Central Georgia Technical College, Paralegal Studies Program, Macon, GA.

FURTHER RESOLVED, That the American Bar Association reapprove the following paralegal education programs: California State University Los Angeles, Paralegal Studies Program, Los Angeles, CA; Kapiolani Community College, Paralegal Program, Honolulu, HI; Kankakee Community College, Paralegal/Legal Assistant Studies Program, Kankakee, IL; Northern Essex Community College, Paralegal Studies Program, Lawrence, MA; Macomb Community College, Legal Assistant Program, Warren MI; New Hampshire Technical Institute, Paralegal Studies Program, Concord, NH; Atlantic Cape Community College, Paralegal Studies Program, Mays Landing, NJ; Central New Mexico Community College, Paralegal Studies Program, Albuquerque, NM; Lakeland Community College, Paralegal Studies Program, Kirtland, OH; Chattanooga State Community College, Paralegal Studies Program, Chattanooga, TN; Southwest Tennessee Community College, Paralegal Studies Program, Memphis, TN; Center for Advanced Legal Studies, Paralegal Program, Houston, TX, and Texas A & M University Commerce, Paralegal Studies Program, Commerce, TX.

FURTHER RESOLVED, That the American Bar Association withdraw the approval of Washburn University, Legal Studies Program, Topeka, KS, and Northwestern Michigan College, Legal Assistant Program, Traverse City, MI, at the request of the institutions, as of the adjournment of the 2012 Annual Meeting of the House of Delegates.

FURTHER RESOLVED, That the American Bar Association extend the terms of approval until the February 2013 Midyear Meeting of the House of Delegates for the following programs: DeAnza College, Paralegal Program, Cupertino, CA; University of California Riverside, Paralegal Certificate Program, Riverside, CA; University of San Diego, Paralegal Program, San Diego, CA; West Los Angeles College, Paralegal Studies Program, Culver City, CA; Community College of Aurora, Paralegal Program, Aurora, CO; University of Hartford, Paralegal Studies Department, West Hartford, CT; Georgetown University, Paralegal Studies Program, District of Columbia; Wesley College, Legal Studies Program, Dover, DE; Miami-Dade College, Paralegal Studies Program, Miami, FL; Des Moines Area Community College, Legal Assistant Program, Des Moines, IA; Illinois Central College North Campus, Paralegal Program, East Peoria,
IL; South Suburban College, Paralegal/Legal Assistant Program, South Holland, IL; Ball State University, Legal Assistance Studies Program, Muncie, IN; Louisiana State University, Paralegal Studies Program, Baton Rouge, LA; Bay Path College, Legal Studies Program, Longmeadow, MA; Anne Arundel Community College, Paralegal Studies Program, Arnold, MD; Ferris State University, Legal Studies Program, Big Rapids, MI; Lansing Community College, Paralegal Program, Lansing, MI; Hamline University, Legal Studies Program, St. Paul, MN; Inver Hills Community College; Paralegal Program, Inver Grove Heights, MN; Winona State University, Paralegal Program, Winona, MN; Meredith College, Paralegal Program, Raleigh, NC; Bergen Community College, Paralegal Program, Paramus, NJ; Burlington County College, Paralegal Program, Pemberton, NJ; Gloucester County College, Paralegal Program, Sewell, NJ; Truckee Meadows Community College, Paralegal Program, Reno, NV; Hilbert College, Legal Studies Program, Hamburg, NY; LaGuardia Community College, Paralegal Studies Program, Long Island City, NY; Schenectady County Community College, Paralegal Studies Program, Schenectady, NY; Westchester Community College, Paralegal Studies Program, Valhalla, NY; Peirce College, Paralegal Studies Program, Philadelphia, PA; Roger Williams University, Paralegal Studies Program, Providence, RI; Florence-Darlington Technical College, Legal Assistant/Paralegal Program, Florence, SC; Trident Technical College, Paralegal Program, Charleston, SC; Roane State Community College, Paralegal Studies Program, Harriman, TN; El Centro College, Paralegal Studies Program, Dallas, TX; Lone Star College North Harris fka North Harris College, Paralegal Program, Houston, TX; San Jacinto College North, Legal Assistant Program, Houston, TX; Utah Valley University, Department of Legal Studies, Orem, UT; Northern Virginia Community College, Paralegal Studies Program, Alexandria, VA; Highline Community College, Paralegal Program, Des Moines, WA; Lakeshore Technical College, Legal Assistant Program, Cleveland, WI; and Milwaukee Area Technical College, Paralegal Program, Milwaukee, WI.
**EXECUTIVE SUMMARY**

1. **Summary of the Resolution(s)**

   The Standing Committee on Paralegals resolve(s) that the House of Delegates grants approval to two paralegal education program, grants reapproval to thirteen programs, withdraws the approval of two programs, and extends the term of approval of forty-three 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 resolution have been taken by other Association entities, affiliated organizations or other interested groups.
RESOLVED, That the American Bar Association urges Congress to require non-profit organizations exempt from taxation under section 501(c)(4) of the Internal Revenue Code and political organizations exempt from taxation under section 527 of the Internal Revenue Code that are not currently subject to the Federal Election Campaign Finance Act or state campaign finance laws to disclose (a) those contributions used for making electioneering communications and independent expenditures as defined in federal campaign finance law and (b) amounts spent for such communications and expenditures in public disclosure reports filed with the Federal Election Commission, according to the same requirements applicable to other political committees regulated by the Commission.
EXECUTIVE SUMMARY

a) Summary of the Resolution

The resolution urges Congress to mandate disclosure of all political expenditures and contributions.

b) Summary of the Issues that the Resolution Addresses

The Supreme Court left intact, and emphasized the importance of, disclosure requirements for political spending when crafting its *Citizens United* decision. However, by leveraging the unique status of 501(c)(4) organizations, which can spend some portion of their funds on political activity and do not have to publicly disclose their donors, political groups are able to hide the sources of much political speech. Secondarily, other political organizations organized under §527 of the IRS code do not disclose their donors and expenditures in a uniform and useful fashion.

c) An explanation of how the proposed policy position will address the issue

New legislation would require certain groups making campaign expenditures to report such activity to the Federal Election Commission for public disclosure in a manner consistent with existing reporting requirements for other political committees. Such requirements would not contradict the First Amendment holdings contained in *Citizens United*; they would simply mandate transparency, which the Court itself saw as a crucial aspect of a working campaign finance regime.

d) Summary of Minority Views

None known.
RESOLUTION

RESOLVED, That the American Bar Association urges federal agencies to pursue regulatory cooperation with relevant foreign authorities where appropriate and consistent with their legal authority, statutory mandates, and regulatory missions.

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

1) Work with their foreign counterparts to develop common regulatory agendas, harmonized regulatory standards, information exchanges, and mutual recognition of tests and inspections;

2) Strengthen relationships with foreign counterparts by providing training and technical assistance where such assistance is requested;

3) Promote in these cooperative efforts the core principles of the United States administrative and regulatory process;

4) Seek early input from representatives of affected interests when engaged in discussions with foreign regulators, and, where appropriate, publicly disclose the substance of the international discussions;

5) Recommend corrective legislation to Congress where there is insufficient legal authority to permit the regulatory cooperation contemplated; and

6) Coordinate and share information among sister federal agencies to facilitate regulatory cooperation with foreign counterparts, including through the Regulatory Working Group chaired by the Office of Information and Regulatory Affairs in the Office of Management and Budget.
EXECUTIVE SUMMARY

1. Summary of the resolution

   The resolution urges federal agencies to cooperate with their foreign counterparts – for example by harmonizing regulatory standards, exchanging information, and recognizing each other’s tests and inspections -- when doing so would further their missions and be consistent with their legal authority.

2. Summary of the issue that the resolution addresses

   As the world has globalized and international trade increased, different countries’ inconsistent regulatory requirements have become an increasing burden for firms operating internationally. In addition, in a global economy, the activities of regulators abroad affect the ability of agencies in the U.S. to accomplish their domestic missions.

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

   The resolution urges agencies to cooperate with their foreign counterparts, as appropriate and consistent with U.S. and international law, to harmonize regulatory requirements, share information, accept the results of each other’s tests and inspections, and undertake related efforts in order to minimize burdens on trade, increase U.S. competitiveness, enhance their regulatory missions, and operate more efficiently.

4. Summary of minority views

   No minority views are known to exist.
RESOLVED, That the American Bar Association urges the Federal Acquisition Regulatory Council (FAR Council) to promulgate model contract language for use in contracts posing a high risk of either personal conflicts of interest or misuse of certain non-public information that focus on the most significant ethical risks that arise in government contracts as well as the activities most likely to implicate those risks;

FURTHER RESOLVED, That the American Bar Association urges the FAR Council to encourage agencies to include the model Federal Acquisition Regulation (FAR) provisions in contracting actions involving procurements that pose risks of personal conflicts of interest and procurements that pose risks of contractor disclosure or misuse of non-public information;

FURTHER RESOLVED, That the American Bar Association supports model FAR provisions that prohibit agencies from using contractors to establish and manage scientific or technical advisory committees without requiring such contractors to apply to prospective and actual members of such committees the same ethical requirements that would apply if such individuals were special government employees; and

FURTHER RESOLVED, That the American Bar Association urges agencies not covered by the FAR to consider using or modifying the model FAR provisions when negotiating contracts for activities likely to implicate significant ethical risks.
EXECUTIVE SUMMARY

1. Summary of the Resolution

In keeping with a recent recommendation from the Administrative Conference of the United States, the resolution urges the Federal Acquisition Regulatory Council to issue model language for use in contracts posing a high risk of either personal conflicts of interest or misuse of certain non-public information, which would subject contractor employees to new restrictions analogous to those that apply to federal employees. In addition, the Resolution also urges that expert advisory committees that are organized and managed by agency contractors be subject to the same ethical requirements that would apply if they were organized and managed by the agency.

2. Summary of the Issue that the Resolution Addresses

Federal employees must comply with extensive limitations on conflicts of interest, gifts, post-employment contacts with the government, and the like. With limited exceptions, none of these ethical constraints apply to the employees of government contractors. Yet in many areas government contractors outnumber actual government employees, and the two are often functionally indistinguishable.

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

The resolution proposes that with respect to conflicts of interest and potential misuse of non-public information, employees of government contractors be subject to the same ethical rules as federal employees.

4. Summary of Minority Views

The Section of Public Contract Law had reservations about the ACUS recommendation on which this Report and Resolution are based. These were expressed in a Blanket Authority letter submitted to ACUS in June 2011. The letter did not contest the substance of the proposal, but did argue that it was redundant and burdensome in light of other existing and planned legal requirements. The two Sections are in contact in an effort to find common ground.
RESOLUTION

1 RESOLVED, That the American Bar Association amends the Accreditation Standards for Specialty Certification Programs for Lawyers by the addition of the following provisions in Sections 4.06(F) and 4.08, and the addition of Section 4.10, dated August 2012.
SECTION 2: DEFINITIONS

2.01 - As used in these Standards:
(A) "Applicant" means a certifying organization which applies to the American Bar Association for accreditation or re-accreditation under these Standards.

** **

SECTION 4: REQUIREMENTS FOR ACCREDITATION OF CERTIFYING ORGANIZATIONS

In order to obtain accreditation by the Association for a specialty certification program, an Applicant must demonstrate that the program operates in accordance with the following standards:

** **

4.04 - Uniform Applicability of Certification Requirements and Nondiscrimination

(A) The Applicant's requirements for certifying lawyers shall not be arbitrary and shall be clearly understood and easily applied. The organization may only certify those lawyers who have demonstrably met each standard. The requirements shall be uniform in all jurisdictions in which the Applicant certifies lawyers, except to the extent state or local law or regulation imposes a higher requirement.

(B) Membership in any organization or completion of educational programs offered by any specific organization shall not be required for certification, except that this paragraph shall not apply to requirements relating to the practice of law which are set out in statutes, rules and regulations promulgated by the government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

(C) Applicants shall not discriminate against any lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age. This paragraph does not prohibit an Applicant from imposing reasonable experience requirements on lawyers seeking certification or recertification.

4.05 - Definition and Number of Specialties -- An Applicant shall specifically define the specialty area or areas in which it proposes to certify lawyers as specialists.

(A) Each specialty area in which certification is offered must be an area in which significant numbers of lawyers regularly practice. Specialty areas shall be named and described in terms which are understandable to the potential users of such legal services, and in terms which will not lead to confusion with other specialty areas.

(B) An Applicant may seek accreditation to certify lawyers in more than one specialty area, but in such event, the organization shall be evaluated separately with respect to each specialty program.

(C) An Applicant shall propose to the Standing Committee a specific definition of each specialty area in which it seeks accreditation to certify lawyers as specialists. The Standing Committee
shall approve, modify or reject any proposed definition and shall promptly notify the Applicant of its actions.

4.06 - Certification Requirements -- An Applicant shall require for certification of lawyers as specialists, as at a minimum, the following:

(A) Substantial Involvement -- Substantial involvement in the specialty area throughout the three-year period immediately preceding application to the certifying organization. Substantial involvement is measured by the type and number of cases or matters handled and the amount of time spent practicing in the specialty area, and requires that the time spent in practicing the specialty be no less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice.

(B) Peer Review -- A minimum of five references, a majority of which are is from attorneys or judges who are knowledgeable regarding the practice area and are familiar with the competence of the lawyer, and none of which are is from persons related to or engaged in legal practice with the lawyer.

(1) Type of References -- The certification requirements shall allow lawyers seeking certification to list persons to whom reference forms could be sent, but shall also provide that the Applicant organization send out all reference forms. In addition, the organization may seek and consider reference forms from persons of the organization's own choosing.

(2) Content of Reference Forms -- The reference forms shall inquire into the respondent's areas of practice, the respondent's familiarity with both the specialty area and with the lawyer seeking certification, and the length of time that the respondent has been practicing law and has known the applicant. The form shall inquire about the qualifications of the lawyer seeking certification in various aspects of the practice and, as appropriate, the lawyer's dealings with judges and opposing counsel.

(C) Written Examination -- An evaluation of the lawyer's knowledge of the substantive and procedural law in the specialty area, determined by written examination of suitable length and complexity. The examination shall include professional responsibility and ethics as it relates to the particular specialty.

(D) Educational Experience -- A minimum of 36 hours of participation in continuing legal education in the specialty area in the three-year period preceding the lawyer's application for certification. This requirement may be met through any of the following means:

(1) Attending programs of continuing legal education or courses offered by Association accredited law schools in the specialty area;

(2) Teaching courses or seminars in the specialty area;

(3) Participating as panelist, speaker or workshop leader at educational or professional conferences covering the specialty area; or

(4) Writing published books or articles concerning the specialty area.
(E) Good Standing -- A lawyer seeking certification must be admitted to practice and is a member in good standing in one or more states or territories of the United States or the District of Columbia.

(F) Affirmation of Compliance – A lawyer seeking certification shall affirm in a manner satisfactory to Applicant that the lawyer’s practice in the specialty area is consistent with the lawyer’s status as a certified specialist.

4.07 - Impartial Review -- The Applicant shall maintain a formal policy providing lawyers who are denied certification an opportunity for review by an impartial decision maker.

4.08 - Requirements for Re-Certification -- The period of certification shall be set by the Applicant, but shall be no longer than five years, after which time lawyers who have been certified must apply for re-certification. Re-certification shall require similar evidence of competence as that required for initial certification in substantial involvement, peer review, educational experience, evidence of good standing, and affirmation of compliance.

4.09 - Revocation of Certification -- The Applicant shall maintain a procedure for revocation of certification. The procedures shall require a certified lawyer to report his or her disbarment or suspension from the practice of law in any jurisdiction to the certifying organization.

4.10 Senior Specialist Status – The Applicant may establish a certification as “Senior Specialist” consistent with the requirements of Standard 4.05. An Applicant shall require for certification and re-certification of a lawyer as a “Senior Specialist” at a minimum the same requirements of Standards 4.04, 4.06, 4.07, 4.08 and 4.09 herein, except that:

(A) Substantial Involvement – Substantial involvement in the specialty area for “Senior Specialist” shall mean that the lawyer has been certified as a specialist in the specialty area by the Applicant for a total of at least ten years preceding the initial application for “Senior Specialist.” Applicant shall establish minimum standards in the specialty area that qualify the lawyer for status as a “Senior Specialist” and lawyer shall affirm in a manner satisfactory to Applicant that the lawyer’s practice in the specialty area is consistent with the Applicant’s “Senior Specialist” status.

(B) Written Examination – No additional written examination for “Senior Specialist” shall be required for initial certification or recertification.

(C) Notice of Senior Specialist Status – Applicant shall establish a title that includes the words “Senior Specialist,” and shall require that a lawyer certified as a “Senior Specialist” display the designated “Senior Specialist” title in all places where the lawyer previously displayed the designation as a certified specialist.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution will amend the Accreditation Standards for Specialty Certification Programs for Lawyers to allow ABA-accredited specialty certification programs to create a class of certified “Senior Specialists” who may employ that title publicly even though their practice activities may not allow them to continue to call themselves certified specialists. The Resolution also makes non-substantive editorial changes to the Standards.

2. Summary of the Issue that the Resolution Addresses

By operation of the current Standards’ provisions, no lawyer practicing less than full time with a concentrated focus in a very limited number of practice areas can maintain specialist certification in any ABA-accredited program. But a significant number of lawyers do not practice full time, and there is an expectation that that number will increase in the near future, both in absolute terms and as a percentage of all licensed lawyers. Such certified-specialist lawyers who choose to cut back from a full time practice will lose their specialist certification, even though they will not have lost the expertise and experience they acquired during their full-time practice career.

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

The Resolution will allow creation of a new class of previously certified specialists – Senior Specialists – who need not be engaged in the full time practice of law but still may use a title employing the phrase “Senior Specialist” to publicize the certified expertise and experience they acquired during their full-time practice career.

4. Summary of Minority Views

There are no minority views at this time.
RESOLUTION

RESOLVED, That the American Bar Association opposes governmental actions and policies that limit the rights of physicians to inquire of their patients whether they possess guns and how they are secured in the home or to counsel their patients about the dangers of guns in the home and safe practices to avoid those dangers.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution opposes governmental actions and policies that would limit the rights of physicians to inquire of their patients whether they possess guns and how they are secured in the home or that limit the rights of physicians to counsel their patients about the dangers of guns in the home and safe practices to mitigate those dangers.

2. Summary of the Issue that the Resolution Addresses

Florida recently enacted a statute that prohibits physicians practicing in that state from inquiring or seeking information from patients regarding the presence of guns in the home. The Act is currently under challenge in court action, but introduction of similar legislation in other states is very likely. The resolution supported by its background report articulates legal and policy reasons to oppose enactment of similar legislation or establish such policies by administrative action.

Physician’s inquiries of their patients about firearms are generally routine and part of standard recommended medical protocols. For medical practitioners to meet their preventive care and safety counseling responsibilities, they must be able to discuss a broad range of topics with their patients related to known risk factors. This unfettered access allows doctors to adequately assess and address these factors with their patients. Risk factors that may be discussed vary depending on the age of the patient, but for adults often include alcohol consumption, illicit drug use, smoking, diet, and exercise; pediatricians often discuss wearing seat belts and bicycle helmets, the potential dangers of backyard swimming pools, and the need to securely store household cleaners and toxins. Firearms in the home are another known risk factor that doctors may choose to discuss with their patients or the parents of young patients. These discussions may focus on the known dangers of keeping guns in the home and the importance of keeping firearms unloaded and stored separately from ammunition to mitigate some of these risks. The practice of medicine requires a free and open exchange of questions, answers, and information between patients and their health care practitioners. For that reason, both state and federal law protect the confidentiality of such conversations.

Practitioners must engage in highly personal exchanges with their patients about private, confidential topics, so patients understand the risks to themselves, their families, and their children arising from decisions they make and conduct they engage in. Gag rules directly interfere with, and intrude upon, health care practitioners’ ability to engage fully in these consultations by severely restricting inquiries about a significant and preventable risk to patients. The First Amendment does not permit individual states to require health care practitioners to conform their communications with their patients to the state’s preferences. The ABA has historically opposed legislation to establish a similar “gag rule” to prevent physicians to inquire or discuss abortion issues with patients and this resolution calls for opposition on a similar basis to efforts to ban physician discussion or inquiry regarding safe practices related to firearms. By restricting the free and open exchange of information between a physician and patient in this manner, gag rules violate the First and Fourteenth Amendments to the U.S. Constitution.
3. **Please Explain How the Proposed Policy Position will address the issue**

The proposed policy would put the Association on record in support of the principles underlying the accepted practice in the great majority of states and in opposition to recent efforts to enact legislation to restrict physical discussion with patients of safety practices and risks of firearms in the home.

4. **Summary of Minority Views**

None.
RESOLUTION

RESOLVED, That the American Bar Association urges lawyers, judges, child welfare and education agency administrators, educators, school regulatory bodies, and legislators to support the enrollment in and successful completion of postsecondary education by youth in foster care, or those who have been in foster care.
Executive Summary

1. Summary of the Resolution

This Resolution addresses support for youth in foster care, or those who have been in foster care, who need to succeed in and complete postsecondary education. The Report suggests the importance of appropriate academic support to help them identify and achieve post high school goals, including vocational education, community colleges, and four-year colleges and universities, and it urges such disadvantaged youth receive financial support or tuition fee waivers for college or vocational school to help them afford these opportunities. For example, it is critically important that they have access to housing during the school year and postsecondary school vacations when school housing might be unavailable, due to their past or present “ward of the state” status. It proposes that these youth have the benefit of judicial oversight of support needed during the time of post-secondary education, and that child welfare agencies promote these opportunities through collaborations with state or local higher education and vocational/job training agencies, related programs, foundations, non-profit charitable organizations and colleges.

2. Summary of the Issue that the Resolution Addresses

This Resolution addresses the significant disparities in education for youth who are, or have been, in foster care. Although there has been much work done (supported by the ABA) on improving the outcomes for foster youth, the issue of post-secondary education is one area that has lacked an adequate focus. The focus of this Resolution provides suggestions on how government and critical leaders can help make post-secondary education more easily and readily obtainable for these youth, while also providing support to ensure that their post-secondary education is a success.

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

The Resolution and the accompanying Report will provide lawmakers, public policy administrators, and others with a concrete set of suggestions to develop comprehensive state strategies for providing more current and former foster youth with higher education opportunities. As the Report points out, of the 70% of youth aging out of foster care who have aspirations to attend college, only 3 to 11% graduate with a bachelor’s degree (compared to 28% in the general population).

4. Summary of Minority Views

We are unaware of any views in opposition to the recommendations in this Resolution.
RESOLVED, That the American Bar Association urges attorneys and judges, state, local, and specialty bar associations, and law school clinical programs to help identify and respond effectively to Fetal Alcohol Spectrum Disorders (FASD) in children and adults, through training to enhance awareness of FASD and its impact on individuals in the child welfare, juvenile justice, and adult criminal justice systems and the value of collaboration with medical, mental health, and disability experts.

FURTHER RESOLVED, That the American Bar Association urges the passage of laws, and adoption of policies at all levels of government, that acknowledge and treat the effects of prenatal alcohol exposure and better assist individuals with FASD.
Executive Summary

1. Summary of the Resolution
   The Resolution is about the topic of fetal alcohol spectrum disorder (FASD). FASD is a group of birth-related disabling conditions that can occur in individuals whose mother drank alcohol during pregnancy. FASD can result in birth defects, growth and development deficits, cognitive and learning issues, executive functioning problems, difficulty remaining attentive, and problems socializing, as well as other behavioral issues. The Resolution urges attorneys and judges, state and local bar associations and law school clinical programs to support training to enhance understanding of this issue, its impact on individuals in the child welfare, juvenile justice, and adult criminal justice systems, and the importance of collaboration with medical, mental health, and disability experts, and to help identify and effectively assist individuals with FASD. It also urges state, territorial, tribal, and federal laws, and policies, at all levels of government, to reflect the serious effects of prenatal alcohol exposure and address the serious disabilities created by FASD.

2. Summary of the Issue the Resolution Addresses
   Fetal Alcohol Spectrum Disorders (FASD) is a serious problem in the U.S., adversely affecting a very large number of children and families. There are several types of FASD, including Fetal Alcohol Syndrome (FAS), Partial FAS, Alcohol Related Neurodevelopmental Disorders (ARND), and Alcohol Related Birth Defects (ARBD). These four diagnoses share certain characteristics and fall within the broader category of FASD. FAS is the most severe of the conditions that constitute FASD and is the leading cause of non-genetic intellectual disability in the United States. Its prevalence in the U.S. is estimated to be at least 2 to 7 cases per 1000 births, with all levels of FASD estimated as high as 2-5% among younger school children. Children with FASD are at high risk of getting into trouble with law. Individuals with FASD also have various characteristics that put them at a greater risk of ending up in the criminal justice system. There are also a disproportionate number of children with FASD in the foster care system.

3. Please Explain How the Proposed Policy Position will address the issue
   This resolution calls for developing training that enhances understanding of the child and adult disability of FASD, its impact on individuals in the child welfare, juvenile justice, and adult criminal justice systems, and the importance of legal collaboration with medical, mental health, and disability experts on this issue. It also urges improvement of state and federal laws, and policies at all levels of government, to reflect the serious effects of prenatal alcohol exposure. Finally, it would put the ABA on record for support of preventative measures, increased public awareness, especially for women of childbearing age and substance-abusing women generally, about FASD and the importance of preventing alcohol-related birth disorders.

4. Summary of Minority Views
   We are unaware of any minority views or opposition to this Resolution.
RESOLVED, That the American Bar Association urges the Department of Homeland Security (“DHS”) to create a Haitian Family Reunification Parole Program, and immediately begin paroling into the United States already-approved Haitian beneficiaries of family-based visa petitions.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The American Bar Association urges the Department of Homeland Security (DHS) to create a Haitian Family Reunification Parole Program to expedite entry to the United States by already-approved Haitian beneficiaries of family-based visa petitions who will otherwise languish years longer in Haiti because of the visa backlog in the U.S. immigration system.

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

   The resolution assists with Haiti’s reconstruction efforts from the earthquake in at least two critical ways by relocating people from the displacement camps and allowing more Haitians to send remittances back home to their families, providing a needed boost to Haiti’s economy.

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

   As of November 2011, more than 112,000 Haitian family members of U.S. citizens and lawful permanent residents who have already established their family relationship are waiting for their visas to be issued, with an average wait time of between three and 11 years. The proposed resolution will reunite families as well as aid in reconstruction efforts by enabling approved family members the opportunity to wait in the United States and send remittances back to family members left in Haiti.

4. **Summary of Minority Views**

   None known at this time.
AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ARMED FORCES LAW
JUDGE ADVOCATES ASSOCIATION
JUDICIAL DIVISION
STANDING COMMITTEE ON LEGAL ASSISTANCE FOR MILITARY PERSONNEL

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges the Department of Defense to strengthen further its efforts to prevent and eliminate sexual assault within the military by continuing to augment and enhance its education and training, its response capability, its victim support services, its reporting procedures, and its continuing efforts to ensure accountability through the military justice process.

FURTHER RESOLVED, That the American Bar Association opposes the enactment of H.R. 3435, 112th Congress, the Sexual Assault Training Oversight and Prevention Act or similar legislation.
EXECUTIVE SUMMARY

1. Summary of the Resolution
   a. Affirms the efforts made by the Department of Defense in addressing the critical societal issue of sexual assault. Reaffirm the critical role that commanders play in maintaining good order and discipline in the Armed Forces under the Uniform Code of Military Justice and express opposition to the passage of any legislation that would diminish that role.
   b. Urges the United States Congress to continue ongoing efforts in legislation and policy that combat sexual assaults in the military, but not to pass well intentioned legislation that would undermine the authority of military commanders to preserve good order and discipline while focusing on the mission.

2. Summary of the Issue that the Resolution Addresses
   Proposed legislation in the U.S. House of Representatives that removes authority from commanders to act under the Uniform Code of Military Justice in cases involving sexual assault. The Act instead vests authority in a three-tiered central structure at the Department of Defense. The legislation creates a Sexual Assault Oversight and Response Council that would appoint and advise a Sexual Assault Oversight and Response Office to oversee nearly all aspects of sexual assault investigation, training, and victim response. Among the Office's central roles would be to coordinate with appropriate military criminal investigative organizations to carry out investigations of accusations of sexual assault as well as exercise the power to determine whether alleged victims or alleged perpetrators of sexual assault should be temporarily reassigned to ensure separation from each other. The statute also establishes a Director of Military Prosecutions. This position undermines the critical role commanders and their local prosecutor advisors have in maintaining good order and discipline by eliminating commanders' role in determining whether a case goes to trial. This centralized director would have final authority to oversee the prosecution of all sexual-related offenses under the UCMJ and would serve as the convening authority for these cases. Finally, the Director can request that sexual-related offenses be referred to a military appellate court or to the Department of Justice prior to a judge rendering a verdict in the case. Commanders would be allowed to retain jurisdiction in all other cases.

3. How the Proposed Policy Position Will Address The Issue
   Urges all institutions of government to continue to implement responsible reforms, while giving the highest attention to the rights and needs of victims, without compromising the rights of the accused or disrupting the proven institutions and procedures of American military justice that have been forged through generations of judicial and legislative experience to balance the rights of the accused, the interests of justice and the commander’s essential responsibility to maintain the health, welfare, morale, discipline, and readiness to execute missions in support of the National Security of the United States.

4. Summary of Minority Views Or Opposition That Have Been Identified
   None identified.
RESOLVED, That the American Bar Association encourages federal, state and territorial legislatures to enact legislation to protect individuals and organizations who choose to speak on matters of public concern from meritless litigation designed to suppress such speech, commonly known as SLAPPs (Strategic Lawsuits Against Public Participation).
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This resolution urges the American Bar Association to adopt a policy position which may be used to encourage federal, state and territorial legislatures to enact legislation to provide for the protections to individuals and organizations who choose to speak on matters of public concern from meritless litigation designed to suppress such speech, commonly known as SLAPPs (Strategic Lawsuits Against Public Participation).

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

   The resolution addresses attempts to address the use of litigation to chill speech on matters of public concern.

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

   If adopted, the policy position advanced by the resolution may be used to encourage federal, state and territorial legislatures to enact legislation to provide for protections to individuals and organizations who choose to speak on matters of public concern from meritless litigation designed to suppress such speech.

4. **Summary of Minority Views**

   No minority views are known as of the date of this submission.
RESOLVED, That the American Bar Association amends the 2008 policy regarding racial and ethnic profiling as follows {additions underlined; deletions struck-through}:

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to enact effective legislation, policies, and procedures to ban law enforcement’s use of racial and/or ethnic characteristics and/or religious affiliation (perceived or known) not justified by specific and articulable facts suggesting that an individual may be engaged in criminal behavior, hereinafter termed “racial, and ethnic, and religious profiling.” Racial, and ethnic and religious profiling does not include the use of racial or ethnic characteristics or characteristics indicative of religious affiliation (such as traditional religious dress) as part of a physical description of a particular person observed by police or other witnesses to be a participant in a crime or other violation of law.

FURTHER RESOLVED, That the American Bar Association urges that such legislation, policies, and procedures, except when impractical due to the small size or other characteristics of a law enforcement agency, should require:

1. That law enforcement agencies have written policies, training, and supervision necessary to effectively implement the ban and funding necessary for these purposes;
2. Data collection, on all police stops and searches, whether of drivers and their vehicles or pedestrians.
3. Where feasible, independent analysis of data collected, and publication of both the data and the analysis; and
4. Funding for police agencies to be made contingent on compliance with these requirements.
EXECUTIVE SUMMARY

a) **Summary of the resolution:**

This resolution urges federal, state, local and territorial governments to enact effective legislation, policies, and procedures to ban law enforcement’s use of racial and/or ethnic characteristics and/or religious affiliation (perceived or known) not justified by specific and articulable facts suggesting that an individual may be engaged in criminal behavior, hereinafter termed “racial, ethnic, and religious profiling.” Racial, ethnic, and religious profiling does not include the use of racial or ethnic characteristics or characteristics indicative of religious affiliation (such as traditional religious dress) as part of a physical description of a particular person observed by police or other witnesses to be a participant in a crime or other violation of law.

b) **Summary of the issue which the resolution addresses:**

Current ABA policy addresses racial and ethnic profiling, but not religious profiling. Since 9/11, religious profiling has become an increasingly common practice, with law enforcement agents reportedly targeting mosques for investigation even absent any indication of wrongdoing; law enforcement guidelines suggesting that ordinary religious attributes and behaviors may be signs of incipient terrorism; and law enforcement training materials equating Islam with violence.

c) **Explanation of how the proposed policy position will address the issue:**

The proposed policy position will make clear the ABA considers religion, like race or ethnicity, to be an improper basis on which to make law enforcement decisions, and it will encourage federal, state, local and territorial governments to take the necessary actions to ban religious profiling. The resolution would not alter or expand the data collection requirement contained in the 2008 policy.

d) **Summary of any minority views or opposition which have been identified:**

There is no known opposition to this proposal.
RESOLVED, That the American Bar Association recognizes the fundamental importance of the right to trial by jury and opposes contractually required pre-dispute waivers of the right to trial by jury except where specifically authorized by law.

FURTHER RESOLVED, That the American Bar Association supports legislation declaring such waivers unconscionable, invalid and unenforceable, except where the parties have adopted a legally proper alternative form of dispute resolution.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This report places the American Bar Association on record supporting the fundamental importance of the right to trial by jury in civil cases and announces the Association’s opposition to pre-dispute waivers of that right except where specifically authorized by law.

2. Summary of the Issue that the Resolution Addresses

The right to trial by jury has always been considered of transcendent importance in our system of justice. This resolution acknowledges that importance, even as other alternatives have gained widespread support. Moreover, because the waiver of constitutional rights must generally be knowing, intelligent and voluntary, it is critical that parties are not forced to waive their right to trial by jury before a dispute arises that may be redressed in court. Even so, the resolution recognizes that in some instances, such as those covered by the Federal Arbitration Act, an agreement to utilize alternative remedial mechanisms prior to the time a dispute arises, is authorized and enforceable by statute, and the resolution accommodates such waivers that are specifically authorized by law.

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

Given the ABA’s longstanding concern about the vanishing jury trial, uninformed attacks on juries, and the prevalence of consumer and other contracts that seek waiver, explicitly or indirectly, of the right to trial by jury, as well as the ABA’s consistent stance that decisions waiving trial rights should not be forced upon parties to an agreement prior to the existence of a dispute, this policy fills in two gaps in ABA policy. First, surprisingly, no ABA policy recognizes the importance and fundamental nature of the constitutional right to trial by jury. This resolution remedies this oversight. Second, with respect to cases within the province of the jury-trial right for which no statute authorizes pre-dispute waiver, it extends existing ABA policy to classes of cases that are not covered by current policy.

4. Summary of Minority Views:

The Section is unaware of any opposition or minority views.
RESOLUTION

RESOLVED, That the Association policies set forth in Attachment 1 to Report 400A, dated August 2012, 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.
EXECUTIVE SUMMARY

1. Summary of the resolution
This resolution 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 recommendation 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.
RESOLUTION

RESOLVED, That the Association policies dated from 1950-1985 as set forth in Attachment 1 to Report 400B, dated August 2012, 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.
EXECUTIVE SUMMARY

1. Summary of the resolution
This resolution archives Association Policies dated from 1950-1985. 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.