AMERICAN BAR ASSOCIATION
HOUSE OF DELEGATES
2012 MIDYEAR MEETING
NEW ORLEANS, LOUISIANA

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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 urges the highest courts or legislative bodies of all states, territories, and tribes charged with the administration of justice, admission to the bar, and regulation of the legal profession to respect the organized bar’s ability and right to function independently and express its views freely;

FURTHER RESOLVED, That the American Bar Association urges the highest courts or legislative bodies of all states, territories, and tribes to allow the organized bar to assist them in understanding the implications of their proposed policies and legislative actions on all aspects of the legal system, and to provide specialized advice and opinion on all matters of public policy germane to the bar’s charter.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges state, territorial, and tribal highest courts or legislative bodies charged with the administration of justice, admission to the bar, and regulation of the profession to allow the organized bar in each jurisdiction to express its views freely and independently to assist them in understanding the implications of their proposed policies and legislative actions on all aspects of the legal system, and to provide specialized advice and opinions on all matters of public policy "germane" to the bar's charter.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses attempts by state, territorial, and tribal legislatures to regulate the ability of state and local bar associations to function independently and freely represent the views of the majority of their members.

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

If adopted, the policy position advanced by the resolution may be used by state, territorial, tribal, and local bar associations in jurisdictions where highest courts or legislative bodies may attempt to regulate the organized bar’s ability and right to function independently and express its views freely.

In cases where they have already regulated the organized bar in such ways, the resolution may be used as grounds to support amicus curiae briefs before courts where those laws and regulations may be subject to challenge.

4. Summary of Minority Views

No minority views are known as of the date of this submission.
RESOLVED, That the American Bar Association grant approval to Midstate College, Paralegal Services Program, Peoria, IL; Beckfield College, Paralegal Studies Program, Florence, KY and Tri-County, OH; Baker College of Jackson, Paralegal Program, Jackson, MI; South College, Paralegal Studies and Legal Studies Program, Asheville, NC; and Hofstra University, Paralegal Studies Certificate Program, Hempstead, NY.

FURTHER RESOLVED, That the American Bar Association reapprove the following paralegal education programs: South University Montgomery, Paralegal Studies/Legal Studies Program, Montgomery, AL; Cuyamaca College, Paralegal Studies Program, El Cajon, CA; St. Petersburg College, Legal Studies Program, Clearwater, Gibbs, Downtown, and Health Education Center Campuses, Clearwater, FL; South University Savannah, Paralegal Studies/Legal Studies Program, Savannah, GA; Maryville University, Legal Studies Program, St. Louis, MO; Bucks County Community College, Paralegal Studies Program, Newtown, PA; South University Columbia, Paralegal Studies/Legal Studies Program, Columbia, SC; and Lee College, Paralegal Studies Program, Baytown, TX.

FURTHER RESOLVED, That the American Bar Association withdraw the approval of the College of Southern Maryland, Paralegal Studies Program, La Plata, MD at the request of the institution, as of the adjournment of the 2012 Midyear Meeting of the House of Delegates.

FURTHER RESOLVED, That the American Bar Association extend the terms of approval until the August 2012 Annual Meeting of the House of Delegates for the following programs: California State University Los Angeles, Paralegal Studies Program, Los Angeles, 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; Georgetown University, Paralegal Studies Program, Washington, DC; Miami-Dade College, Paralegal Studies Program, Miami, FL; Kapiolani Community College, Paralegal Program, Honolulu, HI; Des Moines Area Community College, Legal Assistant Program, Des Moines, IA; Ball State University, Legal Assistance Studies Program, Muncie, IN; Bay Path College, Legal Studies Program, Longmeadow, MA; Northern Essex Community College, Paralegal Studies Program, Lawrence, MA; Anne Arundel Community College, Paralegal Studies Program, Arnold, MD; Macomb Community College, Legal Assistant Program, Warren, MI; Winona State University, Paralegal Program, Winona, MN; New Hampshire Technical Institute, Paralegal Studies Program, Concord, NH; Atlantic Cape Community College, Paralegal Studies Program, Mays Landing, NJ; Burlington County College, Paralegal Program, Pemberton,
NJ; Central New Mexico Community College, Paralegal Studies Program, Albuquerque, NM; Schenectady County Community College, Paralegal Studies Program, Schenectady, NY; Westchester Community College, Paralegal Studies Program, Valhalla, NY; 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; Texas A & M University Commerce, Paralegal Studies Program, Commerce, TX; 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 five paralegal education programs, grants reapproval to eight programs, withdraws the approval of one program, and extends the term of approval of twenty-five 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 adopts the black letter *ABA Criminal Justice Standards on Law Enforcement Access to Third Party Records*, dated February 2012.
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PART I. DEFINITIONS

STANDARD 25-1.1. DEFINITIONS

For purposes of these standards:

(a) “Emergency aid” is government conduct intended to eliminate or mitigate what is reasonably believed to be imminent danger of death or serious physical injury.

(b) “Exigent circumstances” are circumstances in which there is probable cause to fear imminent destruction of evidence or imminent flight.

(c) The “focus of a record” is the person or persons to whom the information in a record principally relates.

(d) “Law enforcement” means any government officer, agent, or attorney seeking to acquire evidence to be used in the detection, investigation, or prevention of crime.

(e) An “institutional third party” is:

(i) any nongovernmental entity, including one that receives government funding or that acquires information from government sources; and

(ii) any government institution functioning in a comparable capacity, such as a public hospital or a public university.

(f) A “politically accountable official” is an upper-level law enforcement official or, in the case of a civil investigation, a civil equivalent, who is either elected or appointed by an elected official, or who is specifically designated for this purpose by an elected or appointed official.

(g) A “record” contains information, whether maintained in paper, electronic, or other form, that is linked, or is linkable through reasonable efforts, to an identifiable person. A “de-identified record” contains information that is not so linkable.
PART II. SCOPE

STANDARD 25-2.1. SCOPE

These standards relate to law enforcement investigatory access to, and storage and disclosure of, records maintained by institutional third parties. These standards do not relate to:

(a) access to records for purposes of national security;

(b) access to records after the initiation and in the course of a criminal prosecution;

(c) access to records via a grand jury subpoena, or in jurisdictions where grand juries are typically not used, a functionally equivalent prosecutorial subpoena;

(d) access to records from an individual not acting as an institutional third party;

(e) acquisition of information contemporaneous with its generation or transmission;

(f) an institutional third party:

(i) that is a victim of crime disclosing information that is evidence of that crime or that is otherwise intended to protect its rights or property; or

(ii) deciding of its own initiative and volition to provide information to law enforcement.

STANDARD 25-2.2. CONSTITUTIONAL FLOOR

A legislature or administrative agency may not authorize a protection less than that required by the federal Constitution, nor less than that required by its respective state Constitution.

PART III. GENERAL PRINCIPLES

STANDARD 25-3.1. RECORDS AVAILABLE

Institutional third parties maintain records ranging from the most mundane to those chronicling the most personal aspects of people’s lives, and when those records are stored digitally, access and distribution costs are diminished. These records include such things as the content of communications; medical diagnoses, treatments, and conditions; Internet browsings; financial transactions; physical locations; bookstore and library purchases, loans, and browsings; other store purchases and browgings; and media viewing preferences.
STANDARD 25-3.2. NEED FOR RECORDS ACCESS

Obtaining records maintained by institutional third parties can facilitate, and indeed be essential to, the detection, investigation, prevention and deterrence of crime; the safety of citizens and law enforcement officers; and the apprehension and prosecution of criminals; and can be the least confrontational means of obtaining needed evidence.

STANDARD 25-3.3. IMPLICATIONS OF RECORDS ACCESS

Law enforcement acquisition of records maintained by institutional third parties can infringe the privacy of those whose information is contained in the records; chill freedoms of speech, association, and commerce; and deter individuals from seeking medical, emotional, physical or other assistance for themselves or others.

STANDARD 25-3.4. NEED FOR REGULATION

Legislatures, courts that may act in a supervisory capacity, and administrative agencies should therefore carefully consider regulations on law enforcement access to and use of records maintained by institutional third parties. These standards provide a framework for that consideration.

PART IV. CATEGORIZATION OF INFORMATION AND PROTECTION

STANDARD 25-4.1. CATEGORIES OF INFORMATION

Types of information maintained by institutional third parties should be classified as highly private, moderately private, minimally private, or not private. In making that determination, a legislature, court, or administrative agency should consider present and developing technology and the extent to which:

(a) the initial transfer of such information to an institutional third party is reasonably necessary to participate meaningfully in society or in commerce, or is socially beneficial, including to freedom of speech and association;

(b) such information is personal, including the extent to which it is intimate and likely to cause embarrassment or stigma if disclosed, and whether outside of the initial transfer to an institutional third party it is typically disclosed only within one’s close social network, if at all;

(c) such information is accessible to and accessed by non-government persons outside the institutional third party; and

(d) existing law, including the law of privilege, restricts or allows access to and dissemination of such information or of comparable information.
STANDARD 25-4.2. CATEGORIES OF PROTECTION

(a) The type of authorization required for obtaining a record should depend upon the privacy of the type of information in that record, such that: records containing highly private information should be highly protected, records containing moderately private information should be moderately protected, records containing minimally private information should be minimally protected, and records containing information that is not private should be unprotected. If a record contains different types of information, it should be afforded the level of protection appropriate for the most private type it contains.

(b) If the limitation imposed by subdivision (a) would render law enforcement unable to solve or prevent an unacceptable amount of otherwise solvable or preventable crime, such that the benefits of respecting privacy are outweighed by this social cost, a legislature may consider reducing, to the limited extent necessary to correct this imbalance, the level of protection for that type of information, so long as doing so does not violate the federal or applicable state constitution.

PART V. ACCESS TO RECORDS

STANDARD 25-5.1. CONSENT

Law enforcement should be permitted to access by particularized request any record maintained by an institutional third party if:

(a) the focus of the record has knowingly and voluntarily consented to that specific law enforcement access;

(b) the focus of the record has knowingly and voluntarily given generalized consent to law enforcement access, and

(i) the information in the record is unprotected or minimally protected;

(ii) it was possible to decline the generalized consent and still obtain the desired service from the provider requesting consent, and the focus of the record had specifically acknowledged that it was possible; or

(iii) a legislature has decided that in a particular context, such as certain government contracting, generalized consent should suffice for the information contained in the record; or

(c) the record pertains to a joint account and any one joint account holder has given consent as provided in subdivision (a) or (b).
STANDARD 25-5.2. TYPES OF AUTHORIZATION

When authorization for accessing a record is required pursuant to Standard 25-5.3, it should consist of one of the following, each of which must particularly describe the record to be obtained:

(a) a court order, based upon:

(i) a judicial determination that there is probable cause to believe the information in the record contains or will lead to evidence of crime;

(ii) a judicial determination that there is reasonable suspicion to believe the information in the record contains or will lead to evidence of crime;

(iii) a judicial determination that the record is relevant to an investigation; or

(iv) a prosecutorial certification that the record is relevant to an investigation.

(b) a subpoena, based upon a prosecutorial or agency determination that the record is relevant to an investigation; or

(c) an official certification, based upon a written determination by a politically accountable official that there is a reasonable possibility that the record is relevant to initiating or pursuing an investigation.

STANDARD 25-5.3. REQUIREMENTS FOR ACCESS TO RECORDS

(a) Absent more demanding constitutional protection, consent pursuant to Standard 25-5.1, and emergency aid and exigent circumstances pursuant to Standard 25-5.4; and consistent with the privilege requirements of Standard 5.3(c); law enforcement should be permitted to access a record maintained by an institutional third party pursuant to the following authorization:

(i) a court order under 5.2(a)(i) [5.2(a)(ii)] if the record contains highly protected information;

(ii) a court order under 5.2(a)(ii) [5.2(a)(iii) or 5.2(a)(iv)] if the record contains moderately protected information; or

(iii) a subpoena under 5.2(b) if the record contains minimally protected information.

(b) If the record contains highly protected information, a legislature, a court acting in its supervisory capacity, or an administrative agency could consider more
demanding restraints for access to the record, such as additional administrative approval, additional disclosure, greater investigative need, or procedures for avoiding access to irrelevant information.

(c) The protections afforded to privileged information contained in records maintained by institutional third parties and the responsibilities of privilege holders to assert those privileges are those provided by the law applicable in the jurisdiction in which privilege is asserted. The jurisdiction in which law enforcement obtains documents may impose obligations on both institutional third parties to protect what might be privileged information and on law enforcement with respect to the access to, and storage and disclosure of, such information.

(d) Law enforcement should be permitted to access unprotected information for any legitimate law enforcement purpose.

(e) Law enforcement should be permitted to substitute a more demanding authorization for a required lesser authorization.

STANDARD 25-5.4. EMERGENCY AID AND EXIGENT CIRCUMSTANCES

Law enforcement should be permitted to access a protected record for emergency aid or in exigent circumstances pursuant to the request of a law enforcement officer or prosecutor. As soon as reasonably practical, the officer or prosecutor should notify in writing the party or entity whose authorization would otherwise have been required under Standard 25-5.3.

STANDARD 25-5.5. REDACTED ACCESS TO RECORDS

Legislatures, courts that may act in a supervisory capacity, and administrative agencies should consider how best to regulate:

(a) law enforcement access when only some information in a record is subject to disclosure; and

(b) the use and dissemination of information by law enforcement when a third party provides more information, including more protected information, than was requested.

STANDARD 25-5.6. DE-IDENTIFIED RECORDS

(a) Notwithstanding any other provision of this Part, law enforcement should be permitted to access an appropriately inclusive body of de-identified records maintained by an institutional third party pursuant to an official certification.

(b) A de-identified record should be linked to an identifiable person only if law enforcement obtains the authorization required under Standard 25-5.3 for the type
or types of information involved. The showing for this authorization may be based on a profile or algorithm.

**STANDARD 25-5.7. NOTICE**

(a) If the accessed record is unprotected or minimally protected, law enforcement should not be required to provide notice of the access.

(b) If the accessed record is highly or moderately protected, law enforcement should provide notice of the access to the focus of the record, and this notice should generally occur within thirty days after acquisition.

(c) The court that authorizes access to the record, or in the case of emergency aid or exigent circumstances the court that would otherwise have been required to authorize access to the record, may delay notice for a specified period, or for an extension thereof, upon its determination that:

(i) there is a reasonable belief that notice would endanger life or physical safety; would cause flight from prosecution, destruction of or tampering with evidence, or intimidation of potential witnesses; or would otherwise jeopardize an investigation; or

(ii) the delay is necessary to comply with other law.

(d) When a court authorizes delayed notice pursuant to Standard 5.7(c), the court may also prohibit the third party from giving notice during that specified period. If law enforcement obtains a record for emergency aid or in exigent circumstances, a law enforcement officer or prosecutor may by written demand prohibit the third party from giving notice for 48 hours.

(e) When protected de-identified records are accessed, notice should be provided to the [general public] [legislature] and should generally occur [prior to] [after] acquisition.

(f) Upon request, a court should be permitted to eliminate or limit the required notice in a particular case where it would be unduly burdensome given the number of persons who must otherwise be notified, taking into consideration, however, that the greater number of persons indicates a greater intrusion into privacy.

**Part VI. Retention, Maintenance, and Disclosure of Records**

**STANDARD 25-6.1. RETENTION AND MAINTENANCE**

(a) Protected records lawfully obtained from an institutional third party in the course of law enforcement investigation should be:
(i) reasonably secure from unauthorized access; and

(ii) other than as authorized under Standard 25-6.2, accessed only by personnel who are involved in the investigation for which they were obtained and only to the extent necessary to carry out that investigation.

(b) Moderately and highly protected records should in addition be:

(i) subject to audit logs recording all attempted and successful access; and

(ii) destroyed according to an established schedule.

(c) All de-identified records in the possession of law enforcement for which the linkage described in Standard 5.5(b) is not obtained should be destroyed upon conclusion of the investigation and any prosecution and appeals.

(d) If a law enforcement agency disseminates internal regulations pursuant to this Standard, those regulations should be publicly distributed.

STANDARD 25-6.2. DISCLOSURE AND DISSEMINATION

Law enforcement should not disclose protected records to individuals and entities not involved in the investigation for which they were obtained except in the following circumstances:

(a) Disclosure in the case or cases investigated, pursuant to rules governing investigation, discovery and trial;

(b) Disclosure for purposes of other government investigations, including parallel civil investigations, unless prohibited by law, and except that such disclosure to another government agency should require official certification or, in the case of emergency aid or exigent circumstances, the request of a law enforcement officer or prosecutor;

(c) Disclosure with appropriate redaction for purposes of training, auditing, and other non-investigatory legitimate law enforcement purposes only upon a written determination by a politically accountable law enforcement official that the access is in furtherance of a legitimate law enforcement purpose;

(d) Disclosure of identification records of wanted or dangerous persons and stolen items upon the request of a law enforcement officer or prosecutor; and

(e) Other disclosures only if permitted by statute or upon a finding of a court that the public interest in such disclosure outweighs the privacy of the affected parties.
PART VII. ACCOUNTABILITY

STANDARD 25-7.1. APPROPRIATE SANCTIONS

The legislature should provide accountability for the provisions governing access to and storage and disclosure of records maintained by institutional third parties via appropriate criminal, civil, and/or evidentiary sanctions, and appropriate periodic review and public reporting.
EXECUTIVE SUMMARY

1. Summary of the Resolution
   The resolution calls for adoption of a new set of *ABA Criminal Justice Standards on Law Enforcement Access to Third Party Records*. The proposed standards relate to law enforcement investigatory access to, and storage and disclosure of, records maintained by institutional third parties (such as banks, hospitals, and Internet service providers). They provide a framework through which legislatures, courts acting in their supervisory capacity, and administrative agencies can balance the needs of law enforcement and the interests of privacy, freedom of expression, and social participation.

2. Summary of the Issue that the Resolution Addresses
   Law enforcement access to records maintained by institutional third parties is among the most important and common criminal investigatory activities. Recognizing the privacy interests and implications on social participation, the federal government and all fifty states regulate government access to and use of certain types of record information. But because the federal constitutional regulation has been slight, and because other regulation has occurred in an *ad hoc* manner, there is no existing framework through which legislatures, courts acting in their supervisory capacity, and agencies can make the difficult decisions regarding what records should be protected and the scope of such protection. Such a framework is especially important given the maturation of digital storage technologies and virtually costless distributions, as we now live in a world of ubiquitous third party information.

3. Please Explain How the Proposed Policy Position will Address the Issue
   The proposed Standards provide a framework through which legislatures, courts acting in their supervisory capacity, and administrative agencies can make the difficult decisions regarding what records should be protected and the scope of such protection.

4. Summary of Minority Views
   The proposed Standards were widely circulated within and without the ABA prior to both the first and second readings by the Criminal Justice Section Council. The only response (received prior to the first reading) was from the National Association of Criminal Defense Attorneys concerned that the Standards undercut privacy protections required by the federal and state constitutions; as a result, the Standards Committee incorporated into the “black letter” an explicit recognition that the Standards do not authorize a protection less than that required by federal or state constitutions. During the Section’s second reading when the Council voted by a large majority to approve the Standards, opposing votes were cast by Council liaisons from the U.S. Department of Justice and the National Association of Attorney General without stated reasons for their opposition.
RESOLVED, That the American Bar Association urges federal, state, territorial, and local
governments to adopt pretrial discovery procedures requiring laboratories to produce
comprehensive and comprehensible laboratory and forensic science reports for use in criminal
trials to include identification of:

1. the procedures used in the analysis,
2. the results of the analysis,
3. the identity, qualifications, and opinion of the analyst,
4. the identity and qualifications of those who participated in the testing including peer
   review or other confirmatory tests; and
5. any additional information that could bear on the validity of the test results,
   interpretation or opinion.
EXECUTIVE SUMMARY

1. Summary of the Resolution
   The resolution urges governments at various levels to require laboratories producing reports for use in criminal trials to adopt pretrial discovery procedures requiring comprehensive and comprehensible laboratory and forensic science reports, and lists relevant factors to be included in such reports.

2. Summary of the Issue that the Resolution Addresses
   Laboratory reports that are not comprehensive and comprehensible do not serve the discovery process well. To be useful and not misleading, laboratory reports should at least specify the procedures used in the analysis; the results of the analysis; the identity, qualifications, and opinion of the analyst; the identity, qualifications, and contributions of others who participated in the testing, and any additional information that could bear on the validity of the test results, interpretation or opinion.

3. Please Explain How the Proposed Policy Position Will Address the Issue
   The resolution encourages discovery rules requiring that laboratory reports be comprehensive and comprehensible.

4. Summary of Minority Views
   None known.
RESOLVED, That the American Bar Association urges judges to consider the following factors in determining the manner in which expert testimony should be presented to a jury and in instructing the jury in its evaluation of expert scientific testimony in criminal and delinquency proceedings:

1. Whether experts can identify and explain the theoretical and factual basis for any opinion given in their testimony and the reasoning upon which the opinion is based.
2. Whether experts use clear and consistent terminology in presenting their opinions.
3. Whether experts present their testimony in a manner that accurately and fairly conveys the significance of their conclusions, including any relevant limitations of the methodology used.
4. Whether experts explain the reliability of evidence and fairly address problems with evidence including relevant evidence of laboratory error, contamination, or sample mishandling.
5. Whether expert testimony of individuality or uniqueness is based on valid scientific research.
6. Whether the court should prohibit the parties from tendering witnesses as experts and should refrain from declaring witnesses to be experts in the presence of the jury.
7. Whether to include in jury instructions additional specific factors that might be especially important to a jury’s ability to fairly assess the reliability of and weight to be given testimony on particular issues in the case.
EXECUTIVE SUMMARY

1. Summary of the Resolution
This resolution urges judges who have decided to admit expert testimony to consider a number of factors in determining the manner in which that evidence should be presented to the jury and how to instruct the jury in its evaluation of expert scientific testimony in criminal and delinquency proceedings.

2. Summary of the Issue that the Resolution Addresses
While forensic scientific evidence can be extremely valuable, it can be difficult for lay jurors to understand and weigh its relevance to the case before them. It is important, therefore, that the experts who present it will do so in a manner that accurately and fairly conveys its significance and the significance of their conclusions. In addition, jury instructions can help focus the jurors on the relevant forensic science issues.

3. Please Explain How the Proposed Policy Position Will Address the Issue
The proposed policy will provide judges a checklist of questions to consider in assessing how experts should present contested forensic science evidence, and the nature of jury instructions that should be given to jurors.

4. Summary of Minority Views
None known.
RESOLVED, That the American Bar Association urges judges and lawyers to consider the following factors in formulating jury *voir dire* in criminal cases where forensic science evidence is contested:

1. Jurors’ understanding of general scientific principles, including specialized training in science, knowledge or education in science and experience with laboratory practices;
2. Jurors’ understanding of specific scientific principles relevant to the forensic science evidence that may be presented at trial, including specialized training, knowledge or education in the specific scientific discipline used in the case;
3. Any preconceptions that jurors may have about the forensic science evidence; and
4. Jurors’ bias for or against scientific evidence, including whether scientific results will be accepted or rejected without consideration.
EXECUTIVE SUMMARY

1. **Summary of the Resolution:** The resolution urges judges and lawyers to consider potential jurors’ understanding of general scientific principles, scientific principles relevant to forensic science, and preconceptions or bias with respect to forensic scientific principles in formulating jury *voir dire* questions.

2. **Summary of the Issue that the Resolution Addresses:** Jury *voir dire* is necessary to impanel a fair and impartial jury by revealing potential jurors’ biases and ability to judge the evidence and apply the relevant law. Since there is a relatively low level of scientific knowledge in the general population, it is essential in cases involving scientific evidence that prospective jurors are asked questions that reveal their understanding or capacity for understanding the basic scientific principles involved.

3. **Please Explain How the Proposed Policy Position Will Address the Issue:** *Voir dire* questioning to ascertain prospective jurors’ knowledge, capacity to understand, perceptions, and biases with respect to forensic science will permit selection of jurors able to understand and weigh the evidence to be presented and will facilitate more targeted and therefore more effective presentations of scientific evidence, resulting in more informed jury decisions.

4. **Summary of Minority Views**
   None known.
RESOLVED, That the American Bar Association urges the federal government to encourage public housing authorities to reevaluate their current rules regarding admission, termination, and additions to household to ensure that, while resident safety is protected, those rules do not unfairly punish persons with criminal records.
EXECUTIVE SUMMARY

1. Summary of the Resolution:

The resolution urges the federal government to encourage public housing authorities to reevaluate their current rules regarding admission, termination, and additions to household to ensure that the rules protect resident safety while not unduly denying housing to persons with criminal records.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the problem posed by restrictions on public housing for persons with criminal records. A quarter of the population has a criminal record. Overly broad housing restrictions based on convictions do little to increase public safety and, in fact, probably lead to increased recidivism since homelessness has been shown to be a barrier to effective rehabilitation and reentry into society by those with a criminal record.

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

The proposed policy will encourage revision of public housing rules so as to eliminate overly-broad, arbitrary, unnecessary and detrimental restrictions denying access to great numbers of persons with criminal records.

4. Summary of Minority Views

None known.
RESOLUTION

RESOLVED, That the American Bar Association supports legislation, policies, and practices that allow equal and uniform access to therapeutic courts and problem-solving sentencing alternatives, such as drug treatment and anger management counseling, regardless of the custody or detention status of the individual.

FURTHER RESOLVED, That the American Bar Association urges that provisions of the Immigration and Nationality Act that are determined to be ambiguous be construed in favor of the use of rehabilitative problem-solving courts.

FURTHER RESOLVED, That the American Bar Association opposes interpretations of, and amendments to, the Immigration and Nationality Act that classify participation in, or the entry of a provisional plea upon commencement of a drug treatment or other treatment program offered in relation to problem-solving courts or other diversion programs as a “conviction” for immigration purposes.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution supports policies and practices that preclude triggering immigration consequences for noncitizen defendants who plead guilty in therapeutic courts as a condition of receiving alternative-to-incarceration treatment unless and until the court accepting the plea imposes final sentence as a result of the defendant’s non-compliance.

2. Summary of the Issue that the Resolution Addresses

In recent decades, problem-solving courts such as drug treatment courts, mental health courts, and more recently, veterans’ courts, have become part of the mainstream of criminal justice in the United States. The courts allow defendants to deal with issues that have caused or contributed to the charges against them and, upon successful completion of certain requirements, have the charges against them dismissed. Typically, the entry of a guilty plea is required as a condition of participation in these therapeutic courts. For noncitizens, however, the entry of a guilty plea is likely to result in deportation, detention or other serious immigration consequences. In many jurisdictions, the successful completion of a court treatment mandate resulting in a dismissal of the case is meaningless for immigration purposes and the alien will be deported.

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

The proposed policy will provide noncitizen defendants the same access to therapeutic courts as citizens defendants have.

4. Summary of Minority Views

None known.
RESOLUTION

RESOLVED, That the American Bar Association urges federal, state and territorial courts to adopt jury instructions, which are in language understandable by jurors untrained in law and legal terms, in the penalty phase of trials in which the death penalty may be imposed and such instructions should be provided to jurors in written form.
EXECUTIVE SUMMARY

1. Summary of the Resolution:

The resolution urges courts in capital cases to adopt jury instructions which are in language understandable by jurors untrained in law and legal terms.

2. Summary of the Issue that the Resolution Addresses:

The urgency revolves around the fact that considerable numbers of jurisdictions where the death penalty may be imposed have jury instructions that are poorly written and confusing, making it difficult for jurors to understand their roles and responsibilities. It is essential that the instructions jurors are obliged to follow in considering the imposition of the death penalty are as clear and understandable as possible.

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

The proposed policy will provide quite specific and comprehensive language for courts to consider in instructing jurors who will be considering imposition of the death penalty.

4. Summary of Minority Views:

None known.
RESOLUTION

RESOLVED, That the American Bar Association approves the Uniform Certificate of Title for Vessels Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2011, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   That the ABA approves the Uniform Certificate of Title for Vessels Act promulgated by the National Conference of Commissioners on Uniform State Laws in 2011, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. **Summary of the issue which the resolution addresses**

   The major objectives of the Uniform Certificate of Title Act for Vessels are to: (1) qualify as a state titling law that the Coast Guard will approve; (2) facilitate transfers of ownership of a vessel; (3) deter and impede the theft of vessels by making information about the ownership of vessels available to both government officials and those interested in acquiring an interest in a vessel; (4) accommodate existing financing arrangements for vessels; and (5) provide certain consumer protections when purchasing a vessel through the Act’s branding initiative.

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

   Approval of the Uniform Certificate of Title for Vessels Act by the House of Delegates would indicate to states that the Act is an appropriate mechanism for addressing the issues described above.

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

   None known.
RESOLUTION

RESOLVED, That the American Bar Association approves the Uniform Electronic Legal Material Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2011, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   That the ABA approves the Uniform Electronic Legal Material Act promulgated by the National Conference of Commissioners on Uniform State Laws in 2011, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. **Summary of the issue which the recommendation addresses**

   The Uniform Electronic Legal Material Act establishes an outcomes-based, technology-neutral framework for providing online legal material with the same level of trustworthiness traditionally provided by publication in a law book. The Act requires that official electronic legal material be: (1) authenticated, by providing a method to determine that it is unaltered; (2) preserved, either in electronic or print form; and (3) accessible, for use by the public on a permanent basis.

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

   Approval of the Uniform Electronic Legal Material Act by the House of Delegates would indicate to states that the Act is an appropriate mechanism for addressing the issues described above.

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

   None known.
RESOLVED, That the American Bar Association urges that U.S. federal, state, territorial, tribal and local courts consider and respect the data protection and privacy laws of any foreign sovereign, and the interests of any person who is subject to or benefits from such laws, with regard to data that is subject to preservation, disclosure, or discovery.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution requests the ABA to urge U.S. courts to take into consideration and respect non-U.S. data protection and privacy laws that affect the litigants before them concerning data that is subject to preservation, disclosure or discovery. In practice, U.S. courts rarely take cognizance of foreign privacy statutes (including data privacy laws and bank secrecy legislation, as well as the so-called “blocking” statutes) in a manner that might delay, limit or preclude pre-trial discovery. As a result a litigant who, concerned about the consequences of violation of privacy and data protection laws in countries with applicable jurisdiction, declines to follow the U.S. discovery order to produce protected data or documents may face severe sanctions that can result in the imposition of costs or other penalties that can lead to loss of the case. The current Resolution seeks to address the untenable Hobson’s Choice in which the current state of jurisprudence, in this time of accelerating global commerce and concomitant data flows, places litigants.

2. Summary of the Issue that the Resolution Addresses

U.S. courts have often misapplied the standard on application foreign data protection and privacy laws and ruled that the needs of the proceeding before them inevitably must take precedence over the privacy and data protection concerns of other nations. Litigants often face a Hobson’s Choice: violate foreign law and expose themselves to enforcement proceedings that have included criminal prosecution, or choose noncompliance with a U.S. discovery order and risk U.S. sanctions ranging from monetary costs to adverse inference jury instructions to default judgments. The current state of jurisprudence in this regard, then, is inconsistent with promotion of rule of law, as it facilitates violation of law, either abroad or here. In addition permitting broad discovery in disregard or even defiance of foreign protective legislation can ultimately impede global commerce by, among other things, provoking non-U.S. courts to harden their attitude with regard to the application of U.S. law.

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

Protecting data privacy and disclosing information for purposes of litigation and arbitration need not be mutually exclusive. Properly applied, U.S. law already provides a clear and workable standard for resolving the conflict. This resolution seeks to provide guidance to courts by urging them to give consideration to the national interests behind the non-U.S. laws and weigh and apply in a manner that demonstrates respect for those laws and the principles of international comity.

4. Summary of Minority Views

None known at this time.
RESOLVED, That the American Bar Association adopts the *ABA Model Relocation of Children Act*, dated February 2012, and urges its adoption by state, territorial, tribal and local legislative bodies.
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PREFATORY NOTE

The law governing relocation of children is a timely and important topic affecting millions of families in the United States and around the world. The goal of this act is to provide legislatures and other policy-makers with a uniform set of procedures, factors, and a rule regarding presumptions to assist in deciding cases involving relocation of children.

The act applies to relocation of children in connection with divorce, separation, and parentage. When preparing drafts of this act, the reporter reviewed: (1) Current state statutes on the subject of relocation; (2) Case law on relocation; (3) The American Academy of Matrimonial Lawyers Proposed Model Relocation Act (1997); (4) The American Law Institute Principles of the Law of Family Dissolution, § 2.17 (2002); (5) The “Declaration on International Family Relocation,” which was issued at an “International Judicial Conference on Cross-Border Family Relocation” held in Washington D.C., March 23 - 25, 2010; and (6) Articles from mental health professionals, sociologists, and law professors on the subject of relocation.


Drafting Committee and Contributors: Debra Lehrmann, Supreme Court of Texas, Chair; Jeff Atkinson, Wilmette, IL Reporter; William Austin, Melissa Avery, Allen Bailey, Joseph Booth, Carol Bruch, Gay Cox, Jean Crowe, Howard Davidson, Linda Elrod, Eric Fish, Dianna Gould-Saltman, Jon Gould, Rebecca Henry, Gregg Herman, Vivian Hueglo, Melissa Kucinski, Rebecca McKelvey, Ron Nelson, Allen Palmer, Barton Resnicoff, Aaron Robb, Jack Sampson, Robert Spector, Richard Warshak, Merle Weiner, John Zervopoulos.
ABA MODEL RELOCATION OF CHILDREN ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the ABA Model Relocation of Children Act.

Comment


SECTION 2. DEFINITIONS. In this [act]:

(1) “Child” means an unemancipated individual who is less than 18 years of age.

(2) “Child abuse” is defined by [insert citation to definition of “child abuse” or similar term in state’s statutes].

(3) “Child neglect” is defined by [“insert citation to definition of “child neglect” or similar term in state’s statutes].

(4) "Child-custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, parenting time, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

(5) “Court” means an entity authorized under the law of a state to establish, enforce, or modify a determination of child custody or parenting time.
(6) “Domestic violence” is defined by [insert citation to definition of “domestic violence” in state’s civil statutes].

(7) “Parent” means (a) a natural parent, (b) an adoptive parent, or (c) a person acting as a parent, other than a parent, who (i) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of proceeding under this act; and (ii) has been awarded legal custody by a court or claims a right to legal custody under the law of this State.

(8) “Parenting time” means the time a parent spends with a child, regardless of the custodial designation regarding the child.

(9) “Petition” includes a motion or its equivalent.

(10) “Relocate” means a change of residence made in connection with or following a child-custody determination when the change of residence: (a) will be out of state, (b) will be outside the geographic restriction set forth in the existing court order; (c) will be more than [50] driving miles from the residence of the other parent; or [(d) will substantially affect the nature and quality of the parent-child relationship.]

(11) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe or nation.

Comment

The definitions of “child,” “child-custody determination,” “court,” “petition,” and “state” are based on the definitions used in the Uniform Child Abduction Prevention Act, which, in turn, are similar to definitions in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), with the exception “petition” which is not defined in the UCCJEA. The definition of “parent” includes the UCCJEA’s definition of a “person acting as parent.” The Model Relocation Act includes the more modern term of “parenting time” as part of the definition of “child-custody determination.”
The definitions of “child abuse,” “child neglect,” and “domestic violence” make reference to the state’s existing definitions of those terms in order to avoid inconsistent application of those terms within a state.

The definition of “parenting time” is the same used in Minn. Stat. Ann. § 518.003(5) (2010). “Parenting time” is a more modern term which encompasses traditional concepts of “custody,” “visitation, and “access” exercised by a parent, but seeks to avoid the negative tone that some associate with those words.

“Relocate” means “a change of residence made in connection with or following a child-custody determination. . . .” The act, thus covers cases in which there has already been court involvement, including a child-custody determination. The act does not cover relocations made before a child-custody determination. However, if a child is relocated and a party secures a child-custody determination, the court then would have power under this act to provide remedies, including ordering return of a child. The definition of “relocation” specifies four trigger-events that would invoke the provisions of the act. The first three are precise: an out-of-state move, a move that is outside the geographic restriction set forth in the existing court order, and a move that will be more than [50] driving miles from the residence of the other parent. The mileage limit in the third trigger-event is in brackets, thus indicating a state may wish to substitute a different mileage limit. The fourth trigger-event (“a move that “will substantially affect the nature and quality of the parent-child relationship”) also is in brackets, indicating that its inclusion in the act is optional. The Drafting Committee believed this was an important factor, but also believed that its application was less precise than the other three factors.

SECTION 3. JURISDICTION. A petition objecting to relocation of a child or seeking permission to relocate a child under Section 7 may be filed only in a court that has jurisdiction under [insert citations to the Uniform Child Custody Jurisdiction and Enforcement Act or the Uniform Child Custody Jurisdiction Act pertaining to initial custody determinations and modifications of custody].

Comment

Since the primary remedies under this act are related to parenting time (or custody of or visitation with a child), jurisdiction is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), or by the Uniform Child Custody Jurisdiction Act (UCCJA) if a state has not adopted the UCCJEA. The citations to the UCCJEA (or UCCJA) should be to the provisions related to initial custody determinations or modifications of custody – not to emergency jurisdiction.
When this act is used in connection with establishing or modifying a financial obligation, other laws govern jurisdictional issues. Section 10 of this act lists financial remedies and provides the court may utilize “[i]f the court has jurisdiction.” Financial remedies include: establishing or modifying child support, ordering payment of a child’s travel expenses, ordering the relocating party to provide security in order to guarantee return of child, or awarding attorneys’ fees.

SECTION 4. INDIVIDUALS ENTITLED TO NOTICE; TIME OF NOTICE.

(a) Unless excused by an emergency, other exigent circumstances, or section 5(b), if either parent plans to relocate or to relocate with the child, the parent planning to relocate shall notify the other parent and any other individual with rights of custody, visitation, or parenting time at least [45] days before the proposed relocation.

(b) Notice under this section may be excused or modified by the court for good cause. Good cause includes a finding by the court that the safety of the child or party will be endangered by the notice.

Comment

Of the thirty-seven states with relocation statutes (as of 2009), nineteen states have specific periods of time in which the party seeking to relocate must give notice in advance of the relocation. Those time periods are: 30 days (five states); 45 days (four states); 60 days (nine states); and 90 days (one state). Jeff Atkinson, 1 Modern Child Custody Practice — Second Edition, § 7-14 (LexisNexis 2008). 45 days was chosen as a reasonable time for a party to receive notice, consider options, discuss the situation with the other party, and obtain legal assistance, if necessary. A longer period of notice was considered, but was viewed as unrealistic since, in many situations, a prospective employer may not give a parent more than 45 days notice before the new job begins.

This section excuses 45 days notice in cases of “an emergency, other exigent circumstances, or [as provided in] section 5(b).” The circumstances in which notice is excused is intended to be somewhat flexible. Those circumstances could include an urgent need to change a job, a natural disaster, or (as provided in Section 5(b) “a finding by the court that the safety of the child or party will be endangered by the notice.”
SECTION 5. CONTENTS OF NOTICE.

(a) Subject to subsection (b), notice given under Section 4 shall be a written document or petition containing the following information when available:

(1) the intended new residence, including street address,
(2) the telephone numbers, if any, of the parent and child who are relocating,
(3) the intended date of the relocation [;]
(4) a statement of the specific reasons for the relocation, and
(5) a proposed revised schedule for parenting time or visitation with the child].

(b) If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.

(c) If any information specified in subsection (a) is not known at the time notice is given or if the information changes after the notice is given, the new information shall be provided not later than 72 hours after receipt of the information.

Comment

Section 5(a) lists five items of information which should be contained in the notice. The first three, which are listed without brackets, are considered to be the most basic, and, thus, would be provided in all cases, unless excused for exigent circumstances, such as a case of domestic violence or child abuse in which revealing the information would pose a danger to the parent or child. The three basic items of information are: (1) the intended new residence, including the street address, (2) the
new telephone number, if any, of the parent and child who are relocating, and (3) the intended date of the relocation.

The fourth and fifth items of information are in brackets, indicating their inclusion in the statute’s “Contents of Notice” provision is more optional: “(4) a statement of the specific reasons for the relocation, and (5) a proposed revised schedule for parenting time or visitation with the child.” Such information generally should be provided if requested by the person to whom notice is given. These items of information are of particular relevance if the proposed relocation will substantially affect the child’s established pattern of access to the other parent. Information provided under the fifth item should include a parent’s plans for transportation of the child. Section 7(c) provides that if a parent files a petition objecting to relocation or a parent files a petition seeking permission to relocate, the parent must specify the reasons for the objection or request and the relief sought, including a proposed revised schedule for parenting time with the child, if applicable.

Section 5(b) provides an exception to notice pertaining to danger to a party or the child. The language of section 5(b) is taken from Section 209(e) of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

Section 5(c) recognizes that in some cases, a party may not have all of the specified information available at the time the initial notice is given, in which case, the party is obliged to update the notice within 72 hours of when the information is received. If a party provides complete information within the time limits of the act, or earlier than the time limits of the act, that will be evidence of the party acting in good faith.

**SECTION 6. METHODS OF NOTICE.**

(a) Notice of the planned relocation given under Section 4 must be by:

(1) certified mail, return-receipt requested to the last known address of the individual entitled to notice, and first class mail, to the last known address of the individual entitled to notice;

(2) hand delivery, with signed receipt for delivery;

(3) service of process;

(4) commercially reasonable delivery service to the last known address of the individual entitled to notice; or
(5) electronic means reasonably calculated to provide actual notice.

(b) The parties may agree in writing to a means of notice to be used in lieu of or in addition to methods of notice specified in subsection (a).

Comment

This section specifies five methods of notice. The first method (directing use of both certified mail, return-receipt requested, and First Class Mail) was chosen in order to attempt to provide proof of actual service through a return-receipt, while recognizing that a significant number of people do not sign for or pick up return-receipt mail. The second method (hand delivery) is permissible, but it also requires a signed receipt. The third method (service of process) is, of course, a reliable and traditional method of service. The fourth method (commercially reasonable delivery service) includes well-established delivery services, such as Federal Express, UPS, and DHL. The fifth method of service (electronic means) includes e-mail and fax. Section 6(b) allows parties to agree in writing to alternate methods of notice which could be used instead of, or in addition to, other methods of notice.

SECTION 7. PETITION OBJECTING TO OR REQUESTING RELOCATION.

(a) Except as otherwise provided in this section, a parent who objects to a proposed relocation of the child or a revised parenting plan may, not later than [30] days after receipt of notice, file a petition objecting to the relocation. If, however, the parties participate in an alternative dispute resolution process, and the process does not result in an agreement, the objecting parent may file a petition objecting to the relocation not later than [30] days after conclusion of the alternative dispute resolution process.

(b) A parent seeking permission to relocate with the child may file a petition with the court seeking permission at any time.

(c) A petition filed under this section must specify the reasons for the objection or request to relocate with the child and the relief sought, including a proposed revised schedule for parenting time with the child, if applicable.
(d) If a non-relocating parent does not file a petition objecting to relocation with the court or initiate an alternative dispute resolution process within [30] days of receipt of notice, the parent who gave notice may relocate with the child.

(e) If a parent has been subject to domestic violence or if a child has been subject to child abuse or neglect, the parent shall not be required to participate in alternative dispute resolution.

Comment

States statutes that allow a parent to relocate with a child in the event that the other parent does not file an objection with the court include: Ala. Code § 30-3-169; Mo. Rev. Stat. § 452.377(7); OK. Stats. Ann. Tit. 43, § 112.3, S.D. Cod. Laws § 25-4A-19; Wash. Code § 26.09.500. See also American Academy of Matrimonial Lawyers Proposed Model Relocation Act § 301 (1997).

An alternative approach is to require the parent seeking to relocate with the child to obtain permission of either the other parent or the court. See Nev. Rev. Stat. § 125C.200; N.J. Stat. § 9:2-2; N.D. Cent. Code § 14-09-07 (although the North Dakota rule does not apply if the noncustodial parent has not exercised visitation for one year or has moved to another state and is more than 50 miles from the residence of the custodial parent).

The Servicemembers Civil Relief Act, Pub. L. 108-189, 117 Stat 2825 (2003), amending the Soldiers’ and Sailors’s Relief Act, 50 U.S.C. App. §§ 501-594, provides for stays of proceedings for active service members. Courts have held, however, that the act does not preclude entering temporary custody orders in favor of the non-service member parent while the service member is on active duty. Lenser v. McGowan, 358 Ark. 423, 191 S.W.3d 506 (2004). See also Diffin v. Towne, 3 Misc.3d 1107(A), 787 N.Y.S.2d 677 (Table), (N.Y.Fam.Ct.) (granting temporary custody to the father when mother was on active duty, although mother had asked for stay of proceedings and wanted primary custody of the child be with her current husband).

Under this section, a parent objecting to relocation of a child, must file his or her objection with the court 30 days after receipt of notice of the relocation or 30 days after conclusion of an alternative dispute resolution process if such as process is used. The reference to 30 days is bracketed. So, a state could substitute a different number of days if that suited the state’s needs.

Section 7(b) allows the parent seeking to relocate to file a petition seeking to relocate, rather than merely giving notice of intent to relocate and waiting to see if the
other parent will object. This procedure might be used if the desire to relocate is urgent and the parent wishes to expedite proceedings.

Under Section 7(e), if a parent has been subject to domestic violence or if a child has been subject to child abuse or neglect, the parent shall not be required to participate in alternative dispute resolution over parent's objection.

SECTION 8. BEST INTERESTS; NO PRESUMPTION IN FAVOR OF OR AGAINST RELOCATION.

(a) On petition, the court must determine whether relocation is in the best interests of the child.

(b) No presumption shall be in favor of or against relocation of the child.

Comment

Presumptions in favor of or against relocation are the most controversial issues regarding the law of relocation. This act takes a middle-ground approach and directs that there will be no presumption in favor of or against the relocation. In the early years of relocation law, it was common to apply a presumption in favor of allowing the custodial parent to relocate with the child. In more recent years, many states placed the burden of proof on party seeking to move with the child. Several states follow the approach of this act and declare an equal burden of proof between the parents or direct that there be no presumption in favor of or against relocation. Courts, regardless of the burden or presumption applied, generally emphasize that relocation cases need to be decided on the facts of each case.

The modern view is reflected by New York’s Court of Appeals (the state’s highest court) which held: “[W]e hold that each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child. . . . [I]t serves neither the interests of the children nor the ends of justice to view relocation cases through the prisms of presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another.” In re Tropea, 87 N.Y.2d 727, 739-40, 665 N.E.2d 145, 150-51 (1996) (Vito Titone, Judge). Other cases since the mid-1990s reflecting the trend toward examining the facts of each case without a strong presumption for or against relocation include: In re Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005); Bodne v. Bodne, 277 Ga. 445, 588 S.E.2d 728 (2003); In re Marriage of Smith, 172 Ill. 2d 312, 665 N.E.2d 1209, 1213 (1996); and Latimer v. Farmer, 360 S.C. 375, 602 S.E.2d 32 (2004).
For a description of the law of relocation in each state, see the articles and treatise cited in the Prefatory Note.

The approach taken in this act to apply no presumption in favor of or against relocation is consistent with a “Declaration on International Family Relocation,” which was issued at an “International Judicial Conference on Cross-Border Family Relocation” held in Washington D.C., March 23 - 25, 2010. The declaration stated: “In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation.” The conference was organized by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children with the support of United States Department of State. The declaration is available online at: http://www.icmec.org/en_X1/icmec_publications/Washington_Declaration__English__.pdf

Although the burden of proof regarding whether relocation is in the best interests of the child is placed equally on both parents, the parent who has filed the action has the burden of going forward (sometimes referred to as the burden of production). Thus, a parent who objects to the relocation has the initial obligation to present evidence regarding why relocation is not in the child’s best interests. The parent who seeks to relocate would then present evidence regarding why relocation is in the child’s best interests, and the court would decide the issue by a preponderance of the evidence. Similarly, if the parent who seeks to relocate has filed the action, that parent would present his or her evidence first, and the other parent would respond. An analogy regarding the burden of proof can be made to an initial determination of custody in which both parents have an equal burden of proof, and the court decides custody by a preponderance of the evidence.

SECTION 9. FACTORS CONSIDERED.

When making any determination under this act, the court must consider the best interests of the child and:

(1) the quality of relationship and frequency of contact between the child and each parent;

(2) the likelihood of improving or diminishing the quality of life for the child, including the impact on the child’s educational, physical, and emotional development;

(3) the views of the child, having regard to the child’s age and maturity;
(4) the child’s ties to the current and proposed community and to extended family members;

(5) the parents’ reasons for seeking or opposing relocation and whether either parent is acting in bad faith;

(6) a history of or threat of domestic violence, child abuse, or child neglect;

(7) the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent, unless the court finds that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child;

(8) the degree to which one or both parents have relied on a prior agreement or order of the court regarding relocation;

(9) the degree to which the parties’ proposals for contact after relocation are feasible, having particular regard to the cost to the family and the burden to the child; and

(10) any other relevant factor affecting the best interests of the child.

Comment

The list of factors for the court to consider seeks to provide a comprehensive list of relevant factors without overloading the court with issues to weigh. Some states have longer lists of factors – e.g., Ala. Code § 30-3-169.3(a) (17 factors); La. Rev., Stat. § 9:355.12 (12 factors). See also Fla. Stat. Ann. § 61.13001(7) (2008) (11 factors); Tenn. Code § 36-6-108(c) (11 factors); Wash. Code § 26-09-520 (11 factors). The additional factors generally are sub-categories of the factors listed here.

the general quality of life for both the custodial parent and the children”; [2] “the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the noncustodial parent, and whether the custodial parent is likely to comply with substitute visitation orders when she is no longer subject to the jurisdiction of the courts of this State”; [3] “the integrity of the noncustodial parent’s motives in resisting the removal and consider the extent to which, if at all, the opposition is intended to secure a financial advantage in respect of continuing support obligations”; and [4] whether “there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parental relationship with the noncustodial parent if removal is allowed.”

In the decades since D’Onofrio was decided, most states have adopted a list of factors similar to those used in D’Onofrio. Generally, a single factor is not determinative. Courts must weight multiple factors to decide whether to allow or restrain relocation of the child.

The first factor (“the quality of relationship and frequency of contact between the child and each parent”) is a threshold consideration. Generally, a party seeking to prevent the relocation must have actively and routinely participated in the child’s life prior to the proposed move. This factor can support relocation or a restraint on relocation, depending on the comparative strength of the child’s relationship with each parent.

The second factor is “the likelihood of improving the quality of life for the child, including the impact on child’s educational, physical, and emotional development” If relocation of the child will provide the child with significant educational, health, or social benefits, those would be factors in support of relocation. If the facts show that the child’s quality of life would not improve or would diminish as a result of relocation, those would be factors against relocation.

The third factor (“the views of the child, having regard to the child’s age and maturity”) is a traditional factor in cases involving custody. The word “views” was chosen instead of “preferences” in order to broaden the inquiry and to potentially place less pressure on the child to make a choice if the child does not wish to express a specific preference about the relocation. The phrasing of this factors is the same as used in the “Declaration on International Family Relocation,” which was issued at an “International Judicial Conference on Cross-Border Family Relocation” held in Washington D.C., March 23 - 25, 2010. The conference was organized by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children with the support of United States Department of State. The declaration is available online at: http://www.icmec.org/en_X1/icmec_publications/Washington_Declaration__English__pdf
For a psychologists’ perspective on assessing the child’s views, see Richard Warshak, Payoffs and Pitfalls of Listening to Children,” 52 Family Relations, 373-84 (2003) (Vol. 52, no. 4).

The fourth factor is “the child’s ties to the current and proposed community and to extended families members.” This factor directs the court to compare the benefits and drawbacks of the current and proposed communities. The factor would include consideration the child’s ties to schools, friends, and recreational activities as well as extended family members. This factor may be of increasing importance as the child grows older.

The fifth factor is “the parents’ reasons for seeking or opposing relocation and whether either parent is acting in bad faith.” In many states, the reason of the parent seeking to relocate may be a threshold consideration. The party seeking to relocate usually must have a good faith reason for the relocation. Common good faith reasons include: pursuit of a new employment or better economic circumstances, accompanying a spouse to new location, or a desire to be near family members. Regarding pursuit of new employment, courts often will consider whether relocation for employment is truly necessary or if the party who seeks employment in a new location could obtain comparable employment in the current location. A bad faith reason for relocation would be to undermine the child’s relationship with the other parent. If that appears to be the reason for relocation, courts usually will deny permission to relocate. The reasons of the parent opposing relocation also deals with the issue of good faith and bad faith. If a party opposing the relocation has been actively involved in the child’s life and has regularly exercised his or her parenting time or visitation with the child, the motives for opposing relocation will be considered in good faith. If, on the other hand, the party opposing relocation, has not spent much time with the child and appears to be opposing relocation as a means of harassment or to gain advantage on another issue, the opposition to relocation will not be considered to be in good faith.

The sixth factor (“a history of or threat of domestic violence, child abuse, or child neglect”) would support a request to relocate if the party or child have been subject to abuse or the child has been subject to neglect. The weight of the factor could depend on the recency of the abuse or neglect and the impact of abuse on the party who presents evidence of the factor.

The seventh factor is “the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent, unless the court finds that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child.” This factor is commonly used in initial custody determinations and modifications, and it also applies to relocation cases. The willingness of each parent to support the child’s relationship with the other parent is an important factor, although it would not apply in cases of family violence in which there is an

The eighth factor is “the degree to which one or both parents have relied on a prior agreement or order of the court regarding relocation.” Although the act contains no presumption in favor of or against relocation, the existence of a prior agreement order can be a significant factor in a relocation case, particularly if the parties have acted in reliance on the order. If, for example, a prior order explicitly allowed a parent to relocate with the child, and the parent soon thereafter proceeded to accept employment and buy a house in a new location, the relocation generally should be allowed to proceed, absent unusual circumstances. Conversely, if the prior court order restricted relocation of the child and a parent made housing and employment decisions based on such restriction, that would be a factor against allowing the relocation.

The ninth factor is “the degree to which the parties’ proposals for contact after relocation are feasible, having particular regard to the cost to the family and the burden to the child.” This factor includes consideration of the costs and logistics of travel and the degree to which the parties can afford the travel arrangements. This factor also encompasses consideration of the child’s age and developmental needs. Louisiana’s statute – La. Rev. Stat. 9:355.12(2) – lists as a factor: “The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.” The wording for this factor in the Model Act is taken from the “Declaration on International Family Relocation,” which was issued at an “International Judicial Conference on Cross-Border Family Relocation.” For citation to the declaration, see discussion of the third factor, above.

The tenth and final factor (“any other relevant factor affecting the best interest of the child”) gives the court explicit flexibility to consider factors not listed.

SECTION 10. REMEDIES.

The court may:

(1) permit or prohibit relocation of the child on a temporary or permanent basis;

(2) order return of a child who was relocated without compliance with this act;

(3) modify custody, access, visitation, or parenting time under the provisions of [insert citations to state’s existing statutory law regarding modification of custody, visitation, and parenting time];
(4) order either party to provide security in order to guarantee return of the child;

(5) allocate payment of attorneys’ fees and cost between the parties [after
consideration of the factors set forth in Section 9];

(6) allocate transportation costs or modify child support, if the court has
jurisdiction to do so under the Uniform Interstate Family Support Act.

Comment

This section lists remedies available under the act. The first three remedies
require jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act
(UCCJEA) or the Uniform Child Custody Jurisdiction Act (UCCJA), if the state is one of
the few states that has not adopted the UCCJEA.

The fourth and fifth remedies (providing security and allocating attorney’s fees)
could be viewed as incident to the court’s jurisdiction under the UCCJEA / UCCJA as
well as having jurisdictional basis under other law. The requirement of providing security
requires good cause, such as a finding that the parent who seeks to relocate has interfered
with the other parent’s access to the child or that the relocating parent may not have
sufficient funds to facilitate return of the child. Among the statutes that specifically
allow the court to require posting of a bond or other security are: 750 Ill. Comp. Stat.

Failure to provide proper notice under the act would be among the factors that
could be considered in allocating fees between the parties.

The sixth remedy (allocation of transportation costs or modification of child
support) requires jurisdiction under the Uniform Interstate Family Support Act (UIFSA).

Remedies concerning possible abduction of a child are contained in the Uniform
Child Abduction Prevention Act. This act is reproduced online at:
http://www.law.upenn.edu/bll/archives/ulc/ucapa/2006_finalact.htm (accessed May 4,
2011).

To the extent available in other family law cases, courts have discretion to order:
(1) mediation, (2) appointment of an attorney for the child, a guardian ad litem for the
child, or other representative of the child’s interests; or (3) evaluation by mental health
professionals or social service professionals.

The court also may order the parties to submit additional proposed revised
schedules for parenting time with the child. The act requires submission of proposed
schedules with each parents’ initial pleadings. Additional proposed schedules could be
helpful when a court has made a determination regarding whether relocation will be
allowed or not allowed, and the court would like additional input from the parents regarding how to implement that decision.

SECTION 11. PRIORITY FOR HEARINGS. A hearing on a petition objecting to relocation or seeking permission to relocate shall be set within [30] days upon request of a party.

Comment

This provision is modeled after Fla. Stat. Ann. § 61.13001(10) (2010) and La. Rev. Stat. 9:355.9 (2010). Since a request to relocate may be urgent, hearings on such requests should receive priority. Circumstances involving an urgent need for resolution include the need to begin new employment or the start of the school year for a child. If the safety of a parent or child is at issue, the need for priority on the court’s docket will be heightened. Section 11 specifies that the hearing shall be set within 30 days of the request of a party, although the number is in brackets so that states may set time limits to meet local needs. The level of priority beyond that will be within the court’s discretion and may depend on other urgent matters on the court’s docket, including emergency hearings on other family law issues.

SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this model act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

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

SECTION 14. REPEALS. The following statutes, or parts there of are hereby repealed: [current statutes pertaining to relocation of child].

SECTION 15. TRANSITIONAL PROVISION. A motion or other request for relief regarding relocation of a child which was commenced before the effective date of this [Act] is governed by the law in effect at the time the motion or other request was made.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Section of Family Law asks that the House of Delegates approve, and recommend to the states, the ABA Model Relocation of Children Act.

2. Summary of the Issue that the Resolution Addresses

The act provides a model set of procedures and factors for courts to consider when deciding issues of relocation of children following divorce or determination of paternity. Issues covered include: (1) notice to other parent; (2) procedures for objection; (3) standards for the court to apply; and (4) remedies.

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

The act provides: (1) 45 days notice of relocation to the other parent, unless a shorter period of notice is approved by the court because of exigent circumstances; (2) relocation will be allowed unless objection is filed within 30 days (or within 30 days after completion of alternate dispute resolution); (3) there shall be no presumption for or against relocation; instead decisions regarding of relocation shall be based on the best interests of the child after consideration of specified factors; and (4) remedies include allowing or not allowing relocation of the child and ordering return of the child who was relocated without compliance with this act.

4. Summary of Minority Views

The model act was approved by Section of Family Law Council on April 8, 2011, without objection or dissenting view. During the drafting process, the Drafting Committee heard varied viewpoints. Some would give primary consideration to preserving the relationship between the child and the non-relocating parent (or both parents) and would prefer a presumption against relocation of the child. Some others would give primary consideration to the relationship between the child and the custodial parent and the interest of the custodial parent in relocating where he or she wishes. Such individuals would prefer a presumption in favor of relocation. The Drafting Committee and the Section of Family Law Council believes each case should be decided on its own facts and there should be no presumption in favor of or against relocation.
RESOLVED, That the American Bar Association amends the Model Rules for Fee Arbitration, dated February 2012.
MODEL RULES FOR FEE ARBITRATION
(February 2012)

RULE 1: GENERAL PRINCIPLES AND JURISDICTION

(A) Definitions. The following definitions shall apply in all fee arbitration proceedings:
(1) "Client" means a person or entity who directly or through an authorized representative consults, retains or secures legal service or advice from a lawyer in the lawyer's professional capacity.
(2) "Commission" means the Fee Arbitration Commission.
(3) "Decision" means the determination made by the panel in a fee arbitration proceeding.
(4) "Lawyer" means a person admitted to the practice of law in [name of jurisdiction], or any other person who appears, participates or otherwise engages in the practice of law in this state, regardless of the status of his or her license. In these rules, "lawyer" includes a lawyer's assignee.
   (a) a person admitted to practice law in this jurisdiction;
   (b) a person formerly admitted to practice law in this jurisdiction or any other jurisdiction with respect to acts committed prior to resignation, suspension, disbarment or transfer to inactive status, or with respect to acts subsequent thereto that amount to the practice of law;
   (c) a person admitted to practice law in another jurisdiction who is specially admitted by a court in this jurisdiction for a particular proceeding;
   (d) a person admitted to practice law in another jurisdiction who practices law or renders any legal services in this jurisdiction; and
   (e) the assignee of any of the above-named persons in regard to rights or responsibilities related to the fees or costs that are the subject of the arbitration.
(5) "Panel" means the arbitrator(s) assigned to hear a fee dispute and to issue a decision.
(6) "Party" means the client, the lawyer(s) responsible for the representation, the lawyer's assignee, and any third person or entity who has been joined by the client or lawyer in the proceeding who may be liable for payment of, or entitled to a refund of lawyer's fees.
(7) "Petition" means a written request for fee arbitration in a form approved by the Commission.
(8) "Petitioner" means the party requesting fee arbitration.
(9) "Respondent" means the party with whom the petitioner has a fee dispute.

(B) Establishment; Purpose. It is the policy of the [state's highest court] [highest court of appellate jurisdiction] to encourage the informal resolution of fee disputes between lawyers who practice law in [name of jurisdiction] and their clients, and, in the event such informal resolution cannot be achieved,
provide for the arbitration of such disputes. To that end, the [state's highest court] [highest court of appellate jurisdiction] hereby establishes through adoption of these Rules, a program and procedures for the arbitration of disputes concerning any and all fees and/or costs paid, charged, or claimed for professional services by lawyers.

(C) Commission Authority. A lawyer admitted to practice in this jurisdiction is subject to the authority of the Fee Arbitration Commission in this jurisdiction, regardless of where the conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the authority of the Fee Arbitration Commission of this jurisdiction if the lawyer provides any legal services related to the matter that is the subject of the arbitration in this jurisdiction.

(D) Choice of Law. In any exercise of the authority of the Fee Arbitration Commission of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
(1) for conduct in connection with a matter pending before a tribunal, the rules of the tribunal shall apply; and
(2) for any other conduct, the rules of the jurisdiction in which the conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.

(E) Arbitration Mandatory for Lawyers. Fee arbitration pursuant to these Rules is voluntary for clients and mandatory for lawyers if commenced by a client. If at any time the parties have agreed, in writing, to submit fee disputes to Mandatory Fee Arbitration, arbitration is mandatory for both the lawyer and the client.

(F) Jurisdiction. Any lawyer, as defined in Rule 1(A)(4), is subject to these rules for fee arbitration.

(D) Effect of Arbitration. Binding and Nonbinding Arbitration.

(1) The Fee Arbitration is binding where all parties have agreed in writing that it will be binding. Fee arbitration is only binding if,
   (a) all parties have agreed in writing, after the dispute has arisen, that it will be binding, or
   (b) none of the parties have sought a trial de novo within 30 days after service of the decision. This period shall not be extended by an application for modification of decision as permitted under Rule 6(C).

(2) In the absence of a written agreement to be bound by the arbitration, the decision automatically becomes binding, unless, as permitted under Rule 7(B), any party seeks a trial de novo pursuant to the [jurisdiction's rules of civil procedure] within 30 days after service of the decision. This 30-day time period shall not be extended by an application for modification under these rules. A party who is found to have willfully failed to appear for the arbitration hearing
is not entitled to a trial de novo. The determination of whether the party’s non-appearance at hearing was willful shall be made by the court determining a motion for trial de novo. The arbitrator’s finding on the issue of willful non-appearance is admissible in the court proceeding.

(3) After all parties have agreed in writing to be bound by an arbitration award, a party may not withdraw from that agreement unless all parties consent to the withdrawal in writing. At any time during the proceedings, the parties may agree in writing to be bound by the decision.

(GF) Disputes not Subject to Arbitration Covered. These rules do not apply to the following Disputes concerning fees, costs, or both paid, charged, or claimed for professional services by a lawyer are subject to these Rules, except:

(1) disputes where the lawyer is also admitted to practice in another jurisdiction, the lawyer maintains no office in this jurisdiction [name of jurisdiction], and no material portion of the legal services was rendered in this jurisdiction [name of jurisdiction];

(2) Disputes where the client seeks claims for affirmative relief for damages against the lawyer based upon alleged malpractice or professional misconduct, except as provided in Rule 5(T);

(3) disputes where entitlement to and the amount of the fees and/or costs charged, claimed, or paid to a lawyer by the client or on the client’s behalf have been determined authorized by statute or are determinable by court order, rule, or decision; and

(4) disputes where a third person is responsible for payment of the fees and the client fails to join in the request for arbitration; and

(5) disputes where the request for arbitration is filed more than [four] year(s) after the client-lawyer-client relationship has been terminated or more than [four] year(s) after the final billing has been received by the client, whichever is later, unless a civil action concerning the disputed amount is not barred by the statute of limitations.

(HG) Notice of Right to Arbitration; Stay of Proceedings; Waiver by Client.

(1) Prior to or at the time of service of a summons in a civil action against his or her client for the recovery of fees, costs, or both for professional services rendered, a lawyer shall serve upon deliver to the client or the person liable for payment of the lawyer’s fees if other than the client, [by certified mail return receipt requested] a written notice of the client’s right to arbitrate under the fee arbitration program. The notice, in a form approved by the Commission, shall include a provision advising the client that failure to file a Petition for Fee Arbitration within 30 days of service receipt of notice of the right to arbitrate shall constitute a waiver of the right to arbitrate. Failure to give this notice shall be grounds for dismissal of the civil action without prejudice.

(2) If a lawyer commences a fee collection action in any court or other tribunal proceeding, the lawyer must notify the court or other appropriate authority shall issue an order of stay upon the client giving notice to the court and the lawyer that a Petition for Arbitration was filed with the Commission within [thirty]
days of service of the notice of the right to arbitrate.

(3) After a client files a timely Petition, the lawyer shall refrain from any judicial or non-judicial collection activities related to the fees and/or costs in dispute pending the outcome of the arbitration.

(4) Unless all parties agree in writing to the arbitration, the right of the client to petition for maintenance an arbitration is waived if:

(a) the client fails to file a Petition for Arbitration within [thirty] days of service of the notice of right to arbitrate pursuant to these rules; or

(b) the client commences or maintains a civil an action or files any pleading seeking judicial resolution of the fee dispute, or seeking seeks affirmative relief against the lawyer for damages based upon alleged malpractice or professional misconduct; or

(c) the client files an answer or equivalent response in an action or other proceeding prior to filing a petition for fee arbitration, if notice of the client’s right to fee arbitration was properly given pursuant to this Rule, unless the client can show good cause for filing the answer or equivalent response after receiving notice of the right to arbitration.

Comment

[1] A fee arbitration system provides lawyers and clients with an out-of-court method of resolving fee disputes regarding lawyer’s fees, costs, or both that is expeditious, confidential, inexpensive, and impartial. The court should ensure adequate funding for an effective program.

[2] Although these rules only address fee arbitration, consideration should be given to the development of mediation as a component of the program as a prerequisite or alternative to fee arbitration.

[2] For the purpose of these Rules, “assignee” refers to a person to whom the lawyer has transferred any interest in or right to the fees or costs that are the subject of the arbitration.

[5][3] The scope of these Rules includes costs charged by the lawyer as well as fees, because in many cases, fees and costs are inextricably linked. The fee arbitration process should be able to resolve both issues in one process.

[3][4] A client who believes he or she may have been overcharged by a lawyer may have the lawyer’s fee reviewed without incurring the expense of formal litigation. Participation in the Fee Arbitration Program is mandatory for lawyers if the request for arbitration is commenced by a client. Because the inherent regulatory authority of the highest court of appellate jurisdiction extends only to lawyers, fee arbitration is not mandatory for clients unless agreed to pursuant to these Rules. If the parties agreed, in writing, to submit their disputes over fees and costs to the Fee Arbitration Program, then arbitration is also mandatory for the client. The parties may enter into such an agreement at any time.

[3][5] The fee arbitration decision is binding only upon written agreement of the parties entered into after the fee dispute has arisen. While the lawyer and client may agree to enter into
fee arbitration to settle a potential fee dispute before a dispute arises, the client should not be asked to surrender the right to challenge the fee arbitration decision before the dispute arises.

This distinction acknowledges the fact that a client’s considerations at the onset of the client-lawyer relationship may change if the relationship becomes adversarial. In the absence of a written agreement to be bound by the arbitration decision, any party may seek a trial de novo within 30 days after service of the decision. If the parties have an existing private arbitration agreement to resolve the fee dispute outside of the Fee Arbitration Program, then private arbitration would substitute for a trial de novo. The decision becomes binding if neither party seeks a trial de novo within the 30-day period. The program is voluntary for the client since the lawyer regulatory system has no power to regulate the consumer of legal services. However, nothing in these rules precludes a lawyer and a client from entering into a contract to participate in binding arbitration under these rules as permitted by law. However, a party who is found to have willfully failed to appear for the arbitration hearing is not entitled to a trial de novo following nonbinding arbitration.

[7][6] An alternative approach, which currently works effectively in those jurisdictions where it has been adopted, is to provide for arbitration which is both mandatory and binding in all cases. Under such a system, the arbitration decision is binding on the parties, subject to appeal only in cases of demonstrable and fundamental unfairness in the procedures utilized in deciding the matter.

[4][7] A lawyer should notify a client of the availability of the right to participate in the Fee Arbitration Program prior to or at the time of service of a summons in a civil action against the client to recover fees and/or costs for professional services. Notice is accomplished by delivery, to the client, in accordance with Rule 10(A), of the Notice form approved by the Commission. The rule provides that notice be sent by certified mail return receipt requested. However, a jurisdiction may substitute such other means of service as will reasonably establish receipt. The client should file a Petition for Fee Arbitration within [thirty] days of receipt of service of such notice or the client waives the right to petition or maintain an arbitration proceeding under these rules. If all parties agree to set aside any purported waiver, the fee arbitration can proceed even if the client did not file the Petition for Fee Arbitration within the [thirty] day period.

[8] A third person who is not the client but who might be liable for or entitled to a refund of lawyer’s fees or costs is entitled to receive notice of the right to arbitration and to appear as a party in fee arbitration. Fee arbitration between a lawyer and a non-client is not intended to abrogate the requirement that the lawyer exercise independence of professional judgment on behalf of the client. Absent the client’s written consent to disclosure of confidential information, a fee arbitration is not intended to abrogate the lawyer’s duty to maintain the confidentiality of information relating to the representation of the client, unless such disclosure is otherwise permitted by law, applicable rules, or court order. Absent the client’s signature on the request for arbitration, when an arbitration with a non-client is initiated, notice of the request should be sent to the client at the client’s last known address.

[4][9] The client may also waive the right to petition or maintain an nonbinding arbitration program by: if the client commences commencing or maintains a civil action, or files any pleading seeking judicial resolution of the fee dispute, or seeking affirmative relief against the
lawyer for damages based on alleged malpractice, or by filing an answer to a civil action or equivalent pleading after having received notice of the client’s right to arbitration from the lawyer, unless the client can show good cause why the answer was filed after receiving notice of the right to fee arbitration. This provision assumes that notice was properly given. Waiving the right to the fee arbitration program in these limited circumstances prevents the same facts from being the subject matter of the arbitration and a civil action, and discourages forum shopping. Nothing herein precludes a client from filing a complaint with the disciplinary authority. Nothing in these Rules prevents the filing of a malpractice action after a decision is rendered in the fee arbitration proceeding if the malpractice action is otherwise permitted under the applicable statute of limitations. In accordance with Rule 7(B)(4), a decision under these Rules is not admissible in a subsequent malpractice action or trial de novo following nonbinding arbitration except as provided in these Rules.

[6][10] The Fee Arbitration Program can be expanded by the Commission with applicable rules to handle arbitrate fee disputes between lawyers if all parties agree to be bound by the decision of the panel provided the petitioning lawyer gives notice to the client and the client joins the request for arbitration as a party.

[11] The Commission is not authorized to impose or require an automatic stay of any civil action or other judicial or administrative proceeding. It is the responsibility of the lawyer who commenced an action or other proceeding to collect fees to notify the court or program administering the other proceeding that a timely request for arbitration was filed. The lawyer should also agree to refrain from judicial or non-judicial collection pending the outcome of the fee arbitration.

Rule 2: FEE ARBITRATION COMMISSION

(A) Appointment of Commission. The [state’s highest court] [highest court of appellate jurisdiction] shall appoint a Fee Arbitration Commission to administer the Fee Arbitration Program. The [state’s highest court] [highest court of appellate jurisdiction] shall designate one member to serve as Chair of the Commission.

(B) Composition. The Commission shall consist of [nine] members of whom one-third shall be nonlawyers. Members shall be appointed for terms of three years or until a successor has been appointed. Appointments shall be on a staggered basis so that the number of terms expiring shall be approximately the same each year. No members shall be appointed for more than two consecutive full terms, but members appointed for less than a full term (either originally or to fill a vacancy) may serve two full terms in addition to such part of a term.

(C) Duties of the Commission. The Commission shall have the following powers and duties:
(1) to appoint, remove and provide appropriate training for lawyer and nonlawyer arbitrators and arbitration panels;
(2) to interpret these Rules;
(3) to approve forms, and award form language;
(4) to establish written procedures that afford a full and equal opportunity to all parties to present relevant evidence;
(5) to issue an annual report and periodic policy recommendations, as needed, to the [state's highest court] [highest court of appellate jurisdiction] regarding the program;
(6) to maintain all records of the Fee Arbitration Program;
(7) to determine challenges for cause where an arbitrator has not voluntarily acceded to a challenge;
(8) to determine challenges to the Fee Arbitration Program’s jurisdiction to arbitrate a dispute, including claims that the client has waived the right to arbitration or that the dispute is not subject to the Fee Arbitration Program;
(8 9) to educate the public and the bar about the Fee Arbitration Program; and
(910) to perform all acts necessary for the effective operation of the Fee Arbitration Program.

Comment

[1] Overall authority to administer the Fee Arbitration Program is delegated by the state's highest court [highest court of appellate jurisdiction] to the Commission. Both lawyers and nonlawyers members serve on the Commission. Commission members are appointed by the court for a three year terms. The court should ensure diversity in the membership of the Commission.

[2] Members may be appointed for a period not to exceed two consecutive full terms and a portion of an additional term, if appointed originally to less than a full term. A rotation system is employed in the appointment of members so that, generally, the terms of one-third of the members expire annually. This procedure preserves continuity while inviting the fresh ideas which new personnel inevitably bring to a task.

[3] The Commission has the duty to inform the bar and the public about the Fee Arbitration Program through such means as brochures, public service announcements, and any other means available. There should be a central place where the public can call with questions about lawyers and which can refer appropriate matters to the Fee Arbitration Program. Members of the bar should be encouraged to inform any member of the public known to have a fee dispute with a lawyer about the right to seek fee arbitration or to pursue other available means to resolve the dispute, such as mediation.

[4] Depending on funding, pro bono requirements, and other considerations, the Commission may authorize the reimbursement of reasonable costs and expenses to its members and to arbitrators. In larger jurisdictions, The Commission may employ staff to perform functions delegated by the Commission. The Commission can authorize local bar associations to sponsor and conduct fee arbitration programs. However, a client who believes he or she may not be able to obtain a fair resolution at the local level should be permitted to utilize the statewide program.
Rule 3: ARBITRATORS

(A) List of Approved Arbitrators. The Commission shall maintain a list of approved arbitrators and shall adopt written standards for the appointment of the arbitrators. Such standards should ensure appropriate training and experience for arbitrators as well as diversity in the background and experience of the arbitrators. Arbitrators shall be appointed for terms of [three] years and may be reappointed. For good cause, the Commission may remove an arbitrator from the list of approved arbitrators, and may appoint a replacement member to serve the balance of the term of the removed member.

(B) Panels. The Commission shall appoint panels from the list of approved arbitrators. For disputes involving [$7,500] or more, the panel shall consist of three arbitrators of whom one shall be a nonlawyer member. For disputes involving less than [$7,500], or in any case if the parties so stipulate, the panel shall consist of a sole arbitrator who shall be a lawyer. If the panel consists of three members, the Commission shall designate one lawyer member to act as Chair of the panel and to preside at the arbitration hearing. When a three-member panel is appointed, all panel members must be present for the panel to proceed, except, the parties may agree, in writing, to accept a single lawyer arbitrator in lieu of a three member panel.

(C) Area of Practice. At the option of the client, one member of a three-member panel or the sole arbitrator shall be a lawyer with significant experience in the same area of law as the underlying matter that gave rise to the dispute. The client shall be informed of this option (as part of the notice of the right to arbitration).

(D) Conflicts of Interest Impartiality. Within [five] days of the notification of appointment to a panel, an arbitrator shall notify the Commission of any conflict of interest with a party to the arbitration as defined in the ABA Model Code of Judicial Conduct with respect to part-time judges reason why the arbitrator's impartiality might reasonably be questioned, including, but not limited to the circumstances listed in ABA Model Code of Judicial Conduct Rule 2.11(A). Upon notification of the conflict, the Commission shall appoint a replacement from the list of approved arbitrators.

(E) Challenges for Cause. A party may disqualify one arbitrator without cause and A party may challenge any arbitrator for cause. A challenge for cause naming the arbitrator and must include the reason for the challenge. Any challenge or request for disqualification shall be filed within [fifteen] days after service of the notice of appointment. If the challenge or request for disqualification is not timely filed, it will be ineffective, unless good cause is shown why the request was not timely filed. An arbitrator shall accede to a reasonable challenge and the Commission shall appoint a replacement. If an arbitrator does not voluntarily accede, the Commission shall decide whether to
appoint a replacement. The decision of the Commission on challenges shall be final.

(F) Prohibited Contact with Arbitrators. A party or a lawyer or representative acting for a party shall not directly or indirectly communicate with an arbitrator regarding a matter pending before such arbitrator, except:
(1) at scheduled hearings;
(2) in writing with a copy to all other parties, or their representative counsel, if any, and the Commission;
(3) for the sole purpose of scheduling a hearing date or other administrative procedure with notice of same to other parties;
(4) for the purpose of obtaining the issuance of a subpoena as set forth in these Rules; or
(5) in the event of an emergency.

(GE) Duties. The panel shall have the following powers and duties:
(1) to take and hear evidence pertaining to the proceeding;
(2) to administer oaths and affirmations;
(3) to compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding; and to consider challenges to the validity of subpoenas;
(4) to consider challenges to the validity of subpoenas;
(4)(5) to issue decisions; and
(5) to perform all acts necessary to conduct an effective arbitration hearing.

Comment

[1] The Commission appoints both lawyers and nonlawyers to serve as arbitrators for [three] year renewable terms, and maintains a list of approved arbitrators. An arbitration panel composed of lawyers and nonlawyers results in a more balanced evaluation of fee disputes and enhances the credibility of the fee arbitration program for clients. When a Petition is received, the Commission appoints from the list of approved arbitrators a panel of one or three arbitrators to hear the matter, depending on the amount in dispute. For larger jurisdictions, the Commission may hire staff or designate a presiding arbitrator to handle the appointment of panels or other administrative tasks as delegated by the Commission. The number of people on the list of approved arbitrators should not be so large as to prevent the participating arbitrators from obtaining sufficient experience in the program.

[2] Appointments to the list of approved arbitrators should represent all segments of the profession and the general population, including diversity on the basis of race, gender and practice setting. Arbitrators should also be dispersed throughout the state to increase access to the fee arbitration process.

[3] The Commission should adopt written standards for appointment of arbitrators which should include compliance with training requirements, ability to meet minimum time and case
commitments, years in practice, and experience. Standards should exclude disbarred or suspended lawyers, and lawyers with prior criminal convictions that reflect adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. All panels of more than one arbitrator should include one nonlawyer member.

[4] Members of panels exercise a quasi-judicial role and should, therefore, be disqualified upon the same grounds and conditions applicable to judges. The Commission may wish to provide that within [fifteen] days after service of the notice of appointment, any party may file one peremptory challenge. In the event of such a peremptory challenge, the Commission should relieve the challenged arbitrator and appoint a replacement.

[5] Panels do not render advisory opinions but, rather, adjudicate fee controversies between lawyers and clients.

[6] In jurisdictions with a high volume of arbitration cases, consideration should be given to having pre-set arbitration panels which meet at specified times to simplify the scheduling of hearings.

**Rule 4: COMMENCEMENT OF PROCEEDINGS**

(A) Petition to Arbitrate. A fee arbitration proceeding shall commence with the filing of a Petition for Arbitration on a form approved by the Commission and by paying the appropriate filing fee as established by the [state’s highest court] [highest court of appellate jurisdiction]. Any person who is not the client of the lawyer, but who has paid or may be liable for the lawyer’s fees, may consent to be joined by the client to commence or join the arbitration as a party to the arbitration. The Petition for Arbitration must be signed by the client and/or any other proper party included by the client seeking fee arbitration.

(B) Commission Review. The Commission will review the Petition to determine if it is properly completed and if the Commission has jurisdiction. If the Petition is not properly completed, the Commission will return it to the petitioner and specify what clarification or additional information is required. If the Commission believes, based on the face of the Petition, that the fee arbitration program does not have jurisdiction, the petitioner shall be so advised. The parties shall be given an opportunity to submit written statements supporting their respective positions. The Commission will make a determination of whether jurisdiction should be accepted based on these Rules and the written materials submitted.

(C) Service of Petition; Response. Within [five] days of the receipt of a properly completed Petition, the Commission shall serve a copy of the Petition, along with a Fee Arbitration Response Form on the respondent. Within [twenty] days after service, the respondent shall file the completed Fee Arbitration Response Form with the Commission, which shall forward a copy to all other parties. The Commission shall serve a copy of the Petition for Arbitration and a Fee Arbitration Response Form upon the law firm, if any, with which a lawyer party
is associated. If the respondent is a lawyer, the respondent shall set forth in the response the name of any other lawyer or law firm who the lawyer claims is responsible for all or part of the client's claim. Within [five] days of receipt of the response, With the consent of the client, the Commission shall serve on the lawyer(s) or law firm(s) named in the response a copy of the Petition for Arbitration and a Fee Arbitration Response Form for completion. Within [twenty] days after service, the lawyer(s) or law firm(s) may file the completed Fee Arbitration Response Form with the Commission which shall forward a copy to all other parties.

(D) Failure of a Lawyer Respondent to Respond. Failure of a lawyer respondent to file the Fee Arbitration Response Form shall not delay the scheduling of a hearing; however, in any such case the panel may, in its discretion, refuse to consider evidence offered by the lawyer which would reasonably be expected to have been disclosed in the response.

(E) Client Consent Required. If a lawyer files a Petition for Arbitration, the arbitration shall proceed only if the client files a written consent within [thirty] days of service of the Petition.

(F) Settlement of Disputes. If the dispute giving rise to the Petition for Arbitration has been settled, upon reasonable confirmation of that settlement, the matter shall be dismissed by the Commission or by the panel if one has been assigned.

(G) Appointment of Panel. The Commission shall, within [ten] days after receipt of the Petition for Arbitration, appoint a panel and mail to the parties written notification of the name(s) of the panel member(s) assigned to hear the matter.

Comment

[1] The fee arbitration process begins with the filing of a Petition for Arbitration on a form approved by the Commission. The respondent has twenty days after service to return the Fee Arbitration Response Form. The process is commenced either unilaterally by a client or by the lawyer with the client's consent. If it is initiated by the client, participation is mandatory on the part of the lawyer.

[2] The Fee Arbitration Program is designed to be simple and fast. Consequently, most cases should be concluded in an average of within six months.

[3] The respondent lawyer(s) named by the client as being the person(s) responsible for refunding an unearned fee is entitled to identify another lawyer(s) as being responsible for providing such refund to the client. The client must be notified that another lawyer(s) has been so named and that the client has the right to join that named individual in the fee arbitration.

[4] Nothing in these Rules precludes a client from naming more than one lawyer in a fee arbitration if each named lawyer has either had direct or actual responsibility for the underlying
representation or is named as the billing lawyer for the underlying representation.

[3][5] If a respondent lawyer fails to timely file a Fee Arbitration Response Form, the hearing will nonetheless be held in the normal course and the panel may, in its discretion, refuse to consider evidence offered by the respondent lawyer which would reasonably be expected to have been disclosed in the Response. This is not intended as a default procedure. It will still be necessary for the panel to determine the reasonableness of the fee and issue a decision.

[4] The Commission must serve a copy of the Petition and the Fee Response Form on the law firm, if any, of which a lawyer is a member. The purpose of this rule is to assure that where a law firm is due a fee, or is obligated therefore, the law firm will have notice of the arbitration and an opportunity to participate.

Rule 5: HEARING

(A) Notice of Hearing. The panel shall set the date, time and place for the hearing. The panel shall send written notice of the hearing to the parties not less than [thirty], but no more than [sixty] days in advance of the hearing date, unless otherwise agreed by the parties.

(B) Representation by Counsel. Any party, at their expense, may be represented by counsel.

(C) Recording of Proceedings. A party to the proceedings may make arrangements to have the hearing reported at the party's own expense, provided notice is given to the other parties and the panel at least [five] days prior to the scheduled hearing. If a party orders a transcript, that party shall provide a copy of the transcript to the panel free of charge. Any other party is entitled at his or her own expense to acquire a copy of the transcript by making arrangements directly with the reporter. A panel, in its discretion, may make arrangements to have a hearing recorded and the parties may obtain a copy at their own expense. No stenographic, audio, or video recording of the hearing is permissible.

(D) Continuances. For good cause shown, a panel may continue a hearing upon the request of a party or upon the panel's own motion.

(E) Oaths and Affirmations. The testimony of witnesses shall be by oath or affirmation administered by the sole arbitrator or panel Chair.

(F) Panel Quorums. All three arbitrators shall be required for a quorum where the panel consists of three members. A panel of three arbitrators shall act with the concurrence of at least two arbitrators. Any dissenting positions must be filed with the majority decision.

(G) Appearance; Failure of a Party to Appear. Appearance by a party at a scheduled
hearing shall constitute waiver by said party of any deficiency with respect to the
giving of notice of hearing. The panel may proceed in the absence of any
party or representative who, after due notice, fails either to be present or to
obtain a continuance. A decision shall not be made solely based on the
basis of the petition, response, testimony of the party in attendance and other
materials presented, and not based on the default of a party. The panel shall
require parties who are present to submit such evidence as the panel may
require to issue a decision. An award may be made in favor of a party who is
absent if the evidence so warrants. If neither party appears, the panel will issue
an award based on the petition, response, and other materials presented prior to
the arbitration.

(H) Waiver of Personal Appearance. Any party may waive personal appearance and
designate a lawyer or nonlawyer representative to appear at the hearing and
submit the client’s written testimony and exhibits to the panel. Such declarations shall be filed with the
panel at least [ten] days prior to the hearing. If all parties, in writing, waive
appearances at a hearing, the matter may be decided on the basis of written
submissions. If the panel concludes that oral presentations are necessary, the
panel may schedule a hearing.

(I) Telephonic Hearings. In its discretion, a panel may permit a party to appear or
present witness testimony at the hearing by telephonic conference call. The costs
of the telephone call shall be paid by the party.

(J) Stipulations. Agreements between the parties as to issues not in dispute and the
voluntary exchange of documents prior to the hearing are encouraged.

(K) Evidence. The panel shall accept such evidence as is relevant and material to the
dispute and request additional evidence as necessary to understand and resolve
the dispute. The rules of evidence of the jurisdiction need not be strictly
followed. The parties shall be entitled to be heard, to present evidence and to
cross-examine parties and witnesses. The panel shall judge the relevance and
materiality of the evidence.

(L) Subpoenas. Upon request of a party and for good cause shown, or on its own
initiative, the panel may issue in blank subpoenas for witnesses or
documents necessary to a resolution of the dispute. The requesting party shall be
responsible for service of the subpoenas.

(M) Reopening of Hearing. For good cause shown, the panel may reopen the hearing
at any time before a decision is issued.

(N) Death or Incompetency of a Party. In the event of death or incompetency of a
party, the personal representative of the deceased party or the guardian or
conservator of the incompetent may be substituted.
Burden of Proof. The burden of proof shall be on the lawyer to prove the reasonableness of the fee by a preponderance of the evidence.

Order of Proof. The parties shall present their proof in a manner determined by the panel.

The Commission shall not lose jurisdiction, nor shall any arbitration be dismissed or any decision invalidated or modified in any way, solely because of the Commission’s or panel’s failure to comply with time requirements set forth in these Rules.

Upon request, the panel shall permit the client to be accompanied by a person for personal assistance or support. Any such person shall be subject to the confidentiality of the arbitration proceedings.

No discovery is allowable except as specifically set forth in these Rules.

Evidence relating to claims of malpractice and final orders of professional misconduct shall be admissible only to the extent that those claims bear upon the fees, costs, or both, to which the lawyer claims to be entitled. The arbitrators shall not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying any such claim. Nothing in these Rules shall be construed to prevent the arbitrators from awarding the client a refund of unearned fees, costs, or both previously paid to lawyer.

Comment

[1] The goal of these Rules is to provide a setting for hearings that is informal yet fair. To that end, the panel has discretion to grant postponements but need not permit the process to be subverted by unexcused absences. The panel will receive the evidence and testimony offered and judge its relevance and materiality. While the hearing may be conducted informally, witnesses should be required to testify under oath. Support persons are permitted to provide support or assistance to the client.

[2] Clients may be hesitant to participate in the fee arbitration program or pursue other civil remedies to settle a fee dispute for fear that confidential information may be disclosed by the lawyer as permitted under Rule 1.6 of the Model Rules of Professional Conduct. The prohibition against recordings in fee arbitration proceedings helps to ensure that any disclosure of the client’s confidential information is limited to the fee arbitration proceedings.

[3] There is no provision for formal discovery; however, the panel has the power of subpoena, subject to rules of relevancy and materiality.

[4] The burden of proof in fee arbitration is on the lawyer to prove the reasonableness of the fee by a preponderance of the evidence. This is consistent with the See, Rule 1.5 of the ABA
Model Rules of Professional Conduct. Rule 1.5 which provides that a lawyer's fee shall be reasonable.

[4] [5] The panel may consider evidence relating to claims of malpractice and professional misconduct, but only to the extent that those claims bear upon the fees, costs, or both to which the lawyer is entitled. The panel may not award affirmative relief in the form of damages for injuries underlying any such claim.

Rule 6: DECISION

(A) Form of Decision. The panel's decision shall be in writing and shall include the names of the responsible lawyer(s), a clear statement of the amount in dispute, all questions submitted to the panel, whether and to whom monies are due, and a brief explanation of the decision. The panel shall be authorized to include an allocation of the filing fee in the arbitration award; however, it shall not include an award for any other costs of the arbitration, including lawyer's fees resulting from the arbitration proceeding, notwithstanding any contract between the parties providing for such an award of costs or lawyer's fees.

(B) Issuance of Decision. The decision should be rendered within [thirty] days of the close of the hearing or from the end of any time period permitted by the panel for the filing of supplemental briefs or other materials. No decision is final or is to be served until the decision is approved for procedural compliance by the Commission or its designee. The arbitrator or panel Chair shall forward the decision to the Commission, which shall serve a copy of the decision on each party to the arbitration. At the time of service of the decision on the parties, the parties shall also be provided with notice of post-arbitration rights, on a form approved by the Commission.

(C) Modification of Decision.

(1) On application to the panel by a party to a fee dispute, the panel may modify or correct a decision if:

(a) there was an error in the computation of figures or a mistake in the description of a person, thing, or property referred to in the decision;
(b) the decision is imperfect in a matter of form not affecting the merits of the proceeding; or
(c) the decision needs clarification.

(2) Any party may file an application for modification with the panel within [twenty] days after service of the decision and shall serve a copy of the application on all other parties. An objection to the application must be filed with the panel within [ten] days after service of the application for modification.

(3) An application for modification shall not extend the thirty day time period to seek trial de novo under these Rules.

(4) Any corrected or amended award shall be served by the Commission. The time for filing a petition to correct, amend, or vacate the decision begins from the date of service of the amended or corrected decision or the date of denial of the request for correction or amendment of the award.
Retention of Files. The Commission shall maintain all fee arbitration files for a period of [three] years from the date a decision is issued.

Comment

[1] In order to bring a final and speedy conclusion to fee disputes, the decision of the panel is required to be in writing and should be rendered within thirty days. Discretion to extend the time period for unusually complicated or difficult matters should be provided.

[2] Where the petitioner has paid a filing fee for fee arbitration, the arbitrator(s) may allocate the filing fee between both parties. Contracts between the parties providing for lawyer’s fees and costs should not be enforced as part of the fee arbitration decision.

[3] The decision should be accompanied by a notice on a form approved by the Commission advising the parties of their rights to judicial relief subsequent to the arbitration proceeding.

Rule 7: EFFECT OF DECISION; ENFORCEMENT

(A) Compliance with Decision.

(1) Where the parties have agreed to be bound by the arbitration or have settled the dispute, the parties shall have [thirty] days from service of the written decision or the date the stipulation of settlement is signed by the parties to comply with the decision or settlement.

(2) Where there is no agreement to be bound by the arbitration, any party is entitled to a trial de novo if sought within thirty days from service of the written decision, except that if a party willfully fails to appear at the arbitration hearing, that party shall not be entitled to a trial de novo. The determination of willfulness shall be made by the court. The party who failed to appear at the arbitration shall have the burden of proving that the failure to appear was not willful. In making its determination, the court may consider any findings made by the arbitrators on the subject of a party’s failure to appear. If a trial de novo is not sought within 30 days, the decision becomes binding.

(B) Trial De Novo.

(1) If there is an action pending, the trial de novo shall be initiated by filing a rejection of arbitration award decision and request for trial in that action within 30 days from service of the written decision.

(2) If no action is pending, the trial de novo shall be initiated by the commencement of an action in the court having jurisdiction over the amount in controversy within thirty days from the service of the written decision.

(3) The party seeking a trial de novo shall be the prevailing party if that party obtains a judgment more favorable than that provided by the arbitration award decision, and in all other cases the other party shall be the prevailing party. The prevailing party may, in the discretion of the court, be entitled to an allowance for reasonable attorney’s fees and costs incurred in the trial de novo, which...
allowance shall be fixed by the court. In fixing determining the attorney’s
lawyer’s fees, the court shall consider the decision and determinations of the
arbitrators, in addition to any other relevant evidence.

(4) Except as provided in this Rule, the decision and determinations of the
arbitrators shall not be admissible in any action or proceeding and shall not
operate as collateral estoppel or res judicata.

(C) Petition to Confirm, Correct, or Vacate the Decision.

(1) If a civil action has been stayed pursuant to these Rules, any petition to
confirm, correct, or vacate the decision shall be filed with the court in which the
action is pending, and shall be served in accordance with the [jurisdiction's
statutes or rules of civil procedure.]

(2) If no action is pending in any court, the decision may be confirmed,
corrected, or vacated by petition to the court having jurisdiction over the
amount of the decision, in accordance with the [jurisdiction's statutes or rules of
civil procedure].

(3) A court confirming, correcting or vacating a decision under these rules may
award to the prevailing party reasonable fees and costs including, if applicable,
fees or costs on appeal, incurred in obtaining confirmation, correction or
vacation of the award. The party obtaining judgment confirming, correcting, or
vacating the decision shall be the prevailing party except that, without regard or
consideration of who the prevailing party may be, if a party did not appear at
the arbitration hearing in the matter provided by these Rules, that party shall
not be entitled to lawyer's fees or costs upon confirmation, correction, or
vacation of the award. In determining the lawyer’s fees, the court shall consider
the fee arbitration decision and determinations of the arbitrator(s), in addition
to any other relevant evidence.

Comment

[1] Thirty days is considered a reasonable time period in which to expect the parties to
comply with the decision. The thirty days begins to run when the decision in the fee arbitration
process is served on the parties or when a settlement agreement is signed.

[2] The Commission itself has no authority to enforce a decision. Either party may use the
summary action mechanisms which that are provided by the jurisdiction to obtain a judgment
consistent with the panel's decision as expeditiously as possible.

[3] Reasonable fees and costs may be awarded to the prevailing party in an action to
confirm, correct or vacate a panel decision, unless the prevailing party failed to appear at the
arbitration hearing in the manner provided in these Rules. This exception should encourage full
participation of the parties in the arbitration proceeding.

[4] Every jurisdiction is encouraged to consider developing means of assisting clients in
enforcing decisions. Some jurisdictions use a panel of pro bono lawyers to assist the clients in
obtaining civil judgments. Some jurisdictions refer lawyers who fail to comply with a decision or
judgment to an appropriate agency for administrative, non-disciplinary action such as that used in the jurisdiction for failure to comply with mandatory continuing legal education requirements or failure to pay registration fees.

Rule 8: CONFIDENTIALITY

(A) Confidentiality of Proceedings. Except as may be otherwise necessary for compliance with these Rules or to take ancillary legal action with respect thereto, all records, documents, files, proceedings and hearings pertaining to the arbitration of any dispute under these Rules shall be confidential and will be closed to the public, unless ordered open by a [court of general jurisdiction] upon good cause shown, except that a summary of the facts, without reference to the parties by name, may be publicized in all cases once the proceeding has been formally closed.

(B) Confidentiality of Information. A lawyer may reveal information relating to the representation of the client to the extent necessary to establish his or her fee claim. In no event shall such disclosure be deemed a waiver of the confidential character of such matters information for any other purpose.

(C) Confidentiality and Non- Clients. A fee arbitration between a lawyer and a non-client does not limit the lawyer’s duty to exercise independence of professional judgment on behalf of the client.

Comment

[1] Rule 8(B) is consistent with Rule 1.6(b)(5) of the ABA Model Rules of Professional Conduct or its equivalent, which permits limited disclosure of otherwise confidential information only "to the extent the lawyer reasonably believes necessary to establish a claim or defense . . . in a controversy between the lawyer and the client . . . ."

[2] Fee arbitration may proceed between a non-client and the lawyer. In arbitrations where the client is neither a party nor a witness and is not present at the arbitration hearing, the lawyer should exercise care to avoid abrogating the lawyer's duty to maintain the confidentiality of information relating to the representation of the client. See also Rule 1, Comment [4].

Rule 9: IMMUNITY

(A) Parties and Witnesses. Parties and witnesses shall have such immunity as is applicable in a civil action in the jurisdiction.

(B) Commissioners; Arbitrators; Staff. Members of the Commission, panels and staff shall be immune from suit for any conduct in the course and scope of their official duties.

Rule 10: SERVICE
(A) Method. Service on any party other than a lawyer or law firm shall be by personal delivery, by any person authorized by the Chair of the Commission, or by deposit in the United States mail, postage paid, addressed to the person on whom it is to be served at his or her office or home address as last given to the Commission.

(B) Official Address of Lawyer. Service on an individual lawyer shall be at the latest address shown on the official membership records of the [highest court of appellate jurisdiction or state bar association.] Service on a law firm shall be at the address as shown in the Petition for Arbitration Form unless the law firm designates a lawyer to be responsible for the arbitration, in which case, service shall be at the designee's latest address shown on the official membership records of the [highest court or state bar association.] The method of service shall be in accordance with section 10(A) above.

(C) Service on Represented Parties. If either party is represented by counsel, service shall be on the party as indicated in Rules 10(A) and 10(B), and on the counsel at the latest address shown on the official membership records of the [highest court of appellate jurisdiction or state bar association.]

(D) Completion of Service. The service is complete at the time of deposit. The time for performing any act shall commence on the date service is complete and shall not be extended by reason of service by mail.
EXECUTIVE SUMMARY

1. Summary of the Resolution
   The recommendation amends the Model Rules for Fee Arbitration.

2. Summary of the Issue that the Resolution Addresses
   The proposed amendments reflect sound practices that have developed in several fee arbitration programs since the Model Rules for Fee Arbitration were first adopted by the House of Delegates in 1995.

3. Please Explain How the Proposed Policy Position will address the issue
   The proposed amendments are not meant to alter the essence of fee arbitration programs, but to refine current practices in order to increase productivity, efficiency, and fairness.

4. Summary of Minority Views
   There are no minority views at this time.
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 February 2012, to the ABA Standards and Rules of Procedure for Approval of Law Schools:

1. Standard 510. STUDENT LOAN PROGRAMS
2. Rule 3. ACCREDITATION COMMITTEE CONSIDERATION
3. Rule 5. JURISDICTION OF THE ACCREDITATION COMMITTEE
4. Rule 22. TEACH-OUT PLAN AND AGREEMENT AND LAW SCHOOL CLOSURE
Standard 510. STUDENT LOAN PROGRAMS (redline)

A law school shall take reasonable steps to minimize student loan defaults, including provision of debt counseling at the inception of a student’s loan obligations and prior to graduation.

Interpretation 510-1

The student loan default rates of a law school’s graduates, including any results of financial or compliance audits and reviews, shall be considered in assessing the extent to which a law school complies with this Standard.

Interpretation 510-2

For law schools not affiliated with a university, the school’s student loan cohort default rate shall be sufficient, for purposes of Standard 510, if it is not greater than 10% for any of the three most recently published annual cohort default rates. If the school’s cohort student loan default rate is not sufficient under this Interpretation, the school must submit a plan for approval by the Accreditation Committee for coming into compliance with this requirement.

Failure to comply with title IV or having a student loan cohort default rate greater than the rate permitted by title IV is cause for review of a law school’s overall compliance with the Standards. Schools shall demonstrate that they have resolved all areas of deficiency identified in financial or compliance audits, program reviews or other information provided by the United States Department of Education.

Interpretation 510-2-3

The law school’s obligation shall be satisfied if the university, of which the law school is a part, provides to law students the reasonable steps described in this Standard.

Standard 510. STUDENT LOAN PROGRAMS (clean)

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rate is not sufficient under this Interpretation, the school must submit a plan for approval by the Accreditation Committee for coming into compliance with this requirement.

Failure to comply with title IV or having a student loan cohort default rate greater than the rate permitted by title IV is cause for review of a law school’s overall compliance with the Standards. Schools shall demonstrate that they have resolved all areas of deficiency identified in financial or compliance audits, program reviews or other information provided by the United States Department of Education.

**Interpretation 510-3**
The law school’s obligation shall be satisfied if the university, of which the law school is a part, provides to law students the reasonable steps described in this Standard.

**Rule 3. ACCREDITATION COMMITTEE CONSIDERATION (redline)**

(a) Upon completion of the procedures provided in Rule 2, the Accreditation Committee shall consider the application or the status of the law school based upon a record consisting of the law school’s application (in the case of a school seeking provisional or full approval), the site evaluation report, any written material submitted by the school, and other relevant information.

(b) The Committee shall make findings of fact and state conclusions with respect to the law school’s compliance with the Standards. If the matter falls within the provisions of Rule 5(a), the Committee also shall make recommendations to the Council. The Committee also may request (1) that the law school provide the Committee with specific information or (2) that the law school take specific actions, including reporting back to the Committee concerning actions that the law school has taken to bring itself into compliance with the Standards.

(c) In addition to the duties of the Committee set forth in subparts (a) and (b), the Committee shall monitor the accreditation status of law schools on an interim basis using a school’s annual questionnaire submissions, other information requested by the Committee, or information otherwise deemed reliable by the Committee for its review. In conducting interim monitoring of law schools, the Committee shall consider at a minimum: the resources available to the law school [Standard 201], efforts and effectiveness in facilitating student career placement [Standard 511], bar passage [Interpretation 301-6], and student admissions including student credentials, size of enrollment and academic attrition [Standard 501]. Other Standards and Interpretations may be considered as the Committee deems appropriate. This monitoring may result in action by the Committee, including requests for additional information from a school, appointment of a fact finder or other mechanism to ensure compliance by schools with one or more Standards.

(d) The Consultant shall inform the president and the dean of the law school of the Committee’s decision or recommendation in writing.
Rule 3. ACCREDITATION COMMITTEE CONSIDERATION (clean)

(a) Upon completion of the procedures provided in Rule 2, the Accreditation Committee shall consider the application or the status of the law school based upon a record consisting of the law school’s application (in the case of a school seeking provisional or full approval), the site evaluation report, any written material submitted by the school, and other relevant information.

(b) The Committee shall make findings of fact and state conclusions with respect to the law school’s compliance with the Standards. If the matter falls within the provisions of Rule 5(a), the Committee also shall make recommendations to the Council. The Committee also may request (1) that the law school provide the Committee with specific information or (2) that the law school take specific actions, including reporting back to the Committee concerning actions that the law school has taken to bring itself into compliance with the Standards.

(c) In addition to the duties of the Committee set forth in subparts (a) and (b), the Committee shall monitor the accreditation status of law schools on an interim basis using a school’s annual questionnaire submissions, other information requested by the Committee, or information otherwise deemed reliable by the Committee for its review. In conducting interim monitoring of law schools, the Committee shall consider at a minimum: the resources available to the law school [Standard 201], efforts and effectiveness in facilitating student career placement [Standard 511], bar passage [Interpretation 301-6], and student admissions including student credentials, size of enrollment and academic attrition [Standard 501]. Other Standards and Interpretations may be considered as the Committee deems appropriate. This monitoring may result in action by the Committee, including requests for additional information from a school, appointment of a fact finder or other mechanism to ensure compliance by schools with one or more Standards.

(d) The Consultant shall inform the president and the dean of the law school of the Committee’s decision or recommendation in writing.

Rule 5. JURISDICTION OF THE ACCREDITATION COMMITTEE (redline)

(a) The Committee has the jurisdiction to make recommendations to the Council concerning:

   (1) the granting of provisional approval or the extension of the period of provisional approval under Standard 102;

   (2) the granting of full approval under Standard 103;

   (3) the granting of acquiescence in major changes under Standard 105, except that the Committee has jurisdiction to make decisions concerning acquiescence in the types of major changes specified in Interpretation 105-6; and

   (4) the granting of variances under Standard 802-; and
(5) approval of a teach-out plan under Rule 22.

Rule 5. JURISDICTION OF THE ACCREDITATION COMMITTEE (clean)

(a) The Committee has the jurisdiction to make recommendations to the Council concerning:

(1) the granting of provisional approval or the extension of the period of provisional approval under Standard 102;

(2) the granting of full approval under Standard 103;

(3) the granting of acquiescence in major changes under Standard 105, except that the Committee has jurisdiction to make decisions concerning acquiescence in the types of major changes specified in Interpretation 105-6;

(4) the granting of variances under Standard 802; and

(5) approval of a teach-out plan under Rule 22.

Rule 22. TEACH-OUT PLAN AND AGREEMENT AND LAW SCHOOL CLOSURE (redline)

(a) A provisional or fully approved school must submit a teach-out plan for approval by the Accreditation Committee and Council upon occurrence of any of the following events:

(1) The school notifies the consultant’s office that it intends to cease operations entirely or close a separate location in which a student can earn all of the necessary credits to earn the J.D. degree;

(2) The Accreditation Committee recommends or the Council acts to withdraw, terminate, or suspend the accreditation of the school;

(3) The U.S. Secretary of Education notifies the Consultant's Office that the Secretary has initiated an emergency action against an institution, in accordance with section 487(c)(1)(G) of the HEA, or an action to limit, suspend, or terminate an institution participating in any title IV, HEA program, in accordance with section 487(c)(1)(F) of the HEA, and that a teach-out plan is required;

(4) A State licensing or authorizing agency notifies the Consultant’s Office that an institution’s license or legal authorization to provide an educational program has been or will be revoked.
(b) As soon as the decision to close an approved law school or branch is made, the school shall make a public announcement of the decision and shall notify the Consultant of the decision, the appropriate State Licensing authority and the U.S. Department of Education.

(c) The school shall submit the teach-out plan for the school or branch being closed as required by paragraph (a) to the Consultant’s office within such time specified by the Consultant. The Consultant’s Office, in consultation with the Accreditation Committee leadership, may require a school to enter into a teach-out agreement as part of its teach-out plan.

(d) The Accreditation Committee will promptly review the teach-out plan. The Committee may recommend approval of the plan to the Council, which shall consider the recommendation in accordance with Rule 8. The Accreditation Committee or the Council may deny approval of a plan, or condition approval of the plan on the school making specified changes to the plan. The Committee’s decision not to recommend approval of a plan to the Council is final and may not be appealed to the Council. To be approved by the Accreditation Committee and Council, the teach-out plan must satisfactorily address the items identified in paragraph (e), and, if applicable, the teach-out agreement must satisfactorily address the items identified in paragraph (f). If the Accreditation Committee or the Council denies approval of a school’s teach-out plan, the school must revise the plan to meet the deficiencies identified by the Committee or Council; and resubmit the plan as soon as possible and no later than 30 days after receiving notice of the decision.

(b) To be approved by the Accreditation Committee and Council, the teach-out plan must be submitted on Official Form A of these Rules writing and must and provide for the equitable treatment of its own students and, at a minimum, address each item in the Form.

(f) If a school voluntarily enters into a teach-out agreement or if the Consultant requires a school to submit a proposed teach-out agreement as part of a teach-out plan, the school must submit a copy of the agreement in the form of Official Form B to these Rules approved by the Council, demonstrate each of the substantive criteria specified by the Form.

The Consultant's Office, in consultation with the Accreditation Committee leadership, may require a school to enter into a teach-out agreement as part of its teach-out plan.

(d) If the school enters into a teach-out agreement, either on its own accord or as required by the Consultant's Office, the agreement must be recommended by the Accreditation Committee and approved by the Council and must comply with all federal and state laws, including regulations of the United States Department of Education. At a minimum, the agreement must be with a law school approved by the Accreditation Committee and Council for this purpose, must provide students access to the program and services without requiring them to move or travel substantial distances, and must provide students with information about additional charges, if any.

(e) The Consultant's Office, in consultation with the Accreditation Committee leadership, may require a school to enter into a teach-out agreement as part of its teach-out plan.

(d) If the school enters into a teach-out agreement, either on its own accord or as required by the Consultant's Office, the agreement must be recommended by the Accreditation Committee and approved by the Council and must comply with all federal and state laws, including regulations of the United States Department of Education. At a minimum, the agreement must be with a law school approved by the Accreditation Committee and Council for this purpose, must provide students access to the program and services without requiring them to move or travel substantial distances, and must provide students with information about additional charges, if any.

(e) The teach-out institution must have the necessary experience, resources and support services to provide a program of legal education that is reasonably similar in content, structure and scheduling to that provided by the institution that is subject to any of the occurrences that are set out in (a)(1-4) above. Additionally, the teach-out institution must be financially stable and able to
carry out its mission and meet all of its obligations to its students and must demonstrate that it can provide students access to its program and services without requiring them to move or travel substantial distances and that it will provide relocated students with information about additional charges, if any.

(fg) If the Accreditation Committee recommends and the Council approves Upon approval by the Council of a teach-out plan that includes a program that is accredited by another recognized accrediting agency, the Consultant’s Office must shall notify that accrediting agency within 30 days of its approval.

(h) Upon approval of a law school’s teach-out plan by the Council, the Consultant shall notify within 30 days all recognized agencies that accredit other programs offered by the institution of which the law school is a part.

(g) In the event of closure or cessation of operation, an approved law school and its parent institution, if any, must agree to provide an opportunity for currently enrolled students to complete their degrees under the terms of a closure plan which meets at least the conditions set out below. As soon as the decision to close an approved law school is made, the institution shall make a public announcement of the decision and shall notify the Consultant of the decision, the appropriate State Licensing authority and the U.S. Department of Education.

(mi) In the event a School closes without an approved teach-out plan or agreement, the Consultant’s office will work with the U.S. Department of Education and the appropriate State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.

(h) Upon deciding or being required to close or cease operations, the law school shall promptly submit a closure plan, which shall be reviewed by the Accreditation Committee and must be approved by the Council.

(i) The conditions to be met by a closure plan shall include the following:

1. The law school shall not thereafter admit or enroll any student (including a transfer or nondegree candidate) who was not a student at the time when the decision to close is announced.

2. The governing body of the institution shall take all necessary steps to retain degree granting authority for sufficient time to allow completion of degrees by those students who are degree candidates at the time the decision to close is announced and who complete degree requirements either at the law school or at another ABA-approved law school in the normal period of time required for that student’s course of study.

3. The law school shall use its best efforts to assist students in transferring to, or acquiring visiting status at, another ABA-approved law school for completion of their degree requirements.
(4) Until the date of closing the law school shall maintain:

(i) an educational program that is designed to qualify its graduates for admission to the bar;

(ii) a library collection and services adequate to support the curriculum, either on-site or through arrangements with other law libraries in the immediate vicinity;

(iii) a faculty adequate to maintain a sound educational program;

(iv) an adequate administrative staff to handle student problems and recordkeeping along with support of the academic program; and

(v) its existing physical facilities unless prior approval of the Accreditation Committee is obtained.

(j) If the school discontinues instruction or makes a decision to do so prior to the end of the normal period for completion of degrees by current students, then:

(1) The school shall take all reasonable steps to avoid closing during an academic year. If the closing occurs during an academic year, then the school shall make adequate arrangements for students to enroll in other law schools for that current year at no additional cost to the student.

(2) The school shall permit currently enrolled students to complete their degree requirements at other ABA-approved law schools by entering into “teach-out” agreements with other law schools. Credit earned at other law schools shall be received as transfer credit toward the degree of the closing school.

(3) Students transferring credit back to the law school shall not be charged fees beyond a reasonable administrative fee for processing of records.

(4) The Consultant shall notify the Council of the school’s decision and the date at which the school intends to cease operations.

(k) The law school or the governing body of the institution shall make satisfactory arrangements for the continuation of legal representation undertaken during the operation of a law school skills training program.

(l) The governing body of the institution shall make arrangements for permanent retention and availability of student records.

Rule 22. TEACH-OUT PLAN AND AGREEMENT AND LAW SCHOOL CLOSURE (clean)
(a) A provisional or fully approved school must submit a teach-out plan for approval by the Accreditation Committee and Council upon occurrence of any of the following events:

(1) The school notifies the consultant’s office that it intends to cease operations entirely or close a separate location in which a student can earn all of the necessary credits to earn the J.D. degree;

(2) The Accreditation Committee recommends or the Council acts to withdraw, terminate, or suspend the accreditation of the school;

(3) The U.S. Secretary of Education notifies the Consultant's Office that the Secretary has initiated an emergency action against an institution, in accordance with section 487(c)(1)(G) of the HEA, or an action to limit, suspend, or terminate an institution participating in any title IV, HEA program, in accordance with section 487(c)(1)(F) of the HEA, and that a teach-out plan is required;

(4) A State licensing or authorizing agency notifies the Consultant’s Office that an institution’s license or legal authorization to provide an educational program has been or will be revoked.

(b) As soon as the decision to close an approved law school or branch is made, the school shall make a public announcement of the decision and shall notify the Consultant, the appropriate State Licensing authority and the U.S. Department of Education of the decision.

(c) The school shall submit the teach-out plan for the school or branch being closed as required by paragraph (a) to the Consultant’s office within such time specified by the Consultant. The Consultant's Office, in consultation with the Accreditation Committee leadership, may require a school to enter into a teach-out agreement as part of its teach-out plan.

(d) The Accreditation Committee will promptly review the teach-out plan. The Committee may recommend approval of the plan to the Council, which shall consider the recommendation in accordance with Rule 8. The Accreditation Committee or the Council may deny approval of a plan, or condition approval of the plan on the school making specified changes to the plan. The Committee’s decision not to recommend approval of a plan to the Council is final and may not be appealed to the Council. To be approved by the Accreditation Committee and Council, the teach-out plan must satisfactorily address the items identified in paragraph (e), and, if applicable, the teach-out agreement must satisfactorily address the items identified in paragraph (f). If the Accreditation Committee or the Council denies approval of a school’s teach-out plan, the school must revise the plan to meet the deficiencies identified by the Committee or Council; and resubmit the plan as soon as possible and no later than 30 days after receiving notice of the decision.

(e) The teach-out plan must be submitted on Official Form A of these Rules and provide for the equitable treatment of its own students and, at a minimum, address each item in the Form.
(f) If a school voluntarily enters into a teach-out agreement or if the Consultant requires a school to submit a proposed teach-out agreement as part of a teach-out plan, the school must submit a copy of the agreement in the form of Official Form B to these Rules approved by the Council, demonstrate each of the substantive criteria specified by the Form.

(g) Upon approval by the Council of a teach-out plan that includes a program that is accredited by another recognized accrediting agency, the Consultant’s Office shall notify that accrediting agency within 30 days of its approval.

(h) Upon approval of a law school’s teach-out plan by the Council, the Consultant shall notify within 30 days all recognized agencies that accredit other programs offered by the institution of which the law school is a part.

(i) In the event a School closes without an approved teach-out plan or agreement, the Consultant’s office will work with the U.S. Department of Education and the appropriate State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated February 2012, to the ABA *Standards and Rules of Procedure for Approval of Law Schools*:

1. **Standard 510. STUDENT LOAN PROGRAMS**
2. **Rule 3. ACCREDITATION COMMITTEE CONSIDERATION**
3. **Rule 5. JURISDICTION OF THE ACCREDITATION COMMITTEE**
4. **Rule 22. TEACH-OUT PLAN AND AGREEMENT AND LAW SCHOOL CLOSURE**

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

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

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

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

4. **Summary of Minority Views**

Not that the Section is aware of.
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 non-
substantive clarifications to Standard 512 (Student Complaints) of the ABA Standards and Rules
of Procedure for Approval of Law Schools, to which the House of Delegates previously
concurred in August 2011.
Standard 512. STUDENT COMPLAINTS IMPLICATING COMPLIANCE WITH THE STANDARDS

(a) A law school shall establish, publish, and comply with policies with respect to handling student complaints.

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

(c) A “complaint” is a communication in writing that seeks to bring to the attention of the law school a significant problem that directly implicates the school’s program of legal education and its compliance with the Standards.

Interpretation 512-1
A law school’s policies on student complaints must address, at a minimum, procedures for filing and addressing complaints, appeal rights if any, and timelines.
EXECUTIVE SUMMARY

1. Summary of the Resolution

RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making non-substantive clarifications to Standard 512 (Student Complaints) of the ABA Standards and Rules of Procedure for Approval of Law Schools, to which the House of Delegates previously concurred in August 2011.

2. Summary of the Issue that the Resolution Addresses

This Resolution addresses non-substantive clarifications to a Resolution approved by the House of Delegates in August 2011 and addresses compliance with United States Department of Education requirements for accrediting agencies.

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

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

4. Summary of Minority Views

Not that the Section is aware of.
RESOLVED, That the American Bar Association reaffirms the black letter of the *ABA Standards for Imposing Lawyer Sanctions* as adopted February, 1986, and amended February 1992, and rescinds its adoption of the Commentary thereto.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution asks the ABA to reaffirm as policy the black letter Standards for Imposing Lawyer Standards (adopted February 1986, amended February 1992), while rescinding its adoption of the Commentary thereto.

2. Summary of the Issue that the Resolution Addresses

In 1986, the House adopted as ABA policy the black letter Sanctions Standards as well as the Commentary to them. The Commentary to the Sanctions Standards is not, for example, like the Comments to the ABA Model Rules of Professional Conduct or the ABA Model Code of Judicial Conduct, both of which the House adopts; the Commentary to the Sanctions Standards is more like an Annotation comprised of case law citations and summaries. Because the Commentary to the Sanctions Standards is more akin to an Annotation, if the Standing Committee on Professional Discipline (“Discipline Committee”) were presenting the Sanctions Standards to the House for the first time now, it would only request that the House adopt as policy the black letter Standards.

The Discipline Committee has been working to update the case law citations and summaries comprising the original Commentary to the Sanctions Standards. The Committee wants to rename them “Annotations” and publish them. Publishing updated case law citations and summaries will assist the state supreme courts, lawyer disciplinary agencies, respondents, and respondents’ counsel in ensuring that lawyer disciplinary sanctions continue to be imposed in a consistent and fair manner. The Discipline Committee plans to update the new Annotations regularly.

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

Removing the Commentary to the ABA Standards for Imposing Lawyer Sanctions from being considered ABA policy will ensure that a new policy resolution need not be considered and acted upon every time the Discipline Committee seeks to publish a regularly updated Annotation.

4. Summary of Minority Views

The Standing Committee on Professional Discipline was aware of no minority views or opposition at the time the Resolution and Report were filed.
RESOLVED, That the American Bar Association urges state and territorial bar admission authorities to adopt rules, regulations, and procedures that accommodate the unique needs of military spouse attorneys who move frequently in support of the nation’s defense, including but not limited to:

1. Enacting “admission by endorsement” for military spouse attorneys, whereby a member in good standing of one jurisdiction who possesses the requisite good moral character required for admission would be admitted without examination to the practice of law in another jurisdiction, provided that the applicant demonstrates presence in that jurisdiction due to a spouse’s military service and complies with all ethical, legal, and continuing legal education obligations;

2. Reviewing current bar application and admission procedures to ensure that they are not unduly burdensome to military spouse attorneys and that their applications are handled promptly;

3. Encouraging mentorship programs to connect military spouse attorneys with local members of the bar; and

4. Offering reduced bar application and membership fees to military spouse attorneys who are new to the jurisdiction or who no longer reside in the jurisdiction but wish to retain bar membership.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges state and territorial bar admission authorities to adopt rules, regulations, and procedures that accommodate the unique needs of military spouse attorneys, who move frequently in support of the nation’s defense.

2. Summary of the Issue that the Resolution Addresses

Current bar admission rules hinder the ability of military spouses who are attorneys to practice their profession. Bar admission rules do not provide a mechanism for admission of military spouses temporarily stationed in the jurisdiction or for those who move frequently, often with tours overseas. Military spouse attorneys have unique burdens in their efforts to become licensed and maintain their licenses for each jurisdiction to which they are transferred.

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

Appropriate accommodations for military spouse attorneys benefit both the legal community and the military, while maintaining a high level of professionalism. This resolution would encourage licensing authorities to adopt policies that would allow military spouse attorneys to maintain their careers while continuing to support their servicemember spouses, as well as our country. By passing this resolution, the ABA will also stimulate discussion of this issue, which will in turn raise awareness on the part of bar admission authorities, legal employers, and the legal community of the impact of military service on their families.

4. Summary of Minority Views

The Commission is not aware of any formal opposition at this time.


FURTHER RESOLVED, That the American Bar Association urges governments, the private sector, and the legal community to integrate into their respective operations and practices the United Nations Framework and Guiding Principles and the OECD Guidelines.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**


FURTHER RESOLVED, That the American Bar Association urges governments, the private sector, and the legal community to integrate into their respective operations and practices the United Nations Framework and Guiding Principles and the OECD Guidelines.

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

Whether through direct activity or through supply chains on which they rely, business enterprises have a tremendous impact on the realization (or not) of human rights. The impact can extend from work conditions for employees to environmental quality for populations affected by business operations, and can include such gross human rights violations as modern slavery (labor and/or sex trafficking) of men, women and children across the globe. Conversely, business enterprises, by way of a common set of principles for business conduct as it relates to human rights, can help ensure the observance and advancement of human rights through their collective economic impact on developing and developed countries alike. The international instruments that are the subject of the proposed resolution set forth such principles and, in so doing, offer the promise of advancing human rights in a manner consistent with the respective roles of states, business, and private sector.

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

The proposed resolution urges ABA endorsement of the specified international instruments to enable ABA engagement in their implementation. Given the core role that lawyers and the legal profession have in the conduct of business, the ABA should continue to have a constructive impact on this burgeoning area of human rights advocacy.

4. **Summary of Minority Views**

As with any international effort to address multifaceted interests and concerns, not all stakeholders believe that the relevant international instruments strike the right balance – some non-governmental organizations prefer tighter constraints on business, while some private sector commentators prefer fewer. In the main, however, these instruments have received broad, and unprecedented, endorsement across multiple sectors for their well-considered analysis and balanced approach to often complex issues.
RESOLVED, That the American Bar Association supports, in principle, the long-established precedent that patent infringement must be proven by a preponderance of the evidence, and the fact that a product or process accused of infringing a patent-in-suit is itself separately patented does not alter the burden of proof, or create a presumption of non-infringement;

FURTHER RESOLVED, That the American Bar Association supports, in principle, that the separate patentability of an accused product or process may be relevant to whether the accused product or process infringes the patent-in-suit under the doctrine of equivalents, and, therefore, the issuance of a separate patent thereon is entitled to due weight;

FURTHER RESOLVED, That the American Bar Association supports, in principle, that the separate patentability may be particularly relevant in applying the doctrine of equivalents when (a) the separate patent issued later than the patent-in-suit and (b) the patent-in-suit was considered by the U.S. Patent and Trademark Office as prior art against the application for the later issued separate patent.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution calls for the Association to adopt policy reinforcing long-standing judicial precedent that infringement under the doctrine of equivalents be proven by a preponderance of the evidence, and not some heightened evidentiary standard, such as clear and convincing evidence, even when a product or process accused of infringement is, itself, separately patented. The resolution, also acknowledges that the fact that an accused product or process accused of infringement is separately patented may be relevant to the issue of infringement under the doctrine of equivalents, and is entitled to due weight. This is especially so when the separate patent issued *later* than the patent-in-suit, and where the U.S. Patent and Trademark Office considered the patent-in-suit as prior art against the application for the later issued separate patent.

2. Summary of the Issue that the Resolution Addresses

In litigation involving allegations of patent infringement, the patentee has the burden to show that one or more patent claims describe the accused device or process literally or under the doctrine of equivalents. The burden of proof for showing infringement has long been held to be by a *preponderance of the evidence*. In its petition for a writ of certiorari, Saint-Gobain contends that a heightened evidentiary standard (i.e., *clear and convincing evidence*) should be required when proving infringement under the doctrine of equivalents where the accused product or process (i.e., purported equivalent) is claimed in a separately issued United States patent. Specifically, Saint-Gobain argued to the U.S. Court of Appeals for the Federal Circuit that the district court erred in not instructing the jury on this heightened evidentiary standard. The Federal Circuit disagreed with Saint-Gobain, and held that, while perhaps relevant to the issue of infringement under the doctrine of equivalents, the fact that the accused product or process is separately patented does not require a heightened evidentiary standard to prove infringement under the doctrine of equivalents. The Federal Circuit further disagreed with Saint-Gobain that the jury’s infringement finding below presumptively invalidated the later-issued patent covering Saint-Gobain’s accused product.

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1 The doctrine of equivalents prohibits one from avoiding infringement liability by making only “insubstantial changes and substitutions . . . which, though adding nothing, would be enough to take the copied matter outside the claim and hence outside the reach of law.” *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 607 (1950). The “essential inquiry” under the doctrine of equivalents is whether “the accused product or process contain[s] elements identical or equivalent to each claimed element of the patented invention.” *Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 40 (1997).
3. **Please Explain How the Proposed Policy Position will Address the Issue**

The policy advanced by the resolution above would support the filing of an ABA brief *amicus curiae* addressing the issue of the proper standard for proving infringement under the doctrine of equivalents, especially when the accused product or process is, itself, separately patented. More specifically, the policy would support a brief taking the position that infringement under the doctrine of equivalents is to be proven by a *preponderance of the evidence*, and not by a heightened, clear and convincing evidence, standard. The policy would further support a brief taking the position that the fact that an accused product or process is separately patented may be relevant to the issue of infringement under the doctrine of equivalents, and is entitled to due weight, especially where the separate patent covering the accused product or process issued later than the patent-in-suit, and where the patent-in-suit was considered by the U.S. Patent and Trademark Office as prior art against the application for the later-issued separate patent.

4. **Summary of Minority Views**

None known at this time.
RESOLVED, That the American Bar Association urges all entities that administer a law school admission test to provide appropriate accommodations for a test taker with a disability to best ensure that the exam results reflect what the exam is designed to measure, and not the test taker’s disability.

FURTHER RESOLVED, That the American Bar Association urges all entities that administer, score, or report the results of a law school admission test to establish procedures to ensure that the application process, the scoring of the test, and the reporting of test scores is consistent for all applicants and does not differentiate on the basis that an applicant received an accommodation for a disability.

FURTHER RESOLVED, That the American Bar Association urges all entities that administer a law school admission test to:
1. Make readily accessible to applicants the policies, guidelines, and administrative procedures used for granting accommodations requested by those with disabilities;
2. Give notice to applicants, within a reasonable period of time, whether or not requested accommodations have been granted; and
3. Provide a fair process for timely reconsideration of the denial of requested accommodations.
EXECUTIVE SUMMARY

1. Summary of the Resolution

Under the Commission on Disability Right’s (CDR) resolution the ABA would urge entities that administer law school admissions tests to provide accommodations that best ensure that the skills of the test-takers are measured, and not their disabilities. It would further urge that the process for determining whether to grant an accommodation be made public; a decision on approving an accommodation be conveyed to the applicant within a reasonable amount of time; and that there be a fair appeals process for a denied accommodation. The resolution also urges testing entities to not flag scores that have received a disability-based accommodation.

2. Summary of the Issue that the Resolution Addresses

Since 2007, CDR has noted and compiled various problems individuals with disabilities have identified with regard to law school admissions tests. Reports and law suits brought to CDR’s attention have shown that the process to apply for and obtain accommodations is often difficult and sometimes legitimate requests are denied. For example, many applicants are put through a burdensome process or are denied accommodations that they have been receiving in school for years. If an applicant is granted extra time as accommodation, his or her score is then “flagged” as achieved under special circumstances, which raises unfair questions about the score’s legitimacy.

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

This position takes note of regulations issued by the Department of Justice regarding the examination and testing provision of the Americans with Disabilities Act. The intent is to ensure that deserving applicants are given accommodations that only test aptitude and do not test or highlight the person’s disability. The resolution addresses portions of the accommodations process—i.e., administrative procedures, timeliness, and appeals—that have been noted by many in the disability community as problematic areas of the process. Finally, the position directly addresses the unfair practice of “flagging” by urging for its removal in the law school admissions testing process, a position already taken by most entities who administer admissions tests in other fields.

4. Summary of Minority Views

The Law School Admissions Council (LSAC), has consistently expressed positions and views that its accommodations process is adequate. LSAC has declined to follow other testing agencies—such as Educational Testing Service—in abandoning flagging asserting that it cannot demonstrate that scores earned under accommodated conditions have the same meaning as scores earned under standard conditions.
RESOLVED, That the American Bar Association amends the *Model Time Standards For State Courts*, dated February 2012.
## MODEL TIME STANDARDS FOR STATE COURTS
(February 2012)

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<td>90% within 60 days</td>
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<td></td>
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<td>98% within 180 days</td>
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<tr>
<td></td>
<td><em>Habeas corpus and similar</em></td>
<td><strong>98% within 180 days</strong></td>
</tr>
<tr>
<td></td>
<td><em>Post-conviction proceedings</em></td>
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<td><em>(following a criminal conviction)</em></td>
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<tr>
<td>CIVIL</td>
<td>General Civil</td>
<td>75% within 180 days</td>
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<tr>
<td></td>
<td></td>
<td>90% within 365 days</td>
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<tr>
<td></td>
<td></td>
<td>98% within 540 days</td>
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<tr>
<td></td>
<td>Summary Matters</td>
<td>75% within 60 days</td>
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<tr>
<td></td>
<td></td>
<td>90% within 90 days</td>
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<tr>
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<td></td>
<td>98% within 180 days</td>
</tr>
<tr>
<td>FAMILY</td>
<td>Dissolution/ Divorce/ Allocation of Parental Responsibility</td>
<td>75% within 120 days</td>
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<tr>
<td></td>
<td></td>
<td>90% within 180 days</td>
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<tr>
<td></td>
<td></td>
<td>98% within 365 days</td>
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<tr>
<td></td>
<td>Post Judgment Motions</td>
<td>98% within 180 days</td>
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<tr>
<td></td>
<td>Domestic Violence/ Protection Orders</td>
<td><strong>90% within 10 days</strong></td>
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<tr>
<td></td>
<td></td>
<td>98% within 310 days</td>
</tr>
<tr>
<td>JUVENILE</td>
<td>Delinquency &amp; Status Offenses</td>
<td>For youth in detention</td>
</tr>
<tr>
<td></td>
<td></td>
<td>75% within 30 days</td>
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<td>90% within 45 days</td>
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<td>98% within 90 days</td>
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<td>For youth not in detention</td>
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<td>75% within 60 days</td>
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<td>90% within 90 days</td>
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<td>98% within 150 days</td>
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<td></td>
<td>Neglect and Abuse</td>
<td><strong>Adjudicatory Hearing</strong>/Disposition: 98%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>within 90 days of removal</td>
</tr>
<tr>
<td>Category</td>
<td>Process/Action</td>
<td>Timelines</td>
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<tr>
<td>--------------------------------</td>
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<tr>
<td>Permanency Plan Hearing</td>
<td></td>
<td>75% within <strong>270</strong> days of removal; 98% within 360 days of removal</td>
</tr>
<tr>
<td>Termination of Parental Rights</td>
<td></td>
<td>90% within 120 days after the filing of a termination petition; 98% within 180 days after the filing of a termination petition</td>
</tr>
<tr>
<td>PROBATE</td>
<td>Administration of Estates</td>
<td>75% within <strong>420</strong> days; <strong>90% within 540 days</strong>; 98% within <strong>360</strong> <strong>720</strong> days</td>
</tr>
<tr>
<td>Guardianship/Conservator of Incapacitated Adults</td>
<td></td>
<td>98% within 90 days</td>
</tr>
<tr>
<td>Civil Commitment</td>
<td></td>
<td>98% within 15 days</td>
</tr>
<tr>
<td>POST-CONVICTION</td>
<td>Post-conviction proceedings and Habeas Corpus</td>
<td>98% within 180 days</td>
</tr>
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Felony Case Standards: 75% within 90 days; 90% within 180 days; 98% within 365 days

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

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

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

- Ten states have adopted the COSCA time standard of 180 days, with six specifying that all cases are to be disposed within that time, and with five having the 180-day time standard run from filing of or arraignment on an indictment or information rather than arrest or initial appearance.
- As suggested in the ABA time standard, ten other states have adopted one year, 12 months, 365 days or 360 days as the longest time, although four do not have a 100 percent time standard and contemplate that from one to ten percent of all felonies may take longer to be disposed.
- Maximum times to disposition in other states range from 120 days to 22 months.
- The most common approach (14 states) is to provide simply that cases must be decided within a given time period. There are 13 states where the maximum specified duration is for fewer than 100 percent of all cases, assuming that there may always be some cases that might understandably take longer. The next most common approach (five states) is to provide times within which 90 percent, 98 percent and 100 percent of all cases must be disposed. In all, there are at least 17 different configurations for felony time standards.
- In at least 11 states, time standards do not run from arrest or initial appearance, but rather from the filing of an indictment or information, general-jurisdiction arraignment on that charging document, or some other event other than arrest or initial appearance.
- At least ten states have time standards for one or more intermediate case-processing stages.
Overall Felony Case Time Standards. It is critically important to note, however, that the time standard for felony cases is not a “speedy trial rule” requiring dismissal of the case if the standard is not met. These standards are intended as measures of the overall performance of a court, not as a rule governing individual cases or creating rights for individual criminal defendants. Moreover, speedy trial rules generally run from the date of arrest (or sometimes the date of arraignment on the indictment) to the start of trial. These standards are based on the period between the date on which the case is first filed with a court to the entry of the dispositional order (e.g., a dismissal, sentence).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Traffic and Local Ordinance Standard: 75 percent within 30 days; 90% within 60 days; 98% within 90 days

**Definition.** This category of cases includes a violation of statutes and local ordinances governing traffic and parking, as well as violations of other local ordinances. In some jurisdictions these matters are called infractions; in others they are considered non-criminal violations. They include such matters as speeding, failure to yield, illegal parking, violations of noise ordinances, and illegal vending among others. In those states in which these matters are non-criminal violations, the standards applicable to Summary Civil Matters may be used. Driving under the influence and other serious traffic-related offenses punishable by incarceration are intended to be covered under the standard for misdemeanor cases.

**Earlier National Time Standards.** The COSCA time standards and the ABA time standards do not include provisions specifically relating to traffic and local ordinance cases.

**Time Standards in State Court System.** At least 10 state court systems and the District of Columbia courts have developed time standards for traffic and/or local ordinance cases.

- The time period specified ranges from 30 days (1 state) to 270 days (1 state). Four set 60 days as the maximum time; three 90 days; and one each 120, 150, or 180 days.
- Four sets of standards establish tiers of cases.
- Seven set the maximum standard for less than all the cases ranging from 80 percent in one jurisdiction to 98 or 99 percent in four others.
- Two jurisdictions limit their time standards to contested traffic cases.
- One state distinguishes between jury and non-jury matters.
Overall Traffic and Ordinance Violation Case Time Standards. Traffic and ordinance violation cases constitute a significant part of the caseload of many municipal and other limited jurisdiction trial courts, and are the cases that involve the greatest proportion of the general public. Thus, both from the perspective of effective case management and from the perspective of providing effective and efficient judicial services, it is essential that these high volume matters are heard or resolved in as timely a manner as possible. In order not to take up court time and law enforcement officer time unnecessarily with uncontested cases, persons cited who do not wish to challenge the citation should be able to acknowledge guilt or responsibility and pay a standard financial penalty at the clerk's office, through a kiosk, or via the Internet, without having to appear in court. An appearance before a judge or hearing officer should only be required if a person cited submits a notice that he or she wishes to contest the citation of fails to respond. The time standards include both those cases resolved without a court appearance and those in which formal court involvement is required, but contemplates that the overwhelming majority of traffic and ordinance violation citations will be resolved without a formal court appearance.

Intermediate Time Standards

| In 100% of cases, the initial court appearance should occur within 30 days of citation, notice of contest, or failure to respond to the citation. |

The intermediate time standard suggests that the appearance date for all traffic and ordinance violation citations should occur within 30 days. For those matters which may require a trial that cannot be accommodated on a general docket because of length or that require a continuance because the respondent wishes to retain counsel, the trial date should be set to permit disposition within the recommended overall time standard.

The commentary to the Model Time Standards should be amended by deleting following commentary under the Probate, Administration of Estates, Intermediate time Standards:

Time standards are suggested here for two intermediate steps in the administration of a decedent's estate.

- In 98% of cases, letters of administration should be issued within 90 days.
- In 98% of cases, accountings should be filed within 270 days.

The first critical step in a probate estate case is when the court "issues letters" – that is, when it gives formal approval for an executor or administrator to gather the estate and prepare for its distribution to beneficiaries. Since most estates are uncontested and may require little or no active and formal probate court supervision, the intermediate time standard from filing to issuance of letters is short.

The second critical point has to do with the filing of an accounting – a report by the executor or administrator on the receipts and income to the estate; debt and tax payments
and other disbursements; and the balance of assets in the estate at the time of the report. After this accounting to the court on behalf of the beneficiaries, the executor or administrator is typically in a position to distribute the remaining assets of the estate in keeping with the law or the terms of the will, in order to close out the estate.

That section should be replaced with the following commentary on the intermediate time standards:

An intermediate time standards is suggested here for the initial critical step in a probate estate case -- when the court “issues letters” – that is, when it appoints an executor, personal representative, or administrator. Since most estates are uncontested and may require little or no active or formal probate court involvement, the intermediate time standard from filing to issuance of letters is short.

- In 98% of uncontested cases, letters of administration or letters testamentary should be issued within 90 days.

Lastly, within the chart of Time Standards the Post Conviction Case Category should be removed and the Post Conviction proceedings and Habeas Corpus proceedings case types should be moved under the Criminal Case Category.

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

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

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

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

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

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

**Time Standards in State Court Systems for “Limited Non-Summary” Civil Cases.** In addition to “general civil” time standards, courts in six states and the District of Columbia have “limited civil” time standards that do not distinguish between summary and non-summary matters. In addition, there are ten states that have three categories of civil time standards, generally calling them “general,” “limited,” and “summary.” Regarding the time standards for non-summary civil cases in these 17 jurisdictions, the following distinctions can be noted:
• The most common upper time limit is 180 days (six states), although only four of those states require that all such cases be disposed within that time period.

• The upper time limit in the other 11 jurisdictions ranges from 250 days to 730 days.

• In two states, the time standards run not from filing, but from service or return of service.

• In 12 states, the upper time limit is the time within which 100 percent of the cases must be disposed. In the remaining five states, the upper time limit is for fewer than 100 percent.

• As in the ABA time standards, there are four states providing time limits within which 90 percent, 98 percent and 100 percent of all cases must be disposed. Three other states have three tiers at a different percentage level, and one state has only two tiers. Eight states have just one tier – the time within which all or a specified percentage of cases must be disposed.

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

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

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

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

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

**Intermediate Time Standards.** The time standards offered here for intermediate stages of general civil proceedings reflect the key points in case processing that should be monitored by a court and addressed to assure that litigation proceeds to conclusion at a suitable pace.

- In 98% of cases, service of process should be completed within 60 days.
- In 98% of cases, responsive pleadings should be filed or default judgments entered within 90 days.
- In 98% of cases, discovery should be completed within 270 days.
- In 98% of cases, trials should be initiated within 480 days.

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

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

To avoid having cases lay fallow for months or even years without being at issue, the second intermediate time standard thus offers a suggested elapsed time within which there should either be a responsive pleading by a defendant or a plaintiff request for default judgment. This intermediate time standard embodies a suggestion that the trial court should monitor cases to determine whether a responsive pleading has been filed within a reasonable passage of time after case commencement. The exercise of early court control in this fashion has been found to have a statistically significant correlation with shorter times to disposition in civil cases.
Civil cases vary in the amount of discovery they require, with tort cases being more likely to have discovery than contract, real property or other civil cases. Court management of discovery promotes expedition and helps conserve court resources. Research has shown that civil practitioners support direct court involvement and control over discovery through such means as holding an early discovery conference or establishing a discovery plan, through consistent application of the rules, and through the imposition of costs and sanctions for abuse. Having an intermediate time standard like that presented here for completion of discovery can serve as an important tool for the court to exercise ongoing control of case progress.

The fourth intermediate stage in these time standards has to do with having timely and credible trial date scheduling. To help make better use of their time, many civil attorneys prefer to have trial date predictability, and having credible trial dates is a means for the court to prompt the attorneys to give early attention to whether a matter can be resolved by negotiation rather than by trial. Having actual trial commencement within 16 months in most cases where it is needed can serve as a helpful means to assure that almost all cases are concluded within 18 months.

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

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

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

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

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

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

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

Intermediate Time Standards.

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

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

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

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

* Not including a statutorily imposed waiting period if any.

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

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

**Time Standards in State Court Systems.** At least 27 states and the District of Columbia have overall time standards for Family Dissolution/Divorce cases. The standards for the great majority of these states exceed the COSCA time standard of six months and are more in line with the proposed standard of 98 percent within 12 months.

- Five states have separate standards for contested and uncontested matters, but only two states have adopted the COSCA standards as promulgated. In the other three states, the upper time limit for contested cases is 12 or 14 months, and one of them provides that two percent might take longer.
- In two states, a difference in time expectations is based not on whether a matter is contested, but on whether there are children involved.
- No state has adopted the ABA standards as promulgated. Two states come close: one provides that 90 percent of all cases should be disposed within three months, 95 percent within six months, and 99 percent within 12 months; and the other provides that 90 percent should be disposed within three months, 95 percent within nine or ten months (depending on whether there are children), and 100 percent within 12 months.
- In nine states, the maximum time standard is 12 months, like that of the ABA standard, while six states set the maximum time at 18 months. Only one state has a maximum time standard longer than 18 months.
- A common approach (adopted in nine states) is simply to indicate how long it should take for 100 percent of all cases to be disposed, with no provision for the percentage of cases that should be disposed within a shorter time. Ten states allow that a small percentage of cases (from one percent to ten percent) may take longer than the stated maximum.
- Only one state has a separate time standard for complex cases.

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

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

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

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

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

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

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

- In 98% of cases, service of process should be completed within 45 days.
- In 98% of cases, temporary orders should be issued within 60 days.
- In 98% of cases, responsive pleadings should be filed or a default judgment entered within 90 days.
- In 98% of cases, trials should be initiated within 300 days.

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

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

An intermediate standard of 90 days for the issuance of a default judgment is established for
those cases in which there are no contested issues. This would be evident to the court by a failure
of a party, properly served, to respond to the complaint. It would also be evident by parties filing
a stipulation to judgment that resolves all issues to the satisfaction of the judge.

A standard of 300 days for the start of the trial is needed for the overall time standard to be met.
Many cases that go to trial contain complex issues that require extensive findings by the judicial
officer. As is the case with the overall time standards, states should take into account the waiting
period, if any, prescribed in their statutes or court rules in setting their specific standard.

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

Definition. This category includes motions for modification of child support, spousal support,
visitation and custody, and other requests for review of matters determined during a divorce,
dissolution, or allocation of parental responsibility proceeding.36

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

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

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

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

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

Domestic Violence Cases Standard: 90% within 10 days, 98% within 30 days

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

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

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

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

Intermediate Time Standards.

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

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

Delinquency and Status Offense Cases Standard: 75% within 30 days; 90% within 45 days; 98% within 90 days
Definition. This case type includes both delinquency cases (i.e., cases involving an act committed by a juvenile, which, if committed by an adult, would result in prosecution in criminal court and over which the juvenile court has been statutorily granted original or concurrent jurisdiction), and status offense cases (i.e., non-criminal misbehavior by a juvenile such as a curfew violation, running away, truancy, or incorrigibility). In some jurisdictions, status offense cases are called CHINS or CINS cases (child or children in need of supervision), PINS cases (person in need of supervision), or JINS cases (juvenile in need of supervision). The time period begins with the filing of the complaint or petition and runs through the issuance of the dispositional order.

Earlier National Time Standards. The 1983 COSCA time standards did not address juvenile delinquency cases. The 1992 ABA time standards specify that 90 percent of delinquency cases should be disposed within three months; 98 percent within six months; and 100 percent within 12 months. The National Advisory Committee on Juvenile Justice and Delinquency Prevention (NACJJDP) standards issued in 1980 recommend 30 days from filing to disposition for juveniles in custody, and 45 days for juveniles who are not detained. The most recent set of recommendations are contained in the 2005 Guidelines issued by the National Council of Juvenile and Family Court Judges (NCJFCJ). Those Guidelines distinguish between youth who are detained and those who are not detained, setting a maximum time of 30 calendar days between arrest and disposition for detained youth, and 58 calendar days for juveniles who have been released.

Time Standards in State Court Systems. At least 27 states and the District of Columbia have overall time standards for juvenile delinquency cases. Two offer standards for Status Offense cases. All but one set of state standards exceed the NCJFCJ Guidelines; however, all but four specify a maximum time to disposition for all cases well below the ABA’s one year limit.

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

Overall Time Standards. As stated in the National Council of Juvenile and Family Court Judges Guidelines:

. . . [T]imeliness throughout the juvenile justice process is critical for two reasons:
• One purpose of the juvenile justice process is to teach offenders that illegal behavior has consequences and that anyone who violates the law will be held accountable. A youth …who must wait a significant period of time between offense and consequence may not be able to sufficiently connect the two events. . . .

• If the juvenile justice process is not timely, many youth will experience prolonged uncertainty [which] can negatively impact trust and a sense of fairness. If a youth does not perceive the juvenile justice system to be predictable and fair, then the system’s goal of changing behavior is less likely to be achieved.

The most comprehensive information regarding the time required to dispose of delinquency cases is reported in a 2009 study of juvenile courts in 392 counties by Butts, Cusick, and Adams. In 2004, 71 percent of the delinquency cases were disposed within 90 days of filing. Cases in which the youth was not detained proceeded slightly more slowly than those involving detention (67 percent disposed within 90 days vs. 71 percent). A report of 2007 caseload information in one state revealed that only 32 percent of contested juvenile delinquency cases were disposed within 30 days, about 78 percent were concluded within 90 days, and approximately 90 percent within 180 days. However, the report points out that there is no data available on uncontested cases which are generally “too short” to make data collection worthwhile. Data on total delinquency dispositions in 2009 is available from three other states. One reported that 74 percent of juvenile delinquency cases were disposed within 90 days, 88 percent within 150 days, and over 92 percent within 180 days. The second reported that 80.6 percent were concluded within 90 days, 92.5 percent within 150 days, and 95 percent within 180 days. The third reported that 75 percent of the delinquency cases were concluded within the time standards (180 days for non-jury cases; 240 days for jury cases).

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

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

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

The second proposed intermediate standard addresses the timing of the hearing to determine whether the juvenile court will waive jurisdiction and transfer the case to the criminal court. Because transfer of jurisdiction has significant short-term and long-term consequences if the youth is ultimately convicted, time is required by both the state and defense to prepare. On the other hand, because the standard of proof is generally low (usually probable cause), the preparation time can be less than that required for a full-scale trial or adjudication hearing.

The third intermediate standard is for the adjudication hearing or trial. It sets the time for the adjudication hearing sufficiently before the expiration of the overall standard to permit a determination of what services and level of supervision are needed following a finding that the youth is delinquent.

**Neglect and Abuse Disposition Standard:** 98% within 90 days of removal
**Permanency Plan Standard:** 75% within 270 days of removal; 98% within 360 days of removal
**Termination of Parental Rights Standard:** 90% within 120 days after the filing of a termination petition; 98% within 180 days

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

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

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

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

Termination proceedings under ASFA must be initiated, in most instances, if “a child... has been in foster care under the responsibility of the state for 15 of the most recent 22 months.”

**Time Standards in State Court Systems.** Fourteen states have standards addressing neglect and abuse cases, termination of parental rights proceedings, or both. The four that specifically address the permanency hearing are all consistent with ASFA.

- Four states set overall time limits covering the time to a permanent placement with 18 months as the most frequently used goal. Eight address only the hearing to determine that a child has been neglected or abused. These standards vary from 33 to 180 days, with four in the 88 to 120-day range. One state has standards for both achievement of permanency and adjudication hearings.
- Five jurisdiction’s standards distinguish between the time limits that should apply to cases in which a child has not been removed from her/his home and those in which removal has occurred. One also sets different time limits for standard and complex cases in each category.
- Six jurisdictions have specific time standards for termination proceedings (two at 180 days, two at 360 or 365 days, and one each at 120 and 150 days respectively). Four states address both neglect and abuse cases and termination cases.
- Three states provide for a percentage of cases to exceed the maximum time limit – one percent (one state); five percent (one state); 25 percent (one state).

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

States around the nation, inspired by the three National Judicial Leadership Summits for the Protection of Children, enabled by the grant funds provided through the federal Court Improvement Program, and challenged by the federal Child and Family Services Reviews have been striving to meet the prescribed timeframes. Based on 2008 data submitted by the more than 40 states participating in Summit III:
The average mean time from filing of the protection order to the adjudication hearing was 137.2 days.

The average median time from filing of a complaint to permanent placement was 627.1 days.

The average mean time from notice of appeal to the final appellate decision was 197.9 days.

Comparable data was not collected regarding disposition of termination of parental rights proceedings.

**Intermediate Time Standards.**

<table>
<thead>
<tr>
<th>Deadline</th>
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<tr>
<td>Neglect and Abuse, In 98% of cases, the preliminary protective hearing should be held within 72 hours.</td>
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<tr>
<td>Neglect and Abuse, In 98% of cases, the trial/adjudication hearing, if required, should start within 60 days.</td>
</tr>
<tr>
<td>Termination, In 98% of cases, the trial/termination hearing should start within 60 days after service of process.</td>
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The proposed intermediate time standards address key decision points in the process. For neglect and abuse proceedings, the first point of concern to the parties is the initial hearing to determine whether removal was appropriate. If it is determined that removal was required to protect the child, then the court should set the timetable for further proceedings and assure that permanency planning is undertaken from the start. If it is determined that removal was not appropriate or is no longer appropriate, immediate action should be taken to safely reunite the family. The second interim point is the adjudication hearing. In order to achieve the goal of concluding 98 percent of adjudications within 90 days, the bulk of the hearings must occur well before that date to accommodate both the evidentiary process and time required to make a decision and craft an order. Four states have established standards for both adjudication and permanency hearings, with the time set for the adjudication hearing ranging from 33 to 153 days.

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

Administration of Estates Cases Standard: 75% within 120 days; 98% within 360 days

Definition. Cases of this type involve the estate of a deceased person, including the determination of the validity and proper execution of a will or, in the absence of a will, the disposition of the decedent’s estate. Also included is the adjudication of disputes over a will and the oversight of actions by an executor, administrator, or personal representative.

Earlier National Time Standards. The COSCA time standards and the ABA time standards do not include provisions on administration of decedents’ estates. Although it emphasizes that probate proceedings, in general, and estate administration, in particular, should proceed in a timely manner, the National Probate Court Standards do not prescribe specific time standards.

Time Standards in State Court Systems. At least 12 jurisdictions have time standards for cases involving the administration of decedents’ estates. They vary considerably:

- Two states have a time standard only for contested estates, while two others have one time standard for uncontested estates and another for contested estates.
- One jurisdiction has separate time standards for small and large estates, while another separates the time requirement for estates with a federal estate tax from that for all others.
- Two states have one time standard for cases with no formal administration and another for those with full administration.
- Maximum times vary from three months to three years, with the most common expected duration (five states) being 360 days.
- All 12 states expect that a substantial portion of the estates should be settled within 12 months or less.

Overall Time Standards. The 360-day time standard offered here is reasonably consistent with the estate administration norms for all of the court systems with time standards. In some states, however, current experience may be that the portion of all decedents’ estates taking longer than a year to reach conclusion may be greater than two percent.

Intermediate Time Standards. Time standards are suggested here for two intermediate steps in the administration of a decedent’s estate:

The first critical step is a probate estate case is when the court “issues letters” — that is, when it gives formal approval for an executor or administrator to gather the estate and prepare for its distribution to beneficiaries. Since most estates are uncontested and may require little or no active and formal probate court supervision, the intermediate time standard from filing to issuance of letters is short.

The second critical point has to do with the filing of an accounting — a report by the executor or administrator on the receipts and income to the estate; debt and tax payments and other disbursements; and the balance of assets in the estate at the time of the report. After this accounting to the court on behalf of the beneficiaries, the executor or administrator is typically in
a position to distribute the remaining assets of the estate in keeping with the law or the terms of
the will, in order to close out the estate.

An intermediate time standard is suggested here for the initial critical step in a probate estate
case -- when the court “issues letters” – that is, when it appoints an executor, personal
representative, or administrator. Since most estates are uncontested and may require little or no
active or formal probate court involvement, the intermediate time standard from filing to
issuance of letters is short.

- In 98% of uncontested cases, letters of administration or letters
testamentary should be issued within 90 days.

Guardianship/Conservatorship of Incapacitated Adults Case Standard: 98% within 90
days

Definition. This case type includes matters involving the establishment of a fiduciary
relationship between a person charged with taking care of either the personal rights of an adult
who is found by the court to be unable to care for himself or herself (guardianship) or the
property of an adult found by the court to be unable to manage his or her own affairs
(conservatorship). It includes both full and limited guardianship and/or conservatorship for
adults, but does not include guardianship of a minor or elder abuse cases.

Prior National Time Standards. The COSCA time standards and the ABA time standards do
not include provisions for this case type. The National Probate Court Standards call for early
court control and expeditious case processing, with hearings set at the earliest date possible, but
do not offer specific time standards. The terms of the Uniform Guardianship and Protective
Proceedings Act (UGPPA 1997) provide simply that the court should set a date and a time for a
hearing.

Time Standards in State Court Systems. There appear to be only two state court systems with
time standards specifically for guardianship and conservatorship cases. One calls for all such
cases to be disposed within eight months after filing; the other specifies that 75 percent of
guardianship/conservatorship cases should be disposed within six months, 90 percent within nine
months, and 100 percent within 12 months. At least three states have a statutory requirement for
how soon a court hearing should be held after the filing of a petition for guardianship and
conservatorship.70 One requires that a hearing be held within 120 days after filing; the other two
within 60 days after filing.

Overall Time Standards. The time standard offered here addresses the time from the filing of
the petition to denial of the petition or issuance of a court order appointing a fiduciary on a non-
temporary basis. It is premised on two considerations. First, there should be a prompt court
decision balancing the due process rights of a disabled person with the need to protect that
person or her or his estate. Moreover, in most such cases there is no dispute over either the
disabled person’s capacity or the suitability of the individual proposed to be his or her fiduciary.
Intermediate Time Standards.

- In 98% of cases, temporary appointments should be ordered within 72 hours.
- In 98% of cases, trials/hearings regarding a permanent appointment should be started within 75 days.

In some circumstances, it is important for quick action to be taken to protect a disabled person or the estate. For this purpose there should be provision for prompt temporary appointment of a fiduciary. A requirement for temporary appointment in most circumstances within 72 hours allows time for notice and the scheduling of a court hearing while still assuring prompt action. Holding a hearing in most cases within 75 days should provide sufficient time for an investigation and also for possible mediation if there is a dispute.

Civil Commitment Cases Standard: 98% within 15 days

Definition. In terms of court statistical definitions, civil commitments are “mental health cases” in which a court is requested to make a legal determination whether a person is a danger to him or her or others due to mental illness or incompetency and “should be placed, or should remain, under care, custody and/or treatment.” This case type does not include court determination of competency to stand trial, nor does it include proceedings for civil commitment of sexually violent predators.

Earlier National Time Standards. Neither COSCA time standards nor ABA time standards include provisions relating to civil commitments. The National Guidelines for Involuntary Civil Commitment urge that a court hearing should be held no more than three days after a respondent was taken into custody or a petition was filed. More recently, the Model Law for Assisted Treatment provides that on any petition a court does not dismiss, the court should schedule a hearing to be held within ten calendar days after the petition was filed.

Time Standards in State Court Systems. Two state-level court systems have promulgated time standards relating to civil commitment proceedings. One provides that 80 percent of mental health cases should be disposed within 30 days, 90 percent within 45 days, and 99 percent within 60 days; the other specifies that 90 percent of civil commitment matters should be disposed within 14 days, and 100 percent within 28 days. Some states have statutory requirements for the timing of court hearings. In Florida, for example, “Baker Act” hearings on involuntary treatment must be held within five days, unless a continuance is granted; and in North Carolina, a court hearing must be held within ten days after a respondent has been taken into custody, with the court authorized to grant a continuance of up to five additional days.

Overall Time Standards. Since the 1986 recommendation by the Task Force on Guidelines for Involuntary Civil Commitment that there be a court hearing on involuntary treatment within three days after custody or petition, there has been time to observe whether so expeditious a
process is workable. The 2009 Model Act allows a longer elapsed time – ten days. The statutory provisions relating to the timing of a court hearing in both Florida and North Carolina explicitly allow for the hearing to be continued. The time standard offered here for civil commitment proceedings seeks to balance the need for a prompt court determination of the need for involuntary treatment with the practical problem of completing an evaluation and scheduling the court event with adequate prior notice.

### Intermediate Time Standards.

- In 98% of cases, assessment reports should be filed within ten days.

In order to protect the legal rights of a respondent while addressing a possible need for prompt care, the critical intermediate event is the completion and submission of the assessment report regarding the need for care and treatment. The timing for such a report should give sufficient time for it to be reviewed by the respondent and his or her representatives prior to the hearing by the court.

### Post-conviction proceedings (following a criminal conviction) Standard: 98% within 180 days

**Definition.** This case type involves petitions for collateral review of a criminal conviction, whether under statutory post-conviction review provisions or through proceedings on common law habeas corpus or coram nobis petitions. It does not include direct appeals or proceedings on motions for new trial or in arrest of judgment.

### Prior National Time Standards.

The COSCA time standards and the ABA time standards do not include provisions for such proceedings. ABA standards relating to post-conviction review call for there to be a “prompt response” by the prosecution and court assignment of “suitable calendar priority” if there is reason for expedition, but they do not provide any specific time standard within which such proceedings should be concluded.

### Time Standards in State Court Systems.

One state has established time standards for post-conviction review proceedings -- 100 percent be disposed within 3 months after the filing of a petition.

### Overall Time Standards.

Many petitions for post-conviction relief may be decided by a court without need for an evidentiary hearing. The time standard offered here recognizes that, while allowing time for prosecution and petitioner to prepare for hearing if one is required.

### Intermediate Time Standards.

- In 98% of cases, responses with affidavits should be filed by the prosecution within 120 days.
Given the nature of a petition for collateral review, it is important that the prosecution respond with reasonable expedition. Statutes in some states indicate a time within which a prosecutor must file a response to a post-conviction petition.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution seeks ABA adoption of amendments to the Model Time Standards for State Courts. The adoption of these amendments to Model Time Standards for State Courts, in conjunction with their adoption by the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) would for the first time establish one single set of standards for timely disposition of all types of cases. If adopted, these Model Time Standards for State Courts would amend and update the previously existing ABA Standards from 2011 to align with the small modifications made by the CCJ and COSCA.

2. Summary of the Issue that the Resolution Addresses

The Time to Disposition Standards set forth in these documents are based on a project of over two years by the Trial Court Standards Committee of the National Conference of State Trial Judges/Judicial Division and over eighteen months work by a nation-wide Steering Committee composed of the following professionals: Hon. Stephanie Domitrovich, Judge, Court of Common Pleas, Erie County, Pennsylvania; Hon. William Dressel, President, National Judicial College; Hon. Christine M. Durham, Chief Justice, Supreme Court of Utah; Donald D. Goodnow, Director, New Hampshire Administrative Office of the Courts; John M. Greacen, Greacen Associates LLC., Consultant to the Institute for the Advancement of the American Legal System; Pamela Q. Harris, Administrator, Circuit Court, Montgomery County, Maryland; Sally A. Holewa, State Court Administrator, North Dakota; Hon. Terry Ruckriegle, Chief Judge (ret.) 5th Judicial District Court of Colorado; and Patricia Tobias, Administrative Director of the Idaho Courts. Data compilation, drafting and guidance were provided by NCSN Project Staff: Daniel J. Hall, Vice-President, Court Consulting, National Center for State Courts; Richard Van Duizend, Project Director, National Center for State Courts; Richard Schauffler, Ph.D., Director of Research Services, National Center for State Courts; David C. Steelman, Principal Court Management Consultant, National Center for State Courts; and Lee Suskin, Of Counsel, National Center for State Courts

The review of the experience of state courts in the 35 years since adoption of the original standards by the ABA and nearly 30 years from the COSCA standards involved both larger urban and smaller rural courts. They are intended to establish a reasonable set of expectations for the courts, for the lawyers, and for the public. They reflect a review of the case disposition times currently being achieved in selected jurisdictions around the country as well as consideration of the various time standards adopted by states, local jurisdictions, and national organizations. For the courts, the standards are intended to set forth achievable performance goals. For the lawyers, the standards establish a time framework within which to conduct their fact-gathering, preparation, and
advocacy activities. For the public, the standards are intended to define what can be expected of their courts. Rather than being merely "aspirational" or simply recognizing the current practice regarding time to disposition, these standards are intended to set goals that are attainable in jurisdictions with the requisite leadership, commitment, and resources to do so. They neither ignore reality, nor disregard what is possible to achieve if adequate resources are provided. They are intended as measures of the overall performance of a court, not as a rule governing individual cases or creating rights for individual criminal defendants.

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

If adopted, these *Model Time Standards for State Courts* would amend and update the previously existing ABA Standards passed by the House in Toronto in August of 2011 and align the standards with those passed by CCJ and COSCA.

4. **Summary of Minority Views**

None known.
RESOLUTION

1. RESOLVED, That the American Bar Association adopts the ABA Standards for Language Access in Courts, dated February 2012;

2. FURTHER RESOLVED, That the American Bar Association urges that all courts and other adjudicatory tribunals adopt a plan to accomplish implementation of the Standards; and

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

1. Summary of the Resolution

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

2. Summary of the Issue that the Resolution Addresses

People who have limited English proficiency are especially ill-equipped to protect their legal interests in the courts. The language proficiency required for meaningful participation in court proceedings is high because of the use of legal terms, the structured nature of court proceedings, and the stress normally associated with a legal proceeding when important interests are at stake. Courts and other adjudicatory bodies also require language services as a means to developing and recording an accurate record that can serve as a basis for adjudication. Courts lack guidance on their obligations to provide language access, on steps necessary to create appropriate language access systems, and on resources available to assist them in such endeavors.

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

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

4. Summary of Minority Views

None are known at this time.
RESOLVED, That the American Bar Association urges the Federal Bureau of Investigation to expand the definition of rape in the Uniform Crime Reporting Summary Reporting Program to include all forms of non-consensual sexual penetration, regardless of gender, orifice penetrated, mode of penetration, or presence of force.
1. Summary of the Resolution.

The Resolution supports amending the UCR definition of rape to ensure that all forms of non-consensual sexual penetration, regardless of gender, orifice penetrated, mode of penetration, or presence of force are included.

2. Summary of the issue that the resolution addresses.

The FBI created the Uniform Crime Reporting (UCR) system in 1927 in order to collect uniform police statistics from local police departments. Over 17,000 law enforcement agencies nationwide voluntarily contribute their crime statistics. UCR data have been considered the authoritative source of nationally representative information on crime.

Serious questions exist, however, as to whether this data is in fact reliable as far as sex crimes are concerned. The UCR definition of rape, unchanged since 1927, is exceedingly narrow, including only forcible male penile penetration of a female. It excludes oral and anal penetration, rape of males, penetration of the vagina and anus with an object or body part other than the penis, rape of females by females, and non-forcible rape.

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

The proposed policy position will allow the ABA to act in support of a revised UCR rape definition.

The Criminal Justice Information Services Division's Advisory Policy Board (APB) Uniform Crime Reporting (UCR) Subcommittee met on October 18, 2011 to discuss the definition of rape in the UCR Summary Reporting System (SRS). As a result of that meeting, they forwarded an amended definition of rape to the APB for vote at their December 6-7, 2011 meeting in Albuquerque, New Mexico.

According to ABC News, the APB accepted the subcommittee's recommendation at its December meeting, and Director Mueller has announced his intention to implement the definitional change “sometime this spring”. See http://abcnews.go.com/blogs/politics/2011/12/fbi-to-change-definition-of-forcible-rape/

If adopted, this policy will allow members (as well as staff and GAO) to continue to advocate for FBI implementation of the new definition.

4. Summary of any minority views.

None to date.
RESOLVED, That the American Bar Association supports and encourages the continued efforts of solo, small firm, and general practice lawyers to provide access to justice by delivery of legal services to those in need.
EXECUTIVE SUMMARY

1. Summary of Resolution(s).

The proposed resolution recognizes and acknowledges that the American Bar Association supports and encourages the continued efforts of solo, small firm, and general practice lawyers to provide access to justice by delivery of legal services to those in need.

2. Summary of the Issue which the Resolution Addresses

The proposed resolution acknowledges solo, small firm, and general practitioners are important and will further demonstrate to solos and small firm lawyers that the ABA is committed to them.

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

The proposed resolution would require the House to acknowledge the important contributions of the solo, small firm, and general practitioner.

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

No minority views or opposition to the resolution within the ABA have been identified.
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.

AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association adopts the Guidelines for Conduct of Experts Retained By Lawyers, dated February 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 CONDUCT
FOR EXPERTS RETAINED BY LAWYERS
(February 2012)

INTRODUCTION

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

The 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. 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,
exterts 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, whether in connection with an engagement regarding
a litigated matter, or otherwise. Experts are also subject to the applicable ethical codes of
conduct of their professions or professional associations. These 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.

Comment

The purpose of these Guidelines is to set forth appropriate guidelines for conduct of experts that should apply to engagements by a lawyer of an expert on behalf of a client. The intent is for them to apply to all litigated matters, whether civil or criminal, whether the expert is proposed as a testifying expert or simply retained as a consulting expert, and apply to matters to be resolved in court, by arbitration, mediation or through any other recognized ADR procedure. They also are intended to apply to other matters in which lawyers retain experts on behalf of clients, including matters involving commercial transactions and internal investigations. The extent which the lawyer chooses to require the expert to follow them will depend upon the nature of the engagement and the jurisdiction or jurisdictions in which it 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 or create any lesser standards of conduct. They are intended to create a set of best practices that lawyers should seek to apply to the conduct of all experts retained by lawyers on behalf of their clients. In so doing, it is hoped that clients, retaining lawyers and experts, will have a clear and common understanding of the expert’s expected conduct.

I. INTEGRITY/PROFESSIONALISM

An expert shall 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 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. An expert should not knowingly violate these Guidelines, knowingly assist or induce another to do so, or do so through the acts of another. An expert should not commit any act that reflects adversely on the expert’s honesty, trustworthiness or fitness to serve as an expert. An expert should not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. An expert should disclose to the retaining lawyer any facts or actions bearing upon the above conduct, including pending investigations, indictments or criminal charges, and any disciplinary action taken against the expert by any credentialing, licensing, accrediting, or other professional organization.
II. **COMPETENCE**

An expert shall not undertake an engagement unless the expert is competent to do so.

**Comment**

An expert should: (1) be competent to perform the entire scope of an engagement; (2) be capable of acquiring any additional necessary competencies to perform the engagement; or (3) decline, withdraw from, or circumscribe the engagement.

**Being Competent**

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

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

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

**Acquiring Competency**

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

1. Disclose to the retaining lawyer the area or areas in which he or she may lack knowledge, training or experience;
2. Take all steps necessary or appropriate to complete the engagement competently; and
3. Disclose to the retaining lawyer the steps the expert undertook to complete the engagement competently, including the identification of all sources relied on for completing the engagement.
Competency can be acquired in various ways including association with another expert or other person whom the retained expert reasonably believes has the necessary knowledge, education, training or experience. If the engagement cannot be completed competently, then the expert must decline the engagement or withdraw from the engagement.

III. CONFIDENTIALITY

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

Comment

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

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

Similarly, expert witnesses who are engaged on behalf of clients in legal matters must generally protect confidential information from disclosure to third parties. Disclosure of confidential information can serve as grounds for disqualification of an expert witness. See, e.g., Northbrook Digital LLC v. Vendio Services, Inc., 2009 WL 5908005, at *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 States 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 remind experts, preferably in writing, of their obligation to maintain the confidentiality of confidential information. Experts should acknowledge their obligation to preserve confidentiality. And lawyers and/or clients should identify information as confidential at the time it is provided so there can be no confusion as to an expert’s obligations.

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

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

IV. CONFLICTS OF INTEREST AND DISCLOSURE

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

2. Communications or contacts with any adverse party or lawyer.

3. Prior testimony, writings or positions of the expert in the last 7 years in other matters that 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.

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

Comment

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

The recommended 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, it 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, any such organization should build a firewall between any professional, with past or present involvement on one side of an engagement, and those with any such involvement on an opposing side. Whether this will be sufficient protection to prevent disqualification is an issue for the courts. These Guidelines do not suggest that the same issues would be presented in an academic setting.
Relationships that should be disclosed include financial interests, and personal or business relationships with adverse or other lawyers, clients or other parties, all of which have the potential for creating conflicts of interest. 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 one that should be disclosed.

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

The Federal Rules of Civil Procedure currently require the disclosure of all matters in which the expert testified in the past four years and a list of all publications authored in the past ten years. But the disclosure obligation to retaining lawyers and their clients should go beyond those required disclosures. The retaining lawyer is entitled to know about all prior testimony, published writings or positions by 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.

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

V. CONTINGENT COMPENSATION OF EXPERTS IN LITIGATED MATTERS

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

Comment

Compensation of experts in litigated matters should be determined at the outset of an
engagement and should be structured to preserve the integrity of the expert’s opinion. The
arrangement for a contingent fees has the great potential to undercut the 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.
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

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

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

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

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

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

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

4. **Summary of Minority Views**

None of which we are aware.
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.

AMERICAN BAR ASSOCIATION

SECTION OF ANTITRUST LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association supports the principle that the award
2 of damages or injunctive relief under federal or state antitrust and competition law
3 should require a finding of “competitive” injury of a type that harms not just the
4 plaintiff or plaintiffs, but also harms competition itself.
EXECUTIVE SUMMARY

Submitting Entity: Section of Antitrust Law

Submitted by: Richard M. Steuer
Chair

1. Summary of Resolution

The Section of Antitrust Law recommends that the American Bar Association adopt a policy that supports the principle that the award of damages or injunctive relief under federal or state antitrust and competition law should require a finding of “competitive” injury of a type that harms not just the plaintiff or plaintiffs, but also harms competition itself.

2. Summary of Issue That the Resolution Addresses

A case pending in the Supreme Court of State of California involves a decision by the California Court of Appeals that antitrust injury is established by proof of injury to a competitor.

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

In this Resolution and Report, the Section of Antitrust Law recommends the adoption of policy to support the filing of an ABA brief *amicus curiae* in support of the antitrust injury standard.

4. Summary of Any Minority Views that Have Been Identified

The Section of Antitrust Law is not aware of any minority views that are relevant to this resolution.
RESOLVED, That the American Bar Association supports the principle that “private” lawyers representing governmental entities are entitled to qualified immunity from 42 U.S.C. Section 1983 claims when they are acting "under color of state law".
EXECUTIVE SUMMARY

1. Summary of the Resolution

Lawyers retained to work with government employees in conducting an internal affairs investigation should not be precluded from asserting qualified immunity solely because of status as a “private" lawyer rather than a government employee.

2. Summary of the Issue that the Resolution Addresses

State and local governments routinely retain outside counsel to meet various legal needs. If outside counsel, acting under color of state law, cannot claim qualified immunity, there will be far fewer attorneys willing to serve the public in these roles. Further, outside counsel may not pursue vigorous representation due to concerns over potential exposure to liability, and due to the potential risks involved, outside counsel may charge higher fees which governments today cannot readily afford.

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

This resolution will make it clear that the ABA opposes the automatic preclusion of qualified immunity for “private” attorneys who undertake work for the government.

4. Summary of Minority Views

None known