

**AMERICAN BAR ASSOCIATION  
SECTION OF LITIGATION  
REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

- 1 RESOLVED, That the American Bar Association adopts the black letter of the
- 2 updated [Civil Trial Practice Standards](#) dated February 2007.

**Black Letter of the updated Civil Trial Practice Standards, February 2007**  
**Revised and New Standards**

**12. Use of Tutorials to Assist the Court**

**a. Pretrial Use of Tutorials.** In cases involving complex technology or other complex subject matter which may be especially difficult for non-specialists to comprehend, the court may permit or require the use of tutorials to educate the court. Tutorials are intended to provide the court with background information to assist the court in understanding the technology or other complex subject matter involved in the case. Tutorials may, but need not, seek to explain the contentions or arguments made by each party with respect to the technology or complex subject matter.

**b. Selection of Type of Tutorial.**

- i) In any case in which the court believes one or more tutorials might be useful in assisting it in understanding the complex technology or other complex subject matter, the court should invite the parties to express their views on the desirability of one or more tutorials.
- ii) Once the court decides to permit or require one or more tutorials, it should invite the parties to suggest the subject matter and format of each tutorial.
- iii) If the parties cannot agree on the subject matter and format, the court should invite each party to submit a description of any tutorial it proposes and to explain how that tutorial will assist the court and why it is preferable to the tutorial proposed by another party. The court may approve one or more tutorials proposed by the parties, or the court may fashion its own tutorial after providing the parties with an opportunity to comment on the court's proposed subject matter and format.

**c. Procedures for Presentation.** A court may consider the following procedures for the presentation of tutorials:

- i) An in-court or recorded presentation by an expert jointly selected by the parties.
- ii) An in-court or recorded presentation by one or more experts on behalf of each party.
- iii) An in-court or recorded presentation by counsel for each party.

- iv) A combined in-court or recorded presentation by counsel and one or more experts on behalf of each party.
- v) An in-court or recorded presentation by an expert appointed by the court, which may include cross-examination by counsel for each party.
- vi) Recorded presentations that have been prepared for generic use in particular kinds of cases by reliable sources such as the Federal Judicial Center.

**d. Trial Use of Tutorials.** In cases involving complex technology or other complex subject matter which may be especially difficult for non-specialists to comprehend, the court may permit or require the use of tutorials to educate the court or jury during one or more stages of the trial. Trial tutorials are intended to provide the court or jury with background information to assist in understanding the technology or other complex subject matter involved in the case. Tutorials may, but need not, seek to explain the contentions or arguments made by each party with respect to the technology or complex subject matter.

**e. Selection of Type of Tutorial.** The court should use the process set forth in 12.b. above.

**f. Procedures for Presentation.**

- i) In a bench trial, the court may consider using any of the procedures set forth in 1.b. above.
- ii) In a jury trial, the court should consider the use of tutorials in connection with interim statements and arguments as provided in Standard 14.
- iii) In both bench and jury trials, the court should provide parties with a full opportunity to present admissible evidence in support of their cases that may differ from or quarrel with information presented in a tutorial and to argue that the information presented in a tutorial should be rejected by the court or jury.

**13. Limits on Trial Presentation.**

**a. Procedure.** Limits on trial presentation should be imposed only after the court has:

- i. Made an informed analysis of the case and of the parties' plans for trial;
- ii. Discussed with the parties the possibility of voluntary, self-imposed limits; and

- iii. Afforded the parties the opportunity to be heard as to the amount of time, or number of witnesses or exhibits, they believe they require in order to present their positions fairly.
- b. Discretion.** Subject to the judge's ultimate responsibility to ensure a fair trial and to afford the parties a fair opportunity to be heard, the court should consider whether to enforce voluntary limits agreed to by the parties or to impose reasonable limits on trial presentation, including limits on:
- i. The total time to be allowed each party or side for all direct and cross-examinations;
  - ii. The length of examination and cross-examination of particular witnesses;
  - iii. The number of witnesses or exhibits to be offered on a particular issue or in the aggregate; and
  - iv. The length of opening statements and closing arguments.
- c. Notice to Parties.** The court should notify the parties of any limits it intends to impose sufficiently in advance of trial to permit them to prepare their cases accordingly.
- d. Factors.** In fashioning trial presentation limits, the court should consider:
- i. The complexity of the case;
  - ii. The claims and defenses of the parties;
  - iii. The respective evidentiary burdens of the parties;
  - iv. The subject matter of evidence that is considered for limitation; and
  - v. Whether proposed limits allocate trial time fairly.
- e. Types of Limits.** If the court determines that limits are appropriate, it is generally preferable to limit the total amount of time allocated to each party or side, rather than to limit the number of witnesses or exhibits, or the duration of a particular examination.
- f. Modification.** The court should reassess imposed limits in light of developments during trial, and may grant an extension upon a showing of good cause. After trial has commenced, the court ordinarily should not shorten imposed limits, in light of the parties' reliance thereon, absent disposition of claims or defenses as to which evidence or argument was planned.

- g. Methodology.** If the Court determines to limit the total time allowed to each party, it should enter a written order setting forth those limits and describing the methodology for implementing them.
- i. The Order should make clear what activities are and are not included in the total time limit. Specifically, it should state whether the limit applies to opening statements, closing statements, all witness examinations (whether conducted live in Court or by the reading or playing of previously taken testimony), and time spent reading evidence into the record or publishing evidence to the jury. In general, the time limit should not apply to breaks, time spent arguing motions, objections or discussing other matters with the Court.
  - ii. The Order should designate a neutral person or persons who will be in charge of timing the proceedings. That person could be the Judge, the court reporter, or some designated courtroom official such as a courtroom deputy or clerk.
  - iii. The Order should state that at the end of each trial day, the Court should announce the total elapsed time to be charged to each party for that day and the total time remaining for each party. Those times should be noted for the record at the end of each trial day. The Order should require that any disputes about elapsed time should be raised and resolved immediately.

## **17. Summary Exhibits and Witnesses.**

- a. Discretion.** In cases of appropriate complexity, if it will assist the jury to understand the evidence or to determine a fact in issue, the court may receive for illustrative purposes
- i. a summary of previously-introduced evidence in the form of a chart, diagram, graph or other demonstrative exhibit, and
  - ii. accompanying testimony explaining the exhibit and synthesizing the evidence that it summarizes, provided that:
    - A. all of the summarized items have previously been received in evidence;
    - B. the preparer of the summary, or a person suitably knowledgeable as to its preparation and contents, is or has been made available for cross-examination; and



19. **"Qualifying" Expert Witnesses.** The court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so.
  
23. **Electronic Filing.**  
The court should consider the use of electronic filing processes as recommended by the American Bar Association in its Standards Relating to Court Organization, Standard 1.65, "Court Use of Electronic Filing Processes."
  
27. **Organizing the Complex Case for Trial.**
  - a. **Effective Pre-Trial Management.** In complex cases, it will assist the ultimate decision-making by the trier-of-fact, whether in a jury or bench trial, if the parties and the Court work closely together from the inception of the case to encourage prompt and meaningful judicial involvement in organizing the complex case for trial through effective pre-trial management.
  
  - b. **Cooperation Amongst Counsel and the Court.** Complex litigation places burdens on both the Court and litigants in terms of proper management of both judicial resources and the resources of the parties. Court supervision and control should be dispensed in the context of mutual cooperation and input between the Court and the attorneys that addresses and is reflective of the needs of both the Court and the parties.
  
  - c. **Input to the Court.** Counsel for the parties should assist the Court in becoming familiar with the substantive issues involved in the complex case at an early date.
    - i. The Court should request and the parties should submit at an early date a joint status report that includes a proposed Case Schedule and Litigation Plan that outlines the nature and complexity of the case, and
    - ii. Prior to the issuance of a scheduling order in the case, the Court should conduct a scheduling conference during which the Court and counsel discuss implementation of an appropriate Case Schedule and Litigation Plan.
  
  - d. **Case Schedule Milestone Dates.** The Case Schedule and Litigation Plan entered by the Court should include sequential milestone dates for the parties' submission and the Court's determination of substantive motions well in advance of any trial required pretrial statements or pretrial orders.
  
  - e. **Periodic Monitoring and Conferences.** The Case Schedule and Litigation Plan should provide for the Court's continuing monitoring of the complex case's progress through periodically scheduled status conferences, which may be telephonic for purposes of convenience, efficiencies and economics. In addition, the Court should allow the parties to request a status conference at any time during the pendency of the action.

- f. **Early and Timely Judicial Rulings.** The Court should endeavor to familiarize itself with substantive issues in the early stages of the complex case and render timely decisions regarding disputes and motions, particularly those involving issues that can alter the course of the litigation including the costs and burdens experienced by the litigants.

## 28. **Judicial Involvement with Settlement.**

- a. **Communication of Availability of Settlement Assistance.** The court should advise the parties of available forms of settlement assistance at the first opportunity, whether at the initial case management or other hearing or in the initial scheduling or administrative order.
- b. **Conferral Requirement.** The court should direct the parties to confer regarding whether and what forms of settlement assistance are appropriate for the case and when such assistance should be provided. The court should direct the parties to advise the court of the results of their conferral and identify any alternative dispute resolution mechanisms in which all parties consent to participate and the agreed timing of such participation.
- c. **Parties in Agreement.** The court should accommodate the parties, to the extent resources are available, by providing any settlement assistance requested, including referral to available alternative dispute resolution mechanisms, such as mediation or settlement conference with a private mediator, senior, magistrate or other judge, or participation by the presiding judge in a settlement conference.
  - i. If the parties prefer to proceed with a settlement conference before the presiding judge, the court should require the parties to waive recusal as a condition of the presiding judge's participation. The parties should not be offered a settlement conference with the presiding judge in the context of an expected bench trial.
  - ii. No party should be required to consent to participation by the presiding judge in a settlement conference. If consent is given, any party should be permitted to withdraw consent at any time, and notice of withdrawal of consent should be made by notice from all parties, without identification of which party is withdrawing consent. The withdrawal of consent does not affect the parties' earlier waiver of recusal.
- d. **Parties Not in Agreement.** If the parties cannot agree on the use of available settlement assistance or the timing of such assistance, the court may order the parties to participate in one or more available alternative dispute resolution

mechanisms, other than participation by the presiding judge in a settlement conference.

- e. **No *Ex Parte* Contact With Third-Party Neutral.** The court should not communicate *ex parte* with any third-party neutral, including a senior, magistrate or other judge, involved in an alternative dispute resolution mechanism about the course of negotiations or the merits of the case.
- f. **No Delay of Proceedings.** The court ordinarily should not delay proceedings or grant continuances to permit the parties to engage in settlement negotiations.
- g. **Final Pretrial Proceedings.** Whether or not a case has previously been the subject of settlement talks or assistance, the court should ordinarily raise the question of settlement assistance with the parties during final pretrial proceedings. At this point, the parties should have a grounded sense of the strengths and weaknesses of their respective cases that could contribute to a resolution by settlement.
- h. **Confidential Settlements.** Unless contrary to law, if the parties agree to confidentiality, the court should not require the settlement terms to be on the record, even if the court or a court-appointed third-party neutral participated in the conference leading to the settlement.

## **REPORT**

### **THE UPDATED CIVIL TRIAL PRACTICE STANDARDS**

#### **Introduction**

The civil jury trial lies at the foundation of the American system of justice, constitutionally protected in the Seventh Amendment. Promoting improvements in the jury trial is a core mission – and one of the highest priorities – of the American Bar Association, and is reflected in existing ABA standards. *See, e.g.*, Standards Relating to Juror Use and Management; Standards relating to Trial Courts; Trial Management Standards; and The American Jury Project.

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

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

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

Based on its work, the Update Task Force created three revised and four new Standards. The revised and/or new standards integrated into the Updated Standards were unanimously adopted by the Council of the Section of Litigation in June 2004 and/or September 2006. The revised and/or new Standards which are the subject of the Recommendation address the following topics.

1. Methodology to measure limits on trial presentation
2. “Qualifying” expert witnesses
3. Electronic filing
4. Use of tutorials to assist the Court
5. Summary exhibits and witnesses
6. Organizing the complex case for trial
7. Judicial involvement with settlement

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

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

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

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

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

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

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

Procedures for a “chess clock”-like methodology to measure limits on trial presentation are now included at 13g in Updated Standard 13. This revision provides guidance for the

developing practice by judges to measure the time limits on trial presentation imposed by the Court.

Updated Standard 19 regarding Qualifying Expert Witnesses provides, “The Court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask for the Court to do so.” The prior version of the Standard included the introductory phrase, “except in ruling on an objection.” The Standard has been modified in furtherance of the objective of avoiding judicial rulings in the presence of a jury to the effect that an expert rendering testimony is “qualified.”

Updated Standard 23 addresses Electronic Court Filings. The Updated Standard is consistent with the filing processes recommended by the American Bar Association in its Standards Relating to Court Organization, Standard 1.65, “Court Use of Electronic Filing Processes” adopted as ABA policy on February 9, 2004.

Updated Standard 12 regarding the Use of Tutorials to Assist the Court is a new standard. It is premised on the fact that tutorials have been recognized to be helpful in understanding complex subjects. *See, Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1093 (9<sup>th</sup> Cir. 2005) (Rymer, J., concurring).

Updated Standard 17 covers the topic of Summary Exhibits and Witnesses. This new standard is derived from substantial case law addressing the use, for illustrative purposes, of summary exhibits and witnesses.

Updated Standard 27 pertains to Organizing the Complex Case for Trial. This new standard is designed to provide guidance in the application and implementation of Fed. R. Civ. P. 16 in furtherance of organizing the complex case for trial. The Updated Standard stresses the importance of cooperative efforts between the Court, the attorneys and their clients to prepare the complex case for trial consistent with case law and the Manual for Complex Litigation. *See, Newton v. A.C. & S., Inc., et al.*, 918 F.2d 1121, 1126 (3<sup>rd</sup> Cir. 1990), *Federal Judicial Center, Manual for Complex Litigation*, 4<sup>th</sup> § 1013 (2004).

Finally, Updated Standard 28 addresses Judicial Involvement with Settlement and is another new standard. Such judicial involvement provides guidance for a process that is explicitly contemplated by Fed. R. Civ. P. 16, but for which there are no clearly developed processes and procedures.

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

### **Conclusion**

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

Respectfully submitted,

Kim J. Askew  
Chair  
Section of Litigation

February 2007



**GENERAL INFORMATION FORM**

To Be Appended to Reports with Recommendations  
(Please refer to instructions for completing this form.)

Submitting Entity: Section of Litigation

Submitted By: Kim J. Askew, Chair, Section of Litigation

1. Summary of Recommendation(s).

The Section of Litigation recommends that the Association adopt the black letter of the revised and/or new Standards that have been integrated into the Civil Trial Practice Standards approved by the ABA House of Delegates in February 1998 to become the Updated Civil Trial Practice Standards dated February 2007.

2. Approval by Submitting Entity.

The revised and /or new Standards within the Updated Civil Trial Practice Standards were unanimously approved by the Council of the Section of Litigation in June 2004 and September 2006.

3. Has this or a similar recommendation been submitted to the House or Board previously?

The Updated Standards that are the subject of the Recommendation have been integrated into the Civil Trial Practice Standards approved by the ABA House of Delegates in February 1998.

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

The Updated Civil Trial Practice Standards advance the Association's core mission of promoting improvements to the system of justice in general and the civil jury trial in particular. These Updated Standards draw upon and advance the policies set forth in existing ABA standards, including specifically the Civil Trial Practice Standards adopted as ABA policy in February 1998, the Standards relating to Juror Use and Management; the Standards relating to Trial Courts; and the Trial Management Standards.

5. What urgency exists which requires action at this meeting of the House?

The Updated Civil Trial Practice Standards fill an important gap. Just as was the case nine years ago in February 1998, when the ABA House of Delegates approved the original Civil Trial Practice Standards, the revised and new Standards furnish the bench and bar needed guidance on how to deal with issues that recur regularly pretrial and/or at trial, but are not dealt with by the rules of evidence or procedure, or elsewhere. The procedures recommended in the Updated Standards are particularly useful in complex cases, and the civil jury trial is under attack on the theory, *inter alia*, that juries are unable to decide complicated cases fairly. In recognition of the Association's abiding goal of promoting improvements in the jury trial, the earliest possible action by the House of Delegates is urged.

6. Status of Legislation. (If applicable.)

Not applicable.

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

None.

8. Disclosure of Interest. (If applicable.)

Not applicable.

9. Referrals.

The Updated Standards have not yet been, but will be, submitted for consideration to the Judicial Division, the Tort Trial and Insurance Practice Section, the Section of Antitrust Law and the Section of Business Law, all of which co-sponsored the original Civil Trial Practice Standards

10. Contact Person. (Prior to the meeting.)

Patricia L. Refo  
Snell & Wilmer L.L. P.  
One Arizona Center  
Phoenix, AZ 85004-2202  
Telephone: (602) 382-6290  
Fax: (602) 382-6070  
E-mail: prefo@swlaw.com

Rudy A. Englund  
Lane Powell PC  
1420 Fifth Avenue, Ste. 4100  
Seattle, WA 98101  
Telephone: (206) 223-7042  
Fax: (206) 223-7107  
E-mail: englundr@lanepowell.com

11. Contact Person. (Who will present the report to the House.)

Patricia L. Refo  
Snell & Wilmer L.L. P.  
One Arizona Center  
Phoenix, AZ 85004-2202  
Telephone: (602) 382-6290  
Fax: (602) 382-6070  
E-mail: prefo@swlaw.com

12. Contact Person Regarding Amendments to this Recommendation. (Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax, and ABA/net number of the person to contact below.)

There are no known amendments at this time.

## **EXECUTIVE SUMMARY**

### **Summary of the Recommendation:**

The Recommendation proposes that the Association adopt the black letter of the revised and/or new Standards that have been integrated into The Civil Trial Practice Standards approved by the ABA House of Delegates in February 1998 to become the UPDATED CIVIL TRIAL PRACTICE STANDARDS. The revised and/or new standards in the Updated Standards address practical aspects of trial that regularly recur but are not fully addressed by rules of evidence or procedure. The UPDATED STANDARDS advance the Association's core mission of promoting improvements to the system of justice in general and the civil jury trial in particular. They are designed to assist judges and lawyers who try civil cases in state and federal court.

### **Summary of the Issue which the Recommendation Addresses:**

The civil jury trial is under attack, often on the theory that juries are unable to decide complicated cases fairly. The UPDATED STANDARDS recommend practices and procedures that are particularly useful in complex cases. The UPDATED STANDARDS are predicated on the recognition that, in an era of increasingly complicated litigation, there are methods for enhancing jury comprehension and minimizing jury confusion that merit wider consideration and use. The UPDATED STANDARDS are designed to furnish practical guidance for the implementation and use of many of these methods.

### **Explanation of How the Proposed Policy Position Will Address the Issue:**

The UPDATED CIVIL TRIAL PRACTICE STANDARDS fill an important gap. They address practical, recurring issues that are not fully addressed in existing rules of evidence or procedure. The UPDATED STANDARDS are not intended to be a substitute for existing evidentiary or procedural rules but rather to supplement and operate consistently with those rules. The UPDATED STANDARDS suggest a variety of approaches and recognize that ultimately the trial court must exercise its discretion in light of the circumstances before it. The UPDATED STANDARDS have been drafted to operate consistently with existing law; they expressly provide that, in the event of any inconsistency, the law governing in the jurisdiction prevails.

### **Summary of Any Minority Views or Opposition which Have Been Identified:**

There are no known minority views or opposition. The black letter of the new and/or revised Standards in the UPDATED CIVIL TRIAL PRACTICE STANDARDS were unanimously adopted by the Council of the Section of Litigation in June 2004 and/or September 2006.