

**AMERICAN BAR ASSOCIATION**

**SECTION OF LITIGATION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

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

3

4           **FURTHER RESOLVED**, That the American Bar Association urges counsel to consider  
5 utilization of the Guidelines in retaining experts for client matters.



46 to address proceedings that take place in the United States or under United States law.  
 47 They do not intend to address obligations that experts may have to foreign tribunals. They  
 48 also do not govern the relationship between tribunals and experts hired by those tribunals,  
 49 but we would expect them to be helpful to tribunals as well, for example, as a guide to the  
 50 disclosures that may be required to be made to the tribunal or to counsel for the parties.  
 51 They are intended to be interpreted with a rule of reason and with common sense.

52  
 53 Comment  
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55 The purpose of these Guidelines is to set forth appropriate guidelines for engagements by  
 56 a lawyer of an expert on behalf of a client in litigated or contested matters. The intent is for them  
 57 to apply where appropriate to all litigated matters, whether the expert is proposed as a testifying  
 58 expert or simply retained as a consulting expert, and whether the matters are to be resolved in  
 59 court, by arbitration, mediation or through any other recognized ADR procedure. They also are  
 60 intended to apply to matters involving internal investigations but not to commercial transactions.  
 61 The extent to which the lawyer chooses to ask the expert to agree to follow them will depend  
 62 upon the nature of the engagement and the jurisdiction or jurisdictions in which the engagement  
 63 will be performed.  
 64

65 The range of expertise required in connection with legal matters is obviously quite broad  
 66 and experts may have ethical requirements governing their chosen profession or field of  
 67 expertise. These Guidelines are not intended to supplant any such ethical requirements nor  
 68 create any lesser standards of conduct. They are intended to create a set of best practices that  
 69 lawyers should seek where appropriate with respect to experts retained by lawyers on behalf of  
 70 their clients for the applicable matters. In so doing, it is hoped that clients, retaining lawyers and  
 71 experts, will have a clear and common understanding of the expert's expected conduct.  
 72

73 **I. INTEGRITY/PROFESSIONALISM**

74 **The lawyer should seek an expert who will act with integrity and in a professional**  
 75 **manner throughout an engagement.**  
 76

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

## II. COMPETENCE

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

### Comment

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

#### Being Competent

Prior to accepting an engagement the lawyer and expert together should determine whether the expert can perform the engagement competently. Competency requires:

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

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

#### Acquiring Competency

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

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

137 Competency can be acquired in various ways including association with another expert or other  
138 person whom the retained expert reasonably believes has the necessary knowledge, education,  
139 training or experience. If the engagement cannot be completed competently, then the lawyer  
140 should not retain the expert or cause the expert retention to be terminated.  
141

### 142 **III. CONFIDENTIALITY**

143 **The lawyer must assure that the expert treats any information received or work**  
144 **product produced by the expert during an engagement as confidential, and secure an**  
145 **understanding from the expert that he or she shall not disclose any such information except**  
146 **as required by law, as retaining counsel shall determine and advise, or with the consent of**  
147 **the client.**  
148

#### 149 **Comment**

150  
151 This Guideline requires that the lawyer take steps to ensure that all information received  
152 and work product produced during an engagement to be treated as confidential except as required  
153 by law or with the consent of the client.  
154

155 The common law has long recognized that client confidences shared with legal counsel  
156 must be protected from disclosure to third parties. Confidentiality “contributes to the trust that is  
157 the hallmark of the client-lawyer relationship.” Comments, ABA Model Rules of Professional  
158 Conduct, Rule 1.6 “Confidentiality of Information,” Comment 2.  
159

160 Similarly, expert witnesses who are engaged on behalf of clients in legal matters must  
161 generally protect confidential information from disclosure to third parties. Disclosure of  
162 confidential information can serve as grounds for disqualification of an expert witness. *See, e.g.,*  
163 *Northbrook Digital LLC v. Vendio Services, Inc.*, 2009 WL 5908005, at \*I (D. Minn. Aug. 26,  
164 2009); *Koch Refining Co. v. Jennifer L. Boudreaux M/V*, 85 F.3d 1178, 1182-83 (5th Cir.  
165 1996). “Courts have inherent power to disqualify expert witnesses both to protect the integrity of  
166 the adversary process and to promote public confidence in the legal system,” *BP Amoco*  
167 *Chemical Co. v. Flint Hills Res., Inc.*, 500 F. Supp.2d 957, 959 (N.D. Ill. 2007). Disqualification  
168 of experts, nonetheless, is viewed as a drastic measure not to be taken lightly. *Id.* at 960.  
169

170 A two-part test is generally followed when a court determines whether an expert should  
171 be disqualified because he or she has improperly disclosed confidential information: (1) the  
172 retaining party and the expert must have had a relationship that permitted the retaining party to  
173 have a reasonable expectation that its communication with the expert would remain in  
174 confidence; and (2) confidential information must have been provided to the expert by the party  
175 seeking disqualification. *Koch Refining*, 85 F.3d at 1182-1183. *See also Northbrook Digital*  
176 *LLC*, 2009 WL 5908005, at \*I. This test also is employed when an expert has a prior relationship  
177 with an opposing party. *See Ascom Hasler Mailing Systems, Inc. v. United States Postal Service*,  
178 267 F.R.D. 9, 12 (D.D.C. 2010).  
179  
180

181 The determination of whether a party has a reasonable expectation of a confidential  
182 relationship with an expert depends on a wide range of factors, including “whether the expert  
183 met once or several times with the moving party; was formally retained or asked to prepare a  
184 particular opinion; or was asked to execute a confidentiality agreement.” *Northbrook Digital*  
185 *LLC*, 2009 WL 5908005, at \*2. The conduct guideline set forth above concerning confidentiality  
186 reinforces and is consistent with the rules generally applied by courts.

187  
188 Lawyers should secure the agreement of experts, preferably in writing, to recognize their  
189 obligation to maintain the confidentiality of confidential information. And lawyers and/or clients  
190 should identify information as confidential at the time it is provided so there can be no confusion  
191 as to an expert’s obligations.

192  
193 Because confidentiality is so important to a lawyer’s relationship with his or her client,  
194 as well as to the integrity of the judicial process as a whole, information regarding the  
195 engagement should only be disclosed to third parties when explicit consent is provided by the  
196 client or when disclosure is otherwise required by law. Lawyers should require that requests for  
197 such information directed to the expert by third parties, either informal or by legal process,  
198 should be referred to retaining counsel or the client so that confidentiality may be protected.  
199 Certain engagements may never become public and the expert should not be placed in the  
200 position of making determinations regarding what documents or information should be deemed  
201 confidential. It is preferable that a client’s consent to the disclosure be provided in writing,  
202 although this is not required.

203  
204 Certain matters are required by law to be disclosed in certain experts’ reports. Federal  
205 Rule of Civil Procedure 26 requires certain disclosures regarding expert testimony in the form of  
206 written expert reports, and in other circumstances, in lawyer disclosures. Written reports are to  
207 include the identity of the expert, all opinions the witness will express and the basis and reasons  
208 for them, the facts or data considered by the witness in forming them, exhibits that will be used  
209 to summarize or support them, the witness’s qualifications, including a list of all publications  
210 authored in the previous ten years, a list of cases in which the witness testified at trial or by  
211 deposition in the past four years, and a statement of expert compensation. Fed. R. Civ. P.  
212 26(a)(2)(B). Many state courts have similar requirements. Certain other lawyer disclosures  
213 must be made with respect to testifying experts not required to provide written reports. Fed. R.  
214 Civ. P. 26(a)(2)(C). Examples of situations in which disclosure to a third party may be required  
215 by law include direct court orders requiring disclosure and ethical rules imposed on experts  
216 under the law, such as an engineer’s obligation to notify authorities of conditions that may put  
217 human life in jeopardy. Other examples may exist as well. The expert should be advised that the  
218 expert should not be making the decision of what is required by law to be disclosed, but should  
219 refer all requests for information and defer all decisions on what to disclose to retaining counsel.

#### 220 221 **IV. CONFLICTS OF INTEREST AND DISCLOSURE**

222  
223 **Unless the client provides informed consent, the lawyer should take steps to assure**  
224 **that the expert’s acceptance of the engagement will not create a conflict of interest, *i.e.*, that**  
225 **the expert’s provision of services will be materially limited by the expert’s duties to other**

226 clients, the expert's relationship to third parties, or the expert's own interests. To facilitate  
 227 a determination of whether a conflict of interest exists, the lawyer should ascertain from  
 228 the expert all present or potential conflicts of interest. Among the matters that need be  
 229 determined are the following:

- 230
- 231 1. Financial interests or personal or business relationships with lawyers, clients,  
 232 or parties involved or reasonably likely to be involved in the matter.
- 233
- 234 2. Communications or contacts with any adverse party or lawyer.
- 235
- 236 3. Prior public testimony, published writings or opinions of the expert in the  
 237 last 7 years in other matters that directly bear on the subject matter of the  
 238 engagement.
- 239
- 240 4. Determinations in the last 7 years in which a judge has opined adversely on  
 241 the expert's qualifications or credibility, or in which any portion of an  
 242 expert's opinion was excluded on substantive grounds going to the soundness  
 243 of the opinion or its credibility.
- 244

245 Since the lawyer needs to be advised of any changes in this information throughout  
 246 the engagement, the expert should be asked to supplement all these disclosures as needed.

#### 247 Comment

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249

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

253

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

262

263 Many of the disqualification controversies have arisen when experts are consulted by one  
 264 side but later hired by another. In general, "side-switching" disputes turn upon factors such as  
 265 whether there was an objectively reasonable expectation of confidentiality and whether  
 266 confidential information was disclosed to the expert who was later retained by the opposing  
 267 party. *See Paul v. Rawling Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988). Another  
 268 scenario occurs with respect to an expert who, prior to the conclusion of the engagement, joins or  
 269 is affiliated with an organization that also has members working for the opposing side. The  
 270 Guidelines take no position concerning the extent to which one professional's knowledge would  
 271 be imputed to another member of the same firm. Should such problems arise, and irrespective of

272 whether disqualification is requested or granted, the expert should be asked to agree that the  
273 expert's organization will build a firewall between any professional, with past or present  
274 involvement on one side of an engagement, and those with any such involvement on an opposing  
275 side. Whether this will be sufficient protection to prevent disqualification is an issue for the  
276 courts. These Guidelines do not suggest that the same issues would be presented in an academic  
277 setting or by memberships in professional societies of experts.  
278

279 Relationships that should be determined include financial interests, and personal or  
280 business relationships with adverse or other lawyers, clients or other parties, all of which have  
281 the potential for creating conflicts of interest. This of course would not require disclosure of  
282 casual contact in professional settings but if there is doubt as to whether the relationship is  
283 sufficiently casual, the expert should err on the side of disclosure. To the extent these  
284 relationships are covered by confidentiality agreements, that fact should be disclosed along with  
285 enough information that may properly be disclosed to allow the retaining lawyer to make an  
286 informed judgment. This disclosure requirement not only pertains to relationships with the  
287 existing parties but also relates to relationships with other parties who are reasonably likely to  
288 become involved. Thus, for example, if the expert has an ongoing relationship with a  
289 manufacturer of a given product and the engagement relates to an action against another  
290 manufacturer of the same type of product, the relationship with the first manufacturer is the one  
291 that should be disclosed.  
292

293 Communications with the adverse party or its lawyer are another area of essential  
294 disclosure. The adverse party might have contacted the expert to explore retention of that expert  
295 before the expert was approached by the current retaining lawyer. Or the expert may be  
296 approached by the adverse party to retain the expert for another matter during the course of an  
297 engagement. These contacts should be promptly disclosed so that they may be fully explored by  
298 the retaining lawyer.  
299

300 The Federal Rules of Civil Procedure currently require the disclosure of all matters in  
301 which the expert testified in the past four years and a list of all publications authored in the past  
302 ten years. But the disclosure obligation to retaining lawyers and their clients should go beyond  
303 those required disclosures. The retaining lawyer is entitled to know about all prior public  
304 testimony, published writings or opinions of an expert, at least in the last 7 years, that directly  
305 bear on the subject matter of the engagement. This of course would not require disclosure of  
306 testimony, unpublished writings or opinions protected by confidentiality orders or agreements or  
307 require the expert to search materials not accessible to the expert. The goal is to inform the  
308 retaining lawyer of materials that may be useful to the other side in cross examination.  
309 Inconsistent positions, whether in testimony, writings, speeches, or otherwise, to the extent  
310 discovered by the adverse party, will likely be the subject of cross-examination by the adverse  
311 party. The retaining lawyer should be aware of these positions from the outset of the  
312 engagement. Surprises are never helpful. To the extent positions were not necessarily  
313 inconsistent but directly bear on the subject matter of the engagement, those differences may also  
314 have the potential to impact the expert's credibility. Accordingly, these positions also should be  
315 disclosed to the retaining lawyer. By referring to opinions that directly bear on the subject  
316 matter of the engagement, the Guideline again refers to opinions that could be used in cross  
317 examination.

318 Court rulings that reflect unfavorably upon the expert’s earlier testimony should also be  
 319 disclosed. These include determinations by a court that an expert was not qualified in a field of  
 320 engagement. Retaining lawyers should also be advised of prior rulings in which all or part of an  
 321 expert’s opinion was excluded on substantive grounds going to the soundness of the opinion or  
 322 its credibility, or in which a judge commented adversely on an expert’s qualification or  
 323 credibility. Again, the goal is to make the lawyer aware of materials reasonably likely to be  
 324 discovered by the adverse lawyer. It is not intended to require experts to retain materials they  
 325 would not ordinarily retain or to breach any confidential relationships. These disclosures would  
 326 not be required if an expert witness were excluded because the testimony was cumulative or not  
 327 a proper subject for expert testimony, reasons which do not challenge the underlying soundness  
 328 of the expert’s opinion or expertise. Adverse court determinations may not be insurmountable  
 329 obstacles but the retaining lawyer should be informed of such facts from the outset so that the  
 330 lawyer can make the required evaluation.

331  
 332 The need for disclosure continues throughout the engagement. Relationships may change  
 333 during the course of an engagement or contacts by an adverse party may occur with respect to a  
 334 new potential matter. Accordingly, all of the above disclosures should be supplemented as  
 335 needed.  
 336

## 337 V. CONTINGENT COMPENSATION OF EXPERTS IN LITGATED MATTERS

338 **No lawyer may offer compensation that is contingent on the outcome of litigation.**  
 339

### 340 Comment

341  
 342 Compensation of experts in litigated matters should be determined at the outset of an  
 343 engagement and should be structured to preserve the integrity of the expert’s opinion. The  
 344 arrangement for a contingent fees has the great potential to undercut the opinions to be offered  
 345 and interfere with the objectivity of the expert. Contingent fees are so universally rejected that  
 346 many codes that govern particular fields of expertise already prohibit compensation dependent  
 347 upon or contingent on the outcome of the matter.  
 348

349 The ABA Model Rules of Professional Conduct prohibit offering an inducement to a  
 350 witness that is prohibited by law. Rule 3.4(b). Comment 3 explains that, under the common law  
 351 in most jurisdictions, it is improper to pay an expert a contingent fee. As the Annotated Model  
 352 Rules explain, the expert’s fees may not be contingent on the outcome “because of the improper  
 353 inducement this might provide to an expert to testify falsely to earn a higher fee. *See New*  
 354 *England Tel. & Tel. Co. v. Bd. of Assessors*, 468 N.E.2d 263 (Mass 1984) (majority rule ‘is that  
 355 an expert witness may not collect compensation which by agreement was contingent on the  
 356 outcome of a controversy’).” Annotated Model Rules at 329 (6<sup>th</sup> Ed. 2007). The prior Code of  
 357 Professional Responsibility expressly prohibited contingent fees for expert witnesses. DR7-109.  
 358 While some cases have permitted contingent fees to consulting experts, such as those who  
 359 located testifying experts, *see Ojeda v. Sharp Cabrillo Hospital*, 10 Cal. Rptr. 2d 230 (Ct. App.  
 360 1992); *Schackow v. Medical-Legal Consulting Service, Inc.*, 416 A.2d 1303 (Md. Ct. Spec. App.  
 361 1980), the better view is expressed in those cases finding such fees against public policy. *See,*  
 362 *e.g., First Nat’l Bank v. Malpractice Research*, 688 N.E.2d 1179 (Ill. 1997) (against public

363 policy to permit a consulting firm to be paid pursuant to a contingency fee arrangement where  
364 the firm would locate and retain expert witnesses as well as act as a consultant); *Dupree v.*  
365 *Malpractice Research, Inc.*, 445 N.W.2d 498 (Mich. 1989) (against public policy to pay a  
366 consulting firm on a contingency fee basis where that firm provided “access to several medical  
367 experts....and provided considerable advice on trial techniques with suggested supporting expert  
368 testimony”); *see also Polo by Shipley v. Gotchel*, 542 A.2d 947 (N.J. Super. Ct. Law Div. 1987)  
369 (contingent fee consulting contract inconsistent with court rules, statutes and public policy).

370  
371 In addition, it is unethical for lawyers to share legal fees with experts. Rule 5.4 of the  
372 ABA Model Rules of Professional Conduct dictates that a lawyer or law firm shall *not* share  
373 legal fees with a non-lawyer. Similarly, Rule 1.5 of the Model Rules of Professional Conduct  
374 addresses fees. Subsection (e) describes the requirements for the division of fee between lawyers  
375 who are not in the same firm may be made. None of those requirements could be met by a fee  
376 arrangement with an expert witness.

377  
378 Furthermore, other professions bar contingent fees to experts. For example, Opinion 9.07  
379 (medical testimony) from the American Medical Association states as follows:

380  
381 Physician testimony must not be influenced by financial  
382 compensation; for example, it is unethical for a physician to accept  
383 compensation that is contingent upon the outcome of litigation.

384  
385 Similarly, Opinion 6.01 (contingent physician fees) states as follows:

386  
387 If a physician's fee for medical service is contingent on the  
388 successful outcome of a claim, such as a malpractice or worker's  
389 compensation claim, there is the ever-present danger that the  
390 physician may become less of a healer and more of an advocate or  
391 partisan in the proceedings. Accordingly, a physician fee for  
392 medical services should not be based on the value of the service  
393 provided by the physicians of patient and not on the uncertain  
394 outcome of a contingency that does not in any way relate to the  
395 value of the medical service.

396  
397 A physician's fee should not be made contingent on the successful  
398 outcome of medical treatment. Such arrangements are unethical  
399 because they imply that successful outcomes from treatment are  
400 guaranteed, thus creating unrealistic expectations of medicine and  
401 false promises to consumers.

402  
403 The American Society of Appraisers recently revised their Principles of Appraisal  
404 Practice and Code of Ethics. Section 7 addresses unethical and unprofessional appraisal  
405 practices. The first area they addressed under unethical and unprofessional practices are  
406 contingent fees (Section 7.1). The wording of Section 7.1 is somewhat similar to the way that  
407 the American Medical Association has dealt with doctors' acting as expert witnesses. Section 7.1

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408 concludes by stressing that “[t]he Society declares that the contracting for or acceptance of any  
409 such contingent fee is unethical and unprofessional.]”

410  
411 The American Society of Questioned Document Examiners has a code of ethics for their  
412 members. Each member of the Society is to abide by certain rules of conduct. One of the rules of  
413 conduct is that “no engagement shall be undertaken on a contingent fee basis.” There are other  
414 groups that have adopted similar language.

415  
416 Contingent fees should be contrasted to other fee arrangements which are certain or fixed  
417 at the outset of an engagement but payment is deferred to the conclusion of the matter. Such  
418 arrangements, however, should not make payment of the arranged fee dependent on the success  
419 or outcome of the matter. In addition, this Guideline is limited to experts retained in litigated  
420 matters in recognition of the fact that certain experts in transactional matters, such as investment  
421 bankers, commonly have fee arrangements which provide that a portion of their compensation is  
422 contingent on the completion of the transaction.

423

## REPORT

The Report establishes Guidelines for Retention of Experts By Lawyers on behalf of their clients. While many experts have ethical codes applicable to their chosen professions, there are no uniform guidelines that apply to the retention and employment of experts that separately address the issues presented when experts are retained by lawyers on behalf of their clients in connection with litigated or contested matters.

The lack of guidelines has led to (a) inconsistent expectations of expert's conduct, (b) unnecessary surprises that have negatively impacted the lawyer-expert relationship, and (c) disqualification motions challenging conduct of experts, which has, at a minimum, distracted lawyers and experts from focusing on substantive matters and caused delay and unnecessary expense. These Guidelines are an effort to create uniform best practices of what lawyers should seek from experts retained by lawyers on behalf of their clients for litigated or contested matters 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.

Upon adoption, these 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 and may even seek to incorporate them into their retainer letters, if appropriate.

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 to determine 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.

The Guidelines set forth five basic guidelines that govern the lawyer-expert relationship: Integrity/Professionalism, Competence, Confidentiality, Avoiding Conflicts of Interest and Avoiding Contingent Compensation of Experts in Litigated Matters. Conflicts of interest are sought to be avoided by requesting disclosure to the hiring lawyer in four basic areas: those addressing (1) financial or personal or business relationships; (2) communications or contacts with an adverse party or lawyer; (3) prior public testimony or opinions in other matters that directly bear on the subject matter of the engagement; and (4) prior court determinations that an

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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 issues. It is also our hope that the system will be improved as a whole when clear guidelines are established for expert conduct.

Respectfully Submitted,  
Ronald L. Marmer, Chair  
Section of Litigation  
August 2012

## I. INTEGRITY/PROFESSIONALISM

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

Lawyers and their clients are entitled to expect all experts to act with integrity and in a professional manner in any engagement and maintain the highest standards of ethical conduct. At a minimum, it expects that an expert not commit any acts that reflect adversely on the expert's honesty, trust, worthiness or fitness to serve as an expert, nor engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

## II. COMPETENCE

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

A lawyer should assure himself or herself that the expert is competent to perform the engagement. The Guideline also addresses what should be done when the expert lacks competence, in whole or in part, to undertake or complete an engagement. If the expert is not competent to complete an entire engagement, he or she should disclose the areas in which there is a lack of competence and how the expert will acquire that competence, such as by associating with another expert with the required competence, or decline or withdraw from the engagement.

## III. CONFIDENTIALITY

**The lawyer must assure that the expert treats any information received or work product produced by the expert during an engagement as confidential, and secure an understanding from the expert that he or she will not disclose any such information except as required by law, as retaining counsel shall determine and advise, or with the consent of the client.**

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

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 an engagement should only be disclosed to third-parties when explicit consent is provided by the client or when the disclosure is otherwise required by law. 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. Requests for such information by third-parties should be referred to retaining counsel so that the client's rights to confidentiality may be protected.

#### IV. CONFLICTS OF INTERESTS AND DISCLOSURE

Unless the client provides informed consent, the lawyer should take steps to assure that the expert's acceptance of the engagement will not create a conflict of interest, *i.e.*, that the expert's provision of services will be materially limited by the expert's duties to other clients, the expert's relationship to third parties, or the expert's own interests. To facilitate a determination of whether a conflict of interest exists, the lawyer should ascertain from the expert all present or potential conflicts of interest. Among the matters that need be determined are the following:

1. **Financial interests or personal or business relationships with lawyers, clients, or parties involved or reasonably likely to be involved in the matter.**
2. **Communications or contacts with any adverse party or lawyer.**
3. **Prior public testimony, published writings or opinions of the expert in the last 7 years in other matters that directly bear on the subject matter of the engagement.**
4. **Determinations in the last 7 years in which a judge has opined adversely on the expert's qualifications or credibility, or in which any portion of an expert's opinion was excluded on substantive grounds going to the soundness of the opinion or its credibility.**

**The duty of the expert to share this information is a continuing obligation. Therefore, the expert should be asked to supplement all these disclosures as needed.**

Conflicts of interest involving experts is a matter that has been addressed by many courts. It is not the intent of this Guideline to prescribe criteria to determine whether and when experts should be disqualified, a subject that evolving case law will continue to address. Instead, it seeks to avoid conflicts of interests and requests disclosure to the retaining lawyer of relationships and facts that create or have the potential to create conflicts of interest, so that the retaining lawyer may make informed judgments at the beginning of an engagement to avoid surprises or potential future problems.

Disclosure is also requested of certain prior opinions of the expert that may be problematic or the subject of cross-examination by the adverse party. For the same reason, the requested disclosure also pertains to prior court rulings that reflect adversely upon the expert's qualifications or credibility.

**V. CONTINGENT COMPENSATION OF EXPERTS IN LITIGATED MATTERS**

**No lawyer may offer compensation that is contingent on the outcome of litigation.**

This Guideline requires the compensation of experts in litigated matters to be determined at the outset of an engagement and structured to preserve the integrity of the expert's opinion. Contingent fees for experts have a great potential to undercut the opinions to be offered, interfere with the objectivity of the expert and should not be permitted. 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.

**CONCLUSION**

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

## GENERAL INFORMATION FORM

Submitting Entity: Section of Litigation

Submitted By: Ronald L. Marmer, Chair

1. Summary of Resolution(s).

The Guidelines set forth five basic principles 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 requesting disclosure to the hiring lawyer in four basic areas: those addressing (1) financial or personal or business relationships; (2) communications or contacts with an adverse party or lawyer; (3) prior testimony on positions in other matters that directly bear on the subject matter of the engagement; and (4) prior court determinations that an expert was not qualified or not credible. The disclosure obligations seek to provide a framework for informed judgments to be made by retaining lawyers at the outset of engagements to avoid future ethical issues. It is also hoped that the system will be improved as a whole when clear standards are established for expected ethical conduct.

2. Approval by Submitting Entity.

February 9, 2011; January 14, 2012

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

Yes. The resolution was withdrawn at the August 2011 and February 2012 meetings. It has been substantially revised to incorporate suggestions of other Sections.

Certain Sections had concerns about the ABA setting standards for other professions. First, while the Standards only sought to set expectations for what lawyers should expect from their experts when hired for client matters, to address the concerns of others, the Standards were changed to Guidelines, and the revised Guidelines were restructured to be a guide for lawyers in hiring experts. Second, the scope of applicability has been greatly narrowed to litigated or contested matters in the United States or under United States law. They do not purport to govern obligations that experts may have to foreign tribunals, they do not govern the relationship between tribunals and experts hired by those tribunals, and they do not apply to commercial transactions or criminal matters. Third, we added explicit references to construing the Guidelines with flexibility, common sense and a rule of reason so the explicit language does not cause unintended problems. We believe that by changing the focus to what lawyers should seek from their experts rather than suggesting what experts should or should not do, and by greatly narrowing the scope of the Guidelines, we have met the principal concerns of other Sections.

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

This Resolution does not affect any existing policies of the Association. It continues the Association's tradition of approving "best practices" and encouraging high ethical conduct.

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

These Guidelines are the result of a year-long project by the Section of Litigation to develop guidelines for conduct of experts retained by lawyers. If these Guidelines are adopted by the House, it is the Section of Litigation's intention to promulgate them to the Bar so that they may be used by lawyers when retaining experts to work on client matters. The timely adoption of these standards will encourage consistent ethical conduct and place the ABA in a leadership role on these issues.

6. Status of Legislation. (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Section plans to publish the policy widely, post it on its website, and seek coverage in its publications.

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

None

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

This resolution has been sent to other ABA entities requesting support or co-sponsorship:

Section of Administrative Law and Regulatory Practice  
 Section of Antitrust Law  
 Section of Business Law  
 Section of Criminal Justice  
 Section of Dispute Resolution  
 Section of Environment, Energy and Resources  
 Section of Family Law  
 General Practice, Solo and Small Firm Division

Government and Public Sector Lawyers Division  
Section of Health Law  
Section of Individual Rights and Responsibilities  
Section of Intellectual Property Law  
Section of International Law  
Judicial Division  
Section of Labor and Employment Law  
Section of Law Practice Management  
Law Student Division  
Section of Legal Education and Admissions to the Bar  
Section of Public Contract Law  
Section of Public Utility, Communications and Transportation Law  
Section of Real Property, Trust and Estate Law  
Section of Science and Technology Law  
Senior Lawyers Division  
Section of State and Local Government Law  
Section of Taxation  
Section of Tort Trial and Insurance Practice  
Young Lawyers Division  
Forum on Affordable Housing and Community Development Law  
Forum on Air and Space Law  
Forum on Communications Law  
Forum on Construction Industry  
Forum on Entertainment and Sports Industries  
Forum on Franchising  
Standing Committee on Ethics and Responsibilities  
National Conference of Lawyers and CPAs

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Jeffrey J. Greenbaum, Esq.  
Co-Chair of Task Force on Expert Code of Ethics  
Sills Cummis & Gross P.C.  
One Riverfront Plaza  
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Phone: 973.643.5430  
Fax: 973.643.6500  
Email: [jgreenbaum@sillscummis.com](mailto:jgreenbaum@sillscummis.com)

or

Section Delegate Lawrence J. Fox (see § 11 below)

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Lawrence J. Fox

Delegate, Section of Litigation

Drinker Biddle & Reath, LLP

One Logan Square, Suite 2000

Philadelphia, PA 19106

Phone: 215.988.2714

Fax: 215.988.2757

Mobile: 215.816.8571

Email: [lawrence.fox@dbr.com](mailto:lawrence.fox@dbr.com)

Email: [lawrence.fox@yale.edu](mailto:lawrence.fox@yale.edu)

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

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

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

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

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

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

These Guidelines will seek to establish guidelines for the retention of experts by lawyers, so that lawyers, experts and clients will have a common understanding of what is expected and future problems can be minimized or avoided. It will serve as a guide for lawyers in retaining experts and making sure that the proper questions are asked to avoid potential conflicts of interest.

### 4. Summary of Minority Views

None of which we are aware. Other Sections shared views with respect to a prior versions. The prior proposed Standards were changed to Guidelines and many other changes were made to meet the concerns of other Sections.

Certain Sections had concerns about the ABA setting standards for other professions. First, while the Standards only sought to set expectations for what lawyers should expect from their experts when hired for client matters, to address the concerns of others, the Standards were changed to Guidelines, and the revised Guidelines were restructured to be a guide for lawyers in hiring experts. Second, the scope of applicability has been greatly narrowed to litigated or contested matters in the United States or under United States law. They do not purport to govern obligations that experts may have to foreign tribunals, they do not govern the relationship between tribunals and experts hired by those tribunals, and they do not apply to commercial transactions or criminal matters. Third, we added explicit references to construing the Guidelines with flexibility, common sense and a rule of reason so the explicit language does not cause unintended problems. We believe that by changing the focus to what lawyers should seek from their experts rather than suggesting what experts should or should not do, and by greatly narrowing the scope of the Guidelines, we have met the principal concerns of other Sections.