Resolution 12
Urging Clarification of the Applicability of the Federal Trade Commission's Red Flags Rule

WHEREAS, Congress enacted the Fair and Accurate Credit Transactions Act of 2003 (FACTA) in part to combat the growing problem of identity theft; and

WHEREAS, FACTA directed the federal banking agencies, the National Credit Union Administration, and the Federal Trade Commission (FTC) to issue joint ?Red Flags? regulations and guidelines for the detection, prevention and response to identity theft; and

WHEREAS, the FTC has adopted a "Red Flags Rule" imposing requirements on financial institutions and creditors relating to identify theft; and

WHEREAS, the FTC's Red Flags Rule provides that professionals who regularly bill their clients for services after those services are rendered are ?creditors,? thereby subjecting lawyers to the Red Flags Rule; and

WHEREAS, nowhere in FACTA did Congress state that it intended to regulate lawyers with respect to their client relationships; and

WHEREAS, the manner in which lawyers bill for legal services should not be considered to be a deferral of payment and thus is not an extension of credit; and

WHEREAS, developing an identity theft program under the Red Flags Rule is a resource-intensive task even for a low-risk entity like a law firm; and

WHEREAS, failure to apply the Red Flags Rule to lawyers would not increase the risk of identity theft; and

WHEREAS, the lawyer-client relationship is the subject of state judicial branch regulation;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices supports the efforts of the American Bar Association to urge the FTC and Congress to clarify that the FTC?s Red Flags Rule imposing requirements on creditors relating to identity theft is not applicable to lawyers when billing for legal services provided to clients.

Adopted as proposed by the Professionalism and Competence of the Bar Committee at the CCJ/COSCA Annual Meeting in August 2009.