



Raising the Bar: A Bench-Bar Symposium on Professionalism

**Presented By
The Connecticut Bar Association,
Middlesex County Bar Association, New London County Bar Association,
and the State of Connecticut Judicial Branch**

**November 2, 2018
8:30 a.m. – 2:00 p.m.**

**Middlesex District Courthouse
Middletown, CT**

CT Bar Institute, Inc.

CLE Credit 3.0 Hours (Ethics)

Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

BENCH-BAR SYMPOSIUM ON PROFESSIONALISM

TABLE OF CONTENTS

Program Agenda.....	6
Faculty Biographies.....	8
Hamilton, Neil. "Professionalism Clearly Defined," <i>Professional Lawyer</i> , Vol. 18, No. 4, 2008	24
Badgerow, J. Nick. "Apocalypse at Law: The Four Horsemen of the Modern Bar -- Drugs, Alcohol, Gambling, and Depression," <i>Professional Lawyer</i> , Vol. 18, No. 3	41
Lachman, Arthur J. "Are They Just Bad Apples? Ethical Behavior in Organizational Settings': An Introduction," <i>Symposium Issue of Professional Lawyer</i> (2006)	50
Ward, Stephanie Francis. "Top 10 Ethics Traps," <i>ABA Journal</i> , November 2007	59
Morgen, Thomas D. "Real World Pressures on Professionalism," <i>Voir Dire</i> , Fall 2001	69
Pollock, Hon. Stewart G. "A Judge's Role in Promoting Professionalism," New Jersey Commission on Professionalism in the Law, Commentary on Professionalism (2000)	75
Whiting, Oran F. "Trials Judges Behaving Badly: Appeals Courts Reverse Jury Verdicts for Hostile Conduct," <i>Litigation News</i> , Vol. 25, No. 2 (January 2000)	78
Paul, Marcia. "Are You Tired of Lawyer Jokes?," <i>The Bench</i> , July/August 2003	79
Horn, Carl, III. "Part One: The Contemporary Practice of Law," <i>ABA Lawyer</i>	
<i>Life: Finding a Life and a Higher Calling in the Practice of Law</i> , (2003)	84
...	
Cramton, Roger C. "The Future of Law Practice in the United States," QLR, The Law Review Association of Quinnipiac University School of Law, Vol. 24, No. 3 (2006)	106
Cramton, Roger C. "Keynote Address On Giving Meaning to Professionalism," Teaching and Learning Professionalism Symposium Proceedings Sponsored By the ABA Section of Legal Education and Admission to the Bar Professionalism Committee and the Stand Committee on Professionalism and Lawyer Competence Of the ABA Center for Professional Responsibility	116
Baldas, Tresa. "Open Web, Insert Foot," <i>The National Law Journal</i> (2010)	134

Lacey, Denise Platfoot. "Embedding Professionalism Into Legal Education," <i>Journal of Law, Business & Ethics</i> , Vol. 18 (2012)	138
"Pillars of Professionalism," Kansas Bar Association June 2012 Meeting Highlights	160
Neil, Martha. "Angry Judge Blasts 'Backseat Driver' Appellate Counsel in High-Profile Murder Case," <i>ABA Journal</i> , October 2012	163
Jacobius, Moshe. "Civility & The Family Law Gladiator," <i>ABA Family Advocate</i> , Vol. 33, No. 2, Fall 2010	165
Reyes, Hon. Jesse G. "The Role of the Judiciary in Fostering Professionalism & Civility," <i>The Bench</i> , Nov./Dec. 2011	168
Lemons, Donald W. "Professionalism: Beyond Ethics," <i>The Bench</i> , September/ October 2011	173
Filisko, G.M. "You're Out of Order! Dealing with The Costs of Incivility in The Legal Profession," <i>ABA Journal</i> , January 2013	176
Whiting, Oran F. "Lawyers Are Ethically Bound to Civility and Professionalism," <i>ABA Section of Litigation</i> , Summer 2013, Vol. 38, No. 4	181
Smith, Jennifer. "Lawyers Behaving Badly Get A Dressing Down From Civility Cops," <i>Wall Street Journal</i> , January 28, 2013	182
Greene, Andra Barmash. "No Good Deed Goes Unrewarded: Why Professional Courtesy Advances Your Client's Cause," <i>ABA's Litigation Magazine</i> , Winter 2013, Vol. 39, No. 1	186
"A Duty to Act: The Court Funding Crisis and a Lawyer's Professional Identity," Statement of the ABA Standing Committee on Professionalism, July 2012	192
"Taking Aim at an Obstinate Opposing Counsel," <i>Connecticut Law Tribune</i> , July 2014	196
"Efforts to Boost Professionalism Must Include Due Process," <i>Connecticut Law Tribune</i> , July 2014	198
..	
"Professor Moses' 31 Commandments of Courtroom Etiquette and Demeanor," <i>Courtroom Demeanor for Lawyers - Homestead</i>	200

“Ethics and Plea Bargaining - What’s Discovery Got to Do With It?,” <i>Criminal Justice</i> , Volume 23, Number 3, Fall 2008	207
“To Be or Not To Be: Civility and the Young Lawyer,” <i>Connecticut Public Interest Law Journal</i> , Vol. 5:1, 2005	213
“Ethical Issues for Lawyers Involving the Internet,” <i>Advocate</i> , Fall 2012	223
“Federal Appeals Court Calls Out Michigan Judge in Gun Case,” <i>National Law Journal</i> , June 11, 2015	230
“Best Practices for Legal Education,” <i>Albany Law Blogs</i> , October 25, 2015	232
Reimagining the Practice of Law in the 21 st Century – Frederic S. Ury.....	242
Meagan Corona v. Day Kimball Healthcare, Inc., September 20, 2018.....	406
The Top Ten Ethical Pitfalls and How to Avoid Them – Mark Dubois and Michael P. Bowler	416
Connecticut Probate Court Rules of Procedure Website	427

Connecticut Bar Association

in collaboration with

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Presents

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Middlesex Superior Court
1 Court St, Middletown CT

CLE Credit

CT 3.0 Credits (Ethics)

Program materials can be downloaded at
ctbar.org/benchbar2018



Keynote Speaker

Hon. Richard A. Robinson, Chief Justice,
Connecticut Supreme Court

Program Co-chairs

Hon. Kenneth L. Shluger, New London Judicial District Superior
Court, Norwich

Timothy A. Diemand, Wiggin and Dana LLP, Hartford

Kristi A. Hanney, President, New London County Bar Association;
Law Office of Kristi A. Hanney LLC, East Lyme

David J. Tycz, President, Middlesex County Bar Association;
Howard McMillan & Tycz LLC, Middletown



MIDDLESEX
BAR ASSOCIATION



Bench-Bar Symposium on Professionalism Schedule

8:30 a.m. – Registration/Continental Breakfast

9:00 a.m. – Welcome Remarks (Jury Assembly Room)

Hon. Jose A. Suarez, Connecticut Superior Court
Kristi A. Hanney, President, New London County Bar Association, Law Office of Kristi A. Hanney LLC, East Lyme
Jonathan M. Shapiro, President, Connecticut Bar Association Shapiro Law Offices LLC, Middletown
David J. Tycz, President, Middlesex County Bar Howard McMillan & Tycz LLC, Middletown

9:30 a.m. – Plenary Session (Jury Assembly Room)

Elevating the Profession and Supporting the Judiciary

Moderator

Hon. Robert L. Holzberg (Ret.), Pullman & Comley LLC, Hartford

Panelists

George Jepsen, Connecticut Attorney General, Hartford
Karen DeMeola, Immediate Past President, Connecticut Bar Association, Assistant Dean for Finance, Administration, and Enrollment, University of Connecticut School of Law, Hartford
Ralph J. Monaco, Conway Londregan Sheehan & Monaco PC, New London

10:30 a.m. – Break

10:45 a.m. – Plenary Session (Jury Assembly Room)

Avoiding Grievances: Top Ten Pitfalls and Common Issues in the Grievance Process

Speakers

Michael P. Bowler, Statewide Bar Counsel, East Hartford
Mark A. Dubois, Geraghty & Bonnanno LLC, New London

11:45 a.m. – Breakout Sessions

A1. Alternative Dispute Resolution (Room 5-B)

Moderator

Hon. Antonio C. Robaina (Ret.), McElroy Deutsch Mulvaney & Carpenter LLP, Hartford

Panelists

Hon. Elaine Gordon (Ret.), Gordon ADR, Westbrook
Hon. Robert L. Holzberg (Ret.), Pullman & Comley LLC, Hartford
Louis R. Pepe, McElroy Deutsch Mulvaney & Carpenter LLP, Hartford

A2. Criminal Practice (Room 5-1)

Moderator

Hon. Susan B. Handy, Superior Court, New London

Panelists

Christa L. Baker, Asst. State's Attorney, GA 21
Michael A. Blanchard, Suisman Shapiro, New London
Jeremiah F. Donovan, Law Offices of Terry and Jeremiah Donovan, Old Saybrook
Michael A. Gailor, State's Attorney, Middlesex JD

A3. Family Practice (Room 5-D)

Moderator

Kristi A. Hanney, Law Office of Kristi A. Hanney LLC, East Lyme

Panelists

Hon. Lynda Munro (Ret.), Pullman & Comley LLC, Bridgeport
Hon. Jose A. Suarez, Connecticut Superior Court, Hartford
Paige S. Quilliam, Gould Larson Bennet McDonnell Quilliam & McGlinchey PC, Essex
Robert G. Tukey, Suisman Shapiro, New London

A4. Probate, Trusts, and Estates Practice (Room 606)

Moderator

Hon. Jennifer L. Berkenstock, Reg. 14 Probate Court, Marlborough

Panelists

Hon. Jeffrey McNamara, Reg. 32 Probate Court, New London Regional Children's Court, Niantic
Kirk W. Lowry, Connecticut Legal Rights Project, Middletown
Susan B. Pochal, Pochal & Pochal LLC, Mystic

A5. Civil Practice (Room 5-A)

Moderator

David J. Tycz, Howard McMillan & Tycz LLC, Middletown

Panelists

Hon. Matthew E. Frechette, Connecticut Superior Court Middletown
Hon. Kimberly A. Knox, Connecticut Superior Court Hartford
Shelley L. Graves, Faulkner & Graves PC, New London

12:45 p.m. Lunch (Jury Assembly Room)

1:00 p.m. Keynote Speaker (Jury Assembly Room)

Hon. Richard A. Robinson, Chief Justice, Connecticut Supreme Court

2:00 p.m. Adjourn

Faculty Biographies

Hon. Richard A. Robinson

The Honorable Richard A. Robinson was born December 10, 1957 in Stamford, Connecticut. He graduated with a Bachelor of Arts Degree from the University of Connecticut in 1979 and a Juris Doctor degree from West Virginia University School of Law in 1984. He was admitted to the West Virginia Bar and the Connecticut Bar, and is a member of the U.S. District Court, Northern District of West Virginia and the U.S. District Court, Connecticut.

From 1985 - 1988, Justice Robinson was Staff Counsel for the City of Stamford Law Department. In 1988, he became Assistant Corporation Counsel in Stamford where he remained until his appointment as a Judge of the Superior Court in 2000. He remained a Superior Court Judge for the next seven years during which time he served as Presiding Judge (Civil) for the New Britain Judicial District (May 2003 - September 2006); Presiding Judge (Civil) and Assistant Administrative Judge for the Ansonia/Milford Judicial District (September 2006 - September 2007); and Presiding Judge (Civil) for the Stamford Judicial District (September 2007 - December 2007). He was appointed as a Judge of the Connecticut Appellate Court on December 10, 2007, a Justice of the Supreme Court on December 19, 2013, and the Chief Justice of the Supreme Court on May 3, 2018.

Justice Robinson's career is complimented by an array of public and judicial service. He served as President of the Stamford Branch of the NAACP (1988-1990); General Counsel for the Connecticut Conference of the NAACP (1988 - 2000); President of the Assistant Corporation Counsel's Union (AFSCME) (1989 - 2000); Commissioner of the Connecticut Commission on Human Rights and Opportunities (1997 - 2000); Chair of the Connecticut Commission on Human Rights and Opportunities (1999 - 2000); New Haven Inn of Court member (2002 - present); Judicial Education Curriculum Committee member (2002 - 2014); Judicial Education Committee member (2003 - 2014); Faculty at several Judicial Institutes as well as spring and fall lectures (2003 - present); Civil Commission member (2005 - 2014); Court Annexed Mediator (2005 - 2014); Lawyers Assistance Advisory Board member (2007 - present); Bench-Bar Foreclosure Committee (2007 - 2014); Legal Internship Committee (2013 - 2017); Chairperson of the Advisory Committee on Cultural Competency (2009-present); Chairperson of the Rules Committee (2017- present); Connecticut Bar Association Young Lawyers Section Diversity Award (2010); Connecticut Bar Association's Henry J. Naruk Judiciary Award for Integrity (2017); NAACP 100 Most Influential Blacks in Connecticut; Connecticut Bar Foundation James W. Cooper Fellows, Life Fellow.

Hon. Jennifer L. Berkenstock

Judge Berkenstock has served as Probate Judge of the consolidated Region 14 Probate District since January 5, 2011. Region 14 serves the towns of East Haddam, East Hampton, Marlborough, and Portland.

Judge Berkenstock is active in the Connecticut Probate Assembly as the Chair of the Procedures Review Committee, Chair of the Floating Clerks List Committee, member of the Executive Committee and member of the Public Information Committee. She also serves as a Special Assignment Probate Judge. She is a member of the National College of Probate Judges as well as the Connecticut Bar Association's Elder Law Section and its Estates and Probate Section.

She earned her B.A. degree in 1983 from Bates College with honors in American History, including study at Oxford University in England during her junior year. After working full time for four years in the insurance industry, she graduated from the University of Connecticut School of Law in 1989. She is a past President of

the Central Connecticut Business and Estate Planning Council. In addition to her practice of law, she served numerous times in the role of fiduciary as administrator, conservator, and guardian for protected persons.

Hon. Matthew E. Frechette

The Hon. Matthew E. Frechette practiced law with the law firm of Frechette & Frechette in New Haven for 20 years before being appointed to the bench in 2007. Since that time Judge Frechette's assignments included three years sitting criminal in Bridgeport and New London doing arraignments, the domestic violence docket, and many jury trials. For the past eight years, Judge Frechette have been sitting on the civil side in New Haven, New London, and Middletown where he currently sits.

Hon. Elaine Gordon (Ret.)

Judge Elaine Gordon was appointed to the Connecticut Superior Court by the late Governor William A. O'Neill in 1988, and retired in 2011. During her 23 year tenure on the bench, Judge Gordon has decided, mediated, or assisted in the settlement of virtually every type of dispute. Her expertise covers commercial, construction, employment, environmental, insurance, professional malpractice, personal injury, product liability, estate, family, and municipal cases. The hundreds of disputes over which she presided include complex, highly contentious matters, as well as multi-party litigation.

In 1993, Judge Gordon was the first Connecticut judge to become a 40-hour trained mediator. She has been an active participant in the court annexed mediation program for many years. Judge Gordon has taught numerous courses on mediation and settlement skills to judges for over 20 years. In addition, she has taught for the National Institute of Trial Advocacy, bar organizations across Connecticut and was an instructor at the Yale Law School.

She is an honors graduate of The University of Connecticut School of Law and Northwestern University.

Hon. Susan B. Handy

Judge Handy is a graduate of the University of Massachusetts and the University of Connecticut School of Law. She started her professional career as a high school English teacher at New London High School. From 1980-1993 she was a litigator with the law firm Conway Londregan Leuba McNamara and Sussler in Southeastern, Connecticut. Judge Handy was appointed a judge of the Superior Court in 1993. She currently is a senior judge sitting in the New London Judicial District, covering both criminal and civil matters. During her judicial career she has served as Chief Administrative Judge of Criminal, Administrative Judge of the New London J.D., and Presiding Judge of Criminal in New London, New Britain, and Middletown. She currently is co-chair of the Events Subcommittee of the Judicial Media Committee which yearly presents a seminar for both judges and members of the media. Judge Handy is part of the core faculty for pre-bench for newly appointed judges and a member of the CBA Civics Education Committee. She formerly sat as a member of the Criminal Jury Instruction Committee, the Rules Committee, the Executive Committee, the Judicial Review Council, and as faculty for the Connecticut Judges Institute.

Hon. Robert L. Holzberg (Ret.)

Robert L. Holzberg, Connecticut Superior Court Judge (Ret.), leads the Alternative Dispute Resolution (ADR) practice at Pullman & Comley, which is comprised of four retired judges and six AAA certified attorney arbitrators. He possesses extensive experience serving as a mediator and arbitrator in complex civil matters in state and federal court including personal injury, employment, construction, environmental, probate, insurance, intellectual property and commercial disputes. He retired from the bench in September 2012 after more than 22 years of service as a Superior Court judge.

Retired Judge Holzberg was appointed to the Superior Court in 1990 by Governor William O'Neill. While on the bench he served as the presiding judge for civil matters in the Middlesex, New Britain, and Waterbury judicial districts. During his career, he earned a reputation for his skill in crafting settlements in some of Connecticut's highest profile and most complex cases and became one of the state's most sought-after mediators.

He has received several awards, including the 2011 Connecticut Bar Association's Henry J. Naruk Award, given to a member of the judiciary who epitomizes long-term, dedicated and conscientious service to the community, possesses the highest integrity, and has made substantial contributions to the administration of justice in Connecticut. In 2005 he received the Hon. Robert F. Zampano Award for Excellence in Mediation and in 1998 received the Connecticut Trial Lawyers Association Judicial Award.

Before his appointment to the bench, he was on the faculty of the University of Connecticut School of Law and also served as an Assistant Public Defender in the Office of the Chief Public Defender.

Retired Judge Holzberg is a frequent speaker and author on the topic of mediation and arbitration. He has been an invited speaker on ADR strategies for the Practicing Law Institute, the Connecticut Trial Lawyers Association, the Connecticut Defense Lawyers Association, and the Hartford County Bar Association.

Hon. Kimberly A. Knox

Kimberly Knox was appointed a judge of the Superior Court in 2017. Since that time, she has had assignments in criminal and civil, currently sitting civil in the Judicial District of New London. Prior to her appointment, she was a principal in a Hartford law firm where her practice included appellate litigation and attorney discipline and ethics. Judge Knox is a past President of the CT Bar Association. She was a co-author of the Connecticut Practice Book Annotated and is a contributor to legal publications. She is a graduate of the University of Connecticut School of Law.

Hon. Jeffrey McNamara

The Hon. Jeffrey A. McNamara served as Probate Judge for the Town of East Lyme from 1998-2011. He is currently serving as Probate Judge for the Niantic Regional Probate Court, which encompasses East Lyme, Montville, Old Lyme, and Salem from 2011 to present. He is a current member of the Probate Administration Executive Committee and the Administrative Judge for the New London Regional Children's Court.

He also serves as Judge at the Mohegan Tribal Court 2012 to present.

He is the Owner and President of McNamara & McNamara PC 1993 to present.

Hon. Lynda B. Munro

Lynda B. Munro, Connecticut Superior Court Judge (Ret.) is a member of the firm's Alternative Dispute Resolution (ADR) and Family Law practices. Her ADR practice focuses on resolution of family and civil disputes. She serves as a mediator, arbitrator, discovery master, and private judge in civil matters and financial, custody and parenting disputes involving families and children, pre-nuptial agreements and post-nuptial agreements.

Former Judge Munro retired in 2014 after 20 years of distinguished service on the Connecticut bench. Most recently, Judge Munro served as a Presiding Judge for the Family Division of the New Haven Superior Court. She served as Chief Administrative Judge for Family Matters from 2008-2013 and Presiding Judge of the Regional Family Docket for seven years. She has assisted parties and counsel in resolving hundreds of couples and high-conflict family disputes.

Judge Munro has extensive experience in the area of civil matters. She has sat on the Complex Litigation Docket, special proceedings, jury, and court trials. She both tried and mediated a wide array of tort and contract cases including commercial disputes, medical malpractice, legal malpractice, and trade secrets matters. Additionally, Judge Munro was an affordable housing judge for many years. Judge Munro also is an American Arbitration Association (AAA)-qualified arbitrator.

Judge Munro is the only active mediator/arbitrator who sat on both the Complex Litigation Docket and the Regional Family Trial Docket in Connecticut. Because of her years of writing and trying cases to the bench, she is particularly well-suited to our Appellate practice.

During her judicial career, Judge Munro heard cases in the Meriden, New London, New Haven, Hartford, Waterbury, Middlesex and Stamford-Norwalk judicial districts. Before being sworn in as a Superior Court Judge in 1994, Judge Munro spent 15 years as a private practice attorney representing municipalities, individuals and business entities in municipal, land use, civil and family matters.

The former chair of the Judicial Education Committee, Judge Munro taught classes in civil, general, and family law to the Superior Court Bench for more than 10 years. She also taught numerous courses through the Connecticut Bar Association, the New England Bar Association, the Connecticut Chapter of Matrimonial Lawyers, the Connecticut Trial Lawyers Association and many other organizations, consortiums and associations. For the past six years, she has been an adjunct law professor at Quinnipiac Law School. In addition, she provides training in best practices in ADR to law firms.

Judge Munro serves on the editorial board of *Family Law Quarterly*, a publication of the American Bar Association. She is a Trustee Emeritus of Connecticut College and was recently awarded the Connecticut College Medal, the highest honor the College can confer, for her accomplishments and service.

Hon. Antonio C. Robaina (Ret.)

ANTONIO C. ROBAINA was appointed to the Superior Court in 1998 and most recently served as the presiding judge for civil matters in the Hartford Judicial District. He has served in judicial districts throughout the state as a trial judge in criminal, family, civil jury and juvenile cases. Notably, from September 2002 to August 2003, Judge Robaina was the presiding judge for Family Matters in the Hartford Judicial District, having the largest family docket in the state.

Judge Robaina acts as a mediator in medical malpractice cases and other types of civil litigation. He has served as the co-chairperson of a bench/bar committee with respect to medical malpractice cases. Judge Robaina mentored law school students through the Connecticut Hispanic Bar Association Mentoring Program and also serves as a mentor to other judges in the Judicial Branch mentoring program. He was a member of the Rules Committee of the Judges of the Superior Court.

He is a James Cooper Fellow of the Connecticut Bar Foundation. He was the chairman of the Diversity Award Committee for the Lawyer's Collaborative for Diversity. He is the recipient of the Judge Robert Zampano Excellence in Mediation Award given by Community Mediation, Inc., the Connecticut Defense Lawyer's Association President's Award of Excellence in 2018, in 2016 he received the Henry J. Naruk Judiciary Award from the Connecticut Bar Association, and in 2009 he received the Connecticut Trial Lawyers Judicial Award.

From 1979 to 1998, Judge Robaina practiced law in New Haven. His general practice included plaintiff's personal injury, insurance defense, criminal defense, immigration law, and family matters. He was a member of many organizations, including the New Haven County Bar Association, the Connecticut Trial Lawyers Association, the American Immigration Lawyers Association, the National Hispanic Bar Association, and the Connecticut Bar Association. He was one of the founders and a member of the Board of Directors of the Connecticut Hispanic Bar Association.

Judge Robaina served as the president of the board of directors of The Connection Fund, Inc., a nonprofit corporation designed to develop real estate for charitable purposes. During his tenure, The Connection Fund completed the state's first supportive housing project called Liberty Commons, which consists of 40 units of supportive housing in Middletown. That organization also built supportive housing for pregnant women in Groton called Mother's Retreat, a children's space called Kids City in Middletown and renovated the former YWCA in New Haven to house treatment and rehabilitation facilities.

Hon. Kenneth L. Shluger

Judge Kenneth Shluger was appointed a judge of the Superior Court in 2004. Since that time, he has had assignments in Criminal, Civil but most frequently in the Family Court, currently sitting Family in the New London Judicial District. Prior to his appointment, he had a general trial practice in Hartford and Glastonbury. He is a graduate of the University of Connecticut and the University of Connecticut School of Law.

Judge Shluger continues to be active in the Connecticut Bar Association and the Hartford County Bar Association chairing numerous committees and task forces including CBA Standing Committee on Professionalism and the HCBA Bench Bar Committee. He has been an adjunct professor at Eastern Connecticut State University and has served on the boards of several civic organizations. He frequently speaks to civic organizations, in schools and in conjunction with bar association activities.

Hon. Jose A. Suarez

Judge Jose Suarez was appointed to be a judge of the superior court in February 2009. Since that time, he was presided over civil, criminal, family, and juvenile matters. From September 2015 through September 2017, he served as the presiding judge of family in the Hartford Judicial District. Currently, he sits as the administrative judge in the Middlesex Judicial District, where he is also the presiding judge for criminal and civil matters.

Prior to his appointment, he worked as an Assistant Attorney General IV and in the environment department handling Clean Air Act matters, concentrating in coal fired power plant litigation, and automobile emissions regulation and litigation throughout the country.

Christa L. Baker

Christa L. Baker graduated from the University of New Haven in 1999 with a B.S. in Criminal Justice and a minor in Forensic Science. She worked as a Private Investigator and then a Bodily Injury claim representative for several years before pursuing her law degree. Christa graduated from Quinnipiac School of Law in 2006 and started working with the States Attorney's office in New London immediately upon being sworn in. She worked as Assistance State's Attorney in GA 10 New London for 6 years before transferring to GA 21 in Norwich where she currently practices.

Michael A. Blanchard

Michael A. Blanchard is a Director of Suisman Shapiro and was admitted to practice before the Connecticut Bar in 1982, the Massachusetts Bar in 1985, and the Mashantucket Pequot Tribal Bar in 1992. Attorney Blanchard received his Bachelor's of Arts degree in Mathematics from Assumption College in 1979 and his Juris Doctor from Western New England College School of Law in 1982. His practice concentration is in criminal and family law.

In his criminal practice Attorney Blanchard has appeared in Part B (misdemeanor) and Part A (serious felony) courts throughout the state. His diversified criminal cases have included murder, felony and misdemeanor assault, sexual assault, computer crimes, manslaughter and drunk driving defense. Attorney Blanchard has assisted those accused of crimes and their families throughout his legal career. Attorney Blanchard has testified as an expert witness concerning the standard of representation in criminal cases.

Attorney Blanchard's varied family practice has included fully contested custody cases, relocation issues, and allegations involving both physical and sexual abuse of children. He has served as a court appointed guardian ad litem representing children's best interests in contested custody matters. Attorney Blanchard has served as a Special Master in the Regional Family Trial Docket since its inception, teaming with child psychologists to conduct full day pre-trials in highly contested custody cases. He has served as a Special Master in New London and Middlesex counties, conducting pre-trials in contested family matters. Attorney Blanchard has been appointed and currently serves on the Family Commission, a committee dedicated to reviewing and revising practice book rules in the family law area. Attorney Blanchard also served on The Child and Custody Matters Work Group, a committee organized to create and administer a training module for court appointed attorneys who represent minor children in contested custody cases.

Attorney Blanchard is a member of the Connecticut Bar Association, New London County Bar Association, and Mashantucket Pequot Tribal Nation Bar Association. He is a member of the National Association of Criminal Defense Lawyers and the Connecticut Association of Criminal Defense Lawyers. Attorney Blanchard is an appointed member of the Windham County Grievance Panel. He is a member of the Labor & Employment and Sports and Entertainment law sections of the Connecticut Bar Association.

An Academic All-American and All-New England baseball player in college, he has coached numerous youth sports. Attorney Blanchard has been inducted in the Athletic Hall of Fame at Assumption College. He continues his involvement with young athletes as an advisor and agent.

Michael Bowler

Michael Bowler was admitted to the bar in 1992. In 1998 he joined the Judicial Branch as an Assistant Bar Counsel to the Statewide Grievance Committee. In 2005 he was made the Statewide Bar Counsel. In 2016, he was appointed to be Counsel to the Minimum Continuing Legal Education Commission. Attorney Bowler is a graduate of the College of the Holy Cross and the University of Connecticut School of Law.

Karen DeMeola

Karen DeMeola is the Assistant Dean for Finance, Administration, and Enrollment at UConn School of Law and is the immediate past president of the Connecticut Bar Association. She received her undergraduate degree in psychology from UConn and her J.D. from UConn Law. After graduation from law school, Karen was a civil rights litigator whose practice focused primarily on employment discrimination, police brutality and housing discrimination. While at UConn Law, she has been an adjunct professor teaching Critical Identity Theory and has presented on numerous panels, symposia, and conferences on diversifying law school populations, implicit bias, intersectionality, leadership, and diversity and inclusion. Karen has also created numerous pipeline projects, including the CBA Pathways to Legal Careers Pipeline. Karen is a Fellow of the Connecticut Bar Foundation.

Karen was the recipient of the 2018 Attorney of the Year Award from the Connecticut Law Tribune; the Lawyers Collaborative for Diversity Edwin Archer Randolph Diversity Award; the CWEALF Maria Miller Stewart Award; the Connecticut Commission on Human Rights and Opportunities Constance Baker Motley Award for Business and Law; and the University of Connecticut Spirit Award.

Timothy A. Diemand

Tim is a Partner in the Litigation Department, Co-Chair of the Insurance Practice Group, and a member of Wiggin and Dana's Executive Committee. He has made his mark defending and representing clients around the country in high stakes matters such as complex insurance class actions, copyright claims against major record labels and recording artists, malpractice defense, catastrophic injury claims, and contractor disputes stemming from Iraq and Afghanistan war reconstruction projects.

Tim has been recognized by *Chambers USA* in the Commercial Litigation category, recognized by *Benchmark Litigation* in its Litigation Stars category, and Super Lawyers selected Tim for inclusion in its New England Super Lawyers publication in the category of Civil Litigation. Benchmark Litigation noted that Tim was lauded by a peer for "a great sense of dealing with the business people, amassing the facts and arguing effectively." Wiggin and Dana's litigation department regularly receives top rankings in Chambers USA (Band 1), Benchmark Litigation, and Super Lawyers (for more about the standards for inclusion please click Chambers, Benchmark Litigation, and Super Lawyers). In 2017, Tim was named one of the Connecticut Law Tribune's (CLT) Distinguished Leaders.

CLT states that this award is meant to "[recognize] lawyers who achieved impressive results and demonstrated clear leadership skills that helped them achieve those results."

Tim is an active member of the Connecticut legal community serves as the Vice President of the Connecticut Bar Foundation, as the Co-Chair of the CBA's Professionalism Committee and is the past Co-Chair of the Federal Practice Section. Tim has been recognized for his charitable and pro bono work, including being honored in 2014 by Connecticut Legal Services for his successful representation of a CLS client in a federal court lawsuit.

Jeremiah F. Donovan

Jeremiah Donovan received his B.A., magna cum laude, from Harvard College in 1970 and his J.D. from Yale Law School in 1977. From 1978-1989, Attorney Donovan worked as an Assistant United States Attorney, District of Connecticut. As a federal prosecutor, he investigated, prosecuted, and tried a significant number of criminal cases, involving both violent and white-collar crimes, as well as representing the United States in a

variety of civil cases. In 1989, Attorney Donovan opened the Law Offices of Jeremiah Donovan. While in private practice as a criminal defense attorney, Jeremiah has litigated a number of significant civil and criminal matters, including *United States v. Jackman*, 46 F.3d 1240 (2d Cir. 1995) (successfully attacking the method of choosing venirepersons in the district court); *Erickson v. Erickson*, 246 Conn. 250, 716 A.2d 92 (1998) (reversing the rule followed in Connecticut since colonial times that parole evidence may not be introduced to correct an error in a will); *State v. Singh*, 259 Conn. 693, 793 A.2d 226 (2002) (the first of a series of Supreme and Appellate Court cases dealing with prosecutorial misconduct); and *Keeney v. Town of Old Saybrook*, 237 Conn. 135, 676 A.2d 795 (1996) (reversal of state order that town construct a sewerage treatment plant). His final argument in a federal RICO case is the subject of a literary exegesis in Meyer, "Desperate for Love," 30 U.S.F.L.REV. 931 (1996). In addition to practicing law, Jeremiah has served as an adjunct professor at Yale Law School, where he has taught a trial practice class for approximately twenty years. Attorney Donovan has been listed among the *Best Lawyers in America***, most recently in 2013.

Mark A. Dubois

In 2011, after serving as Connecticut's first Chief Disciplinary Counsel, Mark Dubois joined the firm of Geraghty & Bonnano LLC. His practice is concentrated on matters of lawyer ethics, discipline, and malpractice. As Chief Disciplinary Counsel, Mark organized and administered an office which investigated and prosecuted cases involving lawyer disciplinary violations and the unauthorized practice of law. Mark handled over 1000 lawyer discipline matters and over 450 unauthorized practice matters. He now represents lawyers accused of misconduct and acts as an adviser and expert witness on matters involving lawyer conduct, malpractice, and the unauthorized practice of law.

Mark was board certified in civil trial advocacy from 1995 to 2005. He has tried numerous cases to conclusion before judges and juries. He has served as an arbitrator, fact-finder, and mediator, both for the Judicial Branch and in private ADR proceedings. He has been recognized as an expert and testified in state and federal court. He has given over 80 talks, symposium presentation, and presentations.

Mark is co-author of *Connecticut Legal Ethics and Malpractice*, the only treatise devoted exclusively to Connecticut legal ethics which is in its third edition. He is also a chapter contributor to *Essential Qualities of the Professional Lawyer*, a publication of the American Bar Association where he wrote chapters on *Mastering the Craft of Lawyering* and *Honesty, Integrity and Loyalty*. This text has been widely adopted by law schools throughout the country. He is the author of a weekly column on lawyer ethics for the Connecticut Law Tribune.

Mark is a member of a number of professional organizations, and is a past president of the Connecticut Bar Association, Connecticut's largest voluntary bar association with approximately 9000 members.

Michael A. Gailor

Prior to becoming the State's Attorney in Middlesex in 2018, Michael Gailor was an Executive Assistant State's Attorney in the Office of the Chief State's Attorney. As an Executive Assistant, he oversaw the investigation and prosecution of complex and multijurisdictional cases around the state, including cold case homicides and those involving political corruption. Several of those investigations involved the use of wiretaps and/or state grand juries. Gailor is cross designated as an Assistant United States Attorney. He is a member of the Racial Profiling Prohibition Project Advisory Board and the Chief State's Attorney's designee on the Databank Oversight Committee. From 1995-2005, Gailor was an Assistant State's Attorney in the Judicial District of Hartford. He started in the Division in 1983 in the Statewide Prosecution Bureau. From 1990-1993, Gailor clerked for three years in federal District Court for Magistrate Judge Thomas P. Smith. Prior to that, he worked

for two years at the Legal Aid Society of Hartford where he represented indigent individuals seeking relief by way of the writ of habeas corpus. Finally, Gailor began his career as a clerk on the Connecticut Appellate Court for the Honorable Flemming Norcott. Gailor received his JD from UCONN law and his BA from Cornell University.

Shelley L. Graves

Attorney Shelley Graves has been named [Best Lawyers](#) 2018 "Lawyer of the Year" for New London County in the field of Personal Injury Litigation - Plaintiffs. This designation is awarded to one lawyer per legal community for having received the highest ratings among their peers for their abilities, professionalism, and integrity. Graves was also selected in 2016 for this honor by her peers. *Connecticut Magazine* has publicized her as one of the "Top 50 Lawyers" in Connecticut (Nov. 2017) as well as the "Top 25 Women Lawyers" in the state based on her ranking by Super Lawyers, a respected rating service. [Super Lawyers](#) also declared her one of the "Top 100 Lawyers" in all of New England (Nov. 2017).

Practicing law since 1994, Graves has handled personal injury matters of all kinds, including those arising from motorcycle and car accidents, tractor trailer truck accidents, fall downs, improper sexual conduct, pharmacy prescription errors, medical malpractice, nursing home negligence, product defects, dog bites, and tragic accidents resulting in wrongful deaths.

In one of her first major negligence cases, she secured a 2.0 million dollar judgment after a jury trial for a youth who suffered the amputation of three fingers when a wood splitter was improperly activated. More recently, Graves obtained a \$8.9 Million Dollar judgment after a trial to a jury for a 27 year old tractor trailer truck driver who suffered serious injury after an oil tanker caused a multi-car collision on I-95. As a result of this multi-million dollar verdict, Graves was named to the Connecticut Law Tribune's Personal Injury Hall of Fame for the category of Motor Vehicle verdicts and settlements.

Graves has been honored each year with selection for the esteemed publication [The Best Lawyers in America](#) since 2010. Best Lawyers is universally regarded as the definitive guide to legal excellence. She has also been chosen repeatedly by [Super Lawyers](#) magazine since 2006, as both a Connecticut Super Lawyer, as well as one of New England's Super Lawyers. She is a member of the [National Trial Lawyers Association](#) (by invitation), and is named by the organization as one of the [Top 100 Trial Lawyers](#) in the State of Connecticut.

Graves is the co-author of [Connecticut Trial Evidence Notebook](#), published by Lexis Law Publishing. The book features an annual supplement that details new judicial decisions on the law of evidence and is commonly used by lawyers and judges in Connecticut.

Based on her credentials and experience, the Connecticut Superior Court appointed Graves in 2009 to serve as a fact finder / arbitrator for the court's dispute resolution program. Since 2003, she has held an elected seat on the Board of Governors of the [Connecticut Trial Lawyers Association](#), an organization dedicated to the rights of injured persons within the civil justice system.

Graves is a true New London County native. She was raised in Norwich, and currently lives in Lebanon with her family. She graduated from St. Bernard High School in Uncasville and obtained both her undergraduate and law degrees from the University of Connecticut. She is dedicated to actively supporting her community by volunteering time and resources to [United Way of Southeastern Connecticut](#), [Sacred Heart School of Taftville](#) and other non-profit organizations in the region.

Kristi A. Hanney

Kristi A. Hanney is the principal of the Law Office of Kristi A. Hanney, LLC. Prior to establishing her practice, she was a partner at Loudon Caisse Hanney LLC, a matrimonial law firm with offices in Hartford and Norwich. Attorney Hanney is a graduate of the College of the Holy Cross and Fordham University School of Law. She is a member of the Connecticut and New York bars, as well as the Mashantucket Pequot Tribal Court bar. She is trained in divorce mediation.

Attorney Hanney plays an active role in her community, both professionally and personally. She served on the board of directors of the Connecticut chapter of the Association of Family and Conciliation Courts, and currently serves on the board of directors of the New London County Bar Association. She is chair of the standardized discovery committee of the Connecticut Bar Association, Family Law Section. Attorney Hanney has acted as coordinator of the Early Intervention Program in the Norwich Family Court, and serves as a special master in the New London, Hartford, Middlesex, and Windham Judicial Districts. She participates in the Middle School Law Advisory program through the Connecticut Bar Association Civics Education Committee, working on civics education with middle school students at Salem School. She lives in Salem, and serves as vice-president of the Salem Surge Soccer Association.

George Jepsen

George Jepsen is the 24th Attorney General to serve Connecticut since the office was established in 1897. He took office in 2011 and was re-elected in 2014 to a second four-year term.

The Attorney General is a constitutional officer and the chief legal officer for civil matters. With a staff of approximately 200 attorneys, the Office of the Attorney General serves as legal counsel to all state agencies. Under state statutes and the Connecticut Constitution, the Attorney General has authority over all civil matters and is responsible for representing the people of Connecticut and the broader public interest.

The Attorney General advocates on behalf of the state and its citizens; ensures state government acts within the letter and spirit of the law; protects public resources; works to preserve and enhance quality of life in Connecticut, and to safeguard the rights of the most vulnerable citizens. On an operating budget of \$30 million, the Office generated \$636.3 million in revenues to the state for the fiscal year ended June 30, 2017.

As Attorney General, Jepsen has focused on reducing healthcare costs by increasing transparency and competition, and by preventing and deterring healthcare fraud. He advocated for stronger consumer protections in Connecticut's competitive electricity market and has vigorously pursued antitrust, environmental, health care, and consumer protection issues. Among other initiatives, Jepsen created a Privacy & Data Security department to focus on data breach and privacy concerns; simplified the process for data breach reporting and consolidated staff to create an Antitrust and Government Program Fraud department.

Attorney General Jepsen is immediate past president of the National Association of Attorneys General and the 2017 recipient of its most prestigious honor, the Kelley-Wyman Award, given annually to the Attorney General who has done the most to achieve NAAG objectives. Among those objectives is "to facilitate interaction among attorneys general as peers, thereby enhancing the performance of attorneys general and their staffs to respond effectively to emerging state and federal legal issues; to coordinate state-federal working groups on topics of mutual concern; to plan and execute a continuing legal education (CLE) program for state lawyers and to serve as a liaison to the federal government in a variety of areas, including environment, consumer protection, criminal law, and appellate advocacy."

As NAAG president, Jepsen's presidential policy initiative focused on "Evolving Challenges in the American Health Care Marketplace: Competition, Cost and Policy Innovation in a Rapidly Changing Industry." His one-

year term concluded in June, 2017. Jepsen also serves as a member of the NAAG Executive Committee, as a director of the NAAG Mission Foundation; as co-chairman of the Antitrust Committee and as a member of the Consumer Protection and the NAGTRI Training Committees. He also serves as a NAAG representative on the board of directors for the Truth Initiative (American Legacy Foundation).

Attorney General Jepsen was among the state attorneys general who helped to negotiate a \$25 billion federal-state settlement in 2012—the largest in history—with the nation's five largest banks over mortgage foreclosure abuses.

Since then, Connecticut has played a prominent role in a number of notable multistate cases. Connecticut joined Texas and the federal Justice Department to investigate e-book pricing, which led to settlements with five publishing companies in 2012 and 2013, \$166 million in consumer refunds and a successful federal suit against Apple for its role in the anti-competitive scheme that netted \$400 million for consumers.

Connecticut led an intensive investigation of financial rating agencies Standard & Poor's and Moody's Investors Service for allegedly misrepresenting their analysis of structured securities leading up to the financial crisis in 2008. The investigation and subsequent lawsuits resulted in a \$1.375 billion federal-state settlement with S&P in February, 2015 and a nearly \$864 million settlement with Moody's in 2016.

Connecticut was one of six lead states in a coalition of more than 40 attorneys general that investigated Volkswagen for marketing, selling and leasing certain diesel vehicles equipped with illegal and undisclosed emissions defeat devices designed to circumvent emissions standards in violation of state laws prohibiting unfair or deceptive trade practices. The investigation led to a \$570 million settlement in June, 2016. Connecticut's share of the civil penalties was approximately \$16.3 million.

Connecticut is currently leading a 47-state multistate lawsuit in federal court against six generic drug makers alleging illegal conspiracies in order to unreasonably restrain trade, artificially inflate and manipulate prices and reduce competition in the United States for two generic drugs. Connecticut began investigating in 2014 and the multistate was formed in late 2016.

Among other pending cases, Connecticut is working with a bipartisan coalition of attorneys general from across the country on an ongoing investigation to evaluate whether pharmaceutical manufacturers have engaged in unlawful practices in the marketing and sale of prescription opioids. The investigation is also looking to identify what role, if any, opioid manufacturers and distributors may have played in exacerbating or prolonging the nation's opioid epidemic.

Prior to his election as Attorney General, Jepsen engaged in the private practice of law. He began his career as general counsel to Carpenters Local 210 and later was in private practice with several prominent firms, most recently Cowdery, Ecker and Murphy, LLC of Hartford, in the areas of corporate transactions and civil and appellate litigation.

Attorney General Jepsen was born on Nov. 23, 1954, in Hattiesburg, Miss., the second of Chuck and Rita Jepsen's three children. In 1955, the family moved to Greenwich, where Jepsen attended public schools. He graduated *summa cum laude*, Phi Beta Kappa in 1976 from Dartmouth College with a B.A. degree in Government with high distinction. He is also a cum laude graduate of Harvard Law School and the John F. Kennedy School of Government at Harvard, where he concurrently earned a master's degree in public policy in 1982.

Attorney General Jepsen served 16 years in the Connecticut General Assembly as a state representative for Stamford's 148th District, (1988-90) and as a state senator for the 27th District, representing Stamford and Darien (1991-2003). As a state senator, Jepsen was chairman of the Judiciary Committee (1993-1995), ranking member of the Finance Committee (1995-1997) and served as Senate Majority Leader (1997-2003). His

legislative record reflects strong advocacy for consumers, civil rights, the environment, protecting women from domestic violence, public safety, and a fair and competitive business climate.

In 2002, he was the Democratic nominee for Lieutenant Governor. He served as Democratic State Party chairman from 2003-2005.

Attorney General Jepsen enjoys world travel and is conversational in Chinese, French, and Spanish. A former marathon runner, his interests now include cooking international cuisines and reading histories and biographies.

He is married to Diana Sousa and they have two sons, Christian and William.

Kirk W. Lowry

KIRK W. LOWRY, is the Legal Director of the Connecticut Legal Rights Project, a non-profit state-wide legal services organization that represents low-income people with mental health conditions in all Connecticut state-operated inpatient psychiatric facilities and in the community. His practice focuses on patients' rights, civil rights, discharge to the most integrated setting, conservatorship defense, involuntary medication, informed consent and commitment issues. Mr. Lowry has practiced law for 31 years, 13 years in private practice and 18 years in legal services and protection and advocacy.

Ralph L. Monaco

Attorney Ralph J. Monaco is a Board Certified Trial Lawyer, a distinction held by very few attorneys. He also is a fellow of the International Academy of Trial Lawyers. He has extensive experience with jury and court trials in both federal and state court and has had many significant verdicts for the firm's clients. He practices in civil and commercial litigation, with an emphasis in the areas of personal injury, wrongful death, product liability, medical malpractice, insurance litigation, municipal litigation, and workers' compensation. In addition, he has extensive experience in business contract litigation and land use. Attorney Monaco regularly handles catastrophic injury cases against major corporations. He has been involved in mass tort cases including the Dalkon Shield litigation, Vioxx litigation, Stryker hip replacement litigation, and the Rhode Island nightclub fire litigation in which he participated in a successful \$176 million settlement. Moreover, Attorney Monaco has tried cases against major automotive companies, insurance companies, trucking companies and product manufacturers. He is one of the leading attorneys in the country in litigation over baseball and softball "hot bats" made from advanced aluminum and composites that propel balls at speeds that exceed human reaction time. Due to his experience and understanding of the many complex facets of the "hot bat" litigation, various media outlets including WFAN in New York have interviewed him.

Attorney Monaco was named the New Leader of the Law for New London County in 2002 by the *Connecticut Law Tribune*. Since that time, *Connecticut Magazine* named him to its list of Connecticut [Super Lawyers](#) Personal Injury Attorneys and New England [Super Lawyers](#) Personal Injury Attorneys in 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, and 2018. In 2009, he received the Publisher's Award from the *Connecticut Law Tribune* for challenging the State of Connecticut's attempt to remove funds from the Attorney Client Security Fund.

Attorney Monaco served as the 87th President of the Connecticut Bar Association (CBA) for the 2010-11 term, being the second youngest person to hold the position. In the past, he has also served as Treasurer of the CBA and Chairman of the CBA Young Lawyers Section. He is a member of the Executive Committee of the CBA Litigation Section and serves as its legislative liaison. Attorney Monaco is on the Board of Directors of the Connecticut Bar Foundation, where he is a Life Fellow. He also serves on the Board of Directors of the

Connecticut Trial Lawyers Association. Attorney Monaco served Jury Committee of the Chief Justice's Public Safety and Trust Commission, which committee made recommendations on improving the jury system. He is a member of the Connecticut Secretary of State Civics Commission, and is chair of the CBA's Civics Education Committee, where he spearheads various civics education programs.

Attorney Monaco is admitted to practice before the state and federal courts in Connecticut and New Jersey. He also is admitted to practice before the United States Court of Appeals for the Second Circuit and the United States Supreme Court. Attorney Monaco is a graduate of Fordham University and Quinnipiac University School of Law, graduating with honors from both schools.

Attorney Monaco has argued numerous cases before the Connecticut Supreme Court, Connecticut Appellate Court, and United States Court of Appeals for the Second Circuit. His reported cases include:

Honan v. Greene, 37 Conn. App. 137 (1995); Branch v. Occhionero, 239 Conn. 199 (1996); McIntosh v. McIntosh, 47 Conn. App. 907 (1997); New Milford Block v. Grondahl, 51 Conn. App. 454 (1999); Kroll v. Steere, 60 Conn. App. 376 (2000); Kroll v. Sebastian, 58 Conn. App. 262 (2000); Olynciw v. Stop n Shop, Inc., 67 Conn. App. 773 (2002); Grasso v. ZBA, 69 Conn. App. 230 (2002); DaCruz v. State Farm, 69 Conn. App. 510 (2002); L'Homme v. Dept. of Transportation, 72 Conn. App. 64 (2002); Cheryl Terry Enterprises v. City of Hartford, 262 Conn. 240 (2002); Jenkins v. Kos, 78 Conn. App. 840 (2003); Malchick v. Division of Criminal Justice, 266 Conn. 728 (2003); DaCruz v. State Farm, 268 Conn. 675 (2004); Cheryl Terry Enterprises v. City of Hartford, 270 Conn. 619 (2004); Hayes v. Caspers, 90 Conn. App. 781 (2005); Cote v. Machabee, 87 Conn. App. 627 (2005); Miskimen v. Biber, 272 Conn. 916 (2005); Terry v. Terry, 102 Conn. App. 215 (2007); Taylor v. Mucci, 288 Conn. 379 (2008); Tocco v. Wesleyan Univ., 112 Conn. App. 28 (2009); Columbia Air Services v. State of Connecticut, 293 Conn. 342 (2009); McDonough v. Forrest, 129 Conn. App. 851, cert. denied 302 Conn. 924 (2011); Malaguit v. Ski Sundown, 136 Conn. App. 381, cert. denied 307 Conn. 902 (2012); Travelers Cas. & Sur. Co. v. Caridi, 144 Conn. App. 793 (2013).

Attorney Monaco also serves on the Essex Planning Commission, New London Catholic Charities Advisory Board, and Villa St. Francis Board of Directors.

Louis R. Pepe

LOUIS R. PEPE is a litigation attorney who focuses his practice on business torts and contract disputes and construction contract cases. He represents his clients in state and federal courts as well as in arbitration, mediation and other ADR proceedings.

Mr. Pepe received a B.Mgt.E. degree and an M.S. in Management from Rensselaer Polytechnic Institute, and a J.D., *with distinction*, from Cornell Law School. He is admitted to the practice of law in Connecticut and before the United States Supreme Court and numerous federal district courts and courts of appeal.

He has taught in seminars presented by the Connecticut Bar Association on trial practice and has presented seminars in business and construction litigation throughout the country. Mr. Pepe has also taught a course on arbitration at the University of Connecticut Law School.

Mr. Pepe is a former president of the Connecticut Bar Association (2005-2006), a Fellow in the American College of Trial Lawyers and the American College of Construction Lawyers, an Associate of the American Board of Trial Advocates, and a Fellow in the Connecticut

Bar Foundation and the American Bar Foundation. He is listed in "Who's Who in America," "Who's Who in American Law," "The International Who's Who of Business Lawyers" (Construction), "Who's Who of Construction Lawyers," and "Who's Who in International Arbitration."

Mr. Pepe has been listed in Super Lawyers® (2006-2018) a Thomson Reuters business, in the areas of Construction Litigation, Business Litigation, and Alternative Dispute Resolution. A description of the standard or methodology on which the accolade is based can be found [HERE](#). He has also been listed in Best Lawyers® (1995-2019), a Woodward/White, Inc. business and partners with U.S. News & World Report, in the areas of Arbitration, Bet-the-Company Litigation, Commercial Litigation, Construction Law, and Mediation. He was also recognized as the 2019 "Lawyer of the Year" for Bet-the-Company Litigation and Construction Law in the Hartford area.

He is a member of the American Arbitration Association's panels for Large, Complex Commercial Cases, International Cases, and Mega Project Cases, and its Construction Master Mediator Panel. He is also a member of the arbitration panel of the International Institute for Conflict Prevention & Resolution.

Susan B. Pochal

Susan is an attorney in private practice at Pochal & Pochal, LLC in Mystic, Connecticut. She practices primarily in the areas of Estate and Tax Planning, Probate, Real Estate and Elder Law. She began practicing law in Massachusetts in 1985 and moved to New London County in 1991, working with local law firms before opening her own practice with her husband, Mark Pochal, in 2003.

Susan assists her clients with the challenging issues that face them, such planning for incapacity, death, and taxes. She also handles real estate matters, wills, and trusts. Some of her most challenging work involves family feuds in the probate process, and "after death" tax planning, a time when most clients don't realize they have options.

Susan finds it very rewarding to give back to the community by being involved in volunteer activities. She currently serves on the Board of the Auxiliary of L+M Hospital, was Chair of the Board for the Community Foundation of Eastern Connecticut, the Hunger Task Force for the Pawcatuck Neighborhood Center, and the Board of Directors for the Greater Mystic Chamber of Commerce. She has also served as President of the Southeastern Connecticut Women's Network, as a member of the Board of Directors for the Charter Oak Chapter of the American Red Cross; on the Board of Directors of the Estate and Tax Planning Council of Eastern Connecticut and as President of the Foundation Board of Three Rivers Community College.

Paige S. Quilliam

Partner Gould Larson Bennet McDonnell Quilliam & McGlinchey PC
Essex, Connecticut

<https://gould-larson.com/attorneys/paige-s-quilliam/>

Jonathan M. Shapiro

Jonathan M. Shapiro joined Shapiro Law Offices as a partner in 2010. His practice concentrates on corporate transactions, employment matters, and complex commercial and general litigation, as well as in arbitrations and mediations. He represents individuals and businesses in a wide variety of matters including breach of contract actions, non-compete claims, unfair trade practice claims, trade secret misappropriation claims, commercial lease disputes, employment and insurance coverage disputes, breach of fiduciary duty claims and product liability claims. Jonathan also regularly serves as "local counsel" for non-Connecticut-based firms that are admitted to practice pro hac vice. Jonathan also counsels clients in a number of other areas including employment law, contract negotiations, commercial transactions, and business formation.

Jonathan is admitted to practice in Connecticut and New York, as well as before the United States District Courts for the Southern and Eastern Districts of New York and the District of Connecticut. He was recognized as a Connecticut Super Lawyer “Rising Star” in 2010, 2011, 2012 and 2013, and was honored by the Fairfield County Business Journal at the 2011 40-Under-40 Awards Dinner. In November 2012, Jonathan was named as a “New Leader in the Law” by the Connecticut Law Tribune. In 2014, 2015 and 2016, Jonathan was recognized as a Connecticut Super Lawyer.

Jonathan speaks regularly at seminars on a broad range of topics and has authored several articles, including

- Moderator, The Battle Behind the Scenes: Handling Difficult Clients, Hostile Judges and Unethical Attorneys During Litigation, American Bar Association, Litigation Section Annual Conference (New Orleans 2015);
- Co-Author, “Hold It! Avoiding Electronic Discovery Disasters with Effective Litigation Holds” (Elizabeth S. Fenton & Diana Rabeh, Reed Smith) and moderator on corresponding program at American Bar Association, Litigation Section Annual Conference.
- Author, “Extra-Territorial Application of Unfair Trade Practice Claims,” American Bar Association business Torts Journal;
- Moderator, Going Commando: Lessons from the Field on Starting Your Own Practice, Connecticut Bar Association Young Lawyers Section;
- Panelist, Career Transitions, University of Connecticut School of Law Alumni Association;
- Panelist, CAPABA Lunar New Year/Networking, Connecticut Asian Pacific Bar Association;
- Panelist, Contract Negotiations, Meeting Planners International-Connecticut River Valley Chapter;

Jonathan is active in the following organizations:

- Connecticut Bar Association, President (Past Vice-President, Past Chair Membership Committee, and Past Chair Young Lawyers Section; Assistant Treasurer-Secretary 2013-2014)
- March of Dimes Connecticut Chapter State Board (Volunteer Development Committee Chair; Past Chair State Board, 2013-2014)
- Membership Chair, American Bar Association Business Torts Committee
- Member, Middlesex County Bar Association
- Corporator and Philanthropy Counsel Member, Middlesex Hospital
- Vice President, Congregation Adath Israel

Prior to joining the firm, Jonathan was a senior associate at Day Pitney, LLP in its Stamford, Connecticut office. He earned his B.A. in History from Boston College in 1998 and his J.D. degree from the University of Connecticut School of Law in 2001.

Jonathan lives in Middletown with his wife and children. In his spare time he enjoys running, biking, reading, and spending time with his family.

Robert G. Tukey

Attorney Robert G. Tukey is a Director of Suisman Shapiro. He is a graduate of Fairfield University and Western New England University School of Law. A native of Southeastern Connecticut, Attorney Tukey returned to the area to practice, primarily litigating marital and custody as well as personal injury matters. He currently resides in Niantic with his family.

Attorney Tukey's professional memberships include the American Bar Association, the Connecticut Bar Association, the American Association for Justice, the Connecticut Trial Lawyers' Association, and the Oliver

Ellsworth American Inn of Court. Attorney Tukey was named to the [Super Lawyers](#) Connecticut and New England Rising Stars 2011 and 2012 lists. Each year, only 2.5% of attorneys in Connecticut, Massachusetts, Rhode Island, Vermont, New Hampshire, and Maine forty years old and under, or in practice for ten years or less, receive the Rising Stars honor. In 2016 Attorney Tukey received the National Academy of Family Law Attorney's 2016 Nationally Ranked Top Ten Attorney Award.

Attorney Tukey has also focused on volunteering within his community. He is the President of the board and a coach for East Lyme Little League, and coaches basketball and soccer for East Lyme Parks and Recreation. Attorney Tukey has served as a member of the board of the Children's Museum of Southeastern Connecticut, the New London City Center District, and as Past President of the ARC of New London County. He is a member of the finance committee and volunteers as a confirmation mentor at the Niantic Community Church.

David J. Tycz

David J. Tycz is the principle and managing member of Howard McMillan & Tycz LLC of Middletown. His practice includes the major disciplines of the firm: real estate; land use and zoning; business, corporate and commercial law; estate planning, administration and probate; and civil litigation. David is the President of the Middlesex County Bar Association. He is the Town Attorney for the Town of Killingworth and represents the Deep River Planning and Zoning Commission. David is a graduate of the University of Connecticut School of Law and Providence College (B.S. Accounting).

Professionalism Clearly Defined

Neil Hamilton*

Introduction

A critical question for the legal profession is whether the profession and each individual lawyer can do better than they are doing today in realizing the profession's public purpose, core values, and ideals. Take a moment and answer the question for yourself. The 2007 Carnegie Foundation for the Advancement of Teaching's substantial study, *Educating Lawyers: Preparation for the Practice of Law*, finds that legal education and the profession itself could do substantially better at socializing students into an ethical professional identity.¹

Since the mid-1980s, the concept of "professionalism" has been the focal point for the organized bar's debate whether the profession is adequately renewing its public purpose, core values, and ideals in each generation of lawyers.² A significant theme in the early debates on professionalism was that recent trends in the profession had undermined some of the core values and ideals evident in the practicing bar in earlier periods of the profession's history.³ The ABA's 1996 Haynsworth Report noted particularly "the loss of an understanding of the practice of law as a calling" and "the loss of civility."⁴ "Professionalism" for many lawyers has meant the bench and bar's response to these perceived losses in recent decades and the consequent loss of public standing.⁵

Arguments by generations of lawyers who graduated prior to the 1980s that ethics were higher and lawyer conduct more civil earlier in their careers, while understandable, are subject to the charge that such an "ethical golden age" did not exist, and in fact there were serious ethical problems of scoundrels, discrimination, and lack of diversity in the earlier time period. Claims of more ethical conduct or more civility in earlier periods are difficult to test empirically.

Moreover, debates over the comparative ethics of different generations of lawyers are not useful. The critical question at any point in the legal profession's history is not whether the profession had more civility or a deeper sense of calling at an earlier period. The critical question is whether the profession and each individual lawyer can do better than they are doing today in realizing the profession's public purpose, core values, and ideals?

The concept of "professionalism," separated from any type of argument that an earlier golden-age existed when ethics were better, is extremely useful to answer this question. Professionalism describes the important elements of

an ethical professional identity into which the profession should socialize both law students and practicing lawyers. This approach to professionalism connects the public purpose, core values, and ideals of the profession with the goal of fostering an ethical professional identity within each lawyer.

Educating Lawyers: Preparation for the Profession of Law points out that some legal educators separate the minimum rules of ethical conduct – referred to as "the law of lawyering" including the professional rules and the law of malpractice – from wider matters of morality – referred to as "professionalism."⁶ The authors indicate that the important elements of an ethical professional identity into which the profession should socialize law students and the practicing bar include both minimum standards below which the profession imposes discipline, and much wider matters of professional morality beyond the minimum standards.⁷

Part I of this essay describes the social contract of the legal profession with society and why the professionalism of each lawyer is critical to fulfill that contract. Part II explores the definition of professionalism currently in the scholarly literature, concluding that there is substantial lack of clarity and agreement regarding the term. Part III argues that a clear definition of professionalism is important, and Part IV closely analyzes the major statements of the bench and bar on professionalism to identify the key principles that define the concept. Part V, using the statements of the bench and bar about professionalism, synthesizes a clear and succinct definition of the term.

Part V puts personal conscience in a professional context as the foundation of professionalism and includes also in the definition that each lawyer should engage in a continuing reflective engagement, over a career, on the relative importance of income and wealth in light of the other principles of professionalism. These are controversial proposals that need reflection and debate, but reflection and debate are at the heart of renewing professionalism in each generation of lawyers.

I. The Legal Profession's Social Contract and Professionalism

Since the late 1800s, the peer-review professions in the United States, including the legal profession, have gradually worked out stable social contracts with the public in both custom and law.⁸ The public grants a profession autonomy to regulate itself through peer review, expecting the profession's members to control entry into and continued membership in the profession, to set standards for how individual professionals perform their work so that it serves the

public good in the area of the profession's responsibility, and to foster the core values and ideals of the profession.

In return, each member of the profession and the profession as a whole agree to meet certain correlative duties to the public: to maintain high standards of minimum competence and ethical conduct to serve the public purpose of the profession and to discipline those who fail to meet these standards; to promote the core values and ideals of the profession; and to restrain self-interest to some degree to serve the public purpose of the profession.⁹ The term "professionalism" – the important elements of an ethical professional identity into which the profession should socialize students and practicing professionals – captures the correlative duties of the profession's social contract for each individual professional.¹⁰

A peer-review profession's ability to regulate itself translates into substantial autonomy and discretion for individual professionals. Peers practicing in the profession understand the complexity of the practice and protect a wide range of "judgment calls" as competent and ethical within the professional tradition.¹¹ In addition, in the case of the legal profession, a lawyer's work representing a client requires a high degree of autonomy. Independent judgment in counseling and serving a client is a core value of the profession.¹²

Of course, professions can be structured according to different models to maximize benefits to society. In a purely market-competition model, society would view the members of the peer-review professions no differently than individuals in other occupations in terms of their dedication to self-interest. Society would subject the peer-review professions to the same combination of market competitive pressure and government regulation to protect the public as other occupations. In this purely market-competition model, the peer-review professions would lose peer review. They would no longer be permitted to set rules for, discipline, or license members of the professions or otherwise restrict entry into the professions.

Over the course of more than a century, the major peer-review professions have convinced the public that the social contract of these professions provides more benefits to the public than a purely market-competition model. However these social contracts are premised on the public's trust that a profession and its individual members are serious about professionalism. The public must trust that the profession will renew the social contract in each generation of the profession by socializing each new entrant into the important elements of an ethical professional identity.

High degrees of professionalism build confidence in the social contract. Failures of professionalism undermine the social contract.¹³ These social contracts are always subject to renegotiation. After the failure of the accounting profession (particularly Arthur Andersen) to fulfill its social contract as an effective gatekeeper exercising its independent judgment to protect the public in recent corporate scandals, the public, acting through Congress with the Sarbanes-Oxley Act, redesigned the accounting profession's social contract to

reduce significantly the profession's peer-review authority and autonomy.¹⁴ The same legislation and subsequent Securities and Exchange Commission regulations sent a shot across the bow of the legal profession by substituting legislation and federal regulation requiring "up the ladder" reporting for what had been the profession's Model Rule 1.13.¹⁵

Paragraphs 10-12 of the Preamble to the ABA Model Rules of Professional Conduct state the social contract for the legal profession. Paragraph 10 provides "The legal profession is largely self-governing," with unique responsibilities "because of the close relationship between the profession and the processes of government and law enforcement."¹⁶ The legal profession is the only peer-review profession whose members control one branch of government. Paragraph 11 states "To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated."¹⁷ Paragraph 12 adds "The legal profession's relative autonomy carries with it special responsibilities of self-government Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves."¹⁸

II. The Definition of Professionalism In Legal Scholarship

Although professionalism is a highly useful term to describe the important elements of an ethical professional identity, scholars so far have been unable to construct and agree upon a widely-accepted clear and succinct definition of "professionalism."¹⁹

Legal scholarship regarding professionalism comes in three typical varieties. One brand discusses professionalism with no attempt to affirmatively state a definition of the concept itself. In these articles, the definition of professionalism is either assumed to be self-evident²⁰ or meant to be implicitly understood within the context of the article's main focus. For example, this brand of legal scholarship often asserts that "professionalism" is in decline, while providing evidence of growing incivility among lawyers, increased legal malpractice actions and greater focus on profit and personal gain in the practice of law.²¹ The suggestion then is that professionalism itself is principally high competence and civility within the practicing bar, including also a commitment to serve the public rather than self-interest. Commonly, this type of article does not provide the legal community with a positive working definition of "professionalism," rather it describes problems in the profession and equates these problems with a lack of professionalism.²²

The second variety of scholarship on professionalism does attempt to define the term by focusing on one or more characteristics that are the "core" of professionalism. Examples include a focus on professionalism as (1) a set of core values,²³ (2) professional standards created by the ABA,²⁴ (3) a commitment to public service,²⁵ (4) client-oriented service,²⁶ or (5) individual morality and respect for the human beings and the community the lawyers serve.²⁷ Finally a third brand of scholarship simply dismisses "professionalism" as a misguided concept.²⁸

III. Why a Clear Definition of Professionalism is Important

It is extremely useful to define clearly and succinctly the major elements of an ethical professional identity for the following reasons:

1. Without the guidance of clear principles of professionalism, the profession's current socialization of law students and practicing lawyers excessively emphasizes just the law of lawyering defined as the professional rules and the law of malpractice.
2. If the floor of the law of lawyering is the dominant focus of the socialization of the profession, then members of the profession will tend to understand ethical professional identity as simply compliance with the rules and avoidance of malpractice. For the vast spectrum of lawyer decisions with ethical dimensions beyond simple rule compliance or malpractice avoidance, extrinsic values relating to ranking systems of grades, income, or prestige will tend to dominate lawyer decision making rather than intrinsic values relating to the principles of professionalism.²⁹
3. Confusion about the meaning of professionalism undermines the public's trust that the profession and each individual lawyer are serious about meeting their obligations under the social contract. A clear and succinct definition helps the public understand what goals the profession is trying to achieve with the socialization of its members.
4. Confusion about the meaning of professionalism much reduces the possibility that the concept will actually influence law student or lawyer conduct. Students and practicing lawyers will give more attention and energy to clear expectations that are clearly stated and rigorously evaluated.
5. With a clear definition of professionalism, legal education and the bar could move toward assessment of which pedagogies are most effective to help students and practicing lawyers to internalize and live the elements of the definition.
6. Assessment of professionalism in general, whether directed at effectiveness of instruction or whether individual members of the profession are internalizing and living the elements of the definition, will give the profession more credibility with the public.

IV. Professionalism Defined in the ABA and Conference of Chief Justice Reports and the Preamble to the ABA Model Rules

Over the past quarter century, the major reports of both the ABA and the Conference of Chief Justices on professionalism and the values of the profession as well as the Preamble to the Model Rules have stated the major elements of an ethical professional identity including the correlative duties of the social contract for each lawyer.

A. The Stanley Commission Report

The ABA formed the Stanley Commission in the mid-1980s in light of the growing concern of bar leaders, judges and lawyers both that the profession was moving "away from the principles of professionalism," and that this shift in professionalism was "so perceived by the public."³⁰ The Stanley Commission Report adopts a definition of professionalism that former Harvard Dean Roscoe Pound first penned in 1953:

The term refers to a group...pursuing a learned art as a common calling in the spirit of public service — no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.³¹

The Stanley Commission also included traits that distinguish a profession from other occupations. A profession is:

An occupation whose members have special privileges, such as exclusive licensing, that are justified by the following assumptions: (1) That its practice requires substantial intellectual training and the use of complex judgments; (2) That since clients cannot adequately evaluate the quality of the service, they must trust those they consult; (3) That the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good; and (4) That the occupation is self-regulating—that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client's trust, and transcend their own self-interest.³²

B. The MacGrate Report

The 1992 ABA MacGrate Report adds to the understanding of professionalism through a focus on professional skills and professional values.³³ The report includes both a Statement of Fundamental Lawyering Skills and a Statement of Fundamental Values of the Profession. The Fundamental Lawyering Skills include:

1. Problem Solving;
2. Legal Analysis and Reasoning;
3. Legal Research;
4. Factual Investigation;
5. Communication (oral and written);
6. Counseling;
7. Negotiation;
8. Litigation and ADR Procedures;
9. Organization and Management of Legal Work; and
10. Recognizing and Resolving Ethical Dilemmas (principally focused on the Rules of Professional Conduct).³⁴

The four Fundamental Values of the Profession are:

1. Providing Competent Representation;

2. Striving to Promote Justice, Fairness and Morality (including pro bono service to the disadvantaged);
3. Striving to Improve the Profession; and
4. Undertaking Professional Self-development.³⁵

C. The Haynsworth Report

In the mid-1990s, the ABA built on the Stanley Commission Report and the MacCrate Report with the 1996 Haynsworth Report to "better inculcate a higher sense of professionalism among American lawyers."³⁶ The Haynsworth Report's definition of professionalism particularizes Pound's 1953 definition to the specific context of the legal profession:

A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good.³⁷

In addition to the definition, the Report includes lists of essential characteristics of the professional lawyer and supportive elements.

The essential characteristics of the professional lawyer are: (1) learned knowledge; (2) skill in applying the applicable law to the factual context; (3) thoroughness of preparation; (4) practical and prudential wisdom; (5) ethical conduct and integrity; and (6) dedication to justice and the public good.

Supportive elements include: (1) formal training and licensing; (2) maintenance of competence; (3) zealous and diligent representation of clients' interests within the bounds of law; (4) appropriate deportment and civility; (5) economic temperance; (6) subordination of personal interests and viewpoints to the interests of clients and the public good; (7) autonomy; (8) self-regulation; (9) membership in one or more professional organizations; (10) cost-effective legal services; (11) capacity for self-scrutiny and for moral dialogue with clients and other individuals involved in the justice system; and (12) a client-centered approach to the lawyer-client relationship which stresses trust, compassion, respect, and empowerment of the client.³⁸

D. The Conference of Chief Justices' National Action Plan on Lawyer Conduct and Professionalism

Despite the efforts of the ABA in 1986, 1992, and 1996, concerns about a perceived decline in lawyer professionalism and the decline's effect on public confidence in the legal profession and the justice system remained. In response to the continuing concerns, the Conference of Chief Justices (CCJ) adopted the National Action Plan on Lawyer Conduct and Professionalism in January of 1999.³⁹ The CCJ's National Action Plan defines professionalism with an aspirational focus.

"Professionalism is a much broader concept than legal

ethics. For the purposes of this report, professionalism includes not only civility among members of the bench and bar, but also competence, integrity, respect for the rule of law, participation in pro bono and community service, and conduct by members of the legal profession that exceeds minimum ethical requirements. Ethics rules are what a lawyer must obey. Principles of professionalism are what a lawyer should live by in conducting his or her affairs. Unlike disciplinary rules that can be implemented and enforced, professionalism is a personal characteristic. The bench and the bar can create an environment in which professionalism can flourish, and these recommendations are intended to assist in that endeavor. But it is the responsibility of individual judges and lawyers to demonstrate this characteristic in the performance of their professional and personal activities."⁴⁰

The Action Plan emphasizes the role of personal conscience in achieving professionalism. "Professionalism ultimately is a personal, not an institutional characteristic.... No disciplinary system can enforce professionalism and no amount of exhortation by judges and bar leaders can instill it where it does not already exist. The vast majority of lawyers possess this characteristic to some degree or another. But far too many have allowed their sense of professionalism to become dormant. The institutional framework of the legal community can create a climate in which professionalism can flourish, but individual lawyers must be the ones to cultivate this characteristic in themselves."⁴¹

The Action Plan also emphasizes the importance of peer-review and the responsibility of all lawyers "not to tolerate unethical or unprofessional conduct by their fellow lawyers."⁴² Last the Action Plan asks each lawyer "to exemplify the ideal of the lawyer-statesman - that is, a professional who devotes his or her judgment and expertise to serving the public good, particularly through participation in pro bono and community service activities."⁴³

E. The Preamble to the ABA Model Rules of Professional Conduct

The Preamble to the ABA Model Rules of Professional Conduct provides additional insight on the meaning and scope of professionalism for lawyers.⁴⁴ The Preamble implicitly defines professionalism by stating several important elements of an ethical professional identity.

The Preamble's implicit definition flows from a number of paragraphs. Paragraph 1 asks each lawyer, as a member of the legal profession, to hold in proper tension sometimes conflicting roles as "a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice."⁴⁵ Paragraph 4 requires that a lawyer, in all professional functions, should be "competent, prompt, and diligent."⁴⁶ Paragraph 6 urges each lawyer to do public service to improve justice, specifically "to seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession [A]ll lawyers should devote pro-

professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel." 47

Paragraph 7 of the Preamble stresses that a lawyer must (1) meet the minimum standards set by the Rules and other law, (2) strive to attain the highest level of skill, and (3) exemplify the profession's ideals of public service. It also emphasizes the role of each lawyer's personal conscience and the importance of healthy peer collegia (ethical peer cultures) in realizing these three goals,⁴⁸ stating:

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.⁴⁹

Paragraph 9 of the Preamble points out "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.... Such issues must be resolved through the exercise of sensitive professional and moral judgment. . . ."⁵⁰

As discussed earlier, paragraphs 10 to 12 of the Preamble outline the social contract among the members of the legal profession and society whereby the society grants lawyers autonomy to govern themselves, and, in return, the members of the profession agree to meet correlative personal and collegial peer-review duties to the society.⁵¹ Paragraph 12 specifically states "a lawyer is responsible for observance of the Rules of Professional Conduct" and "a lawyer should also aid in securing their observance [of the Rules] by other lawyers." It ends with the caution that "neglect of these responsibilities compromises the independence of the profession and the public interest it serves."⁵²

All these paragraphs of the Preamble taken together implicitly define the elements of an ethical professional identity by calling on each lawyer to do the following:

- (1) to comply with the *ethics of duty* – the minimum standards of competency and ethical conduct set forth in the Rules of Professional Conduct;⁵³
- (2) to encourage other lawyers to be accountable for compliance with the Rules and ultimately to hold them accountable;
- (3) to foster in him or herself and other lawyers the *ethics of aspiration* – the core values and ideals of the profession, including internalizing the highest standards for the lawyer's professional skills and ethical conduct;⁵⁴
- (4) to be guided also by personal conscience;
- (5) to do public service to improve justice, particular-

ly to provide service to the disadvantaged; and

- (6) to hold in proper tension the lawyer's roles as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

V. Professionalism Clearly Defined

The three ABA reports, the CCJ National Action Plan, and the Preamble to the Model Rules all state principles of professionalism including the correlative duties of each lawyer under the social contract. I synthesize these common principles below in a clear and succinct list and then provide additional explanation for each listed principle.

A. Five Principles of Professionalism

In my synthesis of the major ABA reports, the Conference of Chief Justices National Action Plan and the Preamble to the Model Rules of Professional Conduct, professionalism means that each lawyer:

1. Continues to grow in personal conscience over his or her career;⁵⁵
2. Agrees to comply with the ethics of duty – the minimum standards for the lawyer's professional skills and ethical conduct set by the Rules;⁵⁶
3. Strives to realize, over a career, the ethics of aspiration – the core values and ideals of the profession including internalizing the highest standards for the lawyer's professional skills and ethical conduct;⁵⁷
4. Agrees both to hold other lawyers accountable for meeting the minimum standards set forth in the Rules and to encourage them to realize core values and ideals of the profession;⁵⁸ and
5. Agrees to act as a fiduciary where his or her self-interest is overbalanced by devotion to serving the client and the public good in the profession's area of responsibility: justice.⁵⁹

a. Devotes professional time to serve the public good, particularly by representing pro bono clients;⁶⁰ and

b. Undertakes a continuing reflective engagement, over a career, on the relative importance of income and wealth in light of the other principles of professionalism.⁶¹

B. Further Analysis of the Principles

1. Personal Conscience

Personal conscience, the first principle of professionalism, is an awareness of the moral goodness or blameworthiness of one's own intentions and conduct together with a feeling of obligation to be and to do what is morally good.⁶² Personal conscience in this definition includes (1) awareness that the person's conduct is having an effect on others, (2) a reasoning process to determine the moral goodness or blameworthiness of the person's intentions or conduct, and (3) a sense of

obligation to be and to do what is morally good.

Personal conscience is the foundation on which a law student or practicing lawyer builds an ethical professional identity. Without this foundation, the remaining four principles of professionalism will collapse into a calculus of simple self-interest, including gaming the Rules of Professional Conduct themselves for self-advantage.

a. The Importance of Self-Scrutiny and Feedback from Others

The MacCrate and the Haynsworth Reports and the CCJ National Action Plan note the importance over a career of self-scrutiny along with feedback from and moral dialogue with others to contribute to a lawyer's professional growth.⁶³ The skills of self-reflection, feedback and moral dialogue help a lawyer to learn from mistakes and to improve professional skills generally. These skills contribute particularly to growth in personal conscience in terms of awareness of impacts of conduct on others, the formation of first ethical principles, and a sense of obligation to live the law student's or lawyer's ethical principles.

b. The Four Component Model and Personal Conscience

Moral psychology also offers a useful analytical framework with which to explore and understand personal conscience. Personal conscience involves awareness of a moral issue, a reasoning process to determine the moral goodness or blameworthiness of alternative courses of conduct, and a sense of obligation to do what is morally good. Similarly the moral psychology literature starts with the question, "what must we suppose happens psychologically in order for moral behavior to take place?" Morality in this meaning focuses on the social condition that humans live in groups and what one person does can affect others.⁶⁴ In light of our understanding that what one person does can affect others, morality asks what do we owe others? What are our duties to them? What rights can they claim? Scholars posit that four distinct capacities, called the Four Component Model⁶⁵, are necessary in order for moral behavior to occur:

1. Moral Sensitivity. "Moral sensitivity is the awareness of how an individual's actions affect other people. It involves being aware of different possible lines of action and how each line of action could affect the parties concerned. It involves imaginatively constructing possible scenarios and knowing cause-consequence chains of events in the real world; it involves empathy and role-taking skills."⁶⁶ Moral sensitivity requires the understanding of one's own intuitions and emotional reactions.⁶⁷

2. Moral Judgment. "Once the person is aware of possible lines of action and how people would be affected by each line of action (Component 1), then Component 2 judges which line of action is more morally justifiable - which alternative is just, or right."⁶⁸ It involves deliberation regarding the various considerations relevant to different courses of action and making a judgment regarding which of the available actions would be most morally justifiable. It

entails integrating both shared moral norms and individual moral principles.⁶⁹

Shared moral norms and an individual's moral principles - what philosophy calls normative ethics⁷⁰ - flow from one of two general sources. A rational approach uses analysis and logic in any situation to reason out right conduct from a set of first ethical principles. This "ethics of principle" approach can be derived from (1) faith or religious teachings, (2) cultural norms, or (3) moral philosophy like Kant's categorical imperative or Mills's utilitarianism. A second general source emphasizes the virtues and good habits of character in any situation and is more intuitive about the right conduct that a virtue or habit of character demands in the situation. Some people using this "ethics of character" approach find the relevant virtues or habits of character in faith or religious teachings. Others look to moral philosophy or cultural norms.⁷¹

3. Moral Motivation and Commitment. Moral motivation and commitment have "to do with the importance given to moral values in competition with other values. Deficiencies in Component 3 occur when a person is not sufficiently motivated to put moral values higher than other values - when other values such as self-actualization or protecting one's organization replace concern for doing what is right."⁷²

It is not only competing values that can halt moral action at this point, but competing drives and emotional states. For example, if someone must choose between having a steady paycheck to ensure her family has food on the table, with acting on her moral values, the drive to care for basic needs may override all else.

Current research is utilizing theories of professional identity development when discussing moral motivation and commitment. Professional identity development is particularly useful in explaining how a professional's conception of the self in relation to other people changes over time as the individual matures. "Our recent explorations into the development of the moral self illustrate how a young professional makes meaning of professional values and expectations. Entering professional school student conception of a professional identity is distinctly different from how moral exemplars understand professional identity and is profoundly influenced by his or her stage of identity development. Development evidence indicates that individuals move from self-centered conceptions of identity through a number of transitions, to a moral identity characterized by the expectations of a profession - to put the interests of others before the self, or to subordinate one's own ambitions to the service of society or the nation. The fully integrated moral self (one whose personal and professional values are fully integrated and consistently applied) tends not to develop until mid-life - if it develops at all. On the other hand, what seems to distinguish moral exemplars and sets them apart from ordinary good people is a kind of unity of self with moral concerns...."⁷³

4. Moral Character and Implementation. "This component involves ego strength, perseverance, backbone, tough-

ness, strength of conviction, and courage. A person may be morally sensitive, may make good moral judgments, and may place a high priority on moral values, but if the person wilts under pressure, is easily distracted or discouraged, is a wimp and weak-willed, then moral failure occurs because of deficiency in Component 4 (weak character).⁷⁴ Problem-solving skills including figuring out the necessary sequence of concrete actions and working around impediments and unexpected difficulties as well as interpersonal skills are important. Component 4 includes the knowledge, skills and abilities to manage conflicts, communicate effectively and minimize polarization.⁷⁵

Lawrence Walker notes that, "Moral failure can be a consequence of a deficiency in any component: being blind to the moral issues in a situation, being unable to formulate a morally defensible position, failing to accord priority to moral concerns, or being unable or unwilling to implement action."⁷⁶ It is important therefore to attend to development of all four components.

A focus on fostering growth in personal conscience as understood in the context of the Four Component Model would mean engaging students and lawyers to develop in each of the four components. Education on professionalism would look to what the moral psychology literature has to offer on effective pedagogies and assessment tools for each component.

c. The Relationship between Personal Conscience and the Other Four Principles of Professionalism

The relationship between the first principle of professionalism – growth in personal conscience over a career – and the other four principles is synergistic. For example personal growth in either the skill of self-scrutiny and encouragement of feedback from others or any of the capacities in the Four Component Model should help a law student or practicing lawyer grow in capability on any of the other four principles of professionalism. In addition as a lawyer grows in these dimensions of personal conscience, the lawyer is also a better counselor to help a client. A fully developed lawyer can help the client think through the situation from the client's shoes wherever that client is in terms of the skills and capacities of moral decision making.⁷⁷

Similarly as a law student or lawyer over a career internalizes professionalism principles 2 through 5, he or she also is forming new dimensions and capacities of personal conscience. A lawyer fully integrated into an ethical professional identity has one conscience, but that conscience now includes capacities of awareness, reasoning and motivation regarding moral goodness or blameworthiness in both personal and professional contexts. When the lawyer is acting in a professional context, the personal conscience of the professional is embedded in an appropriate professional framework.

A different but related line of analysis separates "personal conscience" from "professional conscience." The latter, Professors Fred Zacharias and Bruce Green argue, "embodies professional norms that derive loosely from the lawyer's professional relationship to the court, which is itself committed to promoting justice. The norms have not necessarily been

expressed in the law; they are transmitted through professional socialization."⁷⁸ Zacharias and Green argue that lawyers should rely on professional conscience in making some types of discretionary decisions under the law of lawyering.

The current disciplinary codes, Zacharias and Green point out, "identify two very different kinds of discretionary activity: (1) activity involving professional conscience, in which discretion should be exercised with a view to implementing appropriately the multiple interests and values that the lawyer is obligated to serve, and (2) activity involving personal conscience, in which different lawyers will have different approaches because their individual consciences may emphasize different values. With respect to the first activity, there are often right and wrong answers, and lawyers should expect the possibility of judicial remediation or criticism if they respond inconsistently with the collective professional conscience."⁷⁹ Zacharias and Green provide an example of professional conscience flowing from Model Rule 3.3(a)(3)'s grant of discretion to a lawyer whether to introduce testimony that the lawyer reasonably believes is false. They conclude a lawyer should not interpret this grant of discretion to adopt a policy in all cases that the lawyer will always introduce helpful testimony "unless he is certain that it is false."⁸⁰ Rule 3.3(a)(3), they argue, is intended to draw upon a lawyer's professional conscience and requires a lawyer to make a considered decision in each case, balancing the impact on the client if the testimony is withheld with the likelihood the testimony is false and the impact of the testimony on the decision maker.⁸¹ An example of personal conscience is the discretion under the Model Rule 1.16 that "a lawyer has discretion to refuse a case; [or] to withdraw if the client insists on pursuing a repugnant objective."⁸²

The concept of "professional conscience" is a step in the same direction as the internalization of professionalism principles 2 through 5 proposed in this essay, but principles 2 through 5 provide a clearer definition of the specific elements of an ethical professional identity. The separation of "personal conscience" and "professional conscience" also does not recognize the interrelationship and synergy between personal conscience and the other principles of professionalism. Professor Robert Kegan's theory of professional identity formation development articulates a progression from a personal conscience that is self-centered, to one that is fully integrated with the principles of the profession, and freely chosen. It is about self-authoring one's identity as a professional, and choosing the guiding values that are at the core of both personal and professional identity.⁸³ Most important, defining personal conscience separate from professional conscience will socialize law students and lawyers to live professional lives where personal conscience is relevant in only a small subset of professional decisions. Socialization where students and lawyers see that an ethical professional identity builds on and further develops the personal conscience they brought into the profession and are developing throughout life will take much greater advantage of both the existing personal moral development that a law student brings to legal education or the subsequent personal moral develop-

ment of a practicing lawyer. For these reasons, "personal conscience" and "personal conscience in a professional context" seem more useful descriptive terms rather than "personal conscience" and "professional conscience."⁸⁴

The greatest concern about "personal conscience in a professional context" as the foundation of professionalism is the fear that a lawyer's personal conscience will limit client autonomy and client equal access to justice.⁸⁵ The lawyer's personal conscience will trump client choices that are lawful. The central point of "personal conscience in a professional context" is that the lawyer's personal conscience is now informed and guided also by the role morality of the lawyer's function in the justice system. That role morality calls on the lawyer who accepts a representation to honor principles of client autonomy and equal access to justice. In the counseling role, for example, the lawyer's duty is to help the client think through the client's best interests in the situation *from the client's shoes including the client's morality*. The lawyer is not to impose the lawyer's morality on the client. This duty includes fairly and completely presenting the law applicable to the client's situation. However a lawyer who develops over a career in any of the capacities of the Four Component Model should be a better counselor for all clients and should better understand adversaries. For example, a lawyer whose own moral reasoning is at an early stage of development will be limited in his or her ability to counsel a client who is at a more developed stage of moral reasoning. The lawyer simply will not understand the client well. If the reverse is true, the lawyer will understand the moral reasoning of the client and can help the client think through the client's best interests from the client's shoes.

2. The Ethics of Duty

The Scope Note for the Model Rules of Professional Conduct states "Some of the Rules are imperatives, cast in the terms of 'shall' and 'shall not.' These define proper conduct for purposes of professional discipline. Others, generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment.... The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role."⁸⁶ The ethics of duty – the obligatory and disciplinary elements of the Rules – state the minimum floor of competence and ethical conduct below which the profession will impose discipline. An ethical professional identity requires each law student and practicing lawyer to understand and internalize the ethics of duty.

3. The Ethics of Aspiration – the Core Values and Ideals of the Profession

The ethics of aspiration call on each law student and practicing lawyer, over the course of a career, both to internalize and to strive to realize the core values and ideals of the profession.

The core values and ideals of the profession are apparent in both the Model Rules of Professional Conduct and the ABA Reports and CCJ Action Plan on professionalism.

a. The Core Values of the Profession

- Competent Representation Including Reasonable Diligence and Reasonable Communication with the Client⁸⁷
- Loyalty to the Client⁸⁸
- Confidentiality of Client Information⁸⁹
- Zealous Advocacy on Behalf of the Client Constrained by the Officer of the Legal System Role⁹⁰
- Independent Professional Judgment⁹¹
- Public Service to Improve the Quality of Justice, Particularly to Maintain and Improve the Quality of the Legal Profession and to Ensure Equal Access to the Justice System⁹²
- Respect for The Legal System and All Persons Involved in the Legal System⁹³

b. Ideals of the Profession

- Commitment to Seek and Realize Excellence at the Principles of Professionalism and the Core Values and Ideals of the Profession⁹⁴
- Integrity⁹⁵
- Honesty⁹⁶
- Fairness⁹⁷

4. The Duty of Peer-Review

In the initial 1908 ABA Canons of Professional Ethics, peer-review was a central theme. Canon 29 spoke forcefully on the duty of lawyers to "expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession."⁹⁸ The 1969 Model Code of Professional Responsibility⁹⁹ and the 1983 Model Rules of Professional Conduct also emphasize the critical importance of effective peer-review.¹⁰⁰

Model Rule 8.3 provides that "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority."¹⁰¹ Comment 1 to the rule explains "Self-regulation of the legal profession requires that members of the profession initiate a disciplinary investigation when they know of a violation of the Rules of Professional Conduct."¹⁰² Model Rule 5.1 specifically addresses the responsibilities of a partner or supervisory lawyer. Under Rule 5.1(a), "A partner in a law firm and a lawyer who individually or together with other lawyers possesses comparable management authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."¹⁰³

Peers in the legal profession can also bring to bear informal pressure on unethical conduct. There are many occasions

sions in the legal profession where peers observe a lawyer's work. Parties almost always choose to be represented by lawyers when the context is litigation with anything significant at risk. Lawyers carry out this work subject to observation by both judges and the peers who oppose them, who can bring to bear informal pressure or make a formal complaint to disciplinary authorities regarding a violation of the code of ethics.

Charles Wolfram also notes "A lawyer who seriously offends against widely held professional norms faces unofficial but nonetheless powerful interdictions. Those include sanctions such as negative publicity and other expressions of peer disapproval, the cutting off of valuable practice opportunities denial of access to centers of power and prestige and preclusion from judicial posts."¹⁰⁴ Judges, who are lawyers, observe and review lawyers' work in litigation and also have the power to impose sanctions through fee awards, contempt of court powers, and disqualification motions.

The Model Rules and the ABA Reports tend to focus on the requirement that peers report misconduct below the floor of the Rules. This is important, but the creation of strong ethical cultures emphasizing excellence at the skills, core values, and ideals of the profession is even more important. As the recent corporate scandals in corporations with well-drafted written ethics codes but corrupt cultures demonstrated, unethical culture will trump rules.

There is some literature suggesting that this model of peer review may be based on the false premise that a collegium will supervise itself. A collegium in reality may have a strong tendency to become a "delinquent community." In *Doctoring Together: A Study of Professional Social Controls*, Eliot Freidson studied a large medical group in the United States to observe how the day-to-day work of doctoring was controlled by the physicians. The doctors formed what Freidson calls a collegium, which insisted that self-government was solely its own legitimate function, but which left "individuals free to work in their own ways within the very broad limits set by obvious unethicity or incompetence."¹⁰⁵ Freidson found that the collegium consistently abdicated the role of exercising organized sanctions, permitting all but gross and obvious deviance in performance, so long as inter-collegial relations remained manageable.¹⁰⁶

These rules of silent acquiescence in the face of professional misconduct were designed, in Freidson's analysis, to leave each member of the collegium a maximum amount of autonomy in work performance and behavior. To describe this collegium, Freidson borrows the term "delinquent community" from sociological studies of French school children and personnel in French bureaucracies. In "delinquent communities," members show "a conspiracy of silence against superior authority ... in an effort to create for each member a zone of autonomy. ... Any change that is apt to ... restrict the individual zones of autonomy in favor of a systematized and rational approach to the problem, will be resisted with all the strength the group can muster."¹⁰⁷

The origin of the delinquent community of physicians, Freidson argues, lies in its position of vulnerable privilege. During the past century physicians gained an effective occupational monopoly over practice, but the monopoly was vulnerable to possible imposition of external control. The collegium defended this privileged position by preventing the public from both learning of its occupational excesses and imposing external control over the individual zones of autonomy.¹⁰⁸

Wolfram observes that "Probably no other professional requirement is as widely ignored by lawyers subject to it. Lawyer complaints form a relatively small percentage of the complaints received by lawyer discipline agencies."¹⁰⁹ Our profession's social contract with society asks us to take responsibility for the ethics of other members of the profession. This requires small acts of courage to speak to each other directly. It requires the collegium to foster a peer culture of high aspirations and ideals.¹¹⁰ If we do not do so, we become the delinquent community that Freidson predicts.

5. The Duty to Restrain Self-Interest to Some Degree to Serve the Client and the Public Purpose of the Profession

The social contract of the peer-review professions with the public requires that each member of the profession restrain self-interest to some degree to serve the public purpose of the profession and the client. If members of a peer-review profession seek self-advantage to the same degree as individuals in other occupations, then society has no reason to grant the profession authority to regulate itself¹¹¹ and society would regulate the peer-review professions like other occupations.

For the legal profession, in the words of the Stanley Commission, "the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good."¹¹² The public good served by the legal profession is justice. The peer-review professions have always been about making a satisfactory living in addition to serving the client's interest and the public good. For lawyers, the degree of "overbalancing" the client's interest and the public good of justice against the lawyer's own self-interest is a difficult question explored further in the discussion of Principle 5.b. below.

The common law of fiduciary duty regarding a lawyer's duties to clients developed prior to the drafting of the 1969 ABA Model Code of Professional Responsibility and the 1983 Model Rules of Professional Conduct. A lawyer owes a client the fiduciary duties of safeguarding confidences and property, avoiding impermissible conflicts of interest, dealing honestly with the client, adequately informing the client, following the instructions of the client, and not employing adversely to the client powers arising from the attorney-client relationship.¹¹³ This body of law calls on the lawyer to restrain self-interest similar to what the law of fiduciary duty requires of other agents in fiduciary relationships.

The social contract of the peer-review professions requires each member of the profession to restrain self-

interest to some degree also to serve the public purpose of the profession. A fair analogy is that a lawyer is an agent and fiduciary not just for the client, but also for the legal system, the purpose of which is justice. The first sentence of the Preamble to the Model Rules in effect states this concept by providing that a lawyer is "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."¹¹⁴ In this meaning an officer holds a position of duty, trust or authority, and a lawyer does in fact both hold a position of trust conferred by the court and exercise authority on behalf of the court whose purpose is justice: "Both the client and the court are sources of the lawyer's authority to act as lawyer, the former being the source of the specific authority to act in a particular case and the latter the source of general authority to act in any case."¹¹⁵ The agent lawyer owes fiduciary duties to both the client and the court. Principle 5.a. below explores further this concept of a fiduciary duty to over-balance the lawyer's self interest with devotion to the public good of justice as an officer of the legal system and a public citizen having special responsibility for the quality of justice.

a. The Duty to Give Professional Time to Serve the Public Good, Particularly Pro Bono Assistance to the Disadvantaged

One of the core values of the profession discussed earlier is the duty to contribute public service to improve the quality of justice, particularly to maintain and improve the quality of the legal profession and to ensure equal access to justice.¹¹⁶ Professionalism Principle 4 – the duty of peer review – assumes that each lawyer gives uncompensated time necessary to assist in both assuring that peers meet minimum professional standards and fostering ethical peer cultures of high ideals.

The tradition of the peer-review professions also includes a "to whom much is given, much is expected" duty to provide pro bono or low fee assistance to the disadvantaged.¹¹⁷ This duty to provide pro bono or low fee assistance to the disadvantaged is uniquely compelling for the legal profession in comparison with the other peer-review professions. The moral justification for the work of the other peer-review professions depends to a much lesser degree on the proper functioning of the system within which the work is done than is the case with the moral justification for the work of the legal profession. A physician for example can serve the major public purpose of the profession, the health of individual patients, without significant concern that others will be negatively affected except to the degree that costly procedures may reduce the amount of resources available to others. However a lawyer in litigation will serve the major public purpose of the profession, justice, only when the adversary system is working properly. The adversary system is the society's best approximation of justice only with (1) a competent neutral decision maker and (2) competent representation for all affected persons. Paragraph 8 of the Model Rules' Preamble recognizes this, "Thus, when an opposing party is well represented, a lawyer can be a zeal-

ous advocate on behalf of a client and at the same time assume that justice is being done."¹¹⁸

Therefore to claim that the lawyer's work serves justice, each lawyer should seek to ensure that all affected persons are competently represented. Paragraph 6 of the Preamble urges each lawyer to "devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel."¹¹⁹ Model Rule 6.1 specifically states, "Every lawyer has a professional responsibility to provide legal services to those unable to pay" with an aspirational standard of at least fifty pro bono hours a year.¹²⁰

b. The Duty to Reflect on How Much Is Enough

A common failing of all the definitions of professionalism is that they do not address adequately on the business aspects of the profession that may create tension between a lawyer's personal goals of income and wealth and the correlative duties, core values and ideals of the profession. The Stanley Commission Report states "All segments of the bar should ... resist the temptation to make the acquisition of wealth a primary goal of law practice."¹²¹ The MacCrate Report notes that since the 1970s, large law firms have become more "profit-oriented" resulting ultimately in a change in large-firm culture "from that of a restrained professional organization to that of a competitive, entrepreneurial enterprise."¹²² However the MacCrate Report does not specifically recommend any strategy to address this increased emphasis on profit.

The Haynsworth Report lists "economic temperance" as a supportive element.¹²³ The Haynsworth Report's recommendations urge that, "In particular, the ethical and other problems created by excessive billable hour and income requirements should be more openly acknowledged and remedied."¹²⁴ The Model Rules' Preamble suggests some restraint on self-interest, noting that tension may exist between "a lawyer's responsibilities to clients, to the legal system, and the lawyer's own interest in remaining an ethical person while earning a satisfactory living."¹²⁵ Yet, the Preamble gives no guidance concerning what is a satisfactory living.

Lawyers properly celebrate the virtue of self-sufficiency – making a living and supporting others – but law is a peer-review profession whose tradition and social contract call for some meaningful restraint on self-interest to serve the profession's public purpose. This is the essence of the social contract that the legal profession and each lawyer have with society.¹²⁶

What is the remedy? There is no number that defines a satisfactory living for each lawyer. As with all aspirational ideals, the best the profession can do is to ask and encourage each professional to give serious and continuing reflective thought to the issue of how much is enough? Professionalism requires each lawyer to undertake a continuing engagement, over a career, on the relative importance of income and wealth in light of the four other principles of professionalism.

While two ABA professionalism reports and the Preamble raise the question how much is a satisfactory living, that question is actually part of a larger question posed by the steadily increasing time demands of professional life in our culture. The larger question is how much life energy should be devoted to meeting professional duties (including making a satisfactory living) in comparison with the life energy devoted to other duties as a parent, spouse, adult child in support of elderly parents, friend, contributing member of non-professional communities and a whole person with dimensions other than work? There is much discussion and some action in the legal profession concerning flexible time and other work arrangements that recognize the non-professional time demands of different life stages – particularly the child-raising years of a career.

6. Conclusion

To maintain and strengthen the social contract on a continuing basis in each generation, the profession must socialize both law students and practicing lawyers into the principles of professionalism – the important elements of an ethical professional identity. This is the critical task for legal education, law firms and departments, bar groups and the bench. It is the mandate of professionalism that keeps self-interest in check and builds both the public trust that the profession is fulfilling both the social contract and each client's trust that the lawyer is restraining self-interest to serve the client's interests.¹²⁷

Professionalism is and must be much more than excellent technical competence and civility. It is the bridge from making a satisfactory living to purpose and meaning in the work of a lawyer. William Sullivan emphasizes "By taking responsibility through one's work for ends of social importance, an individual's skills and aspirations acquire value for others. Professionalism thereby forms a crucial link between the individual's struggle for freedom in a fulfilling existence and the needs of the larger society"¹²⁸ Professionalism is the bridge from self-interest to a calling where the lawyer's livelihood acquires meaning by serving the public purpose of justice which is central to a highly interdependent society.

It is a paradox that the professional autonomy of each lawyer to employ his or her human capital to substantial advantage and personal satisfaction depends on each individual lawyer's acceptance and internalization of the correlative duties of the social contract – the principles of professionalism. The lawyers who live the principles of professionalism create a public good for the profession as a whole – a type of shared property available to all licensed lawyers.¹²⁹ The professionalism of these lawyers creates public trust that the profession is fulfilling the social contract, and the public therefore continues to grant the profession autonomy to self-regulate with substantial influence over the justice system. If too many lawyers become free riders, taking advantage of the shared property created by public trust while solely pursuing self-advantage, the public will lose trust and revise the social contract. Each lawyer

will lose some autonomy in that revision.

Current scholarship tells us little about which approaches are most effective in socializing law students and practicing lawyers into the principles of professionalism. We need leadership from both legal education, the practicing profession, and the bench both to emphasize the importance for the profession that this socialization occur and to support efforts to assess which pedagogies are most effective to help adult professionals grow over a career into an ethical professional identity.

Endnotes

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- 1. WILLIAM SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 126-47 (Jossey-Bass 2007). The Carnegie Foundation's series of similar studies on educating clergy, physicians, engineers, and nurses urges the peer-review professions, all of which face the same critical question of whether they could do better at socializing students into the public purpose, core values and ideals of the profession, to learn from each other how to assist this acculturation most effectively. CHARLES FOSTER ET AL., EDUCATING CLERGY: TEACHING PRACTICES AND PASTORAL IMAGINATION 8-12 (2006).
- 2. See generally "... In the Spirit of Public Service: a Blueprint for the Rekindling of Lawyer Professionalism, 1986 A.B.A. COMM'N ON PROFESSIONALISM [hereinafter *Stanley Commission Report*]; *Teaching and Learning Professionalism*, 1996 A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT OF THE PROFESSIONALISM COMM. [hereinafter *Haynsworth Report*]; A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM (adopted January 21, 1999 by the Conference of Chief Justices) [hereinafter *Action Plan*].
- 3. *Stanley Commission Report*, *supra* note 2, at v, 1-3. See Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 605 (1994) (noting that the scholarly discourse surrounding professionalism was primarily concerned with the perceived decline of professionalism and increase focus on commercialism of the profession, particularly in the 1980s); Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 3 (1993) (describing the standing of the legal profession at its "lowest ebb in the history of our country" due to the misconduct of lawyers and judges. The decline of professionalism is characterized by misconduct of legal professionals).
- 4. *Haynsworth Report*, *supra* note 2, at 2-4.
- 5. See MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYER'S ETHICS 123 (3d ed. 2004).

6. WILLIAM SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 129 (Jossey-Bass 2007).
7. *Id.* at 14, 129.
8. WILLIAM M. SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* 3 (2nd ed. 2004).
9. *Id.* at 21. Eliot Freidson posits professionalism as an alternative ideology for the organization of work in contrast to the dominant market competition ideology that assumes rational and fully informed consumers whose preferences are met by competition among producers resulting in lowest cost goods and services. In the dominant market competition ideology, consumer preferences direct what is produced, and management directs workers on how most efficiently to meet consumer preferences. In the ideology of professionalism, the public grants members of an occupation control over their work. Freidson describes an ideal institutional professionalism with five interdependent elements: (1) specialized work that is believed to be grounded in a body of theoretically-based discretionary knowledge; (2) exclusive jurisdiction in a particular division of labor created and controlled by occupational negotiation between workers and management and consumers (ideally incorporated into and protected by law); (3) a sheltered position in labor markets that is based on qualifying credentials created by the occupation; (4) a formal training program lying outside the labor market that produces the qualifying credentials, which is controlled by the occupation and associated with higher education; and (5) an ideology that asserts greater commitment to doing good in the profession's area of responsibility than to economic gain and to the quality rather than the economic efficiency of work. ELIOT FREIDSON, *PROFESSIONALISM: THE THIRD LOGIC* 1-3, 127 (2001). The institutional professionalism Friedson proposes is essentially the social contract which the personal professionalism discussed in this paper supports. Thomas Morgan argues that the legal profession's social contract ended with the Supreme Court decisions that denied special protection from antitrust laws or First Amendment commercial free speech principles to the legal profession. September 7 2007 email from Thomas Morgan to the author (on file with the author). However the profession is still granted substantial control over entry, continued status, and discipline in the profession. Neither consumers or managers are free to employ anyone to do legal work. The judges who ultimately determine the rules governing the profession are all lawyers.
10. ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* 33 (2007) (citing to the work of Larry Krieger and Ken Sheldon, concludes that legal education could do substantially better regarding socialization of students into an ethical professional identity including legal education's tendency to undermine students' intrinsic values and motivation that would otherwise promote professionalism).
11. Peers in the practice distinguish understandable or "honest" mistakes from mistakes caused by gross negligence or willful indifference. Professional judgment requires the exercise of discretion under conditions of substantial uncertainty, and peers protect the autonomy to make honest mistakes. Peer review looks closely at the quality of the process through which the professional exercised professional judgment. ELIOT FREIDSON, *DOCTORING TOGETHER: A STUDY OF PROFESSIONAL SOCIAL CONTROLS* 129 (1975).
12. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007) (emphasizing that in representing a client, a lawyer shall exercise independent judgment); MODEL CODE OF PROF'L RESPONSIBILITY EC 1-1 (1983) (emphasizing that every client is entitled to independent professional services); See also the discussion of the core value of independent judgment see *infra* Part IV.
13. Jordan Cohen, President of the Association of American Medical Colleges, makes the same argument for his profession. "Why is it important to maintain the medical profession's implicit social contract with society? For it is professionalism that is the medium through which individual physicians fulfill the lofty expectations that society has of medicine. If norms of physician behavior fall short of the responsibilities called for by medical professionalism, both presumed signatories to the social contract – the profession and the public – are destined to suffer irreparable harm." JORDAN COHEN, *Foreword to MEASURING MEDICAL PROFESSIONALISM*, v (David Stern ed., Oxford University Press 2006).
14. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 103-106, 116 Stat. 745, 755-766 (2002). See generally JOHN COFFEY, *GATEKEEPERS: THE ROLE OF THE PROFESSIONS IN CORPORATE GOVERNANCE* (2006).
15. *Id.* at § 307; 17 C.F.R. § 205.3 (2007).
16. MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 10-12 (2007).
17. *Id.* ¶ 11.
18. *Id.* ¶ 12.
19. Fred Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1307 (1995) (professionalism is an abused term and is often defined merely as "to act the way we want lawyers to act"); Timothy Terrell and James Wildman, *Rethinking Professionalism*, 41 EMORY L.J. 403, 406 (1992) (professionalism is an elusive concept and defining it is a lofty goal) [hereinafter Terrell and Wildman]; Burnie V. Powell, *Lawyer Professionalism as Ordinary Morality*, 35 S. TEXAS L. REV. 275, 277-278 (1994) (the concept of professionalism is widely discussed, passionately supported, has generated innovative programs, codes and experiments, but is little-defined); Deborah Rhode, *Opening Remarks: Professionalism*, 52 S.C. L. REV. 458, 459 (2001) ("A central part of the 'professionalism problem' is lack of consensus about what exactly the problem is."); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 657 n.2 (1994) (noting there is a tendency to rely on metaphor in the use of the term professionalism, which may contribute to the absence of consensus as to the term's meaning).
20. Powell, *supra* note 19, at 278. Powell further notes that professionalism is often treated as a "self-evident concept requiring no definition."
21. Susan Daicoff, *Asking Leopards to Change their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 549 (1998); John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL. U. L. REV. 563, 564-566 (1994), (describing the demise of professionalism as congruous with the decline of the legal profession generally, symptoms being prevalent lawyer-bashing, negative stereotypes, and low scores on pub-

- lic opinion polls).
22. Robert L. Nelson, *Professionalism from a Social Science Perspective*, S.C. L. REV. 473, 479 (2001) (asserting that in trying to define professionalism "we mostly rely on post-hoc horror stories about what has gone wrong and use them to analyze the nature of the problem").
 23. Terrell and Wildman, *supra* note 19 at 406, 424-431 (arguing that the heritage of the profession of law is the basis of a "professional tradition" defined by a set of essential, timeless principles. Terrell and Wildman attempt to isolate those principles of professionalism and include, (1) ethic of excellence, (2) integrity: saying no to client demands at limits of law, (3) respect for the system and rule of law, (4) respect for other lawyers and others who serve legal system, (5) commitment to accountability to clients, (6) responsibility for adequate distribution of legal services); Buchanan, *supra* note 21, at 579 (suggesting the six standards of the highly selective International Society of Primerus Law Firms are the best model of professionalism and can facilitate the return of legal professionalism. The six standards are (1) integrity, (2) excellence of work product, (3) reasonable fees, (4) professional education, (5) civility, and (6) community service). Cramton, *supra* note 3, at 611 (arguing that a renewed vision of professionalism will include a lawyer who (1) cares about clients, engages in moral dialogue, protects client interests, (2) cares about equal access to legal services and efficiency in the provision of services, (3) considers moral conscience in daily practice). Philip S. Anderson, *Remarks of Philip S. Anderson*, 18 DICK. J. INT'L L. 43, 44 (2000) (identifying four core principles of the legal profession, including (1) specialized training and knowledge for the practice of law as a learned profession, (2) independent exercise and conflict free practice, (3) practice must observe ethical principles and those principles must be enforced and (4) a lawyer has an obligation to the public in addition to his or her client and an obligation to respect the rule of law).
 24. Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 7 (1993), (Without attempting to formally "define" professionalism, Justice Burger associated professionalism with professional standards, specifically ABA standards. He asserts these standards need to be re-examined in order to address the "unprofessional" practices of Rambo-lawyering, lawyers' use of media, and "huckster-advertising.")
 25. Richard C. Baldwin, *Rethinking "Professionalism" - and Then Living It!*, 41 EMORY L. J. 433, 436 (1992) (noting that though dialogue about professionalism cannot be limited to service to the poor, "the most important substantive value carried by our professional heritage" is access to justice for all members of society); Zacharias, *supra* note 19, at 1317-1318 (describing the birth of the emphasis on pro bono activities that many commentators describe as the "core" of professionalism as the elite Bar's response to a declining public image of lawyers).
 26. *Id.* at 1315 (providing a history of the client-oriented theory of lawyering); See *Id.* at 1319-1320, n.54- 57 for a discussion of the contributions of Monroe Freedman, a fundamental voice for a client-oriented model of lawyering, and the subsequent response and adoption of his ideas; Buchanan, *supra* note 21, at 574 (1994) (espousing a renewed "consumer-oriented" course for lawyers in their relationships to clients and public in order to mend current dismal reputation and revitalize professionalism.).
 27. Robert E. Rodes, Jr., *Professionalism and Community: A Response to Terrell and Wildman*, 41 EMORY L. J. 485, 486 (1992), (critiquing Terrell and Wildman's six values because, as he asserts, they espouse a false theory of moral privatization and lack of shared values in the community); W. Bradley Wendel, *Morality, Motivation and the Professionalism Movement*, 52 S. C. L. REV. 557, 608 (2001) ("...essence of professionalism requires attending to the moral dimension of lawyering and seeking motivation in the intrinsic values that inform professional life."); See generally, *Id.* at 599-601; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RIGHTS 1, 8, 15 (1975) (arguing that the pervading view of "professionalism" is one in which the lawyer engages in role-differentiating behavior, inhabiting an amoral universe where he or she provides special competence to accomplish client objectives, but does not judge the character of the client, the client's objectives or the avenues through which they are pursued. Wasserstrom finds this view in some ways problematic, particularly in that amoral legal acculturation can begin to "dominate one's entire life.")
 28. See, Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 263 (1995) (challenging the work of the Bar and scholars on professionalism on grounds that movement has become an altogether too simplistic "crusade" based on an implicit assumption that there is one universal way to be a legal professional which categorically condemns certain conduct); FREEDMAN, *supra* note 5, at 23-25 (arguing that courtesy and civility guidelines and codes will undermine zealous advocacy); Kenneth L. Penegar, *The Professional Project: a Response to Terrell and Wildman*, 41 EMORY L. J. 473, (1992) (critiquing the functional structuralism of Terrell and Wildman's "Professionalism Project" noting that, "without [a] more complicated picture of reality, efforts to conjure a single image, consciousness, or ideal justification of lawyers' roles and work are likely to remain unconvincing.").
 29. SULLIVAN, *supra* note 6, at 148-51.
 30. *Stanley Commission Report*, *supra* note 2, at v.
 31. *Id.* at 10.
 32. *Id.*
 33. *An Educational Continuum. Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS TO THE B., LEGAL EDUC. AND PROF. DEV. [hereinafter *MacCrate Report*].
 34. *Id.* at 139-140.
 35. *Id.* at 140-141.
 36. *Haynsworth Report*, *supra* note 2, at 1.
 37. *Id.* at 6.
 38. *Id.* at 6-7.
 39. *Action Plan*, *supra* note 2.
 40. *Id.* at 2.
 41. *Id.* at 6-7.
 42. *Id.* at 7.
 43. *Id.*
 44. MODEL RULES OF PROF'L CONDUCT Preamble (2007).
 45. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 1 (2007).
 46. *Id.* ¶ 4. Rules 1.1 and 1.3 make the requirement of competence and diligence more specific.

47. *Id.* ¶ 6.
48. *Id.* ¶ 7.
49. *Id.*
50. *Id.* ¶ 9.
51. *Id.* ¶¶ 10-12. Some scholars argue that the social contract calling for some restraint on self-interest on which professionalism is based no longer exists in the profession (or in the alternative, that it never existed). Russell Pearce offers a Middle Range Approach between the professionalism and the business paradigms that rejects both licensing and exclusive lawyer self-policing, but permits the organized bar to control lawyer certification. Russell Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1271 (1995).
52. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 12 (2007).
53. LON L. FULLER, *THE MORALITY OF LAW* 3-9 (rev. ed., Yale U. Press 1969).
54. *Id.*
55. The MacCrate Report, the Haynsworth Report, the CCI National Action Plan, and the Preamble to the Model Rules of Professional Conduct emphasize that a lawyer must continue to grow in personal conscience. The MacCrate Report emphasizes that the primary sources of ethical rules include, "A lawyer's personal sense of morality." *MacCrate Report*, *supra* note 34, at 204. The Haynsworth Report includes both an essential characteristic that a lawyer must demonstrate ethical conduct and integrity, and a supportive element that a lawyer should develop the capacity for self-scrutiny and for moral dialogue with clients and other individuals involved in the justice system. *Haynsworth Report*, *supra* note 2, at 6-7. The National Action Plan defines professionalism as a personal characteristic that each lawyer must cultivate in him or herself. *Action Plan*, *supra* note 2, at 6. The Preamble specifically provides that a lawyer is also guided by personal conscience and sensitive professional and moral judgment. MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 7, 9 (2007). The Preamble to the ABA Model Code of Professional Responsibility is also explicit. "Each lawyer must find within his [or her] own conscience the touchstone against which to test the extent to which actions should rise above minimum standards." MODEL CODE OF PROF'L RESPONSIBILITY Preamble ¶ 4 (1969). The introduction to the Restatement of the Law Third, The Law Governing Lawyers, provides, "other constraints, such as ideals and habits of morality, will often guide the conduct of a good person who also aspires to serve as an honorable public-spirited lawyer, and much more powerfully and pervasively than merely legal obligations. A good lawyer is also guided by ideals of professionalism and by an understanding of sound professional practice. Extensive consideration of such non-legal factors is not undertaken here. However they have obvious significance in a good lawyer's life and in the self-concept of the profession." 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS 3 (2000). This list of five principles of professionalism is a revision of an earlier list of seven principles of professionalism that appeared in Neil Hamilton and Lisa Brabbit, *Fostering Professionalism Through Mentoring*, 57 J. OF LEGAL EDUC. 102, 103-04 ((2007).
56. All the professionalism definitions stress that a minimum level of competence is necessary. The Stanley Commission Report speaks of lawyering as a "learned art" and notes that it requires substantial intellectual training. *Stanley Commission Report*, *supra* note 2, at 10. The MacCrate Report stresses the necessity of providing competent representation. *MacCrate Report*, *supra* note 33, at 140. The Haynsworth Report notes the requirement by including the essential skills of learned knowledge and skill in applying the applicable law to the factual context. *Haynsworth Report*, *supra* note 2, at 6-7. It also includes "maintenance of competence" in its supportive elements. *Id.* The CCI National Action Plan includes "competence." *Action Plan*, *supra* note 2, at 2. The Model Rules' Preamble specifically requires a lawyer to observe the Model Rules. MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 7, 12, 14. Rule 8.3 states that it is professional misconduct to violate the Rules which include Rule 1.1 on competence and Rule 1.3 on diligence. MODEL RULES OF PROF'L CONDUCT R. 8.3, R. 1.1, R. 1.3.
57. In the language of Dean Roscoe Pound, each lawyer should pursue the law as a "learned art in the spirit of a public service." *Stanley Commission Report*, *supra* note 2, at 10. Three of the four Fundamental Values of the Profession noted in the MacCrate Report spell out ideals that a lawyer should seek (to which a lawyer should aspire)—(1) striving to promote justice, fairness and morality, (2) striving to improve the profession, and (3) undertaking professional self-development. *MacCrate Report*, *supra* note 34, at 125. The Haynsworth Report mixes minimum standards and aspirational ideals on its two lists of essential characteristics and supportive elements for the professional lawyer. *Haynsworth Report*, *supra* note 2, at 6-7. The CCI National Action Plan is particularly forceful in stating that professionalism requires lawyers to exceed the minimum ethical standards. *Action Plan*, *supra* note 2, at 6-7. The Preamble to the Model Rules of Professional Conduct states directly that "a lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service." MODEL RULES OF PROF'L CONDUCT Preamble ¶ 7 (2007).
58. Self-regulation is another common theme of these definitions of professionalism. Members of the profession are responsible for building healthy peer communities. The Stanley Commission Report notes that self-regulation is a defining characteristic of the profession, which has a responsibility to protect the public. *Stanley Commission Report*, *supra* note 2, at 10, 37. The MacCrate Report also notes that a lawyer is a member of a self-governing profession. *MacCrate Report*, *supra* note 34, at 141 and 206. The Haynsworth Report lists self-regulation as a supportive element to professionalism. *Haynsworth Report*, *supra* note 2, at 7. The CCI National Action Plan provides that lawyers "should not tolerate unethical or unprofessional conduct by their fellow lawyers." *Action Plan*, *supra* note 2, at 7. The Model Rules' Preamble speaks at length of the self-regulation of the legal profession and the profession's social contract with society. "A lawyer should also aid in securing their observance [of the Rules] by other lawyers." MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 10-12 (2007). The Preamble also stresses the responsibilities that are implicated by self-regulation and notes that the profession risks loss of its autonomy if its members fail in their duties. *Id.*
59. The Stanley Commission Report states, "The client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving the client's interest and the public good." *Stanley Commission Report*, *supra* note 2, at 19. The Haynsworth Report builds on Dean Roscoe Pound's def-

inition of professionalism and emphasizes that a professional lawyer pursues "a learned art in service to clients and in the spirit of public service." The Report's supportive elements include the subordination of personal interests and viewpoints to the interests of the clients and the public good. *Haynsworth Report*, *supra* note 2, at 6-7. Paragraph 1 of the Model Rules Preamble calls on each lawyer to hold in tension three major roles: (1) a representative of clients; (2) an officer of the legal system; and (3) a public citizen having special responsibilities for the quality of justice. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 1 (2007).

60. Public service is an important element to all these professionalism definitions. Each lawyer should devote professional time to serve the public good, particularly by representing pro bono clients. "In the spirit of public service" is part of the title of the Stanley Commission Report. *Stanley Commission Report*, *supra* note 2 at 47. The MacCrate Report stresses that a lawyer should contribute to the profession's responsibility to represent pro bono clients. *MacCrate Report*, *supra* note 33, at 140. The Haynsworth Report's definition of professionalism retains the common phrase of "in the spirit of public service" and lists cost-effective legal services as a supportive element. *Haynsworth Report*, *supra* note 2, at 7. The CCJ National Action Plan exhorts lawyers to devote their judgment and expertise to the public good, particularly through participation in pro bono and community service activity. *Action Plan*, *supra* note 2, at 7. The Model Rules' Preamble also notes "As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and quality of service rendered by the legal profession....[A]ll lawyers should devote professional time....for all those who...cannot afford or secure adequate legal counsel." MODEL RULES OF PROF'L CONDUCT Preamble ¶ 6 (2007).
61. While some restraint on simple income and wealth maximization is implicit in the fifth element of professionalism above (acting as a fiduciary where self-interest is over-balanced by devotion to serving the client and the public good) as well as in the first professionalism element above (development of personal conscience), and the professionalism theme in 5.a. (pro bono service), the increasing emphasis on billable hours and net profit per lawyer means that every lawyer, but particularly those in private practice, should reflect regularly on the question "how much is a satisfactory living?" Otherwise money will dominate as a measure of the value of the lawyer and the lawyer's work. *Stanley Commission Report*, *supra* note 2, at 15; *Haynsworth Report*, *supra* note 2, at 32. The Model Rules' Preamble also has a focus on balancing a lawyer's personal income and wealth goals with the other principles of professionalism. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 9 (2007).
62. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (2002). A personal sense of morality and moral compass are sometimes used as synonyms for personal conscience but focus more specifically on a person's principles of right and wrong.
63. *MacCrate Report*, *supra* note 33, at 137, 205, 215, 218; *Haynsworth Report*, *supra* note 2, at 7; STUCKEY ET AL., *supra* note 10, at 66 ("The key skill set of lifelong learners is reflection skills"); *Action Plan*, *supra* note 2, at 205, 218.
64. This body of scholarship understands "morality" as rooted in the human psyche and the social condition that humans live in groups and what one person does can affect others. Rest

noted "The function of morality is to provide basic guidelines for determining how conflicts in human interests are to be settled and for optimizing mutual benefits of people living together in groups. It provides the first principles of social organization; it remains for politics, economics, and sociology to provide the second-level ideas about the specifics for creating institutions, role-structure, and practices." JAMES REST, MORAL DEVELOPMENT ADVANCES IN THEORY AND PRACTICE 1 (1986).

65. The first reference to the Four Component Model was in James Rest, *Morality*, in HANDBOOK OF CHILD PSYCHOLOGY: COGNITIVE DEVELOPMENT: VOL. 3 (P. MUSEN, J. FLAVELL & E. MARKMAN eds., 4th ed. 1983) at 556-628.
66. JAMES REST & DARIA NARVAEZ, MORAL DEVELOPMENT IN THE PROFESSIONS 23 (1994).
67. *Id.*
68. *Id.* at 23-24. More recent scholarship on moral judgment is de-emphasizing any implication that there is a linear sequence of psychological processes leading to moral behavior. Recent articles frame the four component process as an interactive, dynamic process model. Muriel Bebeau & Verna Monson, *Guided by Theory, Grounded in Evidence: A Way Forward For Professional Ethics Education*, in HANDBOOK ON MORAL AND CHARACTER EDUCATION (D. NARVAEZ & L. NUCCI eds., in press).
69. Over a lifetime, the two most important factors influencing growth in moral judgment as measured by the moral reasoning tests developed in this body of scholarship are education and age, with education being a far more powerful predictor of moral judgment development. REST & NARVAEZ, *supra* note 66 at 15.
70. Normative ethics is aimed at judgments of right and wrong, virtue and vice. It provides criteria to support or refute claims of rightness or wrongness, or virtue or vice. Descriptive ethics is a social science aimed at empirically neutral description of the values of individuals and groups. Meta-ethics (sometimes called analytical ethics) "examines the meaning and objectivity of ethical judgments. Meta-ethics is therefore at a level removed from normative ethics. At this remove, one might [for example] explore the differences among scientific, religious and ethical perspectives, the relation of legality to morality, or the implications of cultural differences for ethical judgments, and so forth." KENNETH GOODPASTER & LAURA NASH, POLICIES AND PERSONS: A CASEBOOK ON BUSINESS ETHICS 523 (3d ed. 1998).
71. SULLIVAN, *supra* note 8, at 262 - 267.
72. REST & NARVAEZ, *supra* note 66, at 24.
73. Bebeau and Monson, *supra* note 68. See Neil Hamilton & Lisa Brabbit, *Fostering Professionalism Through Mentoring*, 57 J. LEGAL EDUC. 102, 115-19 (2007) (explaining Kegan's most common stages of professional identity formation).
74. *Id.*
75. Verna Monson & Muriel Bebeau, *Defining Issues, Defining Realities: The Role of Moral Psychology in Advancing Business Ethics Education* (manuscript in draft).
76. Lawrence J. Walker, *The Model and the Measure: An Appraisal of the Minnesota Approach to Moral Development*, 31 J. OF MORAL EDUC. 353, 355 (2002).
77. In addition, clarity on a lawyer's own personal conscience enables the lawyer to explain the lawyer's moral perspective

to the client. Vischer points out "an attorney's moral perspective often determines the advice she gives, and clients will be better off if that perspective is articulated openly and deliberately instead of being left to operate beneath the surface of the attorney-client dialogue. The attorney's moral experiences and perspective invariably shape her understanding of the client and the object of the representation, not as a result of her irresponsible exercise of professional discretion, but as a consequence of human function." Robert Vischer, *Legal Advice as Moral Perspective*, 19 *Geo. J. of Legal Ethics* 229, 266 (2006).

78. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 *Geo. Wash. L. Rev.* 1, 32 (2005) (noting also that (1) a lawyer learns of these obligations through "socialization, professional lore, independent reflection on the expectations of the professional 'office'..." and (2) the 1908 Canons, the Model Code, and the Model Rules "represent the bar's collective standards for professional conduct - an attempt to help define professional conscience"). *Id.* at 35, 43.
79. *Id.* at 54-55.
80. *Id.* at 56.
81. *Id.*
82. *Id.*
83. See ROBERT KEGAN, *THE EVOLVING SELF* (1982).
84. See SULLIVAN, *supra* note 6, at 135 ("Professional identity is an important part of the individual's identity more broadly."); Zacharias and Green mention but do not explore in depth the concept of "collective professional conscience." Zacharias, *supra* note 78, at 55. The concept that an organization like a law firm or department or an association of lawyers like the bench and bar in a practice area or a state has a conscience is an important idea beyond the scope of this essay. Ken Goodpaster's recent book, *Conscience and Corporate Culture*, offers a strong analysis that conscience is equally important in the culture of an organization and that organizations can do far better in orienting, institutionalizing, and sustaining conscience in the organizational culture. KENNETH GOODPASTER, *CONSCIENCE AND CORPORATE CULTURE* 4-9 (2007).
85. A major reason for concern about the role of a lawyer's personal conscience in representing clients, Vischer points out, is "a morality-driven vision of lawyering, it is feared, will quickly devolve into a lawyer-by-lawyer conception of lawyering, which in turn threatens individuals' equal access to justice." Vischer, *supra* note 77, at 256. Arguing in the other direction, David Bateson notes that sophisticated clients control the lawyer.
86. *Id.* MODEL RULES OF PROF'L CONDUCT Preamble ¶ 14 (2007).
87. MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3, 1.4 (2007); *MacCrate Report*, *supra* note 33, at 205, 207; STUCKEY ET AL., *supra* note 10, at 26-27.
88. MODEL RULES OF PROF'L CONDUCT R. 1.7-1.12 (2007); *MacCrate Report*, *supra* note 33, at 205. Loyalty includes recognition that the lawyer's self-interest in fees is in conflict with the client's interest and therefore the lawyer's fees should be reasonable and fair. MODEL RULES OF PROF'L CONDUCT R. 1.5 (2007).
89. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007). *MacCrate Report*, *supra* note 33, at 205.
90. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 2 ("As advocate, a lawyer zealously asserts the client's position under the

rules of the adversary system."), ¶ 8 ("[W]hen an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."), ¶ 9 ("These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system."). Paragraph 1 of the Model Rules' Preamble makes clear that the lawyer is to hold in tension the roles of "a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice." *Id.* ¶ 1. See *MacCrate Report*, *supra* note 33, at 205. Zealous advocacy focuses on maximizing client autonomy to achieve any lawful client objective through legally permissible means. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1969).

91. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007); *MacCrate Report*, *supra* note 33, at 151; *Stanley Commission Report*, *supra* note 2, at 28; STUCKEY ET AL., *supra* note 10, at 82.
92. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 1 ("A lawyer is 'a public citizen having special responsibility for the quality of justice.'"), ¶ 6 ("As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession."), ¶ 7 ("A lawyer should strive to ...exemplify the legal profession's ideals of public service."). See *Haynsworth Report*, *supra* note 2, at 7; *MacCrate Report*, *supra* note 33, at 213; STUCKEY ET AL., *supra* note 10, at 84-88. The core value of public service focused on the maintaining and improving the quality of service provided by colleagues in the legal profession is developed in more detail in the fourth principle of professionalism. The core value of public service particularly focused on equal access to justice for the disadvantaged is developed in detail in professionalism principle 5.a.
93. MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 5, 9, R. 1.3 cmt. 1, R. 3.5 cmt. 4, R. 4.4(a) (2007); *MacCrate Report*, *supra* note 33, at 204, 213; *Haynsworth Report*, *supra* note 2, at 7; *Action Plan*, *supra* note 2, at 37; STUCKEY ET AL., *supra* note 10, at 82.
94. The major ideal of the profession is to seek continuing growth toward excellence in both lawyering skills and ethical conduct over a career. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 7 (2007) ("A lawyer should strive to attain the highest level of skill, to improve the law and legal profession and to exemplify the legal profession's ideals of public service."); *MacCrate Report*, *supra* note 33, at 136, 200, 219 (Lawyers should "seek to achieve excellence in [their] chosen field"); *Stanley Commission Report*, *supra* note 2, at 15, 17; STUCKEY ET AL., *supra* note 10, at 66.
95. The word "integrity" comes from the Latin *integritas* which means wholeness or oneness. A lawyer of integrity acts consistently with the lawyer's first ethical principles even when there is some cost involved. *Stanley Commission Report*, *supra* note 2, at 15, 47; *MacCrate Report*, *supra* note 33, at 204; *Haynsworth Report*, *supra* note 2, at 7; STUCKEY ET AL., *supra* note 10, at 7, 84-88.
96. The Model Rules of Professional Conduct Rule 8.4(c) prohibits conduct involving dishonesty and Rule 8.3 requires reporting of another lawyer's violation of a Rule that raises a substantial question as to that lawyer's honesty. MODEL RULES OF PROF'L CONDUCT R. 8.4(c), R. 8.3 (2007). Paragraph 2 of

the Preamble asks lawyers to negotiate "consistent with requirements of honest dealings with others." *Id.* Preamble ¶ 2. *MacCrate Report*, *supra* note 33, at 204 and STUCKEY ET AL., *supra* note 10, at 80-82, 84-88. The focus of "honesty" in the advocacy context is that affirmative statements of fact by a lawyer are to be truthful; "honesty" in this context does not require revelation of material confidential facts unless there is either a legal duty to do so or the client consents.

97. Model Rule of Professional Conduct Rule 3.4 focuses on fairness to the opposing party and opposing counsel. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2007). The ABA and CCI reports on professionalism also emphasize fairness as a virtue for a lawyer. *Stanley Commission Report*, *supra* note 2, at 15, 47; *MacCrate Report*, *supra* note 33, at 36, 213; *Action Plan*, *supra* note 2, at 37; STUCKEY ET AL., *supra* note 10, at 84-88. The thrust of these references to fairness is that a lawyer in adversary contexts should conform to established and commonly accepted formal and informal rules and customs in dealing with adversaries. They create trust and efficiency which reduce transaction costs and benefit both the justice system and the clients overall. The lawyer should not "game" these rules and customs with either interpretations outside the spirit of the rules and customs or conduct that may escape the adversary's reasonable ability to monitor compliance. If the lawyer challenges existing understandings regarding these rules and customs, notice and transparency would be important.
98. ABA CANONS OF PROF'L ETHICS Canon 29 (1908).
99. MODEL CODE OF PROF'L RESPONSIBILITY Canon 8 (1969).
100. MODEL RULES OF PROF'L CONDUCT R. 8.3-8.4 (2007).
101. *Id.* at R. 8.3.
102. *Id.* at cmt. 1.
103. *Id.* at R. 5.1(a).
104. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 22 (1986).
105. FREIDSON, *supra* note 11, at 237, 239.
106. *Id.* at 237.
107. *Id.* at 243.
108. *Id.* at 244-45.
109. WOLFRAM, *supra* note 104, at 683.
110. The Preamble to the Model Rules of Professional Conduct emphasizes the importance of peer opinion in both paragraph 7 ("[A] lawyer is also guided by personal conscience and the approbation of professional peers.") and paragraph 16 ("Compliance with the Rules depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings."). MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 7, 16 (2007).
111. Peer-review in turn translates into substantial autonomy and discretion for individual professionals,
112. *Stanley Commission Report*, *supra* note 2, at 10.
113. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. a (2000).
114. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 1 (2007).
115. L. RAY PATTERSON, LAWYER'S LAW: PROCEDURAL, MALPRACTICE & DISCIPLINARY ISSUES 11-12 (4th ed. 1999).
116. See discussion *supra* in both notes 61 and 88.
117. COHEN, *supra* note 13, at vii; *MacCrate Report*, *supra* note

33, at 214-15; STUCKEY ET AL., *supra* note 10, at 24-26. Included in the calculus of what has been given is the autonomy of the profession to self-regulate which in turn creates autonomy for each lawyer's professional judgment.

118. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 8 (2007).
119. *Id.* ¶ 6.
120. *Id.* at R. 6.1.
121. *Stanley Commission Report*, *supra* note 2, at 15. The Stanley Commission Report also cautions "activities directed primarily to the pursuit of wealth will ultimately prove both self-destructive and destructive of the fabric of trust between clients and lawyers generally". *Id.* at 51.
122. *MacCrate Report*, *supra* note 33, at 79-80.
123. *Haynsworth Report*, *supra* note 2, at 7.
124. *Id.* at 32. Professor Rob Atkinson is highly critical of Pound's definition, which both the Stanley Commission Report and the Haynsworth Report utilize. Atkinson notes, "Pound implies that we should somehow be embarrassed that we make our living as lawyers." Rob Atkinson, *Growing Greener Grass: Looking From Legal Ethics to Business Ethics, and Back*, 1 U. OF ST. THOMAS L.J. 951, 985 (2004). Atkinson speaks of the lack of discussion in law school curriculum of what he calls the secondary minimal requirement to legal ethics—how to sustain yourself. *Id.* at 967. To Atkinson, the notion of "sustaining yourself" is second to helping your client, but it still should occupy a very important part of the discussion. *Id.* at 964.
125. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 9 (2007).
126. If the legal profession is indistinguishable from other occupations in terms of restraint on self-interest, then the profession should be regulated as other occupations are regulated. This is what the falling public perception on the ethics and standing of the legal profession is telling us. Over the past 25 years, while the opinion polls continue to indicate the public understands that the other peer-review professions have a unique morality, the public no longer believes that to be true of the legal profession and now is unable to distinguish the legal profession from other business occupations. *Firefighters, Doctors and Nurses Top List as Most Prestigious*, Harris Interactive, July 26, 2006, http://www.harrisinteractive.com/harris_poll/index.asp?PID=685.
127. See COHEN, *supra* note 13, at vii, viii.
128. SULLIVAN, *supra* note 8, at 31.
129. *Id.* at 181-82. ¶



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FEATURES

- "The Indian Lawyer": Legal Education in India and Protecting the Duty of Confidentiality while Outsourcing
BY LAURA D'ALLAIRD 1
- Apocalypse at Law: The Four Horsemen of the Modern Bar - Drugs, Alcohol, Gambling and Depression
BY J. NICK BADGEROW 2
- It's Not Hourly Billing, but How it's Abused that Causes the Poor Image of Attorneys
BY GERALD F. PHILLIPS 21

DEPARTMENTS

- Around the ABA 2

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THE PROFESSIONAL LAWYER

Apocalypse at Law: The Four Horsemen of the Modern Bar - Drugs, Alcohol, Gambling and Depression

J. Nick Badgerow*¹

And power was given unto them over the fourth part of the earth, to kill with sword, and with hunger, and with death, and with the beasts of the earth.²

I. THE BAR AT RISK.

As the number of practicing lawyers continues to grow, so does the number of complaints against lawyers for various violations of the applicable rules of professional conduct.³

There are many reasons for the type of conduct that leads to complaints by clients, opposing parties and counsel, and even judges, but to generalize about the causes is to invite criticism. Each case is as individual as the lawyer-respondent and the circumstances confronting him at the time.

However, there are certain factors that appear in an alarming number of cases. These involve lawyers' use of and dependence upon drugs and alcohol (see Sections II and III, below), participation in gambling (see Section IV, below), and descent into depression. (See Section V, below.)

Many are the cases and articles that chronicle the complaints about lawyers failing to return calls or communicate adequately with their clients;⁴ lawyers failing to take action or meet deadlines, resulting in claims being lost;⁵ and lawyers acting inappropriately, ranging from outbursts of temper⁶ to propositioning sexual relations with clients.⁷ While not excusing this behavior, the respondent lawyers in those cases often cite one or more of these modern problems in mitigation: drugs, alcohol, gambling and depression. These are the Four Horsemen of the Modern Bar. They cause lawyers to lose control of their lives and then to lose their licenses to practice, their families, their self-respect, and frequently, their lives. These four scourges - of drugs, alcohol, gambling and depression, acting alone or in concert, are endemic and increasing, and they represent a threat to the stability of an integral component of liberty and democracy - a free and independent bar.

The purposes of this article are to explore these four phenomena, discuss some of the cases that indicate their nature,

and address some possible solutions in the hope of stemming their stampede. (See Section VI, below.) The first step is awareness. The next step is a resolve by all members of the bar to offer a helping hand.

II. DRUGS - THE WHITE HORSE.

And I saw, and behold a white horse: and he that sat on him had a bow; and a crown was given unto him: and he went forth conquering, and to conquer.⁸

It is no stretch of the metaphor to call drugs the "white horse." Indeed, heroin and cocaine have been called by this name for many years.⁹ As a modern poet has written, in "My Name is Cocaine:"

Remember, my friend, it's all up to you.

If you decide to jump in my saddle you better ride me well;

For on the white horse of cocaine, I'll ride you straight to HELL!¹⁰

The 1980's near-hit by the Danish band Laid Back, "White Horse," said to have been written about heroin, repeatedly intones "Don't ride the white horse."¹¹

There is no doubt that drug use remains a problem in society, generally,¹² and lawyers are not exempt from the lure of this horse. Access to money, familiarity with those who have access to drugs, and perhaps a psychological tendency to seek a quick buzz, sometimes combine to lead a lawyer down the wrong path. Often, once this process has started, it spirals out of control. And the results can be devastating - for the lawyer's clients, as well as for the lawyer himself. Indeed, drug addiction in the Bar has been called "A modern American tragedy."¹³

An example of this is *The Florida Bar v. Heptner*.¹⁴ There the attorney solicited and used cocaine regularly over an eighteen-month period and accepted cocaine in exchange for legal services.¹⁵ The court noted that before drug abuse may serve as a mitigating factor, "the addiction must impair the attorney's ability to practice law to such an extent that it outweighs the attorney's misconduct."¹⁶ The court rejected a proposal for a retroactive two-year suspension and ordered the attorney disbarred. The court noted,

[The attorney] committed serious acts of misconduct. First, he engaged in felony criminal conduct with a client, involving the sale and use of cocaine. Second,

continued on page 14

Four Horsemen, from page 2

he continued to practice law while suspended and, thus, intentionally violated an order of this Court. Third, Heptner has engaged in multiple acts of misconduct over an extended period of time.¹⁷

Such cases should serve as a warning of the destruction that accompanies this first horseman. The use of, and addiction to, drugs such as cocaine increases the danger that an attorney's misconduct poses to the lawyer's clients and to the public at large.¹⁸ Unlike the use of alcohol, which is legal, the use of drugs is illegal; since its use is a criminal act, the courts should not condone that use, particularly by members of the bar.¹⁹

A similar case is *In re Disciplinary Proceedings Against Schwimmer*,²⁰ in which the attorney was addicted to drugs and alcohol and, among other crimes, misappropriated client funds.²¹ The court concluded that, under Washington law, "[t]here are no extraordinary mitigating factors present in this case. Although Schwimmer has indicated that he has little recollection of actually taking client funds and that he had addiction problems with alcohol and drugs, this does not mitigate his professional misconduct."²²

Sometimes a less draconian approach is taken by the court, and addiction is considered as a mitigating factor, if the lawyer has pursued recovery. For example, in *Columbus Bar Ass'n v. Ashton*,²³ the attorney took unauthorized expense-account advances from his law firm, failed to properly withdraw from a client's case, and failed to disclose to clients that he lacked malpractice insurance.²⁴ However, by the time of his hearing, the respondent had come to recognize his addiction to drugs and had taken steps to seek recovery. The court stated:

[W]e attribute mitigating effect to the fact that a lawyer suffers from an addiction to drugs just as we do to the fact that a lawyer suffers from alcoholism or a mental disability. Moreover, even when a lawyer has committed serious misconduct in addition to illegal drug use, we have tempered our disposition when the lawyer has shown a commitment to recovery from drug addiction.²⁵

In either event, the pursuit of this white horse can jeopardize a lawyer's happiness, his livelihood and his life.

III. ALCOHOL - THE RED HORSE.

*And there went out another horse that was red: and power was given to him that sat thereon to take peace from the earth, and that they should kill one another: and there was given unto him a great sword.*²⁶

The subtle lure of alcohol, the red wine that invites one in slowly - promising escape from tension and the cares of this world - can lead to ruin. The classic film "The Days of Wine and Roses" depicts the degradations and losses that

can ensue from that first innocent drink. As the film's theme song says,

The days of wine and roses laugh and run away like a child at play

Through a meadow land toward a closing door

A door marked "nevermore" that wasn't there before.²⁷

Some people simply cannot control their urge to drink.²⁸ The red wine wields the sword of power over them. This loss of control results in a loss of peace and, sometimes, even the loss of life.

Lawyers are not immune to this risk; they are perhaps more at risk than most. Tensions, confrontations, disputes, hard work, the drive to succeed - all endemic to the profession - can lead one to seek an escape. The escape is often found in the quick, legal and relatively inexpensive route of the bottle. But that escape can lead to the "door marked 'nevermore' that wasn't there before," so poignantly described in Johnny Mercer's lyrics in the theme song quoted above.

Lawyers are not immune to this risk . . .

Singer-songwriter Merle Haggard knew the cost of the "Days of Wine and Roses" from personal experience, and he was able to describe that cost in his song, "I Threw Away the Rose:"

But now I'm paying for the days of wine and roses
A victim of the drunken life I chose
Now all my social friends look down their noses
Cause I kept the wine and threw away the rose.²⁹

Disciplinary cases and malpractice lawsuits that describe lawyers' problems resulting from the red horse are legion.

A lawyer was placed on probation for three years in the District of Columbia case of *In re Brown*³⁰ based on an array of actions and omissions resulting from alcoholism, including misappropriation of client funds; failure to maintain complete records, render appropriate accounts, or notify client of receipt of funds; and failure to return any prepaid unearned fees to a client until 13 years after the representation ended.³¹ The court so held "because [the attorney's] alcohol addiction was the substantial cause of the misconduct and because he is substantially rehabilitated."³² However, Brown's reinstatement was conditional on his continued satisfaction of restitution and sobriety monitoring conditions and repayment to clients of misappropriated funds.³³

In Oklahoma, addiction to alcohol is not by itself enough to mitigate discipline.³⁴ In *State ex rel. Oklahoma Bar Ass'n v. Beasley*, the attorney failed to perform legal services for clients, communicate with clients, and respond to Bar Association investigations by reason of his alcoholism.³⁵ The attorney was suspended for two years and one day.³⁶ To be reinstated, the attorney was required to "recognize the alcohol problem, seek and cooperate in treatment and be willing to undergo supervision to assure sobriety."³⁷

Similarly, by reason of her alcoholism, the attorney in *Disciplinary Counsel v. Hiltbrand*³⁸ was convicted of multiple counts of operating a motor vehicle while intoxicated, driving with a suspended license, and telephone harassment.³⁹ The attorney was suspended indefinitely, a judgment not to be reconsidered until the attorney "completed a sustained period of recovery from alcohol dependency."⁴⁰

These are but just a few examples of the hundreds of disciplinary cases and civil actions that have resulted from a lawyer's use, overuse and misuse of alcohol. This is perhaps the most common and dangerous of the four horsemen.

IV. GAMBLING - THE BLACK HORSE

And I beheld, and lo a black horse; and he that sat on him had a pair of balances in his hand.⁴¹

Gambling is a greater problem than it has ever been. Gambling no longer holds with it the tinge of "sin" it formerly carried, and outlets for legalized gambling make it much more accessible to nearly everyone.

Governments must look for ways to finance their operations, and no one likes tax increases. A tempting "no-lose" option for government is to legalize gambling. As gambling becomes more of an accepted, legalized, and prolific phenomenon in our society, its dangers increase. One may bet the red or black, but the odds are stacked in favor of the house. The rider of this black horse has the balances in his hands - and his thumb is holding down the left side. Even a promised return rate of "95%" still means that five percent of the money stays with the casino, time after time.

But the elation of winning, those few times it happens, causes a "high" that can lead to addiction.

Compulsive gambling is a progressive disorder in which the individual has a psychologically uncontrollable preoccupation with gambling. The problem gambler becomes obsessed with an overwhelming urge to gamble and, without intervention, will continue down a path of destruction, similar to alcohol and drug addiction.⁴²

So, with the funding benefit to governmental operations from gambling comes the downside - revenues leave the state, those who cannot afford to lose do lose, and those with a latent compulsion to gamble are given avenues to exercise and increase that compulsion, with all the financial and personal costs that entails.

Only a few short decades ago, legalized gambling was relegated to one state and the horse and dog tracks of only a handful of others. Now all states but three - Utah, Hawaii, and Tennessee - allow legalized gambling of some sort within their borders. Thirty-seven states plus the District of Columbia offer lotteries; casinos legally operate in 28 states; and you can bet on the horses or the dogs in 43. . . . So much

has gambling been de-stigmatized that "Monte Carlo nights" are a staple for many charitable fund-raisers and even for after-prom gatherings of high school kids. In short, when the itch to "test your luck" comes over you in 21st century America, you don't have to travel far to scratch it.⁴³

With the increased availability of gambling outlets at casinos, race tracks and online, one who is inclined to gamble sees the temptation everywhere. This can lead to harmful individual results.

Problem and pathological gamblers can experience psychological difficulties such as anxiety, depression, guilt, attempted suicide, or abuse of alcohol and drugs, as well as stress-related physical illnesses such as hypertension and heart disease. Interpersonal problems include lying and stealing, resulting in a breakdown of relationships and divorce. Work and school problems include poor performance, abuse of leave time, and loss of employment. Financial consequences are substantial, including credit card debt, unpaid creditors, and impoverishment. Finally, pathological gamblers may resort to criminal behavior to finance gambling or pay gambling debts.⁴⁴

Lawyers are in a position to pursue a gambling penchant and to turn it into a harmful habit. With access to client funds in their trust accounts, and with access to settlement funds that belong to the client, lawyers can be tempted to take a temporary "withdrawal" to cover yesterday's losses and to fund today's bets. "After all," they dream, "this losing streak cannot continue, the cards will turn, the horse will come home, and then it can all be paid back." But the horse never reaches the finish pole, because the odds are stacked in favor of the house - no matter what the form of the gambling - and because the compulsive gambler cannot stop even when winning.

Pathetically, however, there never seems to be a big enough winning to make even the smallest dream come true. When compulsive gamblers succeed, they gamble to dream still greater dreams. When failing, they gamble in reckless desperation and the depths of their misery are fathomless as their dream world comes crashing down. Sadly, they will struggle back, dream more dreams, and of course suffer more misery. No one can convince them that their great schemes will not someday come true. They believe they will, for without this dream world, life for them would not be tolerable.⁴⁵

When this black horse takes over, a lawyer can lose control of his life and, sometimes, his practice. It is often hidden, until its symptoms grow and eventually take over.

In a Nebraska reciprocal discipline case,⁴⁶ an attorney with an "uncontrollable gambling habit" was disbarred for misappropriating client funds and undertaking a "check-kit-

[L]awyers can be tempted to take a temporary "withdrawal" to cover yesterday's losses . . .

ing scheme" whereby the attorney attempted to pay back some of the funds from a personal bank account with insufficient funds.⁴⁷ The court agreed with the Iowa Supreme Court, which had already revoked the attorney's license to practice in Iowa, having stated that, "[u]nfortunately, [respondent's gambling] is a matter which, although regrettable and cause for sympathy, does not obviate the seriousness of the improper attorney conduct that has occurred."⁴⁸

Gambling has also proven an insufficient defense elsewhere. In *In re Reinstatement of Fraley*,⁴⁹ the attorney resigned from the state bar with no explanation. The undisclosed reason was that the attorney's employer discovered that the attorney had routinely gambled at a race track and misappropriated client funds to cover his losses.⁵⁰ The court denied the attorney's application for reinstatement.⁵¹ While the court could have remanded the case to the Professional Responsibility Tribunal to supplement the record with respect to the attorney's prior misconduct and the particulars of the original offense, the court "[felt] no compulsion" to remand the matter given that the "paucity of [the] record" was a direct result of the attorney's withholding of germane information.⁵²

In the case of *In re Mendelson*,⁵³ the attorney's gambling compulsion led him to convert client funds and issue a check on his escrow account payable to cash. The court noted that

[r]espondent submits credible medical evidence that his misconduct was caused by compulsive and pathological gambling induced by the medication he was taking for Parkinson's Disease. Since the adjustment of the medication, respondent asserts that he no longer gambles. Petitioner does not disagree with either contention. Under all the circumstances, we conclude that respondent's condition mitigates the misconduct herein but does not excuse it.⁵⁴

The attorney was suspended for one year, but the suspension was stayed on the condition that the attorney refrained from further misconduct.⁵⁵

Indeed, finding excusable compulsion to gamble appears to be rare – and quite difficult for courts and disciplinary authorities to do. Thus, a lawyer who gambles, particularly with client funds, gambles with his life and career as well.

V. DEPRESSION – THE PALE HORSE.⁵⁶

*And I looked, and behold a pale horse: and his name that sat on him was Death, and Hell followed with him.*⁵⁷

Pale and wan, the depressed lawyer fights a daily battle. The highs of a victory are swallowed up in the lows of a loss. Clients take their files to other lawyers. Feelings of self-doubt and insecurity set in. As Hank Williams pointed out so clearly:

On that judgement day; you'll weep and you'll cry
When the Pale Horse and his rider goes by?⁵⁸

At least two causes for depression in lawyers relate to the "eat-what-you-kill" mentality brought on by the increasing commercialization of the practice: the Loaded Desk and the Empty Desk.

The Loaded Desk: One lawyer, highly successful in her business and marketing efforts, finds herself with more clients and cases than she can handle. Her desk is stacked high with files. Her in-box is full of unanswered mail, including demands for discovery and threats of motions for sanctions. Her phone is hidden by message slips. Her computer and Blackberry are overloaded with e-mails. Motions to compel go unanswered. Orders to compel remain unresolved. Sanctions ensue.

The lawyer does not know where to start, how to pick up that first letter in the stack and work through it. She goes into brain freeze, overloads – and fails. The problem compounds itself and leads to missed deadlines and statutes of limitations, client complaints, discipline – or worse.

The Empty Desk: Another lawyer, having not been so well-trained in marketing, is not so successful in developing business. He arrives at work each day to find his desk still bereft of work. He checks his phone, computer and Blackberry to make sure they are still working – so long has it been since he received a call or a non-spam e-mail. He stares at the empty desk, does not know where to turn or how to act – and fails.

Those few matters that the lawyer is handling get ignored, deadlines get missed, the problem compounds itself and leads to client complaints and discipline – or worse.

The courts and disciplinary authorities have been somewhat more understanding and flexible in the case of depression.

An understanding description of depression and its relationship to the practice of law may be found in *Board of Professional Ethics v. Grotewald*,⁵⁹ where the respondent was given a sixty-day suspension for misappropriation and misrepresentation violations, which generally would result in discipline ranging from "a public reprimand to a six-month suspension."⁶⁰

Clearly, misrepresentation is the most serious violation in this case. . . . Yet, against the backdrop of depression, misrepresentation can take on added meanings, as can neglect. This backdrop complicates the imposition of discipline and requires us to fully examine the impact of depression.

The evidence in this case reveals that serious depression often results from chemical imbalances in the brain that cause those afflicted to be plagued by growing and overwhelming feelings of hopelessness and despair. It also reveals that depression can take hold of a person without his or her knowledge or understanding of the need for treatment.⁶¹

Because depression is a condition best diagnosed by

At least two causes for depression in lawyers relate to the "eat-what-you-kill" mentality . . .

symptoms,

[U]nethical professional conduct can double as a symptom of depression. See Beck et al. [*Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sampling of Practicing Lawyers*, 10 J.L. & Health 1, (1995-96)] at 2. Moreover, these symptoms too often appear before the disease is diagnosed and treatment is sought. See Bakke [Brainstorm, My experience with depression.] 61 The Iowa Lawyer, Mar. 2001, at 5-6.⁶²

The court went on to conclude that respondent's "growing state of depression" was "a mitigating factor in the imposition of discipline"⁶³ and therefore imposed discipline of a sixty-day suspension.⁶⁴

The attorney in *In re Mooers*⁶⁵ was disbarred – but disbarment was stayed and a three-year probation was imposed – when the attorney utilized client funds for personal and business expenses as a result of his depression.⁶⁶ "[R]espondent candidly admitted and took full responsibility for his actions, he cooperated with Bar Counsel, and . . . [was] continuing to obtain treatment for his depression, which . . . [was] considerably improved, and [did not] . . . impair his ability to practice law."⁶⁷ The reduced punishment was conditioned on satisfactory reports ever 90 days from the attorney's psychiatrist.⁶⁸

Finally, as with any mental impairment in a discipline case, the respondent must establish a causal connection between his depression and his ethical violation.⁶⁹

Although emotional or psychological disability may serve to reduce the actor's ethical culpability, it does not immunize one from imposition of discipline that is needed to protect the public. There must be a sufficient causal connection between the respondent's ethical lapse and the depression. . . . Our responsibility in a bar disciplinary proceeding is not to punish but to inquire into the lawyer's continued fitness with a view toward safeguarding the interest of the public, the courts and the legal profession.⁷⁰

VI. HELP IS AVAILABLE

And I saw another mighty angel come down from heaven, clothed with a cloud; and a rainbow was upon his head, and his face was as it were the sun, and his feet as pillars of fire.⁷¹

Of course, there is a positive resolution in the Book of Revelation. The threats imposed by the Four Horsemen are repelled and destroyed.⁷² And there is hope for redemption for the lawyer who finds himself challenged by the Four Horsemen of the Modern Bar.

The first step is to see the problem and deal with it. If one has a friend, an acquaintance – even an opponent – who exhibits the symptoms of dependence on drugs, alcohol, or gambling, or the symptoms of depression resulting from

those causes or others, one should be an "angel" and do something about it: reach out a helping hand, offer to talk, even consider an intervention.

If you see in yourself this morning some signs that one or more of these horsemen has visited you, admit it – and do something about it. Seek help – before it is too late. Do the "Barney Fife" thing: "Nip it in the Bud."⁷³

A major resource for lawyers is the Lawyers' Assistance Program available through most state bar associations and many local lawyers' associations. These committees are staffed by lawyers who know (many from first-hand experience) about the problems these horsemen can cause. Those lawyers can communicate, listen, empathize and suggest solutions. Personal support helps show a sufferer he is not alone and that help is available.

In addition, national and local organizations are available to provide resources, information, meetings and one-on-one help. These include:

Narcotics Anonymous.⁷⁴ This organization provides assistance to those who are addicted to drugs. Carrying forward the analogy to the "White Horse," its first booklet was called the "White Pamphlet." The basic premise of Narcotics Anonymous is set forth in its website:

Narcotics Anonymous provides a recovery process and support network inextricably linked together. One of the

keys to NA's success is the therapeutic value of addicts working with other addicts. Members share their successes and challenges in overcoming active addiction and living drug-free productive lives through the application of the principles contained within the Twelve Steps and Twelve Traditions of NA. These principles are the core of the Narcotics Anonymous recovery program.⁷⁵

Alcoholics Anonymous.⁷⁶ This is an older organization, perhaps because man's struggle with alcohol is so longstanding. Like Narcotics Anonymous, this organization offers aid through fellowship, understanding and support.

Alcoholics Anonymous is a voluntary, worldwide fellowship of men and women from all walks of life who meet together to attain and maintain sobriety. The only requirement for membership is a desire to stop drinking. There are no dues or fees for A.A. membership. . . . A.A. is a program of total abstinence. Members simply stay away from one drink, one day at a time. Sobriety is maintained through sharing experience, strength and hope at group meetings and through the suggested Twelve Steps for recovery from alcoholism. . . . Anonymity is the spiritual foundation of A.A. It disciplines the Fellowship to govern itself by principles rather than personalities. We are a society of peers. We strive to make known our program of recovery, not individuals who participate in the pro-

*The first step is to see the problem
and deal with it*

gram. Anonymity in the public media is assurance to all A.A.s, especially to newcomers, that their A.A. membership will not be disclosed.⁷⁷

Gamblers Anonymous.⁷⁸ A more recently-created organization, Gamblers Anonymous provides similar support to compulsive gamblers through abstinence and steps towards recovery. Its creed is quite similar to that of Alcoholics Anonymous:

Gamblers Anonymous is a fellowship of men and women who share their experience, strength and hope with each other that they may solve their common problem and help others to recover from a gambling problem. . . . The only requirement for membership is a desire to stop gambling. . . . Our primary purpose is to stop gambling and to help other compulsive gamblers do the same. . . . Most of us have been unwilling to admit we were real problem gamblers. No one likes to think they are different from their fellows. Therefore, it is not surprising that our gambling careers have been characterized by countless vain attempts to prove we could gamble like other people. The idea that somehow, some day, we will control our gambling is the great obsession of every compulsive gambler. The persistence of this illusion is astonishing. Many pursue it into the gates of prison, insanity or death.⁷⁹

As with the other support organizations, Gamblers Anonymous guides compulsive gamblers to the self-recognition that is essential to dealing with the illness realistically.

We learned we had to concede fully to our innermost selves that we are compulsive gamblers. This is the first step in our recovery. With reference to gambling, the delusion that we are like other people, or presently may be, has to be smashed. We have lost the ability to control our gambling. We know that no real compulsive gambler ever regains control. All of us felt at times we were regaining control, but such intervals - usually brief - were inevitably followed by still less control, which led in time to pitiful and incomprehensible demoralization. We are convinced that gamblers of our type are in the grip of a progressive illness.⁸⁰

Depressed Anonymous.⁸¹ This organization, too, provides education and support, to help those in need, and to prevent the spread of depression.

Depressed Anonymous . . . was formed to provide therapeutic resources for depressed individuals of all ages. We work with the chronically depressed and those recently discharged from health facilities who were treated for depression. . . . We also seek to prevent depression through education and by creating a supportive and caring community through support groups that successfully keep individuals from relaps-

ing into depression.⁸²

The structure and function of Depressed Anonymous are similar to those of the support groups for those dependent on drugs, alcohol, and gambling.

Depressed Anonymous has been formed with the idea that mutual aid empowers people and is a therapeutic healing force. Our organization helps to form groups or circles of support for persons depressed.

We offer depressed individual information on how to gain and use the tools for overcoming depression. Groups have been formed throughout the United States and several have been successfully organized in other international communities as well.

These groups are similar in methodology and goal, to those used by Alcoholics Anonymous in its work in helping alcoholics recover from alcoholism. Our members learn that they have a choice to stay depressed or to take responsibility for themselves and leave the prison of depression.⁸³

So, both within the Bar and in the general walks of society, help and understanding are available.

This is not an issue of morality.

This is not an issue of morality. Perhaps it is or is not an issue of disease - conditions that are endemic to the individual.

But, either way, it still comes down to choices - choosing not to drink, to take drugs, to gamble, to give in to depression. Lawyers - and people generally - must all recognize the risks of certain behaviors, and learn the lessons of precedent. Not only the case books, but also the history books and the fiction books, are filled with tales of destruction arising from the unloosing of the Four Horsemen - destruction to self, family, clients, and the public.

The first step is to realize the existence of the risk, and then to engage in some honest introspection. Then, one should reach out for help, or extend a hand to offer help. With all of the resources available, the Four Horsemen may be corralled or at least avoided.

Endnotes

1. The author acknowledges the assistance of Natasha Self and Tony Biagioli for their valuable assistance in researching for this article.
2. *Revelation* (hereinafter "Rev.") 6:8 (King James). This section of Revelation foretells a time before the "Last Days," when challenges will be made to God's Church and His people. The Revelator predicts that these challenges will come in the form of "Four Horsemen," with descriptions of riders and their horses. *Id.* at 6:2-8.
3. See, e.g., Thomas R. Tindler, *Legal Ethics*, W. VA. LAW., Aug. 2004, at 30, 30.
4. See, e.g., Kennard R. Stutins, *Client Communication: An Essential Element of Criminal Defense Practice*, N.Y. ST. B.J., Mar.-Apr. 1996, at 24, 28 n.7.

5. See, e.g., Drew A. Swank, *In Defense of Rules & Roles: The Need to Curb Extreme Forms of Pro Se Assistance & Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1577 & n.309 (2005).
6. See, e.g., Robert A. Juceam, *Safeguarding Against Criminal Prosecution and Malpractice in Immigration Law Practice*, 142 PLI/NY 179 (West) VIII.A.1.b (Aug. 13 & 24, 2004).
7. See, e.g., Jack W. Birch, Jr., *Risks in Interviewing the Sexual Harassment Client*, 19 AM. J. TRIAL ADVOC. 563, 583-88 (1996).
8. Rev. 6:2 (King James). The traditional view holds that this horse represents War. Four Horsemen of the Apocalypse, http://en.wikipedia.org/wiki/The_Four_Horsemen_of_the_Apocalypse (hereinafter "Wikipedia").
9. Heroin Drug Slang Dictionary, <http://parentingteens.about.com/cs/herpes/l/bisidichet.htm>.
10. Anonymous, "My Name is Cocaine," <http://www.geocities.com/HotSprings/Spa/2476/cocaine.html>.
11. Laid Back, "White Horse," http://www.webfritz.com/lyrics/index.php?option=com_webfritzlyrics&Itemid=27&func=fullview&lyricsid=4707.
12. Office of National Drug Control Policy: Drug Use Trends – Fact Sheet, <http://www.whitehousedrugpolicy.gov/publications/factsht/druguse/>.
13. *Matter of Romano*, 104 N.J. 306, 309, 516 A.2d 1109 (1986).
14. *The Florida Bar v. Heptner*, 887 So.2d 1036 (Fla. 2004).
15. *Id.* at 1039-40.
16. *Id.* at 1043 (quoting *Florida Bar v. Wolfe*, 759 So. 2d 639, 644 (Fla. 2000)).
17. *Id.* at 1042.
18. *In re Jones*, 843 P.2d 709, 712 (Kan. 1992).
19. See *In re Stein*, 483 A.2d 109, 117 (N.J. 1984).
20. *In re Disciplinary Proceedings Against Schwimmer*, 108 P.3d 761 (Wash. 2005).
21. 108 P.3d at 763.
22. *Id.* at 766.
23. *Columbus Bar Ass'n v. Ashton*, 840 N.E.2d 618 (Ohio 2006).
24. *Id.* at 619.
25. *Id.* at 622-23.
26. Rev. 6:4 (King James). The traditional view holds that this horse represents Pestilence. Wikipedia.
27. Johnny Mercer, "The Days of Wine and Roses," http://www.preterhuman.net/texts/lyrics_and_music_related/unsorted_lyrics/days_of_wine_and_roses.txt.
28. Centers for Disease Control & Prevention: Alcohol & Public Health – FAQs, <http://www.cdc.gov/alcohol/faqs.htm#3>.
29. Merle Haggard, "I Threw Away the Rose," <http://www.lyrics-download.com/merle-haggard-i-threw-away-the-rose-lyrics.html>.
30. *In re Brown*, 912 A.2d 568 (D.C. 2006).
31. *Id.* at 570.
32. *Id.* at 571.
33. *Id.*
34. *State ex rel. Oklahoma Bar Ass'n v. Beasley*, 142 P.3d 410, 417 (Okla. 2006) (citing *State ex rel. Oklahoma Bar Ass'n v. Doris*, 991 P.2d 1015, 1025 (Okla. 1999)).
35. *Id.* at 412.
36. *Id.* at 419.
37. *Id.* at 417, 419 (citing *State ex rel. Oklahoma Bar Ass'n v. Carpenter*, 863 P.2d 1123, 1130 (Okla. 1993)).
38. *Disciplinary Counsel v. Hiltbrand*, 852 N.E.2d 733 (Ohio 2006).
39. *Id.* at 733-34.
40. *Id.* at 735.
41. Rev. 6:5 (King James). The traditional view holds that this horse represents Famine. Wikipedia.
42. James Howard, The Missouri Bar, "Compulsive Gambling," <http://www.mobar.org/db52f915-ded4-4c86-8b16-a2f28656b664.aspx>.
43. Tom Raabe, "Compulsive & Problem Gambling," <http://www.family.org/socialissues/A000000434.cfm>.
44. California Office of Problem Gambling, <http://www.problemgambling.ca.gov/>.
45. Gamblers Anonymous, "What is the Dream World of the Compulsive Gambler?" <http://www.gamblersanonymous.org/qua.html>.
46. *State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Reilly*, 712 N.W.2d 278 (Neb. 2006).
47. *Id.* at 278-280.
48. *Id.* at 278 (quoting Iowa Supreme Court Attorney Disciplinary Bd. v. Reilly, 708 N.W.2d 82, 85 (Iowa 2006)).
49. *In re Reinstatement of Freley*, 115 P.3d 842 (Okla. 2005).
50. *Id.* at 845.
51. *Id.* at 854.
52. *Id.*
53. *In re Mendelson*, 780 N.Y.S.2d 801 (N.Y. App. Div. 2004).
54. *Id.* at 802.
55. *Id.*
56. "The Greek word [for pale] is *chlooros*, which we recognize as the origin of such English words as 'chlorine,' 'chloroform,' and 'chlorophyll.' It technically refers to a greenish-yellow color found in nature in the pale green of just-sprouted grass or new leaves . . . In *The Iliad*, Homer describes fearful men's faces with this term, suggesting a pallid, ashen color, and in other instances, it is the pale golden color of honey or the gray bark of an olive tree. Sophocles writes that it is the color of sand, while Thucydides applies it to the skin color of those suffering from plague." Richard T. Ritenbaugh, Church of the Great God, "The Four Horsemen (Part Five): The Pale Horse," <http://ogg.org/index.cfm/fuseaction/Library.sr/CT/PW/k/933/The-Four-Horsemen-Pale-Horse.htm>. A "pale" horse is sometimes called a cremillo, "very pale cream with pink skin and blue eyes." Ann T. Bowling, University of California-Davis Veterinary Genetics Laboratory, "Color Coat Genetics," <http://www.vgl.ucdavis.edu/~lvmillon/coatcolor/coatclr3.htm>. These horses are also called "perlino or albino. Typically, such horses are the product of the mating of two dilute-colored animals such as palominos or buckskins." *Id.*
57. Rev. 6:8 (King James). The traditional view holds that this horse represents Death. Wikipedia, http://en.wikipedia.org/wiki/Four_Horsemen_of_the_Apocalypse#Pale_Horse.
58. "The Pale Horse and His Rider," by Johnny Bailes, Ervin

- ## AROUND THE ABA

The FCP website, <http://www.abanet.org/dch/committee.cfm?com=CL290005>, is where you can go to sign up for the FCP list serve, find up-to-date information about future local roundtables and national events, and help the FCP build on its successes and expand the firm counsel community. ¶

“Are They Just Bad Apples? Ethical Behavior in Organizational Settings”: An Introduction

Arthur J. Lachman*

Model Rule of Professional Conduct 5.1(a) imposes a duty on law firm partners and on lawyers who individually or together with other lawyers possess comparable managerial authority in a law firm to “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” Similarly, under Model Rule 5.3(a), partners and managing lawyers must adopt measures giving reasonable assurance that the conduct of employed, retained, and associated non-lawyers “is compatible with the professional obligations of the lawyer.” The ethical duty to take steps to ensure ethical compliance also applies to lawyers with direct supervisory authority over other lawyers and nonlawyer staff under subsection (b) of Model Rules 5.1 and 5.3.

But how do we determine what steps will be effective in meeting our ethical duty to ensure ethical compliance in our organizations? Others’ misconduct is very often dismissed as the work of “bad apples.” While we can try to create systems and adopt procedures to minimize the risk that improper conduct will go undiscovered, the perception often is that, as a practical matter, there is little we can do from a management standpoint to prevent dishonest people from acting dishonestly.

Recent social science research, however, rejects the “bad apple” theory as an explanation for most ethical misconduct in organizations, and suggests that systematic and predictable psychological and sociological forces are at play causing essentially honorable people to make poor ethical judgments.¹ Obtaining a firm grasp of these forces and the social science research explaining them is essential in making management decisions in legal organizations, including how administrative and compensation systems are structured and how professionals and staff are trained, mentored, and supervised. In short, fulfilling the Model Rule 5.1 and 5.3 duties requires that law firm managers recognize the fact that good people also do bad things, and that the social sciences offer crucial insights in preventing misconduct

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1. A selected bibliography of relevant social science resources appears at the end of this article.

from occurring and in improving ethical decision making by lawyers and staff.

A Brief History

As Professor Donald Langevoort has noted, although academics have recognized the relevance of the social sciences in developing substantive law since at least the 1930s,

both psychology and sociology have suffered from the inability to generate a unified behavioral model rivaling the simplicity, elegance, and testability of the economist's utility-maximizing rational actor. For this reason, and probably a host of others, the rational actor model came to dominate predictions about how "normal" persons and groups respond to legal incentives. By the late 1970s and early 1980s, law and economics was the one social science-based approach to have a truly pervasive effect on legal thinking.²

But at about the same time, work by cognitive and social psychologists challenged the orthodox presumption of rational human behavior.³ As a result, "behavioral economics" has become "an accepted subdiscipline within economics," with legal academics following suit in recognizing the limitations on rational decision making and the impact of cognitive bias drawn from the work of social scientists.⁴

In a series of articles in the 1990s, Prof. Langevoort wrote extensively on the subject, primarily from the perspective of securities lawyers and their corporate clients.⁵ Going beyond the use of social science research in formulating sub-

2. Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1500 (1998).

3. *Id.* at 1501. A new subdiscipline of "behavioral decision theory," was born: "Work by researchers such as Amos Tversky, Daniel Kahneman, Hillel Einhorn, Robin Hogarth, Arie Kruglanski, Lee Ross, Richard Thaler, and many others suggested that there are heuristics, biases, and other departures from rational decision-making processes that are systematic and predictable and can thus be modeled and tested with a fair degree of rigor." *Id.*

4. *Id.* at 1502.

5. This area of legal thought has been referred to as "Behavioral Law and Economics," "Empirical Legal Realism," and "Behavioral Realism." Legal scholars weighing in on this subject include, among others, Cass Sunstein, Jeffrey Rachlinski, Christine Jolls, Russell Korobkin, Chris Guthrie, Mark Kelman, Richard Posner, and Thomas Ulen. Symposia featuring articles by these and other scholars were devoted to this subject in the May 1998 STANFORD LAW REVIEW (Vol. 50), the Spring 2003 NORTHWESTERN UNIVERSITY LAW REVIEW (Vol. 97), and the July 2006 CALIFORNIA LAW REVIEW (Vol. 94). See also CASS R. SUNSTEIN, BEHAVIORAL LAW & ECONOMICS (2000); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, & Deep Capture*, 152 U. PA. L. REV. 129 (2003).

6. See, e.g., Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75 (1993); Donald C. Langevoort, *Ego, Human Behavior, & Law*, 51 VA. L. REV. 853 (1995); Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases & Organizational Behavior*, 63 BROOK. L. REV. 629 (1997); Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375 (1997).

stantive legal policy, he also highlighted the relevance of this research to how lawyers make decisions in rendering advice to clients.⁷ Others, including Professors Gary Blasi,⁸ Paul Brest and Linda Krieger,⁹ and Deborah Rhode,¹⁰ offered suggestions for the education and training of lawyers based on the findings of social science research.

The Social Sciences & Legal Ethics

In recent years, social science researchers studying organizational management issues generally have begun focusing on how *ethical* decisions are made.¹¹ Harvard Business School Professor Max Bazerman, in the most recent edition of his treatise on managerial decision making, concludes that "cognitive biases allow us to act in ways that contradict our own intended standard of ethics" in "systematic and predictable" ways.¹² In the legal literature, exploration into the relevance of this research to matters touching on legal ethics and regulation of lawyer conduct is under way. Scholars are now pointing to social science research in evaluating substantive ethics policy, suggesting for example that disciplinary rules, including those relating to conflicts of interest and the requirement for disclosure and informed consent, may not have the effect intended by regulators.¹³

Perhaps the most exciting development is that legal scholars are using social

7. See Langevoort, *supra*, 51 VAND. L. REV. at 1506-08, 1518-19.

8. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313 (1995); Gary L. Blasi, *Teaching Lawyering as an Intellectual Project*, 14 J. PROF. L. EDUC. 65 (1997).

9. Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527 (1994); Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors & Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5 (Summer/Autumn 1995).

10. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992).

11. From the field of psychology, see, e.g., DON A. MOORE, DAYLIAN M. CAIN, GEORGE LOEWENSTEIN & MAX H. BAZERMAN, *CONFLICTS OF INTEREST: CHALLENGES & SOLUTIONS IN BUSINESS, LAW, MEDICINE, & PUBLIC POLICY* (2005); JOHN M. DARLEY, DAVID M. MESSICK & TOM R. TYLER, *INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS* (2001); DAVID M. MESSICK & ANN E. TENBRUNSEL, *CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS* (1996); SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT & DECISION MAKING* (1993). From the field of sociology, see, e.g., ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* (1988). For a discussion of ethical decision making from a philosopher's perspective, see JOHN M. DORIS, *LACK OF CHARACTER: PERSONALITY & MORAL BEHAVIOR* (2002).

12. MAX H. BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION MAKING* 121 (6th ed. 2006) (devoting a chapter titled "Bounded Ethicality" to the subject of ethical decision making).

13. See, e.g., Daylian M. Cain, George Loewenstein & Don A. Moore, *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1 (2005); Leonard E. Gross, *Are Differences Among the Attorney Conflict of Interest Rules Consistent with Principles of Behavioral Economics?*, 19 GEO. J. LEGAL ETHICS 111 (2006). Similarly, relying on principles of behavioral economics and prospect theory, Professor Richard Painter has proposed that clients be permitted to retain multidisciplinary firms composed of lawyers and auditors by waiving the confidentiality ethics rules applicable to lawyers. Richard W. Painter, *Lawyers' Rules, Auditors' Rules and the Psychology of Concealment*, 84 MINN. L. REV. 1399 (2000).

science research to enhance our understanding of how lawyers exercise judgment in the unique context of serving clients in a law firm practice environment. A significant contribution has been made by Georgetown Law Professor Milton Regan, Jr., in his detailed case study of John Gellene, the Milbank Tweed partner who was convicted by a federal court in 1998 of failing to disclose conflicts of interest in the Bucyrus bankruptcy.¹⁴ Prof. Regan offers keen sociological insights into the pressures of modern law practice, presenting alternatives to a "bad apple" theory in explaining Gellene's behavior. Given other recent scandals implicating the conduct of lawyers and other professionals, this work and related scholarship¹⁵ should serve as a kick-start for legal academics to emphasize ethical decision making in their research and in their teaching.

In the short-term, the most likely impact of this work will be in reforming the management and compensation structure of legal organizations, as well as in the training and mentoring of lawyers in making the transition to legal practice. As noted above, the legal ethics rules already require managing lawyers to take reasonable steps to ensure ethical compliance by others in their organizations. The rise of risk management and ethics compliance functions involving the use of in-firm legal counsel certainly represents a positive step,¹⁶ and further study should give us a better idea of how compensation systems and internal management structure can improve ethical compliance. As for training, social science research has been part of most business school scholarship and curricula for years,¹⁷ and has seeped into the legal academy with the general acceptance of clinical and writing skills programs in our nation's law schools. But the gap

14. MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004).

15. See, e.g., Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957 (2006); Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317 (2006); Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631 (2005); Leslie C. Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 HOUS. L. REV. 309 (2004); Mark A. Sargent, *Lawyers in the Moral Maze*, 49 VILL. L. REV. 867 (2004); Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI.-KENT L. REV. 1569 (2000); Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837 (1998).

16. See, e.g., Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 N.C. L. REV. 1515 (2006); Elizabeth Gorman, *Explaining the Spread of Law Firm In-House Counsel Positions: A Response to Professor Chambliss*, 84 N.C. L. REV. 1577 (2006); Douglas R. Richmond, *Essential Principles for Law Firm General Counsel*, 52 KAN. L. REV. 805 (2005); Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, & Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002); see also Anthony V. Alfieri, *The Fall of Legal Ethics & the Rise of Risk Management*, 94 GEO. L.J. 1909 (2006); William H. Simon, *The Ethics Teacher's Bittersweet Revenge: Virtue & Risk Management*, 94 GEO. L.J. 1985 (2006).

17. Cf. Langevoort, *supra*, 51 VAND. L. REV. at 1502 ("Other professional disciplines—management and accounting in particular—grasped the implications of behavioral decision theory far sooner and more thoroughly than has law."). For a recent insightful evaluation of business school ethics training efforts in light of relevant social science research, see Michael B. Metzger, *Bridging the Gaps: Cognitive Constraints on Corporate Control & Ethics Education*, 16 J. LAW. & PUB. POL'Y 435 (2005).

between legal education and legal practice remains," and there is little doubt that much more must be done to incorporate behavioral theory from the social sciences into preparing law students and new lawyers for making the professional and ethical judgments needed to counsel clients in real world law practice.¹⁸

Opportunities for the Future

Looking forward, there is an opportunity to conduct more social science research relevant to the unique context of modern legal practice. Nearly all of the organizational decision making research by social scientists to date has focused on regular profit-making entities. As we evaluate the available research and attempt to apply it to lawyers and law firms, it is important to keep in mind that the situation of legal professionals differs in important ways from corporate managers and board members who serve primarily the interests of the entity's investors. For example, how (if at all) does the fact that lawyers work primarily as agents of their clients subject to disciplinary rules imposed on individual lawyers under state authority change the decision making dynamic? We would benefit from studies focusing on the exercise of judgment by professionals who often face conflicting duties to their clients and to the public.¹⁹

Teachers and practitioners of legal ethics and risk management can be major contributors to this effort. Because effective management is essential from the perspective of both ethics and liability avoidance, we are in an excellent position to be heard on structural and training issues. What we know and will learn about ethical decision making, and what we instill in lawyers through our training efforts, should have the benefit of improving lawyers' exercise of professional judgment generally. And there is a unique opportunity for academics, practition-

18. A new study of legal education by the Carnegie Foundation for the Advancement of Teaching emphasizes ethics and the development of professional identity and purpose in training new lawyers for the practice of law. See William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, & Lee S. Shulman, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 126-161 (2007).

19. Perhaps not surprisingly, many recent calls for reform in the way lawyers are educated based on principles grounded in the social sciences have originated in the clinical legal literature. See, e.g., Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 CLINICAL L. REV. 731 (2003); Ian Weinstein, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 CLINICAL L. REV. 783 (2003); Richard K. Neumann Jr., *Donald Schön, the Reflective Practitioner, & the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401 (2000). We are even beginning to see scholarship regarding the training and development of law school teachers. See, e.g., Gerald F. Hess, *Improving Teaching & Learning in Law School: Faculty Development Research, Principles, & Programs*, 12 WIDENER L. REV. 443 (2006); Justine A. Dunlap and Peter A. Joy, *Reflection-in-Action: Designing New Clinical Teacher Training By Using Lessons Learned From New Clinical Supervisors*, 11 CLINICAL L. REV. 49 (2004).

20. With calls for regulation requiring lawyers, for example, to take on increased gatekeeping roles and to render non-legal (e.g., moral) advice to clients, ethical decisions are likely to become even more complex and difficult. See, e.g., JOHN C. COFFEE, JR., *GATEKEEPERS: THE PROFESSIONS & CORPORATE GOVERNANCE* 192-244, 347-52 (2006); Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317 (2006).

ers, and bar associations to join together in improving the quality of decision making and client service by members of our profession who are making the transition to legal practice.

Managing ethical compliance in law firms is itself an ethical imperative that must take into account how decisions are made in organizational settings. We have much to learn from the scientific research of other disciplines, including psychology, sociology, and behavioral economics. Simply placing blame on "bad apples" when misconduct occurs is dangerous because it tends to lead law firm partners to abdicate their managerial responsibilities under Model Rules 5.1 and 5.3. Legal educators also have an obligation to ensure that graduating students, including those who will be practicing alone and in small firms, learn how to make professional judgments on behalf of clients in an ethical manner. Failure in this effort is not an option. The very future of our profession hangs in the balance.

SELECTED BIBLIOGRAPHY OF SOCIAL SCIENCE LITERATURE

Books

ELLIOT ARONSON, *THE SOCIAL ANIMAL* (8th ed. 1999)

MAX H. BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION MAKING* (6th ed. 2006)

JOHN M. DARLEY, DAVID M. MESSICK, & TOM R. TYLER (EDS.), *SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS* (2001)

JOHN M. DORIS, *LACK OF CHARACTER: PERSONALITY & MORAL BEHAVIOR* (2002)

AIDAN FEENEY & EVAN HEIT (EDS.), *INDUCTIVE REASONING* (forthcoming, Cambridge University Press, 2007)

SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (2d ed. 1991)

THOMAS GILOVICH, DALE W. GRIFFIN, & DANIEL KAHNEMAN (EDS.), *HEURISTICS & BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* (2002)

ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* (1988)

DANIEL KAHNEMAN & AMOS TVERSKY (EDS.), *CHOICES, VALUES, & FRAMES* (2000)

DAVID M. MESSICK & ANN E. TENBRUNSEL (EDS.), *CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS* (1996)

DON A. MOORE, DAYLIAN M. CAIN, GEORGE LOEWENSTEIN, & MAX H. BAZERMAN (EDS.), *CONFLICTS OF INTEREST: CHALLENGES & SOLUTIONS IN BUSINESS, LAW, MEDICINE, & PUBLIC POLICY* (2005)

SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT & DECISION MAKING* (1993)

- LEE ROSS & RICHARD E. NISBETT, *THE PERSON & THE SITUATION* (1991)
 HERBERT A. SIMON, *REASON IN HUMAN AFFAIRS* (1983)
 CASS R. SUNSTEIN (ED.), *BEHAVIORAL LAW & ECONOMICS* (2000)
 PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007)

Articles

- Mahzarin R. Banaji, Max H. Bazerman, & Dolly Chugh, *How (Un)ethical Are You?*, 81 HARV. BUS. REV. 56-64 (Dec. 2003)
- Max H. Bazerman, George Loewenstein, & Don A. Moore, *Why Good Accountants Do Bad Audits*, 80 HARV. BUS. REV. 97-102 (Nov. 2002)
- Max H. Bazerman & Mahzarin R. Banaji, *The Social Psychology of Ordinary Ethical Failures*, 17(2) SOC. JUST. RES. 111-115 (2004)
- Daylian M. Cain, George Loewenstein, & Don A. Moore, *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1 (2005)
- Dolly Chugh, *Societal & Managerial Implications of Implicit Social Cognition: Why Milliseconds Matter*, 17(2) SOC. JUST. RES. 203-222 (2004)
- John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS; *supra*, at 13-43 (1996)
- John M. Darley & C. Daniel Batson, "From Jerusalem to Jericho": A Study of Situational & Dispositional Variables in Helping Behavior, 27(1) J. PERSONALITY & SOC. PSYCHOL. 100-108 (1973)
- John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377-383 (1968)
- Daniel Kahneman, *A Perspective on Judgment & Choice: Mapping Bounded Rationality*, 58(9) AM. PSYCHOL. 697-720 (2003)
- Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47(2) ECONOMETRICA 263-291 (1979)
- Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80(4) PSYCHOL. REV. 237-251 (1973)
- David M. Messick, *Alternative Logics for Decision Making in Social Settings*, 39 J. ECON. BEHAV. & ORG. 11-28 (1999)
- David M. Messick & Max H. Bazerman, *Ethical Leadership & the Psychology of Decision Making*, 37(2) SLOAN MGMT. REV. 9-22 (1996)
- Stanley Milgrim, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371-378 (1963)

Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, & the Psychology of Conflict of Interest*, 17(2) SOC. JUST. RES. 189-202 (2004)

Emily Pronin, Daniel Y. Lin, & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self & Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369-381 (2002)

Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17(2) SOC. JUST. RES. 223-236 (June 2004)

Ann E. Tenbrunsel & David M. Messick, *Sanctioning Systems, Decision Frames & Cooperation*, 44 ADMIN. SCI. Q. 684-707 (1999)

Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics & Biases*, 185 SCIENCE 1124-1131 (1974)

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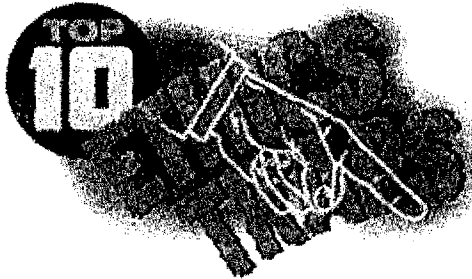
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2006 Issue

ABA Connection

Top 10 Ethics Traps

Posted Nov 1, 2007 3:19 PM CDT
By [Stephanie Francis Ward](#)



Illustrations by Lou Brooks

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Perhaps there was a time when ethics rules for lawyers were straightforward and following them was largely a matter of professional common sense. But it probably ended before your grandfather took down his shingle.

Today it's a much different story. As law practice has become more complex, so have professional conduct rules—at least in their practical application.

"There are still bright lines, but there are lots of ambiguities," says professor Stephen Gillers, who teaches ethics at New York University School of Law. "If you think it's just about the basics, you're on the road to perdition."

With help from Gillers and other experts on professional conduct, the ABA Journal presents its list of the 10 top ethics traps for lawyers. Some of these traps might seem a bit arcane, others obvious. But according to our experts, lawyers in all practice fields fall into them regularly—sometimes with disastrous effects.

[We cite the ABA Model Rules of Professional Conduct, which have been adopted—sometimes with variations—by most states. Lawyers should consult the specific professional conduct rules that apply in their own jurisdictions.]

THE TRAP: Stumbling into a Lawyer-Client Relationship

Phoenix attorney Douglas L. Irish represented Motorola Inc. in a legal dispute over the possible sale of its machine shop to another company.

But M. Dean Corley, a retired Motorola employee who had managed the shop, believed that Irish and his firm, Lewis and Roca, also represented him. And when Corley said as much in a deposition, Irish didn't correct him.

When Motorola threatened to sue Corley for talking to the prospective buyer about working with the company after the sale, he tried to disqualify Irish and his firm from representing Motorola.

Irish responded that he had never represented Corley, but by then it was too late. U.S. Magistrate Judge Lawrence O. Anderson ruled that Corley had shared confidential information with Irish in the belief he was Corley's lawyer, and that Irish had a conflict of interest.

The judge allowed the firm to continue representing Motorola, subject to court-imposed safeguards to protect Corley's interests. *Advanced Manufacturing Technologies Inc. v. Motorola Inc.*, No. CIV99-01219PH XMHMLOA (D. Ariz. July 2, 2002).

THE WAY OUT: Don't Be Vague

BY MICHAEL DOWNEY

Virtually everyone is a potential client. If a lawyer isn't careful, someone may inadvertently become an actual client—or think he or she is—often with grave consequences.

While the ABA Model Rules of Professional Conduct are silent on the formation of a lawyer-client relationship, the Restatement (Third) of the Law Governing Lawyers provides in section 14 that the relationship is formed when a person manifests an intent that a lawyer provide legal services, and the lawyer either (a) manifests consent or (b) fails to manifest lack of consent and knows or reasonably should know the person reasonably relied on the lawyer to provide the services.

In other words, if a person asks a legal question, and a lawyer answers or says he or she will look into it, a lawyer-client relationship may result. There's no need to sign an agreement, shake hands, discuss rates or send an engagement letter.

Once a person becomes a client—even inadvertently—it triggers all the obligations of the attorney-client relationship: loyalty, competency, diligence and confidentiality. Further, under ABA Model Rule 1.10, an inadvertent client relationship imputes to the lawyer's firm, not just to the lawyer.

In *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980), the court upheld nearly \$650,000 in judgments against a firm that thought it had declined a representation. The court ruled that an inadvertent lawyer-client relationship had been created, and thus the firm should have advised the plaintiff about the statute of limitations that governed her original claim.

Lawyers who aren't careful to avoid inadvertent clients may face malpractice claims, disqualification—or worse.

Michael Downey is a partner at Hinshaw & Culbertson in St. Louis. He chairs the Ethics and Technology Committee in the ABA Center for Professional Responsibility.

THE TRAP: Overlooking the Marketing Rules

A North Carolina lawyer who markets and provides legal services over the Internet under the name Virtual Law Firm sought the advice of the state bar on how certain professional conduct rules applied to it.

The resulting ethics opinion states that, while there is no prohibition against lawyers using the Internet for communication purposes, "Cyberlawyers have no control over their target audience or where their marketing information will be viewed. Lawyers who appear to be soliciting clients from other states may be asking for trouble."

At a minimum, the Virtual Law Firm must comply with North Carolina's rules for lawyer advertising, the opinion states. That means the site must list an actual office address, identify the lawyer or lawyers primarily responsible for the Web site, and identify the jurisdictional limits of the practice.

"A prudent lawyer may want to research other jurisdictions' restrictions on advertising and cross-border practice to ensure compliance before aggressively marketing and providing legal services via the Internet," North Carolina State Bar, 2005 Formal Ethics Opinion 10 (Jan. 26, 2006).

THE WAY OUT: Translate for the Internet

BY DIANE L. KARPMAN

Thirty years ago, in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the U.S. Supreme Court laid out the fundamentals of acceptable lawyer advertising: It must not be false, deceptive or misleading. From these three simple ideas, all 50 states have crafted increasingly byzantine rules.

It is nearly impossible to comply, especially on the Internet. States have different retention policies, label requirements and even rules for type size. Rules regulate content like testimonials, comparisons and monikers ("pit bulls," "heavy hitters"). Recently New York attempted to prohibit pop-ups in electronic advertising. *Alexander v. Cahill*, No. 5:07-CV-117 (N.D.N.Y. July 23, 2007).

These advertising rules for lawyers were designed for print media and never anticipated YouTube or Second Life. Half the lawyer ads on YouTube spoof the profession. But parody and satire are inherently confusing unless you "get it." And poking fun

at yourself could be confusing to a consumer.

Reportedly, the Internet is the first place people look for lawyers. How can you take advantage of that amazing marketing potential?

Obviously, comply with your home state's regulations. Include whatever disclaimers should appear. It's a good idea to state that the ad does not create an attorney-client relationship or protect any confidential information until a written agreement is signed. (But see *Barton v. U.S. District Court for the Central District of California*, 410 F.3d 1104 [9th Cir. 2005], for a different approach.) Note that it is void where prohibited by law so you don't run afoul of other state rules.

Remember that Bates acknowledges a public need to be able to find a lawyer, obtain accurate information and make informed decisions about legal services. You can truthfully communicate facts about your professional services and still have a sense of humor. But be careful. The father of commercial spam—a lawyer named Laurence Canter—was disbarred for using the technique for (among other things) promoting his immigration practice. You can check it out on the Internet.

Diane L. Karpman is principal at Karpman & Associates in Los Angeles, where her focus is on legal ethics and professional responsibility. She is a member of the ABA Standing Committee on Professionalism.

THE TRAP: My Boss Made Me Do It

When John B. Bowden started work as a managing associate for the Forquer Law Firm in Greenville, S.C., he was in for an unpleasant surprise. Bowden discovered that the firm was inflating government recording fees on settlement statements for HUD-1 real estate transactions. When he asked his boss in the Charlotte, N.C., office about it, Robert Forquer told him the practice was legal and ethical.

Wrong answer. The South Carolina Office of Disciplinary Counsel informed Bowden that the firm's Greenville office failed to keep sufficient records of recording fee charges and failed to track client funds relating to those fees. Even worse, Forquer was apparently using excess fees to cover office expenses and make various payments to himself, according to a ruling by the South Carolina Supreme Court in a disciplinary action against Bowden.

Fortunately for Bowden, he wasn't aware of the misuse of funds. But in an agreement with the ODC that resulted in a reprimand by the court, Bowden acknowledged that it was his duty to tell clients that their bills were inflated and to assure that HUD-1 forms were accurate in closings he supervised. He also acknowledged an ethical duty to assure that other lawyers in his office complied with state ethics rules. *In the Matter of John B. Bowden*, No. 25978 (May 9, 2005).

THE WAY OUT: Report Even if it Hurts You

BY KATHRYN A. THOMPSON

Rule 5.2(a) of the ABA Model Rules of Professional Conduct is emphatic: A lawyer is bound by the ethics rules "notwithstanding that the lawyer acted at the direction of another person." The single exception to this rule is when the lawyer acts in accordance with a supervisory lawyer's "reasonable resolution of an arguable question of professional duty."

It's not enough for a subordinate lawyer to refuse to comply with any unethical directives from supervisors. The lawyer also is bound by ABA Model Rule 8.3 to report the supervisor to an appropriate disciplinary agency if he or she "knows" the other lawyer has committed an ethics violation that raises a "substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." This requirement applies even when, as in *Bowden*, the reporting lawyer risks implicating him- or herself in an ethics breach.

There's one more thing: Subordinate lawyers also must contend with their obligations toward affected clients under ABA Model Rule 1.6. That rule prohibits lawyers from revealing information about representations unless clients give informed consent or the information falls within an enumerated exception to the rule. And Model Rule 8.3 specifically states that lawyers are not required to disclose information that is otherwise protected by Rule 1.6.

Thus, in reporting the conduct of a supervisor to a disciplinary authority, the lawyer has to take into account what information must be revealed to support the charge. If the information is confidential for purposes of Model Rule 1.6, client consent is generally required before the information may be revealed. To complicate matters, the standard of disclosure may vary from state to state. A recent ethics opinion in Ohio held that a lawyer had a duty to report any misconduct stemming from unprivileged

information. Opinion 2007-01, Ohio Supreme Court Board of Commissioners on Grievances and Discipline (Feb. 9, 2007). By contrast, the broader scope of Model Rule 1.6 protects the disclosure of any information relating to the representation (subject to specific exceptions).

This much is certain: Subordinate lawyers who are dragged into the fray when their bosses flout the ethics rules cannot assume their second-chair status excuses them from their professional obligations.

Kathryn A. Thompson is research counsel for ETHICSearch, a service of the ABA Center for Professional Responsibility.

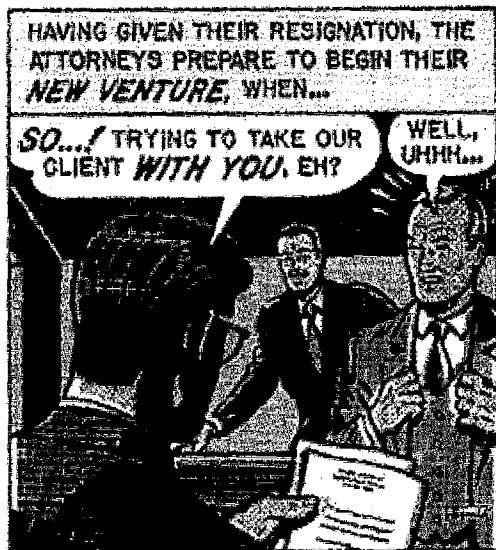
THE TRAP: Law Firm Breakups

When two lawyers left the Chicago firm of Dowd & Dowd in 1990, it triggered a legal battle that was still going on 14 years later.

The primary issues in the case were whether the departing lawyers breached their fiduciary duties to their former employers by using confidential information to help arrange financing for their new venture and by soliciting one of the firm's clients—a subsidiary of Allstate Insurance Co.—before they resigned.

When the legal dust settled, the Illinois Appellate Court upheld a trial court's assessment of nearly \$2.5 million in compensatory damages, plus \$200,000 in punitive damages.

The appellate court noted that lawyers may use lists of clients expected to leave a firm to help obtain financing for their new practice. But in this case, the court stated in its opinion, "The evidence leads to the reasonable inference that the partners actually solicited the Allstate business, secured a commitment from Allstate for future business, and obtained financing based on that commitment—not a mere expectation." *Dowd & Dowd Ltd. v. Gleason*, 816 N.E.2d 754 (2004); appeal den., 823 N.E.2d 964 (Ill. 2004).



THE WAY OUT: Defer to the Client's Wishes

BY EILEEN LIBBY

When a law firm breaks up, things can be every bit as acrimonious as the worst *War of the Roses* marital splits. But who gets custody of the clients?

Rule 1.16 of the ABA Model Rules of Professional Conduct gives the client the unfettered right to choose whether to stay with the original firm or move on with the departing lawyer. Model

Rule 1.4 requires that a lawyer keep the client reasonably informed about the status of the matter, but ethics opinions at the state level differ on whether a lawyer is obligated to inform clients that he or she is leaving the firm.

There is no prohibition in the ABA Model Rules against a departing lawyer advising clients that he or she intends to leave the firm. The nature of the communication is the major concern.

Model Rule 7.3 prohibits a lawyer from soliciting a prospective client either in person or by telephone, but it makes an exception for people with whom the lawyer has had a "prior professional relationship." In ABA Formal Opinion 99-414 (Sept. 8, 1999), the Standing Committee on Ethics and Professional Responsibility explained that such a relationship does not exist where the departing lawyer had merely worked on a matter "in a way that afforded little or no direct contact with the client."

Pursuant to rules 7.1 and 7.3, communications by the departing lawyer must not be misleading or overreaching. The communications should not urge the client to sever a relationship with the original firm or disparage that firm. The requirement under Rule 7.3 that written communications to prospective clients be labeled as advertising material do not apply, however, to "neutral" communications that merely notify people with whom the departing lawyer has had a prior professional relationship that the lawyer is changing employment and provide the lawyer's new address.

Ideally, a departing lawyer and the firm can agree on the content of a joint announcement. The Model Rules do not prescribe the timing of such an announcement, nor do they address the substantive law relating to fiduciaries, "winding up" of partnerships, property and unfair competition. Whether the lawyer can take client lists, continuing legal education materials, practice forms or computer files may turn on principles of property and trade secret law.

Eileen Libby is associate ethics counsel in the ABA Center for Professional Responsibility.

THE TRAP: Communicating by E-Mail

A law firm in Massachusetts maintained a Web site that contained a link allowing visitors to send e-mails directly to lawyers at the firm. But the site contained no warning or disclaimer regarding the confidentiality of the information sent.

So when a company—call it ABC Corp.—sent an e-mail to one of the firm's lawyers regarding a possible legal action against XYZ Corp., the firm suddenly faced an ethical dilemma because it represented XYZ on another matter.

When the firm sought advice from the Massachusetts Bar Association's Committee on Professional Ethics, the news wasn't good. Opinion 07-01 (May 23, 2007).

First, because the firm failed to provide necessary disclaimers, the committee said the lawyer who received the e-mail must maintain the confidentiality of the information furnished by ABC Corp.

And second, the firm may not continue representing XYZ Corp. if protecting ABC Corp.'s confidential information materially limits its ability to represent XYZ.

In this case, a marketing tool intended to help attract clients appears to have lost a firm two of them.



THE WAY OUT: Respect Each E-Mail

BY LAWRENCE J. FOX

E-mails: The greatest of modern conveniences. You can write three while billing someone else.

E-mails: The bane of our existence. Step away from your desk or ignore your BlackBerry for an hour, and 15 more have arrived—all demanding instant responses. For further proof of this mixed blessing, consider these e-mail ethics traps waiting for lawyers and clients.

One way to protect the attorney-client privilege is to add the "attorney-client privileged" label to all communications we think are privileged. Of course, most of us automatically label every e-mail we send that way, just to make sure. Even the order to the deli for five corned beef sandwiches with Russian dressing. If you really want to protect an e-mail, don't rely on the automatic legend. Label the message itself. Then a judge will know you actually thought about it.

2. E-mails permit instantaneous communication. It's way too easy to hit forward and let the whole gang know. They can forward a message on to hundreds more through long strings that add (but rarely subtract) addressees. We know our obligation to protect a client's confidentiality. So share e-mails only with client representatives who need to know. Watch where your privileged message is going, and make sure your clients do, too.
3. E-mails accumulate by the millions. Destruction is essential so hard drives don't crash under an e-mail tsunami. As a result, companies institute policies for discarding the damned things. But when litigation is credibly threatened, a "hold" must be issued, and the deletions must stop. It's up to lawyers to warn clients when this must occur. The consequences of post-threat destruction are severe indeed, for both client and lawyer.

Lawrence J. Fox is a partner at Drinker Biddle & Reath in Philadelphia. He serves on the ABA Task Force on Attorney-Client Privilege and is a past chair of the Section of Litigation and the Standing Committee on Ethics and Professional Responsibility.

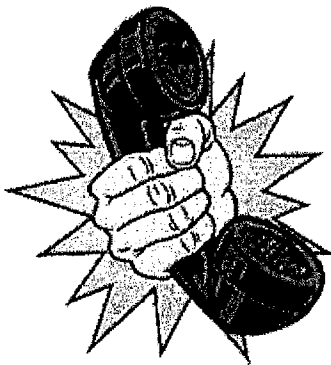
THE TRAP: Failing to Communicate with Clients

In 1997, French lawyer Francois Marland hired the New York City firm of Reid & Priest to represent him in a qui tam action alleging a French bank illegally acquired the assets of an insolvent U.S. insurance company. (The firm, through mergers, became Thelen Reid & Priest; it is now Thelen Reid Brown Raysman & Steiner.) Later, the California Department of Insurance asked the firm to handle its own action against the French bank.

Marland dropped his suit after agreeing to accept a percentage of any fees Thelen Reid got from the California suit. But in 2006, he initiated an arbitration proceeding against the firm claiming that the agreement—under which he received \$19 million—was unfair and unenforceable, and that the firm had rushed him into it. Thelen Reid filed its own action in U.S. District Court seeking to enjoin Marland from pursuing his action.

In February, a district judge ruled that Thelen Reid must produce documents the firm had sought to protect on grounds that they related to its representation of the insurance department.

District Judge Vaughn R. Walker of San Francisco emphasized that the documents related to the firm's representation of Marland, even though they stemmed from internal discussions after the firm asked its own in-house counsel how to proceed. "As a result, all of these documents implicate or affect Marland's interests, and Thelen's fiduciary relationship with Marland as a client lifts the lid on these communications," Walker wrote in his order. *Thelen Reid & Priest v. Marland*, No. C 06-2071 (N.D. Cal. Feb. 21, 2007).



THE WAY OUT: Do More Than Just Return Phone Calls

BY SUSAN R. MARTYN

The duty to communicate is essential to every aspect of the fiduciary duty a lawyer owes to the client. That duty assures the client's interests are properly identified and well-served by the lawyer.

Failure to communicate with one of two clients resulted in malpractice liability in *dePape v. Trinity Health Systems Inc.*, 242 F. Supp. 2d 585 (N.D. Iowa 2003). Failure to clarify the scope of an agent's authority meant professional discipline in *Machado v. Statewide Grievance Committee*, 890 A.2d 622 (Conn. App. 2006). And in *Maritrans GP Inc. v. Pepper, Hamilton &*

Scheetz, 602 A.2d 1277 (Pa. 1992), failure to communicate a conflict to an ex-client resulted in disqualification to prevent disclosure of client confidences.

Remember to initiate communications on six key occasions: (1) When decisions require client consent about the objectives of the representation, such as the decision to settle or appeal. (2) When seeking any waiver of a client fiduciary obligation, especially confidentiality and conflicts of interest. (3) When decisions require client consent about the means to be used to accomplish client objectives, such as whether to litigate, arbitrate or mediate a matter; or whether to stipulate to a set of facts. (4) When clients should be updated on the status of a matter, especially information about developments in the representation itself, such as a serious illness of the lawyer or merger with another firm. (5) When the client requests information. (6) When the client expects assistance the lawyer cannot provide, such as counsel in committing crimes.

The duty to communicate with clients is simple enough. What's difficult is carrying out that duty under many different, and often complex, circumstances.

Susan R. Martyn is a professor at the University of Toledo College of Law. She is a member of the ABA Standing Committee on Ethics and Professional Responsibility.

THE TRAP: Doing Business with Clients

New York City attorney Vincent I. Eke-Nweke drew up a lease for a building on Staten Island. It had some problems—enough for the document to come under the scrutiny of a U.S. District Court.

To start with, the transaction involved Eke-Nweke's own lease of a building owned by one of his clients. But contrary to New York requirements, Eke-Nweke never advised the client to seek independent counsel, nor was the lease written or explained in terms she could reasonably understand.

When client/landlord Judi Anne McMahon filed a lawsuit alleging that Eke-Nweke had breached his fiduciary duty to her, even the judge said he found the terms of the lease hard to follow.

"There is a disparity in bargaining power when an attorney bargains with an unrepresented client, especially where the terms of the contract are so ambiguous that they may not accurately represent the intentions of the parties," wrote Judge Jack B. Weinstein in his Aug. 31 order denying Eke-Nweke's motion to dismiss. *McMahon v. Eke-Nweke*, No. 06-CV-5762 (E.D.N.Y.).

THE WAY OUT: Say It in Writing

BY LYNDA C. SHELLEY

A lawyer's fiduciary duty to the client is so essential to their relationship that a lawyer doing business with a client is held to a much higher standard of conduct than anyone else.

Rule 1.8(a) of the ABA Model Rules of Professional Conduct, for instance, imposes strict disclosure requirements on a lawyer who engages in a business transaction with a client.

- First, the terms of the transaction must be fair and reasonable for the client; and the lawyer must explain them, in writing, in a way that is reasonably comprehensible to the client.
- Second, the lawyer must inform the client, in writing, that it is advisable to consult with another lawyer about the transaction—and give the client a reasonable opportunity to do so.
- Third, the client must sign an informed consent to the transaction disclosing that the lawyer is representing the client in the deal.

Failure to comply completely with all these requirements may result in the lawyer's suspension or disbarment—even if the deal is to the client's benefit.

Doing business with a client includes such things as loaning money (a particularly bad idea), obtaining an ownership interest in a corporate client, joining in a business venture for a client, and receiving a security interest in client property to protect your fees.

Exceptions include such transactions as buying dinner at a client's restaurant or obtaining medical services from a client doctor. In *McMahon*, the attorney should have provided the Rule 1.8(a) disclosures to his client because the lease agreement did not constitute a regular commercial transaction.

A lawyer may also be required by Model Rule 5.7 (Responsibilities Regarding Law-Related Services) to make disclosures under Model Rule 1.8(a) if the lawyer refers a client to an ancillary business of the lawyer. Also, making substantive changes to an existing fee arrangement with a client may cause it to be treated as a business transaction. *In re Hebron*, 771 N.E.2d 1157 (Ind. 2002).

One final consideration is that many professional liability policies will not provide coverage if the lawyer has a financial interest in the client. Doing business with clients is like having sex with clients—it just isn't a good idea, even with their consent.

Lynda C. Shelly of the Shelly Firm in Scottsdale, Ariz., provides professional conduct and risk management services to lawyers. She serves on the Strategic Development Committee for the ABA Center for Professional Responsibility.

THE TRAP: Not Knowing the Ethics Issues

When attorneys Scott G. Lindvall and Patricia J. Clarke worked at Darby & Darby in New York City, their primary task was representing Ivax Corp., one of several defendants in the gabapentin action, a multidistrict patent infringement case. Under a joint defense agreement, they attended confidential meetings with other defendants in which evidence and strategies were discussed in detail.

Lindvall left Darby & Darby in 2003 and ultimately became a partner at Kaye Scholer, another New York firm, and Clarke joined him there. A few months later, Pfizer Corp., a plaintiff in the gabapentin action, notified the court that it intended to replace its attorneys with Kaye Scholer. A defense motion to bar Kaye Scholer followed almost immediately.

Kaye Scholer contended that it had dealt with the potential conflicts before taking on Pfizer, and that Lindvall and Clarke had even obtained a written waiver of conflicts from Ivax.

Not enough, said U.S. District Judge John J. Lifland in Newark, N.J. The joint defense agreement had created an implied attorney-client relationship between Lindvall and Clarke and all the other defendants in the gabapentin action, so conflict waivers should have been sought from those other defendants, too. Lifland barred Kaye Scholer from representing Pfizer. *In re Gabapentin Patent Litigation*, 407 F. Supp. 2d 607 (D.N.J. 2005).

THE WAY OUT: Know—or Learn—the Law

BY STEPHEN GILLERS



If I had a quarter for every time I heard about a firm that got itself in a pickle because of a failure to anticipate conflicts, I could buy dinner for eight at a top Manhattan restaurant. With wine. Good wine.

Kaye Scholer did try to plan ahead in the gabapentin action, and there are good arguments why consent from Ivax should have sufficed. I think Judge Lifland's decision to find an implied attorney-client relationship between Lindvall and Clarke and the other defendants was wrong. But he's the judge, and his ruling did not come out of left field. It was foreseeable.

The trouble is—and here's the lesson—lawyers may assume they know more than they do about complex legal ethics questions like this one, and they make fatal errors as a result. They would never do that in any other field of law. Would an antitrust lawyer who ran into a complicated intellectual property question make an educated guess at the answer? No! He or she would consult an IP lawyer or do some serious research. Doing neither would be malpractice.

Yet for some reason, lawyers assume that when the specialized field is lawyer ethics, they'll reach the right answer intuitively. Based on what? The legal ethics class they took 10 or 20 years ago in law school?

Maybe correct intuitive answers were possible in the 1970s or '80s. But those days are long gone. The law and ethics of lawyering is a specialty and, like other fields, it is constantly changing. When the consequences of error can be unpleasant (or worse) for you or your client, and you haven't got the time or inclination to research a question, consult an expert.

Stephen Gillers is a professor at New York University School of Law. He chairs the Policy Implementation Committee in the ABA Center for Professional Responsibility.

THE TRAP: Fee Agreements

Harry Issler was listed as counsel of record on a medical-malpractice case, even though he referred the case to Greg Starr. The two New York lawyers entered into a fee-sharing agreement in 1999, when they shared office space. Their work relationship soured in 2001, when Issler lost his lease and would not sublet space to Starr at his new office.

The malpractice case settled for \$135,000 and Issler claimed half the fee. Starr argued that the clients had named him sole counsel in the case, and that Issler should receive a quantum meruit amount that he estimated at only 4 percent of the fee.

Judge Dianne T. Renwick rejected Starr's quantum meruit claim because he offered no proof that the substitution of attorneys had met statutory requirements that Issler consent or that a court order be obtained.

The court also rejected Starr's argument that the fee-sharing agreement violated the New York Code of Professional Responsibility. The state code says, in effect, that unaffiliated lawyers may share fees proportional to their actual work or by terms of a written client agreement assigning "joint responsibility."

Renwick held that, under the New York ethics code, *joint responsibility* essentially means that the referring lawyer—in this case, Issler—assumes joint and several liability for any act of malpractice, even if he or she has no ethical obligation to supervise the

work of the lawyer to whom the case was referred. The judge ruled that the language of their fee agreement met that requirement.

THE WAY OUT: Be Clear on Responsibilities

BY PETER H. GERAGHTY

Like New York's code, ABA Model Rule 1.5 permits lawyers who are not in the same firm to share fees in either of two ways: first, on the basis of the amount of work each lawyer performs in the matter; or second, if by written agreement with the client, each lawyer assumes joint responsibility for the matter.

The Comment to Rule 1.5 states: "Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership."

The ABA House of Delegates added that definition to the Comment in 2002 to clarify that lawyers who share fees on a joint responsibility basis in effect become partners for purposes of the representation, and assume financial, legal and ethical responsibility for the matter that would also presumably include a duty to supervise under Model Rule 5.1 See also, ABA Informal Opinion 85-1514 (1985), which is still widely used.

State ethics opinions do not agree on what is meant by *joint responsibility*. The State Bar of Wisconsin (Opinion E-00-01) found in 2000 that the referring lawyer has a duty to make competent referrals, must remain sufficiently aware of the performance of the lawyer to whom the matter was referred, and must assume financial responsibility for the matter. But Arizona Bar Association Opinion 04-02 (2004) states that the requirement is satisfied if a lawyer assumes financial responsibility for any malpractice.

Before agreeing to share fees on a joint responsibility basis, lawyers would be well-advised to check their jurisdictions' rules of professional conduct, ethics opinions and case law to fully understand the extent of their ethical and legal obligations.

Peter H. Geraghty is director of ETHICSearch in the ABA Center of Professional Responsibility.

THE TRAP: Ending the Lawyer-Client Relationship

When lawyers at Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim in Tacoma, Wash., were asked to help represent Rabanco Ltd. employees in a suit against the company, they jumped right in. They did not think an earlier representation of a wholly owned subsidiary of the company disqualified them.

But a U.S. District Court in Seattle saw things differently. Judge Marsha J. Pechman granted the defendants' motion that the firm be disqualified.

The firm argued no one from Rabanco nor its subsidiaries had contacted it in three-plus years. But Pechman noted that the firm had open files on matters involving the Rabanco family of companies, was listed as receiving notices in a settlement agreement, and continued to store documents from the earlier case. *Jones v. Rabanco Ltd.*, No. C03-3195P (W.D. Wash. Aug. 3, 2006).

THE WAY OUT: Don't Rely on Your Assumptions

BY STEPHEN GILLERS

Jones v. Rabanco is a pretty aggressive opinion. Many courts would have ruled differently. Lawyers can do much to insulate themselves from decisions like this one, but only if they know how the rules treat current and former clients differently, and they inform the client that it has moved from the first category to the second if the transition is not clear.

First, the conflict rules are less strict in defining the duty owed to former clients. Most important, under Rule 1.9(a) of the ABA Model Rules of Professional Conduct, the duty to former clients exists only to avoid subsequent adverse representation in substantially related matters. On the other hand, a firm may not ordinarily be adverse to a current client on any matter without informed consent. See ABA Model Rule 1.7(a)(2).

Second, Model Rule 1.4, along with fiduciary duty and malpractice law, requires lawyers to keep current clients informed about

factual and legal developments related to their matters. This duty is not ordinarily owed to former clients unless the lawyer promises otherwise. See *Lama Holding Co. v. Shearman & Sterling*, 758 F. Supp. 159 (S.D.N.Y. 1991), in which the court refused to dismiss a complaint alleging that the firm failed to apprise a former client of tax law changes despite a promise to do so.

Of course, whether a client is current or former is not always within your power to control. You can't drop a client simply to enjoy the more generous former-client conflict rules. But if the work is done, the firm can make that fact clear to the client, rather than leave things vague.

When I explain this to lawyers, they often admit that they prefer to leave things vague because that means the client will likely think of them as "my lawyer," which increases the chance for new work. Fine. That's a business decision, but it comes at a price.

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Real World Pressures on Professionalism

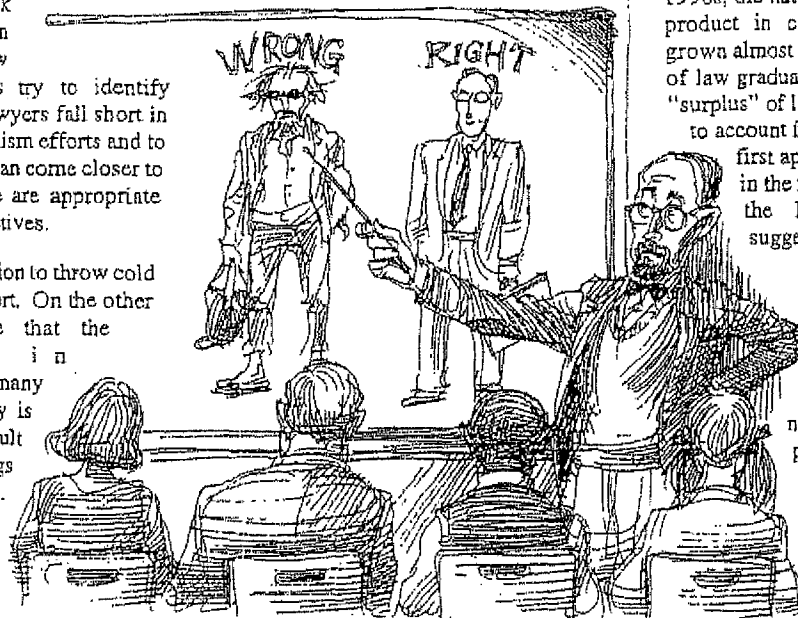
Thomas D. Morgan

It is good to focus attention on professionalism. More than a study of rules, consideration of professionalism can give us pride in our traditions, greater confidence in the health of the legal profession, and hope for a positive future. Defining professionalism remains difficult,¹ but it is fair to say that most of us think we know it when we see it. Law school programs try to identify where today's lawyers fall short in their professionalism efforts and to suggest how we can come closer to the ideal. Those are appropriate and worthy objectives.

It is not my intention to throw cold water on that effort. On the other hand, I believe that the decline in professionalism many tend to see today is not entirely the result of personal failings of lawyers. Indeed, the perceived decline has occurred at a time when some of the brightest, most idealistic lawyers in our history have assumed leadership roles in law firms and the bar. Curing the problems of professionalism may indeed turn out to require personal transformations in some attitudes of some lawyers, but I am going to suggest that many problems of professionalism are less within our control and thus require more than exhortation for solution.

You may conclude that I am offering excuses—that I am saying: "The system made us do it." I hope to avoid that. What I will suggest is that the legal profession now faces a transformed world, one that the rhetoric of earlier generations often does not address very well. I will

argue that it is only when we think about that changed reality that we can address issues of professionalism in a way that can make a difference. In the remainder of this essay, I suggest eight pressures on professionalism with which I believe we have to come to terms.



L GROWTH IN THE NUMBER OF LAWYERS

First, an inescapable reality facing today's lawyers is the increased number of colleagues chasing the same legal work. In the last twenty-five years, the number of American lawyers has roughly tripled, from about 300,000 in the mid-1970s to about 1,000,000 today.² Fortunately, the demand for lawyers has also increased, although not proportionately. University of Chicago economist Peter Pashigian studied the legal profession several years ago and demonstrated that the most important stimulus for the need for legal services is not the degree of regulation, not the receptivity of courts to new legal theories, indeed it is not anything internal to the legal

system. Instead, the demand for legal services correlates most closely with growth in the gross domestic product, the level of economic activity in the country generally.³

The number of lawyers has grown sharply, but with the exception of recessions in the late 1970s and early 1990s, the nation's gross domestic product in constant dollars has grown almost as fast as the number of law graduates. As a result, the "surplus" of lawyers that we have to account for is less than might first appear, but work I did in the mid-1990s to update the Pashigian numbers suggests that, even given the solid economic growth in recent years, the nation has produced a supply of lawyers now roughly fifteen percent greater than present demand would justify.⁴

Thinking about such a point is important to understanding the kind of analysis I hope to put forth. One million lawyers have been minted. Even if we were to regret that, it would do no good to assign blame. Nor is the development something we should necessarily regret. The largest source of the growth in numbers results from a new interest in law school among women and members of minority groups, both of which had theretofore been greatly under represented among lawyers and whose presence in the bar has added clearly needed diversity.

On the other hand, growth in a profession this extensive and this rapid—whatever its source and however demand has grown—has the inevitable effect of reducing the

level of informal sanctions that characterized earlier efforts to enforce professionalism. One is much more likely to treat a professional colleague well when one expects to meet that lawyer again. One can more afford to let professional conduct deteriorate, however, when the number of lawyers decreases the likelihood of dealing with the lawyer again and the penalty for boorishness goes down.

My point, then, is that it is not enough to decry the decline in professionalism without acknowledging that some of its source may be like the growth in the number of lawyers—a growth that in itself is beyond our control and not altogether bad. In the kind of real world we face, solutions to the problems of professionalism will require more imagination and effort than simple exhortation.

II. INCREASED PRESSURE FOR MARKETING AND PROFITABILITY

A second important pressure on professionalism has come from the vigorous efforts of lawyers to market their services. They have been permitted to do this overtly for more than twenty years, and many of us welcomed the *Bates* decision that permitted lawyer advertising.⁵ We had worried that particularly potential middle-income clients were having difficulty knowing what lawyers charged and which ones had an interest in their kinds of cases. We hoped that one effect of lawyer advertising would be to overcome that deficit in information.

But the law of unintended consequences affects changes in ethical standards as it does so much of human activity. What I and others did not adequately foresee was how quickly the freedom of lawyers to advertise would be seized upon by

lawyers and firms to justify marketing their practices to all kinds of potential clients. I am not second-guessing the constitutional validity of lawyer advertising, but what is constitutional is not inherently consistent with professionalism.

I find that a great many lawyers condemn the ads they see on television from the personal injury bar but simultaneously adopt a no-holds-barred effort to attract and hold lucrative clients. The result seems to have been an increase in meanness within the bar and a decline in professional values. In many law partnerships, the dominant ethic has become "you eat what you kill," i.e., originating business is all that counts. Civic activity and pro bono work do not get much credit under that rule unless the lawyer's notoriety makes him or her a rainmaker. Few either measure or reward the extent to which the lawyer's work enhances the community.

Further, when a given lawyer or practice group is unhappy with its share of firm profits under this

model, the group simply moves to another firm, and the process continues. Controversies over when and what kind of active recruiting of the former law firm's clients a departing lawyer may undertake—what one writer has called the "ethics of grabbing and leaving"⁶—are almost always unseemly and typically not in the long-run interest of either clients or lawyers as a profession.⁷ What is ultimately worse, the dream of achieving broad distribution of legal services that led many of us to favor lawyer advertising remains distant.

III. PRESSURES TOWARD COST CONTROL IN OUR CLIENTS

A third real life pressure that may affect lawyer professionalism is the degree of competitive pressure that our clients now experience in markets that are constantly expanding and changing shape. Such competition will hopefully benefit consumers everywhere, but clients have and will experience competition in the form of a need to control costs. Many businesses have closed offices and laid off managers who thought they had lifetime security. Making



the transition to a global economy—one served by the Internet for which few managers had been trained—has been hard on many people, but not making this transition cannot be an alternative for clients who hope to survive at all.

Until now, lawyers have enjoyed relative immunity from this pressure, but that immunity cannot last. Among the major costs clients face are lawyers' fees. We can talk at bar association meetings about the quality service we provide, and we can judge that quality by internal professional standards, but the ultimate test of the demand for our services is going to be whether clients find them worth what they cost. That, in turn, will be determined by standards not entirely within our professional control.

Indeed, clients have found ways around some of our traditional professional standards as they try to manage their legal costs. One such client response has been to bring work in-house. Doing so not only tends to permit clients to avoid what they see as high law firm billing rates, but it allows them to f

compensation in the form of stock and bonuses tied more directly to the client's success than payment of hourly rate bills can ever be.

Lawyers with high professional standards have understandably been concerned about a loss of independence and possible overreaching associated with too great a financial involvement in their clients' affairs.⁸ On the other hand, professionalism can seem counterproductive if client welfare is in fact enhanced by better linking lawyer compensation to the lawyers' contributions to the client's overall effort. If our definition of professionalism is not consistent with reality as clients see it, we can wonder how reliable a guide our definition really is.

IV. INCREASING SPECIALIZATION

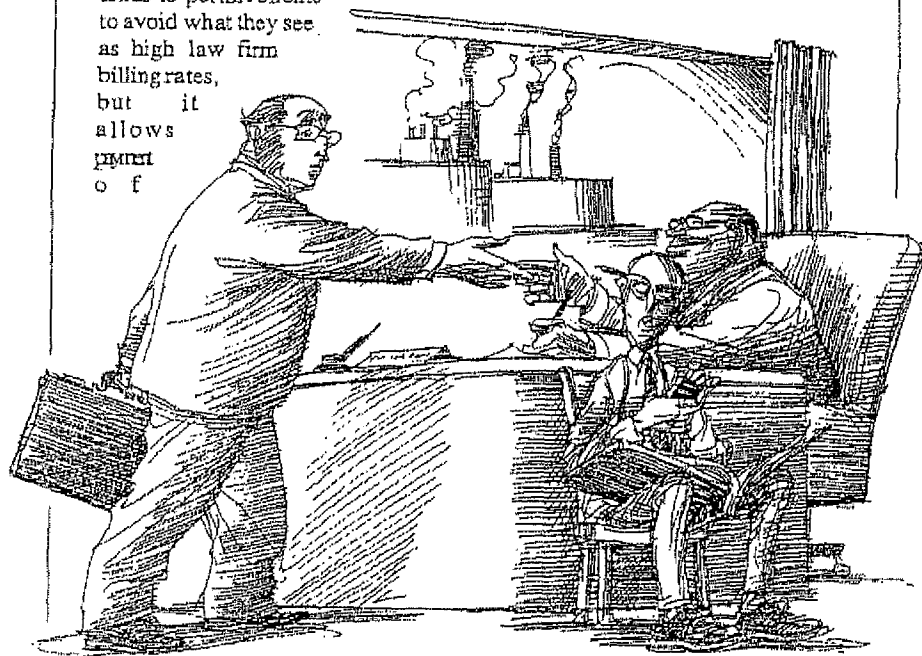
A fourth external reality with which lawyers must come to terms is the importance of specialized expertise in modern practice. An individual lawyer who knows all there is to

know about an aspect of international tax law, for example, is a resource few clients would find it worthwhile to develop internally. Thus, we might predict that lawyers in private practice are most likely to be retained to meet specialized needs at particular times.

If this analysis is correct, we should expect to see the continued growth of law firms with a common name but made up of key individuals or practice groups that operate with some autonomy. The phenomenon has a very positive side; it can allow us to serve clients better. However, we can predict that a bar composed of narrow specialists will be less unified around broad professional concerns than we like to think the bar once was. As just one indicator, membership in the American Bar Association used to be consistently fifty percent of all lawyers; now it is down to about thirty-five percent.⁹ The ABA still represents a lot of other lawyers, but even within the ABA, the largest sections tend to be those that represent specialists rather than general concerns¹⁰ and a majority of lawyers seem to be joining more specialized bar associations or no associations at all.

Again, this pressure on professionalism is inevitable and results from forces outside our control, so the problems it creates will take unusual imagination to address. My own guess is that law firms will be the institutions through which we will want to work to make increased professionalism a reality. Even today, specialized practice groups join large, multicounty organizations in part because of the credibility and reputation for quality control the firms enjoy. Clients as well as lawyers have a stake in having our professional standards encourage law firms to

Continued on page 19



PROFESSIONALISM

continued from page 8

exercise appropriate control over their lawyers so as to preserve and develop the value of the reputation that is a firm-wide—indeed, a community-wide—asset.¹¹ It is through action of those firms, then, that practical steps to improve professionalism might best be taken.

V. OPTIONS PROVIDED BY ALTERNATIVE DELIVERY OF LEGAL SERVICES

A fifth reality undercutting traditional professionalism may be clients' increasing recognition that it does not take a law school graduate to do many things that lawyers usually see as the practice of law. Law firms know that, of course, and have long used paralegal and other support personnel working under the lawyer supervision ethical standards require. Within an organizational client, however, lawyer supervision need only be provided if it is cost-effective to do so. Even preparation of court documents can be done by non-lawyers within a business organization in a manner to which our professional requirements cannot effectively speak.

Nor is this avoidance of lawyers limited to organizational clients. Legal information and advice is increasingly available to individuals planning their own affairs, drafting their own documents, and even appearing pro se in litigation. Books of legal information have been around for many years, of course, but the Internet now makes such information ubiquitous. The Legal Information website at Cornell Law School, for example, receives over eight million "hits" each week.¹² Some of the contact may be from lawyers, of course, but others are

undoubtedly from individuals trying to solve their own problems.

Last year in Texas, an unauthorized practice of law challenge against the sale of the Quicken Family Lawyer CD-ROM for use by individuals trying to draft their own legal documents met with success.¹³ From the standpoint of lawyers, use of such tools may seem foolish, but to many of our potential clients, the difference between the cost of a CD-ROM and a lawyer-drawn instrument makes the wise choice clear. Notwithstanding lawyer views, the Texas legislature promptly took the side of client freedom and made clear that sale of such computer software is not the unauthorized practice of law.¹⁴ My point is not to encourage clients to do without lawyer services, but their desire for choice is a reality we cannot ignore in defining what our professional standards should be.

VI. MOVE TOWARD PUBLIC FUNDING OF LEGAL SERVICES FOR THE POOR

The creation of the Legal Services Corporation represents a sixth and possibly controversial illustration of what I believe is a pressure on professionalism. My point is not to condemn the idea of publicly funded legal services. Like many of the developments outlined in this article, such programs represented changes in response to real public needs. My point here, as it was in discussing the earlier developments, is to say that some desirable changes can put unintended but real pressures on lawyer professionalism. Here, it is reflected in a reduction of lawyers' sense of obligation to assume responsibilities that are properly ours.

Model Rule 6.1 asserts that "a lawyer *should* aspire to render . . . pro bono publico legal services . . ." When the rule first appeared in the

Kutak Commission's 1980 Discussion Draft, however, it demanded more. "A lawyer *shall* render unpaid public interest legal service," the rule said, and the recipients of service were broadly defined. "A lawyer may discharge this responsibility by service in activities for improving the law, the legal system, or the legal profession, or by providing professional services to persons of limited means or to public service groups or organizations." But each lawyer was to "make an annual report concerning such service to appropriate regulatory authority."¹⁵

The bar reacted to the proposal for mandatory service, issued after creation of the publicly funded program, extraordinarily. It almost disbanded the Kutak Commission over the very suggestion that a lawyer is required to give something back to his or her community.¹⁶ The absence of a minimum hour requirement did not make the rule palatable. The ABA exists to help lawyers *against* such public service, the argument seemed to be. The ABA sent the Commission back to the drawing boards.¹⁷

In fairness, I should note that the case for mandatory provision of pro bono legal services is not self-evident to everyone. There is a responsible argument that it is morally more desirable that lawyers volunteer such services. I use this example to raise a more basic point. I believe the decision to create the Legal Services Corporation, however wise in the interest of providing quality legal services to the poor, went a long way toward creating a sense in lawyers that providing legal services to the poor was no longer a lawyer professionalism issue. Overcoming that kind of pressure on professionalism is likely to require more than simple good will.

VII. EXCESSIVE CONCERN ABOUT CONFIDENTIALITY INSTEAD OF ITS PUBLIC IMPACT

Our own standards for protecting confidential client information creates a seventh pressure on professionalism. The ABA Model Rules now create a wide zone of protected information and only limited exceptions from that protection. Unlike the Model Code, however, ABA Model Rule 1.6 reduces the exceptions almost to the vanishing point.

Under the Model Code, a lawyer could reveal confidential information when required by law or court order. Thus, if a law required professionals to report cases of continuing child abuse about which a lawyer knew, the lawyer could be required by that law and thus permitted by the Model Code to make disclosures necessary to protect the child. Now, however, that dilemma has at least presumptively changed. The Comment to Rule 1.6 notes: "Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such supersession."¹⁸

Even more important, under the Model Code a lawyer could warn a potential victim against a client's intention to commit any crime. Under Model Rule 1.6, however, the only crimes that a lawyer may warn against are crimes that threaten the victim's death or substantial bodily harm.¹⁹ A lawyer who knows that her client plans to go to a distant city in the indefinite future and assault a former business associate probably may not, Rule 1.6 says, call and warn the likely victim. If death or substantial bodily harm is not "imminent," the lawyer must keep the secret safe.

As is true with so many of the pressures on professionalism, one can argue that such rigorous protection of confidential client information protects clients interest and thus is well within the professionalism tradition. However, interestingly, some of the most zealous advocates of strict confidentiality have not been the criminal defense lawyers whose violent clients appear in most of the hypotheticals; they have been corporate lawyers, some of whose clients make a lot of their money skating on the thin edge of criminal and fraudulent conduct that virtually no definition of professionalism would let a lawyer assist.

A bit of the history of the development of Rule 1.6 helps make the point. When the Kutak Commission considered the balance to be struck between confidentiality and public protection, it proposed two occasions for lawyer disclosure in addition to those finally adopted. Those were, first, "to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in . . . substantial injury to the financial interests or property of another," and second, "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used."²⁰ It was the provision about protecting the public against significant financial fraud that was deleted by the ABA House of Delegates. It thus is another one of the classic stories of the Kutak Commission's good beginnings ultimately defeated by lawyers voting in what clearly seems to have been a perversion of any true sense of professionalism.²¹

Of course, ironically, Rule 1.6 that we have been discussing has proved to be the least influential of the Model Rules as the states have

considered what they should demand of their own lawyers. Over thirty jurisdictions, for example, still permit a lawyer to disclose the client's intention to commit any crime. Ten states *require*—not simply permit—disclosure of the intent to commit a crime threatening death or substantial bodily injury. Forty states permit a lawyer to disclose a client's intent to commit a criminal financial fraud, a result again directly contrary to the ABA rule.²²

The conclusion I draw from these developments is that, if anything, lawyers acting at a national level have lost touch with what the public thinks our professional standards should be. At least insofar as protection of confidential information is concerned, when lawyers have tried to write the rules the result has been far different than when judges or legislators wrote the rules.

VIII. THE TRANSFORMATION OF THE LAWYER DISCIPLINE SYSTEM

The eighth and final pressure on professionalism I will outline here arises from the move to increasingly detailed lawyer discipline codes that began with adoption of the ABA Model Code in 1969. Once again, the objective was sound. Prior to 1969, the ABA Canons of Ethics had provided challenging rhetoric but little real guidance either to lawyers or disciplinary counsel. State bars could arbitrarily impose disciplinary actions on lawyers with unpopular political views,²³ or others found to have engaged in "conduct unbecoming a lawyer." Thus, the promulgation of detailed standards that gave lawyers fair warning and due process was a wise and appropriate development.

The effect of the move from general aspirations to detailed standards,

however, in the minds of many became a move from a reach for professionalism to a search for loopholes that would justify lower and lower standards of behavior. The "law of unintended consequences" was at work once again. I, for one, would not call for a return to the days of arbitrary discipline just to get a higher level of aspiration, but the challenge of increasing professionalism in a world of detailed, rule-based discipline is a real one.

The pressure is even greater when it is associated with the declining effectiveness of the lawyer discipline system in many jurisdictions. Certainly, the need for an effective discipline system has never been greater. Discipline that removes a lawyer's license to practice protects future clients and third parties against at least some of the harm that lawyer might do. Effective discipline meets a need that no after-the-fact malpractice remedy can match.

However, the present state of lawyer discipline leaves a great deal to be desired. It is true that over the last thirty years or so almost all states have adopted a discipline system that uses full-time professional prosecutors and investigators. That has been an essential step. Discipline committees in most jurisdictions, however, remain composed of volunteer lawyers who simply do not have the time to hear cases expeditiously now that the bar has tripled in size over twenty-five years.

At the risk of trying to prove a point with an anecdote, I would mention a factually very simple case that I have been following from a distance with some horror. The alleged lawyer misconduct occurred over five years ago. It took over two years for the discipline agency even to bring the case to hearing because of the

backlog of other matters on its agenda. The hearing board held four days of hearings but those four days had to be scheduled over almost a twelve month period because of the conflicting and busy schedules of the volunteer board members. The board then gave the lawyer another year, including extensions of time, in which to file supplemental materials, and took over fifteen months in which to write its own opinion. All the while, the lawyer remained eligible to continue in practice and potentially injure hundreds of additional clients.

Because the proceedings are confidential, the complaining client was not permitted to attend the hearings—except to give his own testimony—or even learn what the lawyer offered as his version of what happened in the course of their relationship. And, even though the client believes the board now has made some finding against the lawyer, he is prohibited from knowing what that finding is, at least until a reviewing court acts on the matter at some time yet farther in the future.

Nothing here is meant to cast doubt on the sincerity or professionalism of those involved in lawyer discipline. What I simply mean is that none of us should be surprised when a system still staffed heavily by volunteers is ineffective in regulating the conduct of close to a million lawyers who every day handle other people's money and are in a position to engage in acts of misconduct that justify imposition of sanctions. Nor should we be surprised that clients victimized by lawyers do not feel themselves helped by a system whose proceedings remain largely hidden from their view.

The McKay Report, approved by the ABA House of Delegates in August

1991, recommended creating a professionally staffed system within which a client could file a charge and get a decision ordering payment of damages as well as see traditional discipline imposed. That kind of system has not yet been created in any jurisdiction of which I am aware, but without something closely approaching it, I believe we will lack the leverage with which to force our brothers and sisters at the bar to take professional obligations seriously. It should not surprise us, then, when they then take obligations of professionalism even less seriously.

IX. CONCLUSION

It has not been my intention to depress readers of this article. The task set forth by the conference for which the article was prepared is appropriate—indeed essential—if a sense of lawyer professionalism is to be enhanced. My object has been to encourage lawyers to get real—to see that the challenge of improving professionalism will require more than words. Further, I hope I have suggested that we be modest about our expectations of success; the law of unintended consequences has frustrated many previous attempts to achieve our purpose. If we act with a sense of realism and care, however, we may be able to look back on our efforts with pride that we have made a positive difference—both for our own contemporaries and for our children's children. ~~END~~

Thomas D. Morgan is Oppenheim Professor of Law, George Washington University. This paper served as a basis for a discussion of professionalism at the University of Arkansas at Little Rock at a program held February 25-26, 2000, and is reprinted with permission of Mr. Morgan and the University of Arkansas at Little Rock Law Review. For a copy of the endnotes to Mr. Morgan's article, please contact the editor of Voir Dire.

A Judge's Role in Promoting Professionalism

Honorable Stewart G. Pollock, New Jersey Supreme Court

What is a judge's role in promoting and encouraging professionalism? That's a fair question to someone who has been on the bench for 20 years. Perhaps I should be able to provide a quick snappy answer. Yet, I hesitate. How should judges behave? How should they treat lawyers, litigants, members of the public, court personnel? These are probing questions deserving of careful consideration.

Of this much I am certain, I know a good judge when I see one. So, perhaps the best way to begin to answer the preceding questions is to provide an example. The best trial judge before whom I ever appeared was the late Alexander P. Waugh. I appeared before him in every conceivable kind of court proceeding: jury trials, non-jury trials, motions, administrative matters. He was the assignment judge when I was the President of the Morris County Bar Association, and we often worked on matters concerning bench bar relations.

Not once did Judge Waugh ever use his gavel. Not once did he ever raise his voice. His demeanor was enough for everyone in the courtroom to know how to behave. The lesson to be learned from Judge Waugh is that judges should teach by example. Civility trickles down from the top. Whether a judge sits in a municipal court, superior court, or the supreme court, the judge's role is to create an atmosphere of civility in the courtroom. Judges can create that atmosphere in various ways.

Here are ten suggestions, in no particular order; examples of how judges can set the right atmosphere in a courtroom:

- ♦ Number 1, judges shall not allow cell phones in the courtroom.
- ♦ Number 2, judges shall not call lawyers on one side of the case by their first name while addressing the other side more formally.
- ♦ No. 3, judges shall not tolerate abusive cross-examination.
- ♦ No. 4, Judges shall correct a lawyer who throws a book on the counsel table or kicks courtroom furniture.
- ♦ No. 5, Judges shall neither slouch in their chairs, nor permit lawyers to slouch in theirs.

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Commentary on Professionalism.

- ♦ No. 6, Judges shall treat everyone : lawyers, litigants, witnesses, court employees and members of the public courteously without regard to race, religion, color or economic status.
- ♦ No. 7, Judges shall be punctual.
- ♦ No. 8, Judges shall correct discovery abuse when it occurs even if it means taking telephone calls from lawyers who are taking depositions.
- ♦ And No. 9, Judges shall treat lawyers as they would want to be treated themselves.

No. 10, is up to you.

I know my list is incomplete and that yours, if you made one, would be better. Implicit in my list, is the premise that judges should lead by example. They should correct bad behavior and reward good behavior. It may come as a shock to some and a disappointment to others, but the fact is, you do not need to be a legal genius to be a good judge. The constitution does not require that judges be on law review or in the upper ten percent of their class. If someone is a legal genius, but does not respect the inherent dignity of litigants, no matter how shabby their clothes or broken their English, that person is worse than a bad judge.

On the other hand, someone who may have struggled through law school, but who starts court on time, treats lawyers and litigants respectfully and renders fair and reasonable decisions according to law, is not just a good judge but a great judge. In advancing the cause of professionalism, trial judges will have greater opportunities than appellate judges. When members of the Bar tell me horror stories about unprofessional conduct by judges the stories usually focus on proceedings in the trial courts, most often concerning discovery.

The higher lawyers proceed in the judicial system the better they behave. In my years on the Supreme Court I found that counsel are terminally polite. Still, even in the Supreme Court an occasion will arise to encourage or comment on professional conduct. For example, in the case of State v. W.K., our court recently complimented Assistant Hudson County Prosecutor Susan B. Guess, for acknowledging that the Appellate Division had imposed a longer sentence than the state had sought. Similarly, when the case is well briefed or well tried by both sides a court appropriately may recognize counsel's performance.

What can the bench and the bar do to make things better? First, we can recognize that a shared set of values demonstrates respect for each other and for the judicial process. The central moral tradition of judges and lawyers is honoring

the procedures and institutions of the law. We should revitalize the ideal of the law as a public profession.

The renaissance of professionalism has begun. The Supreme Court has approved the New Jersey Commission on Professionalism, chaired by Dean Riccio. The Court has also approved the establishment of professionalism counseling programs to be operated by county bar associations in conjunction with the New Jersey Commission on Professionalism.

In my home county, Morris County, the Bar Association has established a professionalism committee chaired by Edward Broderick. Under the committee's procedure, a judge or a lawyer may file a grievance about another judge or lawyer. The committee assigns a team of two members to meet with a lawyer or judge and report back to the full committee. The idea is not for the committee to humiliate the subject of the complaint or for the committee's members to become legal policeman. Rather, the committee tries to remind the subjects that they are privileged to be lawyers and judges, and that anything that harms the profession harms all lawyers and judges. So far the committee has processed two complaints, one involving a judge and the other involving a lawyer.

My time is just about up on this panel and on the court. So I would like to take the remaining seconds allocated to me to thank the members of the bench and the bar for the 20 most wonderful years of my life. In a few months I shall leave the position that I love to return to the profession that I love. With the end in sight, I thank you for your arguments and your briefs, your respect and friendship, and for your professionalism.

Justice Pollock served on the New Jersey Supreme Court for over 20 years until his retirement in September 1999. This article was adapted from remarks given during a professionalism seminar at the 1999 Annual Meeting of the New Jersey State Bar Association.

Trial Judges Behaving Badly

Appeals courts reverse jury verdicts for hostile conduct

ORAN F. WHITING
LITIGATION NEWS ASSOCIATE EDITOR

Trial judges' hostile treatment of, and meddlesome interference with, counsel resulted in two recent appellate court reversals, one state and one federal.

A New Jersey appellate court reversed a \$1.17 million jury verdict and remanded the case to a different judge. *Mercer v. Weyerhoeuser Co.* The appellate court was extremely critical of trial court Judge E. Stevenson Fluharty's actions, comments, and treatment of defense counsel. The judge's conduct was not raised during trial, or in defendants' post-trial motions, but was raised in defendants' appeal.

The appellate court focused on whether Judge Fluharty's conduct "went over the line," and whether he abused his discretion. In a 37-page opinion, the appeals court cited numerous instances of the judge's rude or otherwise inappropriate behavior.

The court stated that the trial judge made numerous gratuitous comments that were detrimental to defense counsel and her clients. It criticized the trial judge for his facial expressions and overall demeanor, for constantly berating defense counsel in the jury's presence, and for repeatedly insinuating that the jury knew more than defense counsel. The appellate court had the benefit of being able to review a videotape of the trial.

The judge's lecturing of defense counsel about the rules of evidence and his taking over examinations of witnesses for defense counsel created the unmistakable impression that defense counsel did not know what she was doing, the appellate court said. The judge's actions telegraphed to the jury that he did not respect defense counsel's legal ability. In the end, the appellate court could not uphold the jury's verdict because it "... lacked any attitude that the jury determined the case on its merits alone."

Ann C. Slinger, Westmont, NJ, the defense counsel who was the object of the trial judge's tirades, comments only that "the appellate court appropriately addressed the problem."

Carlo Scaramella, Cherry Hill, NJ, plaintiffs' counsel, argues that the trial judge did not have an opportunity to

explain or defend himself or to place on the record his thoughts about the trial or the behavior of counsel. This was a "hotly contested matter," tried over 17 trial days, Scaramella says. "There are many instances in the rough-and-tumble of a trial where there are disagreements between counsel themselves and the judge. Sometimes personalities interact," says Scaramella.

Scaramella believes that a judge has to be given adequate power to exercise control over the courtroom. "If you strip that power from the judge, you will have bedlam." The appellate court's decision was "very principled," however, and the appellate court "did what it thought was fair to the parties," Scaramella says. "I respect the line drawn by the appellate court, but I would have drawn a different line."

The United States Court of Appeals for the Sixth Circuit also vacated a jury's verdict because of inappropriate behavior of the trial judge. *Nationwide Mutual Fire Ins. Co. v. Ford Motor Co.* It

remanded a products liability subrogation action for a new trial, due to the trial court judge's abuse of discretion.

The appellate court found that the actions of the trial court judge, Joseph P. Kinneary, constituted bias. It cited his six interruptions of plaintiff's counsel's opening statement, as compared with a single interruption of defense counsel's opening statement; interruptions of plaintiff's counsel's witness examinations; cross-examination of plaintiff's witnesses; the intemperate tone and context of the questions asked of plaintiff's counsel; and suggestions to defense counsel to object.

The Sixth Circuit stated that the judge is the "governor of the trial" who must always remain calm, judicially dispassionate, and impartial, and who should sedulously avoid all appearances of advocacy. The trial judge "failed utterly" to set an example of judicial temperance and impartiality, and to allow competent lawyers to proceed in their preferred fashion, the appeals court said.

Anthony J. Damelio, Cleveland, counsel for Nationwide, believes that the

cumulative effect of the trial judge's actions took the appellate court "over the edge," forcing a reversal. Damelio states that as a trial lawyer, his underlying concern was what to do to protect his client's interest and the record when he realized that he was trying the case for the appellate court and not for the jury. Damelio thought long and hard about his appeal.

"Issues of judicial misconduct must not be asserted unless there is a bona fide belief that they have merit. If an appeal is based, in part, on a judge's conduct, it must not be handled lightly, because the integrity of the judiciary is an important concern that we as lawyers all need to foster and maintain," says Damelio.

James W. Wiggins, III, Columbus, OH, counsel for Ford Motor Company, says that judges have extraordinarily difficult jobs. He asserts that the trial judge became frustrated with the length of time that Nationwide took to prove its case. "Judge Kinneary believes in streamlined cases, especially when the jury is in the box. He is acutely aware of the difficulty that jurors face balancing their obligations with their professional and/or private lives."

The Sixth Circuit "went a little overboard," Wiggins contends. "It is almost unprecedented for a civil case to be reversed based on judicial misconduct," he adds.

Section of Litigation leaders find the two cases significant in two respects. First, basing an appeal on the behavior of a trial judge is a "low percentage argument," says Walter H. Sargent, Colorado Springs, CO, Appellate Practice Committee Co-Chair. "Appellate courts are usually reluctant to publicly discipline

lower court judges through their written opinions," he adds.

Second, the cases illustrate a regrettable fact of life, says Timothy J. Thomson, Phoenix, Ariz., Trial

Practice Committee Co-Chair. "Unfortunately, it seems that (in some cases) the longer that a judge has been on the bench, the more rude and insensitive he or she becomes. The vast majority of judges are perfectly civil and behave appropriately. Regrettably, there are a few who have forgotten what it is to be a lawyer, and make life miserable. The trick for the trial lawyer is to not let a judge's lack of professionalism impact the job you have to do." □

Citations:

Mercer v. Weyerhoeuser Co., 1999 WL 345267 (N.J. Super. App. Div. July 13, 1999).

Nationwide Mutual Fire Ins. Co. v. Ford Motor Co., No. 97-3548, 1999 U.S. Lexis 7674 (Apr. 22, 1999).

Etiquette Rules Apply to Judges, Too

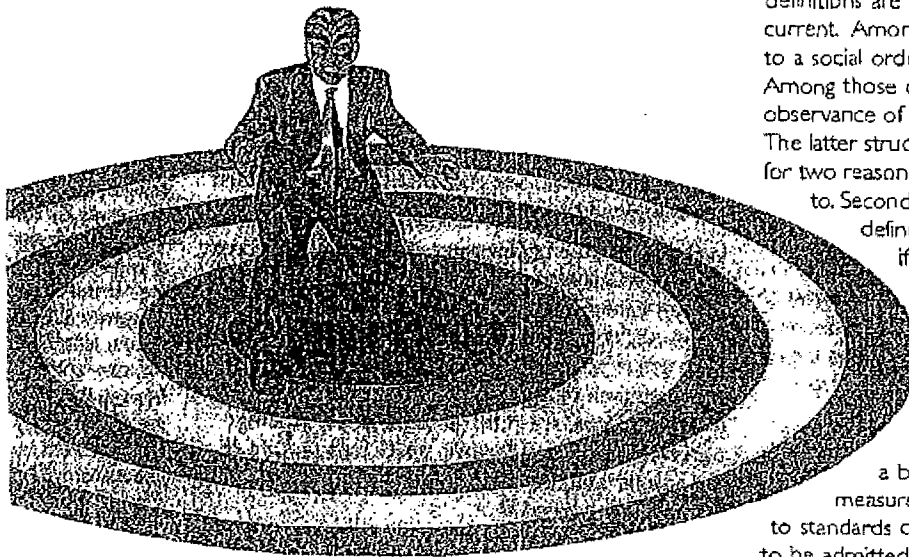
Canon 3A(3) of the Code of Conduct for United States Judges requires that a judge be "patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. . . ." The commentary explains that a judge has a duty to hear all proceedings fairly and with patience. This duty is not inconsistent with the duty to dispose of cases promptly. Courts can be efficient and businesslike while being patient and deliberate.

A judge also has the duty to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The commentary cites as a specific example the judge's duty to be respectful of others, which includes responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias.

Are You Tired of Lawyer Jokes?

Marcia Paul

*Advocating civility
among lawyers is an unassailable
proposition; if a counter-argument
could be fashioned, it would be
akin to attacking motherhood or apple pie.
We have all heard time and again
that if we want to stop being the butt of
lawyers' jokes, we must change our
own behavior and thus, the way we are
perceived by society.*



We know that the stereotypes of lawyers that pervade the media are just that: stereotypes not all-inclusive characterizations. The media may exaggerate the stereotype to some extent, but we are collectively the root of it and only by changing our own conduct can we succeed in gradually changing the public perception. Even apart from that perception is the question of what we demand of ourselves. There is nothing inherent in being a lawyer that should, by definition, produce the kind of contentious conduct that increasingly seems to pervade our profession, notwithstanding systemic efforts to effect behavioral change. It seems apparent that our lives would be more pleasant, our clients would be better served, and we would increase respect for our justice system, if we were each a little less strident, a little more tolerant, and a lot more respectful of each other. The open question is how best to accomplish that.

On the Meaning of "Civility"

To begin, we need to define our goal. Simply to say that lawyers should exhibit "civility" to one another, to judges, and to clients, is rather amorphous. What is civility to one may be incivility to another. I surveyed several dictionaries and thesauruses for an appropriate definition of "civility" and was surprised to learn which definitions are considered obsolete, and which are current. Among the obsolete ones were "allegiance to a social order" and "civil government or policy". Among those deemed current, I found "the bare observance of the forms of accepted social behavior". The latter struck me as insufficient for present purposes for two reasons: a "bare norm" is far too little to aspire to. Second, "accepted social behavior" is obviously defined by the society in which it is measured; if lawyers today do not treat one another with sufficient respect, that may well be the norm, but it should not be the benchmark we strive for.

The obsolete definitions are more helpful. The concept of allegiance to a social order is, after all, the foundation of a bar system. Lawyers take bar exams to measure competency and ethics; they subscribe to standards of conduct and professionalism in order to be admitted to the bars of states, courts, and bar

The Benchers • July/August 2003

associations; and our entire judicial system is a social order of sorts. These obsolete definitions also hark back to the word "civil" from which the word "civility" is derived. Once again, dictionary definitions provide a useful framework. Civil means, among other things, "of or relating to citizens in their interrelations with one another or with the state"; or "pertaining to a citizen in his relations to his fellow citizens or to the state". These "obsolete" definitions are more useful for present purposes, because they look to the role of the individual (here the lawyer) not just with reference to other lawyers, but with reference to the other members of the community who make up the "civitas", e.g. clients, government, judges, juries and society at large. Each of these members of the community play a role in how we behave and are perceived, and if we are to effect change, it must be throughout that community.

The Line Between Advocate and Adversary

I begin with the interactions between and among attorneys, outside the presence of judge or jury, or even the client. As a litigator, most of my time I have an "adversary" - the lawyer who represents the client on the other side. I know that that lawyer is not truly my adversary; it is rather our clients who are at odds. Nonetheless, we all have a natural tendency to adopt, to some extent, our own client's view of right and wrong. (I remember when I first discovered, as a relatively young lawyer, that my most objective view of the strength of my client's position was generally towards the beginning, before I was fully invested in the client's view of the case). Perhaps this personification is necessary for effective advocacy and perhaps it is unavoidable, but it ignores the fact that we are not only representatives of or advocates for our clients, we function as part of the system or "social order" itself. Personalizing the adversary relationship unnecessarily limits our role and our effectiveness.

When are the borders of our "advocate" role transgressed the most? Probably when in front of a judge, as we are the voice of our client's interest; and also in the presence of our clients, as that is the behavior we believe they expect.

In what circumstances do these adversarial tendencies play least? Perhaps when you are a member of a relatively small bar—whether defined geographically or by a particular practice area—and therefore you know that you will deal, again and again, with the same lawyer either on the same or opposite sides of a case. This is a litigator's perspective. But lawyers do not just deal with each other in litigation. They deal across a negotiating table. They deal on behalf of their clients with lawyers employed by the government. Sometimes they are employed

by the government or are in-house lawyers employed by the client.

Are litigators more prone to over-identification with the client or more "zealous" advocacy (or "uncivil" behavior) than others? An informal survey of my colleagues suggests not. Indeed, many say that the absence of a judge to turn to when reasonable minds might differ can actually enhance hostility (and consequent lack of courtesy). Others attribute the perceived arrogance of some government lawyers to the absence of a living, breathing client as such, with his or her own agenda. And surely it is harder for an in-house lawyer to overcome the identification with his or her client, as s/he is not only beholden to his or her employer in a different way, but also knows the business people, the overall business needs, the industry, and the impact of a particular dispute or deal on the client.

Does the number of years an attorney has been practicing make a difference? Certainly most lawyers are more strident in their early years at the bar than they are later on, perhaps because they believe that they must come on more aggressively to be taken seriously, or because of insecurity. But any change over time is generally just relative to a particular lawyer's style. Lawyers fashion their styles based upon the role models they encounter. A lawyer who is discourteous to other lawyers early on is likely to continue the practice unless forced to stop. A vital aspect of our profession is the diversity of the personalities it attracts. So long as that diversity exists, there will be differences between the level of civility exhibited among lawyers. But there is a fine line between the permissible range of style and impermissible conduct. When the lawyer's role is solely advising the client, the consequences of advocacy fall to the side. But the moment we engage in representative behavior on behalf of our clients, it does not seem to matter whether our interrelationships are in the context of litigation or a corporate deal, whether we have many clients or just one, or who that client is. It is the level of personalization and, to some extent, the personality of the lawyer, that dictate behavior. Therefore, it is at least theoretically within the power of each lawyer to increase his or her level of civility.

What Of The Role of the Client?

We have all heard that part of the way we behave as lawyers vis-a-vis other lawyers is a function of what our clients expect from us, and there is probably some measure of truth in that. For this reason, many lawyers (and I include myself among them) will sometimes

Continued on page 10.

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be more strident in their positions when the client is present, than when the client is not. But a client's expectations are a function of the norm, and redefining the norm should modify those expectations.

If advocates exhibit more or less the same amount of civility, the playing field is level. But there is a lurking fear that if we act civilly to our adversary and the behavior is not reciprocal, a client may believe that the adversary's lawyer is the more effective one. While that may be the perception, it is not always or even usually the case and explaining your style to clients in advance, may disabuse them of that notion. We have all encountered clients who want us to behave less cordially and to be less accommodating than we want to be. In those circumstances, civility "codes" that we can be held accountable to, may help to persuade the client to see it our way.

It is also true that reciprocal courtesies between the lawyers may migrate to the client-to-client relationship. If the dispute is viewed as a business not a personal one, or if the deal is perceived as mutually beneficial, then the lawyers are simply part of the system, engaged in either dispute resolution or papering the deal in a constructive manner. On the other hand, we have all been in situations where the level of hostility between the attorneys becomes counter-productive and the settlement of the case or the resolution of contentious issues is best accomplished client-to-client on a business basis without advocate trappings.

There are always going to be personality clashes and personality clicks. What works best in a particular case or matter is a function of who we are as people, how we relate to a particular adversary, the demands of our clients, and unrelated stresses that wend their way into our professional dealings. Simply trying to justify otherwise unjustifiable behavior by laying the blame at the client's doorstep, however, should not be an acceptable answer.

The Role of the Judge

I have heard many lawyers say, increasingly in recent years, that they believe that judges are at least in part to blame for the "devilization" of the bar, because they allow us to get away with unacceptable behavior. That seems odd at a time when judges are far more inclined to grant sanctions than they have been in the past, or to publicly embarrass—if not discipline—lawyers who are chronic malfesants.

A judge's willingness to intercede has, at a bare minimum, a prophylactic effect on lawyers' conduct. We have all encountered some judges who have zero tolerance for *ad hominem* attacks in the courtroom or who raise the prospect of Rule 11 sanctions even when the lawyers themselves are mum on point. But

does that behavior actually improve the day-to-day interactions between and among attorneys or result in a greater degree of civility between them when out of the judge's earshot? I believe that it does. Perhaps it is child-like that we need the scepter of punishment to behave like civil human beings but, in my own experience, the more activist the judge in policing lawyers' conduct, the less the need for actual intervention. Judges set the tone. There are very few litigators who, if asked, would honestly say that they prefer to try a case before a judge who gives them a fair amount of leeway, rather than one who tightly controls the courtroom. Given less room to transgress, the urge to do so is stifled. And judges not only have the power to impose sanctions, they can also act in other ways that set a tone for the lawyers who appear before them. I know of more than one judge who has publicly stated that, absent special circumstances, s/he will deny a temporary restraining order sought on the Friday afternoon before a holiday weekend, simply because it appears that it was brought then for tactical advantage.

What is it about the way our system currently operates that seems to have increased the amount of incivility, notwithstanding the availability of sanctions and more judicial activism? To some extent, the more active a judge is in a case and the more s/he knows the issues, the parties and the lawyers, the more effective s/he can be at preventing discourteous conduct. To the extent that changes in the Federal Rules or in state procedures leave the litigants on their own or with a series of different referees for discovery disputes, the less continuity the judge has with the case and the less able s/he is to control it. Likewise, the more crowded the docket of the judge, the less time s/he has to understand how the interaction among the lawyers may be impeding the case. The individual case assignment system certainly helps. By way of contrast, my own experiences in "rocket docket" courts suggest that appearing before a different magistrate judge each week results in a lack of continuity that can leave the judge clueless as to aberrant behavior patterns. It is no more fair to place the blame on the judges, however, than to blame the client as, to return to our definitional predicates, each lawyer is charged with behaving in a civil manner to each facet of the legal community, and while resorting to judicial interaction may sometimes be necessary, it should be a last resort.

Why Do We Behave Differently In Front of a Judge or Jury?

By and large, lawyers act with civility before judges, not only in the sense of treating them civilly as human beings, but out of respect for their office and what they symbolize. Interrupting a judge is something

that few of us do and live to tell the tale. We always caution witnesses that if the judge asks a question, s/he should immediately stop, look the judge in the eye, and respond. We need to follow that advice ourselves. One of the tools of effective advocacy is to use your response to a judge's question as a vehicle to make your own points, but it is certain to annoy the judge if you do not also directly answer the question.

Respect for the judge also extends to respect for the courtroom as the place where justice is dispensed. While judges have differing levels of tolerance, conversations in the courtroom while waiting to argue or to approach the bench, are not just distracting, they are rude. I am invariably frustrated by being forced to leave my cell phone and, in some jurisdictions, my palm pilot, in the marshal's office in the lobby of the courthouse; I feel like I am being treated like a child. But having been in courthouses where that is not the case, and hearing an assortment of jangling cell phones in the courtroom, I grudgingly accept the need for the restriction. Some judges have shorter fuses than others and the line between contemptuous conduct and uncivil conduct may be a hazy one, but the heart of the problem does not lie in how we behave in front of judges; that is where lawyers behave the best. It is when the judge is not present that the rules of civility break down.

Likewise, lawyer conduct is generally more tempered in front of a jury. Although civil jury trials consume a relatively small part of most of our practices, we all are more deferential to adversary counsel and adversaries themselves in front of a jury, than we are in its absence. We do that because we know how jurors react: as a cross-section of our respective communities, they do not like uncivil behavior and they are quick to notice it. Having served as a juror myself, I found the perspective interesting; I saw the lawyers as extensions of their respective clients and assumed that they were reflecting their clients' attitudes towards the case. I looked for facial expressions when the other was arguing to telegraph disdain or disbelief; I watched for body language that would indicate something other than respect for each other or the system. That it is not just the presence of the judge but the jury itself that affects our behavior, is illustrated by practice in our New York state court system, where jurors are frequently selected in the absence of a judge. I have observed that lawyers in these circumstances similarly modulate their behavior before the juror pool. Thus, the idea that jurors will frown upon a lawyer's discourteous behavior and perhaps hold it against his or her client is a deterrent in and of itself.

How do we square a juror's discerning perspective—looking askance at unprofessional or discourteous

conduct—with the notion that jurors, as members of the broader community, watch television programs and flock to movies in which lawyers engage in disreputable or otherwise uncivil conduct? As a firm believer in the jury system, I also believe that jurors take their roles very seriously; they step out of society at large, and they too become invested in the system and in their own role in the process. Having done so, they do not like showmanship and they expect lawyers to respect the dignity of the process.

Of Codes and Enforcement

The emergence of "Civility Codes"—rules or standards designed to improve lawyers' level of civility—may be traced to Chief Justice Warren Burger's 1984 speech to the ABA, decrying a general decline in professionalism among lawyers. The early 1980's saw many changes in the legal profession, e.g. the first demises of stalwart law firms and revolving door partnerships. In the past two decades, we have moved away from a self-perception of lawyers as a collegial fraternity (pardon the word), to the law as a quintessential service business. It is no coincidence that courtesy began to decline at about the same time.

One product of Justice Burger's comments was the adoption by various state bar associations and courts of Civility Codes to try to regulate aberrant conduct. Some of these Codes are "aspirational", rather than mandatory, and their language, in many instances, leaves room for subjective interpretation. I mentioned at the outset that arguing against increased civility is like attacking motherhood, but there is no shortage of critiques of these various Codes, whether aspirational or mandatory. Part of the problem is that the line between unethical conduct and uncivil conduct is a difficult one to draw. It is also inherently difficult to define what are necessarily subjective behavioral standards. A particular interesting critique in 25 U. Dayton L. Rev. 151 Comment "Civility Codes: The Newest Weapons in the 'Civil' War Over Proper Attorney Conduct Regulations Miss Their Mark" by Brenda Smith, queries whether these civility codes serve any purpose at all. The author argues, *inter alia*, that they overlap with existing disciplinary rules and, to the extent that they do not, it would be preferable to expand the rules, rather than positing loosely-worded aspirational



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Continued on page 17.

is out of order, he proclaims "You're out of order! You're out of order. The whole trial is out of order!"

While Kirkland's portrayal may be the pinnacle of attorney incivility in the cinema, the treatment the judiciary sometimes receives on screen is hardly better. At one point during the movie, the judge attempts to restore order by stating "Gentlemen, need I remind you we are in a court of law!" Unfortunately, he is firing a gun into the ceiling while he is making the statement. Such is the way things sometimes are portrayed in Hollywood.

Obviously, civility encompasses an attorney's dealings with his or her clients. And it entails more than simply keeping a client informed, zealous representation and returning phone calls promptly. It also covers the manner in which you help your clients through what is usually a very difficult time for them. For most people, litigation is a new and unknown world. It is important to take the time to walk them through the process in a manner they will understand. In the movie

Amistad, John Quincy Adams, portrayed by Anthony Hopkins, does this by explaining the trial tactics he will use to an ex-slave seeking to retain Adams to represent imprisoned and frightened slaves kidnapped from Africa and charged with rebellion aboard a slave ship. Tossing technical explanations aside, Adams explains "When I was an attorney a long time ago as a young man, I realized, after much trial and error that, in a courtroom, whoever tells the best story, wins."

Though civility is the cornerstone of professionalism in the practice of law, it is not taught in law school. Indeed, seeming incivility can dominate the curriculum in some Hollywood law schools—as demonstrated in *The Paper Chase* by the dialogue between Professor Kingsfield, portrayed by John Houseman, and law student James Hart:

HART: You are a son of a bitch, Kingsfield!

PROFESSOR KINGSFIELD: Mr. Hart, that is the most intelligent thing you've said all day. You may take your seat. ♦

Lawyer Jokes continued from page 11.

standards. I think that it is also appropriate to ask more fundamentally, whether the enforcement of civility is an oxymoron.

Even apart from the question of whether we can enforce what is inherently a social rather than legal proscription, who should be the enforcer? The most obvious answer is that it is the role of the judge to enforce infractions in particular cases. As stated in *Mruz v. Coring, Inc.*, 166 F. Supp. 2d 61, 70 (D. N.J., 2001):

As is becoming clear to attorneys who practice in this District, this Court is growing increasingly distressed by the deteriorating level of civility and decorum that has long been the hallmark of this estimable profession. It is the obligation of this Court to protect and nurture the vestiges of professional legal conduct so that the practice of law is once again not only socially and commercially valuable, but also enjoyable and worthy of esteem. This Court takes this obligation seriously and conduct before the Court that violates the principles of courtesy and professionalism embodied in the Rules of Professional Conduct will not be tolerated".

With respect to those of the Civility Codes that purport to be binding rather than aspirational, the decisions of judges relying upon them are few and far between. Perhaps for this reason, others advocate self-regulation by the profession. Thus, Codes of

Civility would be treated in much the same way as grievances are, i.e. by disciplinary committees of a bar association, with appellate review.

I believe that making lawyers and law students aware that codes of civility exist can help shape and perhaps alter the way lawyers deal with each other—the behavior dictated by the Code may become the norm. Likewise, in cases of particularly egregious conduct, judicial intervention in form of sanctions may be necessary. But codes and enforcement aside, the only way the profession is going to change is if each of us takes it upon ourselves to make that change.

How to Make Ourselves Behave More Civilly

We accept that we cannot change society's view of lawyers unless we change the stereotype and we cannot change the stereotype without changing our own behavior. We have also seen that how we behave towards other lawyers varies with our own personalities, the real or perceived needs of our clients, the role and temper of the judge, and stage of the process itself. Enacting "Codes of Civility", asking for judicial intervention and/or seeking sanctions, all may be necessary in particular instances, when there is no other alternative. But all of those look to the outside: they require actions by those other than ourselves. We can enact Codes of Civility, but they are only truly effective if we internalize them. ♦

PART ONE

The Contemporary Practice of Law

CHAPTER I

Law as a “High Calling”?

Recent books and articles about the legal profession paint a troubling picture. Although the optimism/pessimism mix and proposed remedies vary, many agree with Harvard Law Professor Mary Ann Glendon that the profession is in extremis—or, as she puts it, on “the edge of chaos.”¹ Indeed, Yale Law School Dean Anthony T. Kronman ups the philosophical ante in *The Lost Lawyer: Failing Ideals of the Legal Profession*, diagnosing “a spiritual crisis” in which “the profession now stands in danger of losing its soul.”²

Other notable commentators concur. Almost ten years ago Sol M. Linowitz, about to retire from a distinguished career in law, business, and government,³ minced no words in *The Betrayed Profession: Lawyering at the End of the Twentieth Century*. Ambassador Linowitz’s assessment, rich in historical example, laments the transformation of the profession he loved—and understood to be a high public calling—into an increasingly unprincipled, dollar-driven business.⁴

With the current prevalence of lawyer misery,⁵ lawyer-bashing,⁶ and lawyer jokes,⁷ it is crucial that the legal profession rediscover the “high calling” and rekindle the ideals that are its prouder heritage. On the other hand, lest we appear hopelessly naive, before the law-as-a-high-calling flag can be credibly raised, two caveats are in order.

Caveat One: Polls, Surveys, and Opinions

Whether or not it is entirely deserved, the general public’s low opinion of lawyers must be acknowledged and engaged. Even if much of the criticism is based on composite stereotypes or media hype of atypical cases, addressing negative perceptions is a necessary step toward

reestablishing foundational ideals and restoring public respect for the legal profession.

Professor Roger E. Schechter accurately summarized relevant survey data in his 1997 article titled "Changing Law Schools to Make Less Nasty Lawyers":⁸

The public does not think well of us. Lawyers are held in extraordinarily low regard by the public at large. In several recent surveys ranking public esteem of various professions, lawyers have scored near the bottom. One such poll revealed that 95 percent of Americans would not recommend that their sons or daughters enter the legal profession. The members of the profession are considered arrogant, confrontational, manipulative, and unscrupulous, to state just a few of the adjectives that can be said in polite company.⁹

Unhappily, polls and surveys conducted in the 1980s and 1990s confirm Professor Schechter's conclusions. For example, in a 1993 American Bar Association (ABA) poll, "out of nine professions, only lawyers (40 percent), stockbrokers (28 percent), and politicians (21 percent) scored minority favorability ratings."¹⁰ The same year a *National Law Journal*/West Publishing Company poll found that almost a third of Americans believed lawyers were "less honest than most people."¹¹ In the ABA poll, only one in five considered lawyers to be "honest and ethical" and "the more a person [knew] about the legal profession and the more he or she [was] in direct personal contact with lawyers, the lower [his or her] opinion of them."¹²

A 1997 Harris poll produced similar results. Comparing the percentage of the public that regarded various occupations as "very prestigious" in 1977 and 1997, the "drop [in the percentage placing law in this category was] the biggest among occupations in the survey." The occupations considered more prestigious than law in the 1997 survey, and the percentages considering them "very prestigious" were doctor (52 percent), scientists (51 percent), minister/clergyman (45 percent), teacher (40 percent), engineer (32 percent), and athlete (21 percent). Lawyers, down from 36 percent in 1977, were tied with artists at 19 percent and 1 percentage point ahead of entertainers (18 percent).¹³

In a separate Harris poll, also conducted in 1997, law firm "leaders" received even lower marks. *National Law Journal* reporter Chris Klein summarized the findings of the second poll:

Just 7 percent of respondents have "a great deal of confidence" in people who run law firms—dead last on a list of 14 such institutions. Leaders of

the military placed first, garnering 37 percent, followed by medicine at 29 percent and the U.S. Supreme Court at 28 percent. One notch above those in charge of law firms were leaders of organized labor, in whom 9 percent of respondents said they had great confidence.¹⁴

Intending no slight to the wise and virtuous in their ranks, when public confidence in the leaders of organized labor is greater than their confidence in bar leaders, Houston, we have a problem.

On the other hand, as Stanford Law Professor Deborah L. Rhode reminds us in her provocative book, *In the Interests of Justice: Reforming the Legal Profession*, criticism of lawyers and their ancient craft is nothing new.¹⁵ Indeed, when paid advocates first emerged over 2000 years ago, Seneca described our early forbears as “smothered by their prosperity,” and Plato scorned their “small and unrighteous souls.”¹⁶ In *Utopia*, Sir Thomas More (1478–1535)—the Lord Chancellor of England deposed by King Henry VIII and, according to Catholic tradition, a patron saint of lawyers—specifically excluded all lawyers from his vision of the perfect society. Several hundred years later another Englishman, Samuel Johnson (1709–1784), sardonically quipped: “I do not care to speak ill of any man behind his back, but I believe the gentleman is an attorney.”¹⁷

Alexis de Tocqueville’s high view of early American lawyers notwithstanding,¹⁸ Walter Bennett is correct that:

The resentment of the power of lawyers is not new but is deeply embedded in our social history. American colonists brought with them from England a dislike of lawyers who, in the “old world,” were part of the political and financial elite. . . . Lawyers were seen as part of an evil and unnatural apparatus that worked to repress and disenfranchise the common man and to undermine the ideal of a utopian republic.¹⁹

There are many historical examples of the antilawyer sentiment in early America, some of which are better for a hearty laugh than most lawyer jokes in current circulation. Consider, for example, the description of the Grafton County, New Hampshire population in its 1770 census report: “6,489 souls, most of whom are engaged in agriculture. . . . There is not one lawyer, for which we take no personal credit, but thank an Almighty and Merciful God.”²⁰

Less humorous but equally unequivocal is University of Wisconsin Law Professor Marc Galanter’s summary of widespread antipathy to-

ward lawyers during the same period and extending for at least 100 years:

In the years following the revolution "there existed a violent universal prejudice against the legal profession as a class" and its members "were denounced as banded, as blood-suckers, as pick-pockets, as wind-bags, as smooth-tongued rogues. . . . The mere sight of a lawyer . . . was enough to call forth an oath." In the Jacksonian era and in the years after the rise of industrialism, there were strong currents of hostility to lawyers that are not outdone by contemporary lawyer bashing.²¹

Of course, it is not altogether fair to compare contemporary law practice to Greek or Roman, or even eighteenth- and nineteenth-century practice—before most American lawyers had attended law school, the first bar association had been formed, or standards for admission or ethical practice had been clearly established.²² On the other hand, there is something strangely comforting in realizing that the current barrage of criticism is not without historical antecedent, particularly in light of the many laudable accomplishments of the profession—providing a majority of our presidents, for example—in the intervening years. If we survived the dismissive contempt of these earlier periods, earning public respect and even admiration from subsequent generations, why can our current choices not effect a similar transformation in future public opinion?

Historical perspective is also helpful in responding to specific criticisms. Most lawyers are now familiar with the concern—and an increasing percentage share it—that the "dignity and honor" formerly associated with our profession have been "contaminated with the spirit of commerce."²³ Many, however, will be surprised to learn that this particular charge was levied in 1895. In the 1930s, a period some commentators include in the "Golden Age" of lawyering in the United States, Supreme Court Justice Harlan Fisk Stone complained that pressures had already transformed many lawyers into "obsequious servants of business . . . tainted with the morals and manners of the marketplace. . . ." ²⁴

What we do with this criticism, from the ancient to the most recent poll and survey, may be less important than that we show good faith—and a measure of humility—in acknowledging it. In the eyes of many, the legal profession has lost its way. Have we? What *are* our higher, more-noble purposes in twenty-first-century America, and how might

we better demonstrate these to a cynical public, which increasingly sees lawyers as “sharks” preying on the problems of others, or worse, as high-priced whores willing to do almost anything if the money is right?

These are unavoidable questions if we are to achieve what must be our goals: renewed ideals, a sense of “calling” in our work, and proud participation in a profession that has reclaimed—even in the eyes of the fickle public—its “dignity and honor.”²⁵

Caveat Two: No “Golden Age”

Much of the recent literature lamenting the legal profession’s loss of character or status presumes there were earlier periods during which the bar more or less “had it together.” Dean Kronman, for example, appears to favor a period spanning the nineteenth and twentieth centuries when “lawyer-statesmen,” primarily from major cities, moved freely from successful law practices to periods of equally impressive public service. For Professor Glendon, who graduated from University of Chicago Law School in 1961 (where the famous Karl Llewellyn, father of the “legal realism” movement and author of *The Bramble Bush*, was one of her professors) and then practiced for a number of years before teaching law, the showcase period is roughly 1920 to 1960. Glendon highlights this period for emulation as a time “when lawyers were ‘widely oriented . . . to a common set of ideals’; bar leaders consistently affirmed concepts of professionalism; associates who did good work were ordinarily rewarded with partnerships; [and] lawyers would subordinate considerations of economic gain to ‘firm solidarity or to ideals of right conduct.’”²⁶

Dean Kronman, Professor Glendon, and others are correct to highlight admirable qualities and practices of earlier periods, and indeed, any discipline hoping for a bright future neglects its past at great peril. On the other hand, as Professors Rhode and Gallant also correctly instruct, it would be a mistake to consider any period a “Golden Age” or to apply recent critiques and criticism primarily as a call for return to the past.²⁷ We cannot turn back the clock—and might not be as pleased as expected if we could—although our own period may be becoming, as Gallant has quipped, “the . . . Golden Age of nostalgia for the Golden Age of lawyering.”²⁸

There are two fundamental reasons why we must not allow future efforts to restore or reform the legal profession to devolve primarily

into nostalgic longing to turn back the clock. First, whatever period is selected as a model, upon closer scrutiny we will discover that it had ample deficiencies and problems of its own. The legal profession has been, and continues to be, a work in progress. And second, comparing the large and diverse bar of the twenty-first century, and our increasingly varied and complex work arrangements, to the much smaller, more homogenous bar of any other period is to a substantial degree a comparison of apples to oranges.

Dean Kronman's "lawyer-statesmen" period would include, for example, the formation in 1870 of the Association of the Bar of the City of New York, the nation's first local bar association—but as it turns out, an organization that only welcomed the "decent part" of the practicing bar.²⁹ At the same time, writes legal historian Lawrence Friedman, "the odor of corruption" permeated the courtrooms of New York City,³⁰ "justice" was openly for sale in certain judicial chambers, and the practice of the "magnificent shyster," William F. Howe, notoriously flourished through regular "perjury, bribery, and blackmail."³¹

During the so-called "gilded age" of the late nineteenth and early twentieth centuries, Professor Glendon herself observes that "some of the bar's best and brightest made their reputations 'using every tactic in the book (and many that were not) to help bust unions, consolidate monopolies, and obtain favorable treatment' from corrupt judges."³² As noted, strenuous criticism of those who were "commercializing" the legal profession also dates from this period,³³ compelling no less august a figure than Supreme Court Justice Louis Brandeis to warn lawyers, in 1903, "that they were losing public respect because they were also losing their commitment to public service and their moral independence from clients."³⁴

Compared to the antilawyer attitude in certain quarters of colonial America and the open corruption in some segments of the bar in the late 1800s, the mid-twentieth century does appear to be a calm between the storms. What limited research exists indicates that the typical lawyer during this period, whether practicing in a major city or in a small town, was both professionally satisfied and held in relatively high public esteem. The latter was reflected in the almost heroic way lawyers were portrayed in the media during this period. Legal sociologist Marc Gallant made this broad point in his 1998 article, "The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse":

The period around 1960 may well have been the historic high point of public regard for law and lawyers. It was certainly an era of favorable portrayal by the media. In movies such as *Witness for the Prosecution* (1957), *Anatomy of a Murder* (1959), *Compulsion* (1959), *Inherit the Wind* (1960), *Judgment at Nuremberg* (1961), and *To Kill a Mockingbird* (1962), and on television (*The Defenders* [1961–65], *Perry Mason* [1966–72]), lawyers ranged from the benign to the heroic. Steven Stark regards the lawyers portrayed in shows like *The Defenders* and *Owen Marshall* (1971–74) as “television’s great benevolent authority figures. . . .” To Anthony Chase, the portrayals in films like *To Kill a Mockingbird* represent a complete integration of the virtuous-lawyer archetype in popular culture—an elaborated image unprecedented . . . [in] American mass cultural iconography.³⁵

However satisfied or well regarded lawyers may have been during the halcyon 1960s, however, there are two basic reasons why the large and diverse bar of the present can glean only limited lessons from this happier, more stable period: simple math and a dramatic increase in diversity.

First, consider the numbers: In 1850, “there were according to one estimate, 21,979 lawyers in the country. . . . By 1880, there were perhaps 60,000 lawyers; by 1900, about 114,000.”³⁶ This pattern of manageable growth continued until the mid-1960s when doubling size and diversity over a 20-year period had come to mean absorbing hundreds of thousands of new lawyers, and diversity of those entering the legal profession had dramatically increased. Between 1965 and 1985, for example, “the size of the profession doubled (from 300,000 to more than 600,000) as upwardly mobile young men and women swarmed to the nation’s law schools.”³⁷ By the early 1990s, lawyer ranks had grown to more than 750,000, and as this book is written, to around 1.1 million.³⁸

Simply put, what may have “worked” when there were only a handful of lawyers in small to medium-sized towns—and even major city bars numbered only in the hundreds—cannot be successfully replicated for bars that now number in the thousands or even tens of thousands. While we are right to strive for a return to the civility and “professionalism” of earlier periods, the challenge is certainly exacerbated by the increase in the sheer number of lawyers. And, of course, lawyers who rarely or never see each other outside the workplace can hardly be expected to form the kind of personal relationships that were the building blocks of civility in the past.

Just as the number of lawyers has dramatically increased, so has the diversity of those entering the profession. Harry T. Edwards, former Chief Judge of the U.S. Court of Appeals for the District of Columbia, an African-American who entered the profession in 1965, poignantly illustrates why we must think again about nostalgia for the "good old days." Speaking at the 74th annual meeting of the American Law Institute in 1997, Judge Edwards rightly cautioned:

I must say that I am highly skeptical of suggestions that we should look to the "good old days" to find cures for our profession's ills. In the "good old days," I could not have been a member of the federal bench. In fact, when I graduated from the University of Michigan Law School in 1965—with top grades, law review, and Order of the Coif honors—I could not get a job with most of the major law firms whose cases I now hear and decide. I recall interviews with several partners from prominent law firms who said that, although they were impressed with my record, their firms would not hire a "Negro." I, for one, am hardly enamored of the "good old days."³⁹

Certainly, Judge Edwards would concur with the goals of the professionalism movement, particularly its call for a greater commitment to public service, but his words of caution about uncritical nostalgia must also be heeded.

In his tome *A History of American Law*, Professor Friedman traces the cultural, ethnic, and gender homogeneity of the bar back to its early American origins. At the beginning of the nineteenth century, lawyers in the most influential bars—New York and Philadelphia, for example—came "predominantly from families of wealth, status, and importance."⁴⁰ Although the mid-nineteenth century witnessed a higher percentage of new lawyers coming from the middle class—"sons of shopkeepers, clerks, small businessmen"⁴¹—the big Wall Street firms and the "little Wall Streets in other cities" continued to be "solid Republican, conservative in outlook, standard Protestant in faith, [and] old English in heritage" well into the twentieth century.⁴² Much like the exclusive clubs to which most of the partners belonged, those regarded as outsiders—which included Jews, women, any ethnic minority, and most Catholics—simply "needed not apply."

Mary Ann Glendon's interview at Cravath, Swaine & Moore in the early 1960s is instructive—and probably not atypical. Like Judge Edwards, Glendon was a top graduate of an elite law school, but that was not enough to get a female foot in the door in those "good old days."

As Glendon, now a distinguished professor at Harvard Law School, recalls the reason given for her rejection:

It was no use hiring me, a senior partner bluntly explained, because "I couldn't bring a girl in to meet Tom Watson [of IBM] any more than I could bring a Jew." The "golden age" was a time of shameless exclusionary practices.⁴²

And this anecdote from the very period emulated for its "civility"! The increase in number and percentages of women entering the legal profession since Professor Glendon's ill-fated interview has been nothing short of dramatic. As one commentator expressed it, "When American law schools opened their doors in the fall of 1990, 53,000 women, about one-half the total enrollment, strode inside with their male colleagues. This figure is remarkable compared with 1966, when women were awarded a mere 3.5 percent of all law degrees conferred in the United States. . . ."⁴³

The challenges—and, as we will see, the opportunities—presented by the increase in women in the profession will be addressed in future chapters. However, it should be noted here that this dramatic increase in women lawyers—beginning in the mid-1960s and expected to plateau at between 40 and 50 percent sometime in the next decade or two—is the single most compelling reason why even the successes of the past will have limited utility in our efforts to fashion a more promising future. This is true for two basic reasons. First, without succumbing to gender stereotype, the complex needs of our twenty-first-century workforce—looking for more-creative arrangements to balance profession and family, for example—bears little resemblance to those of what was essentially a male fraternity with mostly stay-at-home moms just a few decades ago. Second, addressing what Dean Kronman calls our "spiritual crisis" will require a healthy measure of what women have traditionally done better than men: building relationships, reconnecting with heart and healthy emotions, and striving for better balance generally.

The point here is not to dwell on the blind spots, or even the egregious sins of the past, which would serve little constructive purpose. Rather, we accept as fact "that historically the legal profession was exclusive by race and gender and to some degree social class,"⁴⁴ and then apply this knowledge in two basic ways. First, we avoid a simplistic response to contemporary problems; that is, we will use our historical awareness to escape the tempting illusion that there was a "golden age" to which we can or should return. And second, our current diversity

will be kept clearly in mind as we consider what core values and ideals to affirm and what steps should be taken—as a profession and as individuals—to advance them.

The Best of the Past/Renewed Hope for the Future

Having acknowledged our critics and conceded the legal profession's somewhat mottled history, perhaps it will not strike even the cynical reader as self-serving if we now consider what is, or has been, "high" or "noble," or in the nature of a "calling," about the practice of law. Indeed, these brighter elements of our history are what Professor Rhode—in a book full of sharp and sweeping criticism of the contemporary profession—collectively calls "a broader truth."⁴⁵ As Professor Rhode explains, hers is:

a book with a reform agenda, and its focus is more on what is wrong with lawyers than on what is right. But that emphasis should not obscure a broader truth. The legal profession is also responsible for much that is best in American democratic processes. Lawyers have been architects of a governmental structure that is a model for much of the world. And they have been leaders in virtually all major movements for social justice in the nation's history.⁴⁶

Professor Carl T. Bogus, who practiced law in Philadelphia for eighteen years before joining a law faculty, makes a parallel point in his article—sanguinely and, we hope, inaccurately titled "The Death of an Honorable Profession":⁴⁷

[L]awyers enjoyed a special status from the very beginning of the Republic. Twenty-five of the fifty-two men who signed the Declaration of Independence were lawyers. Many highly regarded—even revered—figures were lawyers, among them Jefferson, Hamilton, Marshall, John Adams, and Daniel Webster. From 1790 to 1930, two-thirds of all U.S. senators and roughly half of all members of the House of Representatives were lawyers; since 1937, lawyers have made up between half and three-quarters of the Senate, more than half of the House, and more than 70 percent of all presidents, vice presidents, and members of the cabinet. At present [in 1996], the President and more than half of all U.S. senators and state governors are lawyers.⁴⁸

Even if some of these lawyer politicians also brought a measure of disrepute to the profession—Presidents Nixon and Clinton, for example—this is an impressive record by any standard.

There was undeniably a degree of antilawyer sentiment present in early American society, as has been dutifully noted.⁴⁹ But that is not the whole story or the end of the story. French historian Alexis de Tocqueville, who toured America in 1831 and 1832, certainly reached a starkly different conclusion, describing lawyers in his famous treatise, *Democracy in America*, as the "only enlightened class *not* distrusted by the people."⁵⁰ As de Tocqueville reflected on the various forces at work in early America, searching for a counterbalance to what he regarded as potential dangers and excesses of a pure democracy, it was the nation's lawyers and judges in whom he placed most confidence.⁵¹

Of course, it is possible that de Tocqueville's heralded tour of America exposed him disproportionately to those whom Professor Friedman describes as "the most prominent, famous lawyers . . . lawyer-statesmen, who argued great cases before great courts, who went into politics, and above all were skilled in the arts of advocacy."⁵² As in any other period, this would not have described or included the vast majority of lawyers practicing at that time. And it is certainly true, as more recent scholars have noted, that de Tocqueville's status as a member of the French aristocracy, for whom the far more radical French Revolution had been an unmitigated disaster, caused him to approach his subject with deeply held suspicions about democracy itself.

Nonetheless, de Tocqueville was pleasantly surprised by what he found in nineteenth-century America—and he gave America's lawyers and judges much of the credit. For example, in chapter 8 of *Democracy in America*, titled "What Tempers the Tyranny of the Majority in the United States," de Tocqueville reported to his worldwide audience:

Visiting Americans and studying their laws, one discovers that the prestige accorded to lawyers and their permitted influence in the government are now the strongest barriers against the faults of democracy. . . .

* * *

Men who have made a special study of the laws and have derived therefrom habits of order, something of taste for formalities, and an instinctive love for a regular concatenation of ideas are naturally strongly opposed to the revolutionary spirit and to the ill-considered passions of democracy.

Study and specialized knowledge of the law give a man a rank apart in society and make of lawyers a somewhat privileged intellectual class. . . . [T]hey are the master of a necessary and not widely understood science; they serve as arbiters between the citizens; and the habit of directing the blind passions of the litigants toward the objective gives them a certain scorn for the judgment of the crowd. . . .

* * *

In America there are neither nobles nor men of letters, and the people distrust the wealthy. Therefore the lawyers form the political upper class and the most intellectual section of society. . . .

* * *

If you ask me where the American aristocracy is found, I have no hesitation in answering that it is not among the rich, who have no common life uniting them. It is at the bar or the bench that the American aristocracy is found.⁵²

Serving the Common Good and All Those Other Roles

Implicit in de Tocqueville's dated praise,⁵³ and at the heart of most *positive* critiques and depictions of the legal profession since—the fictional Atticus Finch comes to mind—has been the assumption that lawyers serve and advance the “common good.” When lawyers are seen as values-free mouthpieces for amoral clients, that is, as stereotypical hired guns, public respect has plummeted. On the other hand, when lawyers are understood as marching to the beat of a higher drummer than mere self-interest, public respect has followed.

But what is the public or common good, an inquiring mind might ask, in regard to the average contract, real estate closing, commercial or employment dispute, or securities transaction—or even in regard to the typical criminal defense or divorce case? How, if lawyers are to make value judgments about their clients' conduct or intentions, do we decide what—or whose—values, ethics, or morals to apply? And, to use Justice Stone's phrase, can we really avoid becoming “tainted with the morals and manners of the marketplace” in today's highly competitive legal *market*?

These are good questions, of course, that defy simple answers. However, we must be careful in genuflecting to the complexity of contemporary value judgments that we not lose sight of an even larger truth. And the larger truth is this: While there is certainly less “black and white” in how contemporary Americans understand right and wrong, good and evil (or, if you prefer, better and worse), all is not gray either. In other words, as ethicists have warned, we must be careful in acknowledging the complexity of contemporary value judgments not to proceed down the “slippery slope” into complete cynicism and unabashed moral relativism.

In *The Betrayed Profession*, Ambassador Linowitz treats us to a guided historical tour featuring leading lawyers who understood this truth

well. Meet, for example, Secretary of State Elihu Root (1845–1937), a “lawyer statesman” who moved freely from successful law practice to periods of celebrated public service, ultimately winning the Nobel Peace Prize in 1912. The sophisticated but plainspoken Root certainly had no problem giving value-based advice. “About half the practice of a decent lawyer,” Root once observed, “consists in telling would-be clients that they are damned fools and should stop.”⁵⁴ In a similar vein, Linowitz laments the loss of an era when a good lawyer would refuse to “undertake the representation of someone he does not trust and whose story he does not believe.”⁵⁵

If public respect for the legal profession is to be restored, more attention must be given to this traditional role of the lawyer as “counselor.” In the simpler-old-days, when there were fewer laws and those we had were perhaps less “creatively” interpreted, this meant at a minimum “that a good lawyer helped his clients not to evade the law but to obey it.”⁵⁶ But being a “counselor” also meant—and continues to mean—more than that. It means advising, in circumstances that call for it, not only what the client must do or can get away with doing, but also what the client *should* do. Even if the counsel is ultimately rejected—at which point the lawyer with a conscience may or may not decide to continue the attorney-client relationship—we would do well to emulate the blunt, value-based advice Elihu Root reportedly gave one of his clients: “The law lets you do it, but don’t. . . . It’s a rotten thing to do.”⁵⁷

Closely related to these fundamental ideals—lawyers serving the common good and lawyers providing independent, frequently value-based counsel—is the traditional understanding of the lawyer as “an officer of the court.” All three models have implicit or explicit boundaries beyond which the ethical lawyer must refuse to go. Conversely, lawyers who find themselves under fire or even the subjects of criminal prosecution have invariably failed to govern their conduct or counsel under any standard higher than what is perceived at the moment to be in the client’s interest. As it turns out, however, having a higher standard than client interest—or, where significant fees are involved, self-interest—is really in every lawyer’s best interest.

Another role better lawyers have historically played may surprise those who take for granted the increasingly unforgiving sue-the-bastards approach to dispute resolution. I speak here of the traditional role of more esteemed lawyer/counselors as brokers of reconciliation or, in a word, as peacemakers. That the very concept of lawyers as peacemakers

will strike many as impractical or even laughable only underscores the moral vacuum its long-term neglect has created.

In a nutshell, lawyers need to admit to themselves, their clients, and the general public that the benefits of litigation are overrated, with lawyers sometimes being the only real “winners.” We need to reflect on the wise counsel of elder lawyer Abraham Lincoln to younger colleagues. “Persuade your neighbors,” Lincoln, the renowned *trial lawyer*, wrote, “to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker a lawyer has a superior opportunity of being a good man.”⁵⁸

What a lovely, if somewhat quaint concept: the lawyer as “a good man”—or to bring the language current, as a good person. But why not, and why not now? Walter Bennett, then a clinical law professor at the University of North Carolina who had absorbed much of the negative data on the contemporary profession, reports “experienc[ing] something close to euphoria” when he discovered, through “oral histories” gathered by his students, that:

there were lawyers and judges out there who were living lives dedicated to a higher purpose, who loved what they were doing, and who found intellectual richness and creativity in lawyers’ work. There were lawyers and judges who had faced loneliness and feelings of powerlessness and had overcome them, sometimes after great struggle and heartache. There were lawyers and judges—very successful, dedicated lawyers and judges—who had learned how to balance their lives at work with their lives as citizens and family members. And, most important, there were lawyers and judges who were proud of being members of the profession, who felt that being a lawyer involved a deep moral commitment, that it was a position not only of prestige but of honor.⁵⁹

The astute reader will note the connection between lawyers and judges who were “living lives dedicated to a higher purpose” and understood lawyering “involved deep moral commitment” and those “who loved what they were doing.”

In *The Lawyer’s Myth: Reviving Ideals in the Legal Profession*, Professor Bennett reports the “profound effect” these oral histories had on his students, who discovered that “the profession had a heritage that was still alive and cried out to be passed on. . . .”⁶⁰ Sensing in these stories “something very close to what Oliver Wendell Holmes called a life of

'passion' in the law," Bennett and his students "studied [their professional experiences] intently . . . for the secrets their lives would yield."⁶¹

As Professor Bennett summarizes what he and his students discovered:

Perhaps the most important of those secrets is that passion in one's life's work does not come from a perfection of lawyer's skills or monetary success. It comes from connection with parts of oneself that are rarely recognized in law school or in much of the current lore about being a good lawyer. I found that a passionate life called on something much deeper and greater than anything yielded by the traditional notions of professional success. . . . It had to do with placing one's work as a lawyer, with all the attendant skills and devotion it requires, in the larger context of one's life and one's place in the world.⁶²

Two of the "oral histories" collected by Bennett's students are illustrative of this connection between "passion in one's life work" and discovering "the larger context of one's place in the world."

Wade Smith, one of North Carolina's most successful and well-respected lawyers, recalls a day when lawyer jokes would have almost certainly on fallen deaf ears:

To be a lawyer in the 1960s [when I graduated from law school] was a great honor. . . . The lawyers returned to the small towns in North Carolina. They were president of the PTA; they formed the corporations; they defended people accused of crimes; they headed the United Way campaigns. They really became leaders in their communities. They were very, very much respected in their communities. . . . The lawyers went to the legislature and passed the laws. The lawyers became judges. The lawyers were the governors. Lawyers were an honorable, honest, distinguished group of people. They wanted to make the world better. They were idealists. They struggled to make the world better. . . . They went to law school because it was a way to make the world better.⁶³

Although his practice experience was in a smaller town on the other side of the state, the late Sam J. Ervin III, then Chief Judge of the U.S. Court of Appeals for the Fourth Circuit, gave a similar report:

Lawyers had a much higher standing in the average town or city . . . than they have now. I think they were looked up to as the leaders of the com-

munity, the people that you would expect to take on civic responsibilities, people who were primarily interested in seeing that justice was being done and who were not primarily interested in seeing how much money they could make.⁶⁴

Judge Ervin went on in the interview, as have many in his generation who remember a brighter professional day, to concede with sadness that "the lawyer has lost a great deal of prestige and respect . . . [and] the profession . . . is not nearly as highly regarded today. . . ." ⁶⁵ These concessions did not communicate helpless resignation to Professor Bennett or his students, however, and they need not have that effect on us. Rather, consistent with the counsel against unproductive nostalgia for a mythical golden age, we can be properly encouraged that lawyers in recent memory were "passionate" about their work, "were living lives dedicated to a higher purpose," and were well respected by the public they served.

If the bad news is a profession on "the edge of chaos"⁶⁶ and "in danger of losing its soul,"⁶⁷ the good news is a rich heritage stretching back hundreds of years from which we can draw wisdom and seek contemporary guidance. Historically and even recently, there have been lawyers in a variety of practice contexts—from major city firms to small town solo practitioners—who have understood law as a "high calling," who have balanced the business of law with a commitment to public service, and as a direct consequence of their "ideals," have been held in high public regard.

Rekindling Ideals

Of course, understanding the lessons of the past—the good, the bad, and the ugly—will have little practical effect if they are not actively applied in the present. We can be justifiably proud of what Professor Rhode calls the "broader truth":⁶⁸ the fact that "[t]he legal profession is . . . responsible for much that is best in American democratic processes."⁶⁹ We can be properly encouraged by de Tocqueville's lofty praise for the role lawyers and judges played in the formation of our democratic republic, and by larger-than-life forbears like Lincoln and Elihu Root. What matters most, however, is that knowledge of this rich heritage motivate us, as individuals and as a profession, to rekindle the ideals that propelled and made these success stories possible.

Although the application of these higher ideals to contemporary practice raises complex questions and will require decades of arduous effort, happily, the ideals themselves can be rather simply stated. First and foremost, we must reaffirm our commitment to serve the "common good;" that is, we must embrace the historical understanding of law as a public service profession. This means more than participation in civic activities primarily as a means to attract new clients or business. Rather, it means that we understand a "calling" to public service as being at the very heart of who we are as a profession and as individual lawyers. Justice Brandeis's exhortation in 1903—warning lawyers "that they were losing public respect because they were also losing their commitment to public service"—is just as true today as it was 100 years ago.

Once we cross this philosophical rubicon—that is, once we affirm law as a calling that transcends client or self-interest—the remaining points logically fall into place. From the basic idea of lawyers striving to serve the common good, it is an easy next step to affirm the traditional understanding of lawyers as "counselors," as "officers of the court," and as "peacemakers." And it is precisely in the rehabilitation and rigorous application of these core ideals and values that our contemporary reform efforts should be grounded. As we have seen, the lawyer as "counselor" will reject the cynical notion that scorns value-based advice. How much better, and more rewarding, to spend a professional lifetime seeking to provide increasingly wise counsel. As an officer of the court, the lawyer will recognize that the boundaries created by an ethical practice are beneficial to both lawyer and client—and are completely nonnegotiable. And understanding that early dispute resolution is often better for the client and for society than full-blown litigation, lawyers who wisely counsel and who govern their conduct as officers of the court will increasingly find themselves in the "blessed" role, once again, of peacemaker.⁷⁰

Can the "dignity and honor" and public respect that have characterized the profession's brighter days be recovered? Can clarified vision and renewed ideals lift us from the "slough of despond" in which much of the profession now finds itself to the more-sustaining and even exhilarating views of the higher peaks?⁷¹ And can lawyers on the brink of what the Japanese call "karoshi" (defined as "death from overwork")⁷² discover and cultivate the kind of "passion in the law" Justice Holmes advocated and Professor Bennett and his students serendipitously found in compiling their oral histories?⁷³

Yes, yes, and yes, but certainly not without a sustained and concerted effort, and then only if we have the collective nerve for it. Certainly many trends and pressures pull against us and it is not extreme to recognize ours as a profession "in crisis." And yet, if individual lawyers in increasing numbers are spurred to principled, conscientious action—and if law schools, firms, bar organizations, and the courts will support and cooperate, as discussed in chapter 6—the legal profession's best days just might still lie ahead.

Notes

1. MARY ANN GLENDON, *A NATION UNDER LAWYERS* 3 (1994).
2. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 1-2 (1993).
3. In addition to practicing law in New York and Washington at various times, Linowitz served as U.S. Ambassador to the Organization of American States under Presidents Johnson and Nixon, negotiated the Panama Canal Treaties under President Carter, and served as general counsel and chairman of the board of Xerox Corporation.
4. See, e.g., SOL M. LINOWITZ (with MARTIN MAYER), *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994).
5. The studies indicating increased lawyer dissatisfaction and dysfunction are reported and discussed in chapter 2.
6. See, e.g., MARC GALANTER, "The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse," 66 U. CIN. L. REV. 805 (Spring 1998); GARY A. HENGSTLER, "Vox Populi: The Public Perception of Lawyers: ABA Poll," A.B.A.J., Sept. 1993, at 60-65; CHRIS KLEIN, "Poll: Lawyers Not Liked," NAT'L L.J., Aug. 25, 1997, at A6 (Harris poll); RANDALL SAMBORN, "Anti-Lawyer Attitude Up," NAT'L L.J., Aug. 9, 1993, at A1 (*National Law Journal*/West Publishing Co. poll); LAWRENCE SAVELL, "Why Are They Picking On Us?," A.B.A.J., Nov. 1992, at 72.
7. See, e.g., GALANTER, *supra* note 6, at 816-45, citing DAVID L. YAS, "First Thing We Do Is Kill All The Lawyer Jokes," MASS. LAW. WKLY., Oct. 20, 1997 (reporting inter alia that there were at that time at least 3,473 web sites devoted to lawyer jokes).
8. ROGER E. SCHECHTER, "Changing Law Schools to Make Less Nasty Lawyers," 10 GEO. J. LEGAL ETHICS 367 (Winter 1997). Schechter is a Professor of Law at George Washington University.
9. *Id.* at 367-68 (internal footnotes omitted).
10. *Id.* at 394 n.1, citing HENGSTLER, *supra* note 6, at 60. "Scores for other professions ranged from 84 percent favorable for teachers to 60 percent for accountants [before Enron!] to 56 percent for bankers." *Id.*

11. See SAMBORN, *supra* note 6, at 20.
12. HENGSTLER, *supra* note 6, at 62.
13. KLEIN, *supra* note 6, at A6.
14. *Id.*
15. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 1 (2000). Rhode also directs the Keck Center on Legal Ethics and the Legal Profession at Stanford Law School, is a past-president of the Association of American Law Schools and Chair of the ABA Commission on Women in the Profession.
16. *Id.*
17. Quoted in SAVELL, *supra* note 6, at 72.
18. See, e.g., ALEXIS DE TOCQUEVILLE, *Democracy in America* (J. P. Mayer ed. Harper & Row 1969) at _____. (1835) GLENDON, *supra* note 1, at 280; Dick Dahl, *The Trouble with Lawyers*, THE BOSTON GLOBE MAGAZINE, Apr. 14, 1996, at 28.
19. WALTER BENNETT, THE LAWYER'S MYTH: REVIVING IDEALS IN THE LEGAL PROFESSION 62(2001)(footnote omitted). Accord LAWRENCE W. FRIEDMAN, A HISTORY OF AMERICAN LAW, 2D ED. 96(1985) and GALANTER, *supra* note 6, at 810-11.
20. Quoted in RHODE, *supra* note 15, at 117.
21. GALANTER, *supra* note 6, at 810-11 (internal footnotes omitted).
22. Although Harvard University established the first university-based law school in 1817, most American lawyers continued to enter the profession through apprenticeships and "reading for the bar" well into the nineteenth century. Uniform standards for law school education, admission to the bar, and discipline of offending practitioners were not firmly established in the United States until the next century, largely through the efforts of the American Bar Association (founded in 1878) and the Association of American Law School (founded in 1900).
23. RHODE, *supra* note 15, at 1, citing AMERICAN LAWYER, quoted in MARC GALANTER and THOMAS PALAY, *The Law Firm and the Public Good* 19, 38-39 (Robert A. Katzmann ed., Brookings Institution 1995). On this point, see also MARC GALANTER, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 670 (1994).
24. Quoted in RHODE, *supra* note 15, at 12.
25. See text accompanying note 23, *supra*.
26. MARC GALANTER, *A Nation Under Lost Lawyers: The Legal Profession at the Close of the Twentieth Century*, 100 DICK. L. REV. 549, 552 (Spring 1996), quoting GLENDON, *supra* note 1, at 35, 37.
27. See RHODE, *supra* note 15, at 11-12; GALANTER, *supra* note 26, at 549-62.
28. GALANTER, *supra* note 26, at 553.
29. Quoted in FRIEDMAN, *supra* note 19, at 578.
30. *Id.* at 648.

31. *Id.* at 572, citing *THE MAGNIFICENT SHYSTERS* (1947).
32. RHODE, *supra* note 15, at 11, quoting GLENDON, *supra* note 1, at 57.
33. *See* text accompanying notes 23 and 24.
34. RHODE, *supra* note 15, at 12.
35. GALANTER, *supra* note 6, at 811 (notes omitted).
36. FRIEDMAN, *supra* note 19, at 633 (notes omitted).
37. GLENDON, *supra* note 1, at 88.
38. Due to the increased number of licensed lawyers who have gone on "inactive" status with their state and local bars, and/or are working in nonlegal positions, it becomes increasingly difficult to determine who qualifies as a "lawyer," and once that issue is resolved, to identify and accurately count them. The 1992 *World Book Encyclopedia* reported that there were then "over 750,000 lawyers" in the United States, and ABA figures are roughly in accord. Those charged with counting lawyer heads at the ABA, acknowledging the increased complexity of who gets counted, are the author's source for the contemporary number.
39. HARRY T. EDWARDS, "A New Vision for the Legal Profession," 72 N.Y.U. L. REV. 567, 571-72 (Spring 1997) (reprinting Judge Edwards ALI speech).
40. FRIEDMAN, *supra* note 19, at 634.
41. *Id.* at 637-38.
42. GLENDON, *supra* note 1, at 28.
43. ROYANNE C. BAILEY, "Changing Demographics Challenge Lawyers," *Breaking Traditions: Work Alternatives For Lawyers* 13 (Donna M. Killough ed., American Bar Association 1993).
44. BENNETT, *supra* note 19, at 93.
45. RHODE, *supra* note 15, at 3.
46. *Id.*
47. CARL T. BOGUS, "The Death of an Honorable Profession," 71 IND. L. J. 911 (Fall 1996).
48. *Id.* at 930.
49. *See* text accompanying notes 18-21.
50. DE TOCQUEVILLE, *supra* note 18 (emphasis added).
51. *Id.*
52. FRIEDMAN, *supra* note 19, at 635.
53. DE TOCQUEVILLE, *supra* note 18.
54. *Quoted in* LINOWITZ, *supra* note 4, at 4.
55. *Id.* at 31.
56. *Id.* at 3.
57. *Id.* at 48.
58. *Id.* at 14.
59. BENNETT, *supra* note 19, at 6.
60. *Id.*

61. *Id.*
62. *Id.* at 6-7.
63. *Id.* at 35.
64. *Id.* at 35-36.
65. *Id.*
66. *See* text at note 1.
67. *See* text at note 2.
68. *See* text at notes 45-46.
69. *See* text at note 45.
70. In perhaps the best known of the beatitudes, which serve as an introduction to the "Sermon on the Mount," Jesus said, "*Blessed* are the peacemakers: for they shall be called the children of God." *See* *Matthew* 5:9 (emphasis added).
71. In *Pilgrim's Progress*, English author and preacher John Bunyan (1628-1688) likened life's spiritual journey to a trek that includes periodic entanglement in what he called "the slough of despond." In sharp contrast are life's moments, freed from such entanglements and having made the hard climb to the top, when one enjoys clear vision and brilliant views from life's figurative "peaks."
72. *See* GLENDON, *supra* note 1, at 87; MARA ELEINA CONWAY, "KAROSHI: Is It Sweeping America?" 15 UCLA PAC. BASIN L.J. 353 (1997); TATSUO INOUE, "The Poverty of Rights-Blind Communality: Looking through The Window of Japan," 1993 BRIG. YOUNG L. REV. 517, 532-38.
73. *See* text at notes 61-62.

I. The Future of Law Practice in the United States

COMMENTS OF ROGER C. CRAMTON*

I have been asked to speak about “the future of law practice in the United States”—a very broad and amorphous subject. Yogi Berra once said “the future ain’t what it used to be.” Berra’s pithy remark suggested that life was not likely to be as good as it was in the golden age of the past in which the Yankees usually won the World Series. But Berra, as a happy professional who was very good at his trade, enjoyed work and enjoyed life. And that is my theme today: relax and enjoy our good fortune as lawyers and citizens.

Many lawyers today have a dim view of the future of our profession. They believe there was a golden age in the past when lawyers were independent, autonomous, respected in their communities, and the profession was cohesive and united concerning its core values. Pan to a view of Gregory Peck as Atticus Finch in *To Kill a Mockingbird* with appropriate rousing music. Compared to those idyllic days of autonomy and bravery (but also lynching!), we are thought to have lost our compass. Witness the embarrassing television ads by some lawyers, the frenzied solicitation of accident victims after a mass disaster, the growth of multistate practice, and internal quarrels about such things as MJPs and MDPs (insider lingo for practice across state lines and across disciplines). And public opinion polls tell us that a large majority of Americans view lawyers as shysters who cannot be trusted to tell the truth.

The future, of course, emerges from the past. Thus, I will start by tracing the major changes in the profession during the last half-century and the major causes of those changes. On the assumption that these

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trends are likely to continue, I will then discuss their implications for state bar associations and their leaders.

I.

In 1950, when I graduated from college, there were about 200,000 U.S. lawyers (or about one lawyer for 700 persons). Forty years later, in 1990, the lawyer population had grown to 800,000 lawyers, and the lawyer-to-population ratio was more than cut in half (one lawyer for 310 persons). Since 1990, the profession has continued to grow, but more slowly. In 2000, there were well over one million U.S. lawyers (about one lawyer for 260 Americans). Over a fifty year period, the lawyer population had increased more than five-fold while the population generally had only doubled in size. The massive growth of the legal profession had been triggered by a huge surge in the demand for legal services in the 1970s and then again in the late 1990s with continuing steady growth at other times.

This vast increase in the number of lawyers, however, was not spread evenly throughout all sectors of the profession. Instead, it involved an even more massive growth in the sector of the profession that serves business clients and much slower growth in the sector that serves individual clients. The mid-sized and large law firms that handle the work of business clients grew at a much faster rate. The solos and small firms that primarily serve individual clients grew, but very slowly.

The effects of these changes have been illuminated by the fine empirical work done by Bob Nelson and his colleagues at the American Bar Foundation. Two large studies of Chicago lawyers, one in 1975 and the other in 1995, supported by a number of more general studies by the ABF and others, tell us a great deal about how and why the profession has changed and continues to change. Fortunately, Bob is here and he can correct any of my errors and add his own views. Six changes are worth brief mention.

First, lawyers employed by law firms or other organizations, who were a minority of all lawyers in 1950, became a majority. The Atticus Finch image of the legal profession—the independent solo practitioner—is now a lesser reality than the organization man or woman of today's more bureaucratic practice.

Second, the size of the organizations in which law firm lawyers work has increased enormously in size. Thus, the proportion of such

lawyers working in organizations of more than thirty lawyers or more than 100 lawyers increased hugely. We now have megafirms with thousands of lawyers distributed in offices around the U.S. and abroad.

Third, in 1950 the majority of legal work involved individual clients and was handled by solo or small firm lawyers. Today, a substantial majority of legal work is performed for business clients and is carried on primarily in mid-size and large firms and by house counsel of business organizations. Some legal fields have had great relative growth, such as business litigation. Other fields, such as divorce, have stayed fairly stable in market share. And some, such as probate, have declined sharply in market share.

Fourth, specialization is now the name of the game. Fewer lawyers are generalists who handle a variety of legal problems. Lawyers increasingly spend most of their time working in a particular legal field. Their professional relationships are limited largely to other lawyers working in the same field, and many specialized bar associations now reduce the portion of the bar that joins, or is active in, the state's bar association or the ABA.

Fifth, lawyer incomes have changed dramatically in ways that are strongly associated with the factors already mentioned. Although inequalities have always existed, they have become more extreme. Since 1970, the incomes of solo practitioners and lawyers working for government organizations have suffered a decline in real income (i.e., earnings adjusted by inflation). Meanwhile, lawyers in mid-size, and especially in large firms, have had steady and large increases in real earnings. And within organizations, the disparity in earnings between associates and partners has widened. The rich have gotten richer and the poor poorer.

Sixth, since 1970 women have entered the profession in large numbers, and blacks and other minorities have entered in increased numbers. Women, who were 4 % of lawyers in 1960, now make up 43% of the profession; and minorities now make up about 14 %. But the nature of their practices has resulted in an income inequality that is large and persistent. Women, for example, are a majority of lawyers for government organizations, a group which is the least well paid. They are also heavily represented in the business practice of large law firms, but largely as associates and only rarely as partners. The story for African-American lawyers is similar. Many observers worry that this income inequality constitutes a troublesome stratification of influence and hierarchy. A similar point is made concerning the lower status and

income of the solo and small firm lawyers in the personal client field, who do mostly family work and a large portion of personal injury plaintiffs' work. The increasing dominance of large law firms in the social and income structure of the profession has important implications for the bar's autonomy, cohesion, and ability to influence future developments.

II.

What were the causes of these changes? First, entry into the profession was limited a half-century ago by bar admission requirements of citizenship and residence, but these restrictions were struck down by the Supreme Court.¹ Entry was also limited by the time and cost of obtaining two degrees, a problem that was eased by the increased public support of higher education during the last half of the 20th century.

Second, competitive forces in the markets for legal services were also restrained by bar-established rules: minimum fee requirements for common legal work, the prohibition on lawyer advertising, and fairly strict enforcement of unauthorized practice prohibitions. Here also, court decisions removed barriers to competition. In the late 1970s, most lawyer advertising was given First Amendment protection,² restraints on solicitation were modified,³ and minimum fee requirements were struck down as antitrust violations.⁴ The elimination of these barriers stimulated competition in legal services markets.

The third and primary cause of the profession's growth, however, was the great surge in demand for legal services of the 1970s and late 1990s as well as continuing high levels of demand at other times. Most of the increased demand came from business clients. A growing economy generated many new transactions; companies grew, established new lines of business, and mergers and acquisitions became endemic. New and expanded state and federal regulations fed the demand. A modest "litigation explosion" in suits against businesses and insurers,

1. See *In Re Griffiths*, 413 U.S. 717 (1973) (citizenship); *New Hampshire v. Piper*, 470 U.S. 274 (1985) (residence).

2. See *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

3. See *In Re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447 (1978).

4. See *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

and among businesses, gave a jolt to both the plaintiff and defense bar.

The profession's accommodation of the increased demand has taken a variety of forms, all of which involved expanding the supply of legal services. Supply was expanded by increases in the number of suppliers, increased competition among suppliers, and technical and organizational innovations that enhanced the productivity of legal services.

Since 1963, the supply of new lawyers has quadrupled by the creation of fifty-four new law schools, the expansion of existing ones (resulting in about three times as many enrolled J.D. students), and a reduction in the rate of flunking out students. These changes resulted in a nearly four-fold increase in the number of J.D. graduates and new admissions to the bar (from less than 11,000 in 1963 to more than 40,000 a year ever since 1983). Competition among law firms for the new lawyers that were necessary to meet the increased demand had the effect of increasing starting salaries, which in turn increased the demand for legal education. Firms also expanded their capacity through new technologies such as the computer and the addition of large support staffs. It is estimated that most large firms employ 1.5 individuals per lawyer, and the ratio may be even higher in smaller firms where the economies of scale are somewhat less.

Although non-lawyers continue to have difficulty in competing directly with lawyers in the individual client sector of the profession, paralegals are used with great effectiveness and economy by legal services organizations and small law firms in the individual client sector, and by law firms and other organizations in the business and government sectors of the profession. Non-lawyers do a lot of legal work in today's world, but almost entirely as paralegals or other employees working under lawyer supervision.

As the legal work of business organizations grew, companies have found it profitable to create and then expand large in-house legal staffs. When efficient to do so, work that formerly was given to law firms is performed inside. Even when the work is given to a private firm, as is usually the case, the in-house staff monitors the firm's performance and adopts practices designed to result in better and cheaper services. For example, in-house counsel often require firms to submit competitive bids for legal work, play firms off against one another in "beauty contests," and thus negotiate better rates.

Increased competition has had its rewards. Since 1970, the price of legal services has fallen in real, inflation-adjusted terms. But the

competitive pressures have had other effects. Escalating costs and competition have resulted in greater focus on the bottom line and higher billable hour requirements. Partnership means less and is harder to obtain. Recent law graduates face a tough job market with higher debt burdens than their predecessors. Strong and continuing relationships between a law firm and a major business client are less frequent and more anxiety-ridden than before. Getting and keeping legal business has become a vital and anxious endeavor for nearly all firms.

The division of labor caused by increased specialization also expanded the delivery of legal services. Lawyers had to learn new and more specialized skills, such as working in teams and cultivating marketing and management skills. Working longer and harder is a characteristic of firms in a competitive world, as are the processes of rapid growth, merger, acquisition and, not infrequently, failure, the latter evidenced by the number of established law firms that have gone belly up.

As Richard Posner says, work in a competitive market has unpleasant psychological aspects. Greater uncertainty, more strain, sudden change, a more structured and bureaucratic work environment—all of these characteristics lead many lawyers to say that they don't enjoy the practice of law as much as they once did. As Posner puts it, "competitive markets are no fun at all for most sellers; the effect of competition is to transform most producer surplus into consumer surplus and . . . to drive the less efficient producers out of business."⁵ Yet, as Nelson and his colleagues have discovered, most lawyers still express reasonable satisfaction about their job.

III.

So what does the future hold for U.S. and Connecticut lawyers? As the American economy continues to expand and the population grows, the experience of the last half-century tells us that the legal profession will grow at least as fast as the growth in the economy and population, and probably at a somewhat higher rate. The income of lawyers serving business clients will increase, and the gap between their incomes and those of lawyers serving individual clients and working in government

5. RICHARD POSNER, *OVERCOMING LAW* 92 (1995).

offices is likely to continue to widen.

Voluntary state bar associations, such as that in Connecticut, will continue to be concerned with many of the issues that have confronted them in the recent past: multi-jurisdictional practice, multi-disciplinary practice, ancillary business activities of firms, personal solicitation of clients by lawyers in all sectors of the profession, and unauthorized practice of law. But the profession is segmented and divided in ways that limit its ability to deal with these and other issues. State bar associations lack legal authority today to reimpose competitive restraints or substantially reduce lawyer advertising. And they no longer have the cohesion to agree on regulatory measures that might be within their authority and would roll back the competitive forces that have contributed to the profession's growth. Some things, of course, could be done by revising the profession's rules of professional conduct and enforcing them in disciplinary proceedings. But doing so is difficult and may be counterproductive. Consider multi-jurisdictional practice.

Everyone knows that Connecticut is the home office of many large national and international companies, all of which have large in-house counsel staffs. My guess is that only a portion of the lawyers in those offices are admitted to the Connecticut bar despite the high likelihood that nearly all of them are practicing law in Connecticut. As is the case in many states, disciplinary authority extends only to lawyers admitted in the jurisdiction. But even if Connecticut amended Rules 5.5 and 8.5 to give it disciplinary authority to proceed against a lawyer admitted elsewhere who is engaged in practice in Connecticut, would the bar have the will and resources to start a large policing effort aimed at some of its largest employers and taxpayers? Would it make sense to do so?

My view is that a crusade against this form of multi-jurisdictional practice would not be in the best interest of either the public or the profession. The inside lawyers are representing their employer on company business, and there is no credible argument that Connecticut citizens will be hurt by the work of these unlicensed lawyers. The companies have a strong interest in hiring, training, and supervising highly qualified lawyers and the resources to do so. Moreover, companies, using employment sanctions or discharge, will punish staff lawyers who harm their interests or behave improperly. My guess is that this free market deterrent to improper conduct is stronger and more effective than the slight likelihood that the limited resources of Connecticut's professional discipline system might be brought to bear. Why should Connecticut, under these circumstances, initiate disciplinary

or unauthorized practice proceedings against these staff lawyers, irritating and angering business organizations that are a major contributor to the state's high average income and educational levels?

I also expect that a number of law firms in Connecticut have engaged in ancillary business activities, such as owning an enterprise that assisted businesses in acquiring and developing real estate. Presumably that is permissible under Connecticut's current ethics rules. Why shouldn't Connecticut, like the District of Columbia, go further and allow principals of the ancillary business—accountants, for example—to become partners of the law firm if the firm believes that is in its best interest. Now we have multi-disciplinary practice rather than multi-jurisdictional practice. The basic issue here, in my view, is the continuing application of the profession's quite strict conflict-of-interest rules. If the profession maintains those, it can tolerate multi-disciplinary firms. If it does not, we may suffer some of the consequences that flowed from Arthur Andersen's conflicted relationship with Enron.

A strong regulatory approach to these and other issues would require changes in state law and a willingness by the state to enforce them. The profession is so segmented and divided that it is unlikely to have sufficient cohesion and clout to persuade the public that it is acting in the public interest and not that of its current lawyers. And that is as it should be. Competition in legal services is in the interest of consumers and the people of Connecticut. Law firm partners who shudder at a personal injury lawyer's graphic or obnoxious T.V. ad soliciting business should bear in mind the time and effort they put into marketing the services of their firm through publications, outreach activities, and country club conversations with members of the business community.

I will close with some words of informed observers of the profession: Deborah Rhode, Robert Nelson, Richard Posner, and Patrick Schiltz:

For the contemporary bar, these are "the best of times and the worst of times." In no country do lawyers enjoy greater power, wealth, and status. The number of lawyers has [increased much more rapidly than the population]. Law is the second highest paying occupation and a common path to leadership in both the public and private sector. Demand for corporate legal services has continued strong, corporate lawyers' income has remained high, and the profession continues to expand.

Yet that overall economic prosperity has also been accompanied by increasing insecurity, acrimony, and pressure [A]mong practitioners who represent primarily individual rather than corporate clients, the demand for services has been relatively weak, lay competition has increased, and average earnings [in real terms have declined]. The consequence has been to widen income disparities within the profession. Dissatisfaction with the quality of professional life is reflected in lawyers' exceptionally high rates of stress, depression and substance abuse.

[The result is a sense that] lawyers, both individually and collectively, have lost control over forces that are reshaping the markets in which they compete, the law firms to which they traditionally devoted their careers, the pace and quality of their work lives, and their status in society.⁶

Many lawyers wish that they worked in more stable markets with more stable relationships with their clients. They wish that the professional values exemplified by an Atticus Finch were the center of attention rather than the necessary concentration on billable hours, cutting costs, and "the bottom line" that are part of a competitive marketplace. But this option is not really available to the profession for the reasons previously mentioned.

A wise profession, like a wise person, does not get excited about things, such as the weather, that it cannot control. The path of wisdom is to be good at what you can do well—the practice of some form of law—and relax and enjoy the lively circus that goes on around us. Competition in legal services creates anxieties and stresses for lawyers, but it brings great benefits to clients and society. It forces lawyers to keep their eye on the ball, as Yogi Berra would recommend, and hit the good pitches. To enjoy those we work with in the office and the courtroom. To give the best we can and enjoy the rewards of a relatively high status, high income job. To give thanks that we live in a free

6. The three paragraphs are a condensation of DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 41 (4th ed. 2004). The first and second paragraphs are from DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE* 4, 25, 215 n. 4 (2000), and the first sentence quotes ROBERT L. NELSON & DAVID M. TRUBEK, *NEW PROBLEMS AND NEW PARADIGMS IN STUDIES OF THE LEGAL PROFESSION, LAWYERS' IDEALS/LAWYERS' PRACTICES* 14 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon, eds., 1992). The second paragraph relies on Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 *VAND. L. REV.* 871 (1999). The third paragraph, also quoted by Rhode, is from NELSON & TRUBEK, *supra* at 14.

country in which this is possible. And, as Yogi might say, although the future "ain't what it used to be," the present is pretty damn good. Relax and enjoy it.

II. Keynote Address

On Giving Meaning to "Professionalism"

Roger C. Cramton

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The transformation of the legal profession in recent years has renewed old fears—loss of professionalism—and created new concerns—why are so many lawyers today unhappy?¹ The goal of this symposium, I gather, is to illuminate the problems that face the profession, explore ideas for ameliorating them, and renew our commitment to the teaching and learning of professionalism.

I begin by asking a fundamental and preliminary question: Do we know what we are talking about when we talk of "lawyer professionalism?" To get somewhere, it is important to have a destination in mind. Before discussing what needs to be done in teaching and practicing professionalism, we need to agree on what it is that should be inculcated and encouraged.

Our confusion about the meaning of professionalism precedes the choice of means. This confusion, I will also argue, leads us to portray professionalism in terms that are both too abstract and too limited. My principal effort today is to say something affirmative about what we mean, or should mean, when we talk about lawyer professionalism.

My thesis in a nutshell is that since 1955, when I became a lawyer, the legal profession has neglected its central moral tradi-

Note: Roger C. Cramton is the Robert S. Stevens Professor of Law, Cornell University. This paper was prepared for the Symposium on Teaching and Learning Professionalism of the Professionalism Committee of the American Bar Association Section of Legal Education and Admissions to the Bar and the Standing Committees on Professionalism and Lawyer Competence of the American Bar Association Center for Professional Responsibility, Oak Brook, Illinois, October 2-4, 1996. I have benefitted from comments from John Leubsdorf and Deborah Rhode.

¹ For book-length treatments, see Mary Anne Glendon, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); Anthony T. Kronman, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); and Sol Linowitz (with Mayer), *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994). For citations to recent law review discussion of professionalism, see Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 Tex. L. Rev. 259 (1995).

tion for the modern heresy, endlessly repeated in multiple settings, that “the client comes first,” meaning “first and only.”² Some years ago the fidelity and loyalty owed to clients was balanced by a generally accepted understanding that the lawyer’s primary obligation was to the procedures and institutions of the law. When tension arose between client interests and those of the legal system, the lawyer’s respect for the rule of law—the maintenance and improvement of just and efficient legal institutions—almost always prevailed. Our greatest need today is to regenerate this common faith.

My remarks fall into three parts: First, development of the proposition that we haven’t defined or agreed upon what we mean by lawyer professionalism. Second, a critique of four false faces of professionalism, which may help us identify its more important aspects. And, finally, an effort to state an appropriate conception of lawyer professionalism—something I can profess to my students and encourage others in the profession to support.

Lack of Definition of “Professionalism”

What do American lawyers profess? What constitutes the heart of our calling and gives meaning and purpose to our lives as lawyers? The difficulty stems from the fact that, although everyone talks about professionalism as an icon or goal of lawyering, no one has been able to define it in ways that others could accept. The result is that bar pronouncements rely on abstractions of immense generality—concepts so vague and uncertain that they lack the power to guide lawyer conduct in particular situations or to motivate commitment by a would-be believer. Our failure to agree on

² A qualification should be noted. Lawyer behavior is highly contextual in nature, influenced by: (1) the lawyer’s role as litigator, negotiator, counselor, etc., (2) the milieu of practice (e.g., large corporate law firm, legal services office, staff lawyer for a government agency, appointed counsel for an indigent criminal defendant), (3) the substantive law framework (e.g., products liability litigation, securities offerings, banking examination), and (4) other circumstances. The “client comes first (and only)” attitude predominates in criminal defense (where constitutional criminal procedure presents some special issues relating to lawyer role), civil litigation generally, and, I believe, in representation of corporate clients. The authority of lawyers vis-à-vis their clients in the individual-client sector of the profession presents special issues of client protection not dealt with in this paper. See Roger C. Cramton, *The Delivery of Legal Services to Ordinary Americans*, 44 Case W. Res. L. Rev. 531 (1994). Because the organized bar is heavily influenced by its most elite sector—lawyers for corporate clients—I have concentrated here on the issue of loss of lawyer autonomy and independence in situations in which clients with repeat business are in a powerful position to influence or control lawyers. For discussion of the contextual nature of lawyer conduct and regulation, see David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 799 (1992).

principles and narratives that could inspire and guide lawyer conduct is a critical problem.

The Professionalism Committee's Report on Teaching and Learning Professionalism reflects this deficiency: It fails to provide an adequate elaboration or embodiment of the abstractions that it views as the heart of professionalism.³ The Report's definition of professionalism describes some of the characteristic features of professions, such as knowledge, skill, diligence, and good judgment—terms that have meaning in our accumulated experience. But the critical characteristics of the professional lawyer are described in vague and undefined terms: "ethical conduct and integrity" and "dedication to justice and the public good."⁴

What do these vital phrases mean? If a body of stories or examples illustrated the presence or absence of professionalism, meaning could be inferred from these concrete narratives. Unfortunately, illustrations of departures from professionalism are largely confined to instances of incivility on the part of lawyers, tasteless advertisements, and general references to abusive litigation tactics. The phrases "ethical conduct" and "serving justice" are too abstract unless they are embodied in principles and narratives that speak to today's lawyers.

I will say a few words about both phrases. First, "ethical conduct." Is this a reference to ordinary morality—the shared norms of the society? Perhaps general agreement can be obtained on such values as truth-telling, promise-keeping, respect for persons, respect for law, and the like. But the Report does not attempt to spell out such values; and our time is one in which many matters of morality are fiercely contested. Witness the "culture wars" that surround "family values." I surmise that the reference to "ethical conduct" has a narrower focus: conduct not permitted by the profession's ethical codes.

The professional rhetoric of lawyers and bar associations carries the implication that a lawyer can find sure guidance in facing problems encountered in law practice in the traditions and ethics of the legal profession. At the individual level, the moral example of professional mentors—teachers, practitioners, and judges—is an energizing source of guidance and aspiration. At the collective level, the resonance of shared images and stories helps form a

³ American Bar Association Section of Legal Education and Admissions to the Bar, Report of the Professionalism Committee, *TEACHING AND LEARNING PROFESSIONALISM* (1996) [hereinafter, Professionalism Report].

⁴ *Id.* at 6–7.

lawyer's professional persona. But the guidance from rules of formal ethics is less sure and more troubling.

First, the contemporary evolution of ethical codes into quasi-criminal rules of minimum conduct largely abandons their role as a source of vocation or calling. The morality of aspiration, central to professionalism, is eclipsed by the morality of duty. The recent emphasis on lawyer oaths, creeds and civility resolutions is an appropriate effort to fill this gap.

Second, the profession's rules are inevitably influenced by the self-interest of the profession itself. Every group that has a strong collective identity tends to view the world from a special vantage point. The tendency of individuals and groups to believe that what is in their own interest is also in the general interest is a constant danger. The profession's rules deserve skeptical evaluation rather than uncritical obedience.

Moreover, rules that state a clear duty are inevitably morally simplistic. Uncritical obedience may lead to wrongdoing because the rules exclude from consideration some moral aspects of a particular situation. Consider, for example, the blanket obligation to report of Model Rule 8.3 or the limited disclosure options of Model Rule 1.6.⁵ Would a truly moral lawyer conform woodenly to those prescriptions? A good lawyer who is also a good person may be faced with some situations in which civil disobedience of the profession's edicts may be the truly moral choice.

Third, the profession's rules fail to give guidance in many problematic situations.⁶ Sometimes the rules are self-contradictory, with one rule pointing in one direction and another in a different direction. Sometimes the ethics rules are contradicted by other law, as in the client fraud situation. More frequently, the ethics rules fail to tell a lawyer what to do but leave it to the individual lawyer's discretion.⁷ Such guidance as exists in these situations comes from the ideology and practice of professional subcultures of which the

⁵ ABA Model Rules of Professional Conduct (1983).

⁶ The ABA Model Rules of Professional Conduct, for example, are silent on the lawyer's authority to select clients and to use threats of criminal charges in negotiations with a third person. The ABA Model Code of Professional Conduct contained no explicit provisions governing conflicts of interest between a current and former client. The California Rules of Professional Conduct say nothing about one of the lawyer's most important duties, that of confidentiality, leaving the topic to an inadequate and sweeping statutory provision. See Roger C. Cramton, *Proposed Legislation Concerning a Lawyer's Duty of Confidentiality*, 22 Pepperdine L. Rev. 1467 (1995).

lawyer is part: the criminal defense bar, legal services lawyers, plaintiff's personal injury lawyers, outside or inside counsel to large corporations, etc. But even within a legal subculture, ideology and practice are highly variable and often rest on unexamined assumptions.

For these and other reasons, the profession's codes cannot provide sure guidance to the lawyer who aspires to excellence as distinct from the lawyer who just wants to stay out of trouble with disciplinary authorities.

The looseness-at-the-joints of professional codes has a positive aspect in rebutting claims that it is not possible to be a good person and a good lawyer. Doubts on this score are pressed by moral philosophers—Wasserstrom, Luban and others—who argue that conventional understandings of client loyalty require a lawyer to violate ordinary morality as, for example, the unjustifiable harm of a brutal cross-examination of a truthful witness or the failure to disclose unsafe products.⁷ Except for the limited exceptions to confidentiality found in the Model Rules, however, the lawyer codes provide ample discretion to the conscientious lawyer: choice of client, opportunity to discuss the moral and other implications of goals and strategies with the client, authority of the lawyer over many procedural and tactical matters, and, as a final resort, withdrawal.

The other reference in the Report—"dedication to justice and the public good"—also leaves open the question of substantive content. What does it mean in today's world to be a minister of justice? To serve the public good? If the reference is to the shared ideals of lawyers, they must be embodied in principles and stories that lead to commitment and action. What are those principles and stories?

Once upon a time American lawyers viewed law and justice as objective, rational, and universal. Today, when pragmatic instrumentalism, legal realism, and critical theory are the orthodoxies of the day, law is viewed as contingent, contemporary, and arbitrary.

⁷ For discussion of the discretion conferred on lawyers by current ethics codes, see Andrew L. Kaufman, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 765-84 (3d ed. 1989); and Theodore J. Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 Wis. L. Rev. 1529, and Schneyer, *Some Sympathy for the Hired Gun*, 41 J. Legal Educ. 11 (1991).

⁸ See Richard Wasserstrom, LAWYERS AS PROFESSIONALS: SOME MORAL ISSUES, 5 Human Rights 1 (1975); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 615 (1985); and David Luban, LAWYERS AND JUSTICE (1988). For criticism of the "standard conception" of lawyering, see Theodore J. Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 Wis. L. Rev. 1529, and Schneyer, *Some Sympathy for the Hired Gun*, 41 J. Legal Educ. 11 (1991).

A social order based on justice gives way to one that is viewed, alternatively, as subjective (leading to fragmentation of community), as coercive power, or in positivist terms of whatever officials do.⁹

In a recent book on the legal profession, Anthony Kronman contrasts the wise counselor of the past with today's expert technician.

[E]arlier generations of American lawyers conceived their highest goal to be the attainment of a wisdom that lies beyond technique—a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess. They understood this wisdom to be a character trait that one acquires only by becoming a person of good judgment, and not just an expert in the law.¹⁰

Practical wisdom, Kronman argues, is the central lawyer virtue and, under the conditions of practice formerly prevailing, it was a virtue engendered by the everyday practice of law. Lawyers developed the skill of identifying means to achieve ends. More important, they developed traits of character that are essential to practical wisdom: the capacity at the same time to detach themselves from a situation and to view it sympathetically (sympathetic detachment) and a concern for the general good (civic-mindedness).¹¹ These lawyers of the past, Kronman argues, found their calling in the social ends their work was serving. Their profession had something to profess.

Today, Kronman argues, the conditions of practice, especially in the large firm sector of the profession, have eroded the development of practical wisdom and civic-mindedness that characterized the ideal of the "lawyer-statesman" of the past. Kronman's book ends in a counsel of despair: "the whole ethos of professionalism [is] a doomed attempt to sustain the idea of a calling within certain traditionally prestigious lines of work—an attempt that has now clearly failed."¹² Irreversible forces in law teaching, judging, and everyday practice stand in the way of gaining fulfillment, finding self-identity, in legal work. In short, according to Kronman, the traditional aspirations of professionalism cannot flourish in the current conditions of practice, which have undermined opportunities to develop and exercise the required virtues, especially that of practical judgment.

⁹ See E. Clinton Gardner, *JUSTICE AND CHRISTIAN ETHICS* 1 (1995).

¹⁰ Anthony T. Kronman, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 2 (1993).

¹¹ *Id.* at 160–61.

¹² *Id.* at 372.

I agree with much of Kronman's analysis of the virtues of lawyering and his description of changes in the structure of large firm practice.¹³ But I refer to him now to critique what his ideal—the lawyer-statesman—actually professes.¹⁴ The lawyer-statesman is that person who, almost above all other qualities, understands that there is no right or wrong on questions of intense public debate such as abortion and the death penalty, to use two examples mentioned by Kronman. Moral complexity and the incommensurability of values, Kronman argues, necessitate a pragmatic posture. Because "justice" is an "intractable" and "controversial" subject in today's world, the lawyer-statesman need have no vision of justice other than as a description of process outcomes and a commitment to efficient case management.¹⁵ Justice is replaced by "political fraternity" as the ultimate virtue. In short, justice has no meaningful content and disappears from the book of virtues.¹⁶

The underlying point, if it is not obvious, is that in today's world of moral relativism, deconstruction and denial of foundational truth it is not enough to be for "justice" and "the public good" because they lack agreed-upon content. We are left with three alternatives: first, admitting that these terms are contested or uncertain in meaning; second, leaving the task of supplying content to each individual lawyer; or, third, attempting as a group to give some content to them. The first approach concedes that the smoke-and-mirrors of hypocrisy is involved (we are appealing to something that we can't identify) and the second abandons any hope of a collective aspiration to motivate lawyers. I believe that lawyers can or should agree

¹³ See also Mary Anne Glendon, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 60–87 (1994) (applying Jane Jacobs' analysis of the ethical systems of raiders and traders to modern changes in the American legal profession—the displacement of cautious office counselors in firm and bar leadership by Rambo litigators).

¹⁴ Kronman, *supra*, note 10 at 49–52.

¹⁵ Kronman discusses "justice" at two points in *THE LOST LAWYER*. At pp. 107–108 Kronman states that justice is such an "intractably controversial" topic that it "provides little guidance in resolving the endless controversies" of today's world; an emphasis on political fraternity, he states, is required "precisely because these concepts [liberty and justice] are so controversial" at 342. Because, in Kronman's view, the incommensurability of values makes justice meaningless, the virtues of the lawyer-statesmen are largely reduced to prudence, public-mindedness, and political fraternity. Because Kronman places so much emphasis on conciliation and compromise as aspects of the lawyer-statesman, he inevitably suggests that adversarial advocacy, confrontation, and conflict are inappropriate, even though the short-term use of these measures may serve long-term interests of political community and harmony. Martin Luther King, Thurgood Marshall, and the civil rights movement come to mind. So does Abraham Lincoln, who put justice above political fraternity.

¹⁶ Robert F. Cochran, Jr. reaches similar conclusions in an excellent review of the Kronman and Glendon books. See Cochran, *Lawyers and Virtues*, 71 *Notre Dame L. Rev.* 707, 719 (1996).

on some aspects of ordered liberty in a just society, a topic to which I will turn after critiquing the false faces of professionalism.

False Faces of Professionalism

Four false faces of professionalism masquerade as the real thing by treating a modest concern as the heart of the subject:

- “Professionalism” as “civility”;
- “Professionalism” as a disdain for the “commercialism” associated with competition in legal services markets;
- “Professionalism” as limited to public or pro bono service; and
- “Professionalism” as a plea for self-regulatory authority of a kind that diminishes the accountability of lawyers to courts, lawmakers and the public.

Professionalism as Civility

Civility, of course, is a good thing: every lawyer should deal with other participants in the justice system with decency and courtesy, recognizing the dignity of each person. Civility reinforces the legitimacy and effectiveness of legal institutions by respecting the people and processes on which our ordered liberty depends. Civility, however, is not the core of the enterprise.¹⁷ It is like an elegant dessert, which dresses up and completes a good meal. The nourishment—the substance of the enterprise—is found in the meat, potatoes, and salad.

All too often, talk of civility displaces talk of fundamental issues and problems on which the legal profession cannot agree: Should the excessive zeal of current “hired gun” representation be tempered by recognition of limited duties to third persons? Should the absolutist notions of confidentiality found in many professional codes be modified to permit disclosure where other weighty interests are threatened? Should the failure of professional discipline to deal with the two problems of most importance to clients—competent performance by lawyers and reasonable fees—lead to professional recognition of other mechanisms of making lawyers accountable?

¹⁷ Timothy P. Terrell and James H. Wildman make a similar argument, criticizing the reduction of professionalism “to the level of professional etiquette—pleasantness, returning telephone calls, and the like—so that it appears to lack any real moral content at all.” Terrell and Wildman, *Rethinking “Professionalism,”* 41 Emory L. Rev. 403, 419 (1992).

The disarray and malfunctioning of the justice system needs constructive criticism that is passionate, truthful, courageous and committed, which may sometimes require blunt or harsh language. Civility is a virtue that must be viewed as compatible with, and less important, than the virtues of courage, integrity and justice. When the profession talks as if civility is the heart of professionalism, it abandons a commitment to the vital task: defining lawyer roles and attitudes that will result in a just social order.

Professionalism as the Absence of "Commercialism"

A second bastard form of modern professionalism is a version that restricts its content to complaints about "commercialism." Real-life stories of plaintiffs' lawyers rushing to accident scenes or touting their wares in tasteless advertisements become a metaphor for many lawyers' profound distaste for the commercial realities of the modern world. They become arguments for anti-competitive measures that are likely to harm consumers: attempts to exclude lawyers from outside the jurisdiction from competing for local business; restrictions on the flow of information about the availability and cost of legal services; and limitations on the provision of useful service by both lawyers and nonlawyers (the "ancillary business" controversy provides an example). Avoidance of "commercialism" becomes synonymous with "professionalism."¹⁸

The rhetoric of commercialism assumes that those in business are morally inferior to lawyers and that their calling has no place for ethics or public responsibility. Simultaneously, it ignores the realities that lawyers earn their bread largely from the commercialism of their business clients and that the market for legal services today is fiercely competitive. A rhetoric of professional independence and autonomy has real possibilities, since it makes possible service for clients that furthers public interests. But a rhetoric built on disdain of profit-making activity in a competitive economy—the English barrister model—is unsuited to American values and conditions.

That image of professionalism assumes that the American virtues of risk-taking, private initiative, and competitive markets

¹⁸ See, e.g., Robert L. Nelson and David M. Trubek, "New Problems and Paradigms in Studies of the Legal Profession" 1, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* (Nelson, Trubek, and Solomon, eds. 1992); Russell G. Pearce, *The Professionalism Paradigm*, 70 N.Y.U. L. Rev. 1229, 1256–65 (1995); Theodore J. Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 Ariz. L. Rev. 363 (1993).

are vices in the practice of law—a view that is inconsistent with both history and reality. The practice of law in this country has always been entrepreneurial in character. American lawyers have innovated novel structures and forms of legal practice; they have combined law practice with other endeavors; and they have been adaptive, expansionist, and risk-taking in creating markets for legal services that are broader and deeper than elsewhere in the world. The corporate law firm, the contingent fee, the group services plan are illustrative of this energy and initiative.

The ideals of professionalism must accept the benefits—and the reality—of competition in legal services and provide practical solutions for situations in which competitive forces cannot provide adequate legal services.¹⁹

Professionalism as Limited to Public Service

A third false face of professionalism presents it solely as public service. Public service and pro bono work are ways in which professional ideals can be put into practice, but they are not synonymous with a robust conception of professionalism. Most lawyers most of the time will be working for private clients, usually for the haves of this world, on business transactions or disputes involving money.²⁰ As the old saw puts it, “the practice of law deals mostly with the getting or keeping of money.” Many will be engaged in those activities in law firms or organizations that are large in size and hierarchical in structure. While a pro bono commitment must be part of the message, meaning must be given to the everyday activities of private lawyers working for private clients.

Representation of private clients serves public goals, I will argue, when lawyer professionalism encourages lawyers to assist clients in refining their objectives in the light of moral concerns, channels client conduct in law-abiding paths, and subordinates the

¹⁹ See Richard A. Posner, *OVERCOMING LAW* (1995) (arguing that competitive markets are hard on sellers but generally good for buyers).

²⁰ The single most powerful narrative inspiring the American legal profession is that of “the fearless advocate who champions a client threatened with loss of life and liberty by government oppression.” Historical incidents, such as Abe Lincoln’s defense of Tom Robinson, are mingled with countless fictional heroes in novels, movies, and TV shows, such as Atticus Finch’s defense of another Robinson in *To Kill a Mockingbird*. Yet the work of most lawyers today lacks the elements of this narrative. Today, the lawyer’s partisan endeavors are applied in a quite different context: “The private client is more likely to be a business organization than a private individual; the transaction or proceeding is probably civil or regulatory rather than criminal; the outcome is more likely to be a matter of property or money than life or liberty; and the justice of the cause is probably indeterminate.” Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 *Yale L.J.* 1239, 1244–45.

interests of clients in those less common situations in which a client's wrongful conduct threatens serious injury to third persons or to the integrity of judicial process.

The law office counseling and transaction work that constitutes most of what lawyers do often lacks the adversary structure, neutral umpire, and represented parties that help ensure the fairness of adversary proceedings.²¹ Even in contested proceedings, the claim that the invisible hand of the adversary system will maximize social good is undermined whenever the contest is an uneven one because one party is unrepresented or poorly represented. An adequate ethic of professionalism must reflect these realities.

Professionalism as Self-Regulatory Freedom from Accountability

A fourth false face of professionalism is a preoccupation with "self-regulation" that has the effect of limiting the accountability of lawyers to clients and the public. Some versions of "professionalism" assume that only lawyers are in a position to assess the quality or cost of legal services or have any say in defining the public responsibilities of lawyers, and therefore that only lawyers can make these judgments. Yet we know that clients who regularly use particular kinds of legal services can and do evaluate the quality and cost of what they get; and that public institutions not controlled by lawyers are constantly declaring norms about lawyer behavior and applying them in specific situations. Professional discipline has been transformed from a bar-controlled activity to a more public process and the other forums that pass on a lawyer's conduct are public institutions: judges in applying sanctions in a proceeding; juries in malpractice or third-party liability cases; administrative agencies in enforcing agency rules of conduct.

Each lawyer should aspire to professional excellence, but aspiration alone is not enough. Regulatory structures must be adequate to enforce minimum standards of professional conduct.²² The institution still most under the control of lawyers, professional discipline, depends on clients to report grievances, fails to deal with complaints of negligent performance or overcharging, and remains underfunded, secretive and lawyer-protective in many jurisdictions. A professional recognition that accountability is a vital aspect of professionalism should lead to improvement of professional disci-

²¹ See Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Calif. L. Rev. 669 (1978).

²² See Deborah L. Rhode, *Institutionalizing Ethics*, 44 Case W. Res. L. Rev. 665 (1994).

pline and greater tolerance for other methods of controlling lawyer behavior: malpractice suits, judicial sanctions, and actions by administrative agencies.

The organized bar plays a vital role in defining standards of minimum conduct and in nurturing aspirational ideals of vocation, calling, and service. But the bar cannot expect to have a monopoly of the prescription and enforcement of minimum standards of conduct. It can expect to influence its members by the inculcation of personal and collective ideals of aspiration and excellence. If professionalism, under the rubric of self-regulation, is viewed as a ploy for opposing all forms of public accountability not controlled by the organized bar, it will be rejected by both lawyers and the public as mere special-interest pleading, undeserving of moral respect.²³

We learn to understand justice by recognizing what it is not. Similarly, recognizing the limited truth of the four false faces of professionalism helps us identify central aspects of true professionalism. An account of professionalism for today's world must recognize that civility does not trump reformist or prophetic courage, that competition in legal services serves public needs and is here to stay, and that accountability to courts, juries, and administrative agencies is desirable as well as inevitable. Any adequate conception of professionalism must also give meaning to the representation of private clients that forms the bulk of the work of most lawyers.

The Central Moral Tradition of Lawyering

My critique of some current conceptions of lawyer professionalism has implied elements of an affirmative conception of lawyer professionalism. A fully adequate conception, I believe, rests upon a morality transcending any professional role or traditions, one resting on a religious foundation or some other foundational conceptions of objective reality. For many lawyers, religious faith provides a rich sense of calling as a lawyer.²⁴

The profession as a whole, however, cannot agree on matters of foundational truth. Its sense of professionalism must be founded on

²³ See Roger C. Cramton, *The Delivery of Legal Services to Ordinary Americans*, 44 Case W. Res. L. Rev. 531, 611 (1994).

²⁴ See *Symposium, Faith and the Law*, 27 Tex. Tech L. Rev. 950 (1996) (personal statements of 45 lawyers from a variety of religious traditions on how they reconciled their professional life with their religious faith); Thomas L. Shaffer, *ON BEING A CHRISTIAN AND A LAWYER* (1981); Joseph G. Allegretti, *THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* (1996).

the shared morality of the community as applied to the special roles of lawyers in the American democracy.

The real problem today, in my view, is a contemporary professional ideology of total commitment to clients, reinforced by legal subcultures in various domains of litigation and practice.²⁵ If "client comes first" meant only that the client's interest is superior to that of the lawyer, it would be sound and praiseworthy. But the dominant view often means that only client interests are respected, not those of courts, third persons, and the public. The profession, for example, speaks broadly of the impropriety of abusive litigation practices or of deception in negotiation, but its actions speak louder than these general sentiments. The rules of the profession and the actions of disciplinary bodies are indulgent concerning the excessive zeal that serves short-term client interests at the expense of the justice system and third parties. Moreover, the dominant ideology protects clients who are using lawyers to defraud third persons. The excessive preference for clients threatens the ideal that the practice of law is a public profession serving public interests.

What evidence supports my view that total commitment to client is a dominant ideology of many sectors of the profession? Empirical evidence on these matters is limited, especially data showing behavioral or attitudinal change over time. But repeated studies and reports, especially those dealing with the representation of corporate clients by law firms, tell us that these legal services are market-driven, with lawyers serving as expert technicians and hired guns who view their work as a task-oriented commodity.²⁶ Many lawyers form only weak attachments to the social ends of the profession and allow those ends to be defined, from moment to moment and purely instrumentally, by the shifting bidders of their services.

I hope I am wrong in this diagnosis and that the public responsibilities of the profession are as alive in the everyday behavior of lawyers as they are in the minds of those gathered here. But I sus-

²⁵ As indicated earlier, *supra* note 2, this paper does not address another serious problem: systemic underrepresentation of clients in some sectors of practice. Attending to that problem in the delivery of legal services is a major responsibility of lawyer professionalism. See Rhode, *supra* note 22, and Cramton, *supra* note 23.

²⁶ In addition to the materials cited in note 1, see the essays in *LAWYERS IDEALS/LAWYER PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* (Robert L. Nelson et al., eds., 1992); Robert L. Nelson, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988); Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1 (1988); and John Heinz, *The Power of Lawyers*, 17 Ga. L. Rev. 891 (1983).

pect you are an unrepresentative group of lawyers and are focusing your attention on ideals, not everyday law-office realities.

Moreover, some actions of the organized profession encourage and support the notion that lawyers have limited or no public responsibilities. A particular action, of great symbolic importance, is the ABA's reluctance to acknowledge that a lawyer should disclose client confidences to prevent or rectify a substantial fraud in which the lawyer's services had been employed.²⁷ Although the actions of most state courts in rejecting the ABA position is helpful, the ABA view powerfully signals to law students that the public responsibilities of lawyers are for show and not for action. The treatment of client fraud is a self-inflicted wound endangering lawyer professionalism.

What is the central moral tradition of lawyering that can be reaffirmed today?²⁸ A good beginning of such a statement may be found in a 1958 joint report on the professional responsibilities of lawyers of a prestigious AALS-ABA special committee.²⁹ This much-neglected report, largely drafted by Lon Fuller, outlined the central moral tradition of lawyering.

That tradition asserts that a lawyer's primary loyalty is not to the lawyer's client. The lawyer's obligation to the client is subordinate to the lawyer's primary obligation to the "procedures and institutions" of the law. That is how Lon Fuller put it in the 1958 report. Moreover, the role of the lawyer within the legal system "imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends."

As Professor Lawry has pointed out, the legal system defines and gives meaning to the very terms "lawyer" and "client."³⁰ The lawyer's duty (or loyalty) to a client "is bounded and contextualized by the legal system itself."³¹ The law licenses a lawyer, in bringing

²⁷ For discussion of the tortured history of client fraud by the ABA, see Geoffrey C. Hazard, Jr., Susan P. Koniak, and Roger C. Cramton, *The Law and Ethics of Lawyering* 295-323 (2d ed. 1994).

²⁸ This part of the paper relies heavily on Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 Hofstra L. Rev. 311 (1990); John M.A. DiPippa, Lon Fuller, *The Model Code and the Model Rules*, 37 S. Tex. L. Rev. 303 (1996); and Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 Tex. L. Rev. 259, 303-12 (1995).

²⁹ Fuller & Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958) [hereinafter Joint Report].

³⁰ See Lawry, *supra*, at 319.

law suits, filing motions, seeking discovery, and the like, to impose risks and burdens on people who are unwillingly brought into the justice system. Lawyers, when they take such actions, should recall Learned Hand's statement that he would "dread a lawsuit beyond almost anything else short of sickness and death." Exercise of these necessary impositional powers must be balanced by obligations to the letter and spirit of the law.

Once the lawyer has chosen to represent a client, the lawyer serves as a champion of the client's interests. The goals of the representation may turn out to be other than the lawyer would prefer, but there is ample opportunity for dialogue that may shape those goals. And the means employed must be consistent with the lawyer's primary obligation to the processes, procedures, and institutions of the law. As Fuller put it, "the temptations to interested exploitation, to abusive shortcuts, to corroding misinterpretation" provided by institutional arrangements must be resisted.³² "[T]he lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit or purpose."³³ The respect for institutional arrangements conveyed by this statement is totally at odds with implausible casuistry in responding to discovery requests, the use of delay for tactical purposes, the effort to nullify justice by all-out resistance, and the bad man's counsel that law violation is a cheap option because the violation is unlikely to be detected or enforcement costs will be less than the benefits of illegality.

The lawyer's obligation to the law means that clients, when they seek to use the legal system, are not free to abuse it by crime or fraud. Historically, the ethics of the profession have permitted or required a lawyer to reveal confidential information to prevent or rectify the consequences of a client's criminal or fraudulent act involving the use of the lawyer's services. This aspect of the profession's central moral tradition is reflected in the crime-fraud exception to the attorney-client privilege, Canon 41 of the Canons of Professional Ethics, the text of DR 4-101(C)(3) and the original version of DR 7-102(B)(1), and all of the discussion drafts of the *ABA Model Rules of Professional Conduct*.³⁴ The narrowing of this longstanding and vital exception to the professional duty of confidentiality occurred only partially in 1974³⁵ and more fully in 1983

³¹ Id.

³² Id. at 1161.

³³ Id.

³⁴ See Hazard, Koniak & Cramton, *supra*, note 27 at 294-300.

when the ABA House of Delegates rejected disclosure to prevent or rectify client fraud other than fraud on a tribunal.³⁶

States that have rejected this absolutist conception of confidentiality are acting in the interests of professionalism.³⁷ They have concluded, rightly, that the function of lawyers is to assist clients in the proper use of the legal system. Continuing the representation is improper when clients misuse their lawyers' services in defrauding others, and clients sacrifice confidentiality when they trespass on the law itself. Clients are entitled to virtually absolute confidentiality when they seek legal advice concerning past acts, but not when they are engaged in a fraud, the consequences of which are undiscovered and unfolding.

Fuller's 1958 report provides a moral justification for the lawyer's role in the adversary system and an explanation for the larger moral responsibilities of a lawyer when engaged in other functions, such as law-office counseling or as the architect of public or private arrangements. With respect to the lawyer's function of partisan advocacy in litigation, compare Fuller's prescription with the scorched-earth tactics of many of today's litigators:

The advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case. He plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature.³⁸

This aspiration that lawyers be "tough but fair" in litigation means that personal attacks, humiliating cross-examination, and dilatory tactics have no place in a lawyer's arsenal of weapons. The goals of advocacy are not merely winning, but the furtherance of accurate and efficient outcomes.

³⁶ In 1974 the ABA added an "except" clause to DR 7-102(B)(1) that had the effect, if interpreted in accordance with ABA Formal Op. 341 (1975), of virtually eliminating the obligation of disclosure provided by that rule. However, only 14 states adopted the amendment and in some of those it was unclear whether the interpretive opinion was accepted. The result of this moral blindness was uncertainty and confusion.

³⁷ For discussion of consideration of the client fraud problem in the rulemaking process that resulted in the 1983 Model Rules, see Ted Schneyer, "Professionalism as Politics: The Making of a Modern Legal Ethics Code," in *LAWYERS' IDEALS/ LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 95, 120-32 (Nelson et al., eds., 1992).

³⁸ As of September 1993, 41 jurisdictions permitted or required a lawyer to disclose information to prevent a criminal fraud, and 17 permitted disclosure to rectify a client fraud. See Hazard, Koniak & Cramton, *supra*, note 27 at 321-22.

³⁹ Joint Report, *supra*, note 29 at 1161.

In the courtroom, the lawyer presents the client's case in the most favorable light, giving the client the benefit of any doubts so long as the client's position is not untruthful. "A similar resolution of doubts in one direction," the report states, "becomes inappropriate when the lawyer acts as counselor."

[T]he reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal advisor in a line of conduct that is immoral, unfair, or of doubtful legality.³⁹

The lawyer as counselor "must be at pains to preserve a sufficient detachment from his client's interests so that he remains capable of a sound and objective appraisal of what his client proposes to do."⁴⁰ The lawyer's advice channels the client's conduct along lines consistent with law and good morals. The resulting compliance with the law, Fuller argues, "is not generally lip serving and narrow," but rather is consistent with "the underlying spirit and purpose" of legal institutions, procedures, and substantive requirements.⁴¹ Lawyer and client, in a two-way process of moral suasion, work out a course of action that is right and good. Justice does not flow from government alone; it is a gift that good people give to one another.

As an example, consider the role of a lawyer in helping corporate clients deal with governmental regulation. The older view, advanced by Fuller, distinguished the counseling function from that of defending an enforcement proceeding arising out of the client's prior conduct. As a corporate counselor, the lawyer's advice was directed "not just to the defensive aim of minimizing exposure, but to the affirmative one of promoting compliance with the regulation's purpose."⁴²

Recent empirical studies as well as anecdotal reports from the corporate sector of practice provide a very different picture: These lawyers view themselves as technicians who do what their clients want, not as playing an independent, autonomous role. Case reports provide numerous illustrations of a fierce loyalty to client that leads to cosmetic compliance, nullification by resistance, or the Holmesian "bad man's" strategy of violation based on low odds of enforcement.⁴³

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Robert W. Gordon & William H. Simon, "The Redemption of Professionalism?" in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 230, 248 (Robert L. Nelson et al., eds., 1992). My discussion of the lawyer as regulatory counselor relies heavily on Gordon and Simon's paper.

The special powers and privileges of lawyers, such as the attorney-client privilege, are based on the assumption that law office secrecy will result in sound counseling that will channel client behavior in law-abiding ways. Trends in current practice suggest that the respect given to law often turns on whether its coercive force will in fact be brought to bear. What is legal and right is replaced by "what can we get away with?" The same sort of casuistry is then applied in interpreting and applying the profession's own ethics rules. The Hobbesian world of a war of all against all looms ahead, amidst the ruins of the rule of law.

Regulation, of course, is often excessive, inefficient, or in need of reform. Yet regulatory schemes, however imperfectly, also give expression to general social and moral norms relating to health, safety, nondiscrimination, or other matters. As Professors Gordon and Simon put it in a recent article, "Fidelity to the general purposes recorded in law, and the obligation to try to give them practical effect in [the law office], is at the heart of the professional ideal."⁴³

My thesis, then, is that the central moral tradition of lawyering has been that a lawyer's primary obligation is to the procedures and institutions of the law. In recent decades this earlier consensus has been largely, but not totally, replaced by ideology and behavior characterized by total commitment to client and a rejection of lawyers' public responsibilities. The need today is to regenerate the ideal of the law as a public profession with large public responsibilities and to give meaning to those responsibilities by the development of principles and narratives that give life to them.

⁴³ The term comes from O. W. Holmes, Jr., who, in a talk to law students about law study, said: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." Quoted in Hazard, Koniak & Cramton, *supra*, note 27 at 27. For discussion of the "legal realism problem" arising from the lawyer adopting the bad man's orientation in advising clients, see Stephen L. Pepper, *Counseling at the Limits of the Law*, 104 Yale L.J. 1545 (1995).

⁴⁴ Gordon & Simon, *supra*, note 42 at 257.

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Ethical stumbles online leave digital trail for bar counsel.

It's not as if lawyers never misbehaved before. But now they're making the same old mistakes — soliciting for sex, slamming judges, talking trash about clients — online, leaving a digital trail for bar counsel to follow.

Tresa Baldas
May 10, 2010

Steven Belcher was defending a wrongful-death case in 2006 when he had a bad idea. Belcher, then a temporary attorney at Paule, Camazine & Blumenthal in St. Louis, e-mailed a photograph of the overweight deceased, lying naked on an emergency room table, to a friend, along with his own lewd and disparaging commentary.

The firm, which monitored work e-mails, turned him in to the state disciplinary counsel, and he was slapped with a 60-day suspension, stayed pending probation. Belcher, who is still licensed to practice law but has joined the Army, admits he made a "stupid" mistake. "I had my head up my butt," he said.

Because he was licensed to practice in Illinois and Virginia as well as Missouri, more than one bar counsel heard about his case. And they wondered whether there was more here than one lawyer's bad decision.

"It got our eyebrows up," said James Grogan, chief counsel of the Illinois Attorney Registration and Disciplinary Commission and a past president of the National Organization of Bar Counsel. "We thought, 'Wow, are we going to see more of these?' Well, I think it's clear we are starting to see more."

Grogan, also chief counsel of the Illinois Attorney Registration and Disciplinary Commission, said the sense among his disciplinary brethren is that "more investigations are being generated for lawyers misusing electronic communications and the Internet."

Numbers are hard to come by; no one agency tracks the number of lawyers facing discipline for online behavior. But social networking by attorneys and all its potential dangers is being closely monitored in nearly every corner of the legal profession. Disgruntled clients, lawyers outing other lawyers and bar counsel themselves are sparking investigations. Law firms host seminars and webinars on it. And bar counsel and bar associations bring it up at nearly every meeting. The American Bar Association's Commission on Ethics 20/20 has on its agenda, among other 21st century issues, whether existing ethics rules adequately address social media use by lawyers.

It's not as if lawyers never misbehaved before. But now they're making the same old mistakes — soliciting for sex, slamming judges, talking trash about clients — online, leaving a digital trail for bar counsel to follow.

Legal ethics expert Michael Downey said lawyers' tendency to be risk-averse seems to fade away on the Internet. "They're disclosing confidences, talking about pending matters, they take potshots...like everyone else," said Downey, immediate past chairman of the American Bar Association's Ethics and Technology Committee and a member of the ABA Center for Professional Responsibility.

At the ABA, Downey, a partner in Chicago-based Hinshaw & Culbertson's St. Louis office, said the focus is on whether new misdeeds require new ethics rules. He suspects the current rules "are probably adequate."

Downey routinely lectures to law firms and bar associations on the ethical concerns lawyers face in the worlds of Twitter, Facebook and blogs. "Someone just suggested yesterday that I do a program on this."

The following stories may explain why.

SEX IN THE FILES

It was a want ad with a twisted twist in the "Adult Gigs" section of Craigslist. Now it could get Chicago immigration lawyer Samir "Sam" Chowhan disbarred.

In May 2009, Chowhan was seeking a dual secretary/sexual partner, according to a complaint filed with the Illinois Attorney Registration and Disciplinary Commission. His ad read: "Loop law firm looking to hire am [sic] energetic woman for their open secretary/legal assistant position. Duties will include general secretarial work, some paralegal work and additional duties for two lawyers in the firm. No experience required, training will be provided."

The ad asked for a résumé and a few pictures, "along with a description of your physical features, including measurements."

A woman identified in the complaint as Debbi responded. Chowhan e-mailed her back: "[I]n addition to the legal work, you would be required to have sexual interaction with me and my partner, sometimes together sometimes separate. This part of the job would require sexy dressing and flirtatious interaction with me and my partner, as well as sexual interaction. You will have to be comfortable doing this with us."

Debbi was not comfortable.

The woman filed a complaint with the attorney discipline board. Chowhan initially denied he wrote the ad, claiming someone with "malice" set him up, but in September he fessed up. He appeared for a sworn statement at the disciplinary commission and, under oath, "acknowledged that he posted the May 28, 2009 Craigslist advertisement and sent the May 29, 2009 responsive e-mail."

His penalty is pending. Chowhan, who also faces discipline over his handling of immigration matters, now practices at Chowhan Law in Fort Wayne, Ind. He did not return calls seeking comment.

FACEBOOK FOLLY

Susan Criss, a Texas state trial judge in Galveston County, is a fan of social media. As an elected judge, she finds Facebook a good way to connect with voters. It also helps her keep tabs on lawyers.

Criss has busted more than one lawyer in a sticky situation online. Last year, a prosecutor sought and received a weeklong continuance to attend a funeral, but her daily Facebook postings showed her drinking and riding motorcycles. When the prosecutor returned, Criss called her on the less-than-funereal activities — and denied the prosecutor's request for another, monthlong continuance.

"She was embarrassed," the judge said.

More recently, Criss said, another prosecutor in a case before the judge took pictures of a crime scene and posted them on her Facebook page, along with comments from law enforcement talking about the crime and crime scene. Criss was baffled. "Y'all are not thinking one bit about the fact that when you're asked to provide discovery to the other side in litigation...this is going to count," she said.

Criss, who spoke about social networking mishaps at the American Bar Association's annual conference last year, said, "I see a lot of venting about judges. I see a lot of personal information being posted, like, 'Let's go get drunk tonight' or 'Let's go meet at the bar.'... You see these things and say, 'What are you thinking?'"

On a positive note, she believes her Facebook bustings have had some impact. "I'm starting to see a lot more lawyers using common sense," she said. "They're reading about people getting caught, and they're seeing the consequences."

CRITICAL LINE

It seemed like the perfect venting tool, a courthouse blog. Florida criminal defense attorney Sean Conway couldn't resist the temptation.

Conway wrote that Broward County Circuit Judge Cheryl Aleman was an "evil, unfair witch" with an "ugly, condescending attitude." He also suggested she was "seemingly mentally ill." His beef? The judge allegedly wasn't giving defense lawyers enough time to prepare for trials.

Repercussions? You bet.

The Florida Bar reprimanded Conway in April 2009 and fined him \$1,200 for violating five ethics rules, including impugning a judge's qualifications or integrity.

Conway argued that it was his constitutional right to criticize a judge. He contended that, outside a courtroom, a lawyer's speech cannot be restricted any more than anyone else's. But the Florida Supreme Court declined to hear his case.

Sure, Conway admits now, his words were harsh, but he had to use powerful words to get his point across. "She was doing something that was blatantly unfair...and I had to expose it," said Conway, who still encourages attorneys to vent online. "Just don't sign your own name....Just do it from hiding."

Conway recently started his own solo defense practice in Hollywood, Fla. He said he only visits blogs now; he doesn't comment in them.

TRASH TALK

If she'd confined her blog posts to her hobbies, bird-watching and photography, her supervisor likely wouldn't have minded. But Kristine Ann Peshek, an assistant public defender in Winnebago County, Ill., also wrote about her clients — quite candidly.

According to a complaint filed last August with the Illinois Attorney Registration and Disciplinary Commission, she disclosed confidential information about them. On March 28, 2008, she wrote of one client: "This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch.'...My client is in college. Just goes to show you that higher education does not imply that you have any sense."

Peshek hid clients' names, but spoke freely about their cases. In another 2008 post, she wrote: " 'Dennis,' the diabetic whose case I mentioned in Wednesday's post, did drop as ordered....Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge."

Peshek, according to the complaint, also criticized judges, calling one an "a..hole" and another "Judge clueless."

In April 2008, Peshek's supervisor learned of her blog. She was terminated that month. The disciplinary commission has recommended a 60-day suspension. A final decision from the Illinois Supreme Court is expected within weeks.

Peshek, now in private practice at Peshek & Rabbitt in Beloit, Wis., declined to comment.

ALL PUFFED UP

Dennis Hernandez identified four lawyers with his firm who were not — to get technical about this — licensed to practice law in the state of Florida. Since Dennis Hernandez & Associates is based in Tampa, the Florida Bar was not pleased. And since the four were named on his Web site under "Our Attorneys," the evidence of Hernandez's misstatements wasn't hard to find.

The Florida Supreme Court last August disciplined Hernandez for, among other things, making statements that were "potentially false or misleading" about the lawyers working at his firm.

According to a complaint filed with the Florida Bar, Hernandez on his Web site provided biographies for four individuals not licensed to practice law in Florida.

One of them had been disbarred elsewhere. Harry M. Walsh Jr. was licensed to practice law in Maryland until September 2004, when he was decertified and prohibited from practicing law. He was disbarred in 2005.

The other three were Massachusetts lawyer Lori E. Eisenschmidt, Tennessee lawyer Christopher Lee Denison and Georgia lawyer Alan Austin Gavel, who had been suspended in Georgia from July 15, 1996, through Sept. 16, 2002. Hernandez was billing clients a senior associate rate of \$300 per hour for these three.

Gavel said, "When I was asked to do things that I thought were inappropriate, I left."

In August, Hernandez was suspended for 90 days, ordered to attend ethics school and required to pay restitution totaling \$19,766 to six clients who were misled.

NO COMMENT

Sometimes the judge herself ends up in the online hot seat.

Judge Shirley Strickland Saffold of the Cuyahoga County, Ohio, Common Pleas Court is refuting claims that she posted anonymous, snarky comments about some of her own cases. The more than 80 comments — posted by one "lawmiss" on Cleveland.com, the Web site of *The Plain Dealer* — were linked to Saffold's personal e-mail account. Saffold was outed by the paper, which had obtained public records showing the browsing history of her courtroom computer.

Despite Saffold's insistence that she did not write about her cases online — and the fact that her daughter has copped to the postings — the judge was recently yanked off a serial-killer trial. The Ohio Supreme Court removed her from the case on April 22 to avoid "even an appearance of bias, prejudice or impropriety."

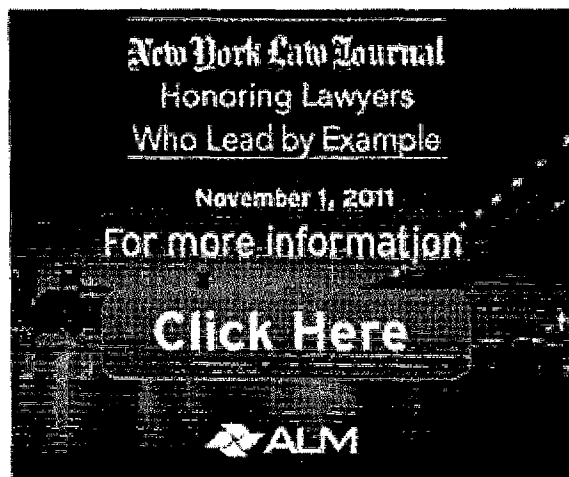
Ohio Chief Justice Paul Pfeifer wrote, "[T]he nature of these comments and their widespread dissemination might well cause a reasonable and objective observer to harbor serious doubts about the judge's impartiality."

So what exactly did "lawmiss" say? Here are some excerpts from *The Plain Dealer*.

In a November 2009 post, she called a defense lawyer in a vehicular manslaughter case a "buffoon" and wrote, "If only he could shut his Amos and Andy style mouth."

About a 2008 triple-murder case that ended in a life-without-parole sentence, lawmiss wrote, "If a black guy had massacred five people then he would've received the death penalty....A white guy does it and he gets pat on the hand. The jury didn't care about the victims....All of them ought to be ashamed."

Saffold, meanwhile, has gone from judge to defendant to plaintiff. She is suing *The Plain Dealer* for \$50 million, claiming it violated its own online privacy policy by outing lawmiss.



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EMBEDDING PROFESSIONALISM INTO LEGAL EDUCATION*

*Denise Platfoot Lacey***

INTRODUCTION

There has been a repeated call to incorporate professionalism training in legal education in order to assist students in developing professionalism. While law schools have begun to answer this call, they often fail to teach and assess actual professionalism behaviors of their law students. Such failure results in lost opportunities to impart to law students the expectations of the legal profession, as well as to help them to develop the highest standards of conduct. This article will present information about a model of professionalism assessment in medical education and how it can be integrated into legal education to facilitate the teaching and evaluation of professionalism in law students.

In Section I, this article will discuss the call to integrate professionalism training into legal education. In Section II, it will describe one model of professionalism assessment that is used in medical education. In Section III, it will propose ways to apply the medical school model in law schools.

SECTION I: THE CALL TO INTEGRATE PROFESSIONALISM TRAINING INTO LEGAL EDUCATION

Over the past twenty years there has been a repeated and increasingly urgent call to integrate professionalism training into legal education. The reasons to do so include that it will better prepare law students to be professionals,¹ that it will

* The title of this paper was borrowed from the title of a 2002 medical education conference cosponsored by the Association of American Medical Colleges and the National Board of Medical Examiners. Report from an Invitational Conference Cosponsored by the Association of American Medical Colleges and the National Board of Medical Examiners, *Embedding Professionalism in Medical Education: Assessment as a Tool for Implementation* (2003), available at <http://www.nbme.org/PDF/Publications/Professionalism-Conference-Report-AAMC-NBME.pdf> (last visited March 31, 2011).

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1. NAT'L ORG. OF BAR COUNSEL, LAW SCHOOL PROFESSIONALISM INITIATIVE REPORT 1 (2009) [hereinafter NOBC REPORT], available at http://nobc.org/template_main.aspx?id=3072&terms=law+school (last visited March 31, 2011).

restore public trust and confidence in the legal profession,² and that it will help students attain professional competence and excellence.³

A. *The MacCrate Report*

One of the primary reports of the last two decades which articulated the need for students to develop professional values during law school was the MacCrate Report,⁴ a highly regarded report on legal education issued in 1992 by an American Bar Association Task Force. The MacCrate Report developed a comprehensive statement of skills and values of the legal profession intended to provide a foundation for law schools and the practicing bar to assist prospective and new lawyers to become competent practitioners.⁵ The overall purpose of the report was to enhance the quality of the preparation of lawyers.⁶

MacCrate established four fundamental values of the profession, which are universally recognized as standards of professionalism.⁷ MacCrate's fundamental values of the profession include a commitment to competent representation; a commitment to public service; a commitment to improving the profession; and a commitment to professional self-development.⁸

MacCrate suggested that law schools teach valuable legal skills and values in a non-traditional classroom setting, such as a well-structured clinical program, where teaching could focus on communication, counseling, negotiation, and resolution of ethical dilemmas, among others.⁹ It further recommended that law school faculty emphasize the values of the profession in all courses and model conduct that underscores the importance of those values.¹⁰

B. *A National Action Plan*

A National Action Plan on Lawyer Conduct and Professionalism adopted in 1999 by the Conference of Chief Justices expanded upon the recommendations of the MacCrate Report by providing specific recommendations of how the bench,

2. WILLIAM A. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 28 (2007); Conference of Chief Justices, *A National Action Plan on Lawyer Conduct and Professionalism* 1 (1999) [hereinafter *National Action Plan*], available at <http://ccj.ncsc.dni.us/natlplan/NatlActionPlan.html>.

3. Robert MacCrate, *Legal Education and Professional Development—An Educational Continuum: Report of the Taskforce on Law Schools and the Profession: Narrowing the Gap* 1992, A.B.A. Sec. of Legal Educ. & Admissions to the Bar, [hereinafter *MacCrate Report*], available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html> (last visited March 31, 2011).

4. *Id.*

5. *Id.* at Introduction.

6. *Id.*

7. Many states and bar associations have issued statements of professionalism which incorporate the MacCrate Report's values of the profession into their standards of professionalism. See list of Professionalism Codes accessible on the American Bar Association Center for Professional Responsibility website, available at <http://www.abanet.org/cpr/professionalism/profcodes.html> (last visited March 31, 2011).

8. *MacCrate Report*, *supra* note 3, at 3-8.

9. *Id.* at 234.

10. *Id.* at 235.

bar and law schools could enhance lawyer professionalism.¹¹ The National Action Plan defined professionalism as civility among members of the bench and bar, as well as competence, integrity, respect for the rule of law, public service, and lawyer conduct that exceeds the minimum ethical requirements.¹²

The National Action Plan recommended that law schools provide more course offerings, such as simulated law practice, clinical and pro bono programs, and internships, to provide students with an understanding of professionalism and basic legal skills.¹³ It further recommended that law schools assist bar admissions agencies in assessing the character and fitness of law students, including instances of conduct reflecting poor character and fitness, even if it constituted non-academic misconduct.¹⁴

C. *Best Practices*

Best Practices for Legal Education written by Roy Stuckey and others in 2007, provided a comprehensive set of guidelines for improving legal education to better prepare students for practice.¹⁵ One recommendation was that law schools should improve the competence and professionalism of their graduates,¹⁶ including educating students on improving access to justice,¹⁷ providing basic skills instruction to better prepare students for the practice of law,¹⁸ and providing professionalism instruction to assist students in developing the ability to conduct themselves professionally.¹⁹

Best Practices explained that law schools should aim to train students to demonstrate professionalism, by teaching students to understand and commit to the values, behaviors, attitudes, expectations, and ethical requirements of a lawyer.²⁰ Professionalism should be taught pervasively throughout law school and should be modeled by faculty.²¹ The first step to such training is changing the culture and environment of the law school community to foster professional conduct.²² Further, students should be expected to conduct themselves professionally with clear guidelines as to what the school considers to be appropriate professional conduct.²³

Moreover, Best Practices endorsed the recommendations for improving law school professionalism training that were set forth in Teaching and Learning

11. *National Action Plan*, *supra* note 2.

12. *Id.* at 2.

13. *Id.* at 15.

14. *Id.* at 7, 16.

15. ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (CLEA, 1st ed. 2007), *available at* http://law.sc.edu/faculty/stuckey/best_practices/best_practices-full.pdf.

16. *Id.* at 24.

17. *Id.* at 26.

18. *Id.* at 27.

19. *Id.* at 27–28.

20. *Id.* at 79.

21. STUCKEY, *supra* note 15, at 100.

22. *Id.* at 101.

23. *Id.*

Professionalism, a 1996 report of the American Bar Association Section of Legal Education and Admissions to the Bar,²⁴ which included role modeling by faculty, pervasively teaching professionalism, developing an effective system for encouraging and monitoring ethics and professionalism programs, using interactive teaching methods, and developing activities, policies and infrastructures that reflect genuine concern with professionalism.²⁵

D. The Carnegie Report

The Carnegie Report published in 2007 comprehensively examined how law students were trained, including how they form professional identity.²⁶ The Carnegie Report noted that law schools fail to provide “effective support for developing ethical and social skills”²⁷ despite the fact that “[s]tudents need opportunities to learn about, reflect on and practice the responsibilities of legal professionals.”²⁸ Carnegie further observed that attention to professionalism in law schools has been handled in an “. . . *additive* way, not an integrative way.”²⁹ The problem with this approach is that it assumes that legal analysis is sufficient in and of itself to train law students, thereby only requiring a slight increase in attention to professionalism.³⁰

Carnegie suggested that law schools need to “. . . bridge the gap between analytical and practical knowledge, and a demand for a more robust professional integrity.”³¹ In this regard, law schools should integrate into its curriculum “. . . exploration and assumption of the identity, values and dispositions consonant with the fundamental purposes of the legal profession.”³² Further, students should be provided with opportunities to wrestle with the issues of professionalism, as well as those that support students’ ethical-social development.³³ An integrative approach would require that ethical-social issues fully pervade the doctrinal curricula and that educational experiences concerned with values of the legal profession are provided to students.³⁴

24. American Bar Association, *Teaching and Learning Professionalism: Report of the Professionalism Committee*, 1996 ABA Sec. of Legal Educ. & Admissions to the Bar [hereinafter *Teaching and Learning Professionalism*].

25. Stuckey, *supra* note 15, at 103 (citing *Teaching and Learning Professionalism*, *supra* note 24).

26. SULLIVAN, *supra* note 2, at 27-28.

27. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, Summary at 6, http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf.

28. *Id.* at 6.

29. *Id.* at 7.

30. *Id.* at 8.

31. *Id.*

32. *Id.*

33. Sullivan, *supra* note 27, at 9.

34. *Id.*

E. The National Organization of Bar Counsel Law School Professionalism Initiative Report

In 2009, the National Organization of Bar Counsel (hereinafter “NOBC”) issued a Law School Professionalism Initiative Report suggesting that the law school accreditation process should require law schools to adopt professionalism plans that address the three apprenticeships of the Carnegie Report: legal analysis, practical skill and professional identity.³⁵ The NOBC suggested that in addition to professionalism training in the classroom, law schools should track student behavior, provide remediation of students with observed and demonstrated problems, and hold students accountable for their behavior in law school.³⁶

The NOBC suggested criteria and input and outcome measures that law schools could use in creating a professionalism plan, including classroom criteria, student accountability and law school environment, and external contacts and influence.³⁷ With regard to accountability and the law school environment, the NOBC suggested that law schools adopt formal conduct and honor codes, the difference being that the “. . . conduct code provides a standard of professional and personal behavior for law students to follow, which is distinct from an academic-centered honor code,”³⁸ and is based upon the Rules of Professional Conduct of the jurisdiction where the law school is located.³⁹ The honor code, on the other hand, would “. . . establish standards of professional behavior that promote core professional and character values going beyond minimal compliance with mandatory standards of conduct.”⁴⁰

The NOBC recommended that monitoring systems be used to monitor student compliance with the codes to help “. . . identify students who display signs of failing to understand or display essential professionalism traits.”⁴¹ Further, law schools should provide a remediation program to respond to student conduct that falls below that which is identified in the codes.⁴²

F. Examples of Professionalism Training in Law Schools

As law schools have taken heed of these reports and recommendations, there are increasing examples of how law schools have incorporated professionalism training into their students’ law school experience. For example, law schools provide orientation programs for first-year law students which include professionalism discussions with practicing attorneys about the best course of conduct in hypothetical professionalism situations.⁴³ Law schools host formal

35. NOBC REPORT, *supra* note 1, at 2–3.

36. *Id.* at 3.

37. *Id.* at 3–4.

38. *Id.* at 14.

39. *Id.*

40. *Id.*

41. NOBC REPORT, *supra* note 1, at 15.

42. *Id.* at 16.

43. *Gambrell Professionalism Award Recipients*, AM. BAR ASS’N, http://www.americanbar.org/groups/professional_responsibility/initiatives_awards/awards/gambrell/pre

ceremonies where students recite an oath of professionalism to emphasize the special significance and responsibility of entering into the legal profession.⁴⁴ Law schools offer clinical courses which specifically address professional responsibility issues which arise in the legal representation.⁴⁵

These efforts are commendable and certainly succeed to emphasize the importance of professionalism in the legal profession. Even so, these programs exhibit an "additive" approach rather than an integrative approach, as noted by Carnegie.⁴⁶ Although some of the programs are required for the students, many are offered as extra-curricular. Further, those that are mandatory are offered outside the realm of the traditionally "substantive" curricula; in other words they have not fully pervaded the doctrinal curricula.⁴⁷ As Carnegie warns, this leads students to assume that professionalism, while perhaps highlighted, is less important than the legal analysis being taught in doctrinal courses and results in misunderstandings of how the law works.⁴⁸

Given this, still more needs to be done to embed professionalism into legal education in order to instill in students the professionalism values and the high standard of conduct expected in the legal profession. One obvious solution is to adopt the integrative approach suggested by Best Practices and the Carnegie and MacCrate Reports by pervasively addressing professionalism in every course in law school.

However, even if law schools continue to develop extra-curricular professionalism programs and begin to pervasively integrate professionalism discussion in all law school courses, there will continue to be a disconnect for students between the discussion of professionalism values and the behaviors that they exhibit in law school.

Typically, unless student conduct rises to the level of a violation of the school's honor code (which is akin to the minimum standards of conduct required by the Rules of Professional Conduct), students' lack of professionalism—behaviors like non-cooperation with colleagues, combativeness, disrespectful attitudes, inappropriate tone and demeanor with colleagues, faculty and staff, lack of initiative, tardiness, disruptive behavior, poor work ethic, inability to take responsibility for actions, etc.—tends to be ignored in law schools.⁴⁹ Until students are held accountable in law school for the unprofessional behavior in

vwinners.html (last visited March 31, 2011) (describing the Emory University Law Schools' Law School Professionalism Project in 1999).

44. *Id.* (describing the Southern Illinois University School of Law's Professionalism Development Workshop Series for First-Year Law Students and Wake Forest University School of Law's Professionalism Program in 2004).

45. *Id.* (describing the Seattle University School of Law's Professional Responsibility Integrative Component Clinic in 1995, East Bay Community Law Center's Ethics & Professional Responsibility Clinical Education Program in 2002, Yale Law School's Lawyering Ethics Clinic in 2002, and Southern Illinois University's clinic and externship programs in 2004).

46. See SULLIVAN, *supra* note 27, at 7.

47. *Id.* at 9.

48. *Id.* at 6.

49. For a list of various jurisdiction's professionalism codes which list aspirational professional conduct, see generally Am. Bar Ass'n Ctr. for Prof'l Responsibility, *Professional Codes, Commissions, and Reports*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html (last visited March 31, 2011).

which they engage, the culture of professionalism will not be fully entrenched in them as they transition into practicing lawyers.

The expectation in law schools should be that students engage in the professionalism characteristics and behaviors that are expected to be exhibited by lawyers. Law schools should reinforce the professionalism expectations of the profession by *requiring* students to demonstrate professionalism throughout law school.

Legal educators should "... incorporate into their curricula and learning environments explicit means to reinforce..."⁵⁰ the professionalism ideals and values that the legal profession expects. As recommended by the NOBC Report, law schools should expect and require students to demonstrate professionalism throughout law school with opportunities for "remediation of deficiencies in conduct"⁵¹ and with consequences for under-performance or outright non-compliance with the expected standards of professionalism.⁵² In sum, law schools should engage in professionalism assessments of their students.

What is perhaps lacking is the practical model that law schools can use to implement such a program of professionalism assessment. To identify such a model, this article examines in Section II a practical model of professionalism assessment in one medical school and in Section III, adapts it for use in law schools.

SECTION II: DIRECT ASSESSMENT OF STUDENT PROFESSIONALISM AT THE UNIVERSITY OF CALIFORNIA, SAN FRANCISCO SCHOOL OF MEDICINE

Since 1995, the University of California, San Francisco School of Medicine ("UCSF") has operated an evaluation system that monitored students' professional behaviors in their third and fourth years.⁵³ The purpose of the system is "... to identify medical students who demonstrate unprofessional behaviors in order to remediate their deficiencies and to give the school an administrative structure to deal with such behaviors."⁵⁴

The system grew out of the UCSF faculty's concerns that the school had no mechanism in place for dealing with professional disqualification of students who received passing grades in their courses, yet had notable deficiencies in the professional behavior.⁵⁵

Prior to 1995, UCSF students completed core clerkships in their third and fourth years, with student evaluation done by the clerkship site directors covering

50. Jordan J. Cohen, Viewpoint: *Linking Professionalism to Humanism: What It Means, Why It Matters*, 82 ACADEMIC MED. 1029, 1029 (2007).

51. Maxine A. Papadakis, Helen Loeser & Kathleen Healy, *Early Detection and Evaluation of Professionalism Deficiencies in Medical Students: One School's Approach*, 76 ACAD. MED. 1100 (2001) [hereinafter Papadakis, Loeser & Healy]; see also NOBC Report, *supra* note 1, at 15.

52. Papadakis, Loeser & Healy, *supra* note 51, at 1101.

53. *Id.* at 1100.

54. *Id.*

55. Maxine A. Papadakis et al., *A Strategy for the Detection and Evaluation of Unprofessional Behavior in Medical Students*, 74 ACAD. MED. 980, 981 (2001) [hereinafter Papadakis].

the areas of "... fund of knowledge, clinical skills, and interpersonal skills."⁵⁶ Interpersonal skills included "... (1) professional attributes and responsibilities; (2) self-improvement and adaptability; (3) relationships with patients; and (4) interpersonal relationships with other members of the health care team."⁵⁷ In each of these areas, students were "... evaluated on a 1-4 scale of 'excellent,' 'solid,' 'concern,' or 'problem.'"⁵⁸

The clerkship directors long noted the deficiency in this form because of minimal consequence for students who had marginal professional skills earning less than "solid" on that portion of the form.⁵⁹ In response, UCSF developed a professional evaluation system using a Physicianship Evaluation Form.⁶⁰

The Physicianship Evaluation Form "... is submitted about a student who receives a less than satisfactory rating on professionalism skills at the end of any clerkship."⁶¹ After receiving a Physicianship Evaluation Form, the student and the school meet to work together to remediate the student's deficiencies.⁶² Generally, this counseling involves hearing "... the student's perspective of the issues, and identification of strategies for improvement."⁶³ Sometimes students are also referred to the school's counseling service.⁶⁴

If deficiencies in professional skills are identified in more than one clerkship, the student is placed on academic probation and may be subject to academic dismissal, even if passing grades have been attained in all clerkships.⁶⁵ Additionally, the deficiencies and concerns are documented in the dean's letter for the student's application to residency programs.⁶⁶

The behaviors that are assessed on the Physicianship Evaluation Form expanded the four areas of interpersonal skills in the clerkship evaluation form.⁶⁷ Specific performances and behaviors in each category of interpersonal skills were intentionally described negatively "... to define the minimum standard of behavior that the student had not attained."⁶⁸ For example: "The student does not accept blame for failure or responsibility for errors"⁶⁹ defined the behavior rather than "The student needs to improve in the area of accepting responsibility for errors."⁷⁰

In addition to identifying the behavior which is deficient, the process also requires the clerkship or site director to include narrative comments on the form and discuss the evaluation with the student before its submission.⁷¹

56. *Id.*

57. *Id.* at 983.

58. *Id.*

59. *Id.*

60. Papadakis, Loeser & Healy, *supra* note 51, at 1100.

61. *Id.*

62. *Id.*

63. Papadakis, *supra* note 55, at 985.

64. *Id.*

65. Papadakis, Loeser & Healy, *supra* note 51, at 1100.

66. *Id.*

67. Papadakis, *supra* note 55, at 983.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

The four categories of interpersonal skills and their defining conduct include:

- Unmet professional responsibility, for example: needs continual reminders to fulfill responsibilities to patients or other health care professionals; cannot be relied upon to complete tasks; and misrepresents or falsifies actions/information.⁷²
- Lack of effort toward self improvement and adaptability, for example: is resistant or defensive in accepting criticism; remains unaware of his/her own inadequacies; resists considering or making changes; does not accept blame for failure or responsibility for errors; is abusive or critical during times of stress; and demonstrates arrogance.⁷³
- Diminished relationships with patients and families, for example: inadequately establishes rapport with patients or families; is insensitive to the patients' or families' feelings, needs or wishes; uses his/her professional position to engage in romantic/sexual relationships with patients or members of their families; lacks empathy; and has inadequate personal commitment to honor the wishes of patients.⁷⁴
- Diminished relationships with members of the health care team, for example: does not function well within a healthcare team; and is insensitive to the needs, feelings and wishes of the healthcare team members.⁷⁵

After much success with its program of professionalism assessment, UCSF expanded it in 1999 to its first and second year students because "... they realized that several students identified as having deficiencies in physicianship skills during their clerkships had manifested problematic behaviors earlier in medical school."⁷⁶ For example, they observed unnecessary interruptions in class, inappropriate behaviors in small groups both with peers and faculty, and unacceptable timing of requests for special needs for taking examinations.⁷⁷ They believed that early remediation for first and second year students exhibiting these types of behaviors would have been optimum.⁷⁸ They would then be able to address and remediate the professionalism deficiencies prior to the third and fourth year clerkships.⁷⁹

72. *Id.* at 982.

73. Papadakis, *supra* note 55, at 982.

74. *Id.*

75. *Id.* at 983.

76. Papadakis, Loeser & Healy, *supra* note 51, at 1101.

77. *Id.*

78. *Id.*

79. *Id.*

Accordingly, UCSF created a separate Physicianship Evaluation Form for first and second year students.⁸⁰ The process allows a faculty member who has concerns about a student's professional behavior to use the form to report it to the course director who then makes inquiries into the student's behavior with relevant instructors who have observed the student.⁸¹

If the course director determines that the student has deficiencies in professional development, he or she meets with the student to provide feedback and review the contents of the form.⁸² The student has a chance to discuss the contents with the course director and include comments.⁸³ If the student provides information that negates the form, the course director can retract it.⁸⁴ If not, it is submitted to the associate dean of student affairs who is responsible for the physicianship evaluation system.⁸⁵

The dean meets with the student to identify the problematic issues, to counsel and remediate, and refer the student to professional counseling if needed.⁸⁶ When promotions are before the quarterly academic screening committee, the course directors are asked about the student's progress in professional growth and the forms are discussed.⁸⁷ Course directors are notified of the student's educational needs to craft educational opportunities to help the student, like selecting an appropriate preceptor or clerkship sites that might best assist the student's development.⁸⁸

The purpose of the first and second year professionalism evaluation process is to help students understand why the evaluation is written, give them appropriate feedback on their behaviors, and help them develop ways to improve so they have a good start on becoming physicians.⁸⁹ The process is intended to be educational, not punitive.⁹⁰ Accordingly, the academic consequences are different for first and second year students receiving a form than for those in their third and fourth years.⁹¹

If multiple forms are received in years one and two, no mention of it is made in the dean's letter of recommendation for residency and the student is not necessarily placed on probation like would happen in the third and fourth years.⁹² But if a student receives more than one form during the first two years, and receives a subsequent form in the third or fourth year clerkships, the academic consequences

80. *Id.*

81. *Id.*

82. Papadakis, Loeser & Healy, *supra* note 51, at 1102.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Papadakis, Loeser & Healy, *supra* note 51, at 1102.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

are the same as having received two forms in the third or fourth years, because it "... indicates a persistent pattern of inappropriate behavior."⁹³

The behaviors that are assessed in the first and second year professionalism evaluation process focus on professional development issues that occur in the first two years of medical school which differ somewhat than those in the third and fourth years of clerkships.⁹⁴ First and second year Physicianship Evaluation Forms therefore emphasize student relationships with other students, staff and faculty within the learning environment.⁹⁵

The form also includes a code of conduct and a preamble stating that the purpose of the form is to note faculty concerns about the student behavior and to help him or her in developing physicianship skills.⁹⁶ It also gives examples of the kinds of behaviors that warrant the form.⁹⁷

The following behaviors are identified in the Physicianship Evaluation Form for first and second year students as those with which the student needs further education and assistance:

- Reliability and responsibility, for example: fulfilling responsibilities in a reliable manner; and learning how to complete assigned tasks.⁹⁸
- Self improvement and adaptability, for example: accepting constructive feedback; recognizing limitations and seeking help; being respectful to colleagues and patients; incorporating feedback in order to make changes in behavior; and adapting to change.⁹⁹
- Relationships with students, faculty, staff and patients, for example: establishing rapport; being sensitive to the needs of patients; establishing and maintaining appropriate boundaries in work and learning situations; and relating well to students, staff or faculty in a learning environment.¹⁰⁰
- Upholding the Medical Student Statement of Principles, the school code of conduct, for example: maintaining honesty; contributing to an atmosphere conducive to learning; respecting diversity; resolving conflicts in a dignified manner; using professional language and being mindful of the environment; protecting patient confidentiality; and dressing professionally.¹⁰¹

93. *Id.*

94. Papadakis, Loeser & Healy, *supra* note 51, at 1101.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1103.

99. *Id.*

100. Papadakis, Loeser & Healy, *supra* note 51, at 1103.

101. *Id.*

UCSF also has an Institutional Physicianship Evaluation Form which allows the dean, rather than course or clerkship directors, to note inadequate professional behaviors that occur outside of course work or clinical experiences.¹⁰² The form is generally completed and submitted after attempts to give the student feedback about the issues have been unsuccessful, although such attempts are not required for the form to be submitted.¹⁰³

If an Institutional Physicianship Evaluation Form is submitted, the dean meets with the student to assist the student with ways to improve the unprofessional behavior and allow the student to make appropriate changes.¹⁰⁴ The process is documented with the form.¹⁰⁵ The consequence of receiving an institutional physicianship evaluation is the same as that for receiving a Physicianship Evaluation Form for first and second year students.¹⁰⁶

The Institutional Physicianship Evaluation assesses deficiencies in professional and personal attributes that fall below the standards of professionalism inherent in being a physician.¹⁰⁷ They include the following behaviors:

- Unmet professional responsibility, for example: needs continual reminders in the fulfillment of responsibilities that are essential to being a medical student, which include responding in a reasonable manner to communications from the Offices of Curricular or Student Affairs; completing the requirements necessary to progress to clinical responsibility; and avoiding misrepresentation of financial aid information.¹⁰⁸
- Lack of effort toward self improvement and adaptability, for example: being resistant or defensive in accepting criticism; remains unaware of his/her own inadequacies; resists considering or making changes; does not accept responsibility for failure or for errors; is abusive during times of stress; and demonstrates arrogance.¹⁰⁹

102. *Institutional Professionalism (Physicianship Skills)*, UNIVERSITY OF CALIFORNIA, SAN FRANCISCO, http://www.medschool.ucsf.edu/professional_development/professionalism/physicianship_institutional.aspx (last visited April 1, 2011).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *UCSF School of Medicine Institutional Physicianship Evaluation*, UNIVERSITY OF CALIFORNIA, SAN FRANCISCO, http://www.medschool.ucsf.edu/professional_development/professionalism/pdf/physicianship.pdf (last visited April 1, 2011) [hereinafter *Institutional Physicianship Evaluation*].

108. *Institutional Physicianship Evaluation*, *supra* note 107.

109. *Id.*

- Diminished relationships with administrative faculty or staff, for example: behaves in an inappropriate manner with administrative faculty and staff (e.g. does not respect the professional role of the administrator); and does not respect professional boundaries in interactions with administrative faculty or staff.¹¹⁰

Finally, UCSF believes that a professionalism evaluation system is inadequate without professionalism teaching being done in the curriculum.¹¹¹ In that regard, UCSF focuses its professionalism training in the first two years of medical school with an orientation program for incoming students which introduces, defines and discusses professionalism, in addition to providing students with the code of conduct, the professionalism evaluation system process, and a handbook of related information.¹¹²

Training on professional skills also occurs in a year-long first year course, in intercession courses focused on ethics and personal reflection on professional development, in small group and collaborative learning opportunities, and with designated mentors assigned to students.¹¹³

SECTION III: USING THE UCSF MODEL IN LAW SCHOOLS

Law schools could use the UCSF professionalism assessment model to create similar assessment forms to identify deficiencies in law students' professionalism behaviors with opportunities for remediation and consequences for under-performance or outright non-compliance with the expected standards of professionalism. Such behaviors could be identified based on the traits and conduct that embodies professionalism in the legal profession.

For MacCrate, the fundamental values of the profession were summed up as (1) providing of competent representation, (2) promoting justice, fairness & morality, (3) improving the profession, and (4) professional self-development.¹¹⁴

The Conference of Chief Justices studied state definitions of professionalism and indicated that the most common definition "... related to the courtesy and respect that lawyers should have for their clients, adverse parties, opposing counsel, the courts, court personnel, witnesses, jurors, and the public."¹¹⁵ Others included "... an innate sense of morality and ethics, character, commitment, competence, fairness, integrity, civility, leadership, fidelity to the lawyer's role as officer of the court and respect for the rule of law."¹¹⁶

Furthermore, many states or state bar associations have adopted professionalism creeds that list common characteristics that denote

110. *Id.*

111. Papadakis, Loeser & Healy, *supra* note 51, at 1104.

112. *Id.*

113. *Id.*

114. Adam J. T. W. White, *Upholding the Oath of Competency While Filling the Indigent Void: Why the Law School Curriculum Should be Extended to a Fourth Year*, 11 FLA. COASTAL L. REV. 425, 436 (2010).

115. *National Action Plan*, *supra* note 2, at 36.

116. *Id.*

professionalism.¹¹⁷ In Ohio, these characteristics include loyalty, confidentiality, competence, diligence, and judgment to clients; fairness, integrity and civility to opposing parties, counsel and colleagues; respect, candor and courtesy to tribunals; promotion of the understanding and appreciation of the profession; and public service.¹¹⁸

All of these versions of professionalism echo similar characteristics, values, and behaviors that are expected of practitioners. Creating a list of professionalism behaviors for law student assessment can be modeled after these professionalism characteristics and defined in a Professionalism Evaluation Form similar to the Physicianship Evaluation Form used by UCSF. (Examples of Professionalism Evaluation Forms that law schools could adapt for their own use are at the end of this article.)¹¹⁹

When a student exhibited behavior that showed a lack of professionalism during a course, submissions of the Professionalism Evaluation Form could be made to the Dean of Student Affairs (or other appropriate dean) for determination of the validity of the allegations and for student counseling and remediation. Deficiencies in the conduct of first year students would be reported by the faculty members teaching first-year courses.

One observation that was noted by UCSF about its first and second year evaluation process was that it was important to have opportunities for prolonged observation of students in small-groups and one-on-one settings in order to effectively assess student behaviors.¹²⁰ This might require that law faculty create opportunities to observe students in small groups and one-on-one settings.

Some first year courses are already conducive to such one-on-one contact, like first year legal writing programs which typically involve multiple student conferences over the course of the year to help students develop their legal research and writing skills. Faculty members teaching other courses, however, could develop opportunities in their classrooms to observe students working in small groups on problems or projects, or could hold individual or small group student conferences during the semester to facilitate meaningful interaction with students. Many faculty members already engage in these types of activities in their courses by requiring group work on hypothetical problems in class, by assigning group projects, and by being available for individual or study group sessions.

The purpose of the first year professionalism evaluation would be primarily to help the student identify the problematic behaviors for interim counseling with a plan for remediation so that the student has opportunities to improve in those areas

117. See generally Am. Bar Ass'n Ctr. for Prof'l Responsibility, *Professional Codes, Commissions, and Reports*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html (last visited March 31, 2011).

118. SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO: STATEMENT ON PROFESSIONALISM app. § 5 (1997), <http://www.sconet.state.oh.us/LegalResources/rules/govbar/govbar.pdf>.

119. The forms that are attached are modeled after the UCSF Physicianship Evaluation Forms, available at http://www.medschool.ucsf.edu/professional_development/professionalism/index.aspx (last visited April 1, 2011). They incorporate the ideals and values identified in A Lawyer's Creed adopted by the Supreme Court of Ohio, SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO, *supra* note 118.

120. Papadakis, Loeser & Healy, *supra* note 51, at 1101, 1104.

in which he or she exhibited deficiencies. Focusing on remediation with first-year students would be essential because they have only been introduced to the culture of law school and the expectations of the legal professional, and are in the initial stages of developing appropriate professional identity. For that reason, the conduct in the first year professionalism evaluation form would be identified in relation to needing improvement.

After the first year, the purpose of professionalism evaluation would shift from remediation to defining a deficiency in the minimum standard of behavior that the student is expected to have already grasped. Accordingly, the upper-level form would list behaviors as those which the student failed to attain. Receiving an upper-level professionalism evaluation form would still result in discussion with the student about ways to remediate the conduct. However, the effect of receiving multiple upper-level forms, or a combination of at least one first year form and one upper-level form, would result in more severe consequences, as discussed more fully below.

Faculty members would submit Professionalism Evaluation forms for upper-level students who showed deficiencies in expected conduct during a course. For students taking courses where client, counsel or court contact was essential, like in-house and externship clinics, the forms could also be submitted by the supervising attorney of the students, whether or not they were faculty.

Students would also be subject to receiving a Professionalism Evaluation form for conduct outside of the boundaries of coursework, similar to the Institutional Physicianship Evaluation Form at UCSF.¹²¹ The behaviors that would be assessed in this capacity would be those that are critical to professional performance which occur within the law school, but outside of the dictates of a course. The Dean of Student Affairs (or other appropriate dean) would be responsible for submitting these forms for students having repeated professionalism lapses and failure to fulfill professional responsibilities in settings outside of coursework.

The effect of the submission of Professionalism Evaluation Forms would be significant for students, thus holding them accountable for the professionalism behaviors for which they are responsible as a lawyer in training. First year students who accumulated multiple Professionalism Evaluation Forms would not have such submissions noted academically, although such submissions would be documented in the student's record for future reference.

If a student accumulated at least one Professionalism Evaluation Form in their first year along with one in their upper-level years, or if the student accumulated more than one form in upper-level years, the consequence would be that the student would be placed on academic probation with the possibility of academic dismissal, whether or not the student was passing his or her courses. Additionally, the concerns about the student's professionalism performance would be noted to bar examination authorities when the school was asked to provide information about whether the student possessed the ethical qualifications necessary to be admitted to practice (similar to that which the school currently discloses with

121. Institutional Physicianship Evaluation, *supra* note 107.

reference to an honor code violation). This would assist bar admission agencies in assessing the character and fitness of law students.

CONCLUSION

Adopting professionalism assessment in any law school would require the school's student and faculty buy-in, which could be challenging. In that regard, helping students understand the purpose and use of the Professionalism Evaluation Forms would be essential. To that end, law schools might consider adopting a professionalism code of conduct and providing examples of the types of behaviors that warrant the form as UCSF did.¹²² There could be training on the evaluation process in an orientation session with new students, perhaps in conjunction with other professionalism programming offered in the orientation. In addition, faculty members would have to commit to working together to create a list of the values and behaviors of the profession that they want espoused at their law school. More importantly perhaps, faculty members would have to commit to enforcing the code of conduct.

Despite the challenges, engaging in professionalism assessment of law students would allow law schools to make the expectation of professional behavior explicit and part of the school's culture, thereby helping students to develop appropriate professional identity which would be carried into practice. This, in addition to continuing to develop extra-curricular professionalism programs as well as pervasively integrating professionalism in all law school courses, would better embed professionalism into legal education.

122. Papadakis, Loeser & Healy, *supra* note 51, at 1101.

EXAMPLES OF PROFESSIONALISM EVALUATION FORMS
FOR USE IN LAW SCHOOLS

First-Year Professionalism Evaluation

Student Name

Course

Course Instructor

Semester, Year

Course Instructor Signature

Signature of Dean

Date this form was discussed with
student

The student has exhibited one or more of the following behaviors that need improvement to meet expected standards of the legal profession. The student needs further education or assistance with the following:

Circle the appropriate category. Comments are required.

1. Reliability and responsibility:

- a. Fulfilling responsibilities in a reliable manner.
- b. Learning how to complete assigned tasks; taking initiative to find the answers to questions; carefully reading and following instructions.
- c. Being diligent and thorough in completing work.

2. Self improvement and adaptability:

- a. Accepting constructive feedback.
- b. Taking responsibility for actions.
- c. Recognizing limitations and seeking help.
- d. Incorporating feedback into conduct in order to make changes in behavior.
- e. Adapting to change.
- f. Contributing to an atmosphere conducive to learning.

3. Relationships with students, faculty, staff, and members of the legal profession:

- a. Relating well to fellow students, faculty or staff in a learning environment.
- b. Demonstrating respect to fellow students, faculty, staff, or members of the legal profession in a learning environment.
- c. Avoiding being hostile or argumentative.
- d. Establishing rapport with clients when presented with opportunities to work with them.
- e. Being sensitive to the needs of clients when presented with opportunities to work with them.

4. Upholding the Oath of Professionalism;¹²³

- a. Maintaining honesty.
- b. Engaging in actions that reflect highly on self, the School of Law, and the profession.
- c. Being principled.
- d. Having compassion.
- e. Engaging in dignified conduct.
- f. Maintaining civility.

Comments & Suggestions for Improvement:

To be completed by student:

I have read this evaluation and discussed it with the Dean of Student Affairs.

Student Signature

Date

My comments are: (optional)

123. All first-year students entering the University of Dayton School of Law take an Oath of Professionalism during their orientation prior to beginning courses at Dayton Law. The Oath of Professionalism is as follows: As I begin the study of law at the University of Dayton, I, _____, gratefully acknowledge the privileges inherent in becoming a lawyer and willingly accept the responsibilities that must accompany those privileges. From this day forward, I promise to do my utmost to live up to the high ideals of my chosen profession. I will remember that my actions reflect not only upon myself, but upon the University of Dayton School of Law and the legal profession. I vow to be a person of principle, compassion, strength, and courage. At all times, I will conduct myself with dignity and civility and show kindness and respect toward my classmates, teachers, and all persons. I have read the University of Dayton School of Law Honor Code, and I hereby commit that I will conduct my life in accordance with the values and standards expressed therein. This pledge I take freely and upon my honor.

available at http://community.udayton.edu/law/student_life/partners_in_the_profession.php (last visited April 6, 2011).

Upper-Level Professionalism Evaluation

Student Name_____
Course_____
Course Instructor / Supervising
Attorney_____
Semester, Year_____
Course Instructor / Supervising
Attorney Signature_____
Signature of Dean_____
In-house / Externship Clinic Name (if
applicable)_____
Date this form was discussed with
student

A student with a pattern of the following behavior has not sufficiently demonstrated professional growth and personal attributes for meeting the standards of professionalism inherent in being a lawyer:

Circle the appropriate category. Comments are required.

1. Unmet professional responsibility:

- a. The student needs continual reminders in the fulfillment of responsibilities to clients, to courts, to opposing parties and their counsel, or to their colleagues.
- b. The student cannot be relied upon to complete work in a diligent and thorough manner.
- c. The student misrepresents or falsifies actions and/or information.

2. Lack of effort toward self improvement and adaptability:

- a. The student is resistant or defensive in accepting criticism.
- b. The student remains unaware of his/her inadequacies.
- c. The student resists considering or making changes.
- d. The student does not accept blame for failure, or responsibility for errors.
- e. The student is unprofessional during times of stress.
- f. The student demonstrates arrogance.
- g. The student lacks common sense, maturity and good judgment.
- h. The student repeatedly fails to demonstrate appropriate behavior or etiquette in a professional setting.

- i. The student refuses to acknowledge that his/her actions and demeanor reflect on the legal profession and our system of justice, and/or does not conduct him/her-self accordingly.

3. Diminished relationships with members of the legal profession:

- a. The student is habitually disrespectful, antagonistic, or belligerent with classmates, faculty, staff or others in the legal profession.
- b. The student does not demonstrate concern for the reputation or well-being of colleagues in the legal profession.

4. Diminished relationships with clients, opposing counsel, and courts when presented with opportunities to work with them:

- a. The student inadequately establishes rapport with clients.
- b. The student is often insensitive to the client's feelings, needs or wishes.
- c. The student has inadequate personal commitment to honor client confidentiality.
- d. The student is not worthy of a client's trust.
- e. The student is disrespectful to clients; opposing parties or their counsel; or court, tribunals or others who assist them.
- f. The student does not act courteously and/or with civility with opposing counsel or the courts.
- g. The student does not make an effort to communicate, to resolve differences, or to make disputes dignified with opposing counsel.

Comments:

Appropriate plan of action to pursue when counseling the student:

To be completed by student:

I have read this evaluation and discussed it with the Dean of Student Affairs.

Student Signature

Date

My comments are: (optional)

Institutional Professionalism Evaluation

Student Name

Date Form Completed

Signature of Dean

Date form was discussed with student

The Institutional Professionalism Evaluation has been submitted on the student because s/he has demonstrated insufficient professional and personal attributes to meet the standards of professionalism inherent in being a lawyer:

Circle the appropriate category. Comments are required.

1. Unmet professional responsibility:

The student needs continual reminders in the fulfillment of responsibilities that are essential to being a law student at Dayton Law. These responsibilities include but are not limited to: (a) responding in a reasonable manner to communications from the Offices of the Registrar, Financial Aid, and Student Affairs; (b) timely completing the registration and financial aid requirements; and (c) avoiding misrepresentation of financial aid information.

- a. The student cannot be relied upon to communicate effectively.
- b. The student does not complete essential responsibilities in a timely manner.
- c. The student misrepresents or falsifies actions and/or information.

2. Lack of effort toward self improvement and adaptability:

- a. The student is resistant or defensive in accepting criticism.
- b. The student remains unaware of his/her own inadequacies.
- c. The student resists considering or making changes.
- d. The student does not accept responsibility for failure or for errors.
- e. The student is unprofessional during times of stress.
- f. The student demonstrates arrogance.
- g. The student lacks common sense, maturity and good judgment.
- h. The student repeatedly fails to demonstrate appropriate behavior or etiquette in a professional setting.

3. Diminished relationships with administrative faculty and staff:

- a. The student behaves in an inappropriate manner with administrative faculty and staff (e.g. does not respect the professional role of the administrator).
- b. The student does not respect professional boundaries in interactions with administrative faculty or staff.

Comments:

Appropriate plan of action to pursue when counseling the student:

To be completed by student:

I have read this evaluation and discussed it with the Dean of Student Affairs.

Student Signature

Date

My comments are: (optional)

Pillars of Professionalism*

Professionalism focuses on actions and attitudes. A professional lawyer behaves with civility, respect, fairness, learning and integrity toward clients, as an officer of the legal system, and as a public citizen with special responsibilities for the quality of justice.

Admission to practice law in Kansas carries with it not only the ethical requirements found in the *Kansas Rules of Professional Conduct*, but also a duty of professionalism. Law students who aspire to be members of the Kansas bar should also heed these guidelines. Kansas lawyers have a duty to perform their work professionally by behaving in a manner that reflects the best legal traditions, with civility, courtesy, and consideration. Acting in such a manner helps lawyers preserve the public trust that lawyers guard and protect the role of justice in our society. Lawyers frequently interact with clients, courts, opposing counsel and parties, and the public at large. A lawyer's actions also reflect on the entire legal profession. With those interactions in mind, the following Pillars of Professionalism have been prepared. These Pillars should guide lawyers in striving for professionalism.

With respect to clients:

1. Respect your clients' goals and counsel them about their duties and responsibilities as participants in the legal process. Treat clients with courtesy, respect, and consideration.
2. Be candid with clients about the reasonable expectations of their matter's results and costs.
3. Encourage clients to act with civility by, for example, granting reasonable accommodations to opponents. Maintaining a courteous relationship with opponents often helps achieve a more favorable outcome. Counsel clients against frivolous positions or delaying tactics, which are unprofessional even if they may not result in sanctions.
4. Counsel clients about the risks and benefits of alternatives before making significant decisions. Act promptly to resolve the matter once the relevant facts have been obtained and a course of action determined.
5. Communicate regularly with clients about developments. Keep them informed about developments, both positive and negative.

With respect to courts:

1. Treat judges and court personnel with courtesy, respect, and consideration.
2. Act with candor, honesty, and fairness toward the court.

1

3. Counsel clients to behave courteously, respectfully, and with consideration toward judges and court personnel.
4. Accept all rulings, favorable or unfavorable, in a manner that demonstrates respect for the court, even if expressing respectful disagreement with a ruling is necessary to preserve a client's rights.

With respect to opposing parties and counsel:

1. Be courteous, respectful, and considerate. If the opposing counsel or party behaves unprofessionally, do not reciprocate.
2. Respond to communications and inquiries as promptly as possible, both as a matter of courtesy and to resolve disputes expeditiously.
3. Grant scheduling and other procedural courtesies that are reasonably requested whenever possible without prejudicing your client's interests.
4. Strive to prevent animosity between opposing parties from infecting the relationship between counsel.
5. Be willing and available to cooperate with opposing parties and counsel in order to attempt to settle disputes without the necessity of judicial involvement whenever possible.

With respect to the legal process:

1. Focus on the disputed issues to avoid the assertion of extraneous claims and defenses.
2. Frame discovery requests carefully to elicit only the information pertinent to the issues, and frame discovery responses carefully to provide that which is properly requested.
3. Work with your client, opposing counsel, nonparties, and the court to determine whether the need for requested information is proportional to the cost and difficulty of providing it.
4. Maintain proficiency, not only in the subject matter of the representation, but also in the professional responsibility rules that govern lawyers.

5. Be prepared on substantive, procedural, and ethical issues involved in the representation.

With respect to the profession and the public:

1. Be mindful that, as members of a self-governing profession, lawyers have an obligation to act in a way that does not adversely affect the profession or the system of justice.
2. Be mindful that, as members of the legal profession, lawyers have an obligation to the rule of law and to ensure that the benefits and the burdens of the law are applied equally to all persons.
3. Participate in continuing legal education and legal publications to share best practices for dealing ethically and professionally with all participants in the judicial system.
4. Take opportunities to improve the legal system and profession.
5. Give back to the community through pro bono, civic or charitable involvement, mentoring, or other public service.
6. Defend the profession and the judiciary against unfounded and unreasonable attacks and educate others so that such attacks are minimized or eliminated.
7. Be mindful of how technology could result in unanticipated consequences. A lawyer's comments and actions can be broadcast to a large and potentially unanticipated audience.
8. In all your activities, act in a manner which, if publicized, would reflect well on the legal profession.

* The late Chief Justice Robert E. Davis (1937-2010) inspired these pillars of professionalism. The Chief Justice "always maintained his sense of grace and civility" and was a model of professionalism. See 79 J. Kan. B. Ass'n. 10 (Oct. 2010). Chief Justice Davis cited the pillars in the Ralph Waldo Emerson poem "A Nation's Strength" to inspire and recognize the staff of the Kansas Legal Services and, thus we believe it is fittingly used here. See 79 J. Kan. B. Ass'n. 9 (Jan. 2010). We dedicate these pillars of professionalism to the memory of Chief Justice Davis.

Criminal Justice

See the Video: Angry Judge Blasts 'Backseat Driver' Appellate Counsel in High-Profile Murder Case

Posted Oct 9, 2012 2:37 PM CDT

By Martha Neil

In an action-packed Sept. 28 hearing, a Kentucky senior judge blasts an appellate lawyer seeking a new trial for his client in a high-profile murder case.

As the camera rolls, retired Jefferson Circuit Judge Martin McDonald repeatedly criticizes assistant public advocate David Barron and cuts him off as he tries to offer a few thoughts in response to claims that the attorney is "unethical" and a "backseat driver" who is "making a mountain out of a molehill" rather than a "real" trial lawyer.

At a couple of points, as portrayed in video clips linked to a Louisville Courier-Journal article, the judge also speaks directly to Barron's client, Roger Dale Epperson.

Epperson, along with another defendant, Benny Lee Hodge, was convicted and sentenced to death in two separate home-invasion slayings in the Letcher County area, within a few months of each other, over 25 years ago, that began with a plan to rob the victims. As detailed in Darcy O'Brien's true-crime novel, *A Dark and Bloody Ground*, the crime spree also involved a plan to rob a wealthy doctor of nearly \$2 million in cash he kept in a safe at his home. Eventually, some of that cash reportedly may later have been used by the two men to retain a colorful defense lawyer. Both eventually claimed ineffective assistance of counsel but remain on death row. A third defendant, who testified against them, got life.

Barron is now representing Epperson in an effort to get a new trial in the second of those death penalty convictions, concerning the murder of the doctor's daughter, Tammy Acker, and the hard-fought appeal is clearly getting on McDonald's nerves.

During the Sept. 28 hearing, the judge sharply rebukes Barron in front of his client for calling McDonald on his cellphone at some point previously. However, the judge cuts off the attorney as he tries to explain that he made the call, with the permission of opposing counsel, to a number supplied by the court system, to discuss a scheduling matter.

"If you ever call me again on my cellphone I'll strangle you. You understand?" says the judge, as Barron quickly interjects "I apologize" before the judge rolls on: "I'm telling you, you were unethical, it was improper and then you go to the supreme court and complain, because I told you that we're plowing ahead with this thing, and you complained about information that you improperly obtained through your unethical ex parte contact with the court. Now that is out of bounds. That is totally out of bounds. And if you ever do it again I will send you to the bar association and try to get your bar license yanked. Do you understand that? Yes or no?"

Barron: "I do understand and I have to clarify one thing on that—"

McDonald: "Negative. Be quiet. Now Mr. Epperson," the judge continues, as, speaking directly to Barron's client, he asks Epperson whether he wants to remain for the rest of the hearing. When Epperson says he doesn't, McDonald has him removed from the courtroom and, presumably, returned to prison.

"Have a safe trip back," he tells the defendant.

http://www.abajournal.com/news/article/jefferson_circuit_kentucky_judge_martin_mcdonald_backseat_drive...

As Barron then apparently tries again to explain about what the court had told him to do to contact McDonald, the judge cuts him off anew:

"Your honor, may I request clarification on one thing?" asks Barron, as he explains that he's trying to follow the court's directions.

"Negative," responds the judge, adding a moment later, after listing briefly to the question. "I want you to be quiet. Thank you."

Shortly after that on the video, McDonald murmurs, "The DPA is making a mountain out of a molehill here," apparently referring to the state's department of public advocacy.

Things simmer down for a moment, now that Epperson has exited, as Barron explains his plan to present a witness. The judge tells the appellate lawyer "You are an optimist," and Barron respectfully agrees that it's a necessary job qualification.

But then the judge erupts again:

"I would appreciate DPA sending lawyers who actually are trial lawyers, and not some backseat drivers, that's what I would appreciate. You've never been in the heat of the battle in one of these cases, and now you're criticizing lawyers that actually are real lawyers that do the work, the dirty work, the down in the trenches work. That's what I find distasteful and disgusting about this whole business."

Meanwhile, the judge opted to call—and himself question—one of Epperson's trial lawyers, then tries to limit the number of witnesses and arguments about the case, the Courier-Journal reports.

After hearing only the one Epperson trial lawyer as a witness, the newspaper recounts, McDonald called the hearing "a huge waste of time" and said Barron's allegations "bordered on the ridiculous."

The judge relented, however, as the assistant commonwealth's attorney, fearing an issue on appeal, urges the judge to allow her opposing counsel more leeway, and allowed the hearing to continue.

Several law professors quoted in the newspaper article said the judge's conduct suggested he was not impartial, and Barron told the Courier-Journal that McDonald's conduct at the hearing "about as unprofessional as any I have ever seen in nine years of representing death penalty defendants in state and federal courts."

The article doesn't include any response from McDonald or the judge in charge of the Jefferson County court system, and the McDonald did not respond to a phone message on Tuesday afternoon from the ABA Journal. However, as a United Press International notes, the judge has said that his threat to strangle Barron was facetious, and his tone of voice on the video also indicates that it was simply a figure of speech.

Related material:

Associated Press: "New DNA could alter death row inmate's fate"

Chicago Tribune (book review): "Evil In The Form Of A Flashy, Greedy Lawyer"

The Mountain Eagle: "Judge rejects motion from 1 of 2 Acker killers who are on Death Row"

University of Tennessee Special Collections Online: "Finding Aid for the Donald Paine Collection of State of Kentucky v. Epperson and Hodge MS.2807"

Updated on Oct. 11 to include information from United Press International.

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CIVILITY & THE FAMILY LAW GLADIATOR

BY MOSHE JACOBUS

Zealous advocacy and good manners *can* go hand in hand

ON APRIL 1, 2009, the Domestic Relations Division of the Circuit Court of Cook County adopted new civility rules for the governance of the division. The Circuit Court of Cook County is the largest unified court system in the United States with approximately 400 judges. It is hoped that these rules will have an impact on a gathering national movement to inject more civility into family law practice by helping lawyers be more considerate, polite, and professional in dealings with their brethren and the court.

Although many practicing matrimonial attorneys act in a reasonable and courteous manner, many judges and commentators in the area of attorney professionalism have noted a deterioration of conduct among attorneys and toward the

bench, particularly in the area of family law. Many rationales have been given, including shifting values, the inherent stressors of the law business, and society's increased litigiousness, but perhaps the emotional nature of family law litigation and the anguish that many litigants experience is the paramount reason for so much conflict.

In their groundbreaking work, *Lawyers and Their Clients: Power and Meaning in the Legal Process*, Austin Sarat and William Felstiner point out that attorneys often take on the persona of their clients, adopting a gladiator mentality that insists there must be a winner in each case and it must be their client. Attorneys seem to believe that if they are aggressive and loud, their practices will benefit. They fail to realize that a soft-spoken approach is many times more effective than a strident, uncompromising one.

Radical change is needed: In 2006, the chair of the American Bar Association Family Law Section, Judge Howard Lipsey of Rhode Island, chose to make the issue of civility in family courts a focus of his leadership. In May 2006, the ABA Family Law Section adopted civility standards for family law practices. Numerous Inns of Courts have resolved to work toward improved civility in the courts, and several states have adopted civility rules in family law cases. All of these efforts are welcome. However, if attorneys do not internalize the true importance of civility in family law disputes and effectuate a *radical* change in how they approach their cases, family law litigation will ultimately evolve to an apparition of its present state.

The Circuit Court of Cook County civility rules address attorney conduct in court and insist on professionalism and courtesy. Attorneys must at all times "act reasonably to protect minor children of the parties engaged in a dispute from adverse effects of the proceedings." The rules deal with discovery conduct and seek to prevent scheduling abuses. (See Cook County civility rules, at http://www.cookcountycourt.org/rules/rules/court_rules.html.)

Aspiration triggers action: Some oppose the promulgation of civility rules, arguing that the conduct they regulate is already proscribed by rules of professional conduct for attorneys. Some even insist that new rules might exacerbate disruptive or inflammatory conduct by inviting disputes and arguments over compliance and litigation to effectuate enforcement. One final criticism is that such rules inhibit zealous advocacy. The committee that recommended the circuit court's rules rejected these arguments believing that aspirational rules can educate lawyers and help change the litigation landscape and the culture, engendering greater consideration and respect among counsel and the court.

It has been argued that unless the legal profession regulates itself in the area of professionalism, other means of resolving disputes will trump the litigation model. We are already beginning to see more states adopt ADR models, such as mediation and collaborative law, to resolve family law disputes. Legal scholars have even proposed that attorneys have an affirmative duty to advise their clients of ADR and propose a malpractice claim for failure to do so.

After I gave a talk on the new Cook County rules, one attorney came up to me and asked, "Why don't the rules provide for sanctions?" I tried to explain that providing sanctions in the rules would belie the whole idea of civility. Excessive enforcement actually undermines civility. The rules uphold tolerance by restraining enforcement and reinforcing respect among all parties and the court. An aspira-

tional civility rule also minimizes monitoring costs.

A court always has the authority to order sanctions for egregious conduct. However, civility rules establish a template and an environment within which lawyers can learn to navigate. When things start getting out of hand, the judge can now cite the applicable civility rule to cajole counsel and the parties and corral them back to the "default position" of polite and civilized communication and upright conduct.

To internalize the importance of these rules we need to travel back to our goals upon graduating from law school—to *help humanity and pursue justice*. If we see ourselves as transmitters of the grandeur of the law, we will be less inclined to engage in crass conduct that demeans the legacy of attorneys and jurists we can only dream of emulating. Today we are all impressed by the biographies of great jurists, such as Marshall, Holmes, Brandeis, and Cardozo. When we read of the work and cases in which Thomas More, Thurgood Marshall, John Philpot Curran, Morris Dees, Clarence Darrow, and so many others toiled, we are impressed with their great exploits in the law. Some of the greatest lawyers acted as great advocates for their clients without falling prey to abusive or impertinent conduct.

Michael E. Tigar, in his important article, "Litigators' Ethics," 67 *Tennessee Law Review* 409 (Win. 2000), gives salient examples of how immortal lawyers succeeded with grace and dignity. James Otis, the great Boston lawyer, argued against writs of assistance that the British troops used to break down the doors of colonial merchants. He did so forcefully, without rancor, and with great conviction. After Otis gave a speech against the writs of assistance, John Adams wrote, "Then and there the child independence was born."

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Being civil and assertive: We look up to the lawyer Thomas Erskine. In a famous seditious libel case, the jury found the defendant "guilty of publishing only." The word "only" was important because with that word the defendant could not be considered guilty. The judge, formerly Erskine's tutor, told him to "sit down, or he shall be obliged to interpose in some other way." To that threat Erskine replied, "I stand here as advocate for a brother citizen, and I demand that the word 'only' be recorded. Your Lordship may interpose in any manner you think fit. I know my duty as well as your lordship knows his. (Tigar, *supra*)" Erskine's conduct clearly demonstrates that we can be respectful to each other and still adhere to our convictions. Being civil does not mean that you can't assert yourself.

In his slender but useful book, *Choosing Civility*, P.M. Forni teaches us that we can stand our ground and insist in

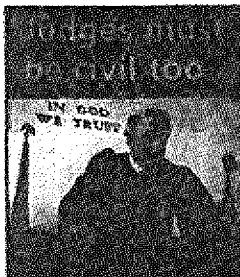
the rightness of our cause, but do it in a respectful way. There is nothing wrong in disagreeing with someone and saying "no." Forni points out that saying "no" to someone means saying "yes" to ourselves. As long as we do it with empathy and reason, we are not transgressing any civility proscription. Reason and logic will vindicate any argument much more effectively than heat and disputation.

We must also distinguish between severities of conduct. Because family law litigation is so fraught with emotion, some reasonable allowance must be permitted for lawyers to vent their clients' frustrations. Not all contrary, forceful conduct violates civility rules. Conduct must be egregious and have a deleterious effect on the court proceedings to fall under the uncivil rubric. It is permissible to allow attorneys to vent a bit so that clients' frustrations can be expressed in a courteous manner that avoids strife and vituperation. Name-calling, smear tactics, and degrading language directed toward the parties or the court is distasteful, degrades the

cost and legitimacy. If lawyers act as professionals and avoid crass attacks as well as questionable tactics in their litigation strategies, the public will appreciate the effort and hold attorneys in higher esteem.

Rather than falling prey to a client's discontent, attorneys must convince the client that anger at a spouse or a child's other parent cannot result in a positive resolution of the dispute. Perhaps we can't all achieve the morality and decency of Atticus Finch; yet, we should strive to act in the same vein because achieving high standards is our charge in making the law an instrument of justice.

In sum, civility rules governing family law litigation should not be seen as a utopian dream that will never be actualized. They must be internalized and seen as a realistic necessity in litigating issues involving families in the twenty-first century. The expectation of the public is changing because of increasing access to other avenues for resolving family disputes. The culture of litigation must evolve if the courts are to maintain a foothold in resolving family dis-



or attorneys, it is hardly realistic to expect that attorneys will be motivated to act in a more elegant manner. Judges face many pressures in family law cases and must constantly monitor adherence to their oath of treating all people with respect and exhibiting appropriate temperament and humility, the hallmarks of being a judge. A judge's intemperate conduct or inappropriate remark is in direct derogation of

An important corollary for implementation of civility rules is the absolute necessity that judges engage in civil conduct and refrain from any vituperative language directed at attorneys or litigants. If the judge engages in demeaning conduct toward parties

the rules of civility for attorneys and litigants. Such conduct undermines the rationale and purposes of civility rules. Curtis Bok, a Pennsylvania common pleas court judge and eloquent author, expressed this sentiment forcefully in his book, *I, Too, Nicodemus*:

A good judge must have an enormous concern with life...and a sense of its tempestuous and untamed streaming. Without such fire in his belly, as Holmes also called it, he will turn into a stuffed shirt the instant a robe is put around him. The first signs of judicial taxidermy are impatience with trivial matters.... Let him be quick, if he must be, but not unconcerned, ever. Worse than judicial error is it to mishandle impatiently the small affairs of momentarily helpless people.

—M.J.

process, and should be avoided at all cost. This is conduct that should not be tolerated under any circumstances.

Christopher Piazzola has articulated compelling public policy considerations in furtherance of civil culture in family law litigation. See also Christopher Piazzola, "Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule," 74 *University of Colorado Law Review* 1197 (Sum. 2003). Civil advocacy preserves the social order and furthers the public good. It reinforces the idea that in our society disputes are resolved through the law and not through force. It promotes judicial efficiency by cutting down on wasteful argument and unproductive conduct that does not advance resolution of the dispute.

Civility maintains the public's trust in the legal system. This is because an equitable, civilized approach to dispute resolution impresses all those who observe it. The latter is of paramount consideration for all lawyers. We know that the public is skeptical of the legal process and often questions its

process. Courts and attorneys must accommodate the public's expectation that family law litigation be civilized, reasoned, productive, and sensitive to the needs of those seeking justice through the courts. The organized family law bar can only benefit from adhering to and respecting rules of civility. The utility and necessity of this "categorical imperative" is self-evident. All of us must work together to help bring about this better tomorrow. **FA**



Moshe Jacobius has served as presiding judge of the Domestic Relations Division of the Circuit Court of Cook County, Illinois, since July 2000. From January 11, 1991, to July 2000, he served as a judge in the domestic relations division, except for a five-month stint in the chancery division. He has lectured widely in the area of domestic relations and was appointed by the Illinois Supreme Court to its Special Committee on Child Custody and Committee on Courtroom Security.

The Role of the Judiciary in Fostering Professionalism & Civility (The Benchers—Nov/Dec 2011)

By Judge Jesse G. Reyes

"And do as adversaries do in law, Strive mightily, but eat and drink as friends." —The Taming of the Shrew

Every day in courtrooms throughout our country judges interpret, apply, and through precedent, develop the laws which we, as a society, are expected to abide by in order to co-exist in a civil manner. Our system of justice was formed and developed by our Founding Fathers in order to form a more perfect union. Our nation's courtrooms were established as the venue where individuals could peacefully and rationally resolve their disputes. However, social commentators have suggested that the public forum where this noble experiment is conducted is far from a civil and professional environment. In fact, the common perception is that the advocacy which takes place in our courthouses is fraught with unprofessional and uncivil behavior. In 2002, the American Bar Association published a study where the public expressed an unflattering view of the legal profession and lawyers. The ABA's report revealed that many of those surveyed perceived lawyers as driven by profit and self-interest rather than the client's interest and as manipulators of both the system and truth.

For many outside of the legal profession, the law has become much more a profit-making business than an honorable profession. A common characterization of the conduct of lawyers is that they are rude, discourteous, and abrasive. For confirmation of this public perception one only need look to popular culture's depiction of the modern-day lawyer in film, television and print. In the movie *The Firm*, a young lawyer, Mitch McDeere, joins a prestigious law firm that turns out to be a front for a crime syndicate and where partners authorize the murders of their own associates. In recent years many fictional novels such as *The Rainmaker*, *A Civil Action*, and *The Runaway Jury* depict lawyers as dishonest and despicable. Perhaps the negative portrayal of lawyers in popular culture is one of the reasons there is such a disgust and distrust of attorneys. These depictions do not positively promote the image of lawyers nor does it serve to enhance the public's confidence in the profession. However, we should be mindful that lawyers in America were not always considered the shysters of society but actually were viewed as dignified members of the community. In fact, during most of America's history, people thought that lawyers could be trusted and that the profession had considerable prestige. Former U.S. Supreme Court Justice Sandra Day O'Connor wrote in her memoirs, "Few Americans can even recall that our society once sincerely trusted and respected its lawyers." So how

do we return to the days of the popular lawyer heroes? How do we return to the era of Atticus Finch, Perry Mason, and Henry Drummond?

One way of accomplishing this goal is for the members of the judiciary to take a more active role in fostering professionalism and civility within the legal profession. Tradition dictates that we as judges have an obligation to participate in this type of endeavor. The English Inns of Court have a time-honored tradition and practice of "pupillage"—the sharing of wisdom, insight, and experience of seasoned judges and lawyers with newer practitioners. Today, this same tradition is carried out in the American Inns of Court in this country. Furthermore, as members of the judiciary we are uniquely positioned to undertake this task. As judges we have a sworn duty to perform this service to the profession and to the public. Because in carrying out this effort, we will be contributing and advancing the administration of justice. We should remember it is our profession that is under attack and we have a responsibility to future generations to protect it. Whether or not the public's perception is entirely accurate, we must acknowledge that it exists. Therefore, we should not idly stand by while the screenwriters, novelists and stand-up comics continue to disparage our profession. The time to act is at hand and passivity is no longer the word of the day.

The best means by which to perform this task is for judges to quite clearly communicate what it is they want. This can be accomplished through their words and by their conduct on and off the bench. Specifically, we should propose adherence to three basic values: Respect, Reliability, and Reputation. We can call them the three "Rs" of the profession.

Respect

"People seldom improve when they have no other model but themselves to copy after." —Oliver Goldsmith

As jurists we should set the standard and example for the lawyers to follow. As a young lawyer I would arrive early to court and observe the various judges in our courthouse while they were on the bench. I would take note of how they would conduct themselves and how they ran their courtrooms. We should keep in mind that there are young lawyers who are now observing us and we should conduct ourselves accordingly. We should demonstrate and communicate respect by treating the litigants and the lawyers with civility and personal courtesy. We should maintain control of all proceedings which are conducted before the bench. We should define civility in the courtroom with leadership marked by a deep commitment and respect of the law. Accordingly, we should encourage lawyers in our courtrooms to adhere to these same standards. Through our own conduct and words, we should encourage lawyers to always be cordial, courteous, and civil to one another. In stressing respect of the process we should emphasize that we will not permit personal attacks of any kind. Nor will we allow disparaging remarks to be made regardless of the context. The lawyers who appear before us must realize we will not allow counsels to interrupt each other unless to make an appropriate

objection. One of the best opportunities for lawyers to either shine or tarnish their image before the court is in their choice of language and use of tone. Therefore, lawyers should refrain from using words that will most likely elicit an emotional response or reaction from opposing counsel. By doing so the lawyer has definitely taken the high road and not the bait. "The character of every act depends upon the circumstances in which it is done." —Oliver Wendell Holmes. In showing respect to the court lawyers should also strive to be courteous to the judge's staff being mindful to remember that they are an extension of the court.

As jurists we need to communicate through our actions and words that civility is not a sign of weakness but an indication of strength. Justice Anthony Kennedy remarked "civility is the mark of an accomplished and superb professional." Judge Rhesa Hawkins of the Fifth Circuit has stated "civility is the mark of a true lawyer, a true professional." Thus, conducting oneself through civility does not mean a lawyer cannot be an advocate. In fact, an attorney has an ethical obligation to represent their clients zealously. Thus, through our communications to counsels we must remind them that the essence of advocacy is persuading someone to alter their view or perception through effective persuasion. The use of civility will not only serve to enhance the advocate's effectiveness, it will also serve to restore the public's trust in the profession.

Reputation

"Reputation, reputation, reputation! O, I have lost my reputation! I have lost the immortal part of myself, and what remains is bestial." — Cassio in Othello

One of the repercussions from uncivil behavior is the damage to the lawyer's reputation. Here, judges as well can pave the way to a sound reputation through words and action. A judge establishes a reputation over time by communicating, directly or indirectly, the conduct that will be tolerated. Many judges have standing orders that set forth the procedures lawyers are to follow in court. Prior to trial some judges will provide verbal and written instructions on how counsels are to handle exhibits, witnesses, and themselves during the proceedings. By being clear in their communication, judges can establish a reputation of professionalism and civility and also outline what will be expected of the lawyers who appear in their courtrooms. Reputation is how counsels will be known in the legal community. Before entering the courtroom a judge will know by the lawyer's reputation who will be stepping up to the bench. What type of reputation it will be is entirely within the lawyer's control. We determine what our reputation will be in the community. When necessary the court should remind counsel that it is the lawyer and not the client who conducts the matter in court.

Reliability

"Watch your words, for they become actions." —Unknown

As judges we should set the standard for reliability by being prepared to preside over and commence the matter as scheduled. We must punctually and diligently hear all cases assigned and be thoroughly prepared to render judgment. Judges should act prudently but decisively and render rulings efficiently and without delay. Hearings, conferences, and trials should be scheduled with appropriate consideration to the schedules of lawyers, parties, and witnesses. Jurists should act judicially in the granting of continuances because unnecessary delays only add to the anxiety and cost of litigation. Lawyers should arrange their work schedules in order to achieve the maximum productivity. The pressures of the practice of law can be overwhelming but lawyers must find the means by which to complete their time sensitive work product. Otherwise, the lawyer's day before the judge may prove to be a very long one if the court imposed deadline has not been met. To avoid this dilemma stay with the task until it is completed. Judges learn very quickly upon whom they can rely. Along those lines lawyers should be reliable in their communications. If you make a commitment verbally or in writing to provide a document or produce a witness by a certain date then do so. In essence, reliability means following through on our commitments and doing what we say we will do. When we are reliable, others can count on us, and by conducting ourselves accordingly we can count on each other to improve the image of our profession.

Justice Oliver Wendell Holmes once remarked, "Greatness is not in where we stand, but in what direction we are moving. We must sail sometimes with the wind, and sometimes against it—but sail we must. And not drift, nor lie at anchor."

We also should be cognizant of the fact that an individual judge can only address the unprofessional conduct that occurs in the jurist's courtroom. If we make a difference in the professional life of one attorney then there is one less attorney that the public can criticize. However, away from the bench a judge can have a significant impact by participating in outreach programs for the community at large and for the young people attending schools in the various communities in which we reside. Ultimately, the responsibility for fostering professionalism and civility can not solely be conducted by the members of the judiciary. This effort must be shared by the various institutions and entities that comprise the practice of law. Therefore, to enhance the image of our profession through professionalism and civility we must look to the law schools, law firms, bar associations, and the American Inns of Court, which make up the fabric of our profession. Together we may be able to stem the tide of public's negative view of our profession. Together we should strive to heed the words of William Shakespeare "And do as adversaries do in law, Strive mightily, but eat and drink as friends." The sooner we do so, the sooner the public may take notice and change their perception of our profession.

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Professionalism: Beyond Ethics (The Benchers—September/October 2011)

By Donald W. Lemons

Some years ago when I was practicing law, I was sitting at a luncheon table in a room filled with several hundred members of the Bar. The luncheon speaker was addressing the subject of ethics and professionalism. He told the assembled crowd that it was very easy: "If you want to avoid getting into trouble as a lawyer, just remember the lessons your mother taught you; remember what your elementary school teachers taught you; remember what you learned from your rabbi, minister, or priest; you will do just fine." It took all the civility and strength that I could muster to keep from standing and shouting, "No, No, that is a formula for disaster!"

While professionalism embraces aspirational values of civility, courtesy, public service, and excellent work product, legal ethics rules express the lowest level of permissible conduct at the bar, below which you are subject to discipline. Sometimes the rules are detailed and precise; at other times they are subject to interpretation. Often they are morally neutral. For all of these reasons, you can't rely upon your mother to stay out of trouble as a lawyer! My mother was a nice woman who lived an upright and moral life—but she never read the Rules of Professional Conduct!

When it comes to compliance with the rules of legal ethics, there is no substitute for knowing the rules. You wouldn't think of practicing tax law without knowing the IRS code; you wouldn't think about being a trial lawyer without knowing the rules of procedure and evidence. Why would anybody practice law without knowing the base-line rules regarding ethical conduct expected of a member of the bar?

When I was practicing law, I would receive phone calls, usually late at night, from lawyers seeking advice about their conduct. These lawyers didn't know the rules and were seized with panic. There is no substitute for learning the rules, anticipating problems, and knowing the right course of conduct before the problem arises. It is like baseball. When you are in the batter's box, your bat is in your grip, and the pitcher is winding up—it's too late to say I don't want to play!

But professionalism is different. Of course it includes adherence to the expectations of the Rules of Professional Conduct. Throughout the nation, various bar associations have promulgated professionalism and civility creeds. They have similar themes:

- Respect for the law and the system of justice
- Integrity and trustworthiness
- Maintenance of competence and excellent work product
- Leadership and Community Service
- Provision of pro-bono legal service
- Civility and courtesy

Let us consider these building blocks of professionalism.

Respect for the law and the system of justice. What does that mean? Simply stated it embraces two very important concepts—commitment to the client's cause above self-interest and commitment to the system of justice itself and to a lawyer's role as an officer of the court. It is a privilege to hold a client's cause in your hands and to pursue and protect their interests within the bounds of proper conduct. It is a privilege to be an officer of the court—a vital link in sustaining the rule of law that holds our society together.

Integrity and trustworthiness. Does this idea need definition? Apparently, it does. In public opinion polls, lawyers do not fare well on the honesty scale. To be fair to the bar, part of the reason is a simple misunderstanding of the lawyer's role in an adversary system. After all, some people may wonder why we believe that it is virtuous to be able to argue with passion either side of the same issue. There is more to it than misunderstanding.

When I was a member of our disciplinary committee, I frequently heard about lawyers lying to clients about what the lawyers thought were small things. A client calls and the lawyer tells the receptionist, "Tell them I am not here." A client asks for a progress report and the lawyer tells the client, "It's almost finished" and in reality the work has not yet begun. These aren't small things, unless you think your reputation for truthfulness is a small thing. At the heart of a lawyer-client relationship is the expectation that a lawyer will be truthful in his or her dealings with a client.

Maintenance of Competence and Excellent Work Product. The dictionary defines competence in terms of "the ability to do something well or to a required standard." As in other aspects of modern life, continued professional education is necessary in order to keep skills, learn new skills, and adapt to rapid change. Many judges I know lament the deteriorating quality of legal work product. Professionalism embraces the notion that a lawyer should produce the very best work product he or she can under the circumstances presented and never be satisfied with second best.

Leadership and community service is an expectation of members of a learned profession. The French writer, Alexis de Tocqueville, observed the unique role that lawyers played in the shaping of American society. They still play that role. It is not simply that lawyers hold the keys to the courthouse or that specialized learning and knowledge of a unique "legal language" make them practically indispensable. It is more than that. It is the leadership they demonstrate in community. Tocqueville said,

The more we reflect upon all that occurs in the United States the more we shall be persuaded that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element. In that country we easily perceive how the legal profession is qualified by its attributes, and even by its

faults, to neutralize the vices inherent in popular government. When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counselors. These secretly oppose their aristocratic propensities to the nation's democratic instincts, their superstitious attachment to what is old to its love of novelty, their narrow views to its immense designs, and their habitual procrastination to its ardent impatience.

When lawyers take the oath of office, we take upon ourselves the duties of leadership in the community. It may be that you will serve on the boards of non-profit organizations involving the arts or organizations providing needed services. It may be that you are coaching young children in sport. But one of the privileges and duties of being a lawyer is the call to service and leadership in your community.

Provision of Pro-Bono Services. As lawyers and judges, we take pride in the simple declaration on the frieze above the entrance to the Supreme Court of the United States: "Equal Justice under Law." How can I say it more directly: Without access to the court systems and legal counselors, this axiom is an empty promise. Professionalism involves provision of legal services to those who cannot afford them. It is a part of the privilege of the profession. It is a part of the duty of the profession. I urge you to join your local and state bar associations in their efforts to provide pro-bono legal services.

Finally, may I address civility and courtesy at the bench and bar.

Recently, a very well-respected trial judge in the Commonwealth of Virginia called me to ask advice about how to handle a problem with lawyer civility. He told me that a court reporter had complained to him that the lawyers were cursing at each other during depositions and she found it offensive to have to record and then transcribe their coarse language. I asked him what he did in response to the court reporter's complaint. He told me that he had entered an order directing them to stop cursing during the depositions. I was astounded! Is it necessary to enter an order to keep lawyers from cursing during proceedings? I told the trial judge that, our rules of court say that you take depositions "as at trial." "Would you let them do that at trial in front of you in court?" Here is a question that we all must address: "Has the coarseness of our society been so invasive that we at the bar have surrendered to its influence?"

I have heard some lawyers hide behind their clients when justifying their conduct. They say that certain things they do are "the client's call." Well, there are some things that are the client's call, but whether a lawyer behaves in a civil manner is not one of them.

- Your client does not decide whether you will keep your word.
- Your client does not decide whether you engage in sharp practices antithetical to the profession.
- Your client does not decide whether you engage in a scorched earth policy in litigation that unnecessarily increases the cost and the emotional toll of litigation.

You're OUT OF ORDER!

Dealing with the
costs of incivility
in the legal
profession

BY G.M. FILSKO

ILLUSTRATION
BY MATT MAHURIN

The Supreme Court of South Carolina has issued "four or five opinions that are strictly on civility, including three in one year and one for a lawyer hitting an opponent in a deposition."

—Lesley Coggiola

William Gary White III was accused of being so uncivil and unprofessional that the South Carolina Supreme Court suspended him in 2011 for 90 days and ordered him to complete the state bar's legal ethics and professionalism program.

White was found to have violated a slew of South Carolina's ethics rules in a letter to his client, an Atlantic Beach, S.C., church that had received a town notice that it needed to comply with zoning laws. White's letter, copied to the town manager and later made part of the published opinion, was a scorcher:

"You have been sent a letter by purported Town Manager Kenneth McIver. The letter is false. You notice McIver has no order. He also has no brains, and it is questionable if he has a soul. Christ was crucified some 2,000 years ago. The church is His body on Earth. The pagans at Atlantic Beach want to crucify His body here on Earth yet again. ...

"First-graders know about freedom of religion. The pagans of Atlantic Beach think they are above God and the federal law. They do not seem to be able to learn. People like them in S.C. tried to defy federal law before with similar lack of success."

A town council member filed the disciplinary complaint that led to White's suspension. In its opinion, the state supreme court held that White ran roughshod over an oath it implemented in 2003 mandating that lawyers act with "fairness, integrity and civility, not only in court, but also in all written and oral communications."

White says he's learned from the experience. He says his client told him to make the comments in the letter and at the time believed them to be political statements regarding a religious matter. "I thought it was free speech," he explains.

"I think the rules are clearer now; I didn't consider it a breach of ethics before that. I considered it representing a client."

South Carolina is just the latest in a string of states formally demanding their lawyers treat others with respect. But it's been only recently that the state's highest court has punished lawyers solely for uncivil acts, as it did with White.

"Until two years ago, we didn't have any public opinions or sanctions simply on civility," says Lesley M. Coggiola, disciplinary counsel for the Supreme Court of South Carolina. "There might have been problems with communication, diligence and any number of other issues, and the court would say, 'By the way, we'll cite the oath as well.' We now have four or five opinions that are strictly on civility, including three in one year and one for a lawyer hitting an opponent in a deposition."

The South Carolina court may just be warming up. "We take this opportunity to address what we see as a growing problem among the bar, namely the manner in which attorneys treat one another in oral and written communication," it said in a 2011 opinion. "We are concerned with the increasing complaints of incivility in the bar."

MULTILATERAL APPROACH

It's impossible to say whether incivility in law is escalating or there's simply more grousing about it. But the profession's leaders are calling out what they say is a troubling lack of civility, and states like South Carolina are cracking down. However, the most effective tools for erasing incivility in the profession may be the judges and lawyers willing to tamp down uncivil behavior the moment it emerges.

Coggiola's agency doesn't track complaints about incivility, nor do other states. And even anecdotally, some aren't discerning a spike. "We haven't seen it here," says Wallace E. "Gene" Shipp Jr., bar counsel at the District of Columbia Bar. "We're not receiving complaints about that sort of thing."

However, there is unmistakably more talk about a troubling

"Young lawyers are hungry for information on the proper balance between advocacy and civility. ... They want to do the right thing, but don't know what the right thing is."
—Jonathan Smaby

growth in incivility. "My speech to the opening assembly at the 2011 ABA Annual Meeting was all about civility," then-President Stephen N. Zack recalls. "At the same meeting, former Supreme Court Justice Sandra Day O'Connor, Justice Stephen G. Breyer and the chief justice of Canada's highest court all talked about civility. We didn't plan it, but we all ended up on the same page."

Lawyers posit a range of theories on where and against whom incivility is most often directed. Some believe it's more prevalent in large cities. Others say they've seen entirely too much directed at young female associates, often to gain a tactical advantage. Yet the more important question may be why incivility may be becoming the norm.

Lawyers blame incivility on:

- Over-the-top portrayals of lawyers on TV and in films.
- Inexperienced lawyers and a lack of mentoring.
- The fuzzy line between aggressive advocacy and rudeness.
- The broad platform provided by today's technology, coupled with the ability to act anonymously online.
- The country's current, fractious public discourse.

By far, technology is cited most often as the foundation for boorish behavior. Coggiola says she feels old saying it, but she attributes a good deal of the problem to the ability of the everyday jerk lawyer to broadcast views online.

"We've had some serious issues, and they're all related to social media," she explains. "Our court has already spoken on the First Amendment—you give some of that up when you become a lawyer. But we're really struggling with a case sitting at the court right now. A lawyer is blogging, and it's just vile, insulting everybody from Hispanics to women to 'midgets.' It's horrible."

Because South Carolina's civility oath applies only to opposing parties and counsel, Coggiola's office has asked the court to sanction the lawyer for bringing the profession into disrepute. The argument? If he were personally blogging

or posting the comments on Facebook, without identifying that he's a lawyer, the bar couldn't touch him. "However, if you say you're a lawyer, and if there's a nexus between you being a lawyer and what you're posting, then we're going to come back to this rule and find it a ground for discipline," contends Coggiola. "We need the court to come out and say this is not OK."

A close second and third place behind technology are just-licensed lawyers who perhaps watch too many rogue lawyers on TV and in movies. The labor market has forced many to hang their own shingles without the mentoring they'd have through a traditional employer.

"Young lawyers are hungry for information on the proper balance between advocacy and civility," says Jonathan Smaby, executive director for the Texas Center for Legal Ethics in Austin. "They get mixed messages from law school and the media, which portrays lawyers in movies, television and fiction—and sometimes in real life—as much more cutthroat and cutting corners than really goes on."

"They want to do the right thing," he says, "but don't know what the right thing is."

FIGHTING BACK

Lawyers aren't just complaining about incivility. They're fighting back—civily, of course.

Bar organizations and disciplinary bodies are flooding the zone with training. Florida's Orange County Bar has reached out to local law schools to provide more professionalism education to students. A recent topic, according to James Edwards—a shareholder at Zimmerman, Kiser & Sutcliffe in Orlando, who's headed his state and local bar's professionalism committees—covered the interplay between professionalism and civility on one hand and technology and social media on the other. Coggiola and her staff are also providing more frequent opportunities for civility education.

"One thing we do in this office is speak [to legal audiences]

On switching from litigation to transactional work: "Civil litigation is all about fighting over money, and I don't need an ulcer or heart attack fighting over people's money." —Mick Meagher

all the time," she says. "I've made it very clear that if somebody wants us, we're there—and we always cover civility. I often say it baffles me that we had to change the oath to tell people to be nice to each other. But clearly the court thought it was necessary."

Other state courts have also felt obligated to formalize a civility requirement. Florida is among the latest, revising its oath of admission to include a duty of civility in 2011, citing the American Board of Trial Advocates' similar inclusion. Also in 2011, the ABA's policymaking House of Delegates endorsed a renewed commitment to civility. And in 2012, ABOTA published an online Civility Matters tool kit to provide ideas and direction for sessions teaching civility.

Courts are also more often sanctioning egregious behavior. But that requires lawyers and judges to report louts, which can still be a roadblock.

"I don't think people are often willing to report," Coggiola says. "They like to complain about other lawyers, but they don't want their name on it. We also speak to judges and tell them that if they see this behavior, they've got to report it."

First, however, judges have to know the basics of civility themselves, something that can be disputed. In March 2010, the *Plain Dealer* in Cleveland reported that Cuyahoga County Common Pleas Court Judge Shirley Strickland Saffold used her office computer to comment on cases before her under the online username "lawmiss." A later search revealed comments attacking Arabs, Asians and white men on at least 10 other websites using that name. Saffold denied making comments about any cases before her, while her daughter admitted to making some under the lawmiss moniker.

"Judge Saffold has always recognized the fine line between civility and enforcing decorum in the courtroom," says her lawyer, Brian Spitz of South Euclid, Ohio. Saffold and her daughter sued and later settled with the company that administers the newspaper's website over the release

of their names to reporters, according to the *Plain Dealer*.

The best judges set an example and rein in bad behavior before it becomes the norm. "My father was a judge for 20 years, and he was very strict," Edwards says. "People frequently tell me they were afraid of him because he required absolute adherence to the rules and politeness, and if you didn't do right you were in trouble."

That's the opposite of what Calvin House, a partner at Gutierrez, Preciado & House in Pasadena, Calif., recently saw in court. While waiting for a case to be called, House witnessed a lengthy argument between a lawyer and a judge that included the lawyer accusing the judge of violating a bankruptcy stay.

"It was a very heated discussion throughout, and to accuse a judge of basically committing a criminal act—which violating a bankruptcy stay is—was pretty extreme," says House. "That comment the judge sort of rolled with. Eventually he got visibly angry and said, 'We're done!' But that was after, I'd say, 30 minutes of interchange."

House was not only taken aback at how personal and persistent the lawyer's behavior toward the judge became; but also astounded at how long the judge tolerated the lawyer's rant.

"One thing that's surprised me is the amount judges will sometimes put up with before they get to that point," House says. "I get it. From their standpoint, if they're harsh early on, they run the risk of not getting information they need and not appearing fair. But that's part of the problem. There were probably three other cases besides mine while this was going on, so four sets of attorneys were observing what happened. That lawyer got a \$4,000 reduction in what his client had to pay. So someone just learning the business might get the message that this is the way to represent your client."

A judge in that situation risks losing credibility with lawyers and lay observers, neither of which is good for the administration of justice. "I think judges get involved in exchanges with

attorneys more often than they did 10 years ago," adds House. "With that exchange, the judge seemed to feel the need to justify his position. I don't understand why he didn't say, 'Look, I've made my ruling. If you believe I'm wrong, you'll need to appeal. Let's move on.' Where that's done, it can be effective, and it doesn't have to be done in a vehement or rude way."

Edwards says most judges he appears before do just that. Most, but not all: "One told me—and I was sad to hear it—that if you're too tough on people, you're going to draw an opponent in the next election. How can you worry about that? If you do a good job, all the good lawyers will stand up for you."

IT TAKES A VILLAGE

Lawyers are also policing their peers. In the past few years, Edwards has begun to try to set a professional tone by calling opposing counsel at the beginning of each case to pledge cooperation. "I say, 'I really hope we can get along because we'll have enough to fight over without fighting over the petty details,'" he explains. "Surprisingly, that works pretty well."

Many also advocate professionally pushing back as soon as an ugly incident erupts. M. David "Mick" Meagher, a solo litigator in Escondido, Calif., had his first experience with incivility about an hour and a half after he began practicing.

"It was a fairly simple dispute, and this attorney just went off on me on a phone call," he recalls. "He was attacking me personally and I was completely caught off guard."

A friend suggested a tactic Meagher has employed ever since. "I send a confirming letter spelling out as closely as I can recall everything the person said," he explains. "In that case, this guy called me every name in the book, so I put all that in a letter. Later, I got a phone call from the lawyer complaining, 'My daughter's the secretary, and she had to read that letter!' I told him, 'Then I suggest you not use that language again.'"

Meagher says calling out the behavior is especially important when incivility occurs in public. A lawyer recently shook Meagher's hand and exchanged pleasantries—and then walked into court and told the judge Meagher had lied and deserved to be sanctioned.

Stunned, Meagher called his bluff. "I suggested something I've now used several times," he explains. "I told the judge: 'Let's set a show-cause hearing. This attorney just accused me of gross misconduct in front of a whole gallery of people who don't understand the law, making all lawyers look bad. I think he should prove everything he just said. If he can't, you should sanction him.'" Each time, the lawyer has backed down, Meagher says.

The difficulty for new lawyers is not only recognizing that they should stand up for themselves but also properly calibrating their response.

"If I'm a young lawyer dealing with a particularly difficult opponent whom I think is trying to intimidate me, I may be tough back," explains Smaby of the Texas Center for Legal Ethics. "But as lawyers get more experienced, the good ones figure out how to handle the difficult opposing counsel just like they handle difficult clients. A more experienced lawyer may have more tricks in the tool bag to counter that."

One female family lawyer in Dallas told Smaby that when

she runs into a nasty opposing counsel, she mails a copy of the Texas Lawyer's Creed, the state's professionalism and civility code.

"I've also seen young female lawyers not respond to intimidation but make the older lawyer believe they're naive and not very sophisticated," Smaby adds. "Then at the proper time, they come in and wipe them out in court. I tell young lawyers that the most effective way to be a lawyer is to understand your own personality and use that."

Despite his ability to do that, Meagher has had enough. After 19 years of a primarily litigation-based practice, he's transitioning exclusively to transactional work to escape the ugliness. "[Transactional work isn't] perfect—I get that," he says. "But it's better. Most of the civil transactional lawyers have been very reasonable because their goal is solution-oriented, not win-oriented. Civil litigation is all about fighting over money, and I don't need an ulcer or heart attack fighting over people's money."

CAN WE ALL GET ALONG?

Ultimately the best solutions, lawyers say, are those that bring diverse practitioners together. Patricia Lee Refo, a litigation partner at Snell & Wilmer in Phoenix and former chair of the ABA Section of Litigation, supports the American Inns of Court.

"It organizes lawyers from all years of practice into small groups to meet to create an environment in which young, medium and seasoned lawyers talk about the pressing issues of the day," she explains. "That also helps provide an opportunity for younger lawyers to be mentored by seasoned practitioners."

Specialized bar groups are also attempting to bridge divides. The National District Attorneys Association has created a committee to work with the defense bar to foster civility, says Scott Burns, executive director of the NDAA in Alexandria, Va. It's also working with the ABA to offer joint training sessions with prosecutors and defense attorneys covering civility toward one another.

"I'm personally in close contact with the Innocence Project, the Constitution Project and the National Association of Criminal Defense Lawyers," says Burns. "They've all been very receptive about how we can come together and agree to handle criminal trials and deal with one another."

Burns' "pie in the sky" goal to increase cooperation among prosecutors and defense attorneys is the National Criminal Justice Academy, a facility backed by the S.J. Quinney College of Law at the University of Utah, the NDAA and leaders in the defense bar. So far, they've raised \$1.2 million to launch the center, which would train prosecutors and defense attorneys under one roof.

"We'd each have our own training tracks, but there would also be a coming together of America's prosecutors and America's defense attorneys—and nothing but good can come from that," Burns says. "Those I've spoken with on both sides say that would go far in fixing our roles in civility. I truly believe if you bring people together, things get better." ■

G.M. Filisko is a lawyer and freelance journalist in Chicago.

Lawyers Are Ethically Bound to Civility and Professionalism

By Oran F. Whiting, Litigation News Associate Editor

"Professionalism and civility must be the foundation of the practice of law," according to the Indiana Supreme Court. The court made that pronouncement in reprimanding attorneys' boorish behavior and explained that lawyers have an ethical duty of professionalism and civility to the profession, judges, clients, jurors, and each other.

Wisner v. Laney addressed a medical negligence claim. An extremely contentious five-day trial transpired requiring the trial court to repeatedly admonish both counsel for their unprofessional behavior. During the trial, the attorneys' inappropriate behavior included excessive and repeated objections, despite adverse trial court rulings, and unnecessary comments to and outright contemptuous conduct of each other. The attorneys frequently interrupted each other and accused each other of misrepresenting facts and lying while in the jury's presence. The plaintiff's counsel also repeatedly questioned witnesses about issues deemed objectionable and inappropriate by the trial judge.

A jury returned a verdict against the defendants for \$1.75 million. The defendants moved for a new trial pursuant to Indiana Trial Rules 59(J) and 60(B)(3), which allow the trial court to correct any error it determines "prejudicial or harmful," and to relieve a party from a judgment for "fraud . . . misrepresentation, or other misconduct of an adverse party." The defendants claimed the trial court erred by failing to order a mistrial based on the cumulative effect of the consistent, unprofessional, and prejudicial conduct of the plaintiff's counsel, which deprived the defendants of a fair trial. The trial court denied the defendants' motion finding that the defendants were not deprived of a fair trial. The defendants appealed.

The court of appeals affirmed, and the Indiana Supreme Court granted transfer, to determine whether the trial court erred by denying the defendants' motion for a new trial based upon the cumulative effect of the plaintiff's counsel's alleged unprofessional conduct during the trial. The Supreme Court of Indiana affirmed the lower courts' rulings, finding that it could not conclude the trial court's decisions were against logic and the facts. The court moved beyond the affirmation, however, to admonish the attorneys' behavior and to reinforce the legal profession's behavioral and ethical requirements.

The court highlighted one particular statement in Indiana's Admission and Discipline Rule 22, which reads, "I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged." The court pointed out that counsel's poor behavior actually began with personal attacks in the deposition phase of the case, with defense counsel remarking that no competent lawyer would conduct a deposition in the manner the plaintiff's counsel did.

The court noted that this type of behavior continued through trial, post-trial motions, and appeals with more severe personal attacks, noting that the plaintiff's counsel actually bragged to and taunted defense counsel about court imposed sanctions having no effect on him. The court concluded that based on counsel's behavior, a jury trial is not a "free-for-all," and cautioned attorneys to resist becoming too emotionally involved in a client's cause or making the case a personal matter. Otherwise, the court warned, attorneys risk harm to their clients, their reputations, and the profession.

Some in-house counsel would consider replacing trial counsel if personal acrimony between their counsel and opposing counsel reached a certain level. "Look, it is not counsel's job to be friends with opposing counsel," states Victoria T. McGhee, Houston, member of ABA Section of Litigation's Council and in-house counsel at Shell Oil Company. "However, I would fire counsel in a minute if counsel's behavior was contrary to Shell's trial strategy or was alienating the trial judge."

"This case illustrates how, with respect to bad lawyer conduct, attempts to fight fire with fire can be a self-defeating strategy," according to John C. Martin, Chicago, cochair of the Section of Litigation's Ethics and Professionalism Committee. "The opinion gives the sense that, faced with unprofessional behavior from both sets of counsel, the Indiana Supreme Court felt justified in throwing up its hands and affording sympathy to neither. Defendants' arguments that proceedings were prejudiced by the 'consistent, unprofessional, and prejudicial conduct of plaintiff's counsel,' warranting a mistrial, were met by a finding that since both counsel 'committed fouls,' there was no basis for reversal."

"The Indiana Supreme Court's opinion is unusual because" it directly addresses professionalism," according to Gregory R. Hanthorn, Atlanta, cochair of the Section of Litigation Ethics and Professionalism Committee. "Although the court affirmed the trial court's decision that no misconduct took place that required reversal, the court still used the decision as a way to remind the bar that '[p]rofessionalism and civility are not optional behaviors to be displayed only when one is having a good day,'" continued Hanthorn.

"The Indiana Supreme Court's decision to address the need for professional behavior for an additional eight or so pages makes clear that the court wished to send a message to Indiana's attorneys. That same message should resonate with attorneys in other jurisdictions: Professionalism is not optional; it is part of being a lawyer," opines Hanthorn. ¹

¹ An expanded version of this story, including links to resources and authorities, is available at <http://bit.ly/LN384-Whiting>.

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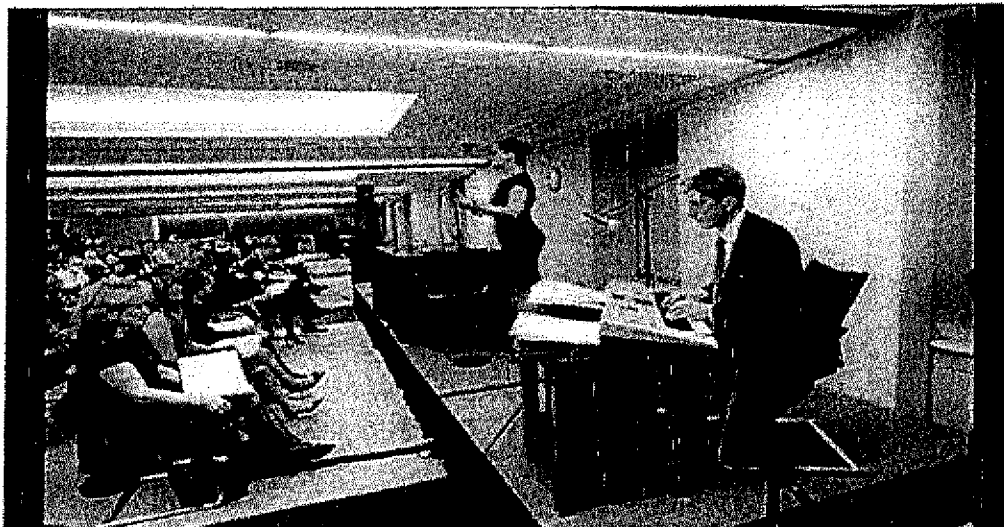
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Lawyers Behaving Badly Get A Dressing Down From Civility Cops

Adversarial System Grows Obscenely Nasty; 'Get More Results With Sugar'

By JENNIFER SMITH



A group of attorneys concerned about bad manners in their profession held a musical revue at a downtown Manhattan law firm, complete with doctored song lyrics. WSJ's Jennifer Smith reports.

In New York one night recently, U.S. District Judge Richard Sullivan donned his robes, walked onstage and belted out to his colleagues this heartfelt plea for lawyerly politeness (to the tune of "If I Were a Rich Man"):

"If lawyers were more civil

Daidle deedle daidle daidle daidle deedle daidle dum

They'd treat their breth-er-en with more respect

Wouldn't always yell, 'object.' "

The ditty struck a nerve—and brought down the house, a largely pinstriped crowd of 80 or so lawyers there for a musical refresher course on the virtues of civility.

But it is no laughing matter to those who fret that a tide of rudeness has engulfed the legal profession.

From courtroom yelling matches to insulting letters and depositions that turn into fistfights, some lawyers and judges worry that the adversarial system of justice has gotten a little too adversarial.

To rein in "Rambo" litigators, the politeness patrol is pushing etiquette lessons, and even seeking to have civility included in attorney oaths.

The well-mannered caution that lawyers who shout, lie and shoot off vulgar emails don't merely alienate judges and juries. They also slow the wheels of justice and cost clients money.

"Lawyers already have a bad enough reputation," said Stewart Aaron, a litigator and head of Arnold & Porter LLP's New York office. He performed alongside Judge Sullivan in the revue.

The show—titled "A Civility Seder" and put together by the New York Inn of Court, a legal group that promotes collegiality and ethical behavior—might be the most colorful example of the manners movement. But it pales beside the R-rated antics of the attorneys whose behavior inspired it.

Take, for instance, lawyer Marvin Gerstein of Illinois, who has been disciplined three times for his profane epistolary style, according to the Attorney Registration & Disciplinary Commission of the Illinois Supreme Court.



Claudio Papapetro for The Wall Street Journal

Ain't Misbehavin'? Attorney Peter Dizozza, right, accompanies a song about civility and ethical behavior.

Over the years, Mr. Gerstein has sent letters to legal adversaries calling them, variously, a "fool," "idiot," "slimeball," and other names unfit for publication. He has also suggested opponents have their heads inserted so far into an unpleasant place that they "think it's a rose garden," language that an expert witness for Mr. Gerstein said served a business purpose by vividly demonstrating the point.

The disciplinary commission rejected that argument, although a dissenting member argued that his conduct was protected by the First Amendment.

"If you cross the line with me, you get both barrels," said an unrepentant Mr. Gerstein. He has since dialed his language back to avoid further sanctions, he said, but "it's none of their business what goes on between two attorneys."

Jaw-droppingly outrageous conduct is rare, even the most ardent defenders of decorum agree. More common are small-bore disputes: lawyers whose sniping, in person and on paper, can spiral out of control.

"When I'm upset, I can feel the testosterone rising, and I can literally feel my judgment declining," said David Casselman, a senior partner at Wasserman, Comden, Casselman, & Esenstein LLP in Tarzana, Calif., and a co-chair of the American Board of Trial Advocates' committee on professionalism, ethics and civility. "It's so easy to slide into tit-for-tat mode."

Last month Indiana's Supreme Court chastised lawyers on both sides of a \$1.75 million medical negligence lawsuit for making excessive objections and for "the unnecessary sparring and outright contemptuous conduct of each attorney directed toward the other."

"A jury trial is not a free-for-all," Justice Steven H. David wrote.

Whether the problem is worse now is hard to quantify. Professional codes instruct lawyers to be civil, but rudeness isn't tracked or punished as much as more concrete trespasses, such as filching clients' money.

But a number of attorneys and judges say courtly conduct has collapsed over the years, particularly in the more fractious realms of the profession, like divorce proceedings.

Some blame email, and the decline of face-to-face interactions among lawyers in big cities, where sparring attorneys rarely encounter foes at their kids' weekend soccer game.

"You don't do this to people you know," said San Francisco lawyer William B. Smith, also a co-chairman of the trial lawyers' civility committee. "Now it's people sitting behind computers doing nasty things to each other."

Mr. Casselman began collecting examples of bad behavior a few years ago.

He enlisted prominent judges and lawyers for a civility video, and, with Mr. Smith, persuaded the trial lawyers group to develop an entire program on the topic.

Thus far the amiability advocates have made presentations at dozens of law firms, bar groups and law schools. Now they are pushing legal educators to make civility a regular part of the curriculum.

Some lawyers say nastiness and aggression results in smaller settlements or can even lose a case, hitting lawyers where it hurts—their wallets.



RICHARD SULLIVAN

"I tell all the lawyers in my firm, you're not a fighter, you're a lover," said Stephen Susman, a founding partner at litigation boutique Susman Godfrey LLP, which has a tradition of inviting opposing counsel to its holiday party. "You will get more results with sugar than with vinegar."

Still, the bad behavior rolls on.

Last year Meyer Ziman, an Arizona personal-injury lawyer, was suspended from practice for 12 months after he "repeatedly and intentionally committed offensive conduct," in violation of the state's oath of admission to the bar.

In one instance, during phone calls while trying to obtain a client's medical records, Mr. Ziman allegedly showered a hospital employee with expletives, then told another who asked him to watch his mouth, "you are nothing but a slut that works for a copy service."

Mr. Ziman said during disciplinary proceedings that he had used the term "slug," an explanation that Arizona's attorney discipline panel found "implausible" according to its report on the case.

Mr. Ziman, wrote Presiding Disciplinary Judge William J. O'Neil, "brandishes his opinion as a battering ram, intentionally offending people...While in his private life he may be as rude, offensive and demeaning as he chooses, in his professional life he may not hide behind his First Amendment right [in order] to ignore his sworn responsibilities."

Mr. Ziman doesn't feel his conduct warranted a suspension, said his lawyer, Joseph Collins, who said he personally doubts civility codes will do much to burnish lawyers' reputations.

"I think the end goal," Mr. Collins said, "is not going to be achieved by pursuing attorneys who use offensive language."

Write to Jennifer Smith at jennifer.smith@wsj.com

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No Good Deed Goes Unrewarded: Why Professional Courtesy Advances Your Client's Cause

ANDRA BARMASH GREENE

The author is with Irell & Manella LLP, Newport Beach, California.

I may be the only attorney who hears the words "professional courtesy" and immediately thinks of my mother's funeral. The reason is that back in 1998, I had a case in which my opposing counsel refused to agree to continue a motion hearing so I could attend the funeral in Chicago, 1,700 miles away. It seems unbelievable, but it happened. To make matters worse, the motion the lawyer refused to continue was a motion for attorney fees for winning an anti-SLAAP motion that dismissed the case, hardly an emergency. But his approach to the litigation was take no prisoners, extend no courtesies—no exceptions. As a consequence, I went straight from the cemetery after the burial to Kinko's to sign and fax a declaration supporting our ex parte request for a continuance that my associate had to argue back in California. (My father could never understand that.) Not surprisingly, the court granted our request for a continuance.

After that episode, the tide of the litigation turned decidedly against my opponents, who up to that point had won everything. The court of appeals reversed the dismissal, ruling that our client's case could proceed, and when the case returned to the trial court, our client was awarded its attorney fees. The trial judge said that she never wanted to have another case in which a lawyer was so unprofessional that he would not agree to a continuance due to a death. With the handwriting on the wall, our client received a large settlement. While the case's merits had a great

deal to do with the favorable outcome, I will always believe that my opponent's utter lack of professional courtesy was a significant contributing factor.

This unfortunate episode remains indelibly imprinted on my mind. I have come to believe that engaging in professional courtesy makes sense, for many reasons. I no longer think, "No good deed goes unpunished." To the contrary, in my view, "No good deed goes unrewarded." Extending professional courtesies is a smart litigation strategy. It will advance your client's cause and conserve the client's resources. Hence, I make it a point to educate clients on why professional courtesy is a sound litigation strategy, one worth employing.

What is "professional courtesy"? It applies to myriad behaviors, including being civil in communications, granting appropriate continuances when necessary, cooperating in discovery to the extent possible, admitting what you have to admit, and being truthful in papers filed with the court. Professional courtesy does not equal weakness. To the contrary, it is a sensible approach to litigation. As I explain to my clients, extending professional courtesies makes litigation more manageable, avoids "tit for tat" disputes, pleases the court, is often required by local court rules, helps everyone's reputation, and, more often than not, saves expenses for the client.

I also make clear what I am not talking about. Professional

courtesy is not about simply rolling over and doing whatever your adversary wants. Lawyers must advocate zealously for their clients—that is our duty. If your opponent does something and you can take advantage of it ethically, by all means you can and should. Professional courtesy does not mean being soft or letting people off the hook when it may hurt your client's position. This point is important to share with clients who like fire-breathing lawyers—that being professional does not mean you are weak.

I have been practicing law for more than three decades. Many people who have been practicing law much longer decry the demise of civility among members of the bar. I do not know when that era of civility reigned, but I have not seen it in my career. Instead, I have seen or experienced a great deal of bad behavior on the part of litigators. (And I am sure that there are cases in which my opponents would say the same about me.) The genesis of such conduct comes from a variety of sources: a client's directive, the desire to appear tough, concern about being taken advantage of, or a belief that such a "tough guy" strategy will force the other side into submission. These motivations are misguided. In the long run, bad behavior is harmful to your client and to the litigation process.

The following are areas where issues of professional courtesy (or lack thereof) frequently arise: communications with adverse counsel, extensions, discovery, and court filings.

Communications Between Counsel

Lawyers are often rude to each other in correspondence or court filings. The proliferation of email communications has only made it worse. Despite short-lived ego gratification, I do not believe endless nasty correspondence is the proper way to communicate with opposing counsel.

I continue to be surprised at what people put in writing. Don't they know that what they write may end up as an exhibit in a court filing that will not cover them in glory? Two of my favorite pieces of unprofessional correspondence that were sent to me are a copy of someone's middle finger and a letter I sent to opposing counsel returned to me torn into about 300 pieces.

I confess that I have succumbed to a client's desire to include language in letters that is, to put it mildly, not the language I would have chosen. When I sign such a letter, of course, I own it. I almost lost a client as a result of doing this. Here is what happened: I represented a company in contentious litigation over patent licensing. The general counsel was very aggressive and typically rewrote the letters I proposed sending to opposing counsel to be more accusatory and colorful. I signed and sent out the revised letters. Ultimately, my client was acquired by a large Fortune 500 company and a new in-house counsel took over the matter. When we met for the first time, she told me candidly that she had read the case file and she did not believe in



sending the kind of letters I had been sending to our adversaries. She said that if that was my style, it might be better for another firm to represent the company going forward. I told her that, of course, the letters were mine—I had signed them—but the reason for the tone was the direction I had received from the previous general counsel. I told her that I was fully comfortable toning down the language and that I hoped that she would give me a chance to work with her. Luckily, she did, and I went on to represent the new company for many years. But it was a sobering reminder of the collateral consequences of uncivil communications with opposing counsel. I now explain to clients why I do not believe sending nastygrams is worth the price they will pay.

Another unfortunately common practice is endless letter writing battles, which often degenerate into name calling and ad hominem attacks. Clients can end up spending a great deal of money on these letters, which do little to advance the litigation in any meaningful way. These letter campaigns bad enough, but some lawyers go further and try to rewrite history or create fiction in their correspondence. Such tactics have to be addressed, but that is best when done without sinking to the same low level in response. When I find myself in a letter-writing battle that is devolving into a “did not, did too,” I typically send a letter stating that it is not a productive use of my time or my client’s resources to dispute all the inaccuracies in the letter, that I will not be responding further, and that my lack of response should not be construed as any sort of agreement with or admission to the assertions in the letter. The poison pen letters typically stop after that, along with the charges to the client for each piece of correspondence.

Emails live forever. They need to be written with as much care as a letter. They are just as likely to be used as exhibits to filings as are letters. Thus, flip or rude remarks should be excised, even if they feel good at the time. I recall an opposing counsel who was especially obnoxious in email correspondence. He also had issues with women lawyers, which seemed amplified in emails. During a discovery dispute, he was fond of writing to the “ladies” (sprinkling the word “ladies” throughout his emails) and saying that we were becoming “hysterical” and needed to “calm down and control our emotions.” Invariably, we ended up in court. We made sure to attach the “ladies” emails and quote liberally from them in our briefs. Our female judge was particularly irritated when she read the emails. I will never know whether that is why we won the discovery disputes we had, but my opponent did not do himself any favors with such language.

I wish I could create software or an app that would review an email I’m drafting and then respond with “Really? You actually want to send this?” It would be helpful. If I have written a harsh email, I make a practice of waiting before I send it. More often than not, I tone it down or delete it when I have cooled off. I tell

my clients about this practice and explain how emails sent in anger rarely accomplish anything positive for a case. Several have told me they have now incorporated this into their own practices and wait before sending an email created when they are mad.

Extensions and Continuances

I know clients who direct their lawyers never to give extensions or agree to continuances. I always tell my clients that such a position at the outset of a case is dangerous, because there could come a time when we may need an extension or continuance. Rarely have I had a case in which the client did not need some extension. Unless one has a crystal ball, it is impossible to predict how events will unfold in the course of litigation. Therefore, it is wise to give reasonable extensions when doing so does not harm the client’s position. (However, when seeking a temporary restraining order, for example, granting an extension is generally not possible.)

Even after my experience with my mother’s funeral, I remain surprised by how many lawyers refuse to give routine extensions or extensions necessitated by extenuating circumstances. If the request is reasonable and the court is likely to go along with it, you will have burned a bridge by opposing it. For example, I recall a lawyer who opposed continuing the start of a trial by a few days so that his opposing counsel, an observant Jew, could attend services during the High Holy Days. When presented with the motion for a brief continuance for religious reasons, the court granted it and expressed concern that the matter was even contested.

Last year, I was scheduled for a continued arbitration and a jury trial simultaneously. On top of that, I broke my foot and could not put any weight on it. I was in a full cast and could only maneuver using a scooter. I asked that the arbitration’s continued session (its third session at that) occur after my jury trial concluded and that there be some time in between the two actions so that I could deal with my injury. Not only did our arbitration adversaries refuse to agree, but in opposing the request, they accused me of exaggerating my injury to gain an advantage. Hardly. I would have much preferred trying the case on two feet sans scooter. We ultimately obtained the continuance. Ironically, after so vigorously opposing the requested continuance, my adversaries later wanted to further extend the date for their own convenience. We reached an accommodation without involving the arbitrator, but I must admit I took great pleasure in making them sweat a bit by quoting their own vitriolic words back at them.

Of course, professional courtesy in granting extensions should not be limitless. Many lawyers use repeated requests for

continuances simply as a tactic to delay an inevitable bad result. When this happens, clients become frustrated and often direct that their lawyer not agree to any further continuances. This makes sense. If someone is using requests for an extension as a litigation tactic, I am the first one to say no. I have found that having previously given extensions enhances my credibility with the court when I oppose a request for yet another continuance.

Sometimes, however, even requests for continuances made by abusers of the system should be honored due to the circumstances. I represented a client who sought to attach \$5 million in assets, and there was no question that the writ of attachment would be granted when the petition was heard. Opposing counsel used every trick in the book to delay the attachment hearing. After two months of delay, the hearing date was finally approaching. My opposing counsel called me shortly before the hearing and requested a continuance because his wife had just been diagnosed with breast cancer and had to undergo a mastectomy. My client instructed me to oppose it. I told him that I did not agree, especially knowing our female judge. My client angrily told me I was being had. I explained that we would lose all credibility with the judge if we refused the request. Again, my client was upset with my advice, convinced that my opposing counsel was making the story up. I knew that the court would be mad if we refused the request and this could affect the ruling on the writ of attachment. Ultimately, I devised a solution that was beneficial for the client even with the continuance. We entered into a stipulated order that stated that the hearing date would be continued for 10 days, but there would be no further continuances. There were none, and the court granted our writ of attachment.

Discovery

Discovery is an area fraught with opportunities for bad behavior and gamesmanship. Much has been written about "Rambo" tactics. Frivolous objections, scheduling games, refusal to produce documents, and refusal to admit the obvious are all part of the territory. Discovery fights prolong litigation and add to the expense, often substantially. This is another area where professional courtesy can advance your client's position and save costs, often hundreds of thousands of dollars. It, too, requires client education.

Clients, especially corporate clients, typically hate discovery. They find it intrusive, time-consuming, burdensome, and expensive. Discovery is all that and more. As a result, most clients would prefer not to submit to depositions (although they want the other side deposed), answer interrogatories and requests for admissions, or produce documents. Clients are especially loath to turn over documents that they perceive as sensitive or

harmful, understandably worried about how the materials might be used by the other side. There are clients who instruct their attorneys to play hardball in discovery, object to every interrogatory, produce nothing, and fight tooth and nail over everything. These are also often the same clients who later wonder why their legal bills are so high. Discovery is, however, often the most expensive part of litigation, and professional courtesy can go a long way in controlling those costs.

Therefore, at the outset of a case, I typically go over my discovery strategy and practice, and why cooperation can help meet the client's interest. First, the fact of litigation means that there is a certain amount of discovery to which the other side is entitled. That is part of the process, like it or not. Second, courts hate discovery disputes. Courts do everything to avoid them or to punish those who do not cooperate in discovery. Discovery

Being professional does not mean you are weak.

fights can be expensive and the loser can be subject to sanctions. Sometimes, a court will delegate discovery disputes to a discovery referee, thereby increasing the costs of discovery and typically ensuring that more discovery is ordered rather than less. I explain that hardball discovery tactics usually backfire. Being cooperative makes the litigation easier and less expensive for all sides. Of course, where there are reasons to object or limit, we will do so. Where a protective order or motion is appropriate, we will seek one. I also explain that if possible, it is better to deal with the issue with opposing counsel than to put it in the hands of the court, which could have unintended consequences.

Deposition Scheduling

One area fraught with opportunities for discovery battles is deposition scheduling. Everyone wants priority and to set the schedule of depositions for his or her own convenience. Often, there is much letter writing or motion practice about who is deposed and in what order. Eventually, however, everyone is going to get deposed, so it makes sense to work it out, if possible. Cooperation in scheduling can also have numerous benefits. A number of years ago, I had a case in which we had 60 depositions to schedule in a short period of time. My opposing counsel was a single father and candidly asked if we could arrange the schedule to coordinate with his custody schedule. I was pleasantly surprised by his recitation of the reason for his request and agreed, because there was not going to be any prejudice to my client as a result of doing that. The depositions all went smoothly, saving time and money for both sides. My opposing

counsel was extremely grateful for this courtesy. A few years after the case resolved, he referred a client to me.

Responses to Discovery

Responses to written discovery frequently result in gamesmanship. I cannot count the number of times I have been the recipient of boilerplate objections that are baseless. Such tactics result in numerous rounds of meeting and conferring and then motions to compel. Typically, we get the discovery, but each side has spent a lot more time and money to get to this inevitable result. When responding to discovery, I encourage clients to respond to questions that must be answered, and I make tailored objections to those that are improper or overbroad. Such an approach makes it much easier to oppose a motion to compel and to defend the objections that have been asserted. It also means that discovery sanctions are much less likely to be imposed because the position is defensible. It takes great skill to argue with a straight face that responses consisting entirely of boilerplate objections were made in good faith.

Document Production

Document production is another area fraught with opportunities for unprofessional behavior. No one likes to turn over documents that are harmful or contain sensitive business information. Of course, we all know the risks if a client does not do so or if relevant documents are lost or destroyed.

Because I represent defendants in class actions, I typically represent the side that has hundreds of thousands, if not millions, of pages of documents, much of it stored electronically. I am constantly looking for ways to cooperate with the other side to minimize the scope and cost of such document production. Every case is unique, but I have been successful in suggesting sampling and narrowed keyword searches. When the other side is unreasonable and will not work with me, I have had some success in getting the court to shift some or all of the cost of the expanded discovery to the opposing party. I find that I am most likely to get such a motion granted when I can show that I have made efforts to cooperate with the other side before invoking the aid of the court.

Sometimes, however, I find that the "be careful what you wish for" approach is the only thing that works. That strategy means giving the other side literally everything that they have asked for, which means that some poor soul or souls on both sides have to spend weeks in a warehouse or at a computer screen reviewing documents. I recently took this approach in a case in which the other side would simply not agree to any sort of limit. I produced about 1.5 million pages. When they then complained to the judge that we had "buried them" and should direct them to the relevant documents, the judge had no sympathy.

Candor in Court Filings

When I first began practicing as a lawyer, it never occurred to me that people would not be truthful in court filings. After all, there is a duty of candor to the court. In reality, however, shading the truth or outright lying happens all too often. A frequent source of lying is declarations filed in court that attest to what was supposedly said between counsel or to sequences of events. Typically, the truth comes out and the person who lied loses credibility. While I understand advocacy, misrepresenting the facts is beyond the pale. I will give my opposing counsel the benefit of the doubt at the outset of a case and assume that they are being truthful. When they prove me wrong, I do not trust them again.

It is very frustrating to both clients and counsel when an adversary is untruthful. Clients have a hard time understanding how people can get away with that. Then they ask what the point is if one side is truthful and the other side is not. I tell them that, more often than not, such lies get exposed and it is hard for a lawyer or party to recover from that blow to credibility. Clients often get impatient as the lies mount up and there is seemingly no consequence for the adversary. But most of the time, such behavior is exposed and punished. Let me give you some examples.

About 14 years ago, I was litigating against an opposing counsel in a \$200 million breach of contract action in state court. "Mr. N," my opposing counsel, did not feel constrained by the actual facts or evidence in the case. He would constantly make representations to the court about why certain things in our case had to be scheduled at particular times because of his supposed schedule in a case in federal court where he represented the plaintiff. Our court was very accommodating to his requests. One day, I received a call from the lawyer representing the defendant in the federal case that Mr. N had so frequently mentioned. I had never met this lawyer before, but because we shared the same opposing counsel (and had the same opinion of him), we formed an instant bond. He asked about dates in our case. It turns out that Mr. N was making representations in the federal case about the schedule in my case that were flat-out falsehoods. As we compared notes, we realized that Mr. N had been lying to the court in both cases. We made sure to bring this to the attention of both courts, much to our common opponent's dismay. Mr. N's attempt at schedule manipulation abruptly ended. As a bonus, I became good friends with the defense lawyer in the federal case. He went on to become a justice on the court of appeal.

Making misrepresentations about scheduling matters is bad, but lying about the substance of a case is worse. The potential negative consequences are substantial. Two years ago, I represented a defendant in a putative representative action in federal

court. The plaintiff asserted a claim under a California statute that required sending a letter to a particular government agency as a prerequisite to pursuing that claim. This claim was dangerous for our side because it was the claim that could have resulted in the most damages if the plaintiff was successful at trial. We did not receive the letter in the Rule 26 disclosures, nor was the letter produced in discovery, despite a specific request for it. In responding to all of our document requests, the plaintiff only produced 46 pages, all sequentially Bates-stamped, and stated repeatedly that these 46 pages were all the documents he had. We met and conferred about it. Nothing was supplemented.

Discovery is an area fraught with opportunities for bad behavior and gamesmanship.

Accordingly, we moved to dismiss that claim shortly before trial because the prerequisite to filing the claim had not been satisfied. Suddenly, the letter (without any Bates stamp) miraculously appeared. We filed a motion in limine to exclude the letter, along with numerous other motions in limine. Opposing counsel, apparently forgetting the discovery responses and 46 pages of documents produced, filed a declaration stating that the letter had been produced in connection with their document production months before. We were able to show that these representations were false. The court excluded the letter and dismissed the claim, with some very harsh words for plaintiff's counsel. The court then proceeded to grant all of our motions in limine. At midnight on the night before the trial on the few remaining claims was to begin, opposing counsel dismissed the case. It was clear that he did not want to face the wrath of the judge.

Being candid, even if it means having to bring bad news to the attention of the court and opposing counsel, makes sense. It is often the only way to preserve your and your client's credibility. Although it might be tempting to play ostrich and hope no one finds out, that is a very risky strategy, and one I counsel clients against. About five years ago, I represented a defendant in a wage-and-hour class action. We settled the case for \$7.5 million to be paid to the class in three separate installments over an 18-month period. Under the court order approving the settlement, the client was to provide a list of its employee class members that would be the basis for calculating and making the settlement payments. The client produced a list, and the first of

the three payments was made. Shortly thereafter, the client brought to our attention that due to a glitch in their computer system, it believed that some people who should have been included in the class were inadvertently left off the list and had never received notice of the action at any time. Alarmed, we had an independent audit conducted. The audit determined that a large number of people had been omitted from the list. We were worried that once the plaintiffs found out about this mistake, they would seek to increase the settlement amount by millions of dollars. There was, of course, a good chance that no one would ever find out. Nevertheless, we determined that we had no choice but to bring this mistake to the court's and opposing counsel's attention.

We did so. The plaintiffs screamed bloody murder and demanded that the settlement amount be increased. They claimed that our client had acted intentionally and in bad faith in providing an inaccurate class list and that the settlement therefore had to be substantially increased. Much litigation over this issue ensued. However, although the problems were caused by the mistake in the original list, we were always able to point to the fact that we had brought the issue to everyone's attention and were thus acting in good faith. If we had engaged in bad behavior, why would our client have conducted an expensive audit and alerted the court to the problem? This good deed was rewarded. Ultimately, the court folded the omitted class members into the existing settlement, and our client did not have to pay more money to the class. When the order granting our motion came out, our client thanked us for advising that they come forward with the bad news early on.

Good things happen when lawyers are professionally courteous. Engaging in professional courtesy should be part of your overall litigation strategy. If you do so, you will find that by being professionally courteous, your clients' money is not wasted. You will avoid incurring the wrath of the court. You and your clients can focus on the real objectives of the case. Your reputation will remain intact. You may even find, as I did, that being professionally courteous can lead to more business in the future. When clients understand that professional courtesy is a sound litigation approach that will save them expense and enhance their position with the court, they may even thank you for suggesting it. ■

July 2012

Statement of the ABA Standing Committee on Professionalism

A Duty to Act:

The Court Funding Crisis and a Lawyer's Professional Identity

The existence of a fair and functional justice system, open to all, is inextricably bound up with every lawyer's professional identity. As it threatens the very foundations of American justice, the pervasive court funding crisis tears at the core of what it is to "be" a lawyer in our society – that sense of who we are, as public-minded legal professionals.

Certainly any number of potentially dire consequences should move members of the bar to stand as one against the fiscal dismantling of our courts, among them: Worsening inequality in the treatment of "haves" and "have nots" within our legal system; waning overall access to trial courts (still the main engine of American justice); the loss of diversionary court resources that reduce recidivism and help restore people to lawful, productive lives; and economic inefficiencies caused by slow and ineffective court processes. As ABA President Wm. T. (Bill) Robinson III has urgently pointed out, if left unchecked the erosion of the justice infrastructure surely endangers American democracy itself.

Further motivation wouldn't seem necessary, but this additional reason to care about our courts' fate should strike home for every lawyer: The courts crisis places a pillar of our professional existence at risk. To be a professional lawyer is to actively serve the public's interest in maintaining a just society. To remain silent as the edifice of American justice starts to crumble is to be something other than a true lawyer, at least in the professional sense of the word.

Academics, judges, practitioners and bar leaders have given much thought to what constitutes "professional identity" among lawyers, and have arrived at varying definitions as part of the broader professionalism inquiry. All prescriptions for how we should self-identify as lawyers, however, rest on the bedrock of service to the justice system.

Lawyer as Public Citizen

The lawyer's duty as a public citizen devoted to justice is found, and not by accident, in the opening sentence of the Preamble to the Model Rules of Professional Conduct. It states, "[1] *A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.*"¹ (Emphasis added.)

¹ MODEL RULES OF PROF'L CONDUCT Preamble 1 (2011).

Law professors examining notions of professional identity have consistently identified commitment to the justice system as one indispensable element of that identity. As one recent example, Professor David Thompson, Director of the Lawyering Process Program at the University of Denver, Sturm College of Law, has defined professional identity among lawyers as “one’s own decisions about [professional] behaviors...as well as a sense of *duty as an officer of the court and responsibility as part of a system in our society that is engaged in upholding the rule of law.*”² (Emphasis added.)

In foundational authority on point, Dean Roscoe Pound’s well-traveled definition of professionalism places a primary emphasis on public service. “The term refers to a group . . . pursuing a learned art as a *common calling in the spirit of public service* – no less a public service because it may incidentally be a means of livelihood. *Pursuit of the learned art in the spirit of public service is the primary purpose.*”³ (Emphasis added.)

In its report, *Teaching and Learning Professionalism*, the Professionalism Committee of the ABA Section of Legal Education and Admissions to the Bar took Dean Pound’s definition a step further. “A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and *engaging in these pursuits as part of a common calling to promote justice and public good.*”⁴ (Emphasis added.)

The late ABA President Jerome Shestack, a professionalism pioneer who energized the modern movement, wrote of six elements “that are the essence” of that definition, among them: “*Obligations to the rule of law and the justice system.*”⁵ (Emphasis added.)

That the courts of this nation and the great justice machine they represent are under siege is not in question. The National Center for State Courts found that 42 states reduced funding for their judiciaries in 2011. A Center survey determined that 34 states had eliminated court staff and 23 had cut hours.

The notion that personal commitment to preservation of the justice system is integral to our very identity as lawyers is driven home by the professionalism

² David Thompson, *Teaching Professional Identity with Skills & Values Text*, Law School 2.0 Blog (Jan. 21, 2012, 2:48 PM), <http://www.lawschool2.org/lis2/2012/01/index.html>.

³ Roscoe Pound, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES: WITH PARTICULAR REFERENCE TO THE DEVELOPMENT OF BAR ASSOCIATIONS IN THE UNITED STATES* 354 (West Pub. Co. 1953).

⁴ ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR PROF’L’ISM COMM. REPORT, *Teaching and Learning Professionalism* 6 (Aug. 1996).

⁵ Jerome J. Shestack, *Promoting Professionalism: ABA Programs, Plans, and Strategies* 3 (ABA 1998) (foreword).

creeds and codes of many of our state supreme courts and state bars. Consider a few representative examples:

Georgia:

From *The Lawyer's Creed*

To the public and our systems of justice, I offer service. *I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients.*" ⁶ (Emphasis added.)

From the *Aspirational Statement on Professionalism*

(d) *To preserve and improve the law, the legal system, and other dispute resolution processes as instruments for the common good.* (e) *To make the law, the legal system, and other dispute resolution processes available to all.*" ⁷ (Emphasis added.)

Ohio:

From *Professional Ideals for Ohio Lawyers and Judges*, Introduction

Professionalism requires lawyers and judges to remain mindful that their *primary obligations are to the institutions of law and the betterment of society, rather than to the interests of their clients or themselves.*" ⁸ (Emphasis added.)

From *A Lawyer's Creed*

To the public and our system of justice, I offer service. *I shall devote some of my time and skills to community, governmental and other activities that promote the common good. I shall strive to improve the law and our legal system and to make the law and our legal system available to all.* ⁹ (Emphasis added.)

⁶ Georgia Chief Justice's Commission on Professionalism, Rules and Regulations for the Organization and Government of the State Bar of Georgia: *The Lawyer's Creed and Aspirational Statement on Professionalism* (1990).

⁷ *Id.*

⁸ Supreme Court of Ohio, *Professional Ideals for Ohio Lawyers and Judges* 6 (1997).

⁹ *Id.* at i.

The Canadian perspective on a lawyer's public duties is similar:

From Remarks of the Chief Justice of Ontario

Professionalism is . . . the guiding light to lawyers in meeting their obligations to the public they serve, in defending the rule of law, and in upholding their duties and responsibilities to clients and to the court. Stated differently, *being a lawyer, being a professional, means committing oneself to the fair administration of justice and to doing one's part in facilitating true access to justice.*¹⁰

For the Professional Lawyer, Support of the Court System Is Not Discretionary.

All roads thus deliver us to the same conclusion. If we identify ourselves as lawyers, support of the justice system at a time of great distress is not discretionary. The need to respond, in and for the public interest, is part of our professional DNA, and informs our professional duty.

That duty-driven connection has been self-evident to bar leadership. This year, in a closely coordinated effort, the ABA and state and local bars have indeed stood as one, converging on Washington, D.C., and state capitals to make the critical case for adequate funding of our courts. The ABA Task Force on Preservation of the Justice System has eloquently and starkly framed the issue, and for those holding the public purse strings there can be no doubt of the widespread damage inflicted by inadequate court resources.

As those who self-identify as legal professionals, even as we acknowledge the important, essential advocacy of the organized bar on the courts crisis, we might ask ourselves what we have done individually, as public citizens, to support our system of "justice for all" in its hour of need. Our answer to that question may serve as answer to the larger one:

Are you a lawyer?

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The Standing Committee on Professionalism. (312) 988-5175.

¹⁰ Chief Justice Warren K. Winkler, Remarks at the Law Society of Upper Canada's Call to the Bar Ceremony (June 5, 2010).



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Legal Ease

Amy Goodusky: Taking Aim at an Obstinate Opposing Counsel

Amy Goodusky, The Connecticut Law Tribune

July 10, 2014

Lately, it seems that there is a lack of collegiality in the profession.

When I began practicing, it was possible to forget one's concerns with another's behavior or the dilemma du jour on the courthouse steps, and to adjourn with an opponent for a cup of coffee after having vigorously disputed his position moments earlier. We were friendly. Things have changed. It's personal. Low blows, diversionary tactics and frowning faces abound. Nobody gives an inch.

Apparently other jurisdictions have encountered similar difficulties.

I can't now recall how I ran across this case, which is ostensibly a measure of my abject senility, or representative of the fact that I am busy and often tired. It contained a novel procedural remedy, derived from Puerto Rico Rule of Civil Procedure 44.1(d), which states: "In the event any party or its lawyer has acted obstinately or frivolously, the court shall, in its judgment, impose on such person the payment of a sum for attorney's fees which the court decides corresponds to such conduct."

It was the title of the motion which caught my attention, however. It was called, "Plaintiff's Motion for Express Finding of Obstinacy." The case in which the motion to find that the defendant had acted in an obstinate manner was a medical malpractice action. This caught my eye, as that's my practice area. I unwrapped several petite Almond Joys to facilitate comprehension of the court's decision.

The court described the standard by which it might make a finding of obstinacy. Under federal law, "a finding of obstinacy requires that the court determine a litigant to have been unreasonably adamant or stubbornly litigious, beyond the acceptable demands of the litigation, thereby wasting time and causing the court and the other litigants unnecessary expense and delay." *Martinez-Alvarez v Ryder Memorial Hospital*, 2010 WL 3431653, *18, U.S. District Court, District of Puerto Rico (Aug. 31, 2010).

The decision did not cite to any particular behavior during the trial which had prompted the initiation of such a motion, beyond indicating that the strategies employed by both parties

during the discovery phase of the case and the jury trial had been "hard fought."

The court added that the "parties called upon numerous experts and factual witnesses over the course of two weeks of trial. Evidentiary issues and other legal questions were disputed vigorously. In settlement discussions, the parties were far apart in terms of their valuation of the case."

This sounded ominously familiar.

The court declined to find that the defendants had acted obstinately. It emphasized that "the course of the litigation was the result of honest disagreement and diligent advocacy, not obstinacy, rashness, or frivolousness. Defendants pursued strategies which they believed would be victorious. Many of the issues in the case turned upon highly complex assessments of medical issues. To further complicate matters, the evidence presented through testimony and documentary evidence was mixed and in many cases did not clearly lead to any single conclusion. Most notably, the primary cause of Adalberto Martínez's death, whether by loss of blood, heart attack, infection, or preexisting conditions, was hotly disputed."

Had the court found that there was obstinate, rash, frivolous or dilatory behavior which had tainted the proceedings, the movant would have been entitled to money damages. I submit that if Connecticut were to adopt the Motion for Determination of Obstinacy as a procedural cure for litigious shenanigans, the remedy should differ. The offending party should be required to treat its opponents with courtesy, kindness, justice and love for a period of at least 30 days, including, but not limited to, footing the bill for the coffee afterward, or perhaps, in the interests of inducing nutritional narcosis and the associated disregard of petty personal differences which the same might promote, an ice cream sandwich. •

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Editorial: Efforts to Boost Professionalism Must Include Due Process

The Connecticut Law Tribune

July 23, 2014

The American Civil Trial Bar Roundtable, an organization within the American Bar Association concerned with the importance of the civil trial system to the protection and preservation of the American justice system, recently issued a thoughtful, comprehensive and insightful white paper on increasing the professionalism of American lawyers.

Acknowledging the elusive nature of a definition of professionalism, the treatise focuses on its generally accepted major components of competency, ethics, integrity, access to justice, respect for the rule of law, independent judgment and civility. With these core values as the metric, the white paper concluded that, notwithstanding recent efforts by bar associations, courts and law schools to enhance the level of professionalism in the practice of law, "the common experience of the profession suggests that unprofessional conduct of lawyers remains unacceptably high." Unprofessional lawyer behavior, the paper maintains, imposes unnecessary delays and costs on the litigation process, diminishes public confidence in the legal profession and the civil justice systems, and undermines the rule of law itself. As such, it cannot be tolerated.

The roundtable's report went on to acknowledge the various initiatives undertaken in recent years to combat unprofessional conduct, including state court professionalism commissions, state bar professionalism committees, professionalism codes, creeds and oaths, mandatory CLE programs, mentoring programs, and recent law school emphasis on teaching professionalism. All of these efforts, the report argues, can fairly be deemed to be educational in nature, and while cumulatively they have indeed had a positive impact on the professionalism problem, they are not enough to stem the tide of unprofessional conduct in the practice of law. The roundtable takes the position that the only real solution is to "instill a norm of professional conduct in lawyers."

The roundtable then notes that the Florida and Utah supreme courts and the Colorado Bar Association have implemented systems to formally establish such norms, and concludes that those "innovative new approaches ... hold promise." The Utah Supreme Court has a Board of Counselors to take referrals from lawyers and judges (but not from the public) and then hold face-to-face meetings with the transgressors and provide them with counseling.

The Florida Supreme Court has issued a new "Code for Resolving Professionalism Complaints"

that prohibits "unprofessional conduct," which it defines as substantial, repeated violations of the code. For complaints not constituting a violation of a disciplinary rule, Florida's Attorney Consumer Assistance and Intake Program may provide "remedial guidance" in the form of "letters of advice" or referral to a professionalism enhancement program. The Colorado Bar Association has created a Peer Professionalism Assistance Group to offer mentoring or counseling to lawyers referred to it by judges and lawyers.

The roundtable applauded these "new avenues to strengthening professionalism beyond the philosophy of education on professionalism," because in at least those three states, there now exists a process for raising professionalism complaints not involving separate violations of the rules of professional conduct. But when the roundtable submitted its white paper for endorsement by the ABA, it encountered unexpected opposition from a most unlikely source: the ABA Standing Committee on Professionalism.

The standing committee expressed appreciation for the roundtable's commitment to the achievement of professionalism and support of many of the white paper's recommendations, but it stopped short of embracing the efforts in Florida, Utah and Colorado to receive, adjudicate and act on complaints of unprofessional conduct. Noting that the legal profession has always acknowledged and maintained the distinction between the mandatory requirements of the rules of professional conduct and the aspirational goals of professionalism, the standing committee expressed its fear that these programs designed to establish "norms of professional conduct" would blur that bright line.

Moreover, the inherently subjective and broad nature of the aspirational professional norms being addressed in an informal, "off-the-record" process could "unfairly expose some respondents to the vagaries of inconsistent interpretation of subjective norms," the standing committee opined. The standing committee expressed its further concern that, as these programs and their progeny expanded, disciplinary counsel would be drawn into these compliance efforts, thereby imposing a burden on already overcommitted and underresourced enforcement agencies. The standing committee concluded it could not, therefore, cosponsor the roundtable's resolution seeking endorsement of its white paper and called for "further meaningful dialogue" on the issues it raised concerning those quasi-disciplinary commissions.

We believe the concerns expressed by the standing committee and its call to proceed with caution on these issues are justified. While the quasi-enforcement commissions implemented in Florida, Utah and Colorado constitute a direct and creative effort to stem the tide of unprofessional conduct, which is undeniably a most worthy goal, the informal enforcement of broad and subjective aspirational standards may be dangerously close to the formal regulation of mandatory rules of behavior, but without the requisite due process protections. Indeed, what is yet unclear are the consequences of a finding by such a board that a professionalism "norm" has been violated. Must the respondent report that when seeking admission pro hac vice in another jurisdiction? To his malpractice carrier?

The Florida, Utah and Colorado professionalism commissions should be regarded as pilot programs to be observed carefully over the coming few years. If they function as hoped and expected, without jeopardizing the due process rights of the respondents, then they can serve as a model for other states to emulate. Until then, even the most unprofessional lawyers among us must have their due process rights protected. •

COURTROOM ETIQUETTE & DEMEANOR

COJA HOME	JURY SELECTION	EXPERTS	CTA HOME	CTA BOOKS
MANAGEMENT	OPENING	OBJECTIONS	CTA PHILOSOPHY	CTA FORUM
PRETRIAL	DIRECT	ARGUMENT	INTRODUCTION	LINKS
INTERVIEW	CROSS	ETHICS	WITNESS ROLES	CRIMINAL LAW
WITNESS ADVICE	IDENTIFICATION	BIBLIOGRAPHY	ASSIGNMENTS	OPEN CLOSE
MOTIONS	EXHIBITS	E-GROUP	SYLLABUS	TOP COR
TECHNOLOGY	DOC CAMERA	COJA DVD	MINI-TRIALS	JACO

Sidebar

Professor Moses' 31 COMMANDMENTS of Courtroom Etiquette and Demeanor for Trial Advocates

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"As an officer of the court, defense counsel should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, jurors, and others in the courtroom."

Standard 4-7.1(a) - Courtroom Professionalism

ABA Standards for Criminal Justice: Prosecution and Defense Function

See also, ABA Model Rules of Professional Conduct

Etiquette: A body of rules governing the way in which people behave socially, ceremonially, and in public life.

For an amusing glimpse of courtroom demeanor gone awry, look at The Three Stooges' gambits in *Disorder in the Court*.

Just when you least expect it - courtrooms gone wild! (1) (2) (3) (4) (5) (6)

Success in the courtroom and life itself comes from a combination of character, competence, and commitment.

"There's one other reason for dressing well, namely that dogs respect it, and will not attack you in good clothes."

Ralph Waldo Emerson

Here are my suggestions to law students studying trial advocacy and to new lawyers concerning how you should conduct yourself in court.

1. Respect the Rules of the House. Find out the do's and don'ts of the court you'll be practicing in, and follow them. Your client, your witnesses, and your colleagues need to be advised of some of these pet peeves. Every judge has likes and dislikes. A few have rules that are downright persnickety, but most make good sense. For example, all judges want everyone to turn off cell phones and pagers while court is in session; some judges cannot abide any background noise from talking lawyers while the judge is trying to take a plea; some judges are very protective of their privacy and don't want visitors when the door to their chambers is closed; some judges don't want prosecutors bargaining on probation revocations, the judge considering this a contract between the defendant and the court; some judges get very perturbed by lawyers who wait until the last minute to raise housekeeping issues that keep prospective jurors waiting in the hallway; many judges are sensitive to discourteous conduct or bickering between opposing lawyers; most

judges don't want anyone, including lawyers, reading newspapers or magazines in the courtroom; they don't want anyone bringing edibles into the courtroom; they don't want anyone propping their feet on tables, chairs, or benches; they don't want lawyers sitting on tables, railings, desks, or arms of chairs; they don't want people wearing headgear or hats, including baseball caps, in their courtrooms; they don't want lawyers leaning on the bench; they don't want lawyers referring to parties or witnesses by anything other than their last names, e. g., "Mr. Ames," "Dr. Burns." In rural areas, judges may not want to hear how things are done in the big city. Almost all judges are very put off by lawyers interrupting them or opposing counsel. (Let the judge and, unless you need to protect the record, your opponent finish before getting your two cents worth in.) With regard to trials, most judges want you to be able to opine how long it will take to try the case, whether you have scheduling conflicts, whether you anticipate filing motions prior to trial, whether there is a possibility of settlement and whether there are anticipated problems that need to be resolved prior to trial. Many judges prefer that you premark your exhibits; some require that you file an exhibit list with the court. Most judges do not want you to argue your objections or respond to the other side's objections in the presence of the jury. Normally only one attorney for each party will be permitted to examine or cross-examine any one witness, and the lawyer who examines or cross-examines is typically the lawyer who will be permitted make and respond to objections, i.e., no double-teaming on examination or objections. Many judges prefer that you not make substantive motions, e.g., motion for directed verdict, in the presence or earshot of the jury. In cases involving expert testimony, many judges do not want the proponent of the witness to ask the judge to declare the witness an expert; instead the judge prefers to leave it to the opposition to either object to the expert witness' competence or ask to voir dire the purported expert witness re his/her qualifications; only if the opposition raises an objection to the witness' qualifications to testify as an expert will the court be willing to rule that the witness is qualified. Many judges have minimal dress codes for lawyers and defendants. Some judges insist that you have a written motion for continuance prepared and filed if you are going to announce "not ready." Some will require the parties to get together in advance of trial and determine which exhibits will involve evidentiary challenges, i.e., those to which admissibility is not stipulated. Some will require regarding opening statement that counsel request and obtain prior court approval before introducing topics that may have a significant potential for unfair prejudice. Some will require that counsel meet and confer prior to the deadline for submission of instructions and make a good faith effort to agree on the submission of all non-standard instructions. Some courts require that each requested instruction be submitted on a separate sheet of paper. Most judges will not want you to initiate any sort of substantive, case-related *ex parte* (out of the presence of opposing counsel) conversation about the case with the court. Trial judges frown (no pun intended) on lawyers and others who may exhibit facial expressions, head shaking, or guttural approval or disapproval of transactions or testimony elicited from a witness. Pretrial and peri-trial contact with jurors outside of court is prohibited everywhere. Similarly, all judges do not allow you to address a juror by name after voir dire is complete. To avoid improper currying of favor, most judges prefer that you make suggestions regarding comfort of the jury out of the jury's presence. The list can go on and on. It will vary in each jurisdiction and with each judge. In addition to using your common sense, it's up to you to ask around and find out the likes and dislikes of your particular trial judge.

2. Check Out the Venue. Visit the unfamiliar courtroom. Check out lines of sight from the witness box, the jury box, the bench, the lectern (podium), and counsel tables. If you think that counsel tables need to be rearranged for the sake of fairness, do not move them without obtaining the court's permission. Get a feel for the acoustics. If your exhibits will take up space or if you are carting electronic presentation gear, find out if the court opens early and where you can store your exhibits and/or presentation equipment. Note the location of electric power outlets and lighting controls. Determine who (usually the bailiff) handles the courtroom lighting. Determine what sort of presentation equipment, e.g., flipcharts, video monitors, screens, the court supplies and what you need to do to reserve desired equipment. (If you don't reserve the court's equipment, nine times out of ten, it won't be available when you need it.)

3. Be Punctual. Don't Waste the Court's or Jury's Time. Be Candid with the Court. Being Punctual: Better an hour too early than a minute too late! Be so punctual that the judge can predict the rising and setting of the sun by your comings and goings. Or, as a judge once told me, "Mr. Moses, if you can't be on time, *be early!*" Tip: When in trial, make it a habit to get to court before your opponent every day. Your adversary will perceive you as ready and confident. Wasting Time: Don't keep the court waiting. If you are going to be tardy for a court appearance, call the court and provide your reasons for being tardy. Tell the court when you will arrive. Don't waste the court's time. Delaying tactics will irritate the court. Judges are concerned with keeping their dockets moving. Trial engagements typically take precedence over any other business. So, if you have matters in courtrooms other than the one in which you are trying a case, make other arrangements in advance for handling of those matters. If you can, save the court some time, e.g., by premarking your exhibits in advance of the court session, by having your witnesses ready to testify, by having orders prepared in advance for the judge's signature, by providing a bench brief regarding key evidentiary rulings, by having all documents about which you intend to question a witness readily available when you start the examination etc. If you anticipate that oral argument will be required for an evidentiary ruling or to resolve some other issue during the trial, alert the court so the matter may be heard either before the jury arrives or after the jury has been dismissed for the day. Most importantly, the jurors have volunteered their time for negligible pay. Their time is valuable to them. Don't ever engage in dilatory tactics and needless repetition that makes clear that you are wasting their time. If you waste the jurors' time, you will lose their goodwill. Candor: Do not make false statements of law or fact to the court.

4. Be Well Groomed, Well Dressed, and Dignified. The same goes for your client, your witnesses, and your co-counsel. Of course, every lawyer recognizes that you don't persuade jurors simply by pointing a suit at them. But, it's a start. People often judge from appearances; jurors and judges are people.

5. Maintain an Attitude of Confidence, Politeness, and Courtesy to All Court Personnel and Opposing Counsel. It helps to have the court staff, e.g., clerk, bailiff, court reporter, etc. on your side. Have a pleasant expression on your face when deal with the court staff. Be nice. Be likeable. Don't be condescending, arrogant or cocky. Treat opposing counsel in a civil and courteous manner, but do not ever

let the jury think that you have a cozy relationship with the other side. Avoid disparaging remarks and acrimony. Abstain from sidebar remarks, i.e., disparaging comments or remarks, not addressed to the court, made while opposing counsel is questioning or making a jury speech. Don't make comments expressing your personal opinion. Don't attribute bad motives or improper conduct to the opposition, unless you have proof. Stay in control of your emotions. Even if opposing counsel is a jerk, don't be confrontational unless it advances your case, e.g., when a prosecutor has suppressed evidence favorable to the defense. The cardinal rule: *Don't get angry, except on purpose.*

6. Prepare Complicated Stipulations in Writing Before You Present Them in Court. Don't make an offer or request for a stipulation in front of the jurors unless you have vetted it with the opposition in advance of the request or offer. When you have reached an oral agreement concerning stipulations, exchange drafts with the opposition and cooperate in reducing it to writing. As general rule, do not offer any stipulation, unless opposing counsel (and the defendant) has agreed to the stipulation and it has been reduced to writing. In a criminal case, neither side has the duty to stipulate to relevant evidence, even though the evidence may not be vigorously disputed. When you do think about stipulating to witness testimony, recognize that there are two types of stipulation. First, you may stipulate that if any absent witness were present his/her sworn testimony would be thus and so. Second, you may stipulate not only to the testimony that the absent witness would provide but also to the *truth and correctness* of that stipulated testimony. In the former situation, the credibility of the source of the stipulated testimony and the truth and correctness of that testimony is still at issue. In the former situation, credibility and correctness is not in issue because the truth and correctness of the stipulated testimony is no longer in issue. If the other side has the burden of proof on the issue covered by the stipulation, you are much better off stipulating to the testimony but not the truth of it. If you have the burden of proof on the issue, try to get the opposition to agree not only to the stipulated testimony but also to the truth and correctness of it. Tip: If the defendant in a criminal case is stipulating to testimony in either situation, the prosecution should ensure that the court admonishes the defendant regarding his constitutional rights to subpoena, confront, and cross-examine witnesses and obtains a knowing waiver (1).

7. Be Ready with Grounds for Your Objections. Try to anticipate possible objections, the grounds for them, and the probable responses. When you do object in the presence of the jury, make your objection timely and specifically to the point. Cite the Rule of Evidence and/or the common designation, e.g., "inadmissible hearsay" for your objection. Don't argue the objection without court approval, and, even then, argue at sidebar. Don't argue with the ruling of the court in the jury's presence. For more see [Objections](#).

8. Request the Use of Easels, Chalkboards, Document Cameras, Video Monitors and Recorders, Projectors, Screens, and Other Equipment Well in Advance So That They May Be Set Up While the Court Is Not in Session. Don't waste the jury's time. If you are going to display evidence, be certain that the medium of display is ready for your use. If you are using an electronic medium, always have a hardcopy backup in case of power failure. If you plan to use a demonstrative aid that requires a special display medium, let the court know in advance what you are going to do.

9. Stay Out of the "Well" Unless You are Given Permission. The "well" is the area between the judge's bench and the counsel tables. Judges typically insist that this area be kept clear of movement of people, unless permission has been obtained to enter it. Permission to move into the well is gained by asking the court, e.g., "May I approach the witness?" or "May I approach the bench?" or "May I have the reporter mark this item for identification as State's Exhibit No. 1?" or "May the witness step down and approach the chalkboard?" If you don't know the custom of the court regarding position and movement during opening statement and jury argument, as a matter of housekeeping you may want to inquire of the court out of the jury's presence, "Your Honor, do we have permission to move about the well during opening statement and jury argument?" Note: In actual practice, you may find that while all judges will require leave of court to approach the bench, many will allow you to approach the witness without leave of court whenever necessary to show the witness a tangible item of evidence.

10. Stand When the Judge or Jury Enters or Leaves the Courtroom. Stand when court is opened, recessed, or adjourned. Do the same when the jury enter the courtroom or begins to exit the jury box. Remember to tell your client and witnesses to do the same. (1) This is a basic gesture of respect for the referee and/or the decision-maker.

11. Stand When Addressing the Court, Being Addressed By the Court, Objecting and Responding to Objections. Always stand when speaking to the court, being spoken to by the court, objecting, and responding to objections. Those who do not stand when addressing the court, e.g., making or responding to an objection, will sometimes have their words ignored by the court. When you don't stand, the judge may imply ignore you or say, "I can't hear you, counsel." - meaning that your words to the court won't be heard as long as you remain seated.

12. Be Respectful in Your Public Requests, Comments, and Dealings with the Court. Adopt a formal approach that reflects courtesy and respect for the authority of the court. Common phrases that are used when communicating with the judge include the following: "May it please the Court," used as the greeting at the outset of your opening statement and your opening argument; "With Your Honor's leave (or permission), I would like to," used when seeking permission to do something; "As the court pleases," "Very well, Your Honor," and "So be it, Your Honor" - used when you are acceding (consenting) to an unobjectionable oral direction or order of the court. "As the Court well knows," used when you are getting ready to educate the judge about something s/he probably doesn't know. Don't interrupt the judge. Listen to what the judge says. The judge has considerable discretionary power that can be used to help you or hurt you, even in jury trials where s/he serves only as the referee. Something as nebulous as the judge's lone of voice in ruling on objections can influence the juror's perceptions of your credibility. In jury trials, treat the judge as though s/he was the foreperson of the jury. Every judge has quirks. In some locales, there are published Judge's Bench Books that describe the peculiarities, predilections, and requirements of each local judge. These may be

useful reading if you are not personally familiar with the way a certain judge runs his or her court.

13. Avoid Too Many Bench (Sidebar) Conferences. Jurors Don't Like to Feel Left Out of the Loop. Try to anticipate the necessity for rulings and discuss them when the jury is not seated. You can often smooth the road by using pretrial motions in limine. Once trial has started, you should seek to resolve sensitive matters before court the jury is brought into the courtroom. If prejudicial publicity is an issue you may want to seek an *en camera* hearing before the court. Jurors are suspicious of the motives of attorneys who keep them from hearing everything that's going on. When a bench or sidebar conference is unavoidable, seek permission from the court before approaching the bench or sidebar. Rather than saying, "May we approach the bench, Your Honor?", consider gliding the phrasing of your request in a way that will appeal to the judge, e.g., "Your Honor, I need some guidance from the court. May we approach?" The upside of approaching the bench is that sensitive comments made at the bench conference or sidebar are out of the jury's earshot, and the trip to the bench or sidebar does give you a few precious moments to think about what you are going to say when you get there.

14. Talk in the Third Person When Referring to Conduct or Requests of the Court and/or Opposing Counsel. Talking in the third person means that when speaking to or about the judge you refer to the judge as the "court" rather than as "Judge so-and-so", e.g., "Would the Court entertain a request for a brief recess?" and refer to the lawyer on the other side as "opposing counsel" rather than by the lawyer's name, e.g., "Would the Court instruct opposing counsel to provide us with a copy of the witness' prior written statement?"

15. Address All Remarks to Opposing Counsel Through the Court. Do not speak directly to opposing counsel, except for perfunctory matters of courtesy. If you want opposing counsel to do something, ask the court to ask opposing counsel to do it, e.g., "Would the Court ask opposing counsel to furnish us with a copy of the bench brief that she provided to the Court?" Use the court as your intermediary, e.g., "Your Honor, we would ask that the prosecution provide us with a copy of the witness' statement pursuant to Rule 615 TRE." Don't turn and address or question opposing counsel directly, even when opposing counsel makes sidebar remarks. If you need to confer with the opposition while the jury is in the box say, "Your Honor, may we have your permission to confer with opposing counsel for a brief moment?"

16. In Some Trial Courts You Must Question the Witness from a Seated Position at Counsel Table, Unless You Have Been Given Permission to Be On Your Feet. In Texas and in many federal courts, it is customary for trial lawyers to question witnesses while counsel is seated at counsel table. Of course, there are circumstances when you will be given permission to question while standing, e.g., when you need to show a witness an exhibit. In some courts with modern evidence presentation consoles equipped with a podium (lectern) clustered with an evidence camera and projector, a telestrator, a video replay unit, a printer and computer terminals, counsel may question from the lectern housing this equipment. Also, there is nothing to prevent the court from allowing you, upon request, to move about the courtroom while questioning a witness. In Texas, TRE 611(a) gives the trial court the power to control the mode of questioning witnesses. In many jurisdictions, e.g., Florida, Massachusetts, it is common for counsel to question from a lectern. One caveat, if the court allows you to move about the courtroom, don't crowd the jury; respect the juror's space, understanding that jurors are not free to leave their seats at will. [Note: When dealing with a witness on cross-examination, you will have more authority with the witness if the witness perceives that you control the courtroom space. It helps to be on your feet. Try to plan your cross-examination so that you move toward the witness with exhibits that you touch. When you freely move about and the witness is confined to the witness chair, you will have enhanced your control over that witness.]

17. Do Not Thank the Court for Its Ruling, No Matter Whether the Ruling Is in Your Favor Or Not. Don't thank the court for ruling for you or against you. If you thank the court for ruling in your favor, the court may resent the implication that it is biased in your favor. If you thank the court for ruling against you and the jury understands that the ruling was against you, expressing your gratitude makes you look stupid. If you try to fool the jury into believing that the court was ruling for you by thanking the judge, you will probably be caught in your deception.

18. Do Seek a Lifeline or Parachute Line from the Court When a Brain Cramp Causes You to Temporarily Lose Your Train of Thought, Saying, "May I Have a Moment, Your Honor?" or "Would the Court Indulge me for a moment?" At some point in your career as a trial lawyer, you will need to seek help from the court because your brain has shut down temporarily. It will happen eventually. For some reason, lawyer brains take a brief holiday during periods of courtroom stress. We call it losing your train of thought or going brain dead. When this happens, remain calm, don't blanch or revert to bed-wetting. You may decide to camouflage your predicament by pretending to clean your spectacles or getting a drink of water or taking out your pen and scribbling or rummaging among the papers on your table. All of these stunts may provide the few seconds you need for your brain housing unit to kick in. But there is an easier way. Simply say those magic words, "May I have a moment, Your Honor?" This is the international distress call between lawyers and judges, and even the most difficult judges will honor it. Another variation is, "Will the court indulge me for a moment?" You may want to disguise your request by adding "I want to be sure to get this exactly right." The judge will almost always give you a few seconds to get back on track. Why? Because the judge probably suffered a few brain cramps in his/her career as a trial lawyer and sympathizes with you. Use the garnered moment to gather your thoughts together, and proceed when ready.

19. Don't Quarrel With Opposing Counsel or the Court. The most obvious sign of an aggressive rookie advocate is the propensity to quarrel with the court and opposing counsel about everything. Don't do it. In quarreling, stature is lost. Make a pact with yourself to avoid making disparaging or acrimonious remarks to or about opposing counsel. Be assertive rather than aggressive in your conversations with the court and the opposition. It does your cause no good to engage in undignified or discourteous conduct that is degrading to the court or opposing counsel. There is a difference between quarreling with the court and counsel and standing up for your position by making valid legal and factual arguments with regard to objections and responses. Effective argument is part of what you are being paid to do. You aren't paid to whine. If you want

to argue a point with the court, ask if you may be heard.

20. When Your Opponent Blunders, Don't Rejoice, But Don't Pick Him Up Either. Always be civil to the opposition. Recognize that the trial is a contest. When the opposition falters or blunders, do not gloat, thrill, or rejoice. On the other hand, do not save the opponent from the jaws of defeat. If opposing counsel is proverbially digging himself into a hole, let him keep digging.

21. Deal with the Non-Responsive Witness Without Asking the Court to Help You. Let the Court Volunteer to Admonish the Witness. When you run into a non-responsive witness, get control of the witness and demonstrate that the witness is ducking your questions and answering unasked questions. As a general rule, don't ask the court to do your dirty work. Try to avoid the usual practice of beseeching the judge to admonish the witness to answer the question, e.g., "Would the Court please instruct the witness to listen to the question that I ask and to answer that question without adding gratuitous thoughts?" Instead, deal with the witness yourself. You can learn how to deal with the non-responsive witness without having to seek help from the judge. Various techniques for getting control of the non-responsive witness are detailed in the CCJA monograph, *Cross-Examination in Criminal Cases* and on the [Cross-Examination](#) page. If you are skilled, you won't need the judge's help with the witness who doesn't want to answer the question. If the witness simply refuses to be corralled, the judge will usually volunteer to rein him in. Accept the court's help, but don't ask for it.

22. Don't Ask the Court to Sanction Your Opponent. You appear weak when you ask the court to punish your opponent. It's better to punish your opponent personally. How do you level the playing field? Outlawyer him!

23. When You Want the Jurors to See an Exhibit, Ask to Have It "Passed" to the Jury or "Displayed" for the Jury. Leave Out the Stuffed-Shirt Word "Publish." In my trial advocacy course, don't say, "May this exhibit be *published* to the jury?" This prissy language, fostered by law schools and now appearing commonly in court, is too over the top for me. Use plain and simple language that jurors understand and say, "May this exhibit be *passed* (or *displayed* or *shown*) to the jury?" (Note: If, when dining, you are the type who asks your dinner partner to "publish the mashed potatoes," disregard this suggestion.)

24. When You Want the Jurors to See Something Favorable that is Happening in Court Make Sure that All the Jurors Can See If something of favorable importance to your theory of the case is happening in court, make sure that all the jurors can see. Simply say to the court, "Your Honor, we'd like to be sure that all the jurors can see this (describe the demonstration or thing, e.g., 'this demonstration' or 'this scale model')." or "Your Honor, will you inquire of the jury whether everyone can see?" You'll solve the problem. The added benefit is that you have alerted inattentive jurors that they should be observing these upcoming proceedings with care.

25. Don't Ever Pass an Item of Evidence Directly to a Jury Member. Once you have the okay from the judge to have the exhibit passed to the jury, give the item to the court bailiff; one of whose jobs is to pass and retrieve evidence to and from the jurors. Do not ever pass anything directly from your hand to a juror's hand. [This is consistent with the general rule that under no circumstances are you to attempt to communicate in any manner, other than in open court during the trial, with any member of the jury prior to receipt of the verdict and release of the jurors by the court. Note that some jurisdictions, e.g., federal, place very severe restrictions upon post-trial contact between lawyers and jurors.]

26. Don't Echo (Parrot) or "OKAY" the Witness' Answers. These are both common phenomena among inexperienced lawyers. Echoing (parroting) is simply repeating the witness' favorable answer before you ask your next question. It's an unsophisticated effort to use the figure of speech known as repetition as a mode of persuasion. The much preferred technique of repetition is to simply loop a favorable answer into your next question. The most difficult habit to avoid is the "OKAY" syndrome. Odds are that you will find yourself unconsciously saying "Okay" immediately after the witness answers your question. If you are desperately in need of self-assurance, you will say "Okay" as a response to almost every answer that you get on direct examination. The best way of curing yourself of parroting and the loathsome and distracting addiction to the word "Okay" is to watch yourself doing it on video. [In my trial advocacy class, I ring a small dinner bell every time a major violator says "Okay" as a response. It cures the habit.]

27. Refer to the Exhibit by Its Identifying Exhibit Number. Once an exhibit has been marked, refer to the exhibit by its exhibit identification number. Don't say, "Look at *this*. Do you recognize *it*?" Instead, say, "I'm handing you what has been marked for identification as *State's Exhibit Number One*. Do you recognize it?" Once the exhibit has been received in evidence continue to refer to it by its exhibit number, e.g., "Take a look at this aerial photo marked *State's Exhibit Number One*, and show us where the motor home was parked." To understand why you need to refer to exhibits by number, picture yourself as an appellate judge reading a transcript and trying to decipher what the word "*this*" refers to.

28. Recognize That You Are Making a Record Through the Court Reporter. Be conscious that there is a court reporter preserving the record in shorthand. When the last words have been spoken, all that remains is the record. What you say may be read back to the jury or it may be read by one or more appellate judges (or at least by their staff attorneys). Keep this in mind. What can you do to facilitate the making of a good record? Here are a few suggestions:

- Identify yourself to the court reporter before the trial or hearing commences. A good way to do this is simply to provide the reporter with your business card that provides your name, address, phone, fax, e-mail, and state bar card number.
- Provide the court reporter with technical terms that may be used by (expert) witnesses.

- Don't overspeak. The reporter can't hear and understand two people at one time. If the witness overspeaks you, try politely saying, "We both can't speak at once or the court reporter is going to be upset with us. The reporter can't hear and understand both of us talking at the same time." Don't crowd your witness' answer with your next question. It's easy to do when you are excited. If an opposition witness is overspeaking your questions or is running on with an unresponsive answer, you may need to overspeak by saying, "Did you understand my question?" See the web page on Cross-Examination for methods of dealing with a non-responsive witness. Another method of stopping the opposition witness who intentionally overspeaks you is to show the witness your upraised open palm in a stop gesture. It works about 60% of the time, particularly if you stand at the same time and say, "Just a moment. The court reporter can't take this down if we are both speaking at the same time." If you overspeak your witness, you may take the blame by saying, "Sorry, I apologize to the court reporter for overspeaking the witness."
- Don't speak too rapidly. Your speech will become blurred and indistinct at above 200 words per minute.
- Have your witnesses state and spell their names - given and surname (proper).
- Make certain that numbers are presented in a non-confusing manner.
- If you have a large number of exhibits, let the reporter know in advance.
- Many courts require that you premark your exhibits. Find out beforehand if this is the policy in your trial court. Determine if the court reporter uses color-coded exhibit stickers, e.g., blue for the prosecution, yellow for the defense. If so, ask the court reporter for a sufficient number of exhibit stickers to premark your exhibits. Some courts will use letters, e.g., State's/ Plaintiffs Exhibit A, for prosecutors/plaintiffs and numbers for the defense, e.g., Defense Exhibit 1.
- Find out if the court requires you to file an exhibit list prior to trial. If so, copies of your exhibit list typically go to the court, the court reporter and opposing counsel.
- Clarify non-verbal conduct and gestures, e.g., "[To the witness] For the record, you have *(describe the witness' non-verbal conduct, e.g., 'raised you right hand with closed fist to your right ear')*, is that a fair statement?" "For the record, the witness is *(describe the non-verbal gesture, e.g., 'indicating a distance of approximately two feet')*," or "Let the record reflect that *(describe the non-verbal gesture, e.g., 'the witness is pointing to the defendant')*," or "[If you are confident that the trial judge is willing to become a witness] For the record, would Your Honor approximate *(indicate the non-verbal occurrence, e.g., 'the distance indicated by the witness')*?" The goal is to be certain that the witness' testimony is clear in the record. Suppose, for example, that you ask a witness how far he was from the attacker and he answers, "About as far as from me to you." You should clarify this answer for the record by getting the witness to express the distance in feet. Similarly, if a witness answers a question with a shake of the head or a nod, get him to answer orally, e.g., "You'll have to speak up so the court reporter can get your answer." An alternative approach is for you to indicate the unambiguous non-verbal answer for the record, e.g., "Let the record reflect that the witness shook his head affirmatively in a 'yes' answer to the last question."
- If you are using a translator (interpreter), ask your questions directly of the witness. Don't say to the translator, "Ask him if..."
- Withdraw mistaken references immediately upon recognizing their inaccuracy, e.g., "I misspoke myself. Let me withdraw that reference and start over."
- If you want to ask the court reporter to mark certain crucial trial testimony for later copying and use in court during subsequent questioning or in argument, work out a code word/phrase such as "mark, please" that will alert the court reporter that you want that testimony noted for later copying and use in court. Let the judge know in advance that you have made this arrangement with the reporter and obtain the court's approval.
- If you quote from the evidence, indicate the source and page number, e.g., "Concerning your sworn testimony at the preliminary hearing, on page 3, line 7 of the reporter's transcript of the hearing, did you say *(quote the prior inconsistent statement)*."
- If you read prior testimony, use the "question" and "answer" method.
- If you ever go off the record with a sidebar conference, be sure to remember to tell the reporter to go back on the record when the off-the-record conference ends.

29. Don't Pass Notes, Ear Whisper or Sleeve Tug on Your Co-Counsel When Co-Counsel Is Examining a Witness. The lawyer who is questioning the witness is the captain of the case and the master of the examination. Co-counsel, sitting at the lawyer's table, is the first mate. The cardinal rule is: The first mate (co-counsel) does not interrupt or interfere with the captain (the examiner) without the captain's permission. Work this out in advance. If you want to be interrupted mid-stream, ignore this suggestion. Unless you come up with a better procedure, while the examination is taking place, the co-counsel should sit silently and make cogent written notes of any suggestions for the examiner. When the examiner has completed the questioning and *before passing the witness*, the examiner should ask the court, "Your Honor, will the court give me just a couple of minutes to confer with co-counsel?" The judge will always give you a chance to briefly confer with co-counsel. The examiner and co-counsel then confer orally and/or the examiner visually reviews the written suggestions. My reasons for this suggestion arise from seeing hundreds of instances where an overly zealous co-counsel interrupts the examiner with suggestions during the heart of the examination. It's bad practice for several reasons: It distracts the examiner. It distracts the jurors. It gives the appearance that the co-counsel lacks confidence in the examiner. Need I say more?

30. When You Finish a Round of Questioning, Say "No further questions at this time" or "Pass the witness to counsel for (either cross, redirect, recross)" or "We tender the witness for examination (or for questioning) by opposing counsel"; Only When the Witness Is Passed to You and You Have No Questions to Ask Should You Say "No further questions." Many lawyers who call a witness end their direct examination with the statement "No further questions." Then, opposing counsel questions the witness on cross and says "No further questions." So far, so good. Then, in violation of the earlier pledge to ask no further questions the lawyer who called the witness, asks further questions on redirect and again ends with a

"No further questions." Then opposing counsel, who has also promised to ask no further questions, recrosses the witness and ends with "No further questions." This can go on and on, until one side actually has no further questions. At that time, the witness is excused. Why fib? Why say, "No further questions" when you may indeed ask some more questions a little later down the line, i.e., when the witness is passed to you? In my Criminal Trial Advocacy course, when you have finished with your questioning of a witness on direct, cross, redirect, recross, etc., you always say, "No further questions *at this time*" or "Pass the witness for questioning," or "Your Honor, I've concluded my (state the stage, e.g., direct) examination," or, if you want to be assertive in giving the other side a shot at your witness, "We tender the witness for questioning by opposing counsel," or "Opposing counsel may inquire of the witness." If you want to run the risk of speaking directly to opposing counsel, you might say "The witness is back to you, counsel." Only and only when the witness is passed or tendered to you and you have *absolutely no questions* of the witness at that juncture may you say, "No further questions," or "I have no further questions of this witness," or "Nothing further." Under this approach only one lawyer will say, "No further questions." And that lawyer will say it only once. After it is said, the witness be excused or excused subject to recall by the judge and will step down from the witness stand. At the point where the witness is excused, the judge may ask each side if it is agreeable to excuse the witness; if you anticipate needing to recall the witness later in the case and don't want the witness to be released from his/her subpoena, be sure to let the court know that you do not want the witness excused and want the witness to remain in attendance and subject to the court's subpoena. You'll need to provide the trial judge with a good reason for holding the witness. Be prepared to say at sidebar, "Your Honor, I anticipate that I will need to recall the witness later in the case for the purpose of (state your good reason)." Also, be aware that holding the witness after s/he has testified on cross and direct is often a substantial inconvenience to the witness. In such case, you may consider stating to the court that you are amenable to allowing the witness to go about her/his business subject to notification by the court that s/he is being recalled.

31. Act in Conformity with Ethical Values that Are Commonly Held in Esteem: In all that you do in and about the courtroom, reflect the ethical values that people traditionally admire, e.g., sincerity, fairness, etc.

[**Bonus:** If it's not covered above, check Miss Manners. or, if I've missed something, drop an email suggesting an addition. And always remember, *be a little kinder than necessary* to jurors and courtroom personnel. Either can help you or hurt you as they choose.]

TOP
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ETHICS and PLEA BARGAINING

What's Discovery Got to Do With It?

By ELLEN YAROSHEFSKY

The words "ethics" and "plea bargaining" are rarely used in the same sentence. Typically, prosecution and defense conduct in plea bargaining is not perceived as an ethics issue but rather as governed solely by case law, statutes, and rules of procedure.

In many jurisdictions a typical misdemeanor state court case or less serious state felony cases proceeds as follows: The prosecution makes an offer; the defense lawyer after minimal or no investigation discusses the plea with the client who decides to take the offer to ensure a lesser sentence; the court questions the client to meet constitutional requirements of the voluntariness of the guilty plea; the plea is accepted, and the client is sentenced. This process is described as a "middle eastern bazaar" where defense lawyers "shuffle into the prosecutor's office and, in an matter of two to three minutes, dispose of one or more cases 'set down' that day. Generally only a few words have to be exchanged before an agreement is reached." (MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS* (Univ. of Chicago Press, 1978).)

By contrast, in most state felony cases and in federal court, the process is an adversarial model with a more formal process and, hopefully, adequate defense investigation and strategic discussion with the prosecution, but the power balance—particularly under mandatory minimum sentences and sentencing guideline regimes—results in a system where the prosecutor "can effectively dictate the terms of the 'deal.'" (Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, Marq. Univ. L. Sch. Legal Studies Research Paper Series 07-42, 16 (April 2007).)

This raises the most fundamental of ethics issues: Are state and federal plea-bargaining systems fair? Does the "negotiation process," where the defense wields minimal bargaining power, provide for a system to achieve reliable results?

The system has been vigorously justified and premised on the notion that only guilty people plead guilty. "A counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." (Menna v. New York, 423 U.S. 61, 62 n.2 (1975).) Critics of the plea-bargaining process are at least as old as our criminal justice system, decrying the process as inadequate to ensure that we effectively distinguish the guilty from the innocent. (See, e.g., Albert Alschuler, *The Changing Plea Bargain Debate*, 69 CAL. L. REV. 652 (1981); Stephen Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1992 (1992).)

Despite these critiques, plea bargaining is here to stay and is the essence of the criminal justice system. More than 90 percent of cases nationwide result in guilty pleas. In federal courts, guilty pleas are now upwards of 96 percent, an increase of some percentage in the last decade. (Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea Based Ceilings*, 82 TULANE L. REV. 1237, 1259 (2008).) Reflecting on this reality nearly 20 years ago, current United States District Court Judge Gerard Lynch pointed out that ours is not an adversarial but an administrative model of justice. (Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).) The consequence of this "guilty plea system of justice" should be a renewed focus on the ethical obligations of lawyers in this "bargaining" process; that is, the articulation of the best practices and procedures to ensure informed and voluntary guilty pleas to the appropriate charge rather than the virtually exclusive focus upon trial conduct as the reference point for a lawyer's ethical obligations.

Innocent People Plead Guilty

This is particularly essential in our system where the underlying premise—that innocent people do not plead guilty—has been demonstrated to be false. Although commentators have long argued and explained why innocents are likely to plead guilty, the notion that an innocent person would plead guilty to a crime he or she did not commit was apocryphal until about 15 years ago—and even where acknowledged, believed to be so rare as to not require a systemic look backward. (John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437 (2001).)

A range of cases of the factually innocent now provides proof that the fundamental assumption is wrong. Of the more than 230 DNA-based exonerations documented by the Innocence Project and the additional 110 documented non-DNA exonerations, 20 of those are innocent people who pled guilty. (Samuel R. Gross, *Convicting the Innocent*, ANN. REV. L. & SOC. SCI. (forthcoming 2008).)

A significant cause of these wrongful convictions in the pretrial stage is the failure to disclose exculpatory information or a one-sided investigative process where exculpatory proof is simply ignored." (Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241 (2002).) Other causes—often intertwined with the failure to disclose exculpatory information—are faulty eyewitness identification, false confes-

sions, faulty laboratory work, and inadequate defense counsel. The universe of non-DNA cases has yet to be explored, but one can extrapolate that at least hundreds if not thousands of the wrongfully convicted languish in prison without DNA to prove their innocence—an unknown number secured by guilty pleas. Accurate numbers are unknown and unknowable. The numbers of exonerations have increased exponentially over the years as more resources are devoted to the problem and the data demonstrate that the current numbers are merely the tip of the iceberg. (Sam Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005).) In how many of those cases was there evidence not produced to the defense that could have prevented a guilty plea by an innocent person?

A classic example of an innocent man who pled guilty is Christopher Ochoa who, under severe police coercion, falsely confessed to a homicide. When a 20-year-old woman was raped and murdered in Austin in the fall of 1988, Ochoa and Richard Danziger were arrested. According to Ochoa, the police threatened him repeatedly with the death penalty while he was in custody—at one point even pointing to the vein in his arm where the lethal injection would be administered. (See generally Diane Jennings, *A Shaken System*, DALLAS MORNING NEWS (24 Feb 2008).) Eventually, Ochoa wrote out a “confession,” entered a guilty plea and received a life sentence, and agreed to testify against Danziger. Danziger then went to trial and was convicted, largely on Ochoa’s supposed coconspirator’s testimony. Eight years later, a third person—already serving a life sentence for other crimes—wrote to state officials confessing to the murder. More than four years afterwards, DNA testing would show that this man, Achem Josef Marino, was the real perpetrator; the two who had been convicted, Chris Ochoa and Richard Danziger, were innocent.

The Ochoa-Danziger cases produced a fair share of hand-wringing among the Texas press, prosecutors, defense attorneys, and elected state officials. One offshoot in this and other Texas exoneration cases was the passage of an “emergency” bill, signed in 2001, granting convicted persons the right to DNA testing, and, crucially, requiring the preservation of biological evidence. Presumably, the thinking was that postconviction DNA testing could be a fail-safe for the innocent—guilty plea or not. But if the Texas legislation (echoed in many other states with postconviction procedures) was meant to protect people like Chris Ochoa, the Harris County district attorney’s office responded by crafting a waiver, more or less implicitly to be signed as a condition of plea bargains, requiring defendants

to give up their rights to preservation of the evidence. (Lauren Kern, *Waivering Rights: Are Prosecutors Circumventing the New Law Designed to Preserve DNA Evidence?* HOUSTON PRESS (July 12, 2001), available at <http://www.houstonpress.com/2001-07-12/news/waivering-rights/>.) Had Chris Ochoa resided in Harris County and signed such a plea, he and Richard Danziger might still be in prison today. Would a different discovery process have been a significant factor to prevent this and other false guilty pleas? This answer, too, is unknown and likely unknowable. But the demonstrated rise in exonerations since 1989 raises a serious concern that consideration of structural reforms is long overdue.

In the context of guilty pleas, the most significant reform is a change in discovery practices to prevent innocent people from entering guilty pleas and to prevent defendants from being placed in circumstances that give rise to inaccurate and otherwise faulty guilty pleas—such as in the federal system pleading to a higher level of culpability for the role in the offense or a higher level for the amount of loss in a money-laundering case. Mandatory disclosure of the facts in a case—both exculpatory and inculpatory—lies at the heart of both. The defense requires timely access to information to effectively counsel the client and engage in discussion with the prosecution.

The Current State of Disclosure

The current disclosure rules and procedures are inadequate to produce the most reliable results. Rules of discovery are controlled by individual jurisdictions by statutes, rules of procedure, or case law and vary widely. The constitutionalized aspect of discovery is limited to disclosure of exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and subsequent cases. Some prosecutor’s offices, defense lawyers, and commentators have adopted and continue to argue for systems of “open file discovery” that includes timely disclosure of inculpatory material (see *infra*) but in general, the parameters of *Brady* are the main focus of discussions of discovery obligations. The obligations set forth in the Rules of Professional Conduct are not properly observed in most jurisdictions. State and federal systems can and should do better.

The Inconsistency of Brady Obligations

Brady and its progeny require that the prosecution timely disclose exculpatory and impeachment evidence, relevant to both guilt and punishment, whether or not it has been requested by the defense. (*Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985).) The duty encompasses evidence known to agents of law enforcement and the prosecution has an obligation to learn favorable evidence known to others acting on the government’s behalf. (*Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995).)

Brady obligations, however, are subject to varied and of-

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ten erroneous interpretations. In the federal system, where Rule 16 of the Federal Rule of Criminal Procedure sets forth discovery obligations, there is no codification requiring the government to timely disclose to the defendant favorable information material to guilt or sentencing. Although many prosecutors might routinely disclose such information, there is little consistency in the interpretation of the prosecutor's obligations. Some prosecutors believe that the obligation is solely to disclose information that someone other than the defendant confessed to the crime (Am. C. of Trial Law., *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 94, 103-04 (Winter 2003).) Other prosecutors do not view impeachment material as part of the *Brady* obligation. (*Id.*)

In state systems, adoption of the *Brady* doctrine and related discovery rules vary widely across jurisdictions ranging from bare compliance with constitutional minimums to more expansive disclosure requirements, such as in Massachusetts. A report prepared for the Judicial Conference of the United States offers a detailed survey of these differing policies. (Laura L. Hooper, Jennifer E. Marsh, and Brian Yeh, *Treatment of Brady v. Maryland Material in United States District and State Courts' Rules, Orders and Policies*, Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States, Federal Judicial Center, October 2004; available at [http://www.fjc.gov/public/pdf.nsf/lookup/Brady-Mat.pdf/\\$file/BradyMat.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Brady-Mat.pdf/$file/BradyMat.pdf).) Thirteen states require the prosecution to disclose "favorable" evidence regardless of whether the defense has filed a request or motion. Most of these states define "favorable" as some version of evidence as "tends to negate guilt"—a standard echoed in the rules of professional conduct for prosecutors. Colorado, Florida, Arizona, and New Jersey all have broad discovery laws and rules, often based upon the American Bar Association Standards for Criminal Justice: Discovery and Trial by Jury Standard (3rd ed. 1996). (See *Expanded Discovery in Criminal Cases, The Justice Project 2007*, at www.thejusticeproject.org.)

A significant problem on both state and federal levels is that pretrial disclosure obligations are often viewed through the narrower lens of the appellate standard governing reversal of a conviction for failure to disclose information. That is, even though information should be disclosed pretrial, the trial prosecutor will judge whether, if not disclosed, an appellate court would decide that there is a "reasonable probability" that the outcome in a case would have been different, had the evidence been disclosed, or, in the context of a guilty plea whether there is "reasonable probability that but for the failure to disclose the *Brady/Giglio* evidence, the defendant would have refused to plead and would have opted for trial." (U.S. v. Bagley, 473 U.S. 667 (1985); Banks v. United States, 920 F. Supp. 688 (E.D. Va. 1996).) Also, the prosecution may not choose to disclose the information because of the prosecutor's judgment that the in-

formation lacks significance or is not relevant. Certainly, the prosecution cannot be an adequate judge of how a defense attorney could utilize the information.

And even where the prosecution is wrong, the appellate process does not reliably identify the innocent nor sufficiently provide consequences for the prosecution's failure to disclose the evidence pretrial.

Several notorious exoneree cases starkly demonstrate the inadequacy of the appellate process where the *Brady* claim failed because the defense could not prove the evidence in question was "material" and the court made the subjective judgment that a conviction probably would have occurred regardless. One stark example is the case of Dennis Fritz, whose saga is recounted in John Grisham's nonfiction book, the *Innocent Man*. Fritz was convicted for an Oklahoma murder along with Ron Williamson. Fritz claimed on appeal that the state had committed a *Brady* violation in failing to turn over a tape of his polygraph examination and its forensic samples from another suspect—who, indeed, turned out to be the real perpetrator. The court, however, found that the polygraph tape was "merely cumulative" to his claim of innocence and was therefore not "material." (As to the forensic sample, it found no merit to the claim because the results, at least according to the state, excluded the other suspect.) In another case, an Idaho court upheld a death sentence and used a "balancing approach" to say that the state's loss of key biological material was "harmless beyond a reasonable doubt" because the other evidence against the defendant was so overwhelming. This other evidence was mostly the testimony of a jailhouse snitch, who, it would turn out, had been lying. Pretrial disclosure of these materials may have avoided the wrongful conviction but for prosecutors who view the *Brady* obligation through the appellate lens, the harmless error standard governs their disclosure obligation.

Another critical *Brady* issue is the timing of the disclosure. The American College of Trial Lawyers reports that "across the country federal prosecutors routinely defer *Brady* disclosures unless ordered by the trial court." (41 AM. CRIM. L. REV. at 104.) Timeliness—whether prior to the entry of a guilty plea or pretrial—is the subject of case law but not adequately defined in discovery rules, statutes or ethics codes.

Until 2002, there was a trend in federal and state courts that prosecutors had a duty to disclose *Brady* material prior to a guilty plea. The Second, Third, Sixth, Eighth, and Ninth Circuits and some district courts in the First and Fourth Circuits explicitly adopted this view as did state appellate courts in New Jersey, South Carolina, Tennessee, and Missouri. Circuit courts that considered the issue noted that the Supreme Court had never applied *Brady* to a guilty plea.

Subsequent to a 1995 decision in *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995), that a defendant does not waive his *Brady* rights by the entry of a guilty plea, prosecutors in the Southern District of California incorpo-

rated the requirement of an *express* waiver of *Brady* rights in what they called the "fast track plea agreements." The waiver was for impeachment information or that relevant to an affirmative defense. The defendant still retained the right to "any known information establishing the factual innocence of the defendant."

Upon the defense challenge in *United States v. Ruiz*, 241 F.3d 1157 (9th Cir. 2001), the Ninth Circuit held the waiver unconstitutional because a plea "cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution." The Supreme Court accepted certiorari and Justice Breyer, writing for the Court, upheld the waiver, but went further and held that defendants who plead guilty have no right to *Brady* information relevant to either impeachment or an affirmative defense. The Court did not address the right to exculpatory evidence. (U.S. v. Ruiz, 536 U.S. 622 (2002).) *Ruiz* swiftly dampened the trend in state and federal courts for mandated pretrial disclosure of information favorable to the accused in the preguilty plea stage of the criminal justice process.

However, even before the *Ruiz* decision, there was and is widespread inconsistency across federal and state prosecutor's offices as to timing of disclosure of *Brady* material—whether preplea or pretrial in general.

Although most state discovery rules include an obligation for "timely" disclosure, the definition here varies as well. Some states use the commencement of the trial as the focal point, and require prosecutors to complete whatever disclosure obligations they have seven, 10, or 30 days prior. Other states require disclosure within a certain time frame after the defense has made its requests, usually within 30 days or less. Others use filing of charges or arraignment as a marker, and still others only require discovery *after* the defendant has entered a plea of not guilty. Finally, the remaining states provide looser standards such as "as soon as reasonably possible." Although the various timing of disclosure obligations may imply that the information must be made available prior to the entry of a guilty plea, this is not necessarily true as guilty pleas, notably in misdemeanor cases, may be entered at or within days of arraignment.

Brady Proposals to Improve Reliability of Guilty Pleas

Commentators have long argued that *Brady* disclosures prior to entry of a guilty plea would improve the reliability and accountability of the criminal justice process. Such disclosure helps to ensure the accuracy and voluntariness of the plea to an appropriate charge. It increases the likelihood of "meaningful consent" by defendants and provides some substance to the notion of engaging in actual "bargaining" in a system where there is unequal access to information. (See, e.g., Eleanor J. Ostrow, *The Case for Preplea Disclosure*, 90 YALE L.J. 1581 (1981); Stephen L. Friedman, *Note*,

Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial, 119 U. PA. L. REV. 527, 531 (1971).)

Another significant benefit of preplea *Brady* disclosure is that it would require the prosecution to more carefully consider the charges. If the prosecutor knows the details of the case will have to be laid out before he or she can dispose of it, the prosecution is likely to be more careful in assembling and assessing those details than one who expects to "bluff" a quick plea based on limited information. Adequate disclosure could also prevent faulty guilty pleas by some defendants who mistakenly believe themselves to be guilty because they do not have personal knowledge of all of the facts necessary to establish their guilt. (Kevin McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 659 (2007).)

Although many prosecutors disclose *Brady* and other material to the defense pretrial even where there has been no formal discovery request, the lack of clear guidelines leaves the criminal justice system often subject to the interpretation of law by the individual prosecutor and his or her relationship with defense counsel. No doubt, there is the necessity for prosecutorial discretion, notably in the timing of disclosure where witnesses are in need of protection. But, if the goal of the process is better informed plea bargaining, there needs to be carefully drawn disclosure obligations that include the ability of the prosecutor to seek protective orders from the court where witness protection and other significant concerns exist.

In 2004, the American College of Trial Lawyers proposed such a codification for Rules 11 and 16 of the Federal Rules of Criminal Procedure. (See Am. C. of Trial Law., *supra*, at 111, *et seq.*)

In broad outlines, the proposal is for a rule that:

1. defines favorable information to an accused by reference to enumerated categories of information;
2. requires that, upon a defendant's request, that the government disclose in writing, within 14 days, all known favorable evidence to the defense;
3. imposes a due diligence obligation on the government that it has consulted with government agents to locate favorable information;
4. requires disclosure of all favorable information to a defendant 14 days before a guilty plea; and
5. requires a written certification from the government that it has complied with the disclosure requirements.

Presented to the Judiciary Conference Advisory Committee on Federal Rules of Criminal Procedure, the Department of Justice opposed the rule contending that the government's *Brady* obligations are "clearly defined by existing law that is the product of more than four decades of experience with the *Brady* rule." (Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United

States, Federal Judicial Center, October 2004.) The proposal did not make it out of the subcommittee. It should be reconsidered, both for the federal system and the states.

Moreover, all jurisdictions should adopt a clear written policy and protocol for the prosecutor's disclosure obligation that includes the prosecutorial adage adopted by some offices: "If there is a question, turn it over." Some offices, such as Seattle's King County prosecutor's office, have a written protocol, notably for disclosure of information concerning recurring government witnesses that includes a *Brady* committee to ensure its implementation. Similar protocols should be established in all jurisdictions, and that policy should include the timeliness of the disclosure. This is essential in the federal system because the *Department of Justice Manual* does not have a written policy about plea bargaining disclosure and the *U.S. Attorney's Manual*, which has plea bargaining provisions, does not address whether a prosecution must fulfill *Brady* disclosure obligations before negotiating a plea. (U.S. Dep't of Justice, U.S. ATTORNEYS' MANUAL, §§ 9-27.330-27-750 (Sept. 1997).) It should be revised to require *Brady* disclosure prior to a plea negotiation.

Brady Obligations in Ethics Standards of Conduct

Beyond obligations imposed by statute, court rules, or case law is that contained within ethics codes. Few prosecutors, courts, or criminal defense lawyers look to the ethical standard of prosecutorial responsibility for disclosure of exculpatory material.

Rule 3.8(d) of the Model Rules of Professional Conduct, a version of which has been adopted in nearly all jurisdictions, requires a prosecutor "to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." This ethical obligation encompasses disclosure of more than exculpatory evidence that, in hindsight, will be deemed "material."

Broader than interpretations of existing requirements for disclosure in federal and state jurisdictions, neither the rule, commentary, nor existing ethics opinions discuss the scope of the prosecutor's obligation nor specifically address this obligation in the plea bargaining stage.

Similarly, the American Bar Association (ABA) Standards for Criminal Justice Prosecution Function and Defense Function 3-3.11(a) provide: "A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." It too does not define "timely" nor specifically refer to the plea bargaining stage. The ABA and state ethics committees should clarify existing rules.

Beyond Brady: Open File Discovery

Beyond inconsistent *Brady* requirements, pretrial discovery rules and practices vary widely. In the federal system, Federal Rule 16 provides for limited discovery of information. By contrast, the ABA Standards for Criminal Justice: Discovery and Trial by Jury (3rd ed.) provides for more expansive disclosure, including witness lists and witness statements that must be disclosed so that these may be utilized in the plea bargaining process. (*Available at* <http://www.abanet.org/crimjust/standards/discovery.pdf>.)

State discovery practices vary significantly. The court rules or statutes that govern discovery in most jurisdictions define the categories of evidence subject to discovery and the time lines for disclosure. Some jurisdictions without codification of the prosecutor's disclosure obligations are dependent upon the judiciary's inherent right to grant discovery. About a third of the states have implemented versions of the ABA Standards on discovery rules.

Some states and individual county offices have adopted their own policies that go beyond statutory requirements or court rules and provide what that office terms "open file discovery," but the definition of the term and the practices vary widely. It is apparent that effective open discovery laws can produce meaningful results as was demonstrated in North Carolina. Its open discovery law, passed in the wake of several exoneration scandals in 2004, was instrumental to the exposure of District Attorney Mike Nifong's egregious misconduct, and the vindication of the three defendants, in the Duke University lacrosse scandal. The DNA evidence found on the accuser, which included semen samples from various men but none from the defendants (or other members of the lacrosse team), had been withheld by Nifong in the early phases of the case. It was only through making motions for compliance with open discovery laws that defense lawyers were able to obtain the test results that definitively exculpated their clients and led to the indictment's dismissal. (*See, e.g.,* Guy Loranger, *Defense Lawyers Discuss Lessons from Duke Lacrosse Case*, N.C. LAW. WKLY. (Dec. 10, 2007).)

Other jurisdictions have informal "open file" policies that permit defense attorneys to inspect and copy the "entire file" of information produced by the police, including the defendant's oral, written, and recorded statements; the defendant's criminal record; examination and test reports; documents and objects; and the content of expert testimony. These "open file" policies do not provide information much beyond that mandated by Rule 16 of the Federal Rules of Criminal Procedure.

An example of broader discovery is in Tarrant County, Texas, where the district attorney's office has instituted an "open file discovery matrix," requiring the entire prosecution file to be made available within 10 days after filing of charges (for minor cases) or 10 days following indict-

ment. In Harris County, Texas, the Houston police chief has called for a similar policy. (*Chief, Texas Justice Unfair; Bradford Urges Crime Lab Inquiry*, HOUSTON CHRON. (June 24, 2003).) The information subject to disclosure is all unprivileged information known to the prosecution and law enforcement agencies.

In a few offices, the prosecution provides an inventory of materials produced. In others, including offices in Dade County, Florida, defense attorneys are provided, at minimal cost, a CD-ROM containing these materials. A few but growing number of prosecutors provide the information via e-mail through PDF files. This provides a record of the items produced. By contrast, Travis County, Texas, has an "open file" policy that permits the defense attorney to examine but not copy the file, and the attorney is restricted from taking verbatim notes of items in the file.

Some "open file" discovery policies are restricted. For example, Brooklyn District Attorney Charles Hynes established an open file discovery policy that includes most nonwork product material for criminal cases, but not for homicide cases. Disclosure of grand jury testimony, however, is often dependent upon the individual assistant district attorney. And in homicide cases, defense lawyers often object to the lack of timely disclosure to provide an adequate defense.

Other DA offices, such as in Jefferson County, Louisiana, have made claims to "open discovery" to the press that have been disputed in the defense community because critical material is not produced. (Richard Webster, *Burden of Proof: How La. Prosecutors Can Withhold Evidence with Little Fear of Punishment*, NEW ORLEANS CITY-BUSINESS (June 11, 2007).) In Arkansas, the open file policy does not include some information from the police file. And in Bexar County, Texas, open file discovery is conditioned upon the defense counsel signing an agreement that includes an acknowledgment that the "DA's office has no duty and will not supplement the discovery that has been granted by this agreement, including with any documents that are missing or that may be placed in the State's file at a later time."

These varied "open file" discovery policies and practices should be expanded and standardized by the courts or legislatures at least across states, if not the federal system. An adequate open file policy should include all information that is known or, with due diligence, should be known to the prosecution and law enforcement and other agencies acting on behalf of the prosecution. At the very least, the ABA Standards for criminal discovery should be adopted. These provide for timely disclosure of critical information. Disclosure should be both mandatory and automatic. (*See Expanded Discovery in Criminal Cases*, The Justice Project, 2007.)

Additionally, any effective open file discovery policy or law requires that the prosecution provide defense counsel with an inventory of the items produced. Merely claiming to "open up the file" leads to unnecessary disputes as to whether certain information was disclosed. In civil litigation, information is "Bates

stamped" thereby providing a clear record of items disclosed. Such a process could be adopted in criminal cases. Certainly, technology provides a relatively simple process to document disclosure. Scanning documents and sending them as PDF files or copying them onto CD-ROMs is an efficient and inexpensive method that should be systematized in prosecutors' offices. To the extent that budgetary or other staffing constraints make such a requirement overly burdensome for the prosecution, the defense lawyer should inventory the items produced and send that inventory with a letter to the prosecution stating that if any items have been omitted, the prosecution should file and serve notice of the omission within 14 days.

Finally, in addition to enhanced disclosure obligations, the entry of a guilty plea should require not only the litany of constitutional rights that the defendant relinquishes, but an inquiry of the prosecution as to whether it has complied with its obligation to investigate and disclose all evidence or information known to the prosecutor that "tends to negate the guilt of the accused or mitigates the offense."

No doubt imposing additional disclosure obligations has its costs. It may require substantial additional time prior to prosecuting cases, notably in misdemeanor cases where such information may not be readily available. It may require differing calculations by prosecutors as to negotiation or trial strategy. It may result in the dismissal of weak cases where the prosecutor believes but cannot readily prove that the defendant is guilty of a crime. It may also result in time and cost savings because guilty pleas may be entered earlier if defendants have an opportunity to view the government's evidence. Commentators have explored a range of consequences that merit consideration in the implementation of systems of discovery. The bottom line, however, is that a legal system cannot be driven primarily by pressure upon prosecutors to resolve cases quickly or without requisite transparency and accountability. It must be premised upon accurate and reliable outcomes.

Codification and expansion of the prosecutors' obligations will not only provide crucial information essential to ensure that guilty pleas are premised on knowing and intelligent waivers of the right to trial—therefore insuring greater respect for the criminal justice system—but they will also clarify for prosecutors the exercise of their discretion. Rather than leave the prosecution conflicted in its decision of what information should be disclosed and the timing of such disclosure, rules and procedures would provide essential guidance and some measure of uniformity. Accountability and transparency of the criminal justice system commands such movement toward greater disclosure and towards uniformity.

There is no paucity of persuasive argument to expand disclosure requirements particularly to reduce wrongful convictions. Commentators often pointedly refer to the much more expansive discovery in civil cases where money, not freedom, is at stake. Certainly there are no guarantees that defense lawyers will zealously utilize the information, but requiring disclosure is at least an essential step toward an effective justice system. ■

To Be or Not To Be: Civility and the Young Lawyer

BRONSON D. BILLS[†]

I. INTRODUCTION

For the past several months, I have tuned into several courtroom television shows. These programs usually go by the name "Judge so-and-so." Given the sheer number of these programs on television, they must be popular. Even the foreign language channels have embraced the trend—*Viva la lawsuit!*¹ Although a product of Hollywood, the producers assert that the parties are "real," the disputes "real," and the judge, a "real" judge. In my teenage years, such programs were rare, and my TV exposure to the legal process was limited to Perry Mason. Mr. Mason was the model esquire—always a winner, always a gentleman. I have experienced numerous ups and downs while observing these courtroom TV proceedings, and I do not mean cheerful or spiteful emotions tied to certain participants prevailing or losing. Rather, I speak of the TV plaintiff, defendant, or judge yelling at one another to "shut-up," "listen-up," "wise-up," "wake-up," "sit-down," or the participants asserting that the other is a "screw-up" or a "let-down." I often wonder if I am watching a courtroom proceeding or a boardroom scene with Donald Trump in NBC's hit reality show *The Apprentice*. In lieu of "I find for the plaintiff," perhaps the TV judge will soon proclaim "Defendant—you're fired!"

I give an account of my experience watching uncivil courtroom TV shows to compare it with professionalism in the legal process and to illustrate the unique position in which young lawyers stand with respect to civility issues. Although one of the fundamental goals of our legal system is to resolve disputes peacefully, rationally, and efficiently, and to eschew uncivil, abrasive, hostile, or obstructive conduct during the process,² the behavior of some within the profession seems more aptly fit for a Hollywood courtroom TV show rather than a forum of order and civility.³

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¹ Although I would like to take credit for this clever phrase, the Honorable Bruce S. Jenkins, United States District Court for the District of Utah, gave me the idea. See Bruce S. Jenkins, "Is That a Fact?"—*Evidence and the Trial Lawyer*, 12 UTAH B.J. 19, 19 (1999) (after comparing the workings of the three branches of our government, Judge Jenkins proclaimed: "vive le difference").

² See Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441 (1992); Justice Michael J. Wilkins, *Supreme Court Adopts Professionalism Standards*, 16 UTAH B.J. 31, 31–32 (2003).

³ Although there is "an increasing lack of civility among litigating lawyers in our courts," Paul L. Friedman, *Taking the High Road: Civility, Judicial Independence, and the Rule of Law*, 58 N.Y.U. ANN. SURV. AM. L. 187, 187 (2001), such behavior, of course, is nothing new. See, e.g., *Green v. Elbert*, 137 U.S. 615, 624 (1891).

For example, one can read of attorneys who, among other things,⁴ employ foul and profane language,⁵ engage in dilatory⁶ or "Rambo" tactics,⁷ name-calling,⁸ and other belligerent behavior.⁹ One commentator, after assessing

⁴ Other uncivil conduct includes sarcastic or terse questions by counsel or the judge; head shaking and pained facial expressions during opposing counsel's arguments; hardball, slash and burn tactics; and sarcastic, vituperative, scurrilous, or other disparaging remarks. See Rhesa Hawkins Barksdale, *The Role of Civility in Appellate Advocacy*, 50 S.C. L. REV. 573, 574-76 (1999); see also Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 658-59 (1994) (noting other forms of uncivil behavior such as "escalating rudeness among attorneys . . . discovery abuse, misuse of Rule 11 motions, repetitive filings of frivolous claims, advancement of meritless legal positions, flagrant disregard for judicial authority . . . and the abandonment of common courtesy").

⁵ See *Saldana v. Knaut Corp.*, 84 F. Supp. 2d 629, 637-41 (V.I. 1999) (sanctioning counsel for continually saying the F-word). For another egregious example of uncivil behavior, consider the following colloquy between a witness (who was a lawyer being sued by a former client) and the plaintiff's counsel during a taped deposition:

[PLAINTIFF'S COUNSEL]: So, you know you had Mr. Carroll's file in the—

[THE WITNESS]: Where the f*** is this idiot going?

[PLAINTIFF'S COUNSEL]: ~winter of 1990/91 or you didn't?

[DEFENDANTS' COUNSEL]: Nonresponsive. Objection, objection this is harassing.

This is—

[THE WITNESS]: He's harassing me. He ought to be punched in the g**d-damn nose.

...

[PLAINTIFF'S COUNSEL]: How about your own net worth, Mr. Jaques? What is that?

[DEFENDANTS' COUNSEL]: Excuse me. Object also that this is protected by a—

[THE WITNESS]: Get off my back, you slimy son-of-a-b****.

[PLAINTIFF'S COUNSEL]: I beg your pardon, sir?

[THE WITNESS]: You slimy son-of-a-b****.

[PLAINTIFF'S COUNSEL]: You're not going to cuss me, Mr. Jaques.

[THE WITNESS]: You're a slimy son-of-a-b****.

[PLAINTIFF'S COUNSEL]: You can cuss your counsel. You can cuss your client. You can cuss yourself. You're not going to cuss me. We're stopping right now.

[THE WITNESS]: You're damn right.

[PLAINTIFF'S COUNSEL]: We'll resume with Judge Schell tomorrow. Thank you.

[THE WITNESS]: Come on. Let's go.

[PLAINTIFF'S COUNSEL]: Good evening, sir.

[THE WITNESS]: F*** you, you son-of-a-b****.

Carroll v. Jaques Admiralty Law Firm, 110 F.3d 290, 292 (5th Cir. 1997). For two other examples of uncivil depositions, see *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 53-54 (Del. 1994) and Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513, 513-14 (1994).

⁶ See, e.g., *Canady v. Erbe Elektromedizin GmbH*, 307 F. Supp. 2d 2, 3 (D.D.C. 2004) (noting that the defendants' wrongful withholding of documentary evidence was a "textbook example of how Rambo-style litigation tactics prevent the just and speedy determination of a case").

⁷ "Rambo" tactics can be defined as "discovery abuse, overzealous advocacy, excessive zeal, zealotry ('the 'z' words'), incivility, frivolous lawsuits, and other forms of unprofessional or unethical conduct." Allen K. Harris, *The Professionalism Crisis—The 'z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 551 (2002); see also Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 550 (1998); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1424-25 (1997); Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931, 940-41 (1994); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 563 (1994).

⁸ E.g., *Smith Prop. Holdings, L.L.C. v. United States*, 311 F. Supp. 2d 69, 76 n.8 (D.D.C. 2004).

civility in the legal profession, proclaimed "[l]awyers have altered the art of argument as a form of discourse into a battle, made trial a siege, and litigation a war."¹⁰ A legal warfare reality TV show? Take note, Hollywood, you may have your next hit series.

Unfortunately, uncivil behavior is not confined to attorneys.¹¹ Some judges present counsel with derogatory questions from the bench and others insert brusque comments in their judicial opinions.¹² In the same vein, one well-known federal appellate judge criticized, in a law review article, a fellow circuit judge's style and creativity.¹³ Examples like these

("The Court feels compelled to comment on part of plaintiff's counsel's litigation tactics, which the Court can term as nothing other than petty name-calling, hollow claims of bad faith, and mean-spirited invectives. Throughout its pleadings, plaintiff's counsel makes personal attacks against the government . . .").

¹⁰ E.g., *Mullaney v. Aule*, 730 A.2d 759, 761-62 (Md. Ct. Spec. App. 1999) (male attorney calling the opposing female counsel a "babe" during a deposition). Many argue that the uncivil behavior is an extension of the prevailing attitudes and norms within society. Consider the following statement from the former dean of Yale law school:

Is the spirit of civility dying in America? Many people think so. They say that our public discourse has become intemperate and mean; that tolerance and generosity are now rare in political debate; that the process of lawmaking is increasingly dominated by a ruthless partisanship whose expressions are barely distinguishable from physical violence; that candidates today ignore their opponents' ideas and attack their personalities instead, with *ad hominem* arguments of the cruelest and least charitable kind; that our whole public life has become degraded and harsh. The symptoms of this, they say, are visible wherever we look: in the venomous provocations of radio talk show hosts; in the lewd curiosities of the tabloid press; in the personal assaults that today pass for campaign advertising; in the sarcasm and anger of political argument generally.

Anthony T. Kronman, *Civility*, 26 CUMB. L. REV. 727, 727 (1995-1996); see also Friedman, *supra* note 3, at 193-94 (noting that civility problems stem from a rise in incivility in areas such as society, politics, television, the sports world, and the media).

¹¹ Kara Anne Nagorney, Note, *A Noble Profession? A Discussion of Civility Among Lawyers*, 12 GEO. J. LEGAL ETHICS 815, 817 (1999).

¹² See generally James A. George, *The "Rambo" Problem: Is Mandatory CLE the Way Back to Amicus?* 62 LA. L. REV. 467, 486 (2002) ("The decline [of civil behavior in] the judicial side seems to arise out of a general disrespect for practitioners . . ."); Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667 (2001). Chief Justice Berger, aware of the potential for uncivil behavior amongst judges and the significant role courts play in the civility charge, urged his colleagues to always conduct themselves with courtesy and respect:

[C]ivility is relevant to judges, and especially trial judges because they are under greater stress than other judges, and subject to the temptation to respond in kind to the insolence and mad manners of lawyers. Every judge must remember that no matter what the provocation, the judicial response must be [a] judicious response and that no one more surely sets the tone and the pattern for courtroom conduct than the presider.

Warren E. Burger, *The Necessity for Civility, Remarks of The Honorable Warren E. Burger, Chief Justice of the United States at the Opening Session-American Law Institute*, 52 F.R.D. 211, 215 (1971).

¹³ See Barksdale, *supra* note 4, at 579.

¹⁴ See Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1437-45 (1995). After Judge Posner launched a "surprise eight-page strike" on Judge Wald, she replied: "Oh my. I had thought the Federal Judiciary—or some of it at least, including by its own proud proclamation, the Seventh Circuit—was the last refuge of courtesy in our increasingly mean-spirited society. Surely not on the evidence of this article." Patricia M. Wald, *A Reply to Judge*

have led many to declare a civility "crisis"¹⁴ within the profession and have prompted warnings from many that "if incivility . . . becomes culturally institutionalized and accepted, it threatens the pursuit of justice in very real ways, as well as the credibility of the justice system, judges and the courts, and ultimately the rule of law itself."¹⁵

Amidst the crisis stands the young lawyer. Having little to no exposure to such issues in law school,¹⁶ new attorneys naturally "look to those more experienced to learn how to be effective, prosperous and long-lasting,"¹⁷ and will, as Judge Friedman observed, "practice what they see all around them because that's how the world they have come to know seems to function."¹⁸ Indeed, young lawyers will likely adopt the attitude and practices of senior attorneys, "even [if it is] against their better judgment."¹⁹ Noting the impressionability of young attorneys and the civility crisis that the profession faces, it is imperative that new lawyers begin working towards a courteous career. Commentators have recognized this need for years, as evidenced by the numerous articles in the literature addressing the civility "crisis," urging law schools to focus heavily on civility issues to prepare law students for the issues they will face in the real world.²⁰ Additionally, law firms train young lawyers on civility in the practice,²¹ the bar holds mandatory CLE courses to help young lawyers with civility issues,²² and the judiciary provides guidance and leadership to the practice on the importance of civility.²³ All this, in part, because, as the

Posner, 62 U. CHI. L. REV. 1451, 1451 (1995). Ironically enough, the Seventh Circuit began the civility reform by first promulgating a set of civility standards. Many consider the Seventh Circuit the leader of the battle. See Wilkins, *supra* note 2, at 31 (noting that the "Seventh Circuit's standards have become a model for other courts and bar associations").

¹⁴ See, e.g., Christopher J. Piazzola, *Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule*, 74 U. COLO. L. REV. 1197, 1199-1236 (2003).

¹⁵ Paul L. Friedman, *Civility, Judicial Independence and the Role of the Bar in Promoting Both*, 2002 FED. CTS. L. REV. 4, 4 (2002).

¹⁶ See *infra* notes 37-44 and accompanying text. One seasoned attorney put it this way: "Today's law school graduates are in the same situation we were all in when we graduated. We didn't have a clue about how to practice law." Jack W. Burch, Jr., *The Mentor Challenge in Changing Times*, 15 EXPERIENCE 10, 10 (2004).

¹⁷ Thomas R. Mulroy, Jr., Editorial, *Civility, Mentors and the 'Good' Old Days*, CHI. LAW., Sept. 1991, at 14.

¹⁸ Friedman, *supra* note 15, at 4.

¹⁹ Marvin E. Aspen, *Overcoming Barriers to Civility in Litigation*, 69 MISS. L.J. 1049, 1055 (2000).

²⁰ See generally Raymond M. Ripple, *Learning Outside the Fire: The Need for Civility Instruction in Law School*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 359 (2001).

²¹ See Aspen, *supra* note 19, at 1055.

²² See, e.g., *State Bar of Texas Annual Committee Reports*, 62 TEX. B.J. 702, 713 (1999) ("Suggestions for increasing awareness among members of the Bar include adding a mandatory civility CLE component; adding information on the concept of cooperative partnering to the professionalism course offered by the Texas Center for Legal Ethics and Professionalism, 'A Guide to the Basics of Law Practice,' and educating the law schools so they can cooperate in teaching the underlying concepts. The focus of this effort is increased civility among the state's lawyers.")

²³ See generally Joy, *supra* note 11. In the same vein, one commentator suggested that judges

chief justice of the Maine Superior Court stated, "the tradition of civility that used to be transmitted to young lawyers is [now] gone."²⁴

Part II of this article briefly discusses the civility problem and examines why courtesy has declined within the profession. Part III then looks at the numerous pressures young lawyers face today and demonstrates how these demands, when coupled with a young attorney's lack of experience, can lead to the formation of uncivil behavior in new lawyers. Part IV then discusses the importance of civility in the practice of law and looks at the numerous ways the bar and bench are attempting to promote courteous and civil behavior. This part goes on to review the virtues of civil behavior and demonstrates the value in pursuing a courteous and civil career as an attorney. Part V will conclude with an invitation to the young lawyer to pursue a career of courtesy and civility and to reap the benefits such a career brings.

It should be noted from the outset that this article will not engage in a lengthy discussion regarding what civility is, why it is important, or how it can benefit the individual and practice; there are other excellent articles on those subjects.²⁵ Nor will this article attempt to proffer a cure to the civility ills that plague the profession. Rather, this article simply seeks to demonstrate the unique position in which the young lawyer finds him- or herself with respect to the current civility issue and hopes to point out some of the virtues inherent in pursuing a practiced rooted in civility.

II. CIVILITY AND MODERN-DAY PRACTICE

Civility can be characterized as treating others—opposing counsel, the court, clients, and others—with courtesy, dignity, and kindness.²⁶ Despite the obvious benefits of civility to the legal profession,²⁷ today, many avow

visit law schools and develop ethics criteria with the faculty, teach classes, give speeches, and offer internships or clerkships stressing civility. See Nagorney, *supra* note 10, at 823.

²⁴ See Thomas E. Humphrey, "Civil Practice in Maine," 20 ME. B.J. 6, 7 (2005).

²⁵ See generally John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL. U. L. REV. 563 (1994); Eugene A. Cook, *Professionalism and the Practice of Law*, 23 TEX. TECH. L. REV. 955 (1992); Colin Croft, Note, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256 (1992).

²⁶ Any attempt to define civility or professionalism will fall short in one form or another. As the chief justice of the Wyoming Supreme Court said:

Although many codes or creeds of professionalism have been developed, and scores of states and federal jurisdictions have adopted resolutions and rules on professionalism or civility, including the United States District Court for the District of Wyoming, defining professionalism is difficult. It's a bit like defining pornography; as Justice Stewart famously opined, pornography is difficult to define, but "I know it when I see it."

John M. Burman & William U. Hill, *Professionalism and Leadership*, 27 WYO. LAW. 16, 17 (2004) (citations omitted).

²⁷ See *infra* notes 49–54 and accompanying text.

that civility is anachronistic or incompatible with the modern day practice of law. "It is not the way it was twenty years ago," asserts one partner in a large firm. "Tough. Get with it. Law is a business."²⁸ Some equate acting civilly with being a "push over," being "faint of heart," and "weak,"²⁹ while others proclaim that the only way to successfully litigate is through the use of aggressive and belligerent tactics.³⁰ One "naysayer,"³¹ in dismissing the value and role of civility, said that he

get[s] annoyed, and sometimes genuinely infuriated, at these self-anointed "civility" police who lately have pitched their tents at our local bar associations. Seemingly every lawyers' group in America now has a "civility" committee, chock full of patriotic citizens scolding their fellow practitioners into the belief that our highest duty is no longer to win for our clients, but rather to be nice to our adversaries.³²

This attitude can be found in other "slash and burn"³³ tactics, such as "seasoned practitioners in our field [who] often exploit a young associate's naiveté by pushing the hardball tactics to an unprofessional extreme in order to gain tactical advantages."³⁴ A few, in what may be an attempt to justify or explain uncivil behavior (perhaps their own), have gone as far as claiming that civility problems do not exist and that the purported troubles within the legal profession are "created" and perpetuated by the elite.³⁵ To

²⁸ See Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 *FORDHAM L. REV.* 809, 809 (1999); see also Friedman, *supra* note 3, at 193 ("[M]any current lawyers see the legal profession as a money-making venture . . ."). The "business" approach to legal services began in the seventies and burgeoned in the eighties. See Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 *BROOK. L. REV.* 931, 940-42 (1994) (noting that up until the seventies, "law firms were no longer so prepared to assert the ethics of the profession and turn down legal business and litigation once deemed unproductive or frivolous. They had to compete to survive . . ."). The legal practice was once thought to be a "public service," see, e.g., Clarence Thomas, *A Return to Civility*, 33 *TULSA L.J.* 7, 10 (1997), but the driving principle today is the bottom line; see, e.g., Sandra Day O'Connor, *Professionalism*, 76 *WASH. U. L.Q.* 5, 6 (1998).

²⁹ See Thomas J. Vesper, *Civility is Not a Sign of Weakness: Handling Conflict with Opposing Counsel*, 1 *ANN. 2001 ATLA-CLE* 897 (2001); see also Barksdale, *supra* note 4, at 577.

³⁰ Cf. Barksdale, *supra* note 4, at 573 (in discussing the civility question, Judge Barksdale asked: "Is it [uncivil behavior] the armor that must be worn to survive the unceasing battles of modern life? Some might think that—I do not.")

³¹ Naysayers, as popularly used in this context, refers to those who believe civility is unimportant. E.g., Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 *STETSON L. REV.* 253 (1998).

³² Shawn Collins, *Podium: Be Civil? I'm a Litigator!*, *NAT'L L.J.*, Sept. 20, 1999, at A21. Unfortunately, Mr. Collins fails to realize that you can be civil and zealously represent your client. Cf. Sandra Day O'Connor, *Professionalism*, 76 *WASH. U. L.Q.* 5, 9 (1998) ("It is not always the case that the least contentious lawyer loses. It is enough for the ideas and positions of the parties to clash; the lawyers don't have to.")

³³ See Barksdale, *supra* note 4, at 574.

³⁴ Katherine A. Stalton, *Professionalism and Civility in the Practice of Aviation Law—The VORS and GPSS Which Guide our Practice*, 64 *J. AIR L. & COM.* 871, 882 (1999).

³⁵ See, e.g., Richard L. Abel, *Why Does the ABA Pronulgate Ethical Rules?*, 59 *TEX. L. REV.*

lawyers who espouse such ideas, winning is not everything—it is the only thing.³⁶ To be or not to be: according to these few, civility is out of the question.

III. UNDER PRESSURE

Many young lawyers, having little to no exposure to civility issues in law school,³⁷ may come to believe that they need to follow the example of their senior colleagues, even if such behavior is against the new lawyers' sense of how they ought to act.³⁸ They may believe that they must aggressively litigate, or that it is proper to respond in-kind when faced with uncouth behavior from opposing counsel or the court.³⁹ Indeed, young lawyers may believe that they need to act uncivilly, "because that's how the [legal] world they have come to know seems to function."⁴⁰ New attorneys may legitimately wonder if they can act civilly and succeed given the realities of modern day practice. They may truly come to think that they must participate in the "uncivil one-upmanship"⁴¹ to zealously represent a client, believing, as one naysayer put it, "[c]lients want Rambo[,] not Bambi."⁴²

These critical civility issues are compounded by many of the unique pressures (considered unprecedented by some)⁴³ that young attorneys face in today's legal world: impressing colleagues and clients, billing many hours, learning the practice, and establishing a reputable name.⁴⁴

639, 653 (1981) ("All occupations in a capitalist system seek to control the markets in which they sell their labor."); see generally Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657 (1994); David J. Neek, *Exploding Unprofessionalism: Fact or Fiction*, 61 TEX. B.J. 534, 540-41 (1998) (arguing that the purported increase in uncivil behavior "may be nothing more than a complex change in societal values, rather than a decline in professionalism").

³⁶ See Sarai, *supra* note 28, at 815.

³⁷ See William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 222-23 (1996) ("Expressions of dissatisfaction among students have been mirrored by the bar, where concerns over legal education have increased in recent decades. Some of these concerns have focused on the increasing emphasis placed on purely theoretical scholarship: '[T]hree years of observing the intemperate clashes among professors adhering to conflicting schools of thought does little to advance a student's understanding of ethical practice and the importance of dealing with adversaries candidly and courteously.'" (quoting Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2213 (1993))).

³⁸ See Aspen, *supra* note 19, at 1054.

³⁹ *Id.* at 1051.

⁴⁰ See Friedman, *supra* note 15, at 3.

⁴¹ See Aspen, *supra* note 19, at 1051.

⁴² Dane S. Ciolino, *Redefining Professionalism as Seeking*, 49 LOY. L. REV. 229, 238 (2003).

⁴³ See Aspen, *supra* note 19, at 1054.

⁴⁴ Professor Pang notes some of the other numerous pressures lawyers face:

Lawyers are faced daily with the most important problems in people's lives: the weakness of a marriage, the potential loss of a child, the challenge of a serious accident, the threat of imprisonment or death, the vulnerability of a business, the loss of a job, the protection of a home, the provision for one's future, the challenge to

Somewhere between a young attorney's longing to impress a senior partner and the pressure to win at all costs, a new lawyer's desire to practice law with civility and respect may take a back seat to these previously unseen pressures. Indeed, young attorneys may feel compelled to take on the attitude and behavior of the senior attorneys if it means impressing his or her colleagues. Furthermore, as Judge Friedman pointed out, the young attorney, not knowing any different, may believe that he or she is doing nothing wrong.

To be, or not to be: despite the foregoing, consider the following answers to this question.

IV. 'TIS NOBLER TO BE

Although uncivil behavior is becoming the norm, the bench and the bar have gone to great lengths to stress the importance of civility. Numerous state supreme courts, in addition to the American Bar Association, have fashioned codes of professional conduct to emphasize the role and importance of civility in the legal profession.⁴⁵ In addition, courts, both state and federal, are taking the time to identify and reprimand uncivil behavior in judicial opinions.⁴⁶ On the lecture circuit, civility has become a popular topic;⁴⁷ several organizations, such as the American Inns of Court, have been formed to promote civility and professionalism. And many within the practice are pleading for the return of civility.⁴⁸ These codes, opinions, articles, and groups demonstrate the value of civil behavior and the desire of the majority to cultivate this characteristic.

There are good reasons to support the efforts of those who stress civility in the practice as it is quite clear that zealous advocacy, success, and civility are not incompatible—indeed, they are complimentary. For example, it has been noted by many that civil behavior “secure[s] the just,

one's rights.

Furthermore, the expectations for lawyers are as overwhelming as these tasks are endless. When the situation seems hopeless, the lawyer must provide hope. When the world seems flawed, the lawyer must provide justice. When the work is complex, the lawyer must provide perfection. When the work is routine, the lawyer must make the client feel special. When the client is objectionable, the lawyer must make the client feel accepted. Our public demands integrity. Our colleagues are paid to combat us. As layer piles upon layer, any lawyer is going to want to scream, “Enough already!”

Calvin G.C. Pang, *Eying the Circle: Finding a Place for Spirituality in a Law School Clinic*, 35 WILLAMETTE L. REV. 241, 274–75 (1999) (quoting Randy Lee, *The Immutability of Faith and the Necessity of Action*, 66 FORDHAM L. REV. 1455, 1458–59 (1998)).

⁴⁵ See Wilkins, *supra* note 2, at 31.

⁴⁶ See MODEL CODE OF PROF'L RESPONSIBILITY, available at <http://www.abanet.org/cpr/profcode.shtml> (March, 2004).

⁴⁷ “Nearly eight years have passed since the Committee on Civility of the Seventh Federal Judicial Circuit issued its final report. Since then civility has been a popular topic on the legal lecture circuit” Aspen, *supra* note 19, at 1049.

⁴⁸ See generally Buchanan, *supra* note 25.

speedy, and inexpensive determination of every action"⁴⁹ and "fosters respect for other[s], promotes cooperation, instills a sense of community [and] makes relationships better,"⁵⁰ thus "[enhancing] both the daily experience of lawyers, and the reputation of the bar as a whole . . ."⁵¹ Civil behavior benefits the lawyer and the client as attorneys build reputations before tribunals in which they practice.⁵² Ultimately, civility enhances the public's trust in the strength and integrity of the judicial process.⁵³

Most importantly, civility is considered by many to be the measure of a true professional. Consider the value that many well-known and accomplished individuals within the profession have placed on civil behavior. Justice Anthony Kennedy remarked that "[civility] is the mark of an accomplished and superb professional . . ."⁵⁴ And Judge Rhesa Hawkins Barksdale of the Fifth Circuit has stated that "[civility] is the mark of a true lawyer—a true professional."⁵⁵

To be or not to be: according to these seasoned professionals, civility is the ultimate question.

V. CONCLUSION

Having identified the unique position of the young attorney, it is imperative that young lawyers be cognizant of the civility crisis that plagues the profession. Despite the pressures new attorneys face in an increasingly uncivil landscape, pursuing a career founded on courtesy benefits both their own goals and the aims of our judicial system. Without civility, everyone suffers—attorneys, clients, and, most importantly, the integrity and strength of the process at every stage. If new members of the bar are apathetic about the civility dilemma, we will see only a continued

⁴⁹ FED. R. CIV. P. 1; see also Sofia Adroque, *"Rambo" Style Litigation in the Third Millennium—The End of an Era?*, 37 HOUS. LAW. 22 (2000) ("Practicing civility is also the most efficient and economical way to litigate cases").

⁵⁰ Janet Stidman Eveleth, *Where Has Civility Gone?*, 36 MD. B.J. 2, 10 (2003).

⁵¹ See Wilkins, *supra* note 2, at 31. It is well documented that the "win-at-all-cost" approach has directly contributed to the high dissatisfaction rates amongst attorneys. See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1345–46 (1997). Furthermore, uncivil behavior has been directly tied to the negative public perception of the legal profession, society's pessimistic view of lawyers as a whole, and the delaying or denying of justice. *Id.*; see also *Canady v. Erbe Elektromedizin GmbH*, 307 F. Supp. 2d 2 (D.D.C. 2004).

⁵² See Friedman, *supra* note 3, at 193–94 (noting that lawyers "offer to the clients their own professional reputations and the integrity and credibility with the courts that they have established over time").

⁵³ N. Lee Cooper & Steven F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 CUMB. L. REV. 923, 935 (1996) ("[Uncivil behavior] is absolutely terrible for the public image of lawyers and brings with it [the issues] that accompany low public regard for lawyers and lack of confidence in the justice system").

⁵⁴ Anthony M. Kennedy, *Law and Belief*, 34 TRIAL 23, 25 (1998).

⁵⁵ See Barksdale, *supra* note 4, at 577.

decline in civility and frustration of the legal process.⁵⁶

To be or not to be: young attorneys, ask yourselves the question, lest you perpetuate Hollywood's version of dispute resolution. For "Rambo may succeed in the theater, but he self-destructs in the courtroom."⁵⁷

⁵⁶ See, e.g., Frank X. Neuner, Jr., *Professionalism: Charting a Different Course of the New Millennium*, 73 TUL. L. REV. 2041, 2046 (1999) (noting that "incivility is contagious").

⁵⁷ Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 655 (1990).

ETHICAL ISSUES FOR LAWYERS INVOLVING THE INTERNET

BY ELLEN EIDELBACH PITLUK

I. Introduction

The use of the Internet for the practice of law falls into two categories, and can be summarized rather succinctly for purposes of disciplinary liability as:

- A. Commercial speech (e.g., online advertising and solicitation)
- B. Noncommercial speech (e.g., educational blogs, political discourse, and online information that is specifically exempted by Texas Disciplinary Rule of Professional Conduct 7.07(e), which does not have to be reviewed by the State Bar of Texas Advertising Review Committee).

Most practitioners seem primarily concerned about complying with the advertising and solicitation regulations under Part VII of the Texas Disciplinary Rules of Professional Conduct (TDRPC). However, as technology continues to develop, what once was said in private may easily be a public conversation with disciplinary repercussions.

As a result, several rules outside of the Part VII advertising and solicitation regulations may be implicated in noncommercial speech, such as confidentiality (TDRPC 1.05); candor towards the tribunal (TDRPC 3.03); trial publicity (TDRPC 3.07); truthfulness in statements to others (TDRPC 4.01); respect for rights of third persons (TDRPC 4.04); and conduct involving dishonesty, fraud, deceit or misrepresentation (TDRPC 8.04(a)(3)), to name a few.

This article covers electronic media which includes traditional advertising, such as television, radio and websites; but also encompasses social media¹, weblogs (more commonly called "blogs") and other trends.

Finally, to put this article in perspective, it is important to provide the following information:

- A. The opinions expressed in this article are solely the author's and not those of the State Bar of Texas.
- B. The purpose of this article is to inform the reader of disciplinary liability (and not *malpractice* liability), which may be implicated through the use of the Internet.

II. Commercial Speech

A. What is Commercial Speech?

Commercial speech is defined as speech whose purpose is to "propose a commercial transaction," or more broadly, as speech "related solely to the economic interests of the speaker and its audience." See Texans Against Censorship, Inc. v. State Bar of Texas, 888 F.Supp. 1328, 1342 (E.D. Tex. 1995). The U.S. Supreme Court has said, "[i]t is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection." Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995); see also Neely v. Comm'n for Lawyer Discipline, 196 S.W.3d 174, 181 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)(citing Went For It, Inc.).

Part VII of the TDRPC governs the commercial speech of lawyers as it relates to obtaining employment for legal services. If the lawyer is acting in the capacity of a teacher, real estate agent or other professional and solicits or advertises nonlegal services, the Part VII disciplinary rules do not apply. See Texans Against Censorship, 888 F. Supp at 1342; see also Neely, 196 S.W.3d at 181 ("For a legal communication to be subject to [Part VII], it must be commercial speech that proposes professional employment by suggesting '[t]o the public, or a specific individual, that the lawyer's professional services are available for hire.'").

Comment 1 to TDRPC 7.02 says:

The Rules within Part VII are intended to regulate communications made for the purpose of obtaining professional employment. They are *not* intended to affect other forms of speech by lawyers, such as political advertisements or political commentary, *except insofar as a lawyer's efforts to obtain employment is linked to a matter of current public debate.* (Emphasis added).

As the comment suggests, sometimes commercial and non-commercial speech may be combined in one communication. In those instances, the court will look at the communication in its entirety.

For example, in Texans Against Censorship, plaintiffs alleged the lawyer's newsletter (which was not an online version

in this case) “inextricably intertwined” commercial and noncommercial speech. The court found it should be treated as commercial speech as a whole, because the newsletter contained language that began with “A Message from Lawyer Adler...” and ended with:

“TELL YOUR FRIENDS ABOUT US

No one expects them, but accidents do happen. If someone you know has been injured, we can help. At the Law Offices of Jim S. Adler, we’ve helped thousands of people get compensated for their injuries. Please give our toll-free number to someone who might need our services....We thank you for your past support and are ready to help you again.”

Texans Against Censorship, 888 F. Supp. at 1345-46.

In spite of the newsletter’s content on consumer and public safety, the court determined the newsletter was commercial speech as a whole. In other words, a communication cannot masquerade as noncommercial speech if its true purpose is to gain professional employment for the lawyer.

The court said, “the Supreme Court has determined that linking commercial speech to issues of public concern does not controvert otherwise commercial expression into noncommercial speech.” *Id.* at 1346 (quoting Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66-67 (1983)).

It found that nothing kept Lawyer Adler and his law firm “from distributing the noncommercial information in the newsletters separately from the commercial information.” *Id.* at 1346.

As a result, an electronic stand-alone newsletter sent to prospective clients by e-mail, or which is not linked to a firm’s website, could also be viewed as commercial speech based on the entirety of its content. If the electronic newsletter is commercial speech, it will need to comply with the advertising rules. *See, e.g., Gonzalez v. State Bar of Texas*, 904 S.W.2d 823 (Tex. App.—San Antonio 1995, writ denied) (lawyer disciplined for mailing letters that did not comply with the requirements for written solicitation). TDRPC 7.05 requires, for example, e-mail solicitations to state: “ADVERTISEMENT” in the subject portion of the e-mail and again at the beginning of the text. If the newsletter is part of a website, then the website must follow the regulations in

As a result, an electronic stand-alone newsletter sent to prospective clients by e-mail, or which is not linked to a firm’s website, could also be viewed as commercial speech based on the entirety of its content.

TDRPC 7.04. Both e-mail solicitations and websites must be reviewed by the State Bar of Texas Advertising Review Department (which is under the purview of the Advertising Review Committee) pursuant to TDRPC 7.07. For simplicity, the Advertising Review Department and the committee will simply be referred to as the ARC in this paper.

B. Live Chat Rooms

Internet communications initiated by a lawyer (or someone acting on his or her behalf) which cause a prospective client, *who has not sought the lawyer’s legal advice*, to be contacted in a live, interactive manner are prohibited by TDRPC 7.03. Lawyers who communicate in live chat rooms cannot do so if it is prohibited by any of the factors set forth in 7.03(a). For example, a lawyer (or a person acting on his or her behalf) cannot promote the lawyer’s legal services in a chat room for grief support if the purpose of that communication is to obtain employment in a wrongful death suit or probate matter. The ARC does not review these communications, because they are prohibited. However, since anyone may file a grievance against a Texas-licensed lawyer, online communications that violate the TDRPC may result in a disciplinary proceeding.²

C. E-mail

E-mail is a standard tool for business communications with existing clients. However, e-mail sent to prospective clients (and not requested by the prospective client) to solicit professional employment must meet several requirements under TDRPC 7.05. In addition to the word, “ADVERTISEMENT,”

the e-mail (1) shall not reveal the nature of the prospective client’s legal problem in the subject line, (2) shall not resemble legal pleadings or other legal documents, and (3) shall explain how the lawyer obtained the prospective client’s e-mail address, and whether “such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s).”³

[7.05(b)(2)-(5)]. There are other requirements in TDRPC 7.05 as well, such as the lawyer (or a lawyer in the firm) reviewing and approving in writing a copy of the e-mail solicitation. [7.05(d)]. A record of the solicitation must be kept for four years after dissemination. [7.05(e)].

Exceptions to regulations described in 7.05(b) & (c) are listed in 7.05(f). For example, e-mail solicitations to prospective pro bono clients do not have to comply with 7.05(b) & (c), nor do they have to be filed for approval with the ARC. [7.07(e)].

However, 7.05(a) lists other requirements and prohibitions, such as rules about the lawyer's certification and practice area.⁴ A copy of the e-mail solicitation must be filed with the ARC pursuant to TDRPC 7.07 unless it falls under an exemption as described in Paragraph II, E.

Lastly, it should go without saying that e-mail spamming and phishing are prohibited by other law.⁵

D. Public Media: Websites, Online Video-Sharing, Internet Banners and Pop-Up Ads, and Mobile Phone Applications

Law firm websites, online video-sharing for purposes of obtaining employment, and Internet banner and pop-up ads are considered public media under the ARC's Internal Interpretative Comments I, 9 and 17. As a result, they must follow the regulations in TDRPC 7.04 and filing requirements under TDRPC 7.07 unless they fall under the exemptions listed in 7.07(e). TDRPC 7.07(e) is discussed later in section II.E.

TDRPC 7.04 is an extensive rule. For the sake of brevity, websites, online video-sharing and Internet ads are simply referred to hereafter as "advertisements." Because 7.04 is a long and technical rule, the reader should take time to read the rule. The ARC website is also very helpful.

Generally speaking, TDRPC 7.04(a) covers lawyers advertising as specialists when licensed in particular practice areas for patents, trademarks, and intellectual property; listings for certain lawyer referral services; and listings or announcements in legal directories and newspapers.

TDRPC 7.04(b)(1) requires that at least one lawyer who is responsible for content of the advertisement be listed in the ad itself. TDRPC 7.04(b)(2) states the conditions for saying a lawyer is a specialist in an advertisement. Paragraph (c) orders that the statements required in paragraph (b) be conspicuously displayed and in easy to understand language. TDRPC 7.04(d) gives a nonexhaustive list of advertising media.

Other requirements of 7.04, *without covering the whole rule*, say that the lawyer or firm must review the advertisement and have a lawyer approve it in writing; must keep a copy or recording of the advertisement for four years after its dissemination, including when and where it was used; requires lawyers to portray themselves in advertisements and not use actors; must disclose information about fees and give specific information about principal and branch offices; and sets conditions on sharing advertising costs between lawyers who are not in the same firm.

1. Websites

The ARC's Internal Interpretative Comment 17 defines "website" and states that the website's "intended initial access page" (synonymous to the "home page") shall include:

- (1) the name of the lawyer or law firm responsible for the content of the site;
- (2) if areas of law are advertised or claims of special competence are made on the intended initial access page or elsewhere on the site, a conspicuously displayed disclaimer regarding such claims in the language prescribed at Rule 7.04(b); and
- (3) the geographic location (city or town) in which the lawyer or law firm's principal office is located. Publication of a link to a separate page bearing the required disclaimer or information required by Rule 7.04(b) does not satisfy this requirement.⁶

Two copies of the home page must be filed with the ARC. Submission applications and submission procedures are at the ARC home page on the State Bar of Texas website.

Of course, the website must also meet the requirements of TDRPC 7.02, such as truthfulness about the lawyer's services, past successes, comparisons with other lawyers, etc. See TDRPC 7.02(a)-(d). A Texas criminal defense lawyer was disciplined for content that appeared on his website www.dwibadass.com. In a narrative featured on the website describing his own trial proficiency, the lawyer asserted that he would never allow his clients to plead guilty in order to avoid jail time, referring to other lawyers who did this as "plea mill" lawyers. The disciplined lawyer then went so far as to identify one such "plea mill" lawyer by name, stating that was why "God, or Satan, made [the other lawyer]." Comm'n for Lawyer Discipline v. Adam Reposa, No. A0040912358 (combined with evidentiary case no. A01200811967 and adjudicated by Evidentiary Panel 09-1, Travis County, Tex. Feb. 2, 2010, resulting in a three-year fully probated suspension) (lawyer violated TDRPC 4.04(a) & 7.02(a)(4)).

2. Online Video-Sharing

The ARC reviews videos shared on Internet sites like YouTube, MySpace and Facebook. If the video is part of the law firm's website, it does not need to be filed separately from the website ARC submission. TDRPC 7.04 also applies to online video advertising, since it is in the public media on the Internet.

3. Internet Banners and Pop-Up Ads

ARC Internal Interpretative Comment 17 states that: An image or images displayed through the vehicle of an electronic communication is an advertisement in the public media if the ad describes a lawyer or law firm's practice or qualifications, whether viewed independently or in conjunction with the page or pages reached by a viewer through links offered by the ad ("target page"). The content of a web-based display or banner ad will be viewed in conjunction with the target page.

Consequently, TDRPC 7.04 applies to these Internet advertisements, too, which include banner ads, pop-up ads and advertising that may frame, or appear in or around a blog. If the ad content only has the information listed in TDRPC 7.07(e)(1), it is exempted from the filing requirement with the ARC. Keep in mind that if the Internet ad is connected to the law firm's website, it can be reviewed as part of the website under one submission and one filing fee to the ARC.

4. Mobile Phone Applications

Mobile phone applications developed by law firms can vary in content from being strictly educational to encompassing both advertising and educational materials. (Section III. C. of this paper discusses online communication for the purpose of educating a layperson.) The law firm's mobile phone application may also have the lawyer's name, address, phone number, types of credit cards accepted and other exemptions under TRDPC 7.07(e), which remove it from the ARC filing requirement. Exemptions are discussed in more detail in the next section. But remember, if commercial speech is combined with the educational material in the mobile phone application, then it is an advertisement and subject to ARC filing (TDRPC 7.07) and a fee for reviewing it.

A recent conversation with the State Bar's Advertising Review Department indicates that lawyers are submitting their mobile phone applications for review. Although these submissions have increased, they remain a relatively small percentage of the advertisements reviewed by the department. The advantages of this type of marketing include attracting new clients, and improving the collection of information and evidence to support the prospective client's legal matter. In this sense, the mobile phone application serves a unique purpose, making it a highly adaptive marketing tool. See Tousignant, Kristi, *Lawyers Use Smartphone Apps to Market Themselves*, THE DAILY RECORD OF BALTIMORE, June 6, 2012, <http://baltimore.cbslocal.com/2012/06/06/lawyers-use-smartphone-apps-to-market-themselves/>.

E. Exemptions from Filing Requirements with the Advertising Review Committee

After all of this information on what commercial speech must do to conform to the advertising rules, it is welcome news that there are some exceptions. TDRPC 7.07(e) lists those exceptions, or exemptions, to the ARC filing requirements. Rule 7.07(e) is two-pages long and leaves plenty of leeway for what is sometimes referred to as a "tombstone" ad. Additionally, online recognition by charities does not have to be filed with the ARC. See Tex. Comm. on Prof'l Ethics, Op. 548 (January 2003) and TDRPC 7.07(e)(2) (both are available at the ARC home web page).

TDRPC 7.07(e) says that advertisements which include the exempted information in the list below do not have to be filed with the ARC. However, the ads must meet the other requirements of 7.02 and 7.04, such as truthfulness about the lawyer's services, past successes, etc. See TDRPC 7.02(a)-(c) and, where applicable, TDRPC 7.04 (a)-(c).

7.07(e)(1) exempted information includes:

1. Name of the lawyer/s or law firm
2. Office address
3. Phone numbers and fax numbers
4. Electronic e-mail and web addresses
5. Links to other websites
6. Particular areas of the law the lawyer/s or law firm specializes in or possesses a particular area of competence
7. Areas of law to which the lawyer/s or law firm limits the practice
8. Date of admission to the State Bar of Texas or other jurisdictions, including federal courts
9. Foreign language ability
10. Office hours
11. Acceptance of credit cards
12. Acceptance and identification of prepaid legal plans

The rest of 7.07(e) deals with the types of commercial speech which are exempted, such as:

1. Advertisements in the public media that identify the lawyer/s or the law firm as a contributor to a specific charity, public interest program or other activity and contains no other information other than the law office's location. [7.07(e)(2)]
2. Listing in a regularly published law list. [7.07(e)(3)]
3. An announcement card (including one sent by e-mail) stating new or changed associations, new offices, or similar changes relating to a lawyer or

firm, or a tombstone professional card. [7.07(e)(4)]
4. A newsletter, whether written, digital, or electronic that is sent to:

- a. current or former clients;⁷
- b. other lawyers⁸ or professionals; or
- c. members of a nonprofit organization, providing the organization meets the conditions stated in Rule 7.07(e)(5)(iii). For example, the organization's primary purpose is not to provide legal services to its members, nor does it derive financial benefit from the lawyer who provides its members legal services. [7.07(e)(5)]

5. A "solicitation communication" that is not based on a particular past occurrence or event (or series of past occurrences or events), or concerned with a prospective client's particular legal problem. [7.07(e)(6)] In other words, a communication that has all of the exempted information in Rule 7.07(e)(1), but is under the heading of "Were you injured in a car accident?", or "Have you been arrested?" does not comply with this exemption.

6. A "solicitation communication" which is not motivated by the lawyer's pecuniary gain (i.e., pro bono legal work). [7.07(e)(7)]

7. And lastly, if a prospective client requests the "solicitation communication" from the lawyer, it is exempted.

Regarding social media sites, the ARC's Internal Interpretative Comment 17 states that "[l]anding pages such as those on Facebook, Twitter, LinkedIn, etc. where the landing page is generally available to the public are advertisements. Where access is limited to existing clients and personal friends, filing with the Advertising Review Department is not required."

F. Domain Names

TDRPC 7.01 prohibits law firms from using trade names. Additionally, TDRPC 7.02(a) says that a lawyer "shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or law firm," and then proceeds to list communications that are false or misleading. For example, 7.02(a)(3) prohibits creating unjustified results. Consequently, a domain name such as www.iWINcases.com would be prohibited.

G. Jurisdictional Disclaimers in Internet Advertising

Because many states have disciplinary rules pertaining to advertising on the Internet, and jurisdiction over such advertisements reaching residents of their states, it is prudent to use a disclaimer that the ad is intended solely

for residents of Texas, or persons seeking representation in Texas. Of course, if you are licensed in federal court or other state jurisdictions, adjust your disclaimer accordingly. It is important to check the disciplinary rules in each state in which a lawyer is licensed in order to comply with that state's advertising regulations.

In addition, the lawyer may want to disclaim forming a lawyer-client relationship over the Internet, unless it is his or her intent to do so. The TDRPC do not require a lawyer to make a jurisdictional or nonclient disclaimer. These are simply suggestions that may protect against potential disciplinary liability in Texas and other states.

H. Advertising Review Committee Information is on the State Bar of Texas Website

The Internet link to the ARC is <http://www.texasbar.com/adreview/>. Additional contact information is follows for the reader's convenience.

Advertising Review Committee's Contact Information:

Phone number: (800) 566-4616

Fax number: (512) 462-7399

Mailing address

If using the US Postal Service:

Advertising Review Committee
State Bar of Texas
PO Box 12487
Austin, TX 78711-2487

If using another delivery service:

Advertising Review Committee
State Bar of Texas
1414 Colorado St., 5th Floor
Austin, TX 78701

III. Noncommercial Speech

A. What is Noncommercial Speech?

Noncommercial speech is afforded greater First Amendment protection than commercial speech. See Texans Against Censorship, 888 F. Supp. at 1341. For example, noncommercial speech may involve debate about matters of public concern, or political discourse. It includes a wide range of expression that is not commercial in nature,⁹ and perhaps more importantly for purposes of this paper, it is not regulated by Part VII of the TDRPC.

However, it is wishful thinking that noncommercial speech of a Texas-licensed lawyer is not also governed by the dis-

disciplinary rules. As a result, examples of lawyer misconduct through case law and various articles will be used to illustrate disciplinary liability in the context of noncommercial speech. The TDRPC rules are given for each item in the section below to aid the reader in understanding which Texas disciplinary rules would likely apply if similar conduct occurred in this state. These lessons from the Internet are purely illustrative and do not state an opinion as to whether or not a grievance panel would find professional misconduct based upon the same fact patterns.

B. Lessons from the Internet

1. A lawyer in Minnesota is disciplined for sending an e-mail to a witness in a disciplinary proceeding, asking the witness not to testify against another lawyer. *In re Soronow*, 694 N.W.2d 556 (Minn. 2005).

Applicable TDRPC 3.04(e) – A lawyer shall not ask a person other than a client to refrain from voluntarily giving relevant information to another party unless....

Applicable TDRPC 8.04(a)(4) – A lawyer shall not engage in conduct constituting obstruction of justice.

2. A juror was dismissed from a securities fraud case after disclosing the juror had read lawyer Robert Grime's¹⁰ blog about the trial. The Wall Street Journal article said, "Grimes, who is posting up-to-date detailed reports on the trial at his firm's website, was reportedly hired to write the blog by a law firm involved in some of the civil litigation arising from [one of the parties] meltdown, but Grimes declined to identify the firm."¹¹

Applicable TDRPC 3.07(a) – In the course of representing a client, a lawyer should not make an extrajudicial statement... disseminated by means of public communication if... it will have a substantial likelihood of materially prejudicing an adjudicatory hearing. A lawyer shall not counsel or assist another person to make such a statement.

3. A temporary prosecutor wrote on his blog that "opposing counsel was 'chicken' when she asked for a continuance, directly alluded to her with some posting titles obscene enough that the judge did not repeat them."¹² In this case, the judge read the temporary prosecutor's personal blog.

Applicable TDRPC 4.04(a) – In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person....

4. In Pennsylvania, a lawyer was disbarred for falsely accusing a judge in an Internet "press release" of such offenses as the criminal alteration of recorded court proceedings, subornation of perjury by an officer of the court, and harboring criminal conduct. The lawyer had made these accusations repeatedly, which he knew to be false, not only on the Internet, but in the local newspaper and through pleadings and letters to

various officials. *Office of Disciplinary Counsel v. Wrona*, 908 A.2d 1281, 1285, 1288 (Pa. 2006).

Applicable TDRPC 8.02(a) – A lawyer shall not knowingly make false statements, or with reckless disregard for their truth... about the qualifications or integrity of a judge....

Applicable TDRPC 8.04(a)(3) – A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

NOTE: Some lawyers have improperly used their Facebook pages and blogs to name call and criticize judges, and a few, as shown here, have been disciplined for professional misconduct.¹³

5. An Illinois lawyer was disciplined for disclosing confidential client information in her personal blog, because the fact patterns of her clients' cases were thinly veiled. In the blog, her clients were often referred to by their first name, derivatives of their first name, or even by their jail identification number. The lawyer, who was an assistant public defender at the time, also called one judge whom she practiced before "Judge Clueless" and made remarks about a client who lied to the court. *In re Peshek*, M.R. 23794, 09 CH 89 (May 18, 2010).¹⁴

Applicable TDRPC 1.05(b)(1) – A lawyer shall not knowingly reveal confidential information of a client or former client....

Applicable TDRPC 3.03(b) – If a lawyer has offered material evidence [to the court] and comes to know of its falsity,... the lawyer shall take reasonable remedial measures, including true disclosure of the facts [to the court if the client will not take corrective steps after being so advised by the lawyer]. See Comment 13 to TDRPC 3.03.

Applicable TDRPC 8.02(a) – A lawyer shall not knowingly make false statements, or with reckless disregard for their truth... about the qualifications or integrity of a judge....

6. A Texas lawyer lied about the reasons she needed a continuance, which the judge granted. However, the judge discovered that the lawyer's reasons for a continuance were not completely true when she viewed the lawyer's Facebook page and discovered she had been drinking and partying heavily in spite of the relative's death. When the lawyer asked for a second continuance, the judge denied it and told her why.¹⁵

Applicable TDRPC 3.03(a)(1) – A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.

C. Online Noncommercial Speech Serves Several Legitimate Purposes

Lawyers who write legal blogs to educate the public about a particular area of law serve an undisputed legitimate purpose. There are many great legal blogs on the Internet, which are useful resources for both laypersons and lawyers.

The lawyers who write these blogs improve their writing skills, build a reputation for being knowledgeable in a certain area of law, and stay current with developments in case law and legislative changes. The ARC's Internal Interpretative Comment 17 states that "[b]logs or status updates considered to be educational or informational in nature are not required to be filed with the Advertising Review Department. However, lawyers should be careful to ensure that such postings do not meet the definition of an advertisement subject to the filing requirements."

Political speech also informs through debate and discussion. In *State Bar of Texas v. Semann*,¹⁶ the court of appeals reversed a disciplinary sanction against a lawyer who criticized a judge as being a "midget among giants" in comparison to other criminal court judges. The court found the statement was not made with falsity or reckless disregard for the truth about the qualifications or integrity of the judge. See *id.*¹⁷ The court in *Semann* wrote:

It is recognized that persons who make derogatory statements about public officials, including judges, are protected by the First and Fourteenth Amendments of the United States Constitution from imposition of civil and criminal liability, unless the statement is made with knowledge that it is false or with reckless disregard of whether it is false or not.

Id. at 432.

IV. Conclusion

The best prevention regarding disciplinary liability and online noncommercial speech is to behave like a professional. Remember what is said online generally stays online and may be used against you. Familiarize yourself with the Texas Disciplinary Rules of Professional Conduct, and if you need advice on the rules or ethics opinions, call the State Bar of Texas Ethics Helpline at 1-800-532-3947 for nonbinding, nonconfidential advice from an ethics lawyer.

Ellen Eidelbach Pitluk is an ethics attorney with the State Bar of Texas Office of Chief Disciplinary Counsel. She advises attorneys on the Texas Disciplinary Rules of Professional Conduct, Texas Rules of Disciplinary Procedure and ethics opinions issued by the Professional Ethics Committee. Ms. Pitluk received her law degree from St. Mary's University School of Law. ★

¹ "Social media appears in many forms, including e-mail, blogs, online forums and message boards...Examples of social media applications that facilitate professional and social networking include Facebook, LinkedIn and, most recently, micro-blogs such as Twitter."

Nicole Black, *Social media latest networking tool for lawyers*, THE DAILY RECORD, posted July 7, 2008, available at <http://nydailyrecord.com/blog/2008/07/07/social-media-latest-networking-tool-for-lawyers/>.

² There is no standing requirement to file a grievance.

³ See specific language of TDRPC 7.05 and comments which follow the rule.

⁴ The requirements of 7.05(a) must be met in addition to 7.05(b)-(e) for most written e-mail solicitations.

⁵ Several federal and state laws apply to spam and phishing.

⁶ See the Appendix A for Advertising Review Committee links to Interpretative Internal Comments, Frequently Asked Questions and more.

⁷ Note comparison to TDRPC 7.03(a) regarding prohibition against in-person or telephone conversations.

⁸ ARC Internal Interpretative Comment 1, Public Media Advertisement (Nov. 1995) - A public media advertisement is an advertisement broadcast or made available to the general public, such as telephone Yellow Pages, newspapers or other periodicals, outdoor display, the Internet, radio or television. Publications or information disseminated primarily to lawyers, such as legal newspapers, legal directories, firm brochures mailed to other lawyers, and on-line services provided to lawyers are not considered to be in the public media. (Emphasis added).

⁹ The author recognizes that this definition is barely sufficient to describe the large body of First Amendment case law regarding noncommercial speech.

¹⁰ Mr. Grimes is a lawyer in San Diego, California.

¹¹ Dan Slater, *Lawyers Blogging on Cases: Good or Bad?*, WSJ BLOGS - LAW BLOG, posted May 1, 2008, available at <http://blogs.wsj.com/law/2008/05/01/lawyers-blogging-on-cases-good-or-bad/>.

¹² Pam Smith, *Judge Reprimands Temp Prosecutor for Personal Blog*, LAW.COM, posted April 28, 2006, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005548887>.

¹³ See generally Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's Also Dangerous*, ABA JOURNAL, posted February 4, 2011, available at http://www.abajournal.com/news/article/for_lawyers_the_appeal_of_social_media_is_obvious_its_also_dangerous/; John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, posted September 13, 2009, available at <http://www.nytimes.com/2009/09/13/us/13lawyers.html>.

¹⁴ See also Seidenberg, *supra* note 13; Schwartz, *supra* note 13.

¹⁵ Molly McDonough, *Facebooking Judge Catches Lawyer in a Lie, Sees Ethical Breaches*, ABA JOURNAL, posted July 31, 2009, available at http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago/; see also Seidenberg, *supra* note 13; Schwartz, *supra* note 13.

¹⁶ *State Bar of Texas v. Semann*, 508 S.W.2d 429 (Tex. App.—San Antonio 1974).

¹⁷ See also Bruce A. Campbell, *A Primer on What Lawyers Can Say About Judges*, TEXAS LAWYER, August 5, 2008, available at <http://www.lawjobs.com/newsandviews/LawArticle.jsp?id=1202423513344&rss=newswire&slreturn=1&hbxlogin=1#>.

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Page printed from: *National Law Journal*

Federal Appeals Court Calls Out Michigan Judge in Gun Case

Happy Carlock , The National Law Journal

June 11, 2015

Criticizing a federal judge who “belittled” a defense lawyer in front of a jury, a federal appeals court this week granted a new trial in a Michigan gun case.

The U.S. Court of Appeals for the Sixth Circuit said U.S. District Judge John O’Meara’s in-court comments about the defense lawyer, Marvin Barnett, “created an appearance of bias that undermines the verdict.” The court also questioned the judge’s reading of the definition of reasonable doubt. (Read the appeals court ruling [here](#).)

Barnett defended a man named Reginald Daniels, who was charged with gun crimes. A jury found Daniels guilty on two counts—firearm possession and possession of a firearm with an obliterated serial number—but the appeals court reversed the conviction and ordered a new trial. Daniels had been sentenced to more than seven years in prison.

O’Meara, the appeals court said, at one point threatened sanctions against Barnett and interrupted his witness-questioning, calling it “flimflam.” During closing arguments, O’Meara told Barnett to “shut up” and described his argument as mendacious, the appeals court said. When Barnett began to challenge the government’s first witness, O’Meara called the questions “dramatic” and “irrelevant.”

“While any of these statements (or the several others cited by Daniels) might have been harmless during sidebars addressing government objections, allowing the jury to hear these numerous sua sponte statements created an appearance of bias that undermines the verdict,” Sixth Circuit Judge Gilbert Merritt wrote for the panel. The court said the “remarks began with the first witness and continued through to closing arguments. Some influence on the jury seems inevitable.”

In an interview Wednesday, Barnett said: “It was unusual to see that type of conduct in district court. I’ve never seen that before, except on a few occasions. But I do believe that the judge is experienced and fair-minded.”

O’Meara didn’t immediately return a message seeking comment left with his chambers in Ann Arbor, Michigan.

Shane Cralle, the assistant U.S. attorney assigned to the appeal, deferred comment to a spokesperson for the U.S. Attorney's Office for the Eastern District of Michigan. The office didn't immediately comment on the Sixth Circuit ruling. In court papers, the U.S. attorney's office said the trial judge's remarks didn't justify reversing the conviction.

"The district court did not exhibit bias or prejudice in its interactions with defense counsel. Its comments, read in context, show the district court attempting to exercise its oversight function and maintain focus on the issues in dispute despite the irrelevant and redundant questions of defense counsel," Cralle wrote in a brief. "While its comments may not have been ideal at times, the district court did not act with such a high degree of antagonism to deprive Daniels of a fair trial."

The panel judges reversed the conviction in part based on O'Meara's "improvised" instruction to the jury about the definition of reasonable doubt.

After the trial and five hours of deliberation, the jury was hung. When one juror asked a question about reasonable doubt, the judge declined to read through the instructions again. He instead provided a summarized explanation that said, in part, "there is no way a reasonable person can come to the conclusion you need to come to, to in this case find the defendant guilty of two charges."

Merritt, writing for the panel, said "reasonable doubt is a difficult standard to quantify, but it attaches well before 'there is no way a reasonable person can come to the conclusion' that a defendant is guilty."

The appeals court remanded the case for a retrial, but the panel decided not to assign a new judge.

"We do not know why these problems occurred, but we have no reason to believe they will recur in the courtroom of this experienced and fair-minded judge," the appeals court said.

Barnett, a criminal defense lawyer based in Detroit, said he does not think he will represent Daniels back in the district court.

"It was very difficult to hear the comments from the court," Barnett said. "I was heartbroken because I was simply trying to do my job. You don't want somebody convicted because of comments from their attorney."

Below: Read the Sixth Circuit ruling in United States v. Daniels.

Contact Happy Carlock at hcarlock@alm.com.

Best Practices for Legal Education

Legal Education & Civility in the Legal Profession

Posted on October 25, 2015 by dmaranville

A recurrent theme in current critiques of legal education is the need to develop lawyers with interpersonal, intrapersonal, and leadership knowledge, skills and values

(<http://bestpracticeslegaled.albanylawblogs.org/2015/10/08/the-25-most-important-lawyering-skills-2/>), as well as the traditional analytical skills and doctrinal knowledge. (A significant portion of Chapter 6 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2637499), *Teaching the Newly Essential Knowledge, Skills, and Values in a Changing World* in the recent volume *Building on Best Practices* (<http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&skuId=sku-us-ebook-03393-epub&catId=cat-US-ebook-epub&prodId=prod-us-ebook-03393-epub>): *Transforming Education in a Changing World* (Lexis 2015) is devoted to the what and how of teaching such topics.)

Opportunities to reflect on this theme abounded in early October, when I had the privilege of attending the Civility Promise (<http://www.robertsfund.org/>) Continuing Legal Education seminar in Sovana, a small hill town in southern Tuscany, Italy. Sponsored by Seattle University Law School and Robert's Fund, the seminar brought together fifteen attorney participants from diverse practice backgrounds. They included a retired corporate attorney and managing partner of what is now a leading global law firm, a retired trial court judge, and lawyers with criminal or civil litigation, or transactional practices in both private and government settings.

Conceived by Paula Lustbader, teacher extraordinaire and emeritus professor of law at Seattle U. in collaboration with Italian artist Sergio Tamassia, the seminar was co-taught by two exceptionally skilled presenters: Tim Jaasko-Fisher, Senior Director of Curriculum and Programming for Robert's Fund, formerly Assistant Attorney General and then Director of the University of Washington Law School Court Improvement Training Academy, and Craig Sims, Chief of the Criminal Division of the Seattle City Attorney's Office.

The seminar identifies three pillars of civility: **consciousness, community, and creativity**. After fostering each pillar within the group in a brilliantly executed mix of didactic, reflective, and creativity-facilitating teaching methods, participants are challenged to take their learning into the profession.

Each participant was drawn to the seminar for their own personal reasons and several shared compelling experiences — the opposing counsel whose business model was the shake down, the ultimately unsuccessful malpractice suit based on the theory that an attorney approaching a case with a collaborative mindset violated her duty to her client, the former colleague who cracked under pressure and — the ultimate case of incivility — murdered his opposing counsel. And all bemoaned the all-too-common misconception that the adversary system is about behaving uncivilly, rather than developing and presenting the most compelling arguments on the merits.

Concerns over incivility have led some jurisdictions to adopt mandatory civility codes (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302771) and help inspire the burgeoning mindfulness (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465248) movement. Like the profession, many law schools are pursuing mindfulness (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510469) for multiple reasons, including encouraging civility (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2374120). Whether these efforts will be sufficient to effect widespread change in individual attorney behavior and the culture of the legal profession remains to be seen. But the Civility Promise seminar provided both incentive and tools for change. We can also hope that it will inspire similar efforts in legal education.

Filed under: Best Practices, Best Practices & Curriculum, Best Practices for Institutional Effectiveness, Catalysts For Change, Teaching Methodology | Tagged: Add new tag, Best Practices and Curriculum, Catalysts for Change | 2 Comments »

Providing Pro Bono Opportunities and Field Placements at Private Firms

Posted on October 14, 2015 by Margaret Moore Jackson

Law schools working to provide students with substantial pro bono opportunities may look beyond traditional public interest firms, legal services providers, or governmental agencies. The idea of allowing students to assist in representing pro bono clients at private firms is appealing. What a great way to encourage and expand the pro bono efforts of the local bar, while helping students develop professionalism and an understanding of a lawyer's responsibility to the community! Typically, the bench and bar love the idea. Such programs could provide much-needed legal services to persons of limited means, while reinforcing and modeling the importance of pro bono legal service.

But among the challenges to creating these programs at for-profit firms is the need to clearly distinguish such arrangements from an employment relationship. Similar issues arise when law schools explore the possibility of field placement programs at for-profit firms. Cautious directors of field placement and pro bono programs have been watching these issues develop, as the U.S. Department of Labor (http://www.americanbar.org/publications/governmental_affairs_periodicals/washingtonletter/2013/sept) and the ABA (http://www.americanbar.org/news/abanews/aba-news-archives/2013/07/aba_asks_dol_forass.html) have traded correspondence (http://www.americanbar.org/publications/governmental_affairs_periodicals/washingtonletter/2013/june) in an effort to provide clarity.

Recent federal court decisions have cast doubt on whether the DOL's interpretation of the issue will be followed. In Schumann v. Collier Anesthesia (https://scholar.google.com/scholar_case?case=7952052026298324766&q=Schumann+v.+Collier+Anesthesia+2015&hl=en&as_sdt=6,35&as_vis=1), the Eleventh Circuit sided with a prior ruling by the Second Circuit, putting aside some of the concerns of the DOL. As reported in the National Law Journal:

On September 11, 2015, the Eleventh Circuit became the first appellate court to address the standard for lawful unpaid internships since the Second Circuit's ruling in Glatt et al. v. Fox Searchlight Pictures, Inc. et al. (<http://www.natlawreview.com/article/second-circuit-adopts-highly-individualized-primary-beneficiary-test-unpaid-intern-l>) The new decision adopts the Glatt test and reasoning wholesale, and provides helpful guidance on applying the Glatt factors. The case also strengthens the trend away from relying on the DOL's Fact Sheet 71 (<http://www.dol.gov/whd/regs/compliance/whdfs71.htm>), which purports to provide restrictive guidance on unpaid internships.

Echoing the Second Circuit in Glatt, the Eleventh Circuit disagreed with the SRNAs and rejected the DOL's six-factor test. As a threshold matter, the court noted that because the six-factor test is not a regulation it is only due deference "proportional to its power to persuade." The court "[did] not find it persuasive."

Does this change anything? Now what?

We want to provide opportunities for students to participate in well-structured field placement programs and for them to engage in introductory pro bono work. Private firms are perhaps not the best place for this, but many law schools need to see whether somehow it can be made to work – serving the educational needs of the students while improving the provision of pro bono legal services.

Filed under: [Uncategorized](#) | [2 Comments](#) »

The 25 Most Important Lawyering Skills?

Posted on October 8, 2015 by Ben Bratman

In discussing bar exam reform in my earlier post, I referenced the results of this [job analysis survey](http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F55) (<http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F55>) of newly licensed attorneys. The attorneys, all in practice for three years or less, were asked to rate the significance to their jobs of various skills or abilities (e.g., legal reasoning, organizational skills, written communication) and various knowledge domains (e.g., Rules of Evidence, Contract Law, Rules of Civil Procedure). Ever since I first saw the results, I have been taken with one particular statistic: The respondents rated 25 different skills or abilities as more significant to their jobs than the highest rated knowledge domain.

After the results came out, I looked more closely at these 25 skills and organized them into five broader skill categories: (My chart, which includes all 25 skills and each one's average rating on a scale of 1 to 4, is below.) I then led a discussion on the importance of all of this to legal education at a legal writing conference last spring. Some of the colleagues in attendance offered insightful and practical comments that I'd like to share here.

One suggested that the 25 skills are a good starting point for formulating a new course to satisfy the ABA's expanded practical skills requirement in the new Standard 303(a)(3). Others suggested that my chart, or something akin to it, could be a means for identifying and measuring learning outcomes for "other professional skills needed for competent and ethical participation as a member of the legal profession" under Standard 302(d), or additional learning outcomes under Interpretation 302-2.

I hope that many in legal education will find this chart, my colleagues' ideas, and the overall survey results to be valuable tools. And, if anyone has feedback on how to revise the chart to make it a more useful tool, please get in touch.

<u>Communication</u>	<u>Analysis</u>	<u>Research</u>	<u>Project Management</u>	<u>Professionalism</u>
Written communication 3.77	Critical reading & comprehension 3.55	Computer skills 3.28	Paying attention to details 3.67	Professionalism 3.58
Listening 3.60	Synthesizing facts & law 3.55	Electronic researching 3.26	Using office technologies 3.56	Judgment 3.29
Oral communication 3.58	Legal reasoning 3.54	Fact gathering & evaluation 3.22	Knowing when to go back & ask ?s 3.46	Diligence 3.26
Interpersonal skills 3.44	Issue spotting 3.43		Organizational skills 3.46	
Answering questions succinctly 3.30	Information integrating 3.10		Working within established time constraints 3.44	
Advocacy 3.24			Decisiveness 3.31	
			Consciousness of limitations 3.15	
			Planning & strategizing 3.13	

Filed under: [Best Practices](#), [Outcomes & Assessment Techniques](#) | [4 Comments](#) »

Bar Exam Musings, Part II: Skillfully Changing the Bar Exam Narrative

Posted on October 8, 2015 by Ben Bratman

There really needs to be a paradigm shift in the way the National Conference of Bar Examiners and state bar examiners approach potential reform of the exam. It should not be so novel an idea to increase the range of *skills* tested on the bar exam (or at least enhance the testing of existing skills) instead of increasing the number of *subjects* tested on the bar exam. Adding Federal Civil Procedure as the seventh subject on the MBE, as the NCBE just did this year, is not helping. An expanded MBE exacerbates the already heavy imbalance in favor of testing for content knowledge over testing for professional skills

Granted, some skills do not lend themselves to being tested on a standardized exam, but some very well could. Has the NCBE done a careful study of the skills coverage of the Multistate Performance Test akin to its review of the subject coverage of the MBE that led to the adding of Civil Procedure? I have seen little evidence that it has.

Consider a few skill sets as examples. The vast majority of newly licensed lawyers responding to a recent job analysis survey (<http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F55>) indicated that their job requires them to investigate facts and gather facts. A similarly large majority indicated that their job requires them to develop strategy for client matters. The MPT is supposed to test these skill sets, but has it? My review of the last 10 years' worth of MPT questions suggests that it has not but has rather focused consistently on basic legal and factual analysis to be written in the form of a memo, brief, or client letter. (Not that there's anything wrong with that; it's just that there is something wrong with having *only* that.) Moreover, among the documents that MPT examinees are told that they could be asked to produce are a discovery plan or a witness examination plan, but I have never seen either assigned.

Surely, if the MBE deserved review to determine if it needed another subject, the MPT deserves review to determine how it can expand to test more skills and more often.

In the same vein, there is the question of whether and how to test legal research, which has gotten some attention (http://www.aallnet.org/mm/Publications/llj/LLJ-Archives/Vol-99/pub_llj_v99n02/2007-23.pdf) and has been studied by the NCBE. Even legal writing, though a fundamental part of completing an answer to an MPT or essay question, is not really tested on its own merits.

Filed under: [Bar Exam](#) | [3 Comments](#) »

AALS Balance Section Topic Call: New Lawyer Well-being Research: An Imperative to Redefine "Success" for our Students? Presented by Prof. Larry Krieger

Posted on October 6, 2015 by Jessica Persaud
Dear Colleagues,

The AALS Balance Section invites you to participate in a topic call about lawyer well-being and satisfaction, with Prof. Larry Krieger presenting his findings and data from 6200 lawyers in 4 states. As you will see, the findings may have important implications for who is genuinely "successful" in law school, and consequently for how and what we teach as well. Here are the details. Please forward this invitation to your colleagues.

What:

AALS Balance Section Topic Call: New Lawyer Well-being Research: An Imperative to Redefine "Success" for our Students? Presented by Prof. Larry Krieger

When:

Call-in #:

(712) 432-1500, access code 1062814#

Readings:

Please see the topic discussion below and attached PowerPoint slides that may be viewed here:

Krieger Topic Call-AALS Balance (<https://bestpracticeslegaled.files.wordpress.com/2015/10/krieger-topic-call-aals-balance.pptx>)

HappyLwr stdtBrief3 15 (<https://bestpracticeslegaled.files.wordpress.com/2015/10/happylwr-stdtbrief3-15.pptx>) (Professor Krieger uses the linked slides here in presentations for students and lawyers, and is fine with others downloading them for similar use.)

Format:

Presentation by our speaker Larry Krieger, followed by discussion

Topic:

New Well-being Research: An Imperative to Redefine "Success" for our Students?

Hello all. I'm delighted to be part of the topic call programs sponsored by our Section on Balance in Legal Education. The call will be based on findings from my study with Dr. Ken Sheldon, now published (83 Geo. Wash. L.R.) and also viewable in final form at: <http://ssrn.com/abstract=2398989> (<http://ssrn.com/abstract=2398989>). The paper documents our data from 6200 lawyers in four states, and sheds light on the apparent contributions of many kinds of factors to the well-being and satisfaction of those lawyers.

Perhaps the most important pattern and overall finding is that the objective factors typically associated with "success" for a law student or lawyer in our society show weak (even nil in some cases) relationships with lawyer happiness. At the same time, these factors (including, for example, grades/class rank, law review membership, affluence/income, law school debt, USNWR law school ranking, and making partner in a law firm) are all competitive and therefore anxiety-inducing. Indeed, most of the stress and depression/discouragement among law students and lawyers is typically attributed to such factors.

Complementing these findings, the data also highlight several non-competitive, personal and subjective factors (including authenticity/integrity, altruistic and community values, close relationships, and passion for one's chosen work) to be the actual, quite powerful determinants of lawyer happiness and satisfaction.

These and related findings should, I believe, lead us to question the very definition of "success" and "quality of life" shared by our and other modern cultures. Since the dominant paradigm of "success" determines the life priorities, focus, and primary effort of most people, if that paradigm does not bring happiness do we decide that it is flawed or dysfunctional? If so, how might educators (especially legal educators for this discussion) effectively impart this information and thereby shift the priorities of their students?

I hope you can take at least a quick look at the study report before the call, but if not please do join us regardless. And while all thoughts are welcome, I hope we can focus on two fundamental questions:

****What do you consider the most important or meaningful finding(s)?**

****Do you see a way to use one or more of the findings in your work with students or lawyers, whether teaching, counseling, advising, or mentoring? (You may already be working in this area, or may have ideas for how you might in view of these findings now.)**

I will provide a brief summary of the findings, and look forward to hearing as many thoughts and voices as possible given our time.

Best and thanks to all, Larry

Filed under: [Uncategorized](#) | [1 Comment](#) »

Musings on the Bar Exam and Legal Education's Attitude toward it

Posted on October 5, 2015 by Ben Bratman

I have been studying and writing about the bar exam of late, so I appreciate the guest blogging opportunity, graciously offered by Mary Lynch, which I shall use to share some bar exam musings. Later this week, I hope to follow up with a bit more.

I noted with interest a recent New York Times feature, *Is the Bar Too Low to Get into Law School?* (<http://www.nytimes.com/roomfordebate/2015/09/24/is-the-bar-too-low-to-get-into-law-school>) The feature offered perspectives from five legal professionals, four of whom are law professors, on how best to respond to declining bar exam passage rates. (Scores on the MBE, the anchor of the bar exam in almost every state, have declined again this year (<http://www.bloomberg.com/news/articles/2015-09-17/bar-exam-scores-drop-to-their-lowest-point-in-decades>).) Two took issue with the bar exam itself, arguing for fundamental changes or its complete abolition. But Linda Sheryl Greene of the University of Wisconsin Law School argued that law schools simply need to do the work of preparing their students for the exam. (<http://www.nytimes.com/roomfordebate/2015/09/24/is-the-bar-too-low-to-get-into-law-school/law-schools-need-to-better-prepare-their-students>)

Law schools (or at least those not in the very top tier) indeed need to help their students prepare for the bar exam, but the bar exam also has to change in a way that allows law schools to do their part without the deleterious distraction of the exam's heavy focus on recall of memorized law. Regrettably, bar exam reform efforts over the last 20 years have not focused on the one part of the exam that actually *and exclusively* tests lawyer competencies, requiring zero memorization of legal rules. That sadly neglected part of the exam is the performance test, which assigns a specific written lawyering task to be completed using a closed universe of factual materials and legal authorities. About one-fifth of the states do not even administer a performance test. Among states that do, the performance test remains the smallest part of the exam, accorded the least weight in scoring. It is in a very real sense the ugly step-child of the bar exam.

The behemoth of the bar exam, the MBE, compels examinees to study and memorize a copious number of legal rules. To be fair, the MBE does not test *only* for knowledge of law. But every skill set evaluated by the MBE—reading comprehension and legal analysis among them—is evaluated also by the performance test. The MBE's primary value to the overall exam is psychometric—i.e., when scores on other parts of the exam are scaled to the MBE, the overall exam achieves testing reliability. A reasonable level of testing reliability can be achieved if the MBE is weighted at 40% of the overall score. (See page 13 of [this article](http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2012%2F810312beKane.pdf) (http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2012%2F810312beKane.pdf) by the National Conference of Bar Examiners' former Director of Research.) However, the NCBE recommends 50%, a recommendation that most states follow.

What of the rest of the exam? In every state, the remaining part of the score comes mostly from answers to essay questions, which, like the MBE, require memorization and recall of legal rules. If the MBE is testing knowledge of law (and creating more than enough focus on rote memorization), what reason other than inertia is there for essay questions to retain such a significant place on bar exams? Or to remain on bar exams at all? For years, essay questions were the venue for testing knowledge of state-specific law. However, most states now use the NCBE's Multistate Essay Examination. And, as a growing number of states adopt the Uniform Bar Examination, several are employing other means outside of the bar exam, such as a required seminar, to ensure that new lawyers are familiar with unique attributes of local law.

And that takes me back to the performance test, the most valid of the testing instruments on the bar exam. The performance test was the answer from bar examiners 20 years ago to the recommendations of the MacCrate Report, which called on law schools and bar examiners to increase their attention to lawyering skills. Since then, while the MBE and essay examinations have been expanded, the performance test has remained stagnant. That needs to change. Through careful attention to the various skills today's beginning lawyers have to perform, examiners should be able to reinvigorate the performance test and expand its skills coverage. They should also be able to increase the inadequate weight given to the performance test in scoring.

As for legal education's attitude and approach toward the bar, I think an exam that focuses more heavily on skills through performance testing is one that would put law schools in a better position to help their students prepare. Because performance tests do not evaluate substantive knowledge of law, bar preparation specialists in law schools can easily administer performance tests from previous bar exams to students as both formative and evaluative assessments. Legal Writing professors have been using performance test-style problems for many years, especially with first-year students. Clinical professors use them, and, yes, even some doctrinal professors have too. (I compiled a list of articles discussing the use of performance test-based problems by law professors in footnote 269 of my [recent article](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520042) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520042).)

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The 'Best of' Classroom Technology

Posted on October 5, 2015 by eroep



<https://bestpracticeslegaled.files.wordpress.com/2015/10/campus-tech-best-logo.png>

Courtesy of [Instructional Technology at Albany Law School](https://albanylawtech.wordpress.com/) (<https://albanylawtech.wordpress.com/>)

Recently, [Campus Technology](http://campustechnology.com/) (<http://campustechnology.com/>) polled hundreds of education professionals to ask them which products they think are truly the best. To see what they thought click [here](http://campustechnology.com/articles/2015/09/30/campus-technology-2015-readers-choice-awards.aspx). (<http://campustechnology.com/articles/2015/09/30/campus-technology-2015-readers-choice-awards.aspx>)

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Best Practices for Legal Education

Blog at WordPress.com. The Digg 3 Column Theme.

THE LEGAL PROFESSION ON TRIAL: PROFESSIONALISM IN THE 21st CENTURY

Friday, November 6, 2015

READING MATERIALS

“Put Lawyers Where They’re Needed”, Theresa Amato, The New York Times
<http://www.nytimes.com/2015/06/17/opinion/put-lawyers-where-theyre-need>

“Who says you need a law degree to practice law?”, Robert Ambrogi, The Washington Post
https://www.washingtonpost.com/opinions/closing-the-justice-gap/2015/03/13/a5f576c8-c754-11e4-aa1a-86135599fb0f_story.html

“We don’t need fewer lawyers. We need cheaper ones.”, Martha Bergmark, The Washington Post
<https://www.washingtonpost.com/posteverything/wp/2015/06/02/we-dont-need-fewer-lawyers-we-need-cheaper-ones/>

“The fall and rise of lawyers”, Benjamin Barton, CNN.com
<http://www.cnn.com/2015/05/22/opinions/barton-rise-and-fall-of-lawyers/index.html>

“Too Many Lawyers? We Don’t Have Enough, Law Professor Says”, The Aspen Institute/The Aspen Idea Blog
<http://www.aspeninstitute.org/about/blog/too-many-lawyers-justice-and-society-aspen-institute>

Bench Bar Professionalism Symposium

November 3, 2016

Frederic S. Ury

Ury & Moskow, LLC

Fairfield, Connecticut

Reimagining the practice of law in the 21st Century

Atticus Finch



What has to change?

- We need a new business model
- We need to allow innovation to take place within the legal space.
- Allow changes in regulations of the profession
- Don't throw out what makes us special
- Share fees with non lawyer owned legal service providers
- Allow for non lawyer innovation

A little history: The Grand Bargain

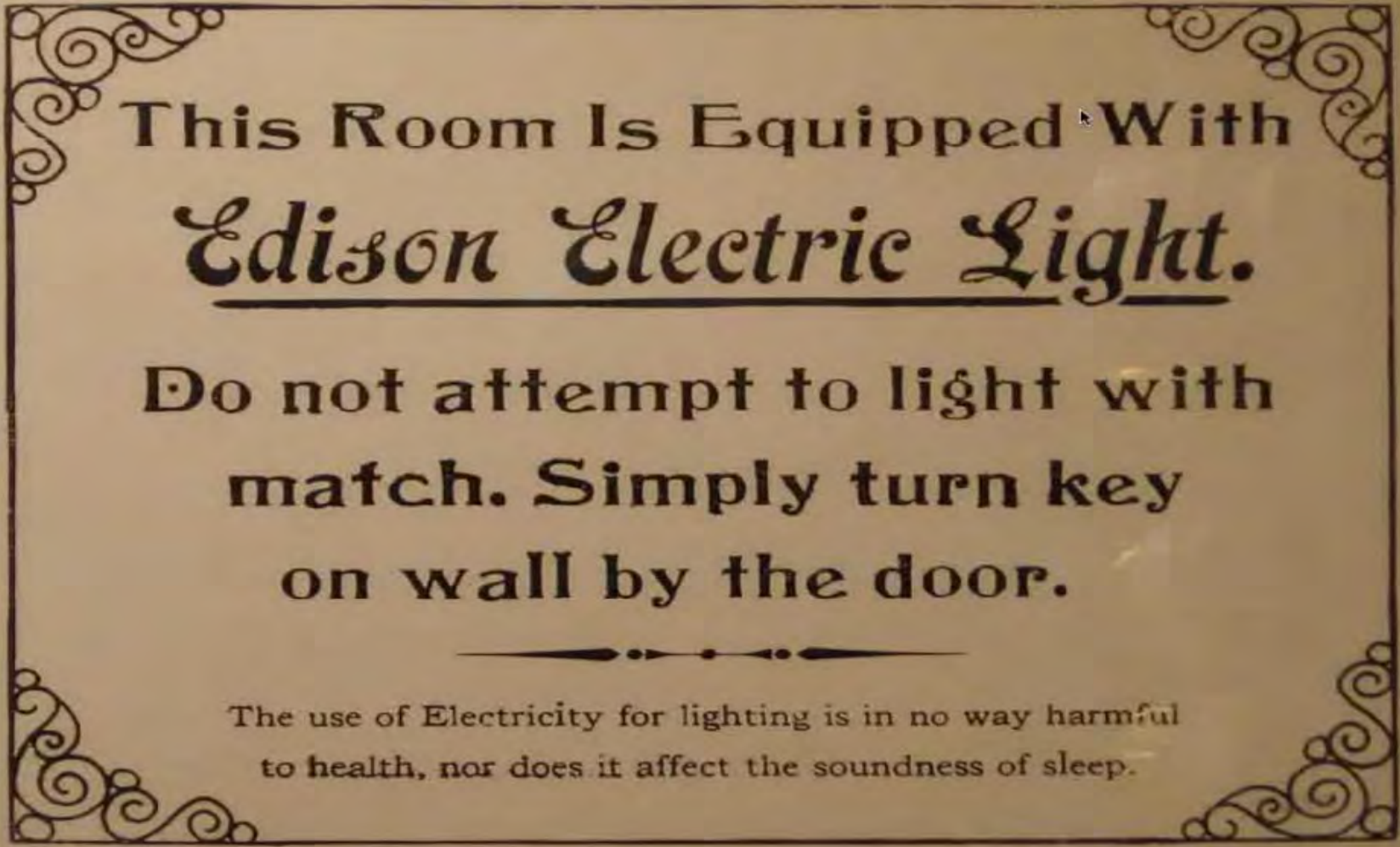
- Self-regulated profession limited to just lawyers
- **Establish law schools to educate lawyers**
- Establish bar exams in each State to limit who is licensed to deliver legal services
- **Discipline lawyers and Judges**
- In exchange lawyers have the monopoly to deliver legal services

Disruptive change

- Change in every industry is occurring faster than ever before.
- **Not just change but disruptive change.**
- Lawyers are not exempt.
- **Disruptive change is not new.**

.

Disruptive change in the 19th Century

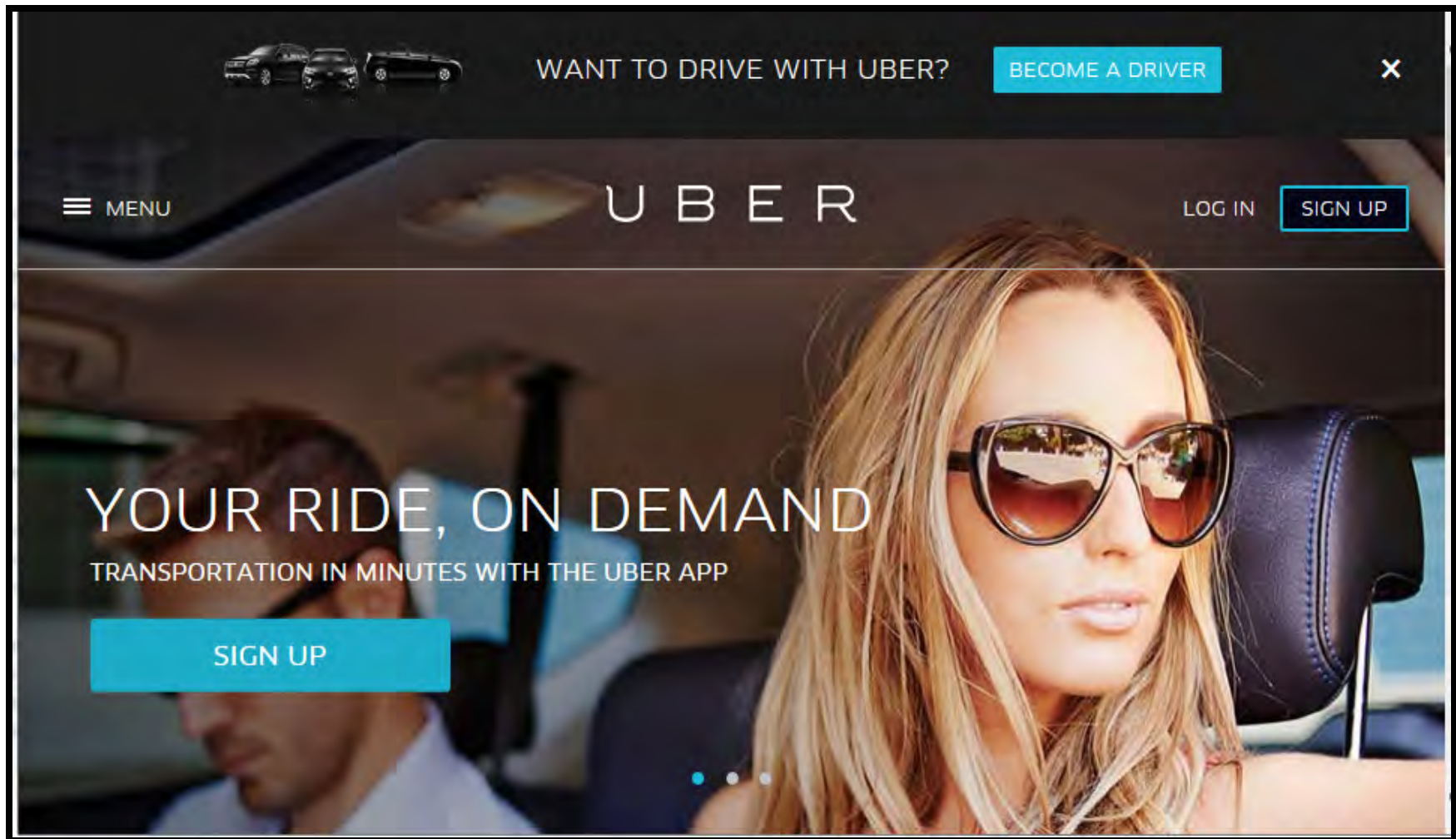


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Edison Electric Light.

Do not attempt to light with
match. Simply turn key
on wall by the door.

The use of Electricity for lighting is in no way harmful
to health, nor does it affect the soundness of sleep.

Disruptive change in the 21st Century



It's all about delivery

- **Borders Books, Blockbuster, Kodak**
- Legal services are not going to disappear...just delivered differently
- **Mail-Pony Express-email- text- drones, FB, Twitter, Instagram, Snapchat**
- Music, news, books available anytime on many devices, Youtube
- **TV, Cable, Direct TV, Netflix, Amazon**

New delivery methods

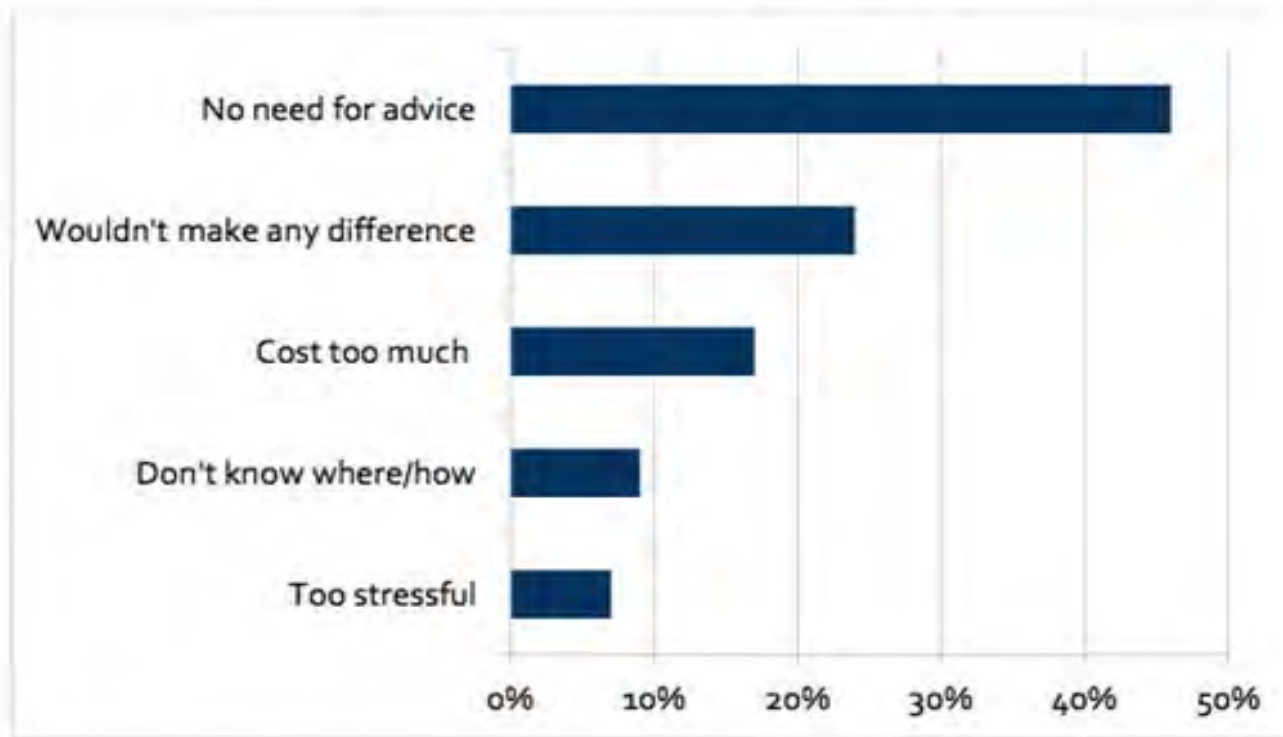
- **Instacart...**food
- **Airbnb..**rentals
- **Lyft and Uber...**ride share
- **Task Rabbit..**outsource household errands
- **Zirx...**users order valet parking
- **Smart phones...**pictures, email, text, internt...

How people handle civil Justice situations

- Do Nothing: 16%
- Self-help: 46%
- Help from family/friends: 16%
- Help from lawyer: 15%
- Help from both: 7%
- Divorces: 85% self-represented

Reasons for not seeking formal advice

Figure 6. Selected Reasons for Not Going to Any Formal Advisor for Assistance with a Civil Justice Situation: Middle City, 2013



Source: Author's calculations from the Community Needs and Services Study.

NY City and NY State statistics

- **NY City**

- 91% of plaintiffs and 92% of respondents do not have an attorney in child support matters
- 99% of tenants are not represented
- 96% of defendants in consumer matters

- **NY State**

- 87% of petitioners and 86% of respondents
- 91% of tenants are unrepresented
- 97% of defendants in consumer matters

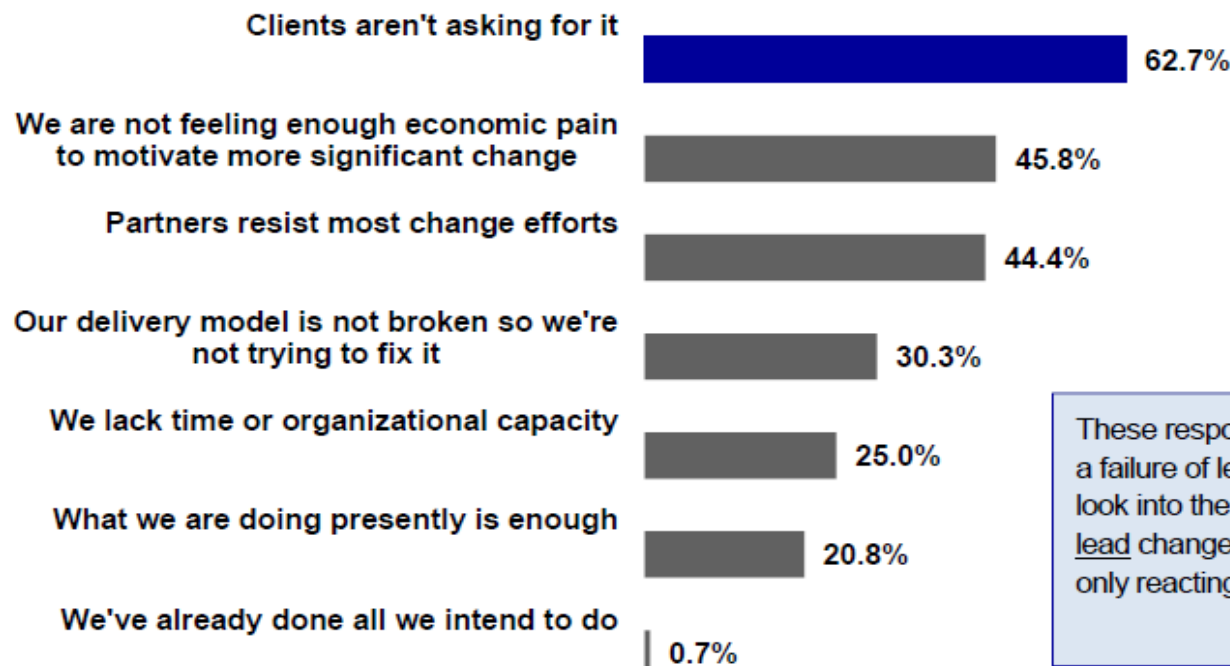
Utah statistics July 2015

- 98% of defendants in consumer debts are not represented
- 97% of defendants in evictions did not have an attorney
- 88% of divorces had at least one party without an attorney
- In only 12% was there an attorney for both

Altman & Weil: Failure in leadership

Law Firms in Transition: Why Firms Aren't Doing More

Q: Why isn't your firm doing more to change the way it delivers legal services?
Select all that apply.



These responses reflect a failure of leadership to look into the future and lead change, rather than only reacting to it.

This does not help



Zillow's Richard Barton's rules

- **If it can be free it will be free**
- **If it can be rated it will be rated**
- **If it can be known it will be known**
- **If it can be on line it will be found on line**

Three trends affecting the legal profession

- Globalization and regulation
- Technology
- Demographics

Law firm ownership outside the United States

- **Australia --publicly traded law firms.**
- The UK --Legal Services Act, Alternative Business Structures; Multi-Discipline Practices.
- **LegalZoom is an ABS and now owns Beaumont Law.**
- Borderless practice in Europe, Australia & Canada.
- **Ontario licenses and regulates paralegals.**

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The primary sources of information for investors are:

1. Slater & Gordon's Annual Report, issued each September/October. This report will be sent to shareholders who are on record as wishing to receive a copy, and will also be available on this website.
2. Slater & Gordon's Half-Year Financial Report, issued in March. This will contain a summary of key events and the financial performance of the business for the first half of each financial year. This will be automatically sent to shareholders who are on record as wishing to receive a copy, and will also be available on this website.



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Stanley Lam Compensation Paralegal Professional Corporation

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- Assist employers undergoing audit.
- Analyze worker status i.e. sub-contractor and independent operator employment status.
- Experience rating analysis.
- Assess the financial costs from a re-classification and/or un-applied accident cost credits.

Claim Services

Claim cost recovery through:

- third party transfers
- cost relief

Legal business model in the US

- Same model for the past 200 years
- **Finance law firms the same way**
- MDP/ABS in Washington DC
- **Licensing Paralegals in Washington State; California and NY are considering**
- Captive insurance defense firms

Axiom

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Outsourcing



Projects



Technology

- Nothing has impacted the law like technology with 24/7 accessibility
- **Small firms can compete with large firms for large transactions or complex litigation**
- Similar tech and resources
- **Clients have the same access**

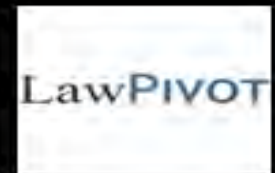
On line legal services industry

- Virtual law firms and legal service companies which deliver bundled and unbundled documents and services did not exist 10 years ago
- 2014 valued at \$4.1 billion
- Growth in the last five years 10.9%
- Growth projected in 2019 at \$5.9 billion
- Investment in LSP in 2012 was \$66 million
- In 2013 it was \$458 million

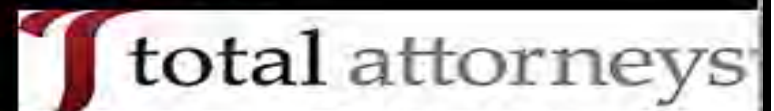
Outside revenue being invested



2010 Avvo \$10M
2011 LAWPIVOT \$1M



2012 JUDICATA \$2M
+ \$5.8M IN 2013



2012 TOTAL ATTORNEY \$15M
2013 AXIOM \$28M



2013 ROCKETLAWYER \$15M

Outside revenue being invested

2013 ANAQUA \$25M

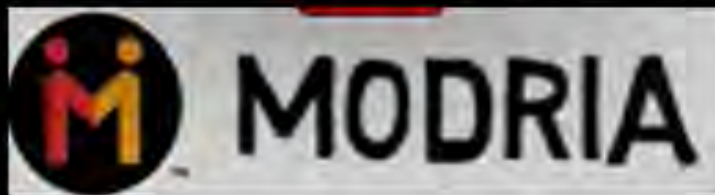


2013 MODUS \$10M

2013 LEGALZOOM \$200M



2013 MODRIA \$5M



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- Pet Trust provisions
- Child Guardianship Appointment clauses
- Guides to help your executor and guardians understand their roles
- Free revisions for 30 Days
- LegalZoom Peace of Mind Review
- Printed on Archival Paper
- Rush Service (prepared in 2 business days)

[more package details](#)

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Gold Includes:

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- Free revisions for 1 year
- LegalZoom Peace of Mind Review
- Printed on Archival Paper
- Rush Service (prepared in 2 business days)

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The screenshot shows the homepage of 10minuteWill.com. At the top left is the logo, which consists of a green '10' with a clock face inside the zero, followed by 'minuteWill.com'. To the right of the logo are links for 'Sign Up' and 'Member Login', along with social media icons for Facebook and Twitter, a 'TEXAS MADE' badge, and a US flag. Below this is a green navigation bar with white text links: 'HOME', 'HOW IT WORKS', 'PRICING', 'TESTIMONIALS', 'ABOUT US', and 'CONTACT US'. The main content area features a large background image of a smiling woman with curly hair holding a young girl on a beach. Overlaid on this image is the text 'Your Loved Ones Deserve It' in green, followed by 'Prepare your WILL in 3 Easy Steps' where '3' is a large green number. Below this text is an orange button with the text 'GET STARTED'. At the bottom of the page, there is a small section with icons representing different services and a document titled 'LAST WILL AND TESTAMENT OF JOHN DOE TESTATOR'.

10minuteWill.com

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NextGenJustice

The screenshot shows the homepage of the NextGenJustice website. The header is red with a logo on the left and contact information on the right. The main content area has a dark blue background with a large white and red graphic of a person running. The text 'NextGenJustice' is prominently displayed, followed by the tagline 'TRUST AT THE SPEED OF LIFE'. To the right, the text 'Legal Solutions Without Lawyers' is shown above a green 'Call Us' button. A white chat bubble on the right says 'Let's Talk!' and 'Thanks for stopping by! We're here to help, please don't hesitate to reach out.' with a green 'Schedule Now' button. The footer contains three icons (people, lightbulb, key) and a row of five service icons: 'Book Appointment', 'Email Us', 'Make Payment', 'Upload Document', and 'My Account'.

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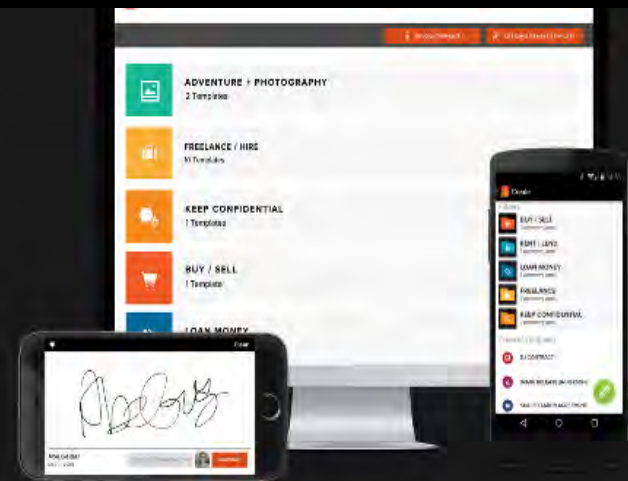
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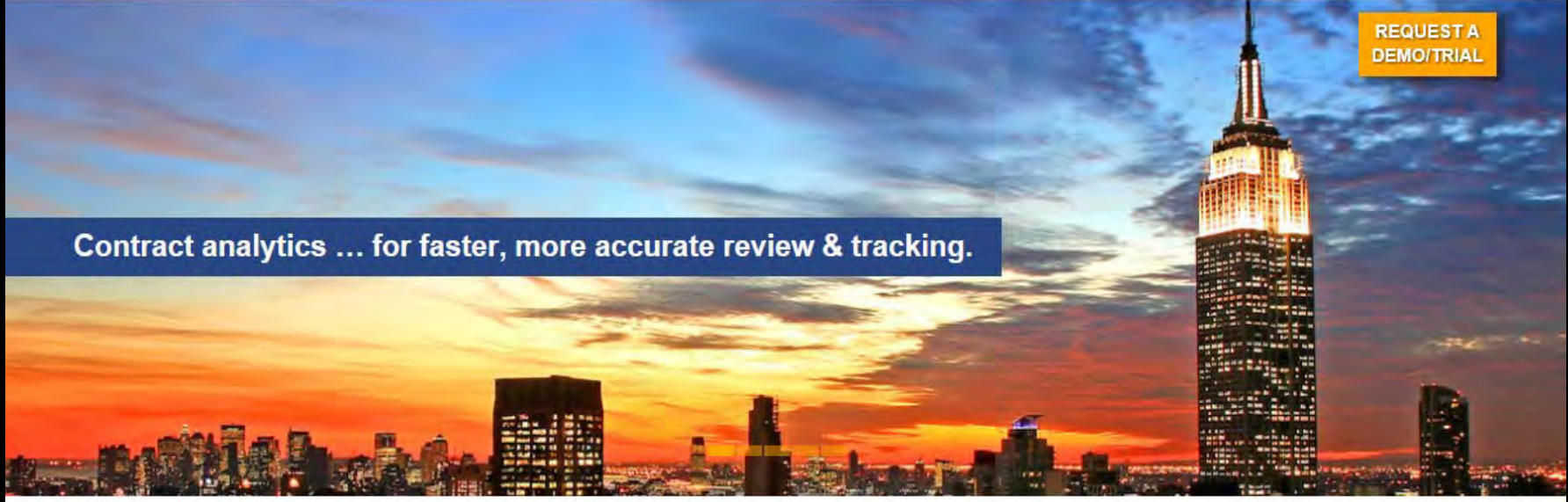
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TAR 1.0 systems required that a senior attorney do all the training, often having to click through thousands of random documents until the system “stabilized.” Also, these systems assumed you had all of your documents at the start, which is rarely the case. Finally, TAR 1.0 allowed only a one-time training process, with no easy way to continue learning as the review progressed.

The Next Level of TAR

Insight Predict is the next level of TAR. We built it around a “continuous learning” process. As your review progresses, Predict keeps learning and refining its results. It is why our TAR 2.0 engine makes your review more flexible and cost effective. To make it possible, we developed our own ranking database, capable of ranking millions of documents in minutes, rather than hours or days.

Predict employs “Reinforcement Learning,” for which we have a patent application [pending](#). It is an advanced form of continuous active learning, which a respected study proved to be more effective at finding relevant documents than the first generation of TAR [engines](#). The quicker you find relevant documents, the quicker the review is complete and the lower the review cost.

With Insight Predict, learning continues until review is complete. Reviewers, rather than senior attorneys, do the bulk of the training. QC processes flag likely mistakes in judgment. Senior members of the team focus on finding important documents, both to use as training seeds and to help them more quickly understand their case. All the while, the algorithm keeps improving.

Ultimately, TAR 2.0 systems such as Predict open the door to a more fluid and flexible approach to TAR, one that works with and adapts to t

Catalyst Insight >

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Why Predictive Ranking

Why Continuous Active Learning

Why TAR 2.0

Ten Reasons to Use Insight Predict

Key Benefits

Why Rank Before Review

FAQs

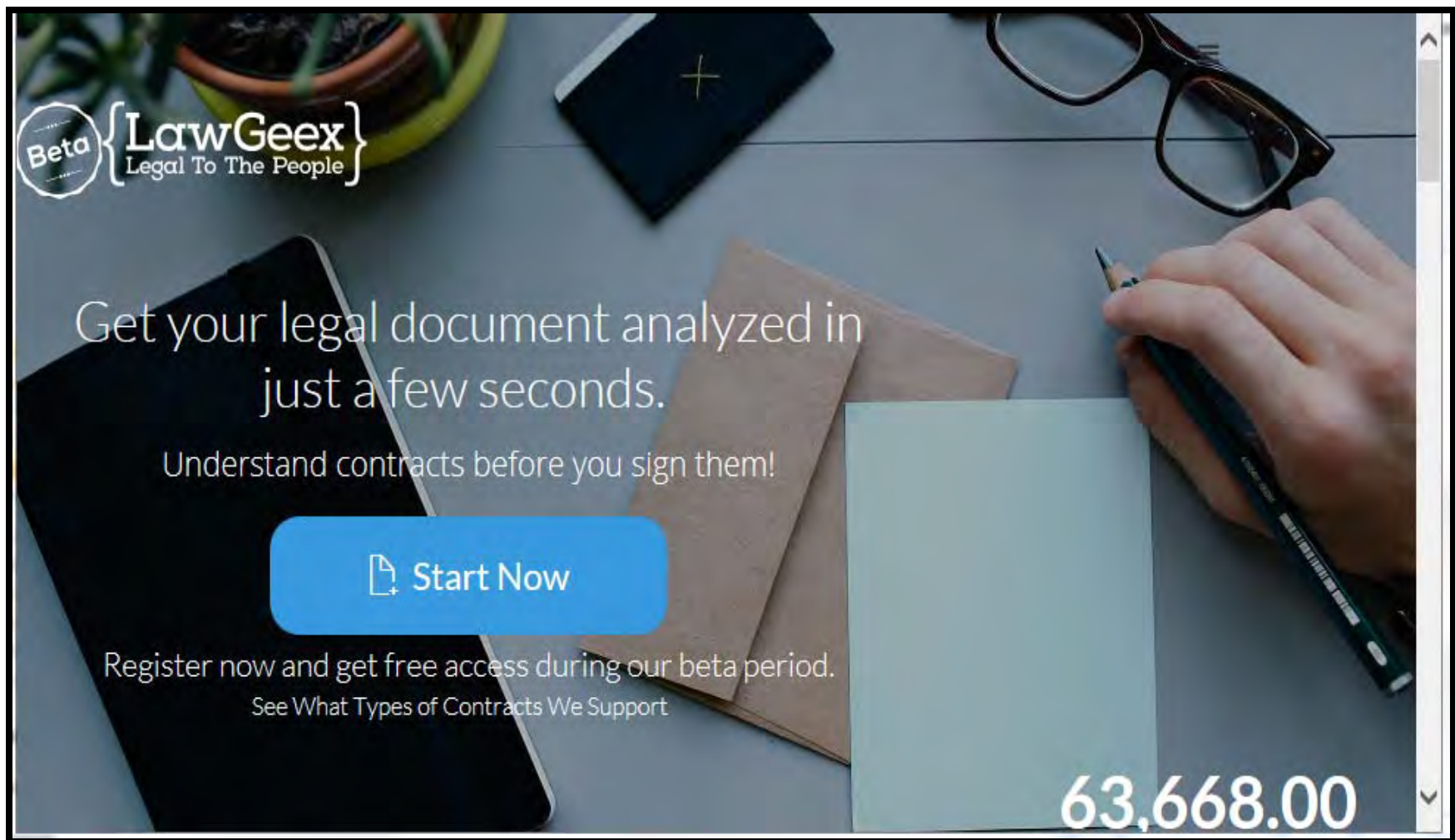
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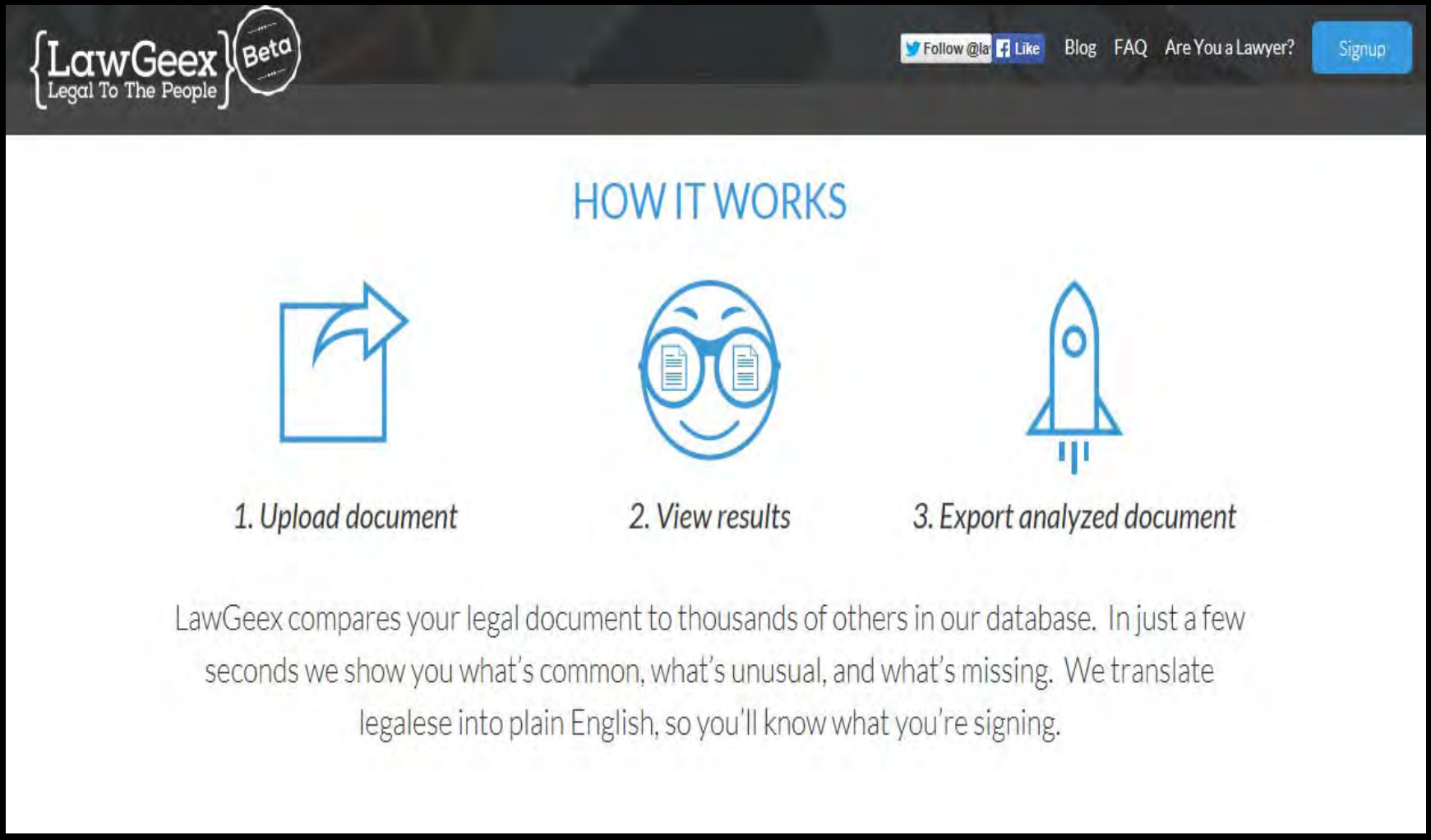
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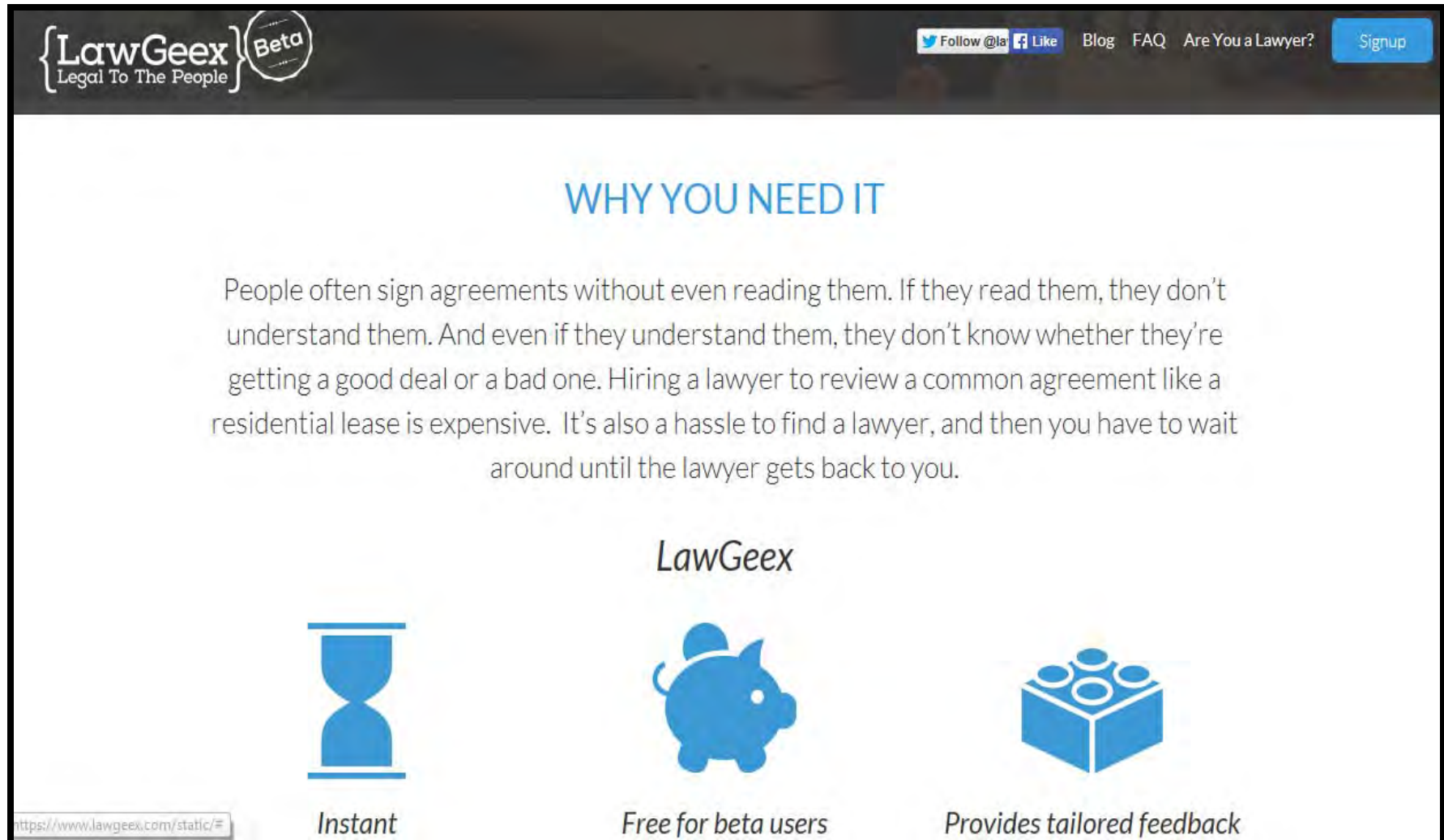
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Miranda v. Arizona

384 US 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 - Supreme Court, 1966 - Google Scholar

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of ...

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Rhode Island v. Innis

446 US 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 - Supreme Court, 1980 - Google Scholar

... With him on the brief was William F. Reilly. [*]. MR. JUSTICE STEWART delivered the opinion of the Court. In **Miranda** v. Arizona, 384 US 436, 474, the Court held that, once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present. ...

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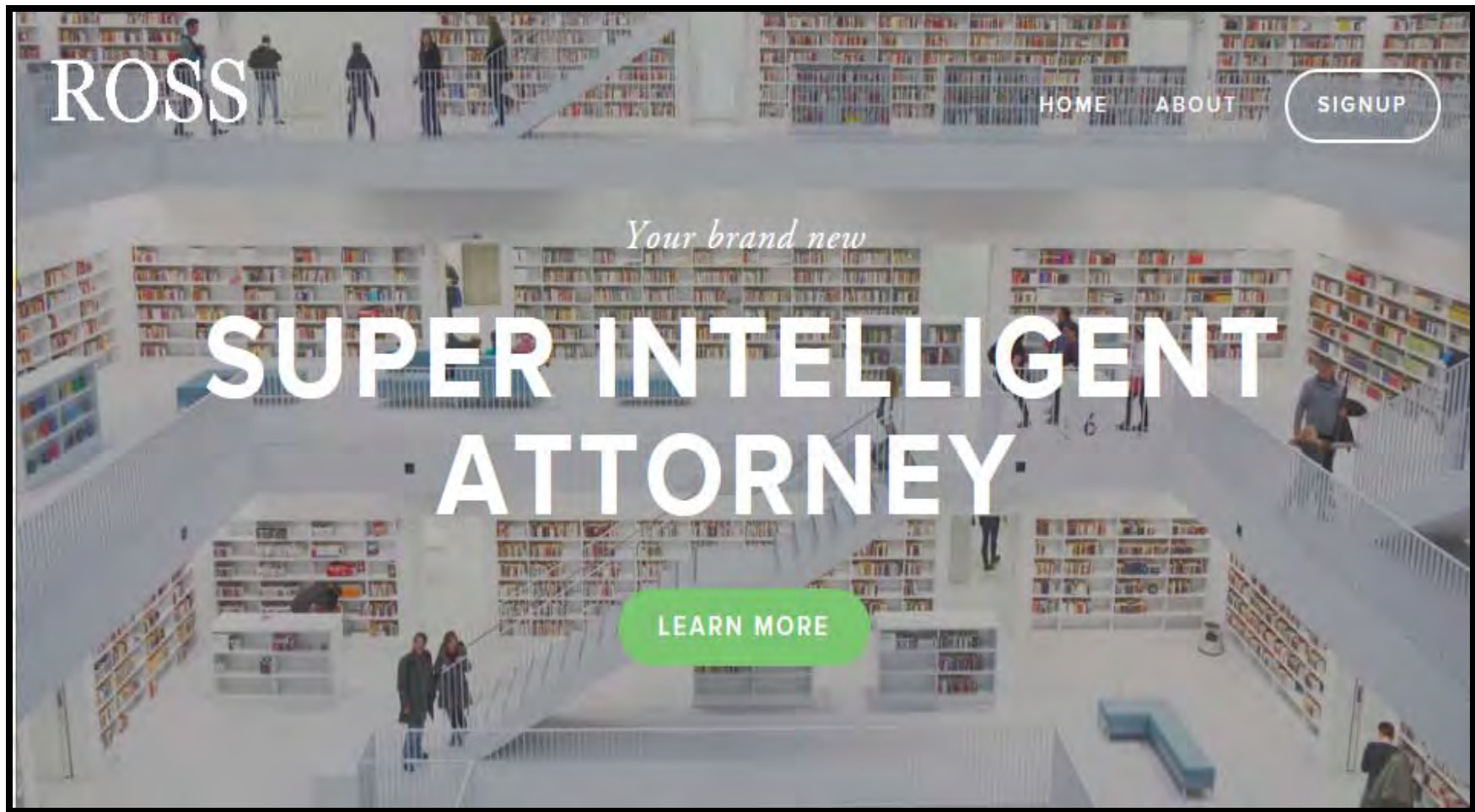
Doyle v. Ohio

426 US 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 - Supreme Court, 1976 - Google Scholar

... The question in these consolidated cases is whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving **Miranda** warnings [1] at the time of ...

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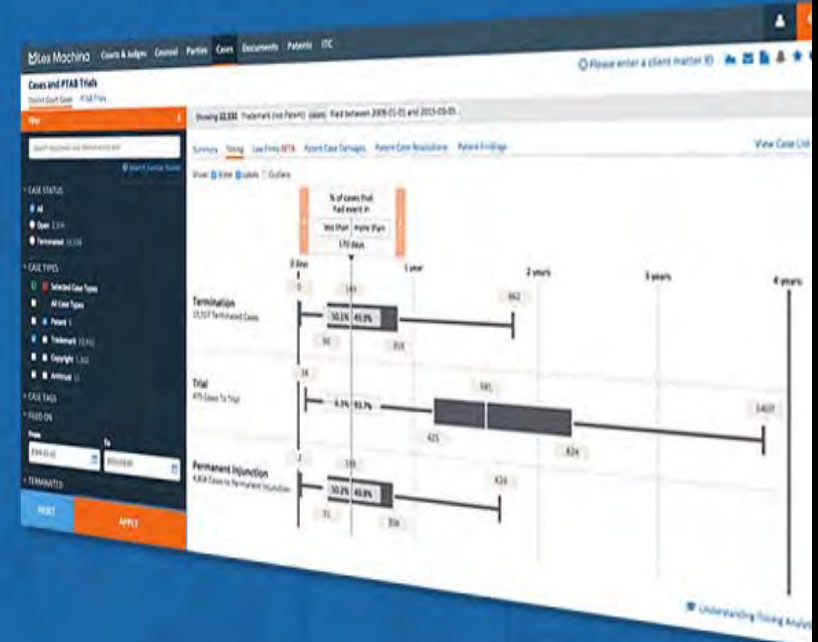
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- Will Judges expect lawyers to use AI? Appellate court?
- Clients are going to expect use to use it because it will become ingrained in their daily life
- How are small firms going to afford AI?

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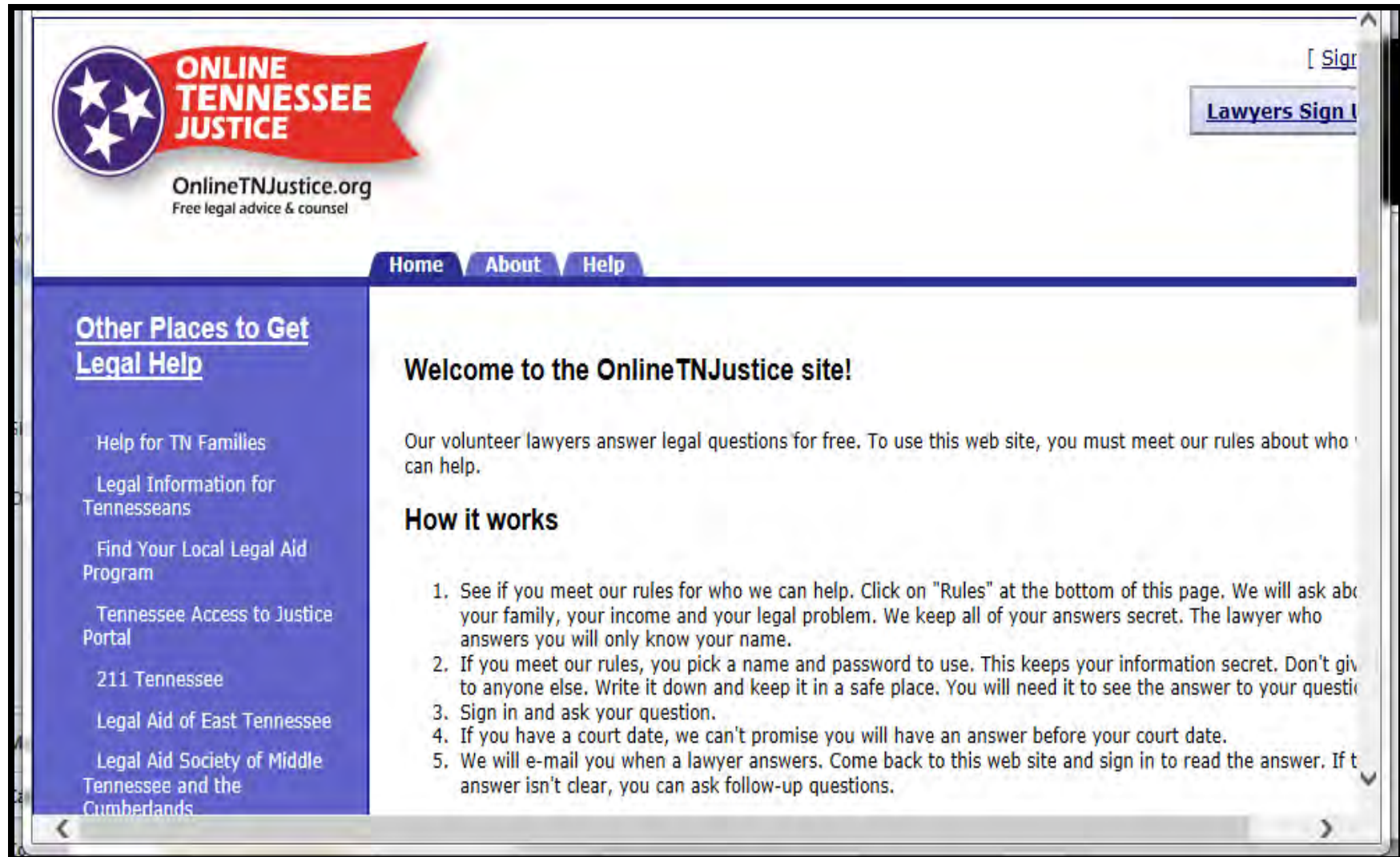
LegalYou is a revolutionary, online legal portal that is going to make the law accessible, affordable and, dare we say, fun for absolutely anyone. Whatever your legal problem, big or small, we offer FREE documents, FREE multi-media informational materials, FREE case tracking tools, and FREE advice from our very own attorneys. LegalYou is revolutionizing access-to-justice and capable of empowering EVERY CITIZEN with effective legal independence. Want in?

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Online Tennessee Justice--portal



The screenshot shows the homepage of the Online Tennessee Justice portal. The header features the logo with three stars and the text "ONLINE TENNESSEE JUSTICE" on a red banner, followed by "OnlineTNJustice.org" and "Free legal advice & counsel". In the top right corner, there are links for "[Sign" and "Lawyers Sign I". A navigation bar contains "Home", "About", and "Help" tabs. A left sidebar lists "Other Places to Get Legal Help" with links to "Help for TN Families", "Legal Information for Tennesseans", "Find Your Local Legal Aid Program", "Tennessee Access to Justice Portal", "211 Tennessee", "Legal Aid of East Tennessee", "Legal Aid Society of Middle Tennessee and the Cumberland", and "Cumberland". The main content area has a "Welcome to the OnlineTNJustice site!" message, a paragraph about volunteer lawyers, and a "How it works" section with five numbered steps.

ONLINE TENNESSEE JUSTICE
OnlineTNJustice.org
Free legal advice & counsel

[Sign
Lawyers Sign I

Home About Help

Other Places to Get Legal Help

- Help for TN Families
- Legal Information for Tennesseans
- Find Your Local Legal Aid Program
- Tennessee Access to Justice Portal
- 211 Tennessee
- Legal Aid of East Tennessee
- Legal Aid Society of Middle Tennessee and the Cumberland

Welcome to the OnlineTNJustice site!

Our volunteer lawyers answer legal questions for free. To use this web site, you must meet our rules about who can help.

How it works

1. See if you meet our rules for who we can help. Click on "Rules" at the bottom of this page. We will ask about your family, your income and your legal problem. We keep all of your answers secret. The lawyer who answers you will only know your name.
2. If you meet our rules, you pick a name and password to use. This keeps your information secret. Don't give it to anyone else. Write it down and keep it in a safe place. You will need it to see the answer to your question.
3. Sign in and ask your question.
4. If you have a court date, we can't promise you will have an answer before your court date.
5. We will e-mail you when a lawyer answers. Come back to this web site and sign in to read the answer. If the answer isn't clear, you can ask follow-up questions.

Stephanie Kimbro: Virtual Law

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Virtual Law Practice

delivering legal services online professionally and securely with a web-based virtual law office

26 | Jul 2013 >>>>

by slkimbro

No Comments

Delivering Legal Services Online, Document Automation, eLawyering, Practice Management, Technology, Virtual practice

Cloud Computing, Delivery of Legal Services, eLawyering, online legal services, Practice Management, Technology, unbundled legal services, virtual law firm, virtual law office, virtual law practice, vlo

Breaking News: Major US Bank Offers Online Legal Services in Business Hub

 +1  6

An exciting breakthrough in online delivery is occurring through the new offering that Suntrust Bank is launching. They have partnered with a third party to create an online Business Hub which provides legal services in addition to assistance with planning, websites, data backup and finances.

From the website: "This online portal helps you create legal documents, develop business plans and generate invoices and financial reports." It appears to be a one-stop shop for small business owners who need accounting and planning software, and even some marketing services. The service also claims to provide risk assessment services for businesses through the legal services tools.

Business Centric Services Group, Inc. is the named developer of the

THE ESSENTIAL HOW-TO MANUAL FOR DELIVERING LEGAL SERVICES ONLINE



- Practical implementation
- Management structures
- Technology options
- Ethics & malpractice issues
- Marketing methods

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- Updated my Pinterest Board finally: <http://t.co/DxncccV2rw> 06:01:54 PM July 26, 2013 from TweetDeck ReplyRetweetFavorite
- RT @rgranat: venture capitalists invest in leading probate provider » LEGAL FUTURES <http://t.co/k3Q9dNGt9G> #UKLegalInnovation 05:22:08 PM July 26, 2013 from TweetCaster for iOS ReplyRetweetFavorite

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ESTATE QUEST VIDEO GAME FOR ESTATE PLANNING

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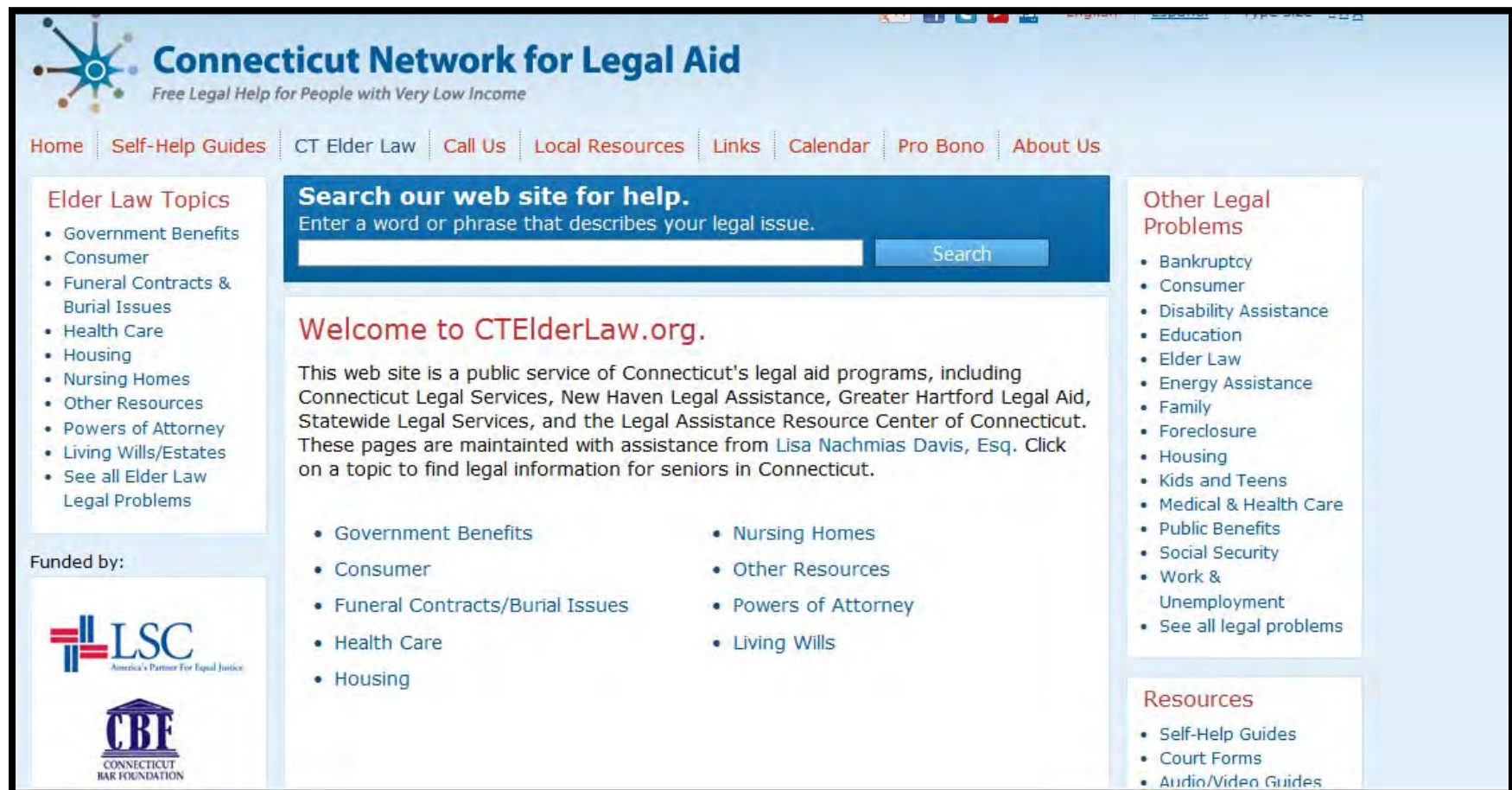


A non-profit law firm? Yes!

Open Legal Services is Utah's first nonprofit law firm for clients with moderate income. Our mission is to serve clients who earn too much to qualify for free/pro-bono legal services, but also earn too little to afford a traditional private firm. Such discounted services for clients with modest means are often called "low bono" legal services.

- More than 50% of Utah residents qualify for Open Legal Services
- We charge between \$60-145 per hour, [depending on your income and family size](#)
- We serve the following practice areas:

CT network for free legal aid



The screenshot shows the homepage of the Connecticut Network for Legal Aid. The header features the organization's logo, a navigation menu with links to Home, Self-Help Guides, CT Elder Law, Call Us, Local Resources, Links, Calendar, Pro Bono, and About Us. A search bar is prominently displayed in the center. The main content area is divided into three columns. The left column lists 'Elder Law Topics' such as Government Benefits, Consumer, Funeral Contracts & Burial Issues, Health Care, Housing, Nursing Homes, Other Resources, Powers of Attorney, Living Wills/Estates, and a link to see all Elder Law Legal Problems. Below this is a 'Funded by:' section with logos for LSC (America's Partner For Equal Justice) and CBF (Connecticut Bar Foundation). The center column has a 'Search our web site for help.' section with a text input field and a 'Search' button. Below the search bar is a 'Welcome to CT Elder Law.org.' section with a paragraph explaining the site's purpose and a list of legal topics: Government Benefits, Consumer, Funeral Contracts/Burial Issues, Health Care, Housing, Nursing Homes, Other Resources, Powers of Attorney, and Living Wills. The right column lists 'Other Legal Problems' including Bankruptcy, Consumer, Disability Assistance, Education, Elder Law, Energy Assistance, Family, Foreclosure, Housing, Kids and Teens, Medical & Health Care, Public Benefits, Social Security, Work & Unemployment, and a link to see all legal problems. At the bottom right, there is a 'Resources' section with links to Self-Help Guides, Court Forms, and Audio/Video Guides.

Connecticut Network for Legal Aid
Free Legal Help for People with Very Low Income

Home | Self-Help Guides | CT Elder Law | Call Us | Local Resources | Links | Calendar | Pro Bono | About Us

Elder Law Topics

- Government Benefits
- Consumer
- Funeral Contracts & Burial Issues
- Health Care
- Housing
- Nursing Homes
- Other Resources
- Powers of Attorney
- Living Wills/Estates
- See all Elder Law Legal Problems

Search our web site for help.
Enter a word or phrase that describes your legal issue.

Welcome to CT Elder Law.org.

This web site is a public service of Connecticut's legal aid programs, including Connecticut Legal Services, New Haven Legal Assistance, Greater Hartford Legal Aid, Statewide Legal Services, and the Legal Assistance Resource Center of Connecticut. These pages are maintained with assistance from [Lisa Nachmias Davis, Esq.](#) Click on a topic to find legal information for seniors in Connecticut.

- Government Benefits
- Consumer
- Funeral Contracts/Burial Issues
- Health Care
- Housing
- Nursing Homes
- Other Resources
- Powers of Attorney
- Living Wills

Other Legal Problems

- Bankruptcy
- Consumer
- Disability Assistance
- Education
- Elder Law
- Energy Assistance
- Family
- Foreclosure
- Housing
- Kids and Teens
- Medical & Health Care
- Public Benefits
- Social Security
- Work & Unemployment
- See all legal problems

Resources

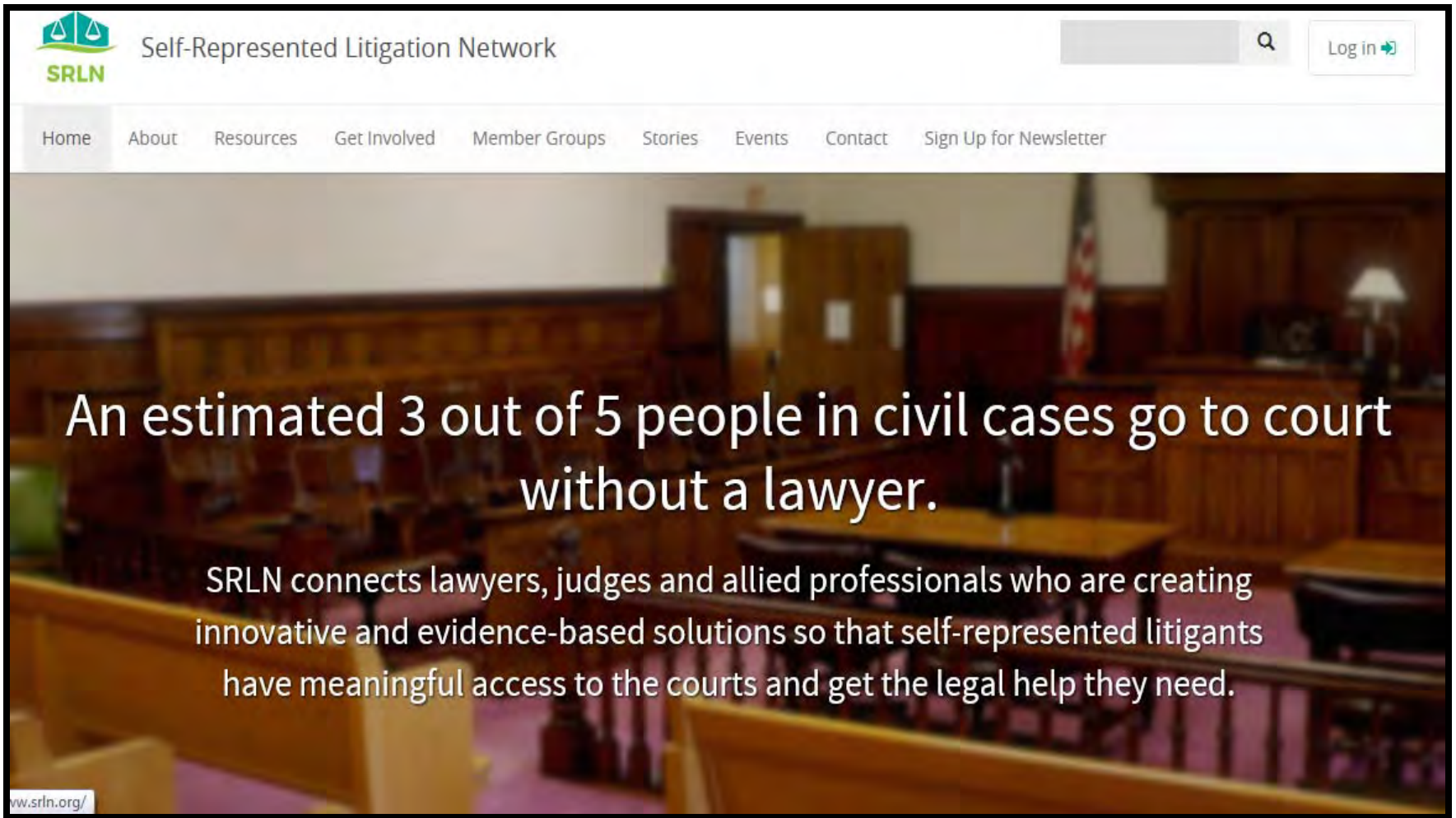
- Self-Help Guides
- Court Forms
- Audio/Video Guides

Funded by:

LSC
America's Partner For Equal Justice

CBF
CONNECTICUT BAR FOUNDATION

Self-represented litigation network



The screenshot shows the homepage of the Self-Represented Litigation Network (SRLN). The header features the SRLN logo (a green scale of justice) and the text "Self-Represented Litigation Network". To the right of the header is a search bar and a "Log in" button. Below the header is a navigation menu with links: Home, About, Resources, Get Involved, Member Groups, Stories, Events, Contact, and Sign Up for Newsletter. The main content area has a background image of a courtroom. Overlaid on this image is the text: "An estimated 3 out of 5 people in civil cases go to court without a lawyer." Below this, it says: "SRLN connects lawyers, judges and allied professionals who are creating innovative and evidence-based solutions so that self-represented litigants have meaningful access to the courts and get the legal help they need." In the bottom left corner of the image, there is a small URL: "www.srln.org/".

 Self-Represented Litigation Network

Home About Resources Get Involved Member Groups Stories Events Contact Sign Up for Newsletter

An estimated 3 out of 5 people in civil cases go to court without a lawyer.

SRLN connects lawyers, judges and allied professionals who are creating innovative and evidence-based solutions so that self-represented litigants have meaningful access to the courts and get the legal help they need.

www.srln.org/

Self-Represented Litigation Network

 Self-Represented Litigation Network

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Topics

100% Access to Justice

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Ethics Education

Self-Help Centers

Libraries

Unbundling

Plain Language & LEP

Forms & Technology

Presentations

Articles & SRLN Newsletters

Funding

State-by-State

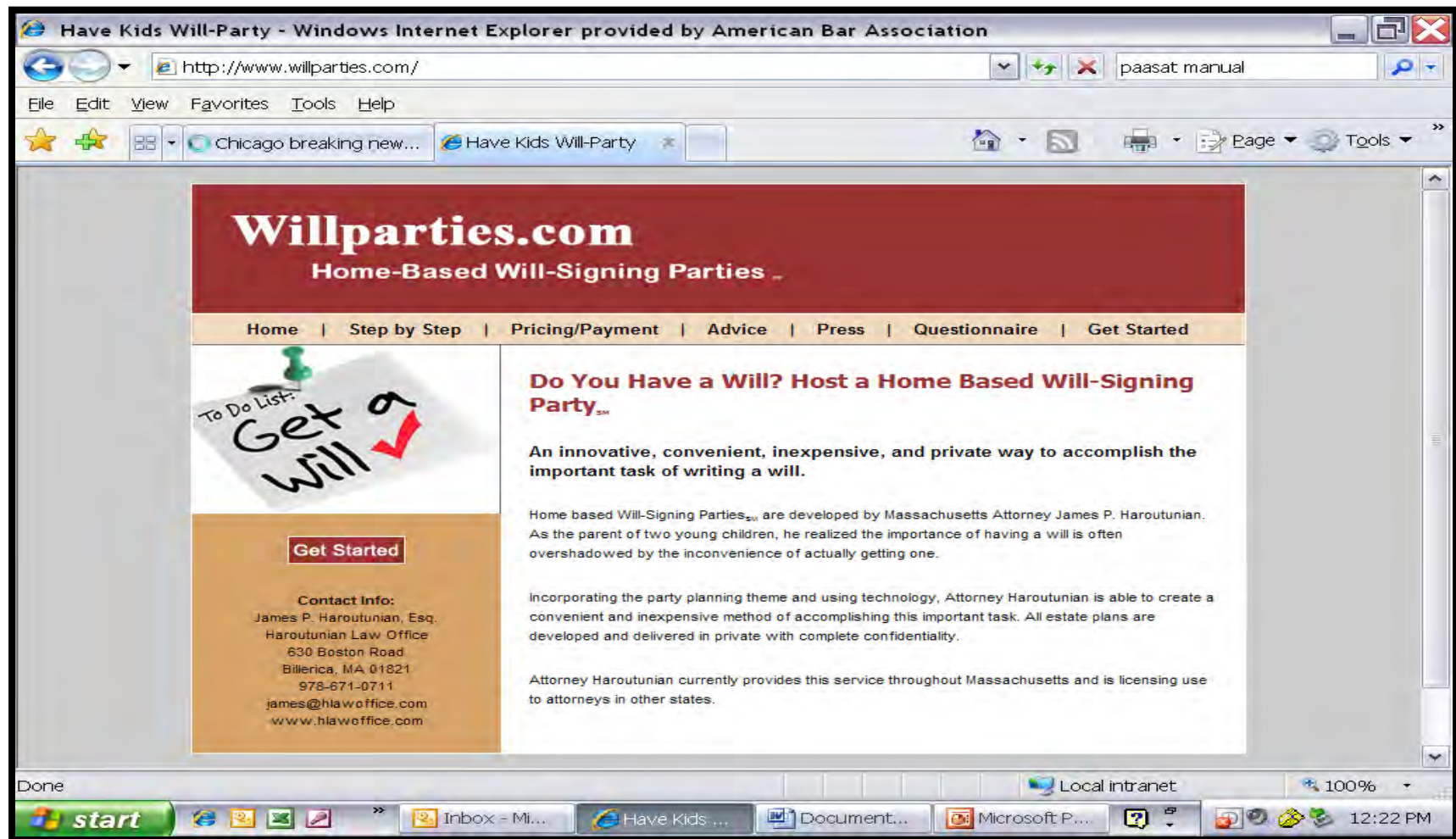
These resources are for legal system professionals. To explore the library by topic, please click on the headings listed above. To find a specific document or explore by keyword, please use the search bar at the top right, which will return initial results by relevance that can be refined with a custom filter on that page. Please note this collection is not meant to be exhaustive, but rather a curated collection that includes a fairly stable collection of foundational and model resources, alongside a more dynamic collection that reflects contemporary innovations and trends.

If you have suggestions for additional materials to include in our collection, comments about the webpage, or need help locating a specific document, please contact us through our [Feedback Form](#).

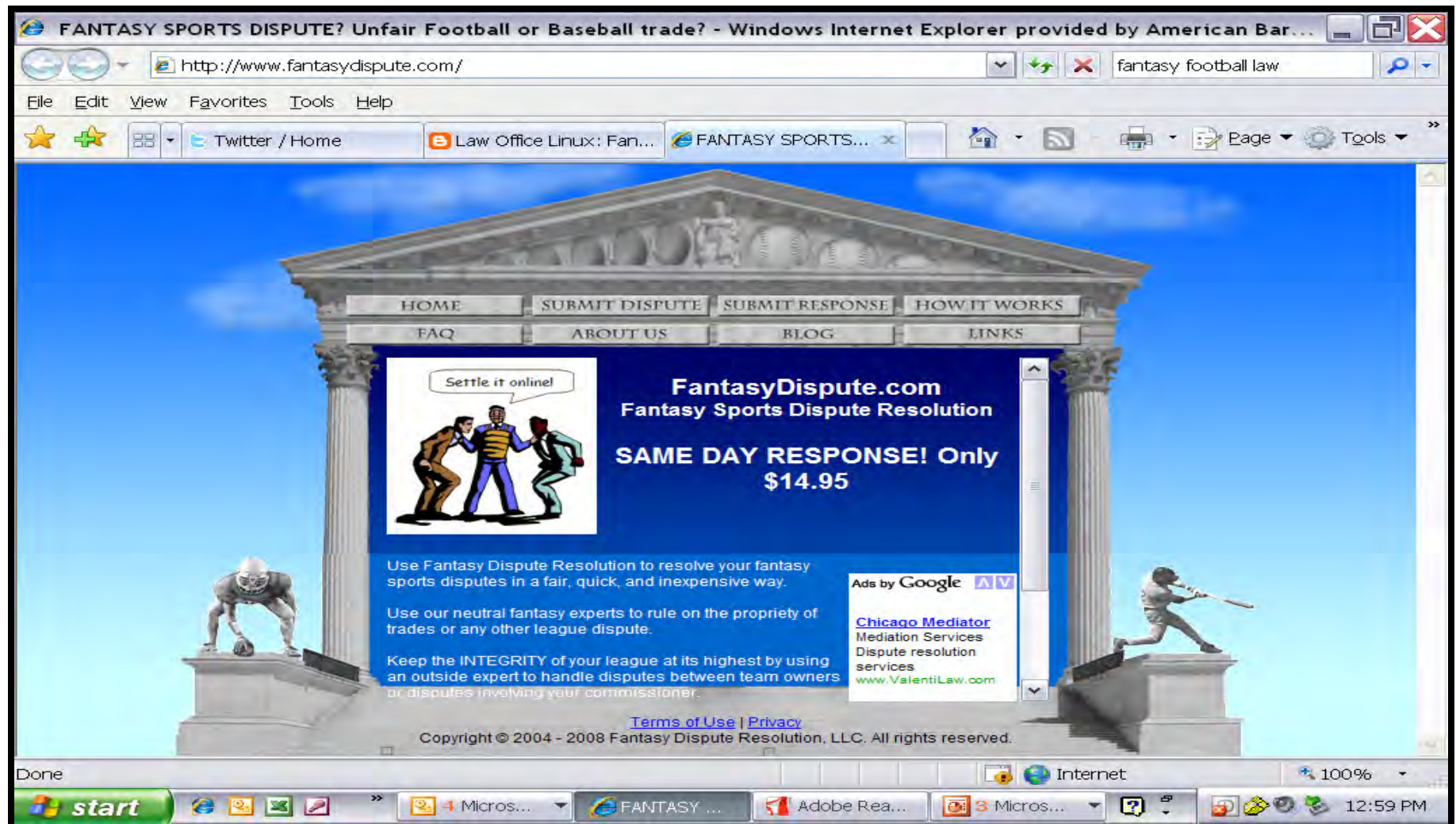
Niche practices: The pot lawyer



Will signing parties



Fantasy sports dispute resolutions



Legal grind



Why pay for something you can get on the internet for free?

- The internet/Google/ is the primary source for information—webmd.com
- **Our children have grown up using the internet to research, study, shop, socialize, and play**
- Music, newspapers, and books
- **Knowledge is available for free**

IF IT CAN BE FREE IT WILL BE FREE

The screenshot shows the homepage of Freelancelawfirm.com. The header has a blue textured background with the site name in white. Below the header is a search bar with a magnifying glass icon and a 'SEARCH' button. To the left of the search bar is a 'Related Searches' section with a list of links: Free CLE, CLE Continuing Legal Education, Ethics, New Immigration Law, Online Lawyers, Workers Comp Lawyers, Pro Bono Lawyers, Lawyers In Dubai, and Hawaii Lawyers. To the right of the search bar is a 'Sponsored Listings' section with three items: 'FREE ONLINE CLE' with a description and the URL www.lexvid.com, 'FIND A LAWYER - FREE' with a description and the URL www.LegalMatch.com, and 'YOUR REAL ESTATE LAWYER' with a description. The bottom of the page shows a partial list of services: Buy, Sell, Ref, All of NYC/LI, Real Estate, Criminal, Traffic.

Freelancelawfirm.com

SEARCH

Related Searches

- Free CLE
- CLE Continuing Legal Education
- Ethics
- New Immigration Law
- Online Lawyers
- Workers Comp Lawyers
- Pro Bono Lawyers
- Lawyers In Dubai
- Hawaii Lawyers

Sponsored Listings

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Find the Right Lawyer in Your Area Save Time - Describe Your Case
www.LegalMatch.com
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Documents for free: Docracy



About Us

What is Docracy?

Docracy is a home for contracts and other legal documents, socially curated by the communities that use them. Our mission is to make these documents freely available for everyone, while in the process making them easier to customize and use. No more shady templates behind a paywall where you click download and just hope for the best. Instead we offer reputable, transparent sources and social proof to help you find something as close as possible to the perfect document.

Why are you doing this?

We're doing this because we believe that it



Documents

Where do the documents come from?

Anyone can upload or write a new document, including you. You can also edit and improve existing documents, either for the community or just for yourself. Documents are private by default: only you can see and edit them. If you make them public, only you, as the owner, will be able to edit them. However, if they are public, other people will be able to make a copy for themselves that they can then edit (we call it "branching").

How do I know if I am using the right document?



Signing

Is signing with Docracy legal?

Yes, agreements signed using Docracy are valid and legally enforceable as we are E-SIGN Act compliant. We use email addresses to identify the parties, and we encrypt all content. Whether you decide to type your signature or draw it, your contract is executed the moment both signatures are appended, with a timestamp automatically added to the online document and the PDF copy. Your signed documents are also securely stored, so you can access them anytime.

Is storing documents on Docracy secure?

Free advice

The screenshot shows the FreeAdvice Legal Forum website in a Windows Internet Explorer browser window. The browser's address bar displays the URL <http://forum.freeadvice.com/>. The website's header includes the FreeAdvice logo with the tagline "Outstanding Advice. Unbeatable Price." and a navigation menu with links for "Free Advice", "Law Advice", "Insurance Advice", and "Community". Below the header, there are links for "Register", "FAQ", "Calendar", and "Today's Posts". A search bar is also present. The main content area features a "FreeAdvice Legal Forum" section with a login form (User Name, Password, Remember Me?, Log in) and a dropdown menu to "Select a Forum to Post a Question". Below this, there are several advertisements, including "Ask a Lawyer Online Now" and "Talk To a Lawyer Now". A welcome message states: "Welcome to the FreeAdvice Legal Forum. If this is your first visit, be sure to check out the FAQ by clicking the link above. You may have to register before you can post: click the register link above to proceed. To start viewing messages, select the forum that you want to visit from the selection below." The forum listing table is as follows:

Forum	Last Post	Threads	Posts
ACCIDENT AND INJURY LAW			
Auto Accidents and Vehicle Claims (7 Viewing) Visit FreeAdvice.com for useful articles and FAQs on Bike Accidents, Bus Accidents, Car Accidents, Motorcycle Accidents, Truck Accidents, etc. Visit AttorneyPages.com to find an experienced Car Accident Lawyer.	Rear Ended by Commercial... by OHRoadwarrior Yesterday 08:45 PM	20,225	91,851
Dangerous or Defective Products (5 Viewing) Click here for useful articles and FAQs for the following drug and medical device hot topics - Accutane Lawsuit, Depakote Birth Defect, Depuy Hip Lawsuit, Fosamax (ONJ) and Femur	Q about selling somewhat... by hipgnosis93 Yesterday 01:58 PM	2,125	11,369

The Windows taskbar at the bottom shows the Start button, several open applications (Microsoft Office, Microsoft PowerPoint, FreeAdvice Legal, 2011 Spring Agen...), and the system clock indicating 8:41 AM.

Free legal forms

The screenshot displays the mylawyer.com website interface. At the top, the logo "mylawyer.com" is accompanied by the tagline "Fixed Fee On-Line Legal Services" and "Law You Can Afford". Navigation links include "Why MyLawyer.com?", "How It Works", "Free Legal Information", "FAQ/Help", "For Lawyers", and "Blog". Search bars for "Search Documents" and "Search Articles" are present. A central banner promotes "FREE LEGAL FORMS, plus lawyers you can afford. LEGAL HELP YOU NEED, WHEN YOU NEED IT." Below this, there are sections for "Five Most Popular Forms This Week" (listing items like Free Bill of Sale, Free General Release, etc.), "Free Forms Added This Week" (listing items like Free Sublease, Free Residential Lease, etc.), and "Free Legal Forms" with a state selection dropdown. A "Find a Lawyer" section also includes a state selection dropdown. At the bottom, there are social media links for Facebook and Twitter, and two promotional boxes for online divorce forms and will forms.

Fixed Fee On-Line Legal Services
mylawyer.com
Law You Can Afford

Access MyLegalAffairs™

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Free legal aid



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- [Personal Injury](#)

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Step 1...Choose your state:

Select State...



Ask a Question

You may ask a question to Free Legal Aid. DO NOT SUBMIT CONFIDENTIAL INFORMATION. Please see full disclaimer prior to submission (which will be presented before the question is actually submitted).

Next Step

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Admitted in California, United States District Court - Central District of California, and United States Court of Appeals for the Ninth Circuit Prove
Los Angeles, CA

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Timothy O'grady
Stange Law Firm, PC, Attorney
Prior to joining Stange Law Firm, PC, Mr. O'Grady practiced law in St. Louis, Missouri where he

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Jeff Walters
Stange Law Firm, PC, Associate Attorney
Jeff Walters is an Associate Attorney at Stange Law Firm, PC based out of the firm's Troy, MO

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Recently answered questions

—RECENTLY ANSWERED—

1

Answer

Purchased Counterfeit Item Unknowingly, What Do I Do?

Asked on: Sep 03, 2015

I purchased an item not knowing it was a counterfeit, and I of course want a full refund but the receipt says all sales are final. I know selling counterfeit items is illegal but I'm just not sure how to go about getting my money back.

1

Answer

Do I Have A Case? Car Accident With Commercial Vehicle.

Asked on: Sep 02, 2015

I've been online all day trying to find out if I can be helped. My brother and I were involved in an accident with a vehicle owned by a business. The driver turned into a do not enter sign hitting us and totaling the car. It's a that's mere blocks away from their business and the driver

2

Answers

2nd Drug Paraphernalia Charge; How Can I Avoid Jail?

Asked on: Sep 02, 2015

I was pulled over and searched and I had a pipe on me.

Free up load site: JDSupra

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Mintz Levin - Immigration Group
We are sending this alert as a reminder of the rapidly approaching April 1, 2010 "deadline" for the filing of H-1B worker petitions for Fiscal Year 2011. Petitions for the new fiscal year will be accepted by the government on April... [more](#)

Legal Alert: OFCCP Update
Ford & Harrison LLP

Ten Tips for Making Partner in a Plaintiff's Firm
Bill Daniels

Why It Might Be a Good Idea to HIRE Additional Employees This Year
Cole Schatz

Special Features

BUSINESS
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Morrison & Foerster LLP
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PERSONAL
U.S. House Passes Legislation That Would Modify Grantor Retained Annuity Trust (GRAT) Rules
Duane Morris LLP
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Proposition 17: Who First Came Up With The Idea Of A Continuous Coverage Discount? Well, The CDI Of Course.
Barger & Wolen

The New Normal: Adapt or Die
Warren Kirshenbaum

Six Ways to Enforce Child Support
Jeff Butler

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2	Law and Bioscience: Pharmaceutical Di...	19 min	Nov 29, 2012	Center for Law and th...	i	Free
3	Biotech Discoveries and the Law	28 min	Nov 29, 2012	Stanford Center for L...	i	Free
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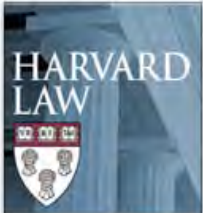
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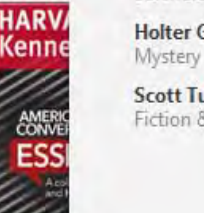
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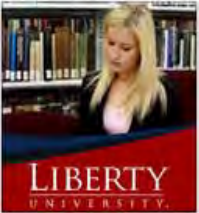
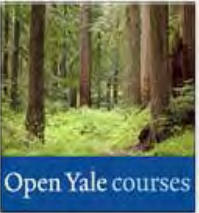
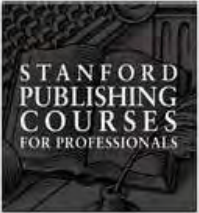
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ABA: Free CLE for members

The screenshot shows the American Bar Association (ABA) website. At the top, the ABA logo and name are on the left, and navigation links for 'myABA | Log In', a search bar, and icons for 'JOIN THE ABA', 'SHOP ABA', 'CALENDAR', and 'MEMBER DIRECTORY' are on the right. Below this is a horizontal menu with links: 'ABA Groups', 'Membership', 'Resources for Lawyers', 'Publishing', 'CLE', 'Advocacy', 'News', and 'About Us'. The main content area is split into two sections. The left section, titled 'FREE CLE for Members', features a man in a suit speaking into a microphone, the Bank of America logo, and a 'Register Now' button. The right section, titled 'ABA Premier Speaker Series', contains text about earning CLE credit hours and a 'Register today' link. A small pagination or navigation bar with numbers 1, 2, 3, and 4 is at the bottom right.

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JUNE 20, 2012

Lawline Opens its Full CLE Catalog to Free Access

by Robert Ambrogi



I [blogged earlier today](#) about how [Fastcase](#) is disrupting the legal publishing field, providing free access to core legal research materials. In much the same way, [Lawline.com](#) has been disrupting the CLE industry. Last year, it began offering [free mobile-phone access](#) to more than 300 video CLE programs. Then, it followed that by launching a completely free e-learning website for lawyers, [Learn.Lawline.com](#).

Now, in a move that is sure to shake up the CLE industry, Lawline has thrown open its front doors, allowing 100 percent free access to every program in its catalog. Lawline CEO David Schnurman likens the move to the [recent announcement](#) by Harvard and M.I.T. that they are teaming up to offer their courses online for free.

"We are in the middle of an e-learning revolution," says Schnurman. "With our new platform, Lawline.com will be at the forefront of it."

Is there a catch? Not really. If you want to receive CLE credit for a course, then you have to pay. However, you do not have to decide until after you watch the course. Watch the course for free, if you like. At the end, if you want credit, simply click the button on the page that says, "Get credit," and you will be taken to a payment page.



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ROBERT J. AMBROGI

Is a Massachusetts lawyer, writer and media consultant. He also writes the blog Media Law and cohosts the legal affairs podcast Lawyer2Lawyer.

Marketing in the internet world: How clients find attorneys

Most Clients Find Lawyers Through the Internet, but. . .

 April 24, 2014 by [David M. Ward](#)

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Findlaw conducted a [survey](#) about how people go about finding a lawyer. To nobody's surprise, the top two answers were the Internet (38%) and referrals (29%). This compares to results of a similar survey they did nine years earlier which found that only 7% used the Internet and 65% asked for referrals.

My pocket attorney



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App to record interactions with the police

The screenshot shows the ACLU website with a banner for the Mobile Justice DC app. The banner includes the text "Justice is within your reach: Download Mobile Justice DC TODAY!" and a date "December 29, 2015". Below this is a video player showing a person holding a smartphone with the app interface, which displays "MOBILE JUSTICE" and "INJUSTICE SENT TO THE ACLU.". At the bottom of the video player, it says "DOWNLOAD FREE ON" followed by the App Store and Google Play logos. To the right of the video player, there are four blue buttons: "JOIN >", "ACT >", "GIVE >", and "SIGN UP >". Below these buttons is a section titled "NEWS & EVENTS >" with three links: "WANT TO WATCH ACLU IN COURT? >>", "FREQUENTLY ASKED QUESTIONS ABOUT MAYOR BOWSER'S PUBLIC SAFETY AND CRIMINAL CODE REVISIONS AMENDMENT ACT OF 2015 >>", and "ACLU-DC Testimony - Public Hearing on December 14, 2015 >>".

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★ December 29, 2015

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★ ACLU-DC Testimony - Public Hearing on December 14, 2015 >>

Mobil Justice app

What does the Mobile Justice DC smartphone app do?

The app, available in both the Google Android and Apple iOS stores, allows users to record law enforcement, to alert other Mobile Justice DC app users to nearby law enforcement encounters, and to submit videos and incident reports automatically to the American Civil Liberties Union of the Nation's Capital (ACLU-DC). Individuals who believe that they have witnessed a civil rights violation can complete an incident report and send it to the ACLU-DC for review, along with their contact information, for follow-up.



How does it work?

The American Civil Liberties Union of the Nation's Capital (ACLU-DC) Mobile Justice smart phone application was created to empower individuals to hold District of Columbia law enforcement agencies accountable for their actions. The application has four main features:

RECORD - allows individuals to capture exchanges between police officers and themselves or other community members in video files that are automatically emailed to the ACLU-DC.

WITNESS - gives individuals the option to alert nearby Mobile Justice Application users when they are

Blog posts to find clients

"Ann Althouse, what exactly are you for?"

Thursday, February 25, 2010

Instead of dashing to the scene of an accident, lawyers in need of clients dash to blog posts about accidents.

There are computer programs that find blog posts about, say, motorcycle deaths and then drop comments that seem to be from an ordinary person sympathizing about the death and dropping a link to a website offering to help you with legal claims. I know this because I just got a comment on an old post of mine — "[The mystery of Bob Dylan's motorcycle crash](#)." It contained some key words like "very seriously injured" (in the phrase "not very seriously injured") and "ambulance" (in "no ambulance was called to the scene") and "died" (in "he would have died if" he hadn't, after the accident, changed the way he lived).

This morning I discovered the comment — already deleted —

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LawPivot—crowdsourced advice

The screenshot shows the LawPivot website interface within a Windows Internet Explorer browser window. The browser's address bar displays the URL <https://www.lawpivot.com/>. The website header includes the title "Legal Advice, Attorney Search, Legal Answers | LawPivot - Windows Internet Explorer provided by American Bar Association" and navigation links for "What is LawPivot?", "Questions", "Lawyers", "Sign Up", and "Log In". A search bar for "Search Public Questions" is also present.

The main content area features a large text input field with the placeholder "Type your detailed legal question here" and a "Get your answer" button. Below the input field, there are two radio buttons: "Ask Question Publicly" (selected) and "Ask Question Confidentially". To the right of the input field is a stylized illustration of a woman in a business suit with her arms crossed.

On the right side of the main content area, a section titled "How it works:" explains the platform's functionality:

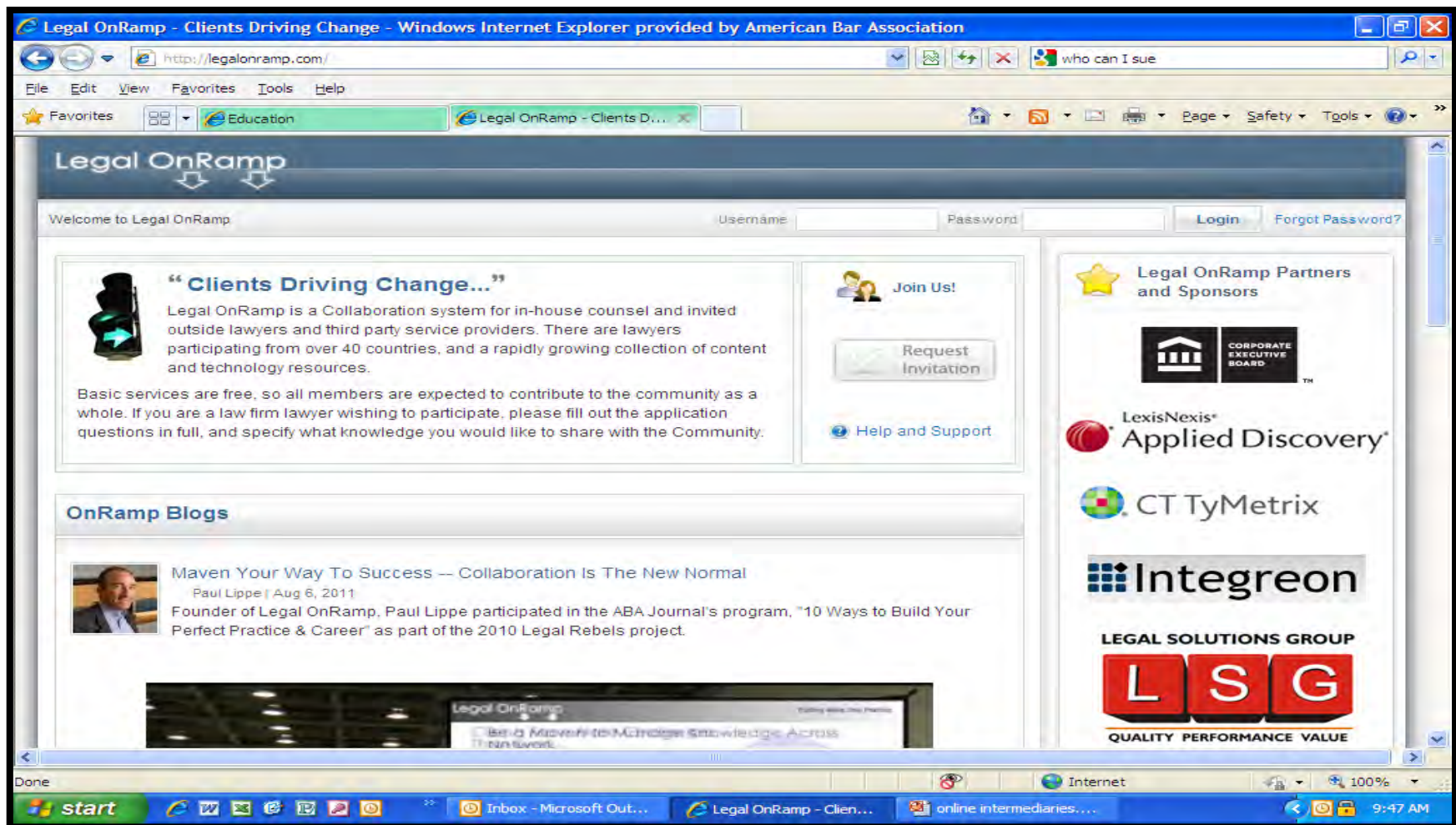
- Businesses get legal advice** by asking questions and receiving crowdsourced answers from lawyers.
- Lawyers market themselves** by providing legal advice, building their online reputations, and providing fixed-price services.

The bottom of the page is divided into three columns:

- Two Options for Legal Advice:** LawPivot is the largest marketplace for businesses to receive crowdsourced legal advice from lawyers. Businesses can either:
 - Ask questions **publicly**, and receive legal advice that will benefit the entire LawPivot community.
- Recent Q&A Activity:** This section lists two recent questions and answers by Ron Shepherd, Partner from Nampa, ID. The first question is "My daughter takes dance and is on a dance team." and the second is "The condo above mine flooded. Who is liable for the...".
- From the Blog:** This section lists two blog posts: "A heads up for startups" by Stewart Einwohner (Stewart G. Einwohner, P.C.) and "Top ten legal tips for independent contractors" by Dana Shultz (Dana H. Shultz, Attorney at Law).

The Windows taskbar at the bottom shows the Start button and several open applications: Microsoft Office Outlook, Microsoft PowerPoint, and the LawPivot website. The system clock indicates the time is 8:16 AM.

Social networking: Legal onRamp



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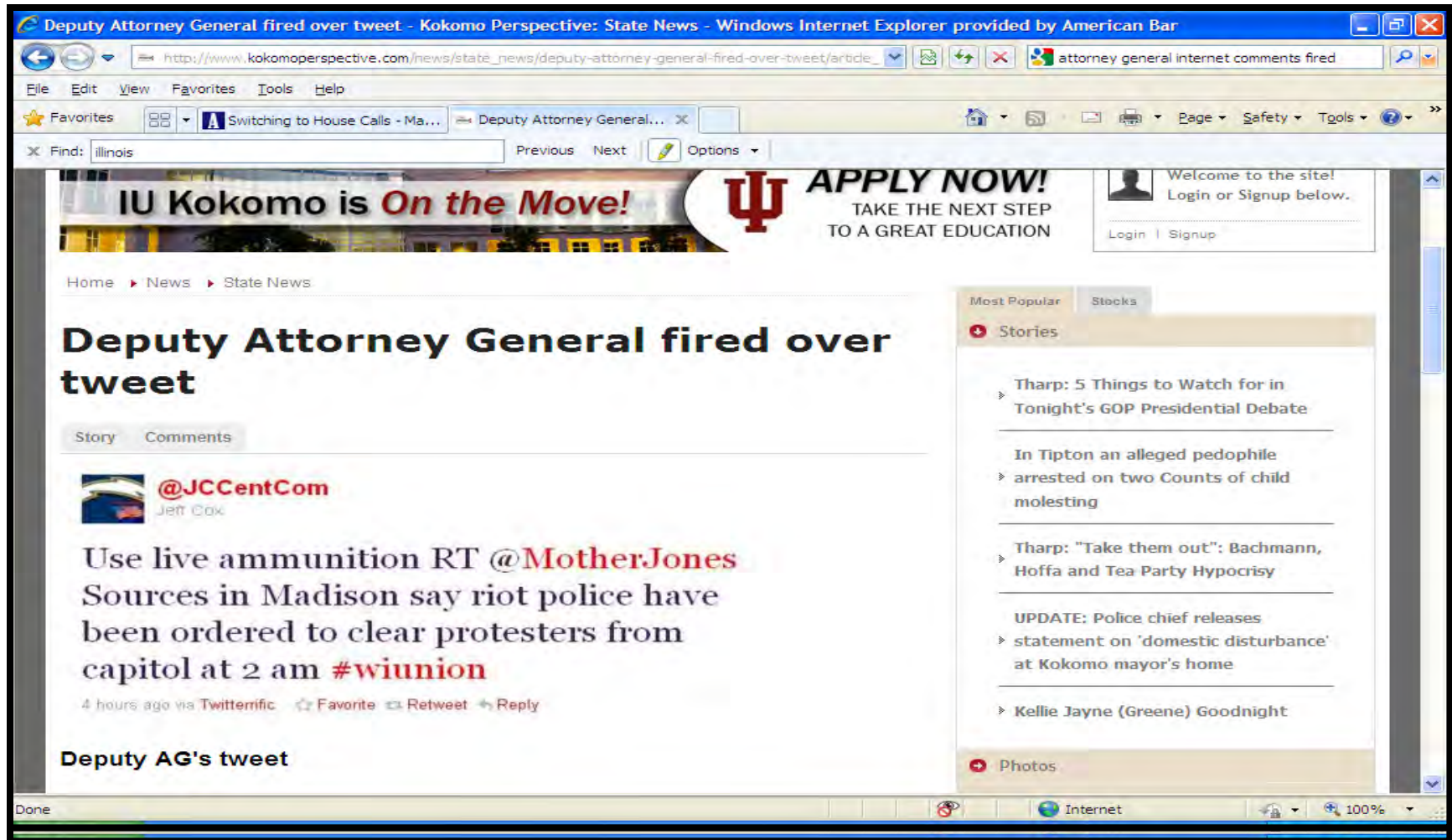
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THE RISKS OF USING SOCIAL MEDIA



Resigns over text messages

Wisconsin county DA resigns from office over texts

Posted 10/4/2010 1:26 PM | Comments 145 | Recommend 4



Enlarge

By Wm. Glasheen, AP

Ken Kratz announces on Sept. 17 that he will step down from his position as Calumet County district attorney in Chilton, Wis.



By Jim Collar, (Appleton, Wis.) Post-Crescent

Calumet County Dist. Atty. Ken Kratz resigned today after almost three weeks of controversy over sexually suggestive text messages he sent last year to a woman who was the victim in a domestic violence case he was prosecuting.

"It is with deep sadness and regret that I announce my resignation as Calumet County district attorney, effective immediately," Kratz wrote in a statement. "I have lost the confidence of the people I represent due primarily to personal issues which have now affected my professional career."

The controversy began Sept. 15 when The Associated Press reported Kratz had sent 30 text messages sent to domestic violence victim Stephanie Van Groll over three days in October 2009.

RACY TEXTS: DA announces resignation
MORE: Wisconsin's Calumet County DA faces removal
WIS. GOV.: Troubled by 'sexting' DA

Kratz in one text asked, "Are u the kind of girl that likes secret contact with an older married elected DA...the riskier the better?"

In another, he said "I have the \$350,000 house. I have the 6-figure career. You may have the tall, young, hot nymph, but I am the prize!"

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Anonymous Blog Comments Snag Another US Prosecutor; Suit Cited 'Superfluous Spacing' as Clue

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Anonymous Blog Comments Snag Another US Prosecutor; Suit Cited 'Superfluous Spacing' as Clue

Posted Nov 12, 2012 5:30 AM CST
By **Debra Cassens Weiss**

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A New Orleans federal prosecutor who was second in command to U.S. Attorney Jim Letten has been demoted after admitting she posted anonymous comments on a newspaper website.

Letten announced the demotion of First Assistant U.S. Attorney Jan Mann on Thursday, the **New Orleans Times-Picayune** and the **Associated Press** reported. The announcement follows a defamation lawsuit filed earlier this month alleging Mann used the online alias of "eweman" to criticize a landfill operator whose business is the subject of a federal probe.

The **lawsuit** (PDF) cited several clues that Mann was the likely author of the eweman posts at NOLA.com, the Times-Picayune website. They included: Eweman used "superfluous spacing before punctuation marks," just as Mann had done in other writings. Eweman used ellipses without spacing between periods as Mann had done in a pleading. One of the online posts used an obscure term, "fender lizard," to refer to "cop groupies," a phrase that that Mann had used in conversation. Also, the posts "attack individuals for whom Ms. Mann is

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4. Anonymous Blog Comments Snag Another US Prosecutor; Suit Cited 'Superfluous Spacing' as Clue
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Child Support	Lawsuits & Disputes
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Criminal Defense	Medical Malpractice
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District Court Judges

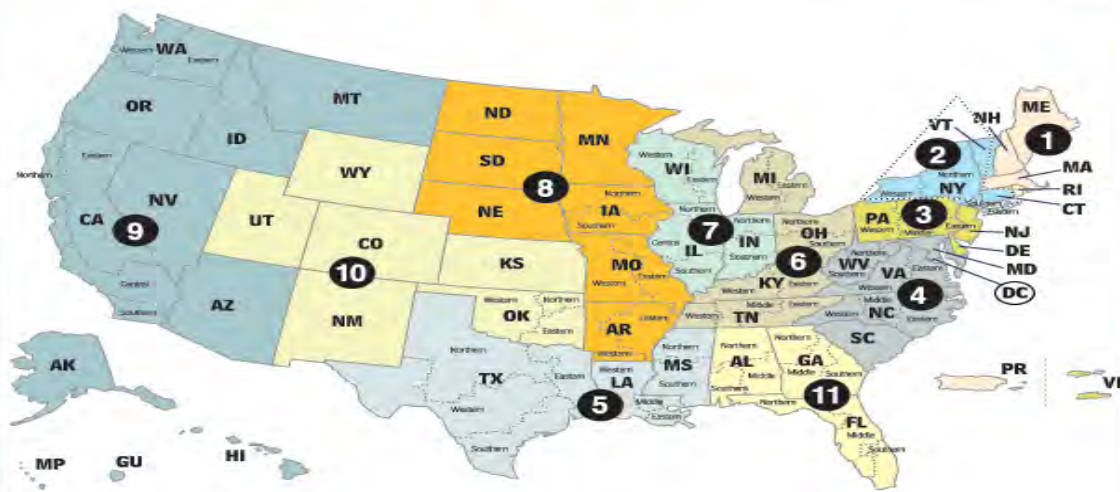
[A](#) [B](#) [C](#) [D](#) [E](#) [F](#) [G](#) [H](#) [I](#)
[J](#) [K](#) [L](#) [M](#) [N](#) [O](#) [P](#) [Q](#) [R](#)
[S](#) [T](#) [U](#) [V](#) [W](#) [X](#) [Y](#) [Z](#)

Magistrate Judges

[A](#) [B](#) [C](#) [D](#) [E](#) [F](#) [G](#) [H](#) [I](#)
[J](#) [K](#) [L](#) [M](#) [N](#) [O](#) [P](#) [Q](#) [R](#)
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Top 10 Judges

Hon. Edward M. Chen (N.D. Cal.)
Hon. Richard Seeborg (N.D. Cal.)
Hon. William I. Garfinkel (D. Conn.)
Hon. Mary Pat Thyng (D. Del.)
Hon. Thomas P. Smith (Recalled) (D. Conn.)
Hon. Henry S. Perkin (E.D. Pa.)
Hon. Keith P. Ellison (S.D. Tex.)
Hon. Mark S. Davis (E.D. Va.)
Hon. Tonianne J. Bongiovanni (D.N.J.)
Hon. George Caram Steeh (E.D. Mich.)

Calculated on a minimum of five ratings

Bottom 10 Judges

Hon. William D. Keller (C.D. Cal.)
Hon. Manuel L. Real (C.D. Cal.)
Hon. Otis D. Wright, II (C.D. Cal.)
Hon. Ivan L.R. Lemelle (E.D. La.)
Hon. John W. Primomo (W.D. Tex.)
Hon. Percy Anderson (C.D. Cal.)
Hon. Juan R. Sanchez (E.D. Pa.)
Hon. Philip S. Gutierrez (C.D. Cal.)
Hon. Kent J. Dawson (D. Nev.)
Hon. Terrence W. Boyle (E.D. N.C.)

Calculated on a minimum of five ratings

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NAME	JURISDICTION	DATE	
James A. Farber	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/31/2015	
Pam B. Jackman Brown	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/29/2015	
Charles W. Dortch	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/29/2015	
Richard A. Nielsen	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/28/2015	
Leslie-Ann M Justus	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/26/2015	
David L. Belz	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/25/2015	
Mark S. Millard	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/24/2015	
Patricia Del Bueno Cleary	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/22/2015	
H. G. Foster	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/19/2015	
Deborah Davis Walker	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/19/2015	
Rocky L. Crabb	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/17/2015	
Margaret Ann Rosenbaum	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/16/2015	
Tandra L. Dawson	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/15/2015	
Kathie E. Davidson	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/15/2015	
Elizabeth M. Budzinski	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/15/2015	
E. Kenneth Wright, Jr.	U.S. (SUPERIOR COURTS/TRIAL-LEVEL/COUNTY LEVEL/)	12/12/2015	

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★ BEST JUDGES



Karen M. Cassidy
★★★★★



D. Webster Keogh
★★★★★



Irvin J. Snyder
★★★★★



Yolanda Adrianzen
★★★★★



James A. Hall
★★★★★



Robert Ponzini
★★★★★



Lowell Reed Jr.
★★★★★



Judith Levey Meyer
★★★★★



Anthony J. Mellaci, Jr.
★★★★★

★ HALL OF SHAME



Severiano Lisboa, III
★



Mary C. Jacobson
★



Joseph E. Turner
★



Esther L. Wiggins-Lyle
★

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Description

This app rates the probable bias of prospective jurors by evaluating four factors. The results indicate the bias toward Criminal Prosecution or Civil Defense.

Tags: rater bias , jury , juror apps , juror , the juror rater , google images jurors , jury star

DISRUPTIVE CHANGE IN HOW WE DECIDE DISPUTES: ODR

BUSINESS TECHNOLOGY | October 10, 2011

At GE, Robo-Lawyers

Oil-and-Gas Unit Tests Online Resolution to Control Costs

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By VANESSA O'CONNELL

Can a computer solve legal disputes? [General Electric Co.](#) GE -4.06% thinks so.

The company's oil-and-gas division is testing online dispute resolution with a simple goal: Reduce the time and money the company might otherwise spend on lawyers.



The GE unit, which provides equipment and services to oil companies and construction firms, is requiring thousands of suppliers to agree to cybersettlements in simple disputes.

The approach is being tested mostly in

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Fair Outcomes, Inc. provides parties involved in disputes or difficult negotiations with access to newly developed proprietary systems that allow fair and equitable outcomes to be achieved with remarkable efficiency. Each of these systems is grounded in mathematical theories of fair division and of games.

Our founders and staff include game theorists, computer scientists, and practicing attorneys with extensive experience in designing, administering, utilizing, and providing consulting and online services with respect to such systems.

Further information about our company and our services may be obtained by using the contact information appearing on this page. Additional information about four of our systems, each of which can be accessed and used online (and examined and



Virtual courthouse

The screenshot displays the Virtual Courthouse.com website. At the top, the logo "Virtual Courthouse.com" is visible, along with navigation links: HOME, HOW IT WORKS +, WHO WE ARE +, and CONTACT US. A "Login" button is in the top right corner. The main heading is "Online Alternative Dispute Resolution System". Below this, a paragraph describes the system as a web-based combination of multimedia technologies and business processes, integrated with a customer-friendly user interface. A green button labeled "Get started now" and a link "or watch our video tour" are provided. On the right, a preview of the "Online Case Initiation" form is shown. The form includes fields for Case Name, Case Type, Case Subject, Scheduled Start Date, Scheduled Start Time, Scheduled End Time, and Number of Parties. A callout box on the form states: "If your case qualifies for free dispute resolution, you will receive an email invitation to participate." At the bottom, a red banner reads: "Type the word 'FreeCase' into the coupon box and get your first case initiation FREE".

Virtual Courthouse.com

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Online Alternative Dispute Resolution System

Virtual Courthouse is a web-based combination of multimedia technologies and business processes, integrated with a customer-friendly user interface. Our system replicates the current process of dispute resolution in an online environment, removing the constraints of time, expense and distance.

[Get started now](#) or [watch our video tour](#)

Online Case Initiation

Case Information

Case Name:

Choose your role:

Pro Se: ☒ No ☐ Yes

Case Type:

Case Subject:

Scheduled Start Date:

Scheduled Start Time:

Scheduled End Time:

Number of Parties:

Brief Description:

If your case qualifies for free dispute resolution, you will receive an email invitation to participate.

Type the word 'FreeCase' into the coupon box and get your first case initiation FREE

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 If you would like to sign up for CyberSettle, please click [here](#).

Registered Users
 If you are a returning CyberSettle user, please click [here](#).

CyberSettle is the world's #1 online settlement company. Our automated dispute resolution method and system is protected under U.S. Patent Nos. 6,330,551, 6,850,918, 6,954,741, and 7,249,114.

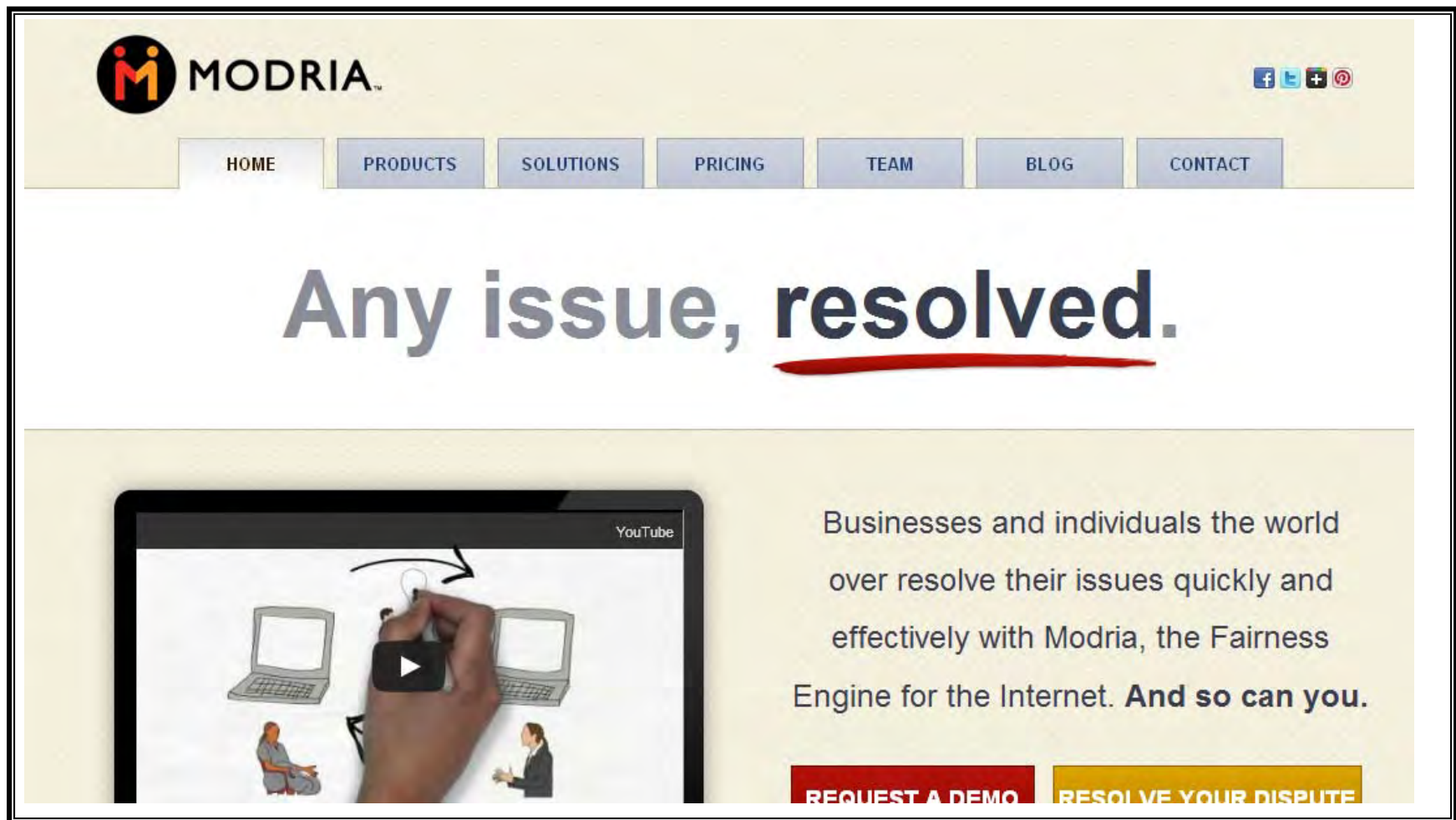
To date, CyberSettle has serviced over \$1,600,000,000 in settlements! [MORE](#)

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<http://www.cybersettle.com/pub/>[3/26/2010 1:07:47 PM]

Modria



The image is a screenshot of the Modria website. At the top left is the Modria logo, which consists of a stylized 'M' inside a circle, followed by the word 'MODRIA' in a sans-serif font. To the right of the logo is a navigation bar with seven buttons: 'HOME', 'PRODUCTS', 'SOLUTIONS', 'PRICING', 'TEAM', 'BLOG', and 'CONTACT'. Further to the right are social media icons for Facebook, Twitter, Google+, and Pinterest. The main heading in the center reads 'Any issue, resolved.' with 'resolved.' underlined in red. Below this is a video player showing a hand drawing a diagram on a whiteboard with two laptops and two people. To the right of the video, the text reads: 'Businesses and individuals the world over resolve their issues quickly and effectively with Modria, the Fairness Engine for the Internet. **And so can you.**' At the bottom right are two buttons: 'REQUEST A DEMO' and 'RESOLVE YOUR DISPUTE'.

MODRIA

HOME PRODUCTS SOLUTIONS PRICING TEAM BLOG CONTACT

Any issue, resolved.

Businesses and individuals the world over resolve their issues quickly and effectively with Modria, the Fairness Engine for the Internet. **And so can you.**

REQUEST A DEMO RESOLVE YOUR DISPUTE

Modria

- Fairness engine that attempts substantive as well as financial settlements.
- Diagnosis module: Machine fact gathering
- Negotiation module: Program summarizes areas of agreement and disagreement and makes suggestions for solving the issue
- Mediation module: Human neutral third party
- Arbitration module: Human decision maker

Ebay and Paypal

- Millions of low dollar transactions across state and international lines making litigation cost prohibitive and impossible.
- Ebay: 60 million disputes per year with 90% settled with no human input.

Modria partnerships

- Local property tax appeals in Ohio, New Orleans, Atlanta and Durham, North Carolina.
- ODR in Europe for small value claims.
- Justice system is going to look more like ODR than the present court system
- Consumers want one click redress just like on click buying on Amazon.

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Welcome to the Virtual Self-Help Law Center

Welcome! Our goal is to provide information that will make it easier for you to handle your court case, whether you have a lawyer or not.

This site can help you learn about court procedures, find forms, and links to other important resources. To save yourself time, you might first want to read [Using This Site](#).

This site does not give legal advice.
If you believe you need a lawyer, or legal help, go to: [Free and Low-Cost Legal Help](#).

If you want help finding what you need, you can email us at virtualselfhelp@contracosta.courts.ca.gov.

You will receive a response within one week.

Computer Safety: People can tell what Internet sites you've visited on your computer. [Be safe!](#) If the information you need is sensitive to your situation, use the Internet at a local library, a friend's house, or at work. If you do use your own computer, you can [clear it after your visit following our directions](#).

Si necesita ayuda en Español, por favor, siga al [Centro Virtual de Ayuda Legal](#).

[Family Law](#)

[Domestic Violence](#)

[Guardianship](#)

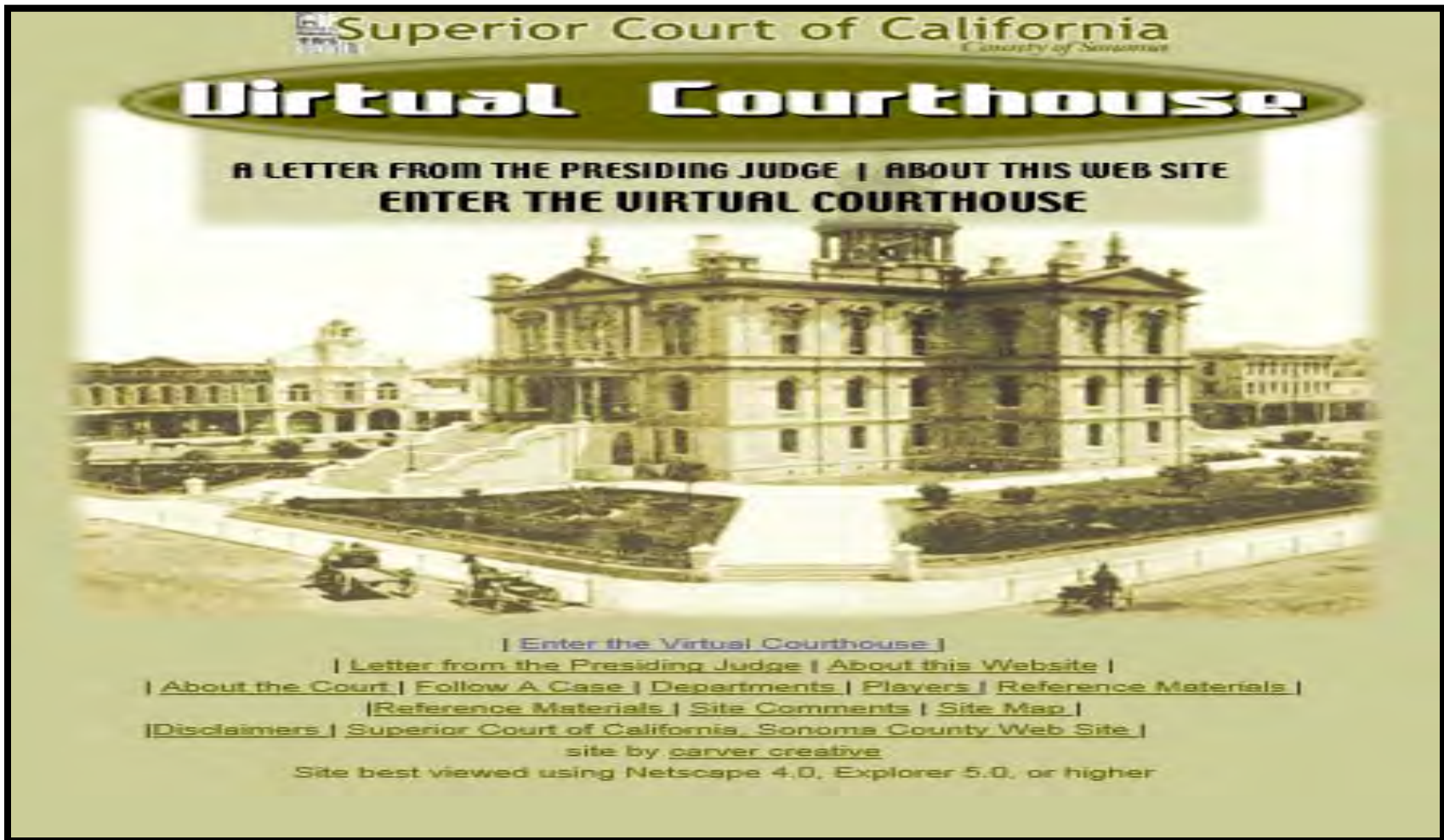
[Eviction \(Residential\)](#)

[Small Claims](#)

[Traffic Court](#)

This website's general information is very helpful for everyone in California.

California virtual courthouse



British Columbia: Civil Resolution Tribunal



Civil Resolution Tribunal

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RECENT POSTS

UPDATE: Tell us what you think about CRT fee options

Posted on [March 4, 2016](#)



UPDATE: Thank you for the huge response to this survey. If you haven't responded yet, the survey is open until March 31, 2016, so please participate to have your say! In the near future, some decisions will be made about ... [Continue reading](#)

Sonia's Story: using stories to put people at the centre

ernet Explorer Browser (2) d on [February 5, 2016](#)

Try the Solution Explorer Beta!

Do you have a strata dispute? Get free legal information and resources while you help us test the Solution Explorer beta. [More here.](#)



Welcome from the CRT Chair



Welcome to the implementation website for B.C.'s Civil Resolution Tribunal (CRT), Canada's first online tribunal. I will be using this website to keep you informed about [our progress towards](#)

Civil Resolution Tribunal

The CRT is going to be very different from other dispute resolution options that have been available in British Columbia. The CRT will give you choices about how, when, and where you resolve small claims and strata property (condominium) disputes, built around your needs and your life.

When the CRT opens in 2016, you will be able to use it 24 hours a day, seven days a week, from a computer or mobile device that has an internet connection. Your interaction with the other participant and/or the CRT can be done when it works for you.

We think that your direct and active participation is an important part of reaching a resolution with the other participant(s). We will provide a new process with information and support along the way to help you get to a satisfactory resolution as early as possible. We will only make a decision for you if you and the other participants cannot agree on your own solution.

The CRT will provide unique opportunities for people using the process to give us feedback and comments. This input will be used to help shape the ongoing development of the CRT's service and tools. If you have feedback now, [please contact us.](#)

Civil Resolution Tribunal

The CRT provides a single online location for an end-to-end process that guides you from information through to resolution of your strata (condominium) property or small claims problem.

We hope you'll be able to reach a satisfactory result as early as possible – either directly with the other party, with the assistance of one of our expert case managers/facilitators or through adjudication by one of the members of the tribunal.

Need a bit of help? Telephone or chat assistance will be available in the information stage and an expert case manager/facilitator can be requested at a later stage.

Here are the phases in our end-to-end process:



(click to enlarge)

Information, problem diagnosis and self-help

To start, you'll use the Solution Explorer to answer straightforward questions about your issue. You'll be guided to useful information, problem diagnosis and self-help. Self-help can include tools like templates, calculators or checklists that will help you prepare for and take steps toward resolution.

Here's a short video on the Solution Explorer:

Civil Resolution Tribunal

Party-to-Party negotiation

Once you know more about your issue, you can invite the other party involved in the dispute to negotiate using the online negotiation tool.

Case management and facilitated dispute resolution

If you and the other party are not able to resolve your dispute on your own, you may invite one of our expert case managers/facilitators to help you reach resolution. The case manager/facilitator can facilitate the discussion, provide a reality check or a neutral evaluation.

Adjudication

Not able to work it out? You can ask for the tribunal to make a binding decision.

Post Resolution

We can provide some information and guidance about your options for obtaining the best results after completion of the dispute resolution process.

Enforcement

You will be able to file final decisions and orders of the tribunal with either the B.C. Provincial Court or B.C. Supreme Court. Once filed, the tribunal's order can be enforced the same way as an order of that court.

Feedback and Continuous Improvement

The CRT will be asking people questions about their experience and will be using that information to modify and improve the service on a continuous basis.

Robot Lawyer for parking ticket appeals

A 19-year-old made a free robot lawyer that has appealed \$3 million in parking tickets



Leanna Garfield, Tech Insider

Feb. 18, 2016, 10:17 AM 🔥 235,334 🗨️ 7



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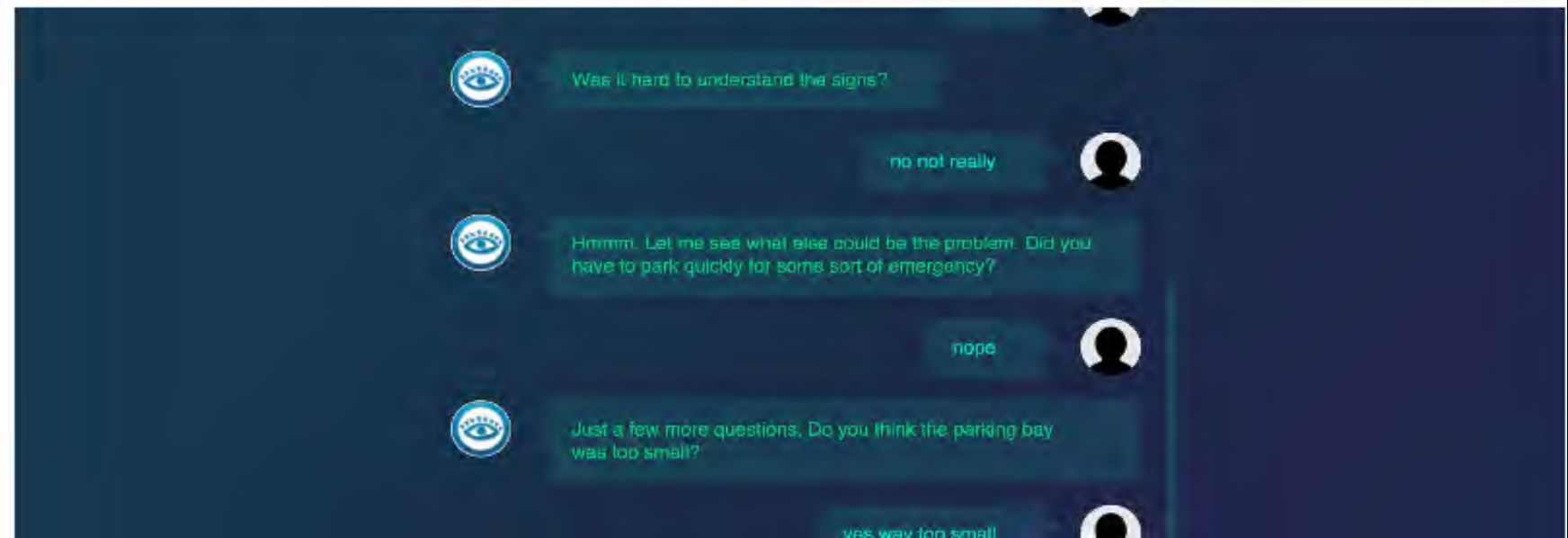
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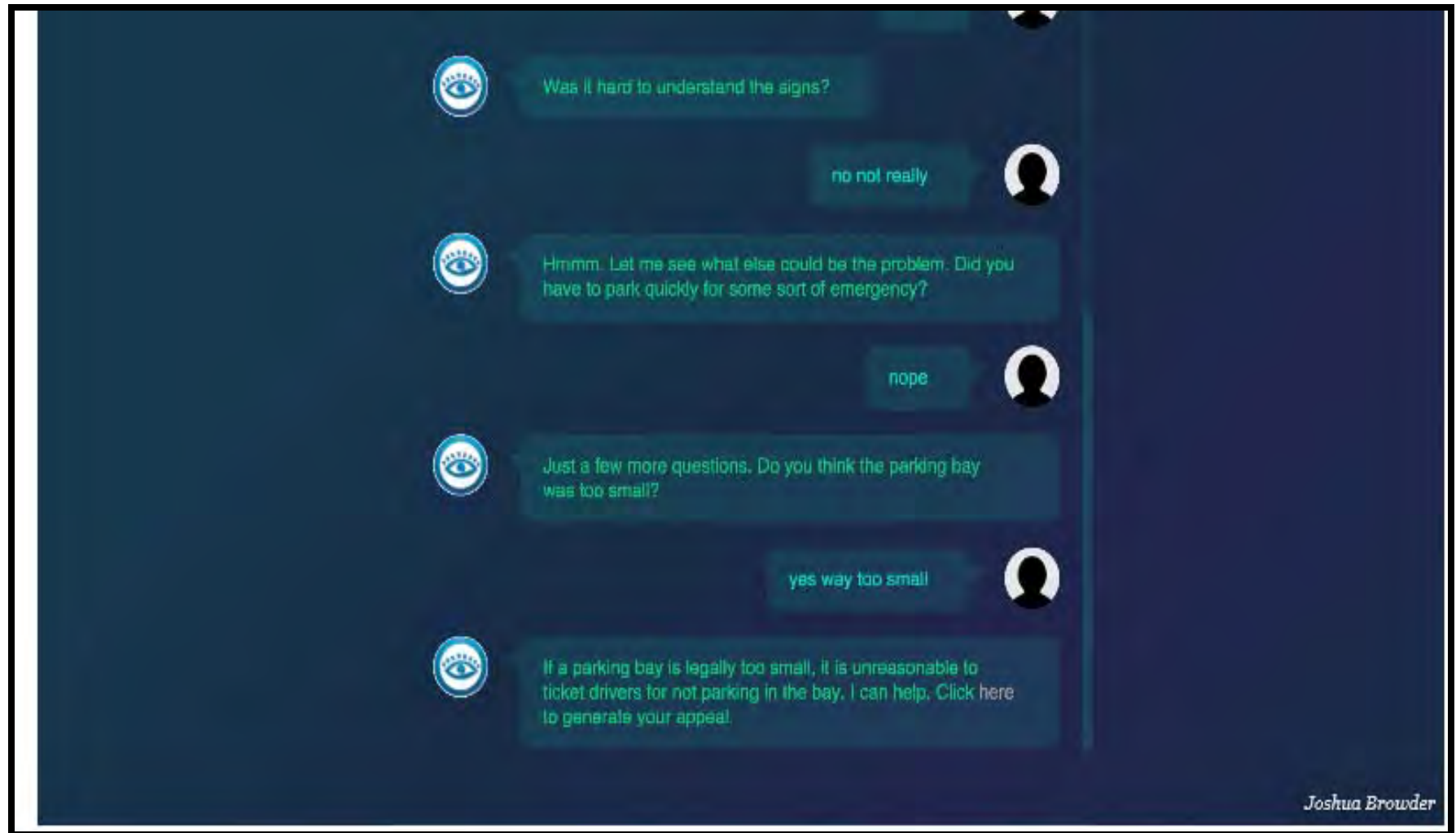
Machines will generate the appeal

Hiring a lawyer for a parking-ticket appeal is not only a headache, but it can also cost more than the ticket itself. Depending on the case and the lawyer, an appeal — a legal process where you argue out of paying the fine — can cost between \$400 to \$900.

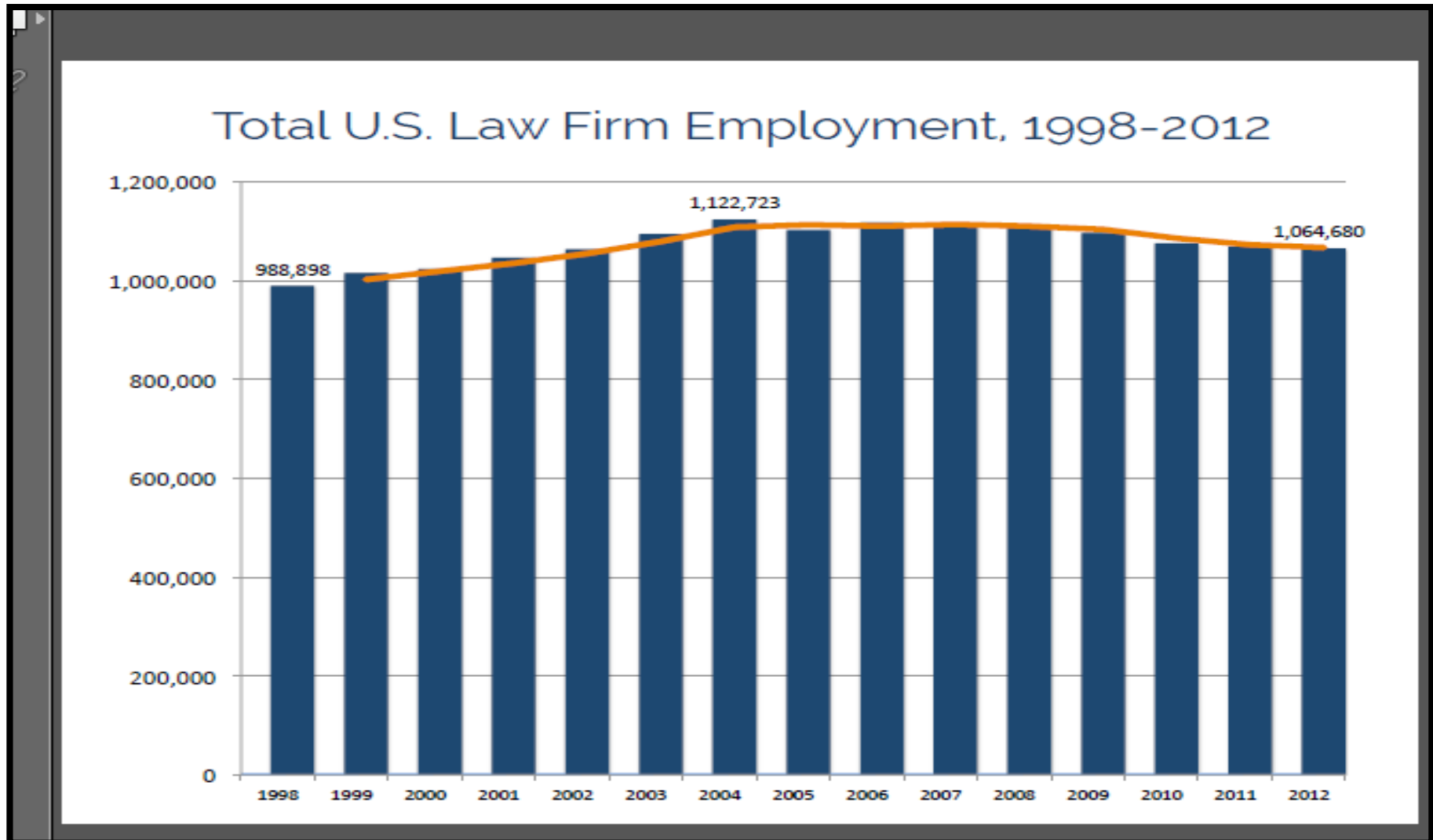
But with the help of a robot made by British programmer Joshua Browder, 19, it costs nothing. Browder's bot handles questions about parking-ticket appeals in the UK. Since launching in late 2015, **it has successfully appealed \$3 million worth of tickets.**



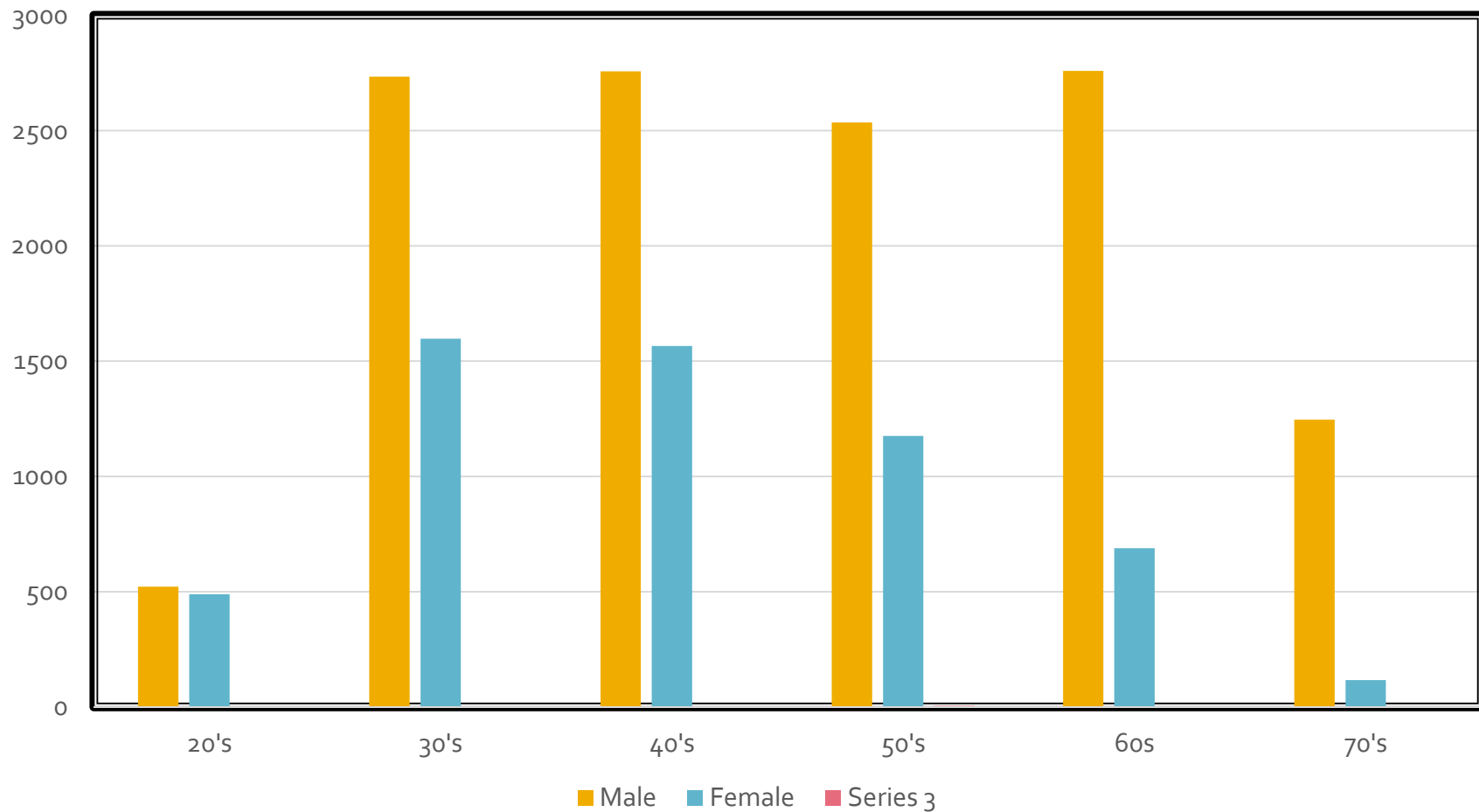
Questions by the machine



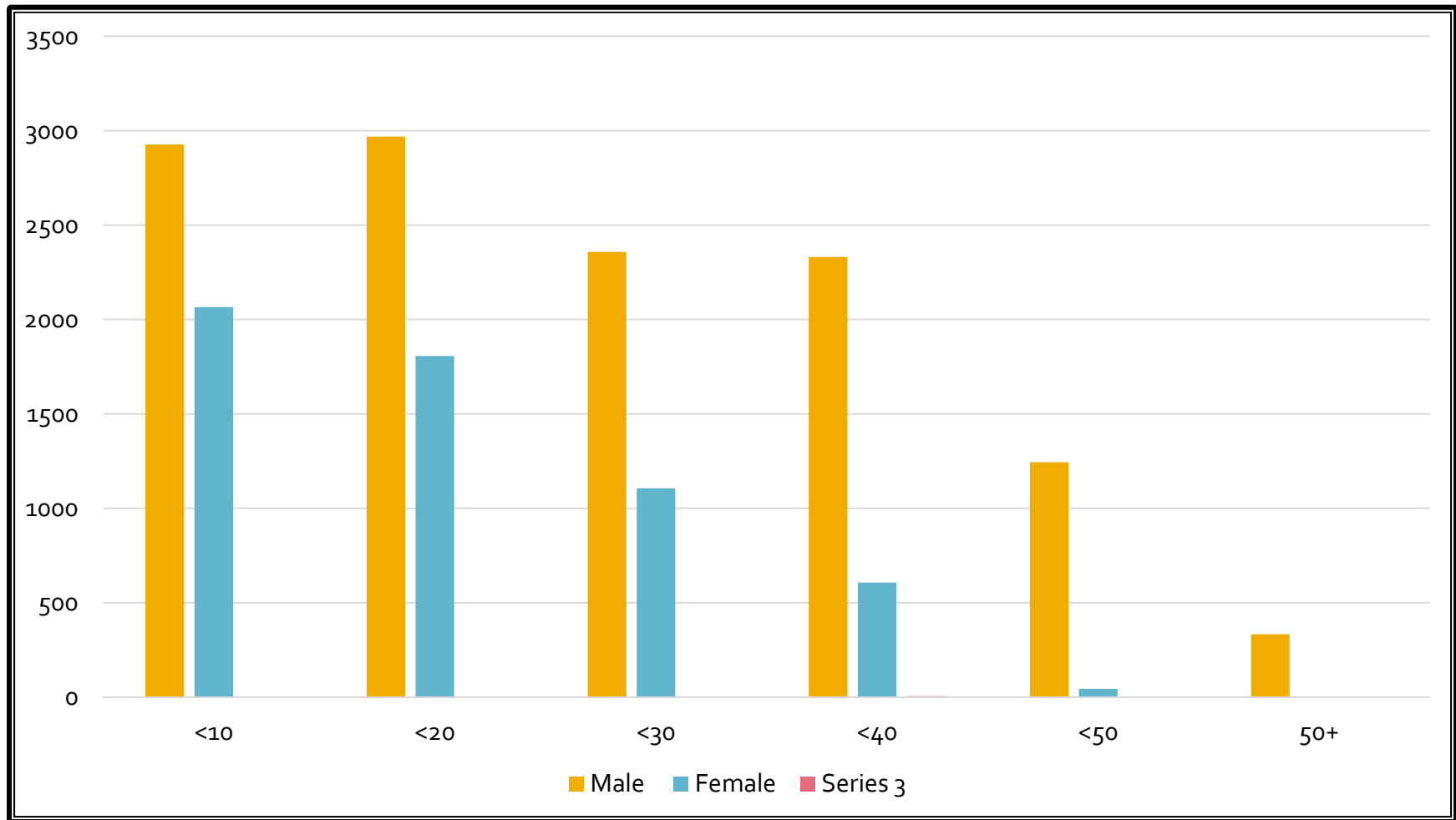
DEMOGRAPHICS: Total U.S. Law Firm Employment 1998-2012.



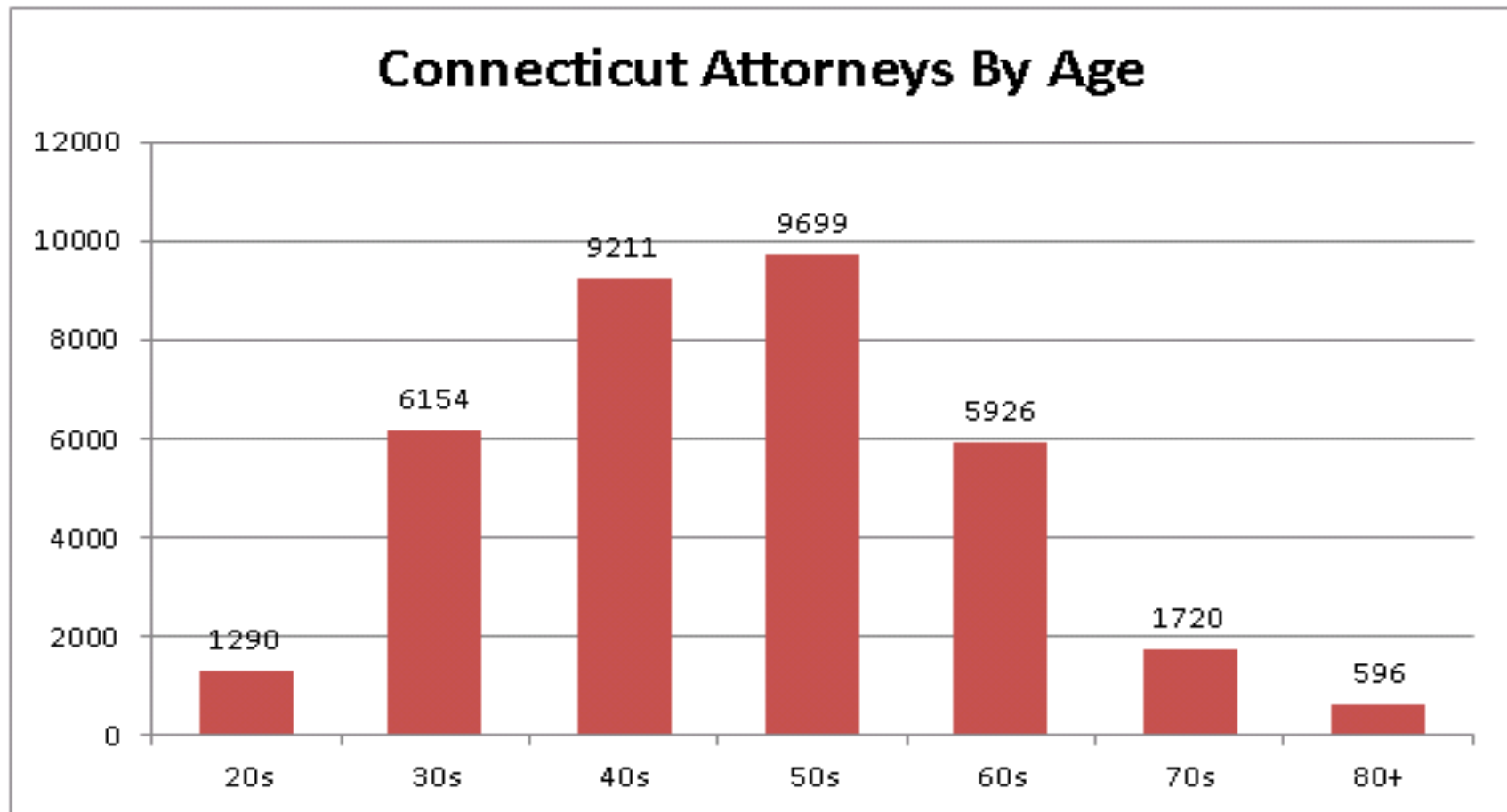
Alabama Attorneys By Gender



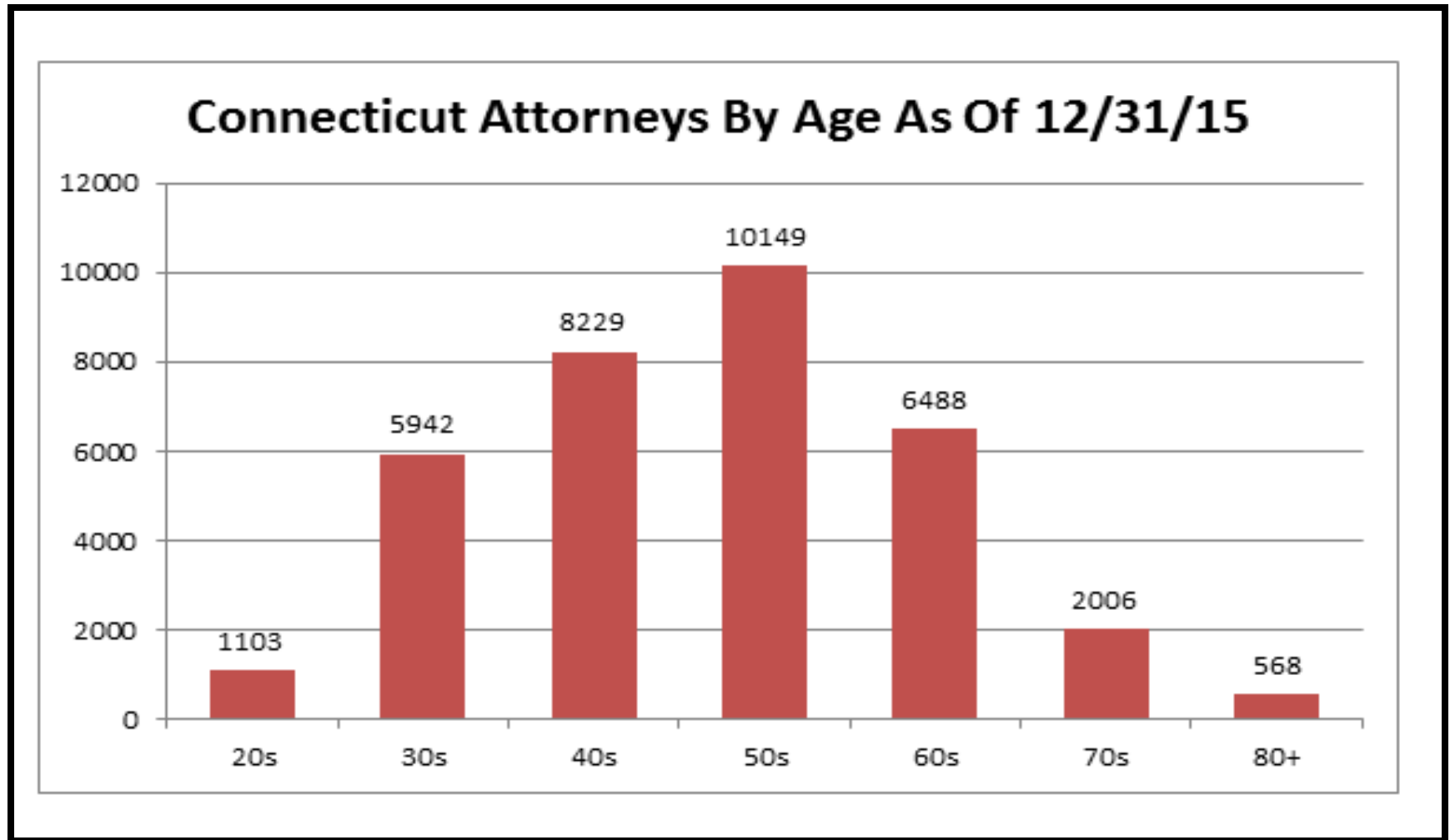
Alabama Attorney's By Years Of Practice



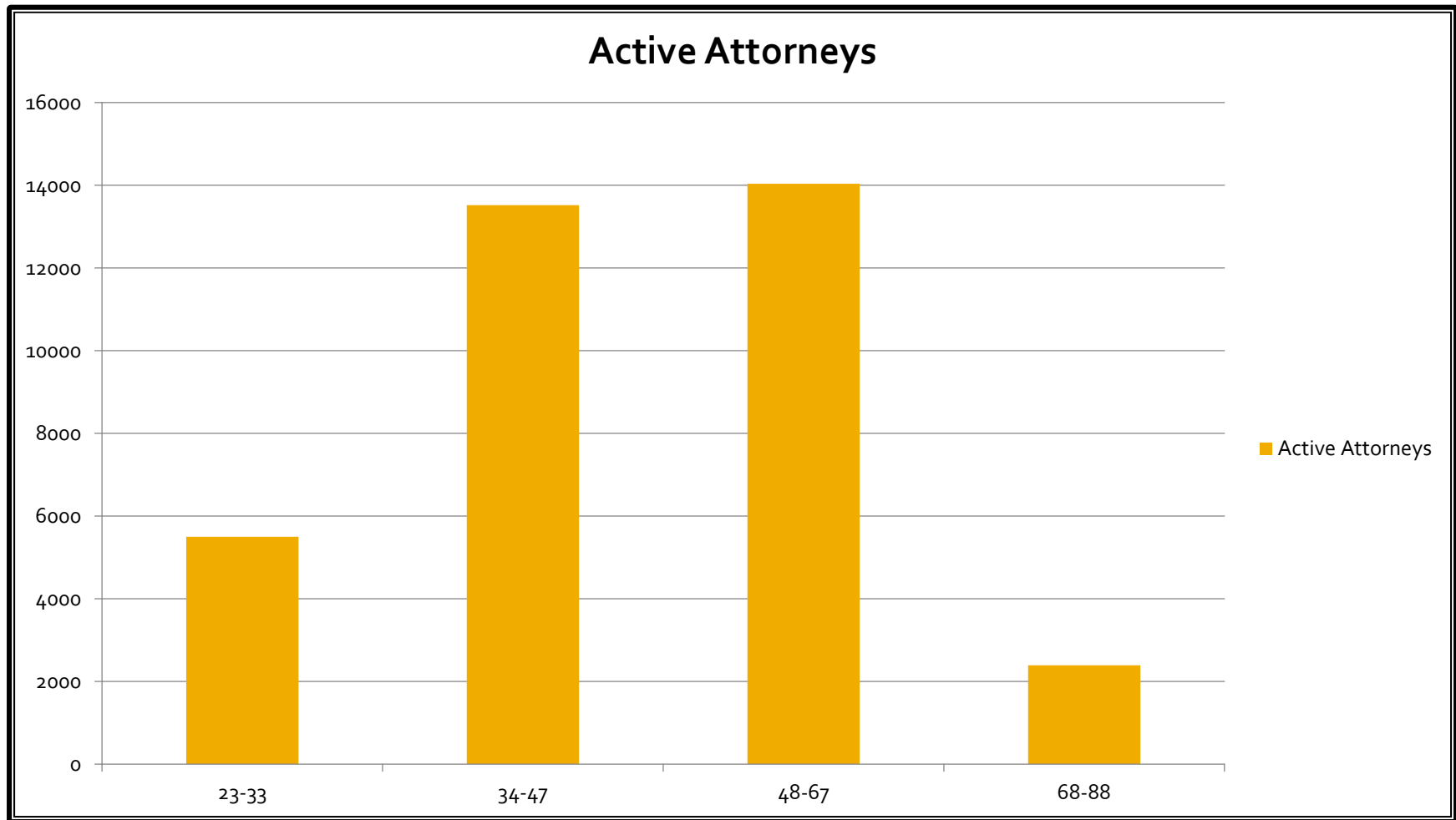
Connecticut by age 12/31/13



Connecticut by age 12/31/15

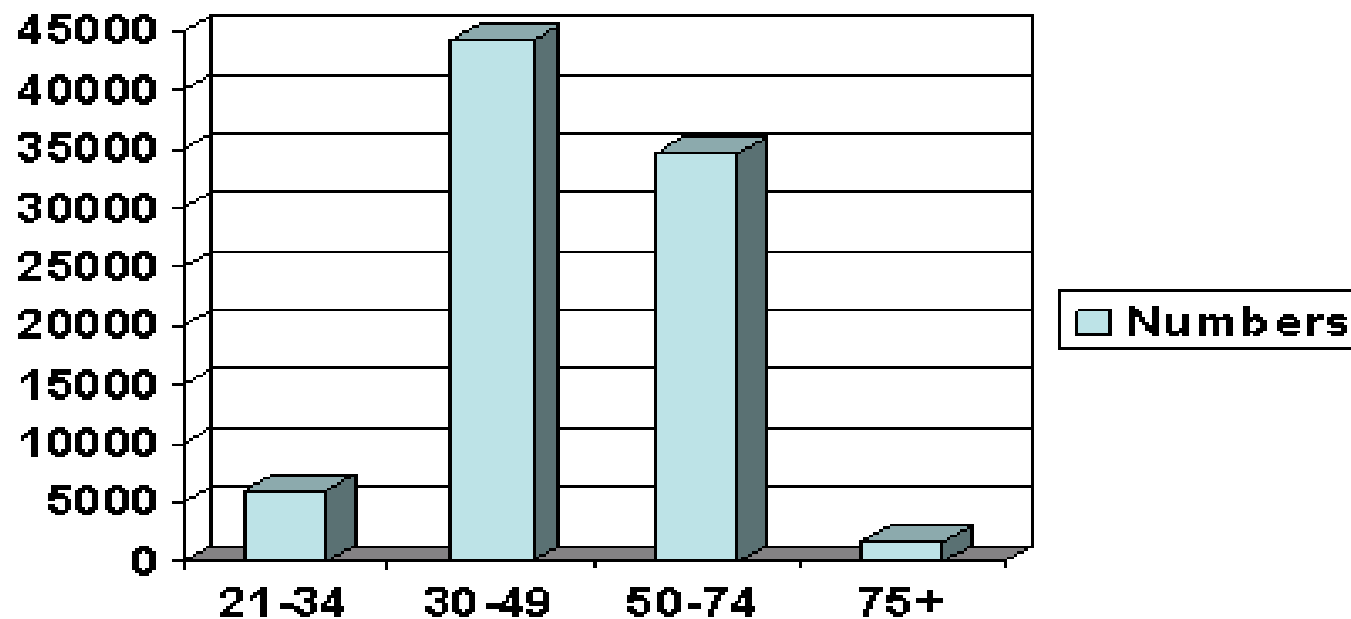


Georgia Bar age demographics 2013

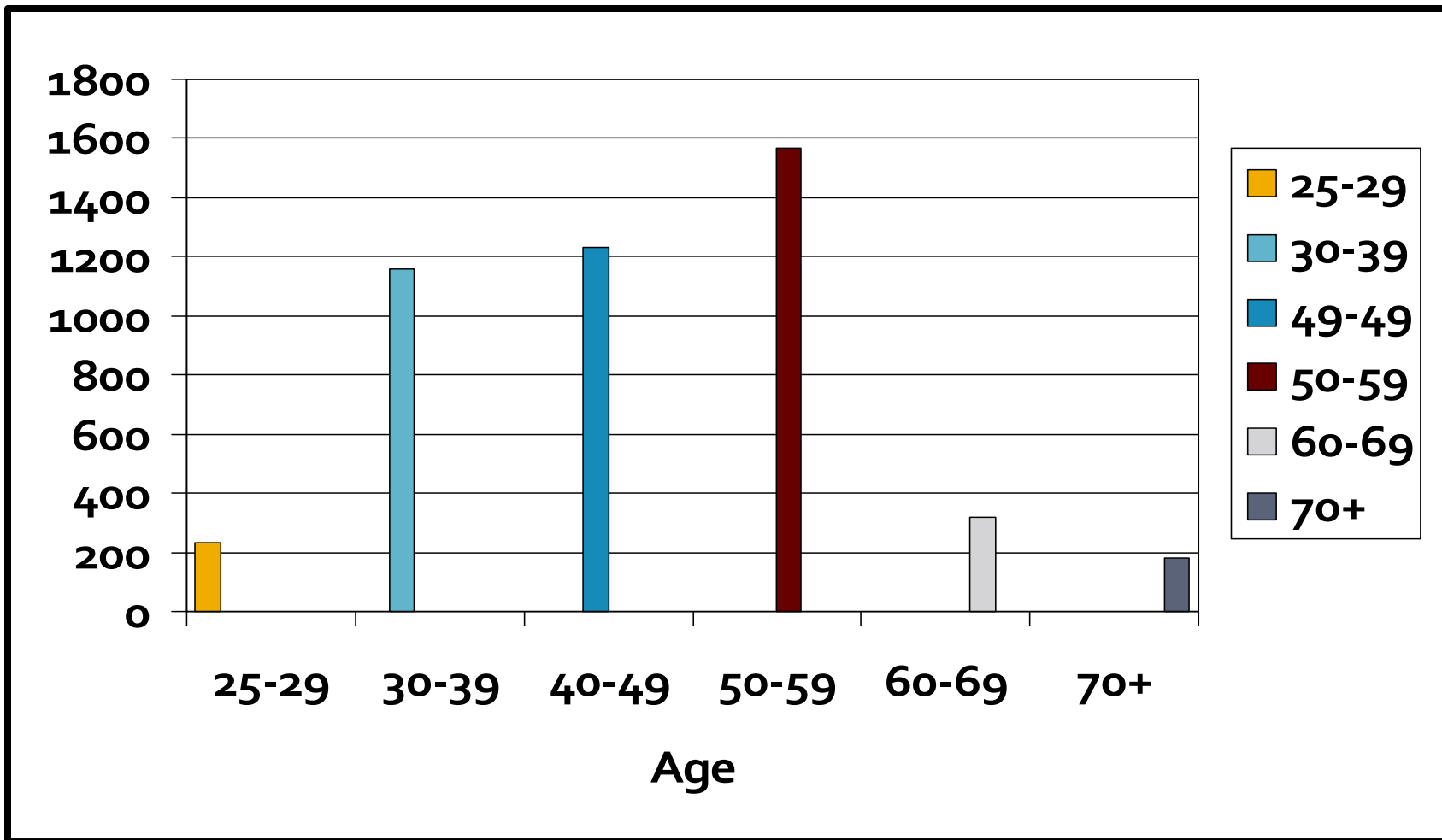


Illinois Bar demographics

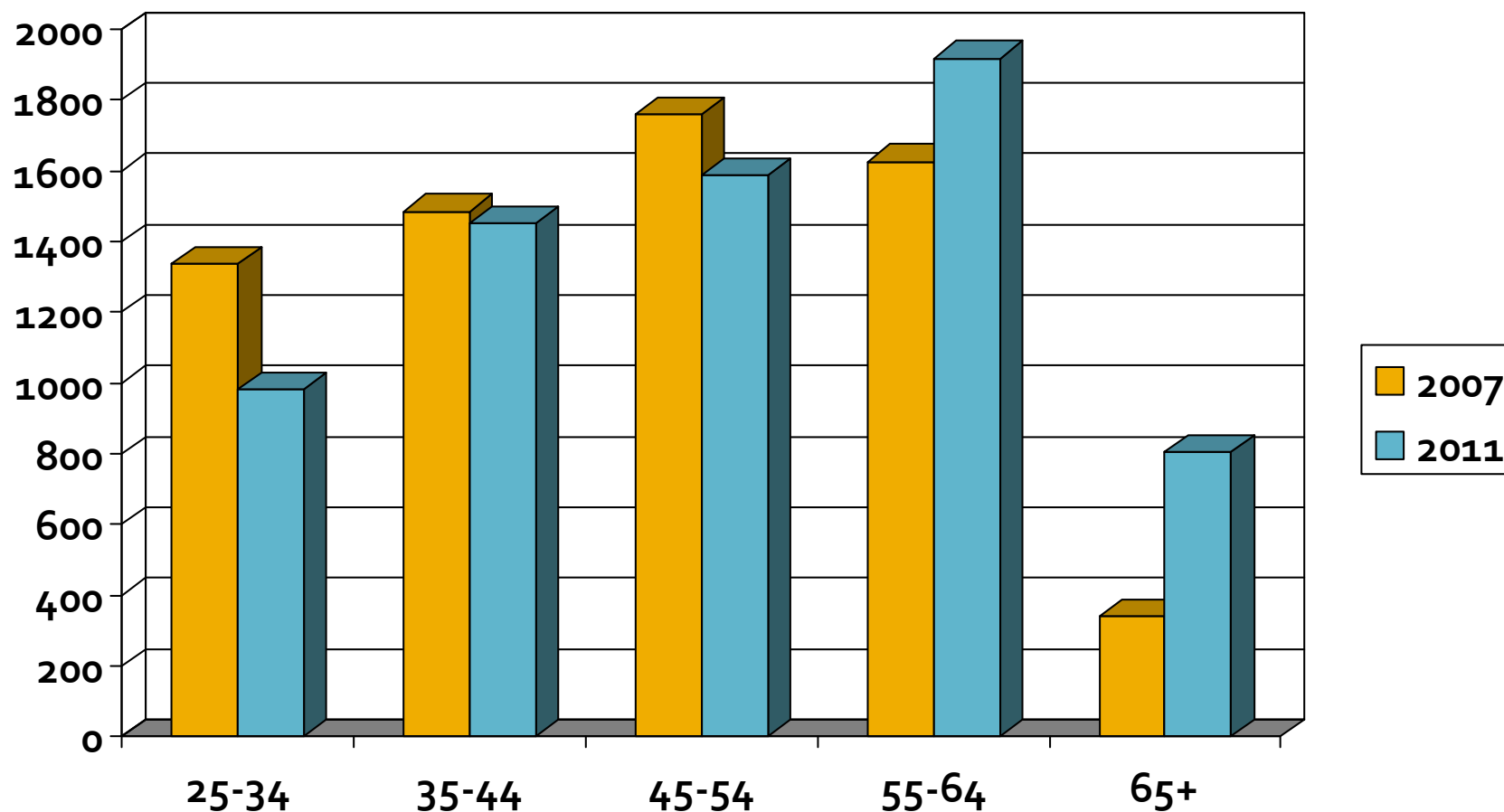
Illinois Bar Demographics



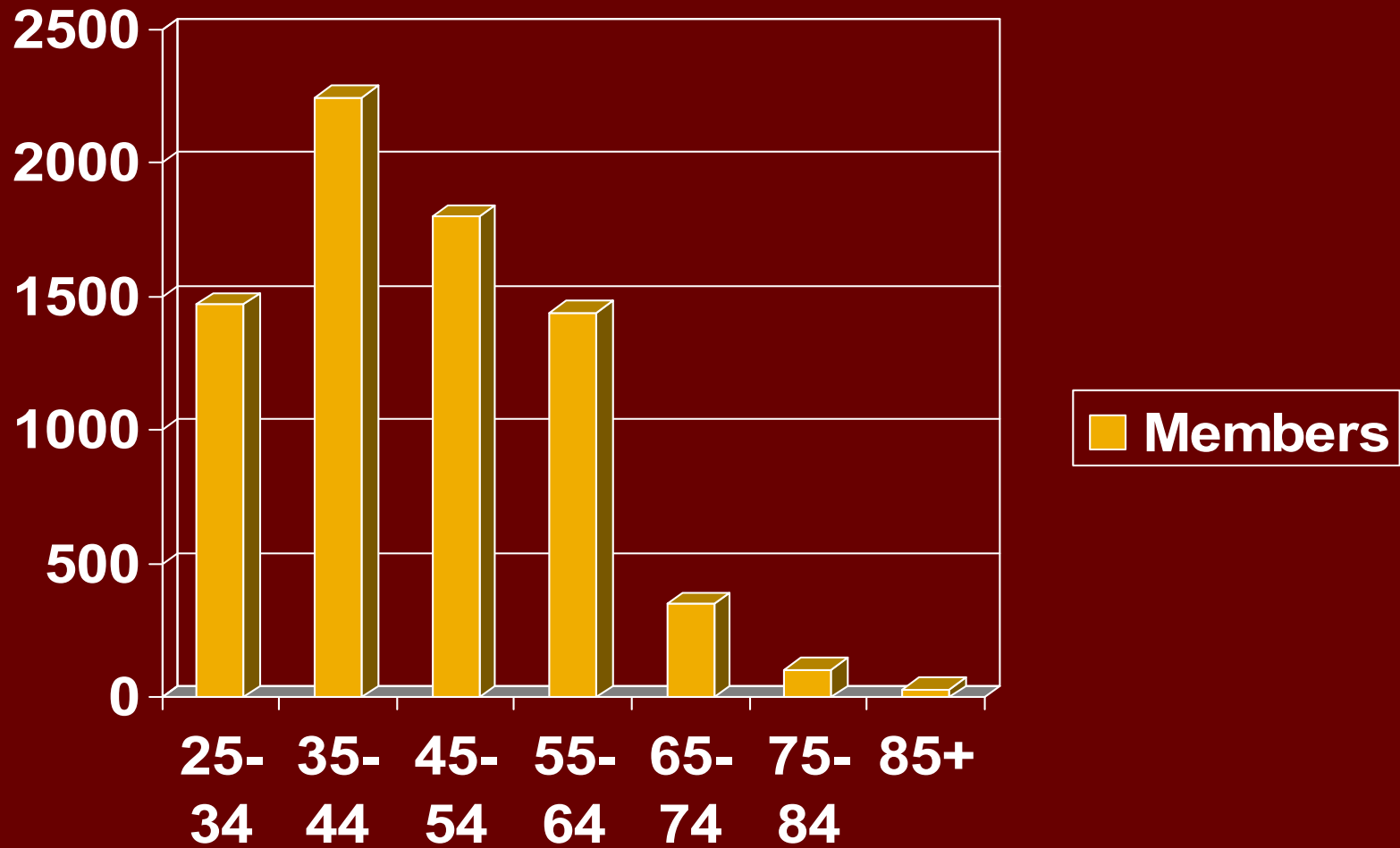
Idaho Bar demographics



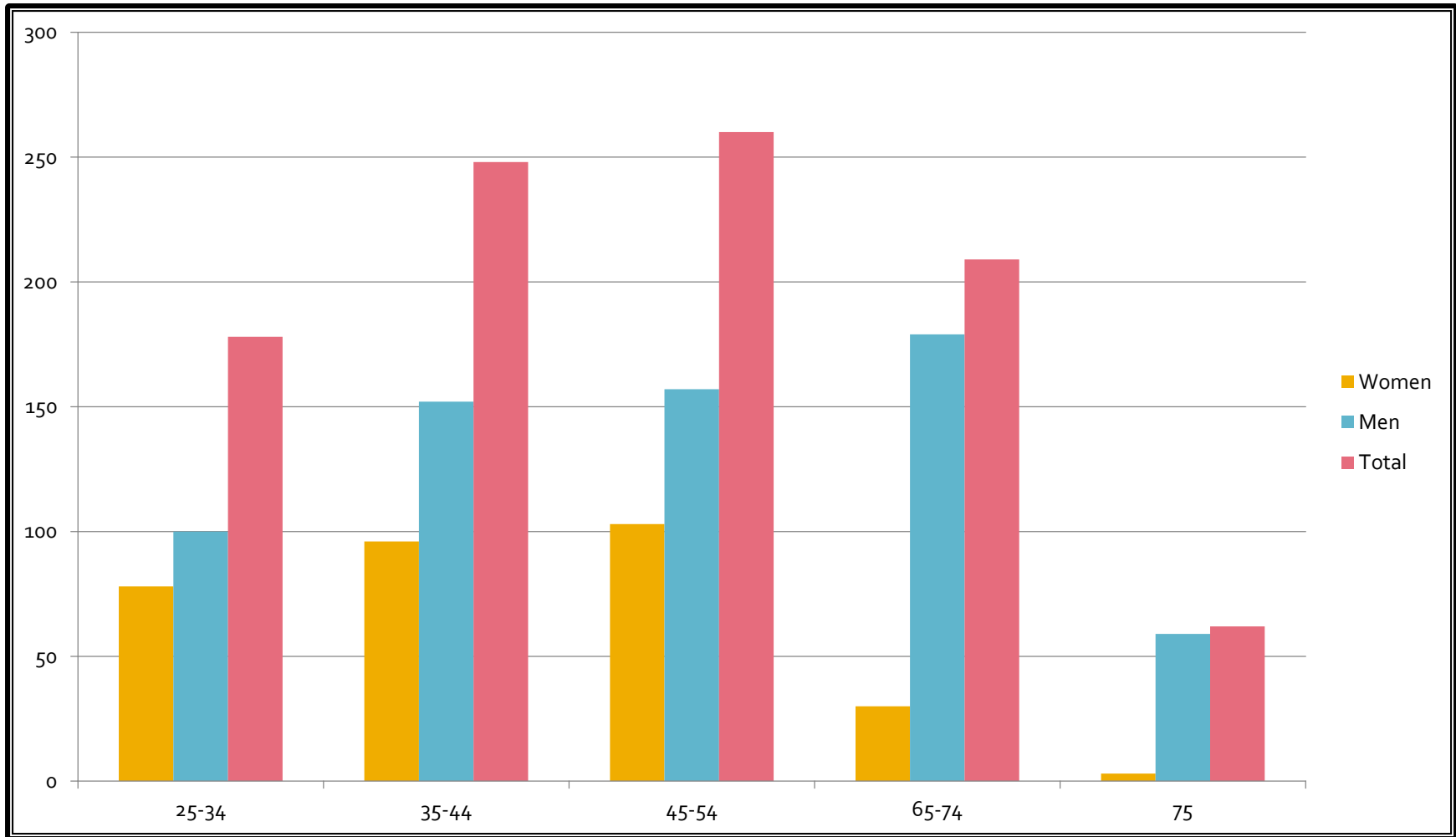
New Mexico Bar demographics 2007 and 2011



Nevada Bar Association.

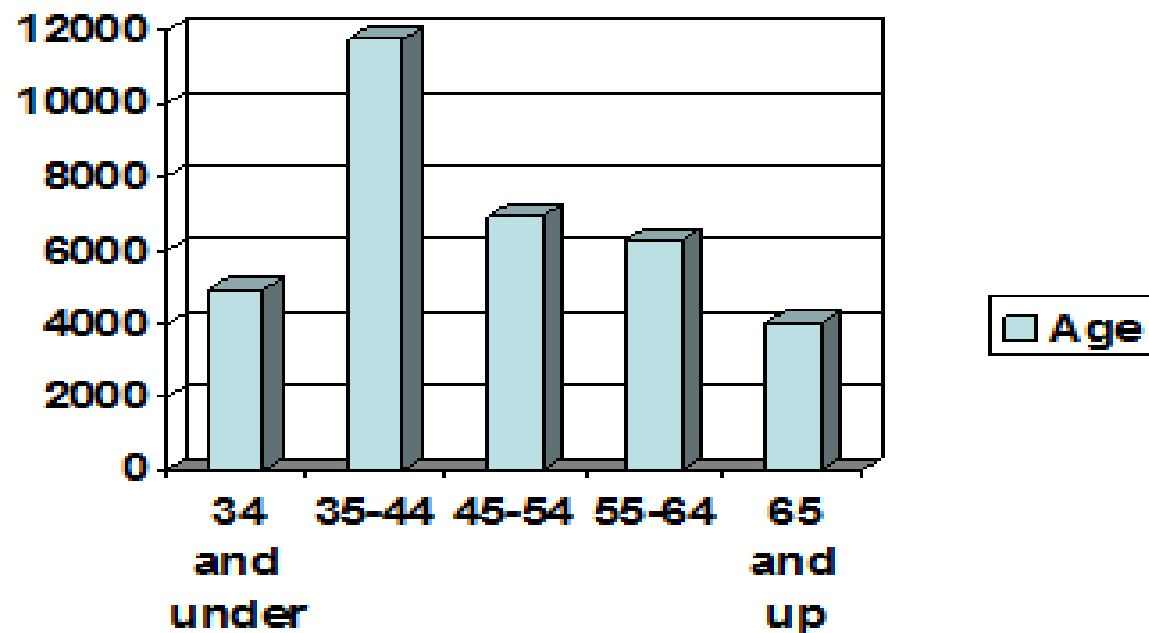


Sarasota County Bar

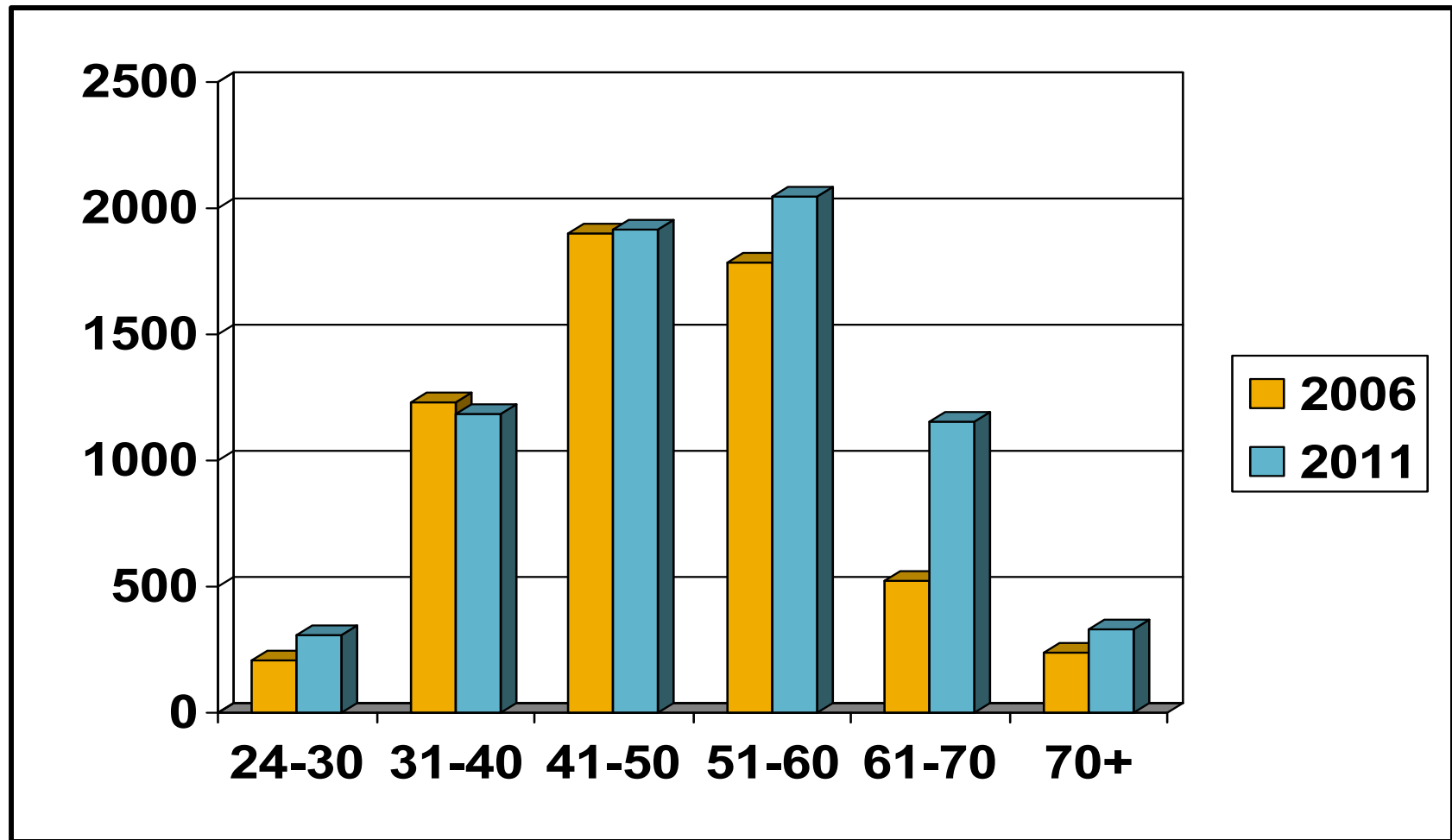


Missouri Bar demographics

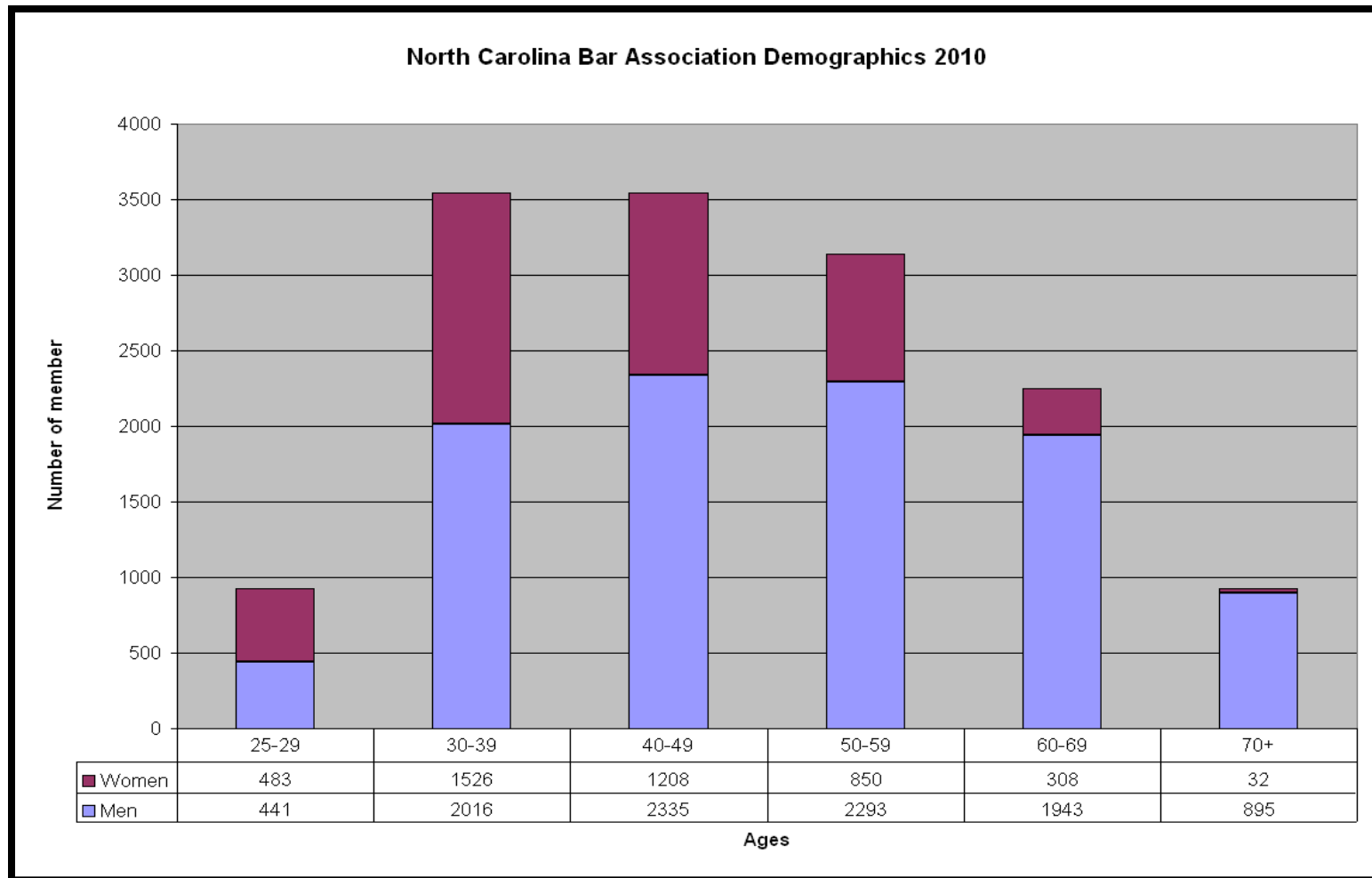
Missouri Bar Demographics



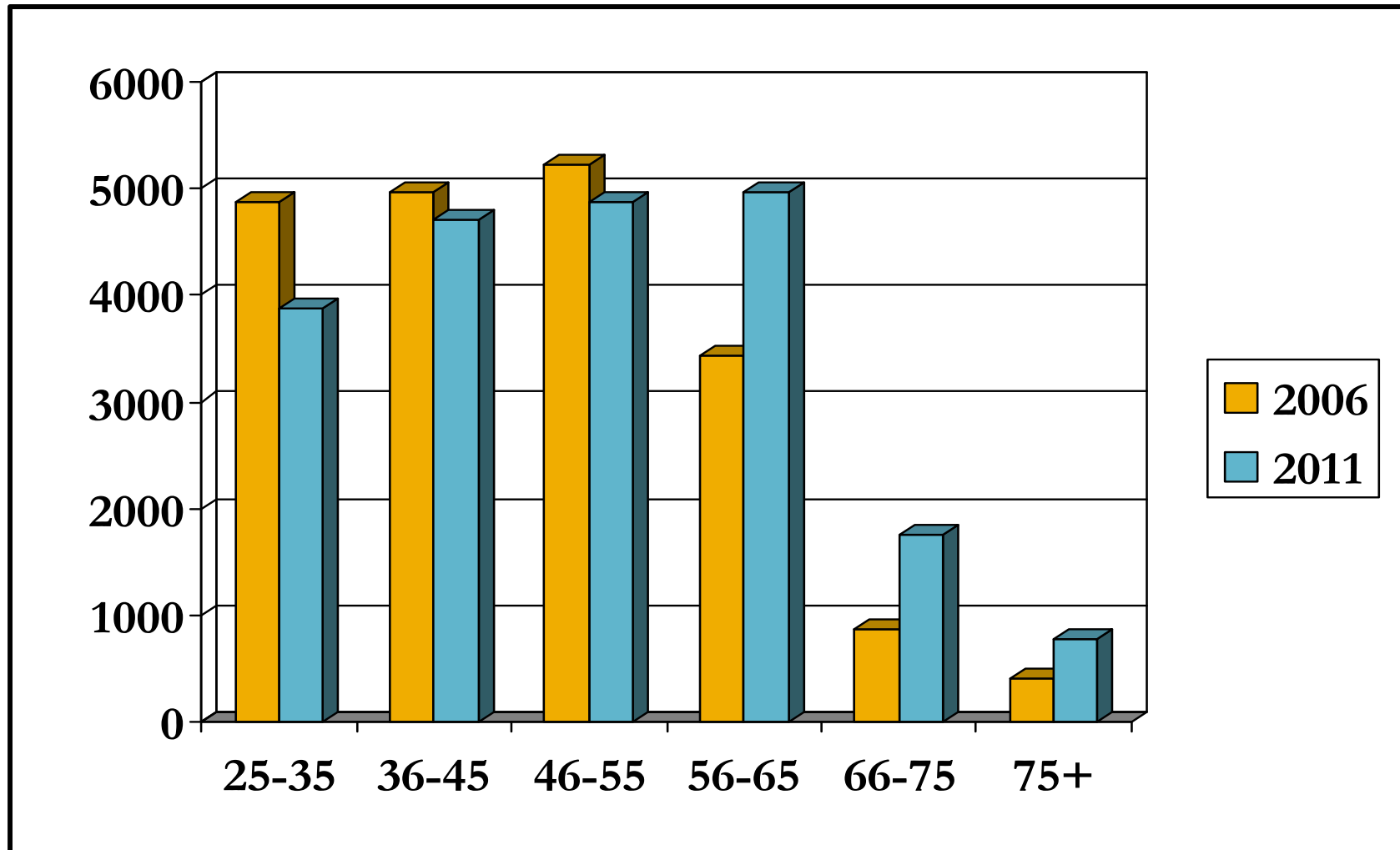
New Hampshire Bar 2006 and 2011



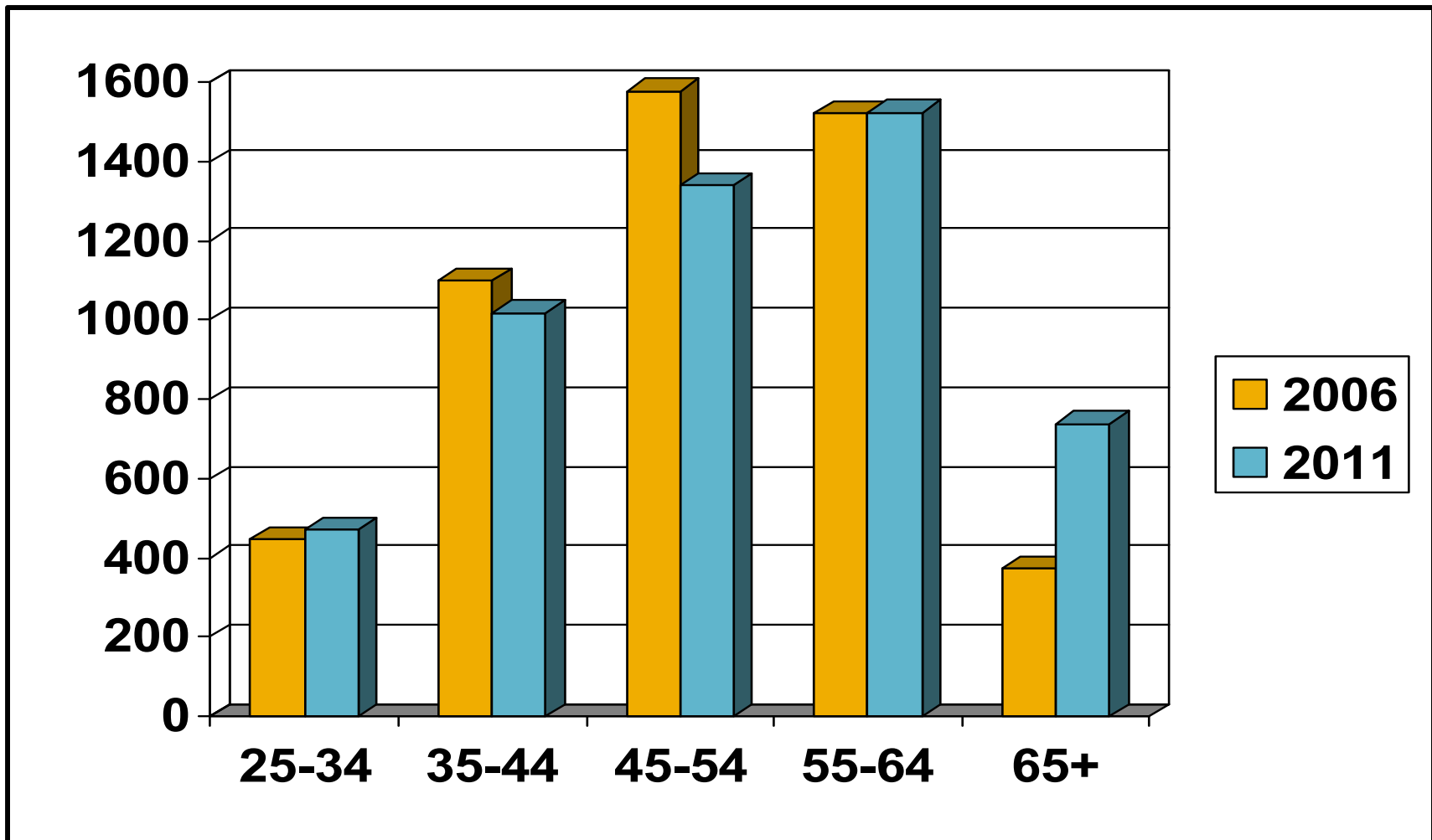
North Carolina Bar Association



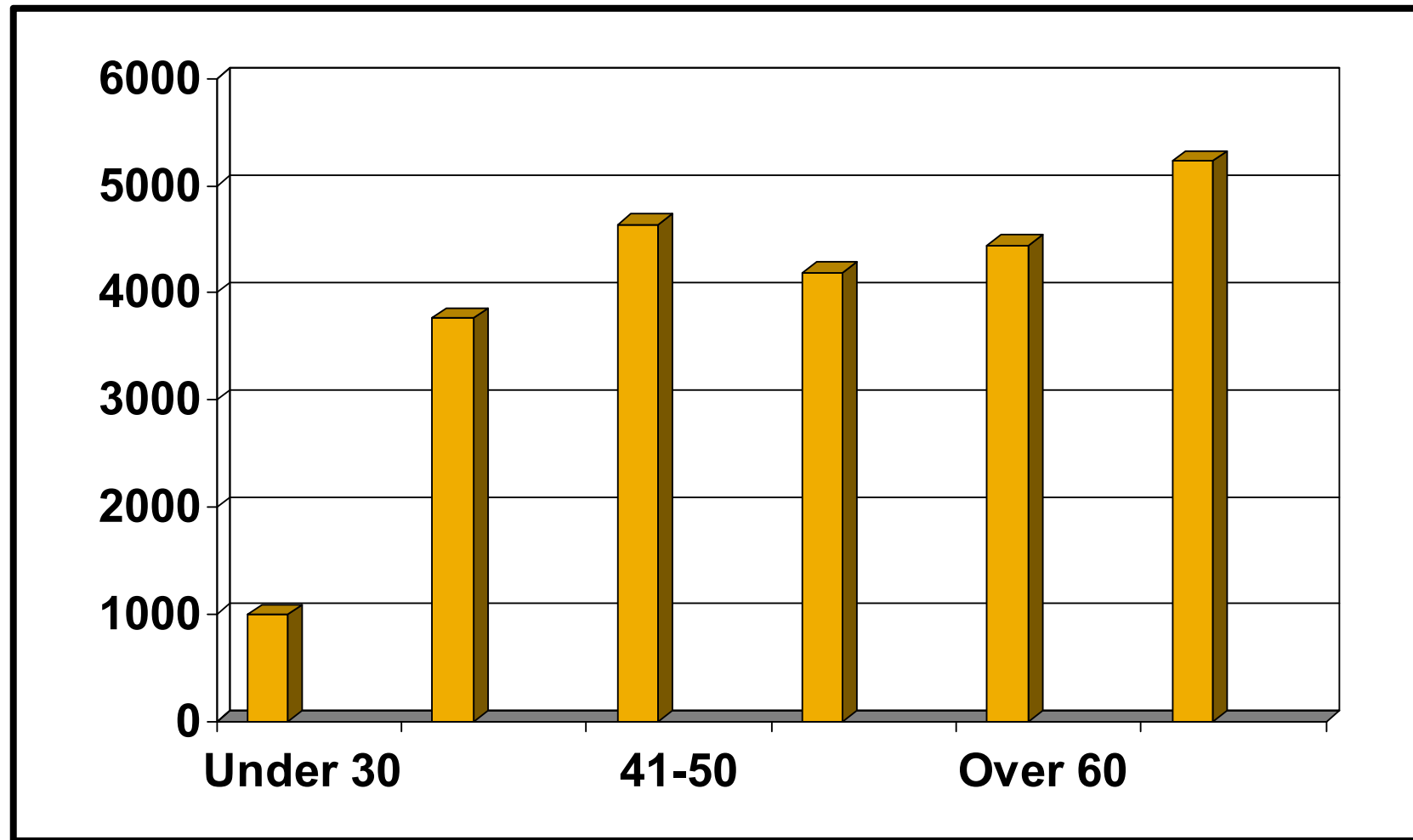
Louisiana State Bar demographics 2006 and 2011



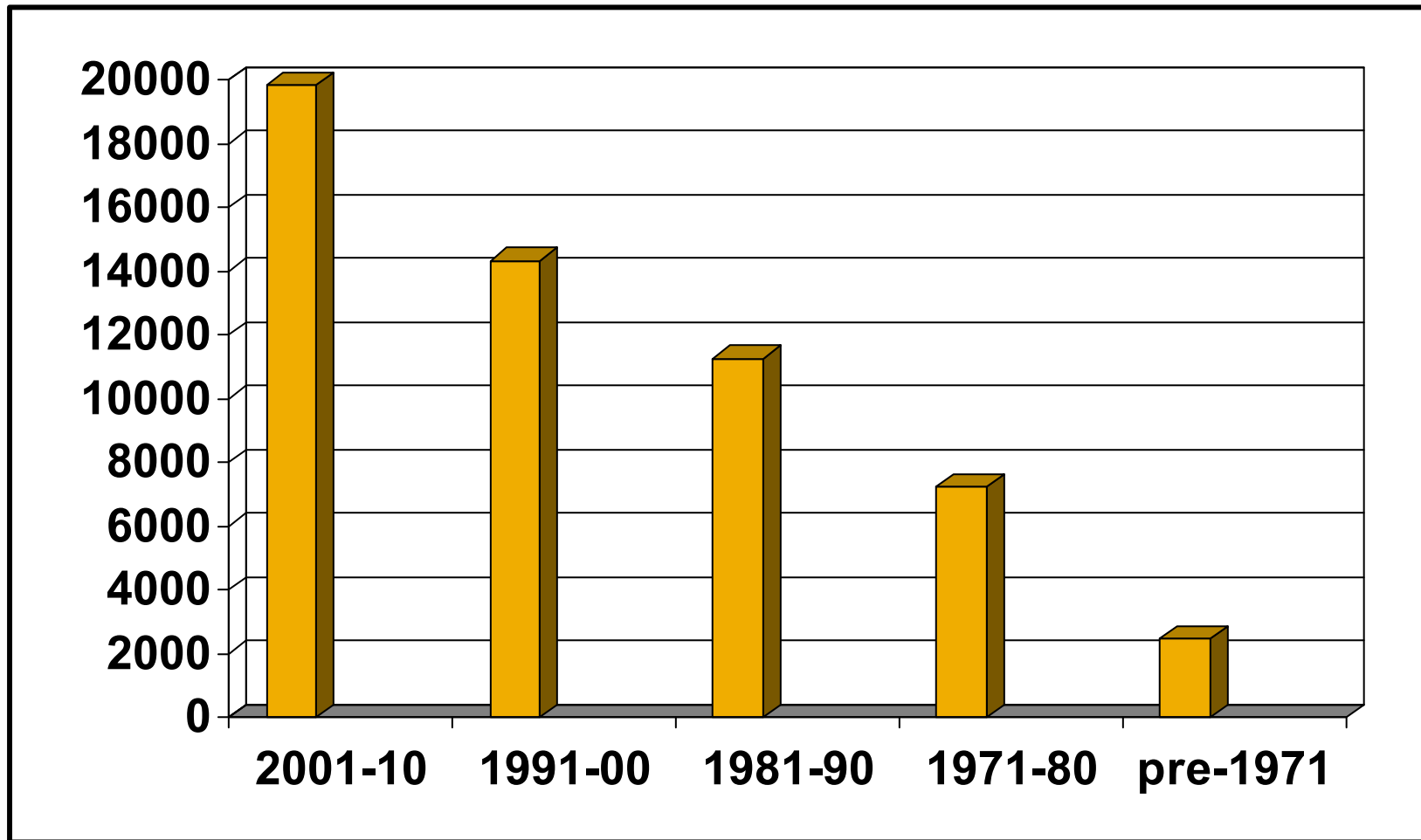
Maine Bar demographics for 2006 and 2011



Maryland Bar demographics



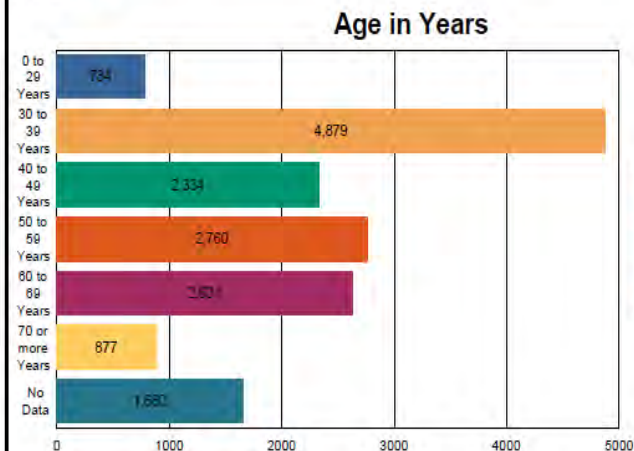
Massachusetts lawyers by year of admission to the bar



Minnesota bar

Age*	Count
Average Age	48
* Only Members with Age Data.	

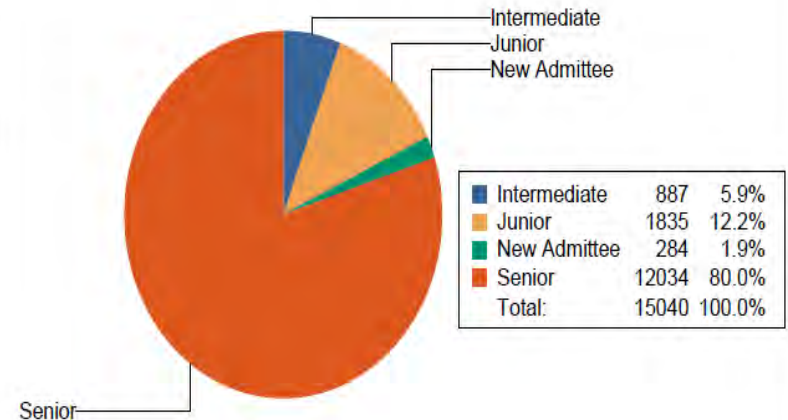
Age in Years*	Count
0 to 29 Years	784
30 to 39 Years	4,879
40 to 49 Years	2,334
50 to 59 Years	2,760
60 to 69 Years	2,631
70 or more Years	877
No Data	1,660



Experience Level*	Percent	Count
Senior	80.0%	12,034
Intermediate	5.9%	887
Junior	12.2%	1,835
New Admittee	1.9%	284

* Attorney Members Only.

Experience Level

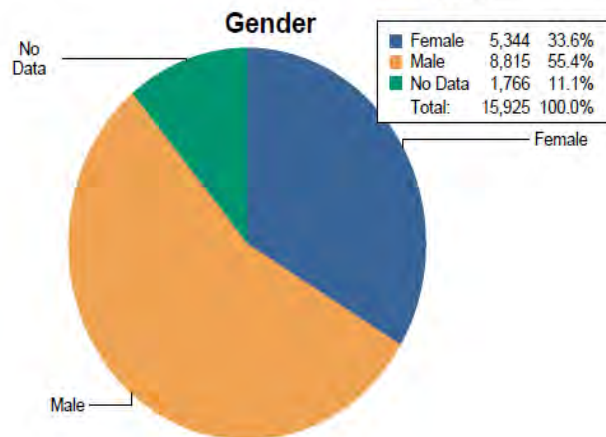


Minnesota bar

www.mnbar.org

Membership	Count
Total Members	15,925
Attorney Members	15,040
Non-Attorney Members	
Law Student Members	722
Paralegal Members	112
Law Management Associate Members	51

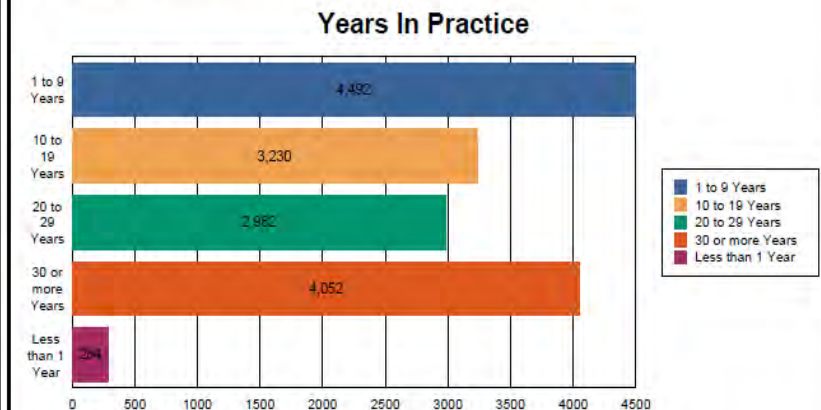
Gender	Percent	Count
Male	55.4%	8,815
Female	33.6%	5,344
No Data	11.1%	1,766



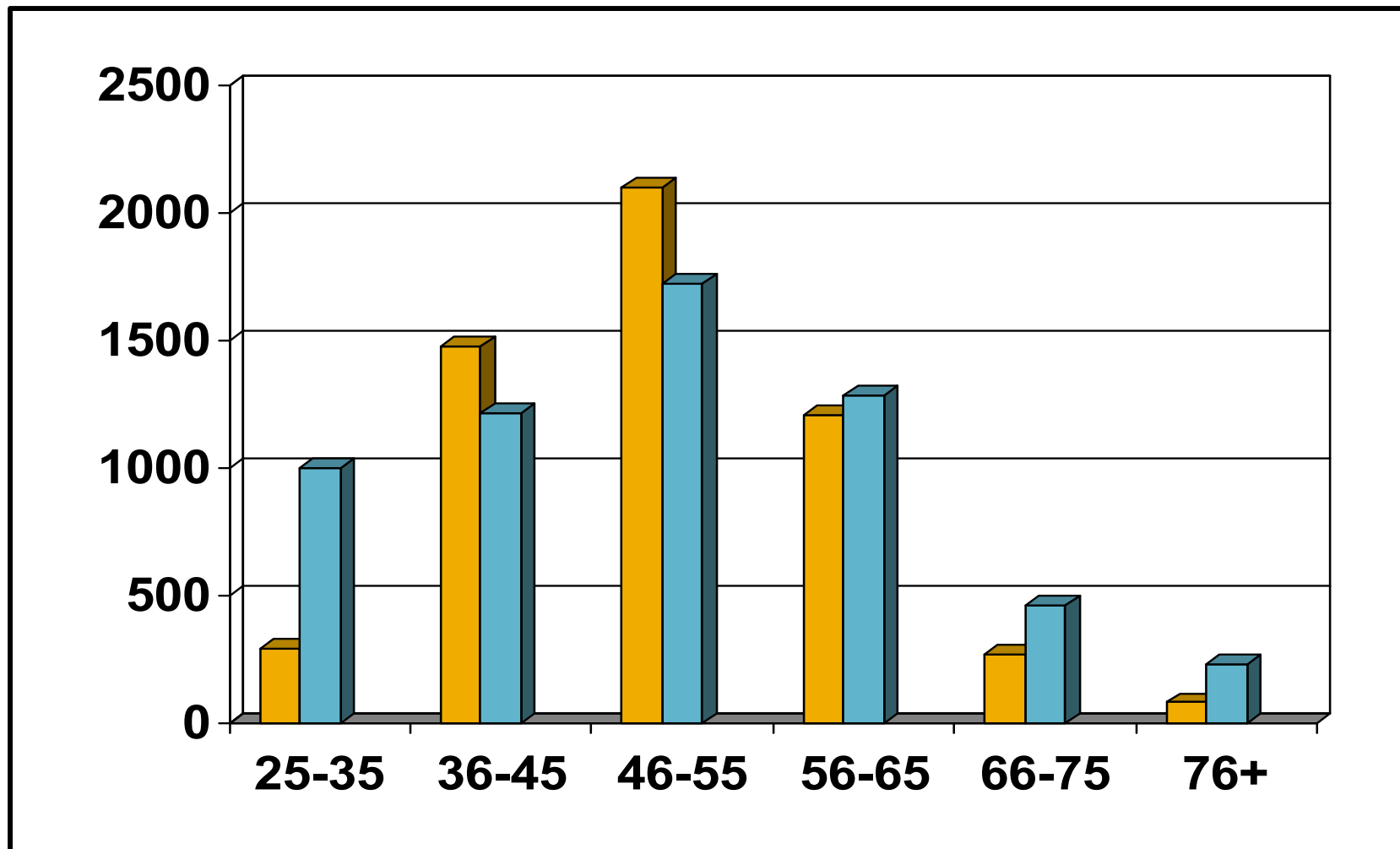
Years in Practice*	Count
Average Years in Practice	19
* Attorney Members Only.	

Years in Practice*	Count
1 to 9 Years	4,492
10 to 19 Years	3,230
20 to 29 Years	2,982
30 or more Years	4,052
Less than 1 Year	284

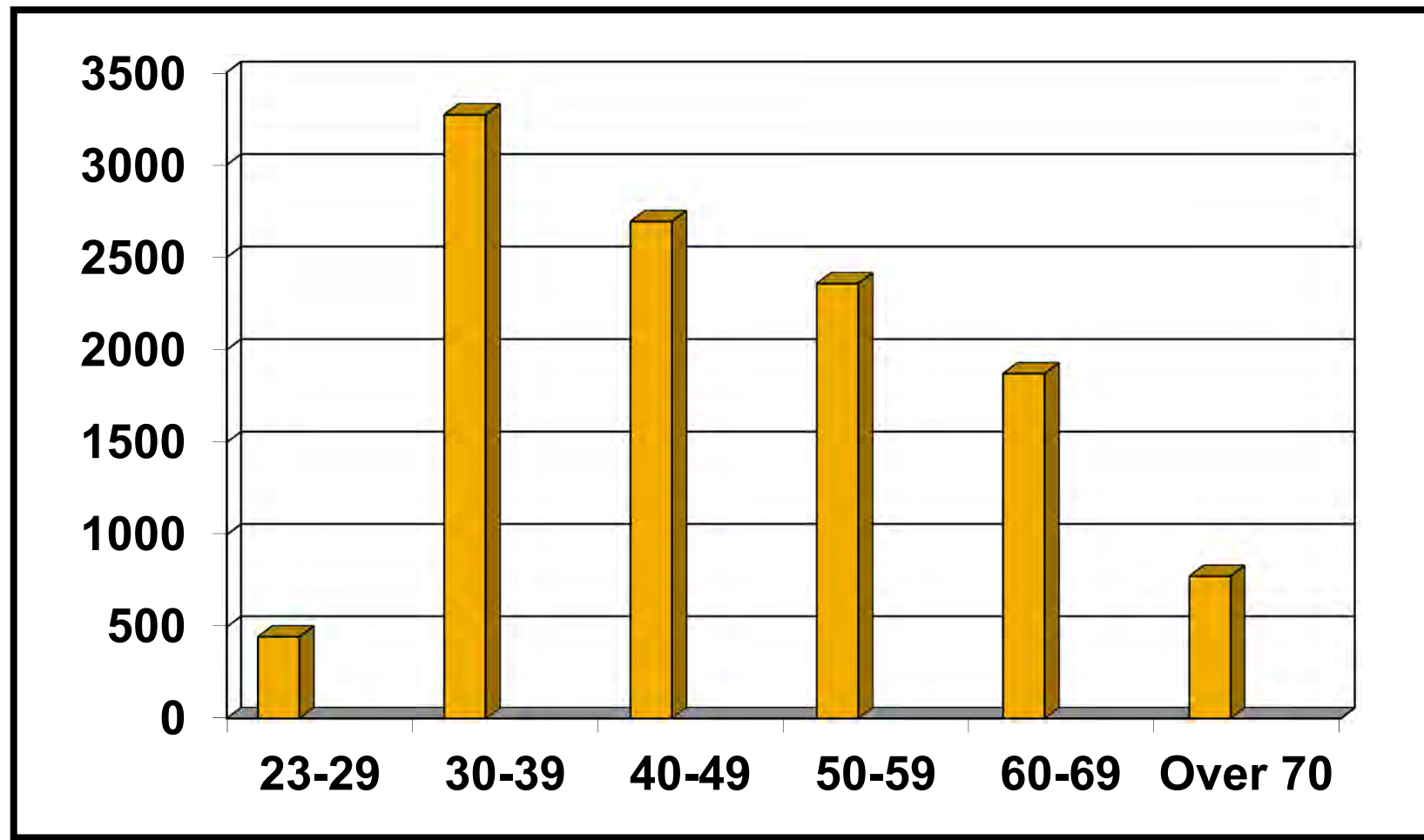
* Attorney Members Only.



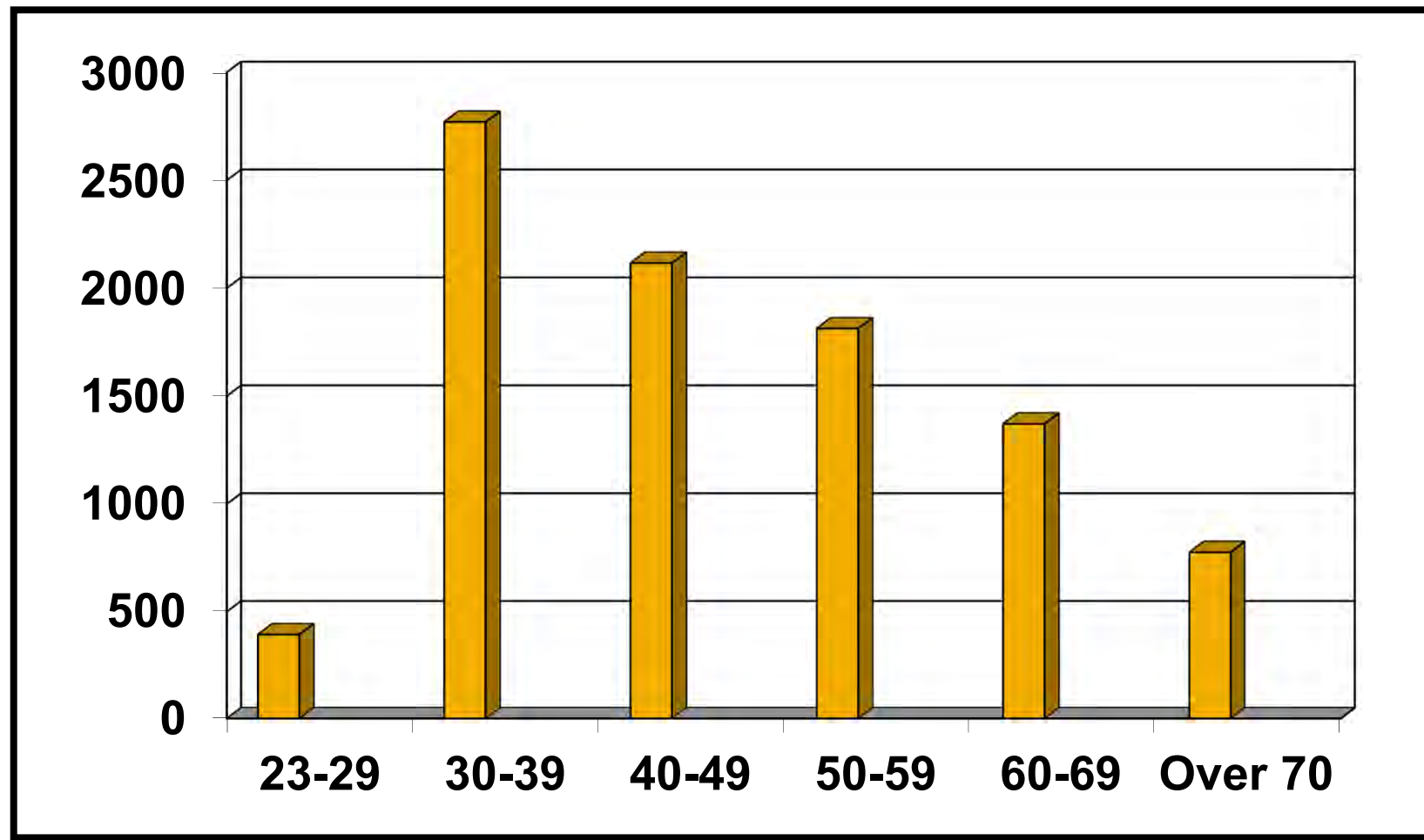
Rhode Island demographics for 2006 and 2011



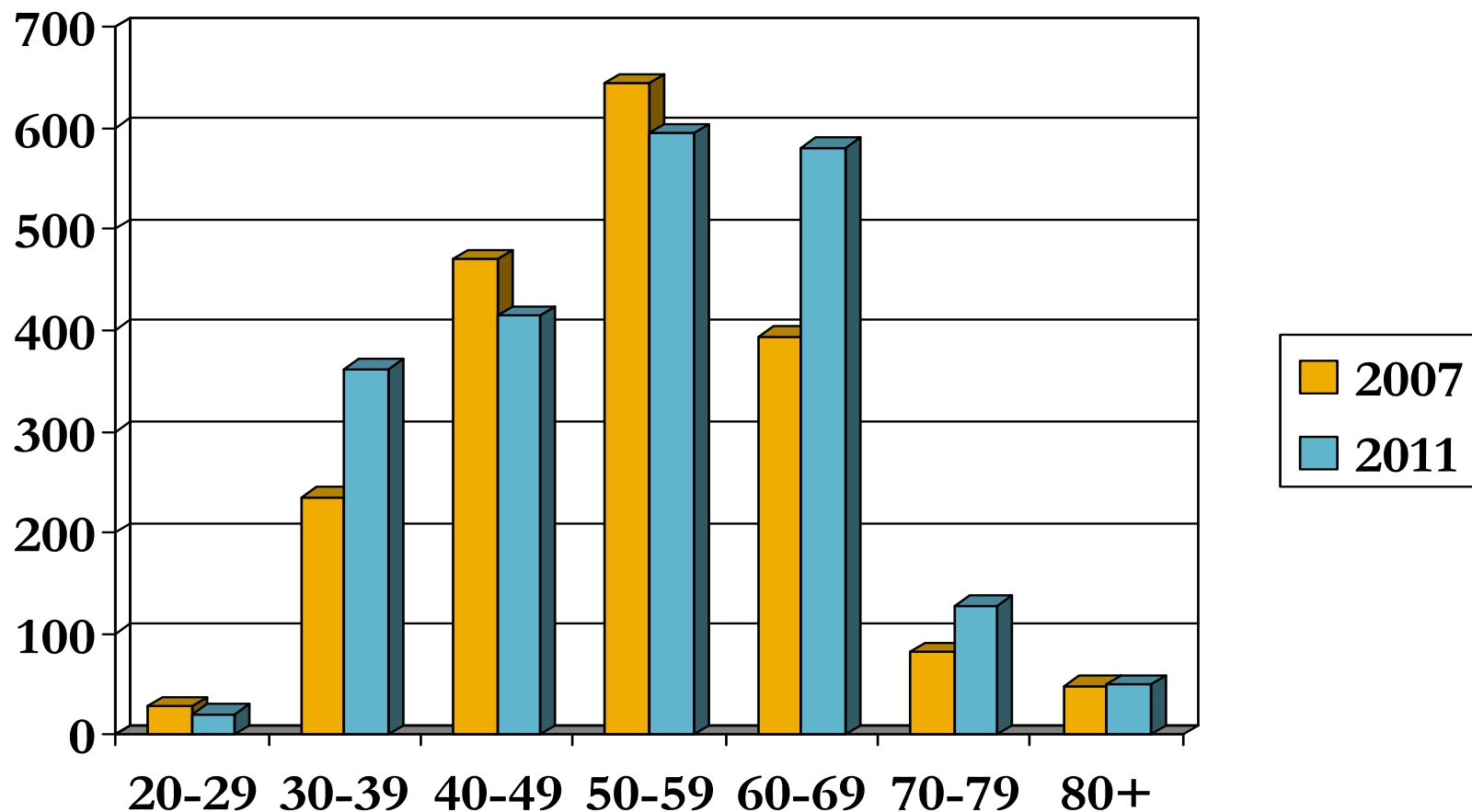
Utah Bar—All Lawyers



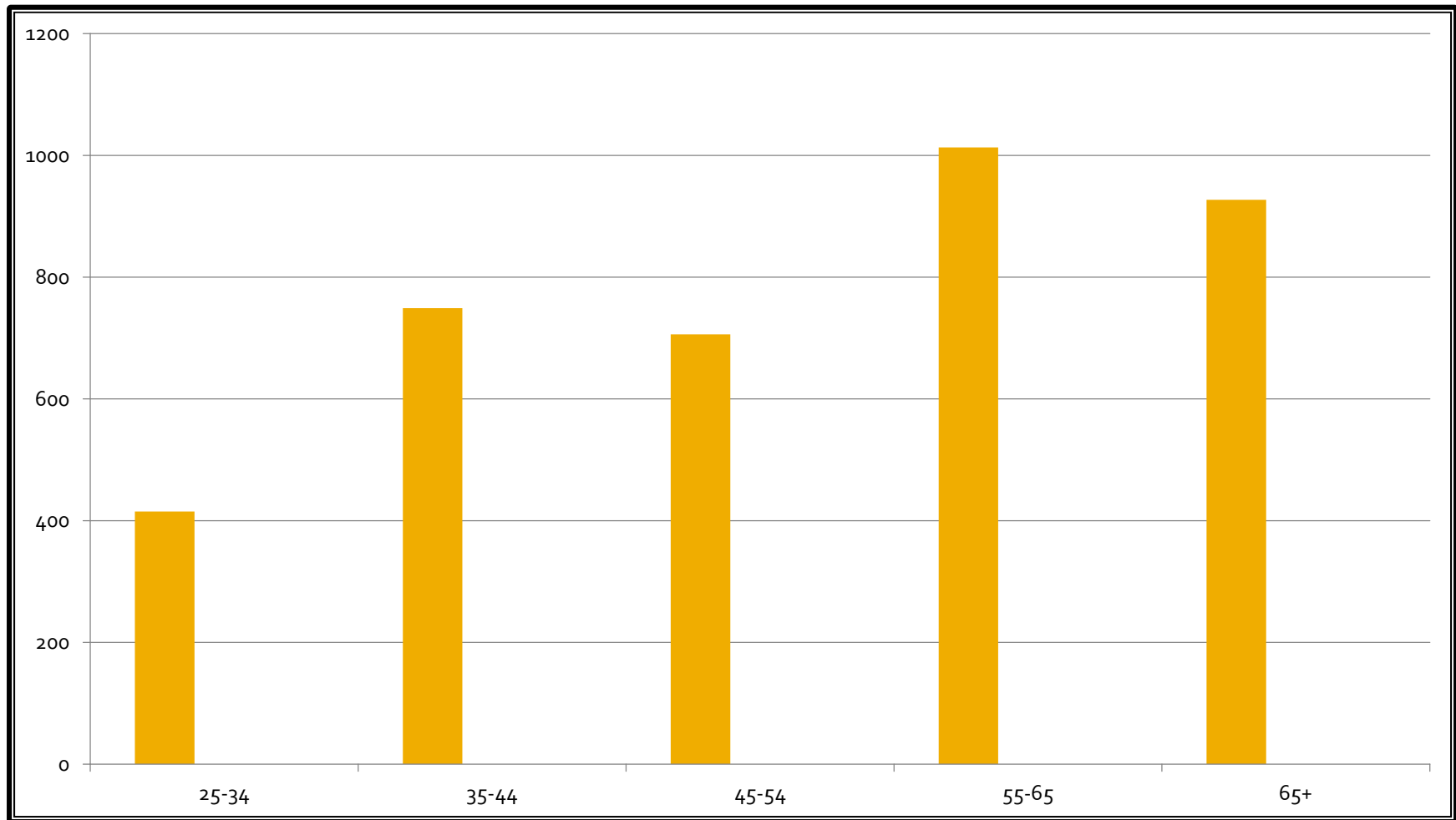
Utah Bar—Active Lawyers



Vermont Bar demographics for 2007 and 2011



Wyoming bar age demographics



ABA Commission on the Future of legal services

- ABA innovation center
- ABA platform/portal
- Annual legal checkup program
- Online dispute resolution system
- Regulatory changes
 - Regulatory objectives
 - Legal service providers
 - Entity regulation
 - Alternative business systems

What is the role for bar associations?

- Establish a Futures commission
- ABA Futures Commission web page
- **Bench bar Committee**
- Representatives from the legal world, judicial, political, business, consumers of legal services and on line legal service providers
- **Partnership with legal service providers**
- This is where are clients are going?
- **Provide artificial intelligence research**

What is the role for bar associations in this new world of change?

- Educate their members about benefits and risks of technology and how to use it to their benefit
- **Expedite getting young lawyers involved in leadership positions**
- Innovate how we deliver CLE and other services
- Attorney focus groups to determine what our membership wants
- **Consumer focus groups**
- Permanent Standing Committee on the Future of legal Services

How do we reimagine the profession?

- Regulations for the legal profession
- Change how we sell our services
- Embrace and use technology
- Develop new methods of delivering legal services involving technology portals especially for legal aid
- Re-engineer the court system

Regulatory changes

- **Regulate entities and not individual lawyers**
- Regulations for law school have to change to allow law schools to experiment
- **The tent has to be enlarged to include everyone who is a legal service provider**
- License and regulate Paralegals
- **2 year masters degree for legal technicians**
- **Multi Discipline Practice**
- **Non-Lawyer ownership**

Change how and where we sell our services

- The billable hour and inefficiency
- Project management
- Break litigation down into pieces:
Strategy; pleadings; discovery;
dispositive motions; trial and appeal
- Success fee
- Put lawyers where there are clients
- Apps are where it is going to happen

What can we do?

- Incubators for new lawyers to develop a modest means practice
- Unbundling legal services
- Seminars on using technology in the delivery of legal services
- Use of remote access for court appearances
- Court Kiosks in rural areas
- Legal resources placed in Community facilities

Embrace technology

- If it is cheaper to do it on line why are we still doing it in the office?
- **Add value to what is on line and give the rest away. It is on line for free anyway!!**
- As artificial intelligence becomes widely available our clients will expect us to use it
- *Automated document review*
- On-line portals
- **Apps**

Re-engineer the courts

- Self represented parties
- **Missing multiple days from work is not an option for many people**
- Discovery abuse
- **Cost of litigation is an access to justice issue**
- Limited scope appearances

Court solutions

- Judicial ADR
- **Mediation docket**
- Standard automatic disclosures
- **Standardized forms**
- Option for small claims on line
- Court service centers/Kiosks
- **Video conferencing**

Pro bono and technology

- If it is cheaper to do it on line why are we still doing it in the office?
- On Line portals 21st century answer
- **Think Apps and games**
- Maximize the use of artificial intelligence and technology and use attorneys for the difficult work

How do we increase the amount of pro bono?

- Unbundling legal services for the pro bono attorneys
- **Limited scope appearances for the pro bono attorneys**
- Combine technology portals, and platforms and lawyers to deliver services
- **Hybrid lawyer/form arrangements/MD Family**

How do we increase participation?

- **Attorney focus groups to determine what they want to increase the amount of pro bono work**
- **Consumer focus groups: How can we help?**
- **Second season of service for Seniors**
- **Project management of attorneys to maximize use of attorneys**

The Glass Half Full by Professor Benjamin Barton

- Civil Gideon and more pro bono are 20th century solutions to a 21st century problem
- **Against Civil Gideon and for Pro se court reform by Benjamin H. Barton Vol. 62 Florida Law Review 1227**

The profession in 2030

- Multi-Discipline practice
- **Entity regulation/portals**
- Alternative business structures
- **All documents will be done on line by artificial intelligence systems.**
- Automated dispute system for everything but the most complicated cases
- **Access to justice will be much improved from today because of: Portals/Artificial intelligence/Technology/On-line dispute resolution**

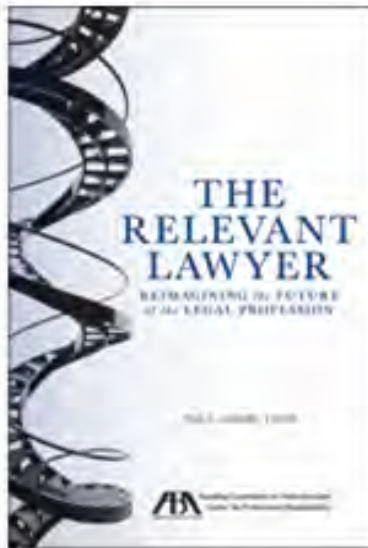
Stand-up your father's passin.



Resource materials

- The Florida Bar Futures Project: Vision 2016
- The ABA Commission on the Future of Legal Services (ABA website)
- Department of Justice: Access to Justice Project
- Utah futures report

Reimagining the Future of the Legal Profession.



Item Details:

Sharing expert insights on how and why the profession of law is changing in fundamental ways and how it will impact lawyers, the authors of this thought-provoking 20-chapter book will advance and sharpen the dialogue within the bar about accelerating disruption of the legal services...

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The Relevant Lawyer: Reimagining the Future of the Legal Profession

Editor(s): Paul A Haskins

Sponsor(s): Center For Professional Responsibility, Standing Committee On Professionalism

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ISBN: 978-1-63425-147-1

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2015, 6 x 9, 344 Pages, Paperback

Available both in print and E-Book formats!

Recommended reading

- The End of Lawyers? by R. Suskind
- The Vanishing American Lawyer by Professor Thomas Morgan
- Tomorrow's Lawyers, by R. Suskind
- The Future of the Professions by R. Suskind
- The Relevant Lawyer: Reimagining the Future of the Legal Profession
- ABA Commission on the Future of Legal Services web page

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2018 WL 4955691
Only the Westlaw citation
is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford, Complex
Litigation Docket at Hartford.

Meagan Corona
v.
Day Kimball Healthcare, Inc.

Docket Number:
Xo7HHDCV156075511S
|
File Date: September 20, 2018

Judge (with first initial, no space for
Sullivan, Dorsey, and Walsh):Moukawsher,
Thomas G., J.

Memorandum of Decision

Moukawsher, J.

***1** For the courts to guarantee the triumph of the law over the loud, there must be civility in court proceedings. Vital to this victory is the lawyer—the official our Rules of Professional Conduct hail as both “an officer of the legal system” and “a public citizen having special responsibility for the quality of justice.”

The court must take up the matter before it today because judges have a critical role

in seeing that lawyers uphold these special responsibilities. Indeed, for matters relating to courtroom conduct, judges have primary jurisdiction over lawyers who do not meet their obligations as officers of the court.¹ So it is this court's unpleasant duty to take up the question of the conduct of one of these public officers as she faces the potential for a seventh sanction from this court: Attorney Madonna Sacco.

¹ Practice Book § 2-45.

As it is sometimes with others, it may be the case with Attorney Sacco that a single comment can sum up a career. The comment at issue here—made by Attorney Sacco after some thirty years of practice—is as revealing as it is unacceptable. In the midst of a dispute during a deposition given before the court, a forgotten lapel microphone picked up Attorney Sacco explaining her courtroom strategy to an associate: “Fuck him,” she said—referring either to opposing counsel or the court itself—“I am going to give him such a fucking hard time.”

Attorney Sacco hasn't denied she said these words and the flash drive provided to the court confirmed she did say them. Instead, through her lawyer, she claimed this is just ordinary lawyer talk, reflecting what many professionals think or say when no third party is listening. Opposing counsel in this litigation, Attorney Angelo Ziotas, did not agree. He moved for sanctions for the conduct this declaration announced and he and his co-counsel disputed on the record the claim that this reflected the mores or the mouths of members of the Connecticut bar. To protect not merely the parties but the

system itself, this court separately and on its own authority ordered Attorney Sacco to show cause why she shouldn't be sanctioned for her deposition conduct.

This doesn't mean this opinion is about punishing members of the bar for their private use of this mindlessly overused profanity. But when wicked words betoken wicked deeds they are a matter for action. Here, those words reflect what Attorney Sacco was doing and would continue to do: willfully disrupt a proceeding in court. Indeed, they reflect what Attorney Sacco appears to have done and has been sanctioned for six times for over a nearly 20-year period.

The record of the court's proceedings confirms that Attorney Sacco meant what Attorney Sacco said. This court's involvement began with the ring of a telephone at a time when Attorney Sacco and her history were entirely unknown to this court. To its surprise, a particularly contentious dispute had erupted during a deposition over not very much and the parties called the court. The parties were so split and insistent during the conference call that instead of resolving the dispute on the telephone the court ordered the parties to come to court and argue the matter.

***2** They did so on October 31, 2017. And it didn't go well. After having shown up late for the hearing, Attorney Sacco repeatedly interrupted the court and disputed petty things like whose copy of the deposition transcript the court should read. Attorney Sacco rigidly insisted that it was perfectly

proper for an expert witness at a deposition to refuse to consider hypothetical questions. She bluntly insisted that the court had no authority to decide whether a witness had fairly answered a question. Then she set to squabbling in front of the court over the facial expressions of her opposing counsel. Not long after she lectured the court on what she perceived as wrong about its use of the word “nonsense” to describe the expert physician's refusal to recognize the difference between a factual and a hypothetical question, belligerently interrupting the court and earning her first warning from the court to correct her behavior. Finally silent, Sacco turned to physical antics, with her hands on her hips striking a defiant pose, head down shaking her head at length displaying disgusted disagreement while the court spoke. This earned her a second admonition to stop and “stand there like a professional.” Instead of complying and apologizing, she snapped “I am a professional from beginning to end.”

Undercutting this assertion, Attorney Sacco then misrepresented the deposition record to the court, stating that the witness had not refused a hypothetical but merely had resisted assumptions because an opinion could not be derived from “that fact alone.” As the court tried to get her to find this assertion in the transcript, Attorney Sacco turned on the court, accusing it of not being “interested in hearing my response.” After a lengthy attempt to bicker with the court and divert it away from the topic, it was revealed that the transcript showed Attorney Sacco had made up the testimony she relied on.

And so the hearing went. Attorney Sacco bizarrely maintained that a hypothetical can't be asked unless it relies on the actual facts of the case. She continued to interrupt the court and when the court said it disagreed and tried to explain she interrupted and peremptorily said "then rule your honor." The court gave a third warning that it disapproved of the attitude Attorney Sacco displayed. Nonetheless, Attorney Sacco went on to declare "we're not here to rule as the court has done" and that "the court cannot determine whether or not an answer is adequate or not based upon the transcript and based upon the court's lack of knowledge of the case."

When the court said the rest of the deposition would be in court she said "I don't even understand that" and went on to lash out at the court for insulting her, including when the court admonished her that her behavior reflected a misunderstanding of her professional duties. In a fourth admonition, she was warned to stop interrupting the court and the deposition ended with a fifth admonition that the court might have to take other action if her behavior continued.

On November 29, 2017, in the wake of this unhappy introduction, plaintiffs' counsel resumed in court the expert deposition of Attorney Sacco's then client, the defendant Dr. Erika J. Kesselman. Rather than wipe the slate clean, Attorney Sacco renewed her complaints from the last time and refused to sit down; she lectured opposing counsel on the position of his microphone and demanded to sit in the witness box next to the witness while refusing to accept the

court's ruling that she could not, bickering and sniping at the court instead.

Instructed to follow the rules and confine non-privilege objections to merely "objection to form," Attorney Sacco interrupted virtually every exchange with objections that made clear that many—if not most—were baseless, especially since some of her objections were stated either before a question was asked or even when opposing counsel made a statement rather than asked a question. The court had to warn Attorney Sacco to at least hold her objections until a question was asked.

Attorney Sacco asserted a privilege objection to the yes or no question of whether the witness had ever heard of the phrase "standard of care" before. When the privilege objection was overruled, Sacco refused to accept the court's ruling, demanding the transcript be read back, interrupting the court, and rudely disputing its right to rule on the privilege objection in the manner set out in Practice Book § 5-5.

***3** Carrying on her refusal to cooperate, Attorney Sacco refused to sit down when asked to do so and even when ultimately she was ordered to do so. Despite the court's repeated orders, Attorney Sacco remained standing and insisted that since counsel asking the question was standing she could stand too. She continued to berate and argue with the court over the issue even after being given her sixth admonition and being specifically threatened with a finding of contempt.

To the extent the deposition was allowed to have any substance, it revolved around Kesselman's stubborn refusal to answer simple hypothetical questions, to say when last she read a medical treatise, to recognize the phrase "standard of care" and the like. Having listened to this hedgehog refusal to engage in even the most ordinary exchange of questions and answers, the court infers this didn't reflect the attitude of the witness alone but her coaching by her counsel. Kesselman gave every appearance of being extremely uncomfortable and greatly distressed while giving her non answers and engaged in a revealing exchange that the court repeatedly had warned Attorney Sacco against. An objection to form with the added hint of "what records?" from Attorney Sacco yielded a parrot like response that "it would depend on the records" from the witness. Attorney Sacco was warned for at least the seventh time in consequence.

As the deposition limped along, the court responded to Attorney Sacco's opposing counsel's claim of obstruction by noting that the court did not expect counsel merely to keep asking the unanswered questions indefinitely. The court explained that the rules allowed him to seek other remedies, including the sanction of negative inferences. Attorney Sacco then snapped that she was intimately familiar with the rules and asserted that the court had no such power. The deposition proved a waste of the court and the parties' time. It ended with opposing counsel's decision to resolve the matter with a motion for sanctions. The motion filed led

the court, after more buffeting, to where it is today.

The plaintiffs' motion for sanctions was filed. It included the tape catching the Attorney Sacco statements from the lapel microphone. With at least the virtue of consistency, Attorney Sacco then struck back with unreasonable belligerence, without any basis in the rules, moving to strike the entire motion from the docket and demanding that the court refer Attorney Ziotas to the grievance committee while simultaneously demanding the court's recusal—a motion this court referred to the district's administrative judge.

After a full hearing and briefing, Judge David Sheridan denied Attorney Sacco's motion directed against the court. After this, Attorney Sacco was discharged by her client, substitute counsel withdrew the motion against Attorney Ziotas, and this court ordered Attorney Sacco, who ultimately appeared with her own lawyer, to show cause why she should not be sanctioned for her conduct before the court.

At the hearing on the motion, Attorney Sacco's lawyer claimed the court couldn't consider Attorney Sacco's remark because it did not appear on the official transcript and was attorney work product. But this is wrong on both counts. First, the remark is important because this is an attorney revealing an intention to disrupt a court proceeding. It wouldn't matter where she announced the plan. The plan is the wrong, not the place. Attorney Sacco is not being

scrutinized for using improper language on the record.

*4 Second, the work product doctrine doesn't bar the court from considering the remark. As the Supreme Court held in 2003 in *Harp v. King*, work product is only protected when an adequate effort is made to keep it confidential.² An attorney must at least be expected to be aware when a live microphone is attached to her in court. The microphones can be muted and a reasonable attorney would take some safeguards to prevent inadvertent disclosure of work product by muting the microphone when conferring with an associate. Attorney Sacco claims thirty years of intimate knowledge of the courtroom and medical malpractice depositions. She can hardly claim ignorance.

² 266 Conn. 747, 768-69.

And while it might be an expression of strategy to say, "I am going to give him [the court or counsel] such a fucking hard time," it is hardly the kind of strategy this court should protect. As the district of New Jersey said in 1994 in *Ward v. Maritz, Inc.* unethical conduct is not protected by the work product rule.³

³ 156 F.R.D. 592, 594.

Attorney Sacco's counsel also insists there is no reason to believe she did anything consistent with this statement and therefore she shouldn't be punished for it. Indeed counsel tried to suggest that every statement Attorney Sacco made must be viewed in isolation. But this assumes rather too much. This point might be well taken if counsel

or the court's concern was in fact punishing Attorney Sacco for each isolated remark. Indeed, the court said so on the record at the hearing. But this ignores the essence of the problem: Attorney Sacco's conduct was part of a totality the effect of which was to frustrate by petty objections, interruptions, and inappropriate behavior, a lawyer who is trying to question a witness. And plaintiff's brief amply illustrates how it kept the lawyer away from reasonable answers to reasonable questions. Second, her profane pronouncement is consistent with how Attorney Sacco handled the proceedings before, during, and after the remark. Third, punishment is being considered here for the conduct, not the remark—which itself is only affirmation that her disruptions were intentional. Fourth, the conduct is consistent, as we will see, with twenty years of sanctions by this court.

Courts, including this one, are justifiably reluctant to sanction lawyers and seek alternatives whenever possible. The courts' reluctance to sanction attorneys makes the six sanctions against Attorney Madonna Sacco that we know of stand out all the more.

Attorney Sacco was first sanctioned by this court 21 years ago in *Hagbourne v. Campell*. It was for the same deposition conduct at issue here: "prolix objections and improper interruptions." The court ordered Attorney Sacco to pay attorneys fees to the plaintiff attributable to the time wasted at the deposition because of the improper objections and frequent interruptions.⁴

4 Superior Court, judicial district of Waterbury, Docket No. CV 96 0132593 (December 12, 1997, Vertefeuille, J.) (21 Conn. L. Rptr. 121).

Attorney Sacco was next sanctioned in 2000 in *Babcock v. Bridgeport Hospital, Inc.* Again, the sanction was for misconduct in a deposition, including suggesting answers to a client with the court holding she “improperly obstructed the deposition, imposed expense and delay, and warrant[ed] the imposition of sanctions.”⁵

5 Superior Court, complex litigation docket at Waterbury, Docket No. X01 CV 98 0150693 (November 15, 2000, Hodgson, J.).

Attorney Sacco was sanctioned again in 2003 for deposition misconduct in *Viscount v. Berger*. Once again, Attorney Sacco was found to have injected inappropriate objections into the process and to have used improper speaking objections that disrupted the proceedings. She was required to pay for the proceedings.⁶

6 Superior Court, judicial district of Ansonia-Milford, Docket No. CV 01 0074852 (December 1, 2003, Robinson, J.).

*5 Undeterred, Attorney Sacco continued the offending deposition conduct in 2007 in *Shannehan v. Aranow*. There, she was found to have improperly and repeatedly disrupted the deposition with speaking objections and impermissible witness instructions. The court found her behavior toward opposing counsel was “inappropriate, undignified, and degrading to the process.” The court ordered her client to pay for the renewed deposition.⁷

7 Superior Court, complex litigation docket at Waterbury, Docket No. X06 CV 03 0183642 (May 18, 2007, Stevens, J.).

Two years later in 2009, she was still doing the same thing. In that year, Attorney Sacco's behavior was catalogued and considered in a thoughtful opinion by Judge Robert Shapiro. Judge Shapiro found that Attorney Sacco's obstructive deposition conduct was “intentional, and not inadvertent” and that the “absence of significant sanctions would prejudice the plaintiffs ...”⁸ The court imposed financial sanctions and warned that they may not be enough in the future, discussing possible disqualification and noting that “[i]ncurring sanctions awards should not become a cost of doing business.”⁹

8 Superior Court, complex litigation docket at Hartford, Docket No. X04 CV 5015994 (July 10, 2008, Shapiro, J.).

9 *Id.*

Finally, in 2014, the court despaired of deterring Attorney Sacco's misconduct merely by financial sanctions. It took up the matter of harsher measures after Attorney Sacco was presented to the Superior Court for her deposition misconduct by the state's chief disciplinary counsel. The court required Attorney Sacco to submit to a one-year period of monitoring by another attorney. Attorney Sacco was required to provide the attorney with a copy of all deposition transcripts or videotaped depositions in which she had participated commencing with the court's order. The monitoring attorney was to review the transcripts and/or video recordings of depositions, decide whether they contained

abuses and inform the court of any misconduct.¹⁰ At the time of the deposition dispute in this case, Attorney Sacco had been free of a monitor for around two years.

¹⁰ *Chief Disciplinary Counsel v. Sacco*, Superior Court, judicial district of Fairfield, Docket No. CV 14 6045132 (September 22, 2014, Bellis, J.).

After 20 years of failed efforts, the court must consider for the sake of the profession it supervises what to do given Attorney Sacco's latest misconduct. After six prior sanctions and at least eight warnings in this case it is not as if alternatives haven't been tried and incremental sanctions imposed. The court finds by clear and convincing evidence that Attorney Madonna Sacco has engaged in serious misconduct. And there is ample authority to deter further misconduct by more substantial methods.

For discovery abuse, Practice Book § 13-14 empowers the court to “make such order as the ends of justice require,” including costs and fees and other relief. General Statutes § 51-84 says that courts may fine attorneys, suspend them or discipline them for good cause. Practice Book § 1-25 similarly gives courts broad powers to impose sanctions for “[willful or repeated failure to comply with rules or orders of the court ...” Practice Book § 2-44 grants the courts authority to suspend or disbar attorneys “for just cause.” Finally, as the Supreme Court recognized in 2001 in *Millbrook Owners Ass'n, Inc. v. Hamilton Standard*, courts have “the inherent power to provide for the imposition of reasonable sanctions, to compel the observance of its rules.”¹¹

¹¹ 257 Conn. 1, 9-10.

*6 So the court's job is to craft a sanction reasonable to fit the circumstances. Plainly, neither the five monetary sanctions, nor court monitoring, nor Judge Shapiro's threat of disqualification has had any appreciable deterrent effect on this attorney's misconduct. It would appear only an interruption of the misconduct that has permeated Attorney Sacco's practice and the prospect that continued misconduct might end that practice may be sufficient to deter future misdeeds.

As the court in *Millbrook* held, it isn't fair to punish attorneys who don't know what they have done wrong and haven't been given fair warning by court order to stop.¹² Here, Attorney Sacco has known of her own misconduct for over 20 years. She has fought with opposing counsel, interrupted their questions, peppered depositions with objections designed primarily to disrupt them, raised frivolous claims about testimony and now she has done the same thing in front of the court. She was warned about this same pattern of misconduct some eight times in these proceedings. She has been found in the past and has declared openly and obscenely in this case that her violations are intentional attempts to disrupt the orderly course of justice in depositions. There can hardly be a clearer case of a party who knows what not to do but has done it anyway even after being repeatedly and distinctly ordered not to do it.

¹² 257 Conn. at 17-18.

On August 20, 2018, this court granted Attorney Sacco an almost five-hour hearing

on the motion for sanctions and the court's own show-cause order entered on July 25, 2018. The parties extensively briefed the matter. They had copies of the transcripts at issue. Attorney Sacco was represented at this lengthy hearing by able and experienced counsel. Her lawyer was repeatedly invited to put on whatever evidence his client desired but Attorney Sacco declined to testify. Attorney Sacco has had due warning and due process.

While this means sanctions may be imposed, they must be proportional. As the Supreme Court held in 2018 in *Ridgaway v. Mount Vernon Fire Insurance Co.*, judges must consider five factors in gauging the appropriate sanction:

The nature of the conduct.

The frequency of the conduct.

Whether the attorney knew she faced potential sanctions.

The availability of lesser sanctions.

The party's participation or knowledge.¹³

¹³ 328 Conn. 60, 73.

Here, all five factors favor a significant sanction. The conduct here was insulting to the parties and the court. It detracted from the dignity of judicial proceedings and was the kind of behavior that tends to undermine respect for the litigation process, especially for the party who was its victim here but even for the defendant doctor who was likely suborned into participating in it. Above all, it threatened to pervert the

course of justice by preventing a party from receiving reasonable responses to reasonable deposition questions.

The frequency of the conduct at issue weighs heavily here. A long-practicing attorney sanctioned six times over twenty years and warned at least eight times in these proceedings has persisted in the same conduct—and even announced in a profane boast that the conduct was intentional and would continue.

This attorney certainly knew what was coming. At any point in the proceedings when told to cease her misconduct she could have simply stopped. Indeed, she did not stop when repeatedly ordered to and did not stop when specifically threatened by the court with contempt and sanctions. In fact, it was the proceedings themselves that had to be stopped because Attorney Sacco's knowledge of potential sanctions did nothing to deter her and allow the deposition to proceed.

***7** Repeated monetary sanctions have been tried. Court-ordered monitoring of Attorney Sacco's practice has been imposed. And having been discharged from representing the defendant in this case, the court cannot sanction Attorney Sacco by merely disqualifying her from this case. This leaves the court only some more substantial sanction to choose.

And a more substantial sanction is especially justified by the fact that Attorney Sacco so clearly knew what was wrong. Having been told by the courts repeatedly to stop

the wrongdoing, instead of heeding them her ultimate response was indecent defiance: “Fuck him. I am going to give him such a fucking hard time.” With lesser sanctions failing and disqualification unavailable, the only sanction proportional under *Ridgaway* is suspension from practice. As the Appellate Court recognized in 2016 in *Disciplinary Counsel v. Williams*, suspension is one of those sanctions the court has the inherent power to impose.¹⁴

¹⁴ 166 Conn.App. 557, 570.

To be proportionate and—the court can hope—effective, the suspension must be long enough to bite but not so long as to bury the attorney's practice. In multi-year litigation like this one a few weeks absence is unlikely to be noticed by either lawyer or clients. Instead, the suspension must be long enough to present the future prospect of exclusion from the legal profession while allowing Attorney Sacco a chance, at long last, reform. Given that her behavior has persisted for twenty years, the practice will not likely go away with a short suspension.

Therefore, the court will impose upon Attorney Sacco a 120-day suspension from the practice of law together with the costs she has forced on the parties to these proceedings. The court will consider reducing the suspension to 90 days upon application and satisfactory evidence that Attorney Sacco has received at least 20 hours of suitable counseling through sources recommended by the Connecticut Bar Association or a qualified physician. The purpose of this part of the ruling is to recognize that a change in litigation

philosophy is likely the only way to prevent future problems. If it fails to take hold—a very real possibility given the length and depth of the problem—the courts will face this moment again and Attorney Sacco may face far harsher consequences. She is being offered an opportunity to prevent this.

The suspension will begin within twenty-one days from the date of this order or the date which it takes final effect following any appeal, whichever is later. During the twenty-one-day grace period Attorney Sacco will inform her firm and clients in writing that the court has suspended her from the practice of law for misconduct and make such arrangements as may be necessary to minimize any prejudice to her clients. Once the suspension is in effect, she may not participate in performing any legal work for any client and must limit her non-legal activities regarding clients to matters that might strictly be necessary to safeguard their interests. Other than such activities—to guard against evasion of her suspension from practice—she may have no contact with clients or potential clients. Attorney Sacco must also make the parties financially whole. The parties are granted thirty days to file any claim for fees or expenses they claim were incurred as a consequence of Attorney Sacco's misconduct. The court will then schedule a hearing on whether the claims are reasonable.

***8** The plaintiffs also seek sanctions against the defendant doctor whose deposition answers were plainly evasive and—the court hopes—the product of bad legal advice. The court invites her with the advice of

new counsel to ask opposing counsel to reconvene at her sole expense the twice aborted deposition that is the center of this dispute. If Kesselman fairly answers questions at the reconvened deposition, no further sanction will be considered beyond paying the legal fees and other expenses associated with the renewed deposition. If she complies, the court will not allow her prior evasions to be used for impeachment at trial. If she chooses not to submit to further deposition within thirty days of this order, the court will upon motion from plaintiffs' counsel craft an appropriate alternative sanction, including a likely holding that some part of the plaintiffs' case will be deemed established.

The court is aware of the frustration that plaintiff's counsel will doubtless feel about giving the witness another chance. Kesselman must have known the game she was playing and clients can't typically hide behind their lawyers when they themselves violate the rules. But there is a significant possibility here that the defendant's failings have been in large part because of our failings—those of the legal profession, a public institution whose credibility is at stake here. Besides, *Ridgaway* suggests it is

appropriate for a court in setting a sanction to decide if a matter is mostly the lawyer or mostly the client's fault—and here the court infers that the matter is mostly the lawyer's fault.¹⁵ Punishing this defendant witness without another chance is also likely unfair here given that she now swears that Attorney Sacco never told her she had been disclosed as an expert and her expert disclosure has been withdrawn. This likely colored her response to some of the questions posed and may even eliminate the need for some of them to be asked again.

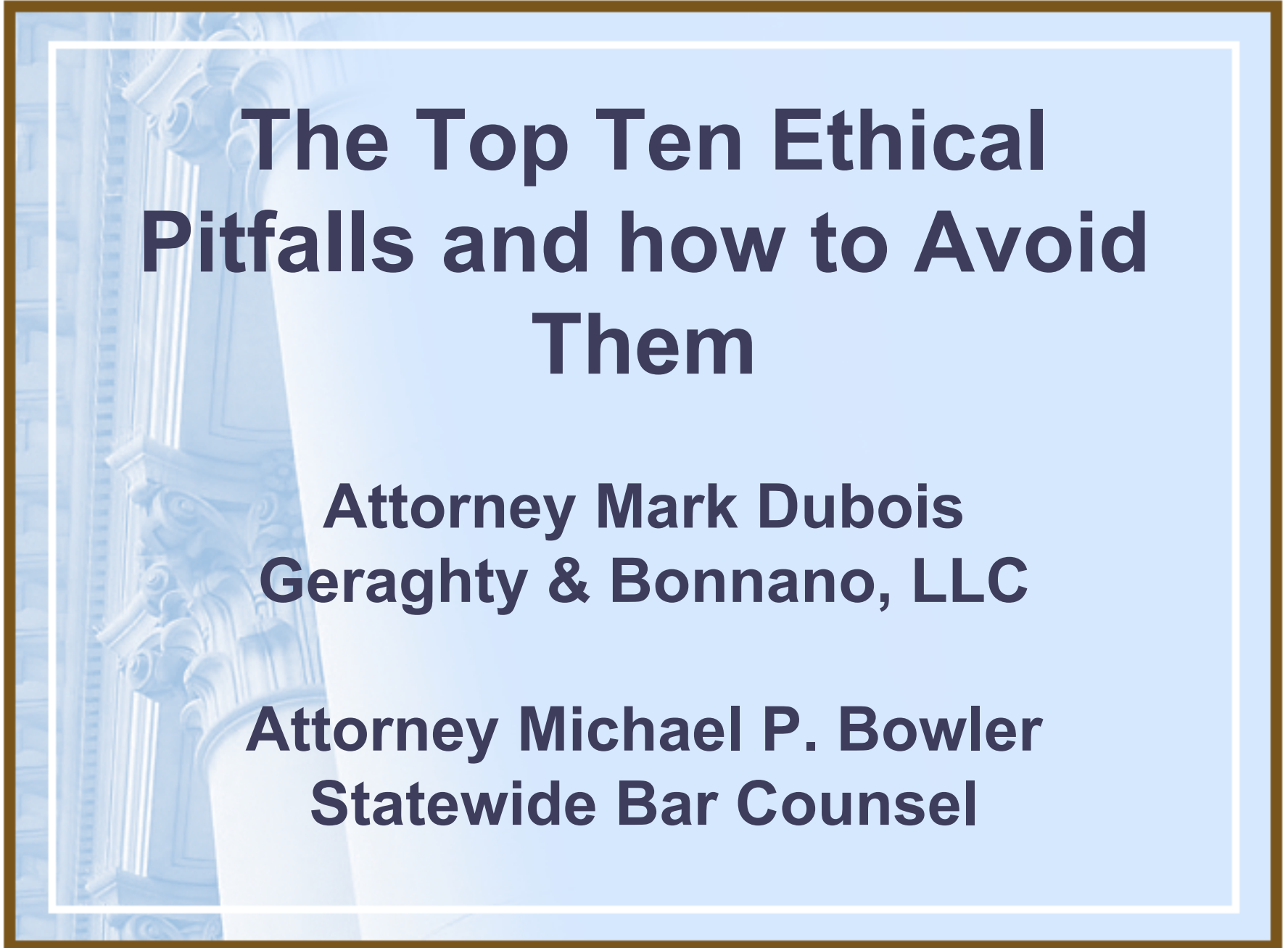
¹⁵ 320 Conn. at 75.

Attorney Madonna Sacco is suspended from the practice of law for 120 days under the terms listed above. The plaintiffs' motion for sanctions against the defendant Kesselman is denied without prejudice to its renewal on the terms described in this memorandum.

BY THE COURT

All Citations

Not Reported in Atl. Rptr., 2018 WL 4955691

The background of the slide features a faint, blue-tinted image of classical architectural columns, likely from a courthouse or government building. The columns are fluted and have ornate capitals. The entire slide is framed by a thin brown border.

The Top Ten Ethical Pitfalls and how to Avoid Them

**Attorney Mark Dubois
Geraghty & Bonnano, LLC**

**Attorney Michael P. Bowler
Statewide Bar Counsel**

1. Financial Matters

- **Trust Accounts, IOLTA**
- **Safeguarding**
- **Commingling**
- **Reconciling**
- **Record Keeping**
- **Overdrafts**
- **Audits**

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2. Fees and Fee Agreements

- **Rule 1.5.**
- **When Do You Need a Fee Agreement and When Do You Need a Signed Fee Agreement?**
- **Scope, Fees, Costs**
- **Reasonable and Unreasonable Fees**
- **Sharing Fees**

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3. Communications

- **Clients**
- **Counsel**
- **Parties**
- **The Court**
- **Others**
- **Misrepresentations**

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4. Electronic Communications and Social Media

- **STOP(!!) and Think Before You Text and Tweet!**
- **Emojis and Emoticons**
- **Rule 8.2(a) and Free Speech**

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5. Diligence

- **Timeliness**
- **Thoroughness**
- **Procrastination**
- **Malpractice**

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6. Competency

- **Know What You Know and Know What You Don't Know**
- **Just Say No!**
- **Technology Knowledge is a Must!**

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7. Conflicts

- **What Forms an Attorney Client Relationship?**
- **Conflicts Checks in Your Office**
- **Concurrent and Former Clients**
- **Duties of Confidentiality and Loyalty**
- **Waivers and Unwaivable Conflicts**
- **Declining Representation**

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8. Civility

- Read the Preamble to the ROPC
- Advocacy vs. Obnoxiousness
- Extends to Clients, Opposing Counsel, Opposing Clients, Third Parties, and the Court

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9. Confidences

- **Rule 1.6**
- **Interplay with Attorney/Client Privilege**
- **Appropriate Circumstances to Disclose Confidential Information**

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10. Personal Conduct

- **You are an Officer of the Court
24/7/365.**
- **Criminal Conduct and its Professional
Consequences**

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http://www.ctprobate.gov/Pages/Statutes-and-Rules-of-Procedure.aspx

Home - Home Rules of Procedure

Suggested Sites Pages - Welcome (2) Pages - Welcome Sign In O'Connor announces li... Return to Evaluation Home

 **CONNECTICUT PROBATE COURTS**
Rules of Procedure

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Rules of Procedure

The publication *Probate Court Rules of Procedure* governs the manner in which cases are handled in the Probate Courts. The rules are intended to promote uniformity in the procedures used by all Probate Courts throughout the state and are an essential resource for attorneys and court users. To view the rules, click here:

[Rules of Procedure](#)

To order of printed copy of the Probate Court Rules of Procedure please fill out the [order form here](#) and send it with a check to:

Commission on Official Legal Publications
111 Phoenix Avenue
Enfield, CT 06082-4453

Go to the [Commission on Official Legal Publications \(COLP\)](#) webpage for more information.

The Probate Court Rules of Procedure are updated biennially to ensure that the rules reflect recent case law and changes to statutes and to further improve court procedures.

To assist with developing recommended revisions to the rules, the Probate Court Administrator established the [Probate Court Rules Advisory Committee](#). The committee is comprised of probate judges, court staff, attorneys and members of the public. Please click on the link for the committee's agendas and minutes.

Written comments on the Probate Court Rules of Procedure are welcome and may be sent to the following address:

Probate Court Administrator
186 Newington Road
West Hartford, CT 06110

Probate Court Statutes

Below is a list of statutes that govern probate law in Connecticut.

[Title 45a](#) - Most probate statutes can be found in this title

C.G.S. section 17a-274 - Involuntary placement of a person with intellectual disability

Part II of Chapter 2181 includes with C.G.S. sections 17-105 - Mental health and substance abuse treatment

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