The Journal of the Legal Profession

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The University of Alabama School of Law

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Judith L. Bonner, B.S., M.S., Ph.D.; Provost, The University of Alabama.
Kenneth C. Randall, B.A., J.D., LL.M., LL.M., J.S.D.; Dean.
Steven C. Emens, B.S., M.B.A., J.D.; Associate Dean.
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Jenelle Mims Marsh, B.S., J.D.; Senior Assistant Dean.
Elizabeth U. Sadler, B.A., J.D.; Assistant Dean.
Cynthia Lee Almond, B.A., J.D.; Assistant Dean.
Claude Reeves Beers, B.A., J.D.; Assistant Dean.

Faculty

The date following the title indicates the year of first appointment to the Faculty of Law.

William L. Andreen, B.A. (College of Wooster), J.D. (Columbia); Edgar L. Clarkson Professor of Law, 1983.

Carol Rice Andrews, B.S., J.D. (Illinois); Professor of Law, 1995.

Donald W. Baker, B.A. (Southern Methodist), J.D. (Texas); Ira Drayton Pruitt, Sr. Professor of Law, 1974.

William S. Brewbaker III, B.A. (Vanderbilt), J.D. (Virginia), LL.M. (Duke); Professor of Law, 1993.

Alfred L. Brophy, A.B. (Pennsylvania), J.D. (Columbia), Ph.D. (Harvard); Professor of Law, 2001.

Carol N. Brown, A.B., J.D., LL.M. (Duke); Assistant Professor of Law, 2001.

James D. Bryce, B.A., J.D. (Columbia), LL.M. (New York University); Joseph D. Peeler Professor of Law, 1978.

Pamela H. Bucy, B.A. (Austin College), J.D. (Washington University); Frank M. Bainbridge Professor of Law, 1987.

Harry Cohen, B.A., J.D. (Tulane); Marc Ray Clement Professor Emeritus of Law, 1954.

Joseph A. Colquitt, B.S., J.D. (Alabama), M.J.S. (Nevada-Reno); Jere L. Beasley Professor of Law and Director of Trial Advocacy Programs, 1991.

Camille W. Cook, A.B., J.D. (Alabama); John S. Stone Professor Emerita of Law, 1968.

Alan L. Durham, B.A. (Pomona College), J.D. (University of California, Berkeley); Associate Professor of Law, 1998.

Steven C. Emens, B.S. (University of North Alabama), M.B.A., J.D. (Alabama); Associate Dean and Director of Continuing Legal Education Program, Professor of Clinical Legal Instruction, 1980.

Bryan Keith Fair, B.A. (Duke), J.D. (UCLA); Thomas E. Skinner Professor of Law, 1991.

Daniel M. Filler, A.B. (Brown), J.D. (New York University); Associate Professor of Law, 1998.

Tony Allan Freyer, A.B. (San Diego State University), M.A., Ph.D. (Indiana University); University Research Professor of History and Law, 1984.

J. Noah Funderburg, B.A. (Auburn), J.D. (Alabama); Senior Assistant Dean and Professor of Clinical Legal Instruction, 1982.

Charles W. Gamble, B.S. (Jacksonville State University), J.D. (Alabama), LL.M. (Harvard); Henry Upson Sims Professor of Law, 1982.

George S. Geis, B.S. (University of California at Berkeley), M.B.A., J.D. (University of Chicago); Assistant Professor of Law, 2003.

Susan Pace Hamill, B.A. (Emory), J.D. (Tulane), LL.M. (New York University); Professor of Law, 1994.

Nathaniel Hansford, B.S., LL.B. (Georgia), LL.M. (Michigan); William Alfred Rose Professor Emeritus of Law, 1975.

William H. Henning, B.A. (University of Tennessee-Chattanooga), J.D. (University of Tennessee), LL.M. (University of Illinois); Distinguished Visiting Professor of Law, 2003.

Steven H. Hobbs, B.A. (Harvard), J.D. (Pennsylvania); Tom Bevill Chairholder of Law, 1997.

Timothy Hoff, A.B., J.D. (Tulane), LL.M. (Harvard); Gordon Rosen Professor Emeritus of Law, 1970.

Jerome A. Hoffman, A.B., J.D. (Nebraska); Elton B. Stephens Professor Emeritus of Law, 1971.

Wythe Holt, B.A. (Amherst), J.D., Ph.D. (Virginia); University Research Professor of Law, 1966.

Harry Hopkins, B.A. (University of Southern Mississippi), LL.B. (Tulane University School of Law); Distinguished Visiting Professor of Law, 2001.

Guy Thomas Huthnance, B.S., J.D. (Alabama); Professor Emeritus of Law, 1963.

Thomas L. Jones, B.S., J.D. (Kentucky), LL.M. (Michigan); Alumni (Class of '36) Professor Emeritus of Law, 1962.

Robert R. Kuehn, B.A., (Duke), J.D. (George Washington), LL.M. (Columbia), M.P.H. (Harvard); Director of Clinical Programs and Professor of Law, 2001.

James B. Leonard, B.A., M.S., J.D. (North Carolina at Chapel Hill); Director of Law Library and Professor of Law, 1997.

Suzette M. Malveaux, A.B. (Harvard), J.D. (New York University); Assistant Professor of Law, 2003.

Gene A. Marsh, B.S., M.S. (Ohio State), J.D. (Washington and Lee); James M. Kidd, Sr., Professor of Law, 1991.

Martha I. Morgan, B.S. (Alabama), J.D. (George Washington); Robert S. Vance Professor of Law, 1979.

Joe C. Morrison, B.A., J.D. (Alabama); Professor of Clinical Instruction and Clinic Attorney and Director of the Public Defender Program, 1980.

Kenneth C. Randall, B.A. (Adelphi), J.D. (Hofstra), LL.M. (Yale), LL.M., J.S.D. (Columbia); Dean and Thomas E. McMillan Professor of Law, 1985.

Susan Lyons Randall, B.A. (North Carolina at Chapel Hill), J.D. (Columbia); Professor of Law, 1992.

Kenneth Rosen, B.S. (Cornell), J.D. (Yale), LL.M. (University of London); Assistant Professor of Law, 2003.

Norman J. Singer, B.S. (Pennsylvania), J.D. (Boston University), S.J.D. (Harvard); Charles O. Stokes Professor of Law and Anthropology, 1971.

Norman P. Stein, B.A. (New College), J.D. (Duke); Douglas Arant Professor of Law, 1984.

David R. Stras, B.A., J.D., M.B.A. (University of Kansas); Hugo Black Faculty Fellow, 2003.

George Peach Taylor, B.A. (Birmingham-Southern), LL.B. (Alabama); Professor Emeritus of Law, 1974.

Richard Ashley Thigpen, B.A., M.A., J.D., LL.D. (Alabama), LL.M. (Yale); John J. Sparkman Professor Emeritus of Law, 1970.

Legal Writing Lecturers

Kimberly Keefer Boone, B.A. (Huntingdon College), J.D. (Alabama); Director of Legal Writing; 2003.

Noel G. Delchamps, B.S. (Alabama), J.D. (Alabama); 2003.

J. Scott England, B.A. (Truman State University), J.D. (Northwestern); 2003.

Daniel C. Powell, B.A. (Vanderbilt), M.A. (Virginia), J.D. (Alabama); 2000.

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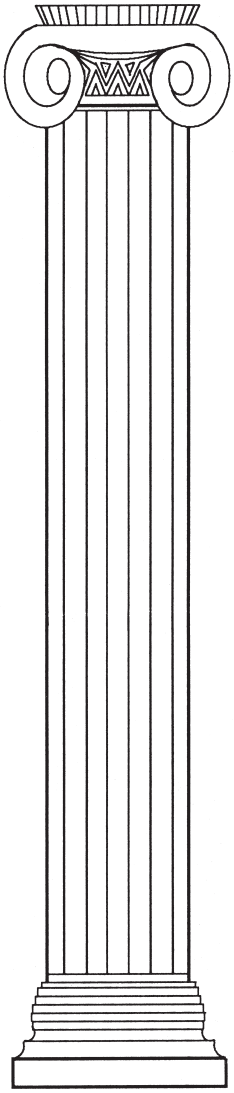

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REMARKS BY DENNIS ARCHER* AT THE UNIVERSITY OF ALABAMA SCHOOL OF LAW

FARRAH LAW SOCIETY BANQUET, FEBRUARY 27, 2004**

Thank you very much.

I am delighted to be here tonight and I am really pleased to be in the company of so many outstanding and wonderful lawyers. Dean Randall and I were together earlier today as he mentioned, and I will talk a little bit about that in a minute.

Allow me to acknowledge several people. As President of the American Bar Association, I have come to really appreciate the work that those who have preceded me have had to do in order to be the principal spokesman on behalf of our bar association, which is an enormous responsibility. Lee Cooper who is a former president of the ABA, here tonight with his wife Joy, is probably one of the principal reasons why I am president of the ABA today.

I became active in the Young Lawyers early on, the Young Lawyers of the American Bar, where a lot of us grew up and participated in the work of our association. That's where I met Boots Gale, who is being honored tonight, and his lovely wife Louise.

Lee and I, at a point in time when I was ending my term as Chair of the General Practice Section got together with Ben Civiletti–who is a former United States Attorney–and set things in motion that allowed me to become the Chair of the Section Officers Conference (SOC). We have a number of sections and divisions within the American Bar, and we have one entity (SOC) which sort of brings everything together. Lee was kind enough to set things up for me to become the chair of that section. Then, when Lee be-

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* Dennis W. Archer, former Detroit mayor and Michigan Supreme Court Justice, is the first African-American elected as president of the American Bar Association. He is chairman of Dickinson Wright PLLC, a 200-person, Detroit-based law firm.

came Chair of the ABA House of Delegates, he asked me to chair the Rules and Calendar Committee. So Lee, I want you to know how much I appreciate and value our friendship, and how much I appreciate the work you did as president of our great association. Lee Cooper, Joy, stand up and be recognized.

I was going to stop by today. I heard that when we were over by the Civil Rights Institute that Lee was in trial, and I thought about going over to the court room, but I didn't want to jinx him. As luck would have it, I didn't. He was defending a case and got a "no-cause," and on a cross-claim, got $3.4 million. So I want to talk to you about my percentage when I get ready to leave. (laughter) Congratulations on a job well done!

The second most powerful office in our association is the Chair of the ABA House of Delegates (Tommy Wells). He just does an outstanding job, and he serves your association so well. So, Tommy, it is always nice to see you and Jan, thank you for coming out tonight. Thank you very much. Give them a hand please.

In your introduction you were kind enough to mention Earl Lassiter. Earl was a Treasurer of the ABA. Everybody genuflects at anybody who keeps the money. I don't know about your bar association, but everybody genuflected to Earl, and Sally always kept him up straight. They do have a very fine son, David, who today was just exemplary. You would have been proud of your son, Earl and Sally, in the manner in which he participated today in the press conference. He talked about getting out the vote and responded to questions from the audience. He was interviewed on television and on some radio hook-ups that will go nationwide. And so David, I expect great things from you, and we are very proud of the work that you are doing.

We have an ABA Board of Governors and on our Board of Governors is Wade Baxley. Wade, I want you to know it is nice to see you and Joan. You all need to know that there are many friendships formed, and also some interesting stories that occur. One time, we happened to be at a board meeting and there was a golf match between Tommy and Wade. They were finishing up this last hole in the dark, and Tommy got a birdie. At least that is what Wade said that Tommy *said*. The disputes and the conversations that go on would make you feel just part of the family, if you could just hear the litany of discussions. Wade it's really nice to see you. I can't wait to see the next rematch between the two of you.

Then of course, we have Reggie Hammer. Reggie is a devout bar junkie, as a person who has ruled the Bar Association and ruled the world. Ann, I want to thank you for keeping him in check. Reggie is a consummate bar leader and we have always valued his presence.

Then of course, J. Mason Davis. When J. Mason Davis was President of the Birmingham Bar Association, I was President of the State Bar Association. A lawyer by the name of I.F. Leevy Johnson was president of the South Carolina Bar Association, and we've maintained a very strong and warm relationship. Jay, it is always a pleasure to be in your company.

Karen Bryan–as a state delegate from the State Bar of Alabama–let me just say that you all continue to do great work. Thank you for being here tonight.

And then finally, for those of you who perhaps have an interest in being appointed as a federal judge, we have the ABA Federal Judiciary Committee. They work really hard and do a fine job. I would like to introduce you to someone tonight who is responsible for the Eleventh Circuit. Her name is Levita Morgan Battle. Would you please stand to be acknowledged?

I'm very pleased to be here in Birmingham, the Magic City. The city that reflects so much of what this country went through in our struggle for Civil Rights and voting rights. You represent some of the most important milestones and place markers in our nation's history. Much of that history was brought to life for me in a tour this afternoon of the Civil Rights Institute and then when I went across the street to the Sixteenth Street Baptist Church. The exhibits give full accounting of life in the times of segregation and of the struggle for Civil Rights and equality. It is inspiring to see what efforts were undertaken by so many people, committed to changing society, to creating a system that would be just, and that would treat everyone fairly. It is a goal for which we still strive.

Also this afternoon, I spent some time talking about a statewide voter education project that the University of Alabama Law School students have undertaken. Most of us know how important it is to exercise our duty to vote to ensure that our great democracy is working effectively, but sometimes we need a little reminder. Sometimes we need someone telling us that our vote counts, that we have a hand in who our representatives are, and that we must exercise this most important constitutional responsibility. The Alabama law students will be pairing up with representatives from community organizations around the state to distribute our American Bar Association Voter Rights and Responsibility cards. To help voters get better informed when they go to the polls, the card reminds voters that we have certain rights: the right to inspect a sample ballot, to receive voting assistance at the polls, to cast a provisional ballot if voting status is in question and others. And the cards also remind voters that with those rights come responsibilities. Voters are responsible to know local registration requirements, to know the rules for absentee ballots, to notify authorities of change of address, and so forth. So the cards we hope will help voters and will also encourage them to get to the polls in this election year. I applaud the University of Alabama's Law School. It is very motivated, and it is committed to its students, and they certainly have a terrific dean in Kenneth Randall. I want to thank you, Dean.

I want to thank you, Dean, to be the first law school, to my knowledge, in America to start this project. You will need the rest of the nation along with your hard working law students in reminding the people to vote. Please appreciate that the ABA does not endorse any candidate. We have no PAC. We have no involvement other than that we believe in democracy and promoting the rule of law. So, this effort and this initiative is just to

remind people to vote. Whoever it is they decide to vote for is up to them. But it is important for us to remind them to vote.

I would also like to mention, that this afternoon I had an opportunity to visit with some very wonderful people. They represent such important lessons that I have learned through your wonderful city. Lessons, frankly, that our nation needs to learn, to grow, to move forward, and to adjust to changing demographic realities. Like many lessons, the learning doesn't come easy.

Carolyn McKinstry was a child during the Civil Rights Era, and experienced the full effects of the rage against people of color who wanted an equal place in society. She saw the tanks in the streets here in Birmingham. She was sprayed with the brutal force of water hoses. She was a witness to the dogs sent to instill fear and keep people down, and she was in the Sixteenth Street Baptist Church when the bomb went off and killed four young people. Ms. McKinstry is a testament to what happened in a city many years ago, but also where we are today. Her voice and her experiences must not be forgotten.

I will tell you something else. When I was in Mobile in July, I had a chance to speak to the State Bar of Alabama. It was during the time before the current president was coming in, and a friend was going out. His name was Fred Gray. Fred introduced me to an outstanding lawyer who wanted to talk to me about the Birmingham Pledge. I didn't know what the Birmingham Pledge was, but we went up to Fred's suite, and we visited, and I signed a Birmingham Pledge. Then I asked him to go to the ABA annual meeting and meet with a number of different sections and divisions that I felt would be as impressed with the Birmingham Pledge as I was. It turned out that my expectations were met.

I was President of the National League of Cities, representing some 18,000 cities, villages and towns across America. So I asked him to go visit Don Borut, our executive director, so that the Birmingham Pledge could be taken nationally. You should have a great deal of pride for what this great city is doing today. The image that you are projecting and the changes that have taken place that are very positive. It is important to remember the past, but it is also equally important to take pride in the here and now, and where this great city is going.

Lawyers do a great job, and I'd like to reflect on our calling as lawyers to do good work, to work for our clients, for the system of justice, and for the greater good. That is really our mission. And with this mission we can change the world. Indeed many lawyers already have. Lawyer, Thomas Jefferson changed history when he drafted the Declaration of Independence. It set a course for this country that we adhere to and follow today. Lawyer, John Adams, ensured that states' rights and liberties would be included in that document, and in the United States Constitution. Lawyer, Abraham Lincoln changed history when he made a stand for abolishing slavery. Lawyers have made great contributions to the world in which we live in today. Whether it is lawyers like John Foster Dulles and William Fulbright

who have made imprints on our foreign affairs and our international politics and exchange; our labor and union lawyers who win victories for workers in this country; or lawyers who just work everyday, unrecognized, unheralded as they help those in society who need it the most.

Lawyers have power: power to challenge injustice, to change society, to help those in need and to make lasting contributions for the betterment of our communities, and yes indeed, our world. I submit to you that lawyers have the power to heal. Lawyers in many respects are healers like physicians and the clergy. We have taken an oath that includes faithfully representing clients, maintaining their confidences and preserving as inviolate their communications, undertaking representation of the oppressed and the defenseless, the disempowered, and the just cause without regard for considerations personal to ourselves. And of course, we all uphold the rule of law. Indeed lawyers have the power to heal the wounds of injustice, to right wrongs and to ensure that they never happen again. Lawyers often help people when they are at their most vulnerable and most troubled, or in crisis, and in those times of pain. We are there when they need us the most– the times when we are best in a position to heal.

We can be counselors, advisors, problem-solvers, and yes, even peacemakers. As stated in our oath among our many tasks is the obligation to serve the poor and the defenseless- to defend them against those who would exploit or even destroy them. Whether we do it free of charge or for a minimal fee, it is logical therefore, in my view, to view lawmakers as public servants. I also believe that lawyering is a calling, a call to serve the public. I firmly believe that lawyers in my own view are ministers of justice. We are in a unique position to heal and to eliminate inequities that can make life unnecessarily hard for some people and unnecessarily easy for others.

One case that healed inequities is the *Brown vs. Board of Education* decision. We'll celebrate its Fiftieth Anniversary on May 17, 2004. It was a heroic work of lawyers throughout that process, ending with Mr. Justice Marshall and others who presented the case to the United States Supreme court, not once, but twice. They devoted countless hours and fought many battles for a cause they knew was right. So, on an individual level, if we approach our life's work as healers, if we re-orientate our thinking to take advantage of the power of healing, we can do much good for our clients and others.

The mere presence of a lawyer can bring comfort and solace to a person in need of help, knowing that we can positively affect change in what may otherwise be a difficult, adversarial, situation. Lawyers as healers can promote a model that emphasizes the greater good. Lawyer-by-training, Mahatma Ghandi suggested that "the true function of a lawyer was to unite parties riven asunder." His healing power was such that he was able to peacefully overcome the might of a well-armed British militia, and lead his country toward independence. Lawyer, Franklin Roosevelt healed the nation by bringing faith and hope at a time when we needed it the most. His New Deal put the unemployed back to work, boosted business and agricul-

ture to get Wall Street back on its feet, and developed a social safety net of assistance to those who needed it. The lawyer used his power as a President to heal a country. He made tough choices politically, but knew that the greater good would be served by taking care of people. Lawyer, Thurgood Marshall helped heal a nation suffering from a legacy of slavery and racial bias. He attacked policies and procedures that were unfair and wrong, and usually won. He argued 32 cases before the United States Supreme Court and won 29.

Lawyers heal in many ways and many of you do it every day. You stand up to represent those accused of the direst of crimes; those who may be sentenced to death and may be on appeal. You give voice to those who have no resources, who are too young, too ill, or too poor to defend themselves. You help families, business partners, and corporations resolve their differences and find solutions to their problems. You defend the rights of even those who are the most reviled in society. You do so, sometimes, against your own self interest. And by doing so, you heal the community. You bring justice and resolution to issues that seem so incredibly unjust and so irresolute. You heal by bringing the power of your words, your knowledge, your compassion to bear on the cases you work to resolve. You heal.

So you see, while many would denigrate our profession, without lawyers providing their time and expertise, most often free of charge, much good and much healing in this world would never be accomplished. Our power is that we are the ultimate volunteers in public service in our society. There is not a chamber of commerce, a battered woman's shelter, a symphony orchestra, a Boys or Girls Club, a church, a synagogue, a mosque, a non-profit board in this country that does not have lawyers from the community intimately involved and volunteering. Lawyers sit in legislatures. They become senators, mayors, governors, and even Presidents of the United States. We have many powerful leaders and active participants in the organized bar right here tonight. The ABA has a great role in speaking out on behalf of lawyers nationwide in promoting the rule of law issues wherever possible and in helping lawyers in their healing work.

I encourage you if you are not a member of the American Bar to join. Participate in our section and committee activities. Join the bar in helping lawyers in their work on national and international policy, as the world becomes increasingly global. The healing power of lawyers has never been more important to our society and your work with your specialty, state, and local bars can only support and compliment the work of the American Bar. I urge you to join us in our common missions. I want you to think about what it is that we do. The ABA, the largest voluntary bar in the world is often times called upon to respond and to stand up on behalf of the Rule of Law, and yes, sometimes in opposite of positions of our own President and members of his cabinet. Witness the fact that the ABA since post-9/11 has taken a unanimous position supporting the President of the United States, and complimenting our President George W. Bush on the leadership role that he has taken to keep our country safe and secure. But at the same time,

the American Bar Association, in evaluating what was promulgated at the time, the ruling or the thoughts of the administration regarding "enemy combatants," military tribunals and how lawyers must respond under military tribunals or in the U.S. Patriot Act, the ABA has respectfully disagreed. When our committee or task force has been appointed and is charged with taking a look at and evaluating recommendations that come from the administration, we have shared with the administration, "Here is what we are saying. Here's what our fundamental beliefs are. Here's where we think you are crossing the line as it relates to the United States Constitution or case law or federal court rulings." We do so in a respectful way. Then we have a full debate before our House of Delegates, and when our policy has been adopted by the House of Delegates, to the credit of the administration, they have changed or modified their views.

That's the kind of role that the ABA plays. We promote the rule of law. We stand up on behalf of judges when judges have been unjustly ridiculed. Why, to protect the independence of the judiciary and to make sure that our judges are free to respond. We have several issues that are going to be coming before the annual meeting in Atlanta. One, began by Mr. Justice Anthony Kennedy, who asked the ABA in our annual meeting in San Francisco, "Would you take a look at considering returning judicial discretion back to the judges? Would you take a look at and determine, whether not in your view the American Bar believes that it is time to stop mandatory sentences? Whether it is time to reduce the sentencing in the sentencing guidelines?" So, we are going to take a look at that at his request. It is balanced on both sides, from a committee's point of view prosecutors, defense counsel, etc., judges, state/federal. When they've been taking in testimony to learn from those who are in the trenches, whether it is the Corrections Commission, the U.S. Attorney's office, or state and local prosecuting attorneys' offices, it is balanced. I don't know what the report is going to say.

We are also taking a look at how the funding of our state courts have been affected in some states in the United States. When our economy went down, governors and the legislature have had to deal with balancing a budget. In our own home state, the new governor coming in campaigned on wanting to increase spending for public education. The deficit she inherited was so bad that she had to reduce funding to public education. We've also seen reductions in our state courts. In the state of Oregon, for example, they shut down the trial courts on Fridays because they didn't have money. In another jurisdiction, if you wanted to have a record of the trial, you could either rely upon the judge's notes, or one party, if they decided not to split the costs, would have to pay for the court reporter. In another state, an Attorney General said "we are not going to prosecute domestic violence cases." The private bar stepped up and said "Train us, we will prosecute them."

We are looking at, through the American Bar, through a committee that has been appointed, we are looking at what impact the reduction of state court funding has on the system of justice. We're not looking to pick any

kind of fights. We're not looking to do anything absurd, but rather these practical real issues. That is what the ABA does. We do so with due respect to all involved, but always protecting the rule of law. As we do it, we try to do it to make sure that we heal at the same time. Our work and what we do, in our everyday practice, or within our state and local bars, or in this case with the ABA, we do with respect.

Let me close by just simply saying that Dr. King said, "Power at its best is love implementing the demands of justice. Justice, at its best, is love correcting everything that stands against love." One counseling point: I understand, and I have never looked it up, but I understand that there are about 420,000 lawyer jokes on the internet. I don't laugh at lawyer jokes because I don't think they're funny. If you think about what it is that we do, and how we step in, and the wonderful lawyers who practice everyday, receiving less money than you would make in the law firm of which I happen to be chairman. I just joined a personal law firm in Detroit. These lawyers practice in legal service entities. They serve those who are poor and disenfranchised. Let me thank all the law firms who are here tonight who engage in pro bono practice. You know Rule 6.1 of the Model Rules asks all of us to give 50 hours of pro bono service, and I want to thank all of the lawyers and law firms who do that. But despite our best effort, about 80% of our legal needs are unmet. Our law schools such as the University of Alabama step up in a big way through law students to help those who are poor and disenfranchised. I was just at the University of Maryland where they have about nine different clinics. They provide close to $1 million a year, if you were to sort of cost it out, in pro bono service.

Shakespeare, as many people would want to throw in our face, has been quoted as saying, "First thing you do is kill all the lawyers." But nobody ever talks about the context in which that statement is made. If you want to destroy democracy, and if you want tyranny to succeed, the first thing you do is kill all the lawyers. Why, because we will stand up for the depressed and the defenseless. You tell me the last time that you have driven down the street, and you've looked at a doctor's office, a podiatrist's office, or a dentist's office and seen a sign: "If you are poor, and you cannot afford it, come in and we will take care of your teeth, or we'll fix your feet, or come in and we'll give you free medical treatment." Take a look at the barbershops and beauty salons, and tell me the last time that you've seen somebody with a sign in their window that says, "We will do hair cuts, hair trim, beards, whatever the case may be, for free if you are poor or disenfranchised." That's what we do. So the next time somebody wants to crack a lawyer joke, just remind them what we do saves America, what we do stands up for democracy, what we do promotes the rule of law, and don't you ever let anybody get you down. Just remember why you went to law school.

We are a good profession. We do good work. And we serve America well. Thank You.

ALICE FINCH LEE: LIVING THE VALUES OF THE LEGAL PROFESSION

Kimberly Keefer Boone[*]

The most famous resident of my hometown, Monroeville, Alabama, is the intensely private Harper Lee,[1] author of the Pulitzer Prize-winning novel, *To Kill a Mockingbird*.[2] Though not nearly as famous to outsiders, her sister, Alice Finch Lee, is even better known, loved, and respected by the residents of Monroeville and many Alabama lawyers. In her own quiet and determined way, "Miss Alice," as she is affectionately known, has advanced social justice and affected positive change. Nelle Harper Lee attended law school, but left shortly before graduation and never practiced. Alice Finch Lee never wrote a novel, but instead makes her contributions through the daily, disciplined, and principled practice of law. Through law and literature, Alice and Nelle Harper, have made many of us better lawyers and better people.

When I first read this speech honoring Alice Lee, I thought about how important Miss Alice's work has been not only to those who know her, but through the people she has inspired, to countless others who will never meet her. Her intellect, honesty, integrity, and sense of fairness are evident to all who know her. While in practice, and now in teaching, I strive to live up to her standards of compassion and hard work. Although I often fall far short of her example, I think she appreciates the effort.

This speech was written and delivered by a dear friend of my family, Dr. Thomas Lane Butts, a retired Methodist minister in Monroeville. Due to Dr. Butts' vocation and his relationship with the Lee family, a good part of Tom's speech relates to Alice's church work. But regardless of one's spiritual beliefs, this speech honors a worthy role model. Although the speech introduces Alice as the recipient of the prestigious Maud McClure Kelly Award given by the Alabama Bar Association, I did not immediately think of asking a law journal to publish this piece. I assumed that most people, at least in Alabama, were aware of the tireless efforts and impressive contributions of one of the "other" Lee sisters.[3] I did, however, share

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1. She is known in Monroeville as "Nelle Harper" or simply "Nelle."
2. NELLE HARPER LEE, TO KILL A MOCKINGBIRD (1960).
3. There is a also a third Lee sister, Louise Lee Conner.

the speech with friends and colleagues. After looking at the text again through the eyes of a colleague,[4] it became clear that publishing this speech highlighting Alice Lee's trail-blazing efforts as a woman practicing law in rural south Alabama in the 1940's and her positive role in the fight for racial justice was quite appropriate, especially in an Alabama journal dedicated to ethics and the legal profession. And so I hope that this speech, which celebrates the life of an Alabama lawyer, will influence those who read it to follow their conscience and to use the practice of law to diligently and unselfishly serve their clients and our profession as Alice has done and continues to do.

Alice Lee's father, Amasa Coleman Lee, died long before my family moved to Monroeville. Mr. Lee is said by many to have been the "real" Atticus Finch, the lawyer/father hero of *To Kill a Mockingbird* who has inspired generations of lawyers. If one looks closely at *Mockingbird*'s dedication, however, there is a hint that such received wisdom is only partially correct, for the book is "for Mr. Lee and Alice."[5] When *Mockingbird* was published in 1960, Alice had already been practicing law for over fifteen years. I never knew Mr. Lee, but I know that there is a lot of Miss Alice in Atticus.

In February of 1993, Nelle Harper Lee wrote the following in a Foreward for *Mockingbird*:

> Please spare *Mockingbird* an Introduction. As a reader I loathe Introductions. . . . . Introductions inhibit pleasure, they kill the joy of anticipation, they frustrate curiosity. The only good thing about Introductions is that in some cases they delay the dose to come. *Mockingbird* still says what it has to say; it has managed to survive the years without preamble.[6]

The same is true of Alice Finch Lee and Dr. Tom Butts' tribute to her. They really need no further introduction.

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4. Many thanks to my friend and colleague, Alfred L. Brophy, for his suggestion to publish this piece and his efforts to accomplish it.

5. LEE, *supra* note 3.

6. HARPER LEE, TO KILL A MOCKINGBIRD (40th Anniversary ed. 1999).

AN INTRODUCTION OF ALICE FINCH LEE, AS RECIPIENT OF THE 2003 MAUD MCCLURE KELLY AWARD PRESENTED BY THE ALABAMA BAR ASSOCIATION, JULY 18, 2003

Thomas Lane Butts[*]

Madam Chairperson, members of the Bar, honored guests and friends: If you were to park in front of the Monroe County Bank Building in Monroeville, Alabama, on any weekday morning, at 8:00 a.m. sharp you would see a plain, blue, ten-year-old Chevrolet pull into the handicapped parking spot nearest the front door of the building. You would next see the driver take a handicapped walker from the back seat, go to the passenger door, and assist a white-haired wisp of a woman from the car to the sidewalk, then try to keep up with her as she makes her way to the door. The small lady with the walker would be dressed in a conservative but elegant business suit and Reebok shoes. This dignified 91-year-old woman in Reeboks is on her way to her office, as she has been for each working day since 1944 when she was a spry 33-year-old. She was a rare curiosity in Monroeville, and in Alabama back then—a woman lawyer, Miss Alice Finch Lee, the person you have shown the good judgment to honor today with the second annual Maud McClure Kelly Award.

Let me tell you something about the journey of this unusual woman who is the, uncontested, quiet queen of the courthouse, the Methodist Church, and the community in which she lives. She is not only known and loved as a genuine gentle woman, and sought after as legal counsel for her broad spectrum of wisdom and experience in the law, but she is also known as a very knowledgeable person in history, literature, and current events. As a voracious reader, she reads three daily newspapers, *The New York Times Book Review*, British publications such as the *Spectator*, the *Times Literary Supplement*, and the *Weekly Telegraph*. She also reads a number of American magazines, several hundred book pages (mostly history and biographies), and *The Monroe Journal* each week. When someone wants to know the history of a piece of property in Monroe County, the source of a quote,

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[*] A graduate of Pensacola Junior College and Troy University. He received his graduate degree in Theology from Emory, a graduate degree in Pastoral Psychology from Northwestern University, and a Doctor of Divinity from Huntingdon College. After 48 years of serving churches in Alabama and West Florida, he is now retired and serves as the Minister Emeritus of First United Methodist Church in Monroeville, Alabama.

or a literary or historical fact, knowledgeable people in Monroeville will say, "Go ask Alice." She is a veritable library of wisdom and information.

The recitation of a standard curriculum vitae hardly describes "Miss Alice," but without it you would miss some of the interesting events in her life, so let me offer an abbreviated and annotated curriculum vitae.

Alice Finch Lee was the first born of four children to Amasa Coleman Lee and Frances Finch Lee. She was born in Bonifay, Florida, on September 11, 1911. She describes herself as the only alien-born member of her family and the one who, at this end of her life, is stuck with a birthday remembered in infamy—September 11. Her family moved to Monroeville, Alabama when she was less than two years of age.

Miss Alice graduated from Monroe County High School in 1928 at the age of 16. She attended Huntingdon College in Montgomery, Alabama, in the academic year of 1928-29. Two factors brought her home at the end of her first year in college: the beginning of the Great Depression and her father's purchase of *The Monroe Journal*. She worked with her father at the newspaper for the next seven years, during which time, she did some of all the things it takes to run a newspaper.

In April 1937, Miss Alice moved to Birmingham to work for the Internal Revenue Service in the newly created Social Security Division. From 1939-43, she attended night school at Birmingham School of Law. She took the Bar Exam in July 1943, and when she knew she had passed the Bar, she began trying to get released from her job with the IRS, which was not an easy task during the war. In January 1944, she came back to Monroeville to practice law with her father in the law firm of Barnett, Bugg, and Lee, where she still practices today.

When I asked how she fared for clients as a neophyte woman lawyer, she explained that in those days a small town lawyer had to take any case that walked through the door. She said, however, that the new federal income tax, the "Victory Tax," had just become law, and all income over $600 per year became taxable. People who never had to file federal income tax now had to. At that time there was no CPA and only four lawyers in Monroeville. Since it was commonly known that she had worked for seven years at the IRS, people assumed that she was well versed in income tax law. They did not know that her work with the IRS had been with the Social Security Division and that she had never filled out an income tax form other than her own. Tax clients poured in, and Miss Alice studied the tax code by night and made tax returns by day. She became the tax lady. Miss Alice stopped taking new tax clients 25 years ago. She has outlived all but one of her oldest tax clients who is 96.

Miss Alice has practiced every kind of law, but claims her favorite is real estate law. Although she has always tried to avoid criminal cases, she once got caught up in a situation in which she had to try a murder case. I was afraid to ask about the verdict, but she told me anyway. Not bad, considering the situation. In those days lawyers in Monroeville had to do their own title research. Through sixty years of real estate law practice, in which

she has done most of her title work, Miss Alice can recite the history of almost every parcel of land in Monroe County, going back one hundred years before her own time.

Miss Alice has served for many years as a member of the Board of Directors and as Bank Attorney for the Monroe County Bank. Her father was instrumental in setting up a special corporation, Monroe Industries Corporation, which was the entity that brought the small company which became *Vanity Fair* to Monroeville. This was a powerful stimulus to the economy of Monroe and surrounding counties for more than a half century. Miss Alice and her father were on many occasions counsel for *Vanity Fair*. Miss Alice was a member of the Monroeville Planning Board for 35 years until her hearing impediment caused her to resign. She also did a great deal of legal work in and for the Alabama River Pulp, one of the primary industries in our local economy.

Miss Alice became Treasurer for the American Red Cross in Monroe County during World War II, a position she held for many years. With all her other work, she became the first night Pink Lady at Monroe County Hospital to reach five hundred hours of service. Miss Alice is a great advocate for the City of Monroeville, and she is one of the primary persons who has helped to make Monroeville a place worthy of enthusiastic advocacy.

I turn now to the area of Miss Alice's life, and her work with which I am most familiar, the Methodist Church. I have known her work in the church for more than fifty years, during which time she has been a mentor and encourager to me in the ministry of the church. She has belonged to the Methodist Church all of her adult life. I asked her to tell me what offices she has held in the church. She simply said, "I have never been the Pastor." That essentially describes the extent of her life of service in and for the church. But, I must tell you, she has done lots of preaching, her protests notwithstanding. She has preached in a most effective way in that her most prominent way of preaching has been wordless.

St. Francis of Assisi once said to the monks in his Order, "Let us go into the city and preach, and we will use words if necessary." Although Miss Alice taught an adult Sunday school class for 44 years (until complications from a Cochlear implant destroyed the nerve that gives balance), she has always been a person of few words.

Miss Alice attended the Alabama-West Florida Conference of the Methodist Church as a delegate from her local church for a dozen years before she made her first speech on the floor of the Conference. It was in the mid-sixties, when the rhetoric of racism was loud and vitriolic. A committee report concerning the problems of our racially divided church and society had come to the floor. Amendments had been made and debate had started. The advocates of continued racism were poised and ready to try to drag the church deeper into institutional racism, but before their titular leader could get the floor, a wee woman from Monroeville got the attention of the presiding officer of the conference. She went to the microphone to make her maiden speech to the Alabama-West Florida Conference of the

Methodist Church. Her speech electrified the seven or eight hundred delegates. It consisted of five words. She said, "I move the previous question" and sat down. The conference applauded enthusiastically and voted overwhelmingly to support her motion, and then proceeded to adopt the committee report without further debate. The advocates of racism were left holding their long prepared speeches. Miss Alice became the hero of the conference and from that day the enemy of the racists. She has always been a person of few words—but important words—said at the right time and place.

Miss Alice served as one of several women members of the Tri-Conference Committee on Merger, which ultimately brought the two white conferences and one African-American Conference in Alabama together. She attended and studied the General Conference of the Methodist Church (the law-making body of the church) for 12 years before becoming a principal delegate to that world-wide body in 1976 and again in 1980. She served for eight years as a member of General Council on Ministries and on numerous sub-committees of that agency. She served as secretary of the Committee on Episcopacy for the Southeastern Jurisdiction of the Methodist Church. This is the committee which assigns bishops to their posts. Not many people get to help tell bishops where to go. I asked Miss Alice of how many entities of the church she had been secretary. She said, "I have been secretary to everything, and I have enjoyed it all."

Miss Alice has been legal counsel to the First Methodist Church of Monroeville since the early fifties. One of her friends asked another friend what she thought Alice would do if she got to heaven and found there to be no Methodist Committees meeting. The friend knowingly said, "She would call one!"

Like last year's recipient of the Maud McClure Kelly Award, the Honorable Janie Ledlow Shores, Retired Alabama Supreme Court Justice, Miss Alice Lee has been a powerful advocate for women at all levels in our society. Miss Alice's advocacy has, again, been more by example than with words. Let me offer a few examples of the recognition for her advocacy for women. In 1992, the Alabama-West Florida Conference of the United Methodist Church established the Alice Lee Award for women who have given outstanding leadership in the United Methodist Church. In 1984, Huntingdon College gave her an honorary Doctor of Laws. In 1987, the Monroeville Kiwanis Club decided to give a Citizen of the Year instead of Kiwanian of the Year Award. This was several years before women were accepted as members of Kiwanis. The first Citizen of the Year Award given by the Kiwanis Club of Monroeville in 1987 was given to Alice Finch Lee. These are but a few examples of the powerful influence of this woman of few words, who speaks when she is silent, and whose presence is still felt after she has left the room.

Her courage, integrity, and ethics are impeccable. As one person who knows her best once said, "She is Atticus in a skirt." Her love of life and people is very much like that of an old friend of hers who lived 2000 years

ago. She is a person who is always seeking "The Pearl of Great Price" in a generation that tends to be content with fake jewelry.

I am not suggesting that Miss Alice is a perfect person. Surely she has some faults, but for the life of me, I cannot think of one. You would have to ask her sisters—Louise and Nelle Harper. Johann Wolfgang von Goethe once offered a magnanimous statement about Catherine the Great of Russia. He said, "Her faults were an infection from her time, but her virtues were her own." I borrow that line to speak of Alice Finch Lee.

I conclude this introduction with a few words from her longtime friend and law partner, John Barnett III, who handed me a piece of paper a few weeks ago and asked, "Will you add this to whatever you have to say about Miss Alice at the Bar Association?" So, here are the words of a man who, from his childhood, has known and respected and loved Alice Finch Lee. I quote:

> I was often perplexed by the debates in law school about the role of women and the law. I was unable to identify either with the archaic male view or the often vitriolic view of the women in my class. This was because all of my life, up until that point, my personal family and our corporate lawyer was Miss Alice Lee. I knew of no better person or lawyer then or now. She is the epitome of personal and professional ethics and character. In those times I have fallen short of the standard she has set, she has remained my steadfast advocate and friend.

How fitting that the first convention on the issue of women's rights in America was held in a Methodist Church in Seneca Falls, New York. I am convinced that if in 1848 Elizabeth Cady Stanton and later Susan B. Anthony had had Miss Alice with them, the course of history would have been changed, and the road to where we are today in women's rights would have been much shorter. This is because men of that time would have been compelled by Miss Alice's logic, reason, and unshakable conviction to do exactly as she counseled, just as I have been for more than thirty years.

With that heartfelt testimony, I commend to you Miss Alice Finch Lee, a woman who, when she has gone forth to preach about the law and life, has used words—when necessary.

TRANSITIONING FROM LAW TEACHING TO PRACTICE AND BACK AGAIN: PROPOSALS FOR DEVELOPING LAWYERS WITHIN THE LAW SCHOOL PROGRAM

Okianer Christian Dark *

The mission statements of many law schools in the United States include some reference to the preparation of law students for the practice of law. There is some disagreement among members of the legal academy regarding the relative importance of the law school as a place devoted to providing students with the necessary skills and exposure to legal concepts to enter the practice. The fact remains, however, that the law school is the initial gateway for the practice of law.[1] There also continues to be a debate between academics and practitioners about whether law schools are in fact adequately preparing law students for the practice. This Article will not answer that question. Rather, I hope to provide a constructive critique of ways legal education can more effectively prepare law students for today's practice environment.[2]

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* Professor, Howard University School of Law. B.A. 1976, Upsala College; J.D. 1979, Rutgers-Newark University School of Law. I wish to thank my former colleagues at the Office of the United States Attorney in the District of Oregon (offices in Portland, Eugene and Medford) for allowing me to be a part of a terrific team of public servants. I am very grateful for the helpful critiques of earlier drafts of this Article that I received from Loretta Argrett, Judith Kobbervig, Jonathan Stubbs and Eileen Santos. Many thanks as well to my wonderful and diligent research assistants, Ara Parker, class of 2004, Kelli Ballard, class of 2004 and Erin Street, class of 2005.

1. Bethany Rubin Henderson, *Asking the Lost Question: What is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 49 (2003).

2. There are, of course, several other purposes attributable to law schools. Many members of the academy see law schools as serving other functions. *See* Gordon T. Butler, *The Law School Mission Statement: A Survival Guide for the Twenty-First Century*, 50 J. LEGAL EDUC. 240, 241 (2000) (noting that a law school's purpose includes scholarship along with training lawyers); Howard B. Eisenberg, *Mission, Marketing, and Academic Freedom in Today's Religiously Affiliated Law Schools: An Essay*, 11 REGENT U. L. REV. 1, 4-7 (1998) (discussing the interest of religious law schools in promoting the religious beliefs on which the institution was founded); Richardson R. Lynn, *Mission Possible: Hiring for Mission In a Vague World,* 33 U. TOL. L. REV. 107, 108 (2001) (noting George Mason's mission to promote scholarship in a specific area—law and economics); Herbert O. Reid, *Charles Hamilton Houston Commemorative Issue: Introduction,* 32 HOW. L.J. 461, 461-62 (1989) (discusses Houston's vision of a law school as an instrument of social justice. He also points out that Houston utilized a strategy akin to a legal clinic in order to promote his goals by engaging both his faculty and his students in his civil rights work); Robert A. Sedler, *Racial Preference in Law School Admissions: The Public Interest in a Diverse Legal Profession,* 1 J. L. SOC'Y 17, 20-21 (1999) (asserting that a purpose of a law school is to promote a diverse legal community so as to infuse the law with a minority perspective and to increase minority confidence in the legal system). The author of this Article does not mean to suggest or imply

I. RETURNING TO THE PRACTICE OF LAW

In the spring of 1995, I left law teaching to work as an Assistant United States Attorney in the Office of the United States Attorney (USAO) in Portland, Oregon.[3] I expected to be with the USAO for only two years at the most. I stayed, however, for a little over six years.[4] I worked in an office with truly dedicated lawyers and staff, under the leadership of a visionary—United States Attorney Kristine Olson. Ms. Olson wanted the USAO to function as a community partner with all constituencies in the District of Oregon. While she wanted the office to continue to do traditional federal prosecutorial and civil defensive work, she also wanted it to focus on projects that created opportunities to work with other governmental units, especially at the state and local level, as well as community groups and organizations. This effort eventually led to the creation of the Community Relations Unit within the office that focused on, among other things, youth gun violence, domestic violence, and hate crimes.[5]

In addition to my responsibilities as supervisor of the Community Relations Unit for the USAO, I was responsible for civil cases involving the Federal Fair Housing Act,[6] the Americans with Disabilities Act,[7] and the Federal Tort Claims Act.[8] The model for cooperative interagency and community problem-solving envisioned by United States Attorney Olson deserves further discussion and analysis.[9] However, this Article has a different focus. It reflects on and provides a critique of my journey back into practice after having spent a significant amount of time in legal education.[10] This critique assesses ways law schools, in general, and law faculty, in particular, might modify their approach to legal education, including teaching,

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that these other purposes are not valid objectives but rather focuses on one of the frequently repeated objectives of law school—the preparation of students to practice law.

3. I was on leave from the University of Richmond School of Law in Richmond, Virginia, where I had been a member of the faculty since 1984.

4. The decision to remain in Portland, Oregon, was primarily for family reasons.

5. The Community Relations Unit (CRU) was concerned with projects that had the potential of generating cases appropriate for the office, but also looked for alternative ways of addressing problems important to the community through education and outreach. In other words, we could only work on projects where there was federal authority to file cases. In order to accomplish this goal, the CRU engaged in a great deal of community building and outreach activities with a full range of constituencies within the district of Oregon. In essence, CRU was a form of community lawyering. *See* Andrea M. Seielstad, *Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 CLINICAL L. REV. 845 (2002) (providing a definition for the term "community lawyering" and discussing the concept of community building through the use of community lawyering and creative problem solving).

6. Federal Fair Housing Act, 42 U.S.C. §§ 3601-3631 (2002).

7. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2002).

8. Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (2002).

9. I firmly believe that her approach works and that the USAO and its partners, by engaging in a broader range of strategies that includes litigation, are more likely to have a meaningful impact on underlying problems that matter to the communities they serve. However, that discussion must wait for another article.

10. I was in practice as a trial attorney with the United States Department of Justice from 1979-1984. I entered law teaching in 1984, and taught until 1995 when I joined the USAO in Portland, OR.

curriculum focus, and scholarship, so that students are more adequately prepared to practice law.[11] Some in the legal profession have described this need to bridge more effectively the law school experience and the practice of law as the "gap."[12] My purpose is not to add any more fuel to this argument about the existence, breadth, or dimension of the "gap." Rather, I suggest in this Article some concrete ways that allow us to get past this debate and onto the business of investing in law students in ways that are productive in the practice of law.

II. HOW THE PRACTICE OF LAW HAD CHANGED

I initially began my career as a lawyer in the fall of 1979.[13] As a trial attorney with the Antitrust Division of the United States Department of Justice, I handled matters in Washington, D.C. and other parts of the United States. Most of my work with the Antitrust Division involved investigation, initiation, and prosecution of litigation on behalf of the United States as plaintiff rather than as the defendant. During my time with the Justice Department, I spent some time with the United States Attorney's Office for the District of Columbia as a Special Assistant United States Attorney assigned to criminal trial work on the local side of the prosecutor's office. During my last year with the Justice Department, I moved to the Civil Division to

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11. Other authors have described similar experiences of academic-practitioner transitions. *See, e.g.*, Douglas H. Cook, *Practitioner's Notebook: How I Spent My Sabbatical, or What Happens When a Torts Professor Is a Juror in a Negligence Case*, 14 REV. LITIG. 219 (1994); Gary S. Gildin, *Testing Trial Advocacy: A Law Professor's Brief Life as a Public Defender*, 44 J. LEGAL EDUC. 199 (1994) (assisting teachers to prepare students for the real life of trial advocacy); Bobby Marzine Harges, *Law Professor's Sabbatical in District Attorney's Office*, 17 TOURO L. REV. 383 (2001) (stating that the sabbatical allowed the author "to narrow the gap between the academic law teacher and the practicing lawyer."); Edward D. Re, *Law Office Sabbaticals for Law Professors*, 45 J. LEGAL EDUC. 95 (1995) (explaining the importance of law school in the teaching of professional skills); *see also* Gerald Torres, *Translation and Stories*, 115 HARV. L. REV. 1362 (2002) ("At the heart of all legal scholarship is the desire to find an adequate account of social life that includes—and in many ways gives priority to—the role of legal institutions . . . .").

12. *See* SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) [hereinafter MacCrate Report]; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (accrediting one of the reasons for "the growing disjunction between legal education and the legal profession" to the decline of "practical" scholarship published by law professors); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like A Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991) (asserting that law school education severely contrasts with the practice of law and that students are ill prepared for what lies ahead when they enter the legal profession); David Luban, *Legal Scholarship as a Vocation*, 51 J. LEGAL EDUC. 167, 168 (2001) (attributing the gulf between law school and the practice to the transformation of law school into a mini-university which imports faculty with trainings in other disciplines like economics and medicine); Michael D. McClintock, *The Declining Use of Legal Scholarship By Courts: An Empirical Study*, 51 OKLA. L. REV. 659 (1998) (stating that "[j]udges and practitioners increasingly feel that there is a lack of legal scholarship that they can use when they face their daily case loads" and further "complain that academia is losing touch with the practice of law"); Rodney J. Uphoff et al., *Preparing the New Law Graduate to Practice Law: A View from the Trenches*, 65 U. CIN. L. REV. 381 (1997) (asserting that law schools fail to respond to the changing needs of the legal profession and fail to teach students about the reality of law practice).

13. I was sworn into the Pennsylvania Bar in October 1979 and the New Jersey Bar in December 1979.

work on the burgeoning asbestos litigation and gained some experience as a civil defense lawyer. In short, I was actively engaged in many aspects and types of litigation for five years prior to joining the legal academy in the fall of 1984.

After approximately ten years as a legal educator, I returned to the practice of law. In some ways, the practice environment had changed, but in other ways the rigors of litigation were essentially the same. The return to practice reminded me about some of the challenges of practice I had forgotten, or conveniently filed away in the recesses of my mind. This section addresses some of the ways the practice had changed for me, and the following section of this Article comments on what has stayed the same.

A. Lawyers and Ethics

When I returned to practice in the spring of 1995, the first thing I noticed was that concerns about lawyer ethics had intensified. At first, I thought that this was to be expected since all law schools require their graduates to take a course in Professional Responsibility,[14] applicants for the bar must take a Multistate Professional Responsibility Exam,[15] and typically lawyers have to satisfy annual ethics Continuing Legal Education (CLE) requirements to maintain their law license.[16] This increased training and awareness of professional ethical rules could translate quite naturally into more discussion about, and even perhaps concern over, lawyer ethics. However, I do not believe that is the entire story. I found there was a real problem about the ethics of lawyers and whether their representations—to the courts or to other lawyers—could be trusted.[17] Further, there were occasions when opposing counsel made representations to the court verbally, or in filed documents where he suggested that I had said or agreed to something when we had no such conversation, or at least, had neither that particular conversation nor had we come to that agreement. At other times, actions of opposing counsel might not be easily classified as ethical violations per se, but rather more a lack of civility and "home training." How-

14. *See* STANDARDS FOR APPROVAL OF LAW SCHS. 302(b) (2002).

15. The Multistate Professional Responsibility Exam is required by all states except Washington, Wisconsin, and Maryland. See Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of MPRE*, 71 FORDHAM L. REV. 1299 (2003), for a discussion about the MPRE.

16. *See* ABA Center for Continuing Legal Education, *Summary of MCLE State Requirements*, *at* http://www.abanet.org/cle/mcleview.html (last visited Apr. 12, 2004) [hereinafter MCLE State Requirements].

17. *See* Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79 (1997) (suggesting an ethical problem with the fact that limitations placed on lawyer's negotiations with unrepresented parties are routinely ignored); Paula A. Franzese, *To Be the Change: Finding Higher Ground in the Law*, 50 ME. L. REV. 11 (1998) (discussing the discontent among members of the legal profession with the conduct of their colleagues); Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751 (1994) (discussing the problems of unprofessionalism and incivility); Raymond M. Ripple, Comment, *Learning Outside the Fire: The Need for Civility Instruction in Law School*, 15 NOTRE DAME J. L. ETHICS & PUB. POL'Y 359 (2001).

ever, for all of the discussion about ethics, one would expect to see a decrease in questionable litigation practices and an increase in trust among lawyers.[18] True, I am generalizing from my experience in Oregon to the entire United States, but the increase of post-licensure trainings on ethics occurring in many jurisdictions suggests some real concerns that the profession is attempting to address.[19]

One consequence of this intensified emphasis on a lawyer's ethics is that lawyers must document more discussions, agreements, or understandings with each other than they had to in the past. This means that virtually every conversation between lawyers on a case may need to be memorialized by sending a letter to the opposing counsel. Documentation may even be necessary in those instances where there was no conversation but merely a request to have a conversation.

For example, the Oregon District Courts adopted a local rule requiring that, before attorneys file a motion to certify, they speak with opposing counsel and try to resolve the matter.[20] In one of my defensive cases, I tried to reach a lawyer to discuss my pending summary judgment motion, which I expected we would be unable to resolve, so that I could prepare the certification as required by the local rule. I called and left a phone message, but did not receive a return call. I sent a letter to the lawyer requesting a conversation about the motion in order to comply with the local rule. No response. I followed up with yet another letter (Federal Express) referencing the previous letter and telephone call and repeating my request. Again, there was no response. Finally, I received a motion from opposing counsel for an extension of time to some of the court-imposed deadlines. I really did not object to the request, but opposing counsel suggested in the motion that I was asking for something that would impact his ability to respond responsibly for his client. In other words, he needed the extension because of my actions and not because of anything on his part.[21] I quickly prepared a response to correct the misimpression that my actions were somehow unnecessarily impeding the opposing lawyer's ability to proceed with the case which was created by opposing counsel's motion. I attached copies of my letters indicating that I had made repeated efforts to speak with counsel about a perfectly sensible summary judgment motion. I explained that I had

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18. *See* Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809 (1998) (providing accounts of various participants in a study of professionalism and giving their explanations for the problems of incivility).

19. MCLE State Requirements, *supra* note 16. For example, Virginia mandates two hours of continuing legal education on a yearly basis. *Id.*

20. The Oregon federal district court requires a certification that "[t]he parties made a good faith effort through personal or telephone conferences to resolve the dispute, and have been unable to do so." U.S. DIST. CT. R. D. OR. 7.1. Obviously, the courts were attempting to encourage resolution of matters between the lawyers and reduce the volume, and perhaps also impact the quality of the motions that the court had to take action on. These certifications were required for every motion including requests for extensions of discovery and pre-trial deadlines.

21. Also, he failed to include in his motion the appropriate certification as required by the local rule.

reached the conclusion that additional time would not necessarily get opposing counsel to respond to my letters so that the case could proceed. The court granted the extension to opposing counsel, but with stern warnings about compliance with the local rule and consequences for lack of compliance. I had no further problems on this issue with opposing counsel.[22] Perhaps this story is more a case of sloppy practice or overextended caseload on the part of opposing counsel, but that does not explain the choice on the part of opposing counsel to file a document with the court that shirks the truth in a way that amounts to dishonesty. This kind of behavior needlessly consumes valuable time by the attorney forced to respond to this behavior when the time is better spent on substantive issues in the cases. Also this behavior, generally, contributes to a lack of trust among members of the profession.

B. Proliferation of Rule 11 motions

The use of Rule 11[23] as a litigation tool by lawyers, rather than as a way for the courts to police the most egregious conduct of some lawyers, represents a significant change in civil practice.[24] Rule 11 of the Federal Rules of Civil Procedure states, in pertinent part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

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22. I filed the motion for summary judgment with the certification that the attorneys were unable to resolve the matter. The court granted my motion for summary judgment and dismissed the case against the United States.

23. FED. R. CIV. P. 11(b).

24. *See, e.g.,* Carol Rice Andrews, *Jones v. Clinton: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 BYU L. REV. 1 (discussing hypothetically the use of Rule 11 in the Jones case); Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORDHAM L. REV. 773 (1998) (discussing ethical and problematic behavior exhibited by lawyers); Georgene Vairo, *Rule 11 and The Profession,* 67 FORDHAM L. REV. 589 (1998) (discussing the regulation of attorney conduct through the use of Rule 11).

> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .[25]

As such, the rule was designed to penalize lawyers who filed wholly baseless claims or motions. Lawyers could be assessed sanctions for inappropriate or unethical behavior.[26]

Opposing counsel now assert Rule 11 as a bullying strategy. This use of Rule 11 by opposing counsel will unnecessarily chill one's enthusiasm and assertiveness in pursuing the client's case. Claims that a Rule 11 motion would be filed if one dared to file a motion for summary judgment were asserted more often than I had experienced previously in practice. Again, this tactic suggested that the litigation environment was testier, and that there was less honesty and trust among lawyers in practice than perhaps may have been the case at other times.

C. Increased use of Alternative Dispute Resolution

The movement to use alternative forms and forums for resolving legal disputes is one of the most dramatic changes in the practice of law in the latter part of the Twentieth Century and has carried forward into the new millennium. The impact of alternative dispute resolution (ADR) can be seen in the law school curriculum, where there are increasing numbers of courses on mediation,[27] in the publication of casebooks and other materials on ADR and negotiation,[28] and in the development of ADR centers or institutes at law schools.[29] Still, I was unprepared for how significant ADR had truly become in civil litigation.

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25. FED. R. CIV. P. 11(b)(1)-(3).

26. FED. R. CIV. P. 11(c).

27. *See* Robert A. Baruch Bush, *Alternative Futures: Imagining How ADR May Affect the Court System in Coming Decades*, 15 REV. LITIG. 455, 470 (1996) (discussing continuing developments in alternative dispute resolution); Jethro K. Lieberman*, Symposium of Litigation Management: Lessons from the Alternative Dispute Resolution Movement,* 53 U. CHI. L. REV. 424 (1986) (describing ADR and its benefits).

28. LAURA J. COOPER ET.AL., COOPER, NOLAN, AND BALES' ADR IN THE WORKPLACE (2000); DONALD G. GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS (1989); JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION WITH FORMS (2d ed. 1997); BEA MOULTON & GARY BELLOW, THE LAWYERING PROCESS: NEGOTIATION (1981); MARK SCHOENFIELD & RICK SCHOENFIELD., LEGAL NEGOTIATIONS: GETTING MAXIMUM RESULTS (1988); EDWARD F. SHERMAN ET AL., MURRAY, RAU AND SHERMAN'S PROCESSES OF DISPUTE RESOLUTIONS (3d ed. 2002); EDWARD F. SHERMAN ET AL., RAU, SHERMAN, AND PEPPET'S MEDIATION AND OTHER NON-BUILDING ADR PROCESSES (2d ed 2002); KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION (1999); JAMES E WESTBROOK & LEONARD L. RISKIN, RISKIN AND WESTBROOK'S DISPUTE RESOLUTION AND LAWYERS (2d ed.1997); GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983).

29. Some examples include the Howard University School of Law Alternative Dispute Resolution Clinic, at http://www.law.howard.edu; Willamette University College of Law Center for Dispute Resolution, at http://www.willamette.edu; University of Florida Levin College of Law Institute for Dispute Resolution, at www.law.ufl.edu; Capital University Law School Center for Dispute Resolution, at

Many courts have established rules to encourage some form of mediation early in the cases.[30] Courts are also providing lists of attorneys who would be willing to mediate cases.[31] Bar associations are compiling lists and distributing booklets of attorneys who specialize in mediation.[32] There were an increasing number of continuing-legal-education (CLE) courses on the topic over the period of time that I was in practice.[33] The United States Department of Justice established a special office on ADR and policies to encourage more mediation of civil cases.[34]

ADR, which uses mediators, helps reduce costs[35] and makes settlement negotiations more productive for all parties. Litigation, especially in the courts, is a very expensive endeavor[36] and does not always lead to a reasonable resolution of the underlying interests in the conflict.[37]

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http://www.law.capital.edu; and The George Washington University Law School Consumer Mediation Clinic, at http://www.law.gwu.edu.

30. Congress passed the Alternative Dispute Resolution Act of 1998 that directed all federal courts to establish ADR programs. Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (2001). The Oregon rule requires no "later than 120 days from the initiation of a lawsuit, counsel for all parties, after conferring with their clients, must confer with all other attorneys of record and all unrepresented parties, to discuss whether the case would benefit from any private or court sponsored ADR option" U.S. DIST. CT. R. D. OR 16.4(c). The Southern District of California provides that if no settlement is reached at the Early Neutral Evaluation Conference, the judicial officer may "[r]efer to non-binding arbitration or mediation to occur within forty-five (45) days (1) any case where the judicial officer believes arbitration or mediation might result in a cost-effective resolution of the lawsuit, and (2) any case where the parties have agreed to arbitration or mediation." U.S.DIST. CT. R. S.D. CAL. 16.1. In New York, "Judges and Magistrate Judges may designate civil cases for inclusion in the mediation program, and when doing so shall prepare an order to that effect." U.S. DIST. CT. R. S. & E.D.N.Y. 83.11(b)(1). Also, "[a]ny court order designating a case for inclusion in the mediation program . . . may contain a deadline not to exceed six months from the date of entry on the docket of that order." U.S. DIST. CT. R. S. & E.D.N.Y. 83.11(b)(1)(A).

31. *See supra* note 28 and accompanying text.

32. For example, the Oregon State Bar produces and distributes a booklet identifying and describing backgrounds of mediators in the state.

33. A number of publications related to alternative dispute resolution are available from the ABA publishing website which can be found at http://www.abanet.org/abapubs/home.hmtl.

34. Peter R. Steenland, Jr., *The Dispute Resolution Program at the Department of Justice: How Our Lawyers Are Using Mediation to Represent the United States More Effectively*, U.S. ATT'YS' BULL., Nov. 2000, at 6; Jeffrey M. Senger, *Frequently Asked Questions about ADR,* U.S. ATT'YS' BULL., Nov. 2000, at 9. In Oregon, the U.S. Attorney's office offered a CLE on ADR to its attorneys as well as to attorneys in the agencies that the office represented in order to facilitate and encourage the use of ADR over the range of cases handled by that office.

35. *See, e.g.,* The Corporate Counsel Section of the N.Y. State Bar Ass'n, *Legal Development: Report on Cost-Effective Management of Corporate Litigation*, 59 ALB. L. REV. 263 (1995) (discussing the reduction of litigation costs and effectiveness of case management); James F. Henry, *Some Reflections on ADR,* 2000 J. DISP. RESOL. 63 (addressing the cost benefits and time benefits of ADR); Robert T. Kenagy, *Whirlpool's Search for Efficient and Effective Dispute Resolutions,* 59 ALB. L. REV. 895 (1996) (analyzing a corporation's use of ADR for efficiency); Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation,* 14 OHIO ST. J. ON DISP. RESOL. 1 (1998).

36. *See, e.g.*, Robert F. Cochran Jr.*, Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and other Professional Responsibility Standards,* 28 FORDHAM URB. L.J. 895 (2001) (discussing whether ADR seems to be a means decision); Steenland, *supra* note 34, at 8.

37. Steenland, *supra* note 34, at 7.

> [S]ettlements occur when we go beyond the "positions" of the parties as articulated in their legal briefs and, instead, negotiate resolutions that address the parties' underlying interests. In other words, although "positions" . . . will control the outcome of a case if presented to the court, the ability to identify and then address a party's "interests" will drive the terms of most negotiated settlements.[38]

For years, the number of cases actually litigated to judgment has been decreasing.[39] It is an established fact that most civil cases are not resolved in court, but rather through some form of mediation, whether negotiations occur between lawyers or through the use of the courts or third party neutrals. As such, the massive use of ADR affects outright litigation strategies that include various motions and the type, extent, and timing of discovery prior to any mediation.[40]

The cost of litigation has skyrocketed along with everything else. As an attorney for the USAO, one might think that cost would not be a real factor. After all, we are backed by the United States, which has a hefty purse. However, this was not the case. There were plenty of internal checks to assist the attorneys in the office with controlling litigation expenses. Further, any expense, such as payments to experts or consultants, a court reporter for recording the deposition or having the deposition reproduced, had to be signed off by the attorney assigned to the case. In these ways, we were very much made aware of the expenses being incurred to support a particular case. Naturally, there were some overhead expenses like photocopying, secretarial support, and technical support for computers and other equipment that were not billed directly to one case but represent a real cost and important support for the litigation. Notwithstanding items like this, keeping track of the cost of the litigation appeared to receive more attention by everyone than I recalled from my earlier days at the Justice Department. The most significant "cost" for us, like any other law office, was our time. We had to consider how much time to invest in a particular matter given the other assigned matters and whether the expenditure of time was worth the investment in light of factors like the expected outcome and the importance of the issue.

Naturally, cost of the litigation was also important for attorneys in the private bar who were representing parties opposing the government. Cost

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38. *Id.* at 8.

39. *See* ELLEN E. SWARD DURHAM, DECLINE OF THE CIVIL JURY 12-14 (2001).

40. *See* ELIZABETH ROLPH ET AL., ESCAPING THE COURTHOUSE PRIVATE ALTERNATIVE DISPUTE RESOLUTION IN LOS ANGELES 103 (1994) (surveying ADR providers in the Los Angeles area in an effort to count the number of private ADR cases), *summarized in* Rand Corporation, Escaping the Courthouse, *at* http://www.rand.org/publications/RB/RB9020/ RB9020doc.html; Edward F. Sherman, *The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process*, 15 REV. LITIG. 503 (1996) (factoring in the implementation of ADR include avoidance of "legal technicalities, expense, delay, and rigidity of remedies associated with litigation").

considerations, of course, assisted the government in encouraging and facilitating settlement of matters that had low-value or nuisance factors.[41]

D. Discovery Challenges

Perhaps the most surprising observation regarding my return to practice is that the excessive and sometimes oppressive discovery of the early 1980s was not the story for the mid-1990s. The American Bar Association and others complained about the abuses of discovery and the archetypical "Rambo Litigat[or]."[42] There were many reforms in response to excesses involving the use of interrogatories, depositions, and other discovery tools. These reforms included limits on the number of interrogatories per party in a particular case,[43] revision of Rule 26 in the Federal Rules of Civil Procedure to require that certain information is turned over to opposing counsel at the outset of the litigation,[44] and rules requiring attorneys to consult with each other prior to filing any motion with the courts.[45] These reforms were definitely in place in the United States Federal District Court in Oregon. Responding to discovery requests is laborious but not particularly painful due, in large measure, to court rules that provide some reasonable boundaries, ground rules, and sanctions in this phase of litigation.[46]

III. HOW THE PRACTICE OF LAW REMAINED THE SAME

I am sure that I have not mentioned in this Article all of the ways that the practice of law has changed from the early 1980s to the mid-1990s.[47]

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41. See Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257 (1995), for a discussion on rational assessments on settlements.

42. *See* Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618 (1996); Suein L. Hwang, *Sniffing Out Evidence Would Be Quite Easy With This Paper Trail*, WALL ST. J., May 3, 1995, at B1, *available at* 1995 WL 8708149; Benjamin Wittes, *Quite a Discovery: Phillip Morris' Papers In ABC Libel Case Leave Foes Fuming*, LEGAL TIMES, May 1, 1995, at 1.

43. Oregon court local rule 33.1 references the Federal Rules of Civil Procedure which requires that without leave of court or written stipulation parties must limit the number of interrogatories submitted as they may not exceed "25 in number including all discrete subparts." FED. R. CIV. P. 33(a). The District of Columbia local rules provide that "limitations shall be placed on the permitted number of interrogatories" and the Rule applies limits of 12 interrogatories for "Fast Track" cases and 25 interrogatories for "Standard Track" and "Complex Track" cases. U.S. DIST. CT. R. D.C. 26.2(b).

44. Within 14 days after the Rule 26(f) conference, counsel for the parties are required to disclose pertinent information such as the following: (1) the names, addresses, and telephone numbers of witnesses, (2) copies of all discoverable documents, and (3) computation of damages asserted. FED. R. CIV. P. 26(a)(1)(A)-(C).

45. U.S. DIST. CT. R. D. OR. 7.1(a)(1)(A).

46. *See* Joel Cohen, *'Obstruction': Can Civil Litigants Afford The Texaco Price Increase?*, N.Y. L.J., Mar. 3, 1997, at 1 (providing examples of several instances of discovery abuse and sanctions imposed for such practice); David G. Savage, *In Real World, 'Obstruction' Is a Legal Rarity*, L.A. TIMES, Sept. 8, 1998, at A1, *available at* 1998 WL 18872104 (stating that this problem has been debated in recent years and "some judges have imposed stiff fines for violations."); John R. Woodard III, *Discovery Abuse: "I Know it When I See It*," THE BRIEF, Winter 1997, at 32 (providing a top ten list of discovery abuses).

47. For example, there has been a great deal of discussion about rules on multidisciplinary practice that seems to be more important today than in the 1980s. *See, e.g.*, James W. Jones & Bayless Manning,

My objective was to provide some basis for the recommendations that will follow on how law schools can continue to prepare law students for the transition from the legal academy to practice.[48] I am not commenting upon whether these changes in the practice of law are positive or negative for the legal profession.[49] In this section, I will briefly comment on those aspects of the practice that certainly had not changed.

First, the workload for attorneys involved in civil litigation is still demanding. Consequently, attorney time is a precious resource. There was far less time to think and reflect on the theoretical framework in which legal strategies would be constructed. There was definitely no time to read law review articles or other such source materials.[50]

My caseload at the USAO consisted of both affirmative and defensive cases. On the affirmative side, I naturally had a little more control because I could decide, with some limited constraints,[51] when to file the case in the federal district court. Once the case was initiated, the court immediately imposed a scheduling order with timelines for discovery cut-off, filing the joint pre-trial order, and commitments for some form of dispute resolution to assist in resolving the matter. At this point, even before the initial response by opposing counsel, the pace of the case was partly out of my control.

On defensive matters, where the United States was a defendant in a lawsuit, there was even more of a loss of control over one's time. When motion or discovery requests are filed, immediately the local court and federal rules clock commence so that a response is due within a certain amount

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Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice, 84 MINN. L. REV. 1159 (2000); *see also* William Eric Pilsk, *The Modern Practice of Law: Assessing Change*, 41 VA. L. REV. 677 (1988).

48. *See* discussion *infra* Section V.

49. *See* Carroll Seron, *Is "In The Interests of Justice" in the Interests of Lawyers? A Question of Power and Politics*, 70 FORDHAM L. REV. 1849 (2002) (discussing the organization structure of the legal profession). S*ee generally* Mary C. Daly, *Ethics and the Multijurisdictional Practice of Law: Resolving Ethical Conflicts in Multijurisdictional Practice*, 36 S. TEX. L. REV. 715 (1995) (referencing Richard L. Abel, *The Transformation of the American Legal Profession*, 20 LAW & SOC'Y REV. 7 (1986) (discussing the various changes throughout the legal profession in recent years)).

50. *See* Thomas L. Fowler, *Law Reviews and Their Relevance to Modern Legal Problems*, 24 CAMPBELL L. REV. 47 (2001) (arguing that law review articles today appear to be irrelevant to the day-to-day concerns of practitioners and judges); Michael D. McClintock, *The Declining Use of Legal Scholarship By Courts: An Empirical Study,* 51 OKLA. L. REV. 659, 670-71 (1998) (stating that "many of the articles published in law reviews appear to involve academics writing for other academics rather than for practitioners."); Deborah L. Rhode, *The Professional Responsibilities of Professors,* 51 J. LEGAL EDUC. 158, 159 (2001) (discussing what legal education exalts and what it actually rewards is the scholarship for each other and not the profession.). *But see* Alex J. Hurder, *The Pursuit of Justice: New Directions in Scholarship About the Practice of Law,* 52 J. LEGAL EDUC. 167, 167 (2002) (surveying clinical scholarship that addresses "the lawyer's role in constructing a case from facts and law").

51. This ability to decide when to file the case was naturally influenced by the statute I relied upon and its requirements. For example, in the Federal Fair Housing matters, these cases were typically referred to the U.S. Department of Justice for filing after a full investigation and were known as "election cases." 42 U.S.C. § 3612(a) (2001). This meant that the U.S. Department of Justice had only 30 days in which to file the case in the Federal District Court. *Id*. § 3612(o)(1). Under this statutory provision, I had a very tight window in which to respond.

of time.[52] Of course, one has to deal with the same scheduling order from the court in this context as in the affirmative context.

In addition to losing, albeit if not total but significant, control over when projects or activities might be conducted**,** there is also the matter of not being able to handle the topics or issues that one would like to spend one's time on. For example, a plaintiff files a complaint against the United States, alleging a range of constitutional issues, Federal Tort Claims Act violations, and other supposed violations of the federal laws.[53] The United States must be represented, and the case with all of its issues must be addressed.

Finally, preparation for these cases, whether affirmative or defensive, included speaking with potential witnesses; drafting pleadings, discovery requests and responses; and researching and writing motions or responses to motions, pre-trial orders, mediation memorandums, and letters to everyone documenting the progress of the work. The practicing attorney with an active civil caseload must complete a product for immediate consumption—filing in court or serving on opposing counsel—within a short period of time. In other words, this meant one did not have the option of controlling the ebb and flow of a work day like a law professor by, for example, taking a year to develop, critique, obtain feed-back upon, and publish an article.

There is no question that having the ability to establish your own priorities for your work, schedule, and ability to be flexible with your schedule is less stressful and can be more personally satisfying.[54] However, there is immense satisfaction in knowing that what you are presently doing can really matter.[55]

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52. The Federal Rules of Civil Procedure provide that "[t]he adverse party prior to the day of hearing may serve opposing affidavits." FED. R. CIV. P. 56(c). The Virginia rules of civil procedure provides as follows:

> The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 21 days after the service of the interrogatories, except that a defendant may serve answers or objections within 28 days after service of the bill of complaint or motion for judgment upon that defendant.

VA. SUP. CT. R. 4:8(d). The Virginia rules of civil procedure also require that "[t]he party upon whom the request is served shall serve a written response within 21 days after the service of the request, except that a defendant may serve a response within 28 days after the service of the bill of complaint or motion for judgment upon that defendant." VA. SUP. CT. R. 4:9(b). The Maryland Rules provide that "[t]he party to whom the interrogatories are directed shall serve a response within 30 days after service of the interrogatories or within 15 days after the date on which that party's initial pleading or motion is required, whichever is later." MD. R. CIV. P. 2-421(b). The Maryland rules also require that "[t]he party to whom a request is directed shall serve a written response within 30 days after service of the requestor within 15 days after the date on which that party's initial pleading or motion is required, whichever is later." MD. R. CIV. P. 2-422(c).

53. This is particularly bothersome when *pro se* litigants file cases against the United States and take the kitchen sink approach to litigation. Everyone in the Civil Division of the Office of the United States Attorney had to take turns handling these types of matters. These kinds of cases, in general, seemed to consume more time because the litigant on the other side was not represented and generally unfamiliar with legal terminology, concepts and procedures.

54. *See* Deborah L. Rhode, *Balanced Lives for Lawyers,* 70 FORDHAM L. REV. 2207 (2002) (discussing how flexible schedules are beneficial to lawyers in giving them a more balanced life).

55. For example, a sexual harassment claim in a Fair Housing Case that resulted in a consent judgment paying in excess of $100,000 to eight low-income women harassed by the manager of a hotel (the

A second, but related, point has to do with the pace of the work. Daily practice tends to move at a faster pace than the day-to-day life of an academic.[56] In practice, especially one that principally involves civil litigation, there are a series of judgments or decisions that have to be made about an issue, a particular motion, a witness, opposing counsel, or something else. It was a luxury to have a solid two-hour block of time during the day of a usual workweek to think and write. The law professor can choose to be ponderous, but such a habit creates problems for the practitioner. In short, there is time—usually during semester breaks and summers—to think and write.[57]

The third point is the pay-off for the work. In practice, depending on the type and complexity of the case, I could expect to experience personal satisfaction or have a sense of making a difference in the lives of people in my cases on a shorter horizon than it would take to produce a typical law review article.[58] In addition, my article may or may not actually reach my target audience like the practitioner, who could put my theories and arguments into operation within the anatomy of a case.

IV. WHAT CAN LAW SCHOOLS DO TO BRIDGE THE GAP BETWEEN THE PRACTICE AND THE LAW SCHOOLS?

In my first year back in the legal academy, colleagues in the law teaching profession repeatedly asked me to comment on how my practice experience might inform proposed changes in legal education or in my classroom teaching. In sum, what could we do differently to improve our collective ability to produce graduates of our law schools who are more able to begin the practice of law?[59]

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largest settlement of this kind in Oregon at the time), and an ADA case that was landmark in the country on application of auxiliary provisions of Title III of the ADA to private physicians offices.

56. Of course that depends on the day and the academic involved. After a long day of classes, committee meetings and other interruptions, the professor may feel that his or her day is not unlike that of someone in practice.

57. Melissa Cole, *Struggling to Enjoy Ourselves or Enjoying the Struggle? One Perspective from the Newest Generation of Women Law Professors,* 10 UCLA WOMEN'S L.J. 321 (2000) (discussing the life of a woman law professor); Kevin H. Smith, *How to Become a Law Professor Without Really Trying: A Critical, Heuristic, Deconstructionist, and Hermeneutical Exploration of Avoiding the Drudgery Associated with Actually Working as an Attorney,* 47 U. KAN. L. REV. 139 (1998) (discussing the important issues that need to be addressed when becoming a law professor).

58. Teaching in the classroom, the hallways or the office does provide a regular source of personal satisfaction. However, one does not really know whether that teaching will accomplish the short-term goal—helping the student to understand concepts and how to do legal analysis to pass your exam—or a longer-term goal—planting seeds in a future lawyer who may make a significant contribution to the profession and the community in which she lives and works.

59. A NALP study found that, as of February 15, 2002, 57.8% of law school graduates went into private practice and 1.5% pursued an academic career. Other legal practice areas included judicial clerkships (11.6%), public interest (2.9%), and business (11.3%). National Association for Law Placement, Inc., *Recent Graduates*, *at* http://www.nalp.org/nalpresearch/newgrads.htm (last visited Apr. 15, 2004) [hereinafter NALP Study].

Proposal #1: Incorporate Ethics Instruction Throughout the Curriculum

The subject of lawyer ethics, which includes notions of civility, is increasingly important in the practice of law.[60] Teaching ethics can no longer be relegated to the single Professional Responsibility course typically found in the law school curriculum. These issues need to be raised consistently in a variety of contexts.[61] It is true that too often the casebooks and other materials that we use do not easily support our ability to raise ethical issues within our courses. However, there are many resources outside of the casebook that we can consult to address these issues within the coursework.[62] A modest proposal to increase student exposure to ethical issues would be for every professor to commit to raising at least one ethical issue in his or her course over a given semester.[63] Students would get the message that lawyer ethics are not trivial or less important than the substantive work in a case. The ethical rules that we operate under within our respective jurisdictions provide an important framework for the way we should conduct the substantive work. These rules provide an important template for advocating the client's interest, maintaining professionalism, and promoting justice and fairness in the courts.

Proposal #2: Support Clinical Programs and Externships

Clinical programs exist in virtually every law school in the United States.[64] Law schools structure these programs in a variety of ways, from direct representation of low-income persons[65] to the development of policy

60. *See* discussion on lawyers' ethics *supra* Section II.

61. Professor Rhode, who directs the Keck Center on Legal Ethics and the Legal Profession at Stanford Law School, has noted that there is a significant lack of attention on teaching ethics in law schools. Deborah L. Rhode, *The Professional Responsibilities of Professors,* 51 J. LEGAL EDUC. 158, 164 (2001); *see also* Alan Watson, *Legal Education Reform: Modest Suggestions,* 51 J. LEGAL EDUC. 91 (2001) (urging requiring a professional responsibility course in the first year of law school).

62. At the very least, the bar magazines or publications that lawyers receive will indicate from time to time the type of disciplinary proceedings with some detail on the violations of the ethical rules along with sanctions. A quick perusal of these materials will probably generate at least one issue that could be raised in a course. Websites that might be helpful are the ABA's Center for Professional Responsibility homepage at http://www.abanet.org/cpr and the American Legal Ethics Library at http://www.law.cornell.edu/ethics.

63. *See* Joshua P. Davis, *Teaching Values in Law School: The Center for Applied Legal Ethics*, 36 U.S.F. L. REV. 593 (2002) (giving examples of how professors teach ethics to their students); Richard A. Matasar, *The Two Professionalisms of Legal Education*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99 (2001) (describing the role of the law school to teach skills and values that will lead its graduates to become effective and "good" legal practitioners); Michael Millemann, *The Institutional Barriers and Advantages Pane,* 39 WM. & MARY L. REV. 489 (1998) (summarizing panel discussion which focused on formats for teaching professional responsibility).

64. *See* STANDARDS FOR APPROVAL OF LAW SCHS. 302(c) (2002), *available at* http://www.abanet.org/legaled/standards/chapter3.html.

65. *See, e.g.*, George A. Martinez, *Theory, Practice, and Clinical Legal Education*, 51 SMU L. REV. 1419 (1998) (demonstrating how legal clinics bridge the gap between theory and practice); Mark V. Tushnet, *Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education*, 52 GEO. WASH. L. REV. 272 (1984) (discussing the marginal aspect of legal education clinical programs); Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*,

or proposed legislation.[66] Most of these programs allow students to integrate substantive legal knowledge with skills particularly directed at assisting clients in litigation.[67] In many instances, this experience is the closest one that students can have to actually practicing law while still in law school. Unfortunately, in order to ensure a quality experience in the clinical programs, the student-teacher ratio must be low, and therefore, space is often quite limited. Further, this is a highly labor intensive enterprise, which means that the law school has to financially support hiring additional faculty to create more opportunities for students to have a clinical experience.[68] Most students who participate in the clinics find the experience invaluable and feel that because of the experience they are better prepared to enter legal practice.[69] These practice experiences give students an opportunity to reflect on their role as lawyers and officers of the court, as well as to find accommodations between their own personal set of values and perspectives and those required for a member of the legal profession. They come to understand the awesome responsibility of how their decisions affect the real lives, liberty, and property of the clients with whom they work.

The clinical programs, and the faculty who teach in them, are often viewed as the stepchild of the law school curriculum for a variety of reasons, none of which are meritorious.[70] Law schools need to support clinical programs in several ways, including to the extent possible, creating more opportunities for students to take such programs.[71] Also, from an institutional perspective, it is important to articulate to law students the role of clinics in the law school curriculum and their importance in the training and preparation of lawyers.[72]

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70 FORDHAM L. REV. 1929 (2002) (discussing how the law school clinic can provide legal education in the interests of justice).

66. *See* Martinez, *supra* note 65.

67. *See* Nina W. Tarr, *Current Issues in Clinical Education*, 37 HOW. L.J. 31 (1993) (addressing the missions of clinical programs).

68. Uphoff, *supra* note 12, at 413; *see also* Leslie L. Cooley & Lynn A. Epstein, *Classroom Associates: Creating a Skills Incubation Process for Tomorrow's Lawyer*, 29 CAP. U. L. REV. 361, 365 (2001) (arguing that one professor for every sixteen students in an upper level class involving applied business lawyering provides students with the individual attention necessary to make the class a success); Kamina A. Pinder, *Street Law: Twenty-Five Years and Counting*, 27 J. L. & EDUC. 211 (1998) (referencing Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. L. & EDUC. 612 (1984) (describing the development of clinical education, including overcoming funding obstacles)).

69. *See* Donald N. Zillman & Vickie R. Gregory, *Law Student Employment and Legal Education*, 36 J. LEGAL EDUC. 390 (1986) (stating that most students clerk at some time during law school and survey participants stated that they were more likely to attribute the acquisition of their legal skills to clerkships over internships).

70. *See* Stephen F. Befort, *Musings on a Clinic Report: A Selective Agenda for Clinical Legal Education in the 1990s*, 75 MINN. L. REV. 619 (1991) (discussing the decline of the use of clinical programs).

71. Kirsten Edwards, *Found! The Lost Lawyer,* 70 FORDHAM L. REV. 37 (2001) (making a case to increase clinical educational opportunities within the law school).

72. Sometimes law schools have provided resources for clinical programs but the enrollment is low by clinic standards. This may be the result of many factors but at least one important one is that students usually do not understand how the work in a clinic will enhance them here-and-now in law school or later in their careers.

Likewise, law schools need to promote and encourage externship opportunities[73] among students. Externships provide a way for students to gain real world experience under the supervision of an attorney. I personally benefited from such an externship experience in my third year of law school when I served as a student law clerk to a judge in the District of New Jersey. My principal supervisor was one of the judge's full-time law clerks; however, my responsibilities included preparing memoranda for the judge on particular motions, just like his full-time clerk. Further, the judge met with me to discuss my memoranda and recommendations, which I had to defend.

As a future litigator, the opportunity to acquire a perspective from the judge's chambers was invaluable.[74] While there were many lessons I learned during that experience, the most important one was that the quality of one's written submissions really mattered. I also learned that a lawyer should be careful not to upset the judge's law clerks. The law clerks are an extension of the judge and should be treated as though you are speaking to the judge. I participated in an externship program without all of the bells and whistles, and curricular safeguards, that are largely present in such programs today, and I still gained much from the experience. While I am not proposing that students should be required to have at least one externship experience while in law school,[75] these program opportunities should be strongly encouraged and institutionally supported, particularly when the number of clinical spots is limited.

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73. Externship programs have had mixed reviews in law schools over the past few years. *See* Mitu Gulati et al., *The Happy Charade: An Empirical Examination of the Third Year of Law School,* 51 J. LEGAL EDUC. 235, 263 (2001) (supporting the expansion of externships especially for third year law students). Some of the problems with these programs relate to poor supervision of the student by the externship supervisor, no accountability to the institution for the student's work, students being used as mere clerks rather than getting a quality legal experience, and difficulty in managing externships or providing any oversight of the program by the institution. More recently, many externship programs have been strengthened by appointment of a faculty member for oversight of the program, clear articulation of goals, standards of accountability for the supervisors and the students, a required class component for students enrolled in an externship, and follow up by the faculty member of supervisors and students in the program.

74. *See* Christopher Avery et al., *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793 (2001) (discussing the importance of federal judicial clerkships as an important point of entry to many of the most sought-after positions in the legal profession); Susan Harp, *Life After Law School: Clerking—Something Every First Year Law Student Should Know*, 29 STETSON L. REV. 1291 (2000) (explaining that one of the benefits of clerkships is the increased employment opportunities upon completion of a clerkship); J. Daniel Mahoney*, Law Clerks: For Better or Wors*e*?,* 54 BROOKLYN L. REV. 321 (1998) (discussing the value of a judicial clerkship).

75. In some schools, students are required to select a clinical offering from the law schools' clinical program. *See* Leonard D. Pertnoy, *Skills is Not a Dirty Word*, 59 MO. L. REV. 169 (1994) (discussing that "skills" should be integrated with the currently used Socratic methodology and analytical doctrine for the betterment of legal education as a whole); Daniel J. Givelber et al., *Learning Through Work: An Empirical Study of Legal Internship,* 45 J. LEGAL EDUC. 1 (1995) (stating that Northeastern law students must complete multiple externships as a requirement for graduation).

Proposal #3: Develop Meaningful Partnerships with the Practicing Bar

It is critically important that we, individually and institutionally, have ongoing dialogue and involvement with the practicing bar. Many law schools do maintain relationships with the bar in the jurisdiction in which the law school is located by sponsoring, or at least providing the physical space for, CLE's and inviting members of the bar to participate in the academic program as speakers.[76] The extensive outreach to alumni of the law school might also count as a way to stay in contact with the practicing bar, since most graduates are usually engaged in the practice of law.[77] While these kinds of efforts are positive, they are not quite enough. The law school needs to have the kind of relationship with the local bar that is perceived as intimate, involved, and serious.

The Virginia State Bar's Section on Legal Education provides a model that allows law schools to have meaningful and continuous input with the bar.[78] The Section is composed of representatives from each Virginia law school as well as members of the bar. The Section regularly publishes a newsletter with articles commenting on aspects of legal education and ethics, news about law schools, and joint CLE programs sponsored by the law school and the Section on Legal Education. The Section appears to be an active one and allows members of the bar to become more conversant with the pressures and issues facing legal education today.[79]

Law school programs might, to the extent it is feasible, establish a rotating chair to allow a practitioner to co-teach in his or her field of expertise along with the faculty member.[80] In a less formal way, faculty could be encouraged to include practitioners in courses for one-day presentations[81] or coordinate teaching and learning opportunities between the clinical and nonclinical teaching faculties.[82]

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76. Also, typically, law schools draw from the practicing bar for professionals to teach as adjuncts in specialized areas of practice.

77. *See* NALP Study, *supra* note 59 (emphasizing the point that most graduates enter the practice of law).

78. This section also provides a forum for all of the law schools in Virginia to exchange information with each other as well as work with the practicing bar.

79. *Id.*

80. Initially, when the Allen Chair was established at the T.C. William School of Law, University of Richmond, in Richmond, VA, the plan was to permit scholars and practitioners to participate in a course on a current topic or area of law. The scholars and practitioners would be at the law school for a short period of time (perhaps a week) and co-teach along with the professor responsible for the Allen course. This model is no longer used for the Allen Chair at the University of Richmond. *See generally* Okianer Christian Dark, *Cosmic Consciousness: Teaching on the Frontiers,* 38 LOY. L. REV. 101 (1992) (describing the first Allen Chair course, objectives and outcomes).

81. Where has it worked? *See* John B. Mitchell et al., *And then Suddenly Seattle University was on Its Way to a Parallel, Integrative Curriculum,* 2 CLINICAL L. REV. 1 (1995) (describing how faculty members have used clinical components and faculty members in their classes).

82. *See, e.g.,* Beryl Blaustone, *Training the Modern Lawyer: Incorporating the Study of Mediation into Required Law School Courses*, 21 SW. U. L. REV. 1317 (1992) (stating that CUNY Law School at Queens College required a mandatory mediation instruction which was included in a second-year course entitled Lawyering and the Public Interest).

There should be resource support for faculty to attend and participate in bar meetings and section activities to facilitate the development of the relationship between the law school and the bar, at both the micro and macro levels. Of course, a more radical way to stay in touch with the bar and the challenges confronting practitioners is to support faculty who wish to return to practice for a limited period of time.[83] The goal with any of these recommendations is to find productive ways for the law school generally, and more particularly its faculty, to remain sufficiently connected with the ebb and flow of the realities of legal practice.

Proposal #4: Every Student Should be Deeply Exposed to ADR

Alternative Dispute Resolution is simply the predominate manner for resolving civil cases today. Students must understand the implications of integrating ADR techniques into the practice. For example, students should have a grasp of how to engage in effective advocacy within the context of mediation, how mediation or other ADR devices add value in settlement negotiations, and the logistical aspects of selecting a mediator. There are also significant ethical issues that need to be examined particularly as it relates to conflicts of interest and multi-disciplinary practice implications for lawyer-mediators and their firms.[84]

Whether or not law schools implement a full-fledged alternative dispute resolution program accompanied by a center or institute,[85] or a less grand effort incorporating some of these issues into existing programs in the law school curriculum,[86] the point is that ADR can no longer be relegated only to specialty elective courses.[87] ADR occupies too significant an area of prominence in the real world of practice, and it continues to grow.[88]

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83. *See generally* Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV 705, 756-67 (1998) (discussing the legal academy's lack of respect for practitioner experience among their law faculties).

84. ABA recently proposed ethical rules for settlement negotiations with specific emphasis on mediation setting. ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS (2002), http://www.abanet.org/leadership/recommendations02/105.pdf (last visited Aug. 26, 2003).

85. Some examples are the Willamette School Center for Dispute Resolution and the Nova Southeastern University Shepard Broad Law Center Alternative Dispute Resolution Clinic.

86. *See* Catherine Therese Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945 (1991) (noting that the University of Maryland School of Law has a curriculum requirement that their students must complete a Legal Theory and Practice course, which includes a substantial clinical experience which allows students to work with real clients).

87. Upper class courses on ADR, mediation, and negotiation are still needed in the law school curriculum. The point here is that this should not be the only way that law schools deliver information and training to students about ADR. The availability of course materials to assist in preparation have also grown over the past few years. *See* COOPER ET AL., *supra* note 28; GIFFORD, *supra* note 28; SCHOENFIELD & SCHOENFIELD, *supra* note 28; SHERMAN ET AL., *supra* note 28. Finally, this may be another area where some practitioner-law school collaboration would be fruitful.

88. *See* Nick Hall, *Alternative Dispute Resolution 2020*, HOUSTON LAWYER, Sept.-Oct. 2000, at 37 (discussing the continued growth of ADR as an alternative to litigation). Federal courts are now requiring the use of ADR whenever possible; s*ee also* Carrie Menkel-Meadow, *Ethics In ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979 (2001) ("[V]irtually every state and federal court requires some form of ADR at least to be considered by the

Proposal #5: Students—and Perhaps That Means Faculty as Well—Must be Conversant With New Technologies

I was first introduced to the use of computers as a tool for legal research in my first year of practice. In short, computer-assisted legal research was not a part of the law school curriculum in the mid-1970s. A great deal has happened since that time. Now, law students are routinely trained on both Westlaw and Lexis-Nexis legal research databases, and increasingly, law schools are strongly encouraging, if not requiring, law students to bring a laptop to school.[89] Moreover, our students are quite computer savvy, having been exposed to the computer and the Internet before law school.

There are, however, other technologies to which students should be exposed to as well. Many courtrooms throughout the country are being upgraded to accommodate various types of equipment that will facilitate the presentation of information and evidence to judges and the juries. For example, the new federal courthouse in Portland, Oregon has many features that require lawyers to receive a full one-day training to maximize the use of that equipment and technology for their cases. Further, the federal district court in Oregon is moving to a paperless filing system for instituting actions, filing motions and replies, receiving orders, and any other action by the court. These paperless systems will become more common as we move further into this century.

While it may not be possible to retrofit a law school so that it keeps up with every technological whiz gadget of the day, it is important that law schools continue to support the technological centers within their institutions. Further, faculty must continue to work with the technologies to the extent possible and incorporate uses in the classroom so that students are exposed to them.

Proposal #6: Encourage and Credit Scholarship Accessible to the Bar

Most law review articles with extensive footnoting are not read by the bar.[90] Rather, the principal audiences for these articles are other scholars. I am not proposing that law faculty should discontinue producing law review articles. I am suggesting that we should produce more articles that are both shorter and more manageable for busy practitioners to read and use in practice. There are useful critiques of cases and interesting ideas for argumentation in the law review articles that practitioners may never see simply because the current format is not easily accessible given demands on time.

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lawyers in a litigation matter."). Even the U.S. Dept. of Justice encourages ADR by creation of the Office on Mediation.

89. For example, Howard University School of Law requires law students to have laptops.

90. *See* Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990) (claiming that law review articles were made to be written, not read); Randall Shepard, *What the Profession Expects of Law Schools,* 34 IND. L. REV. 7 (2000) (criticizing current legal scholarship).

Very rarely did I hear a practitioner in my field, or another, say anything about a law review article that he or she had read or used for a legal issue or problem.

Articles published in bar journals, specialty publications, monographs, chapters in books, and in a web format accessible on the Internet can provide many different venues for getting very thoughtful critiques and proposals before practitioners for consideration in developing the legal theory of a case, proposing legal arguments, or planning legal strategies. Traditionally, faculty who publish in some of these formats have not been rewarded within the institution to the same extent as faculty producing law review articles. There must be a balance, and each institution needs to find a way to strike that balance. The law school or the legal academy has a very valuable resource—the expertise of its faculty—that can be used by the practicing bar. There should be ways to create incentives within the law school to promote the production of legal scholarship that both the legal academy and the bar value, rather than to discourage the production of scholarship that does not fit traditional notions or definitions of scholarship.[91]

Proposal #7: Diversity Really Matters!

Today's lawyers must be able to work in more diverse work environments as well as to appreciate how various types of racial, cultural, and other differences affect legal strategies or the practice of law in general.[92] No longer is diversity a boutique issue or only an issue for those persons who are not white, male, heterosexual, protestant, middle-class, or able-bodied.[93] The world has changed as is evidenced by the latest 2000 Census, and it will continue to become increasingly diverse.

While it is true that law schools need to continue to diversify faculty and student bodies, some attention must also be given to the staff. Much of the work of running the law school is in the hands of the staff who are responsible for admissions, financial aid, library services, alumni affairs, development, career services, secretarial support, technology, housekeeping, and meals. Typically, law schools are criticized or applauded for hiring and promotion practices regarding faculty, but there is no discussion about the

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91. *See, e.g.*, Erwin Chemerinsky & Catherine Fisk, *The Life and Legacy of Bernard Schwartz: In Defense of the Big Tent: The Importance of Recognizing the Many Audiences for Legal Scholarship*, 34 TULSA L.J. 667 (arguing that legal scholarship should be directed at a wide array of audiences); Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347 (1995) (discussing the importance of empirical scholarship).

92. The American Bar Association has CLE programs, and meetings available focusing on diversity issues. *See* JACOB HERRING, ABA STANDING COMMITTEE ON CONTINUING EDUCATION OF THE BAR , VALUING DIVERSITY: LAW FIRMS AND LEADERSHIP IN THE 21ST CENTURY (1999).

93. *See* Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching,* 32 WILLAMETTE L. REV. 541 (1996) (discussing the importance of incorporating diversity into the classroom); Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, *in* COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES (Michael Chang et al. eds., 2003).

staff at law schools that are often largely white and female—with the exception of the males in technology, housekeeping, and food service.[94] Law students have more contact with staff in the law school than they do with their professors. One important way to get these students prepared for a diverse workplace is to create one in the law school by focusing some attention on diversifying the staff who perform critical functions within the law school community.

Proposal #8: Courses on Time Management and Stress Management Should be Offered to Students as a Part of the Preparation for Practice.

The practice of law is stressful, and there never seems to be sufficient time to get projects completed.[95] In addition to the practice of law, there are the day-to-day challenges that we all experience in trying to have a life, which includes family and community service. If law school is a place where students are expected to acquire the knowledge, skills, and training necessary to enter the legal profession**,** then they must also be equipped with coping strategies to have a chance to successfully manage the practice of law within the context of life's special challenges.[96] Increasingly, law schools do recognize this need and provide courses on time and stress management for their students.[97] What I am suggesting is that this trend continue. Law schools need to approach students in a holistic manner and provide them not only with the critical legal tools, but also with ways to manage the stresses and tensions of the lawyer in practice.[98]

Several of the proposals in this section have been implemented in many law schools or discussed in various fora.[99] Notwithstanding that some of these proposals may not be new, I repeat them to underscore the importance of proposals not yet fully implemented and to suggest others that will help

94. *See* Joseph F. Baca et al., *Report of the Diversity Committee 1999-2000*, *at* http://www.abanet.org/legaled/committees/diversity.html (last visited Aug. 27, 2003).

95. *See* Patrick J. Schiltz, *Attorney Well-Being in Large Firms: Choices Facing Young Lawyers: On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999) (discussing various factors for unhappiness including stress); John Sonsteng & David Camarotto, *Minnesota Lawyers Evaluate Law Schools, Training and Job Satisfaction*, 26 WM. MITCHELL L. REV. 327 (2000) (discussing factors that affect job dissatisfaction).

96. Keg parties and the occasional reference to a counseling center located someplace outside of the law school building are not sufficient.

97. There may be some other areas where instruction is needed to help the new lawyer avoid some of the pitfalls that could cause undue stress in the practice of law. For example, some law schools like Howard University School of Law provide instruction and guidance on how to manage finances, stress, and the special challenges of being a parent and a law student. Typically, these kinds of courses or programs occur as a part of the first year orientation program. While this is positive, I would encourage law schools to offer such programs to upper-class students as well as they encounter new challenges as they progress through the law school program.

98. *See generally* J. Michael Papantonio, *Living As a Lawyer*, 26 AM. J. TRIAL ADVOC. 1 (2002).

99. *See, e.g.*, Bobette Wolski, *Why, How and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum*, 52 J. LEGAL EDUC. 287 (2002); ABA, SELECTED EXCERPTS FROM THE MACCRATE REPORT (1992), *at* http://www.abanet.org/legaled/publications /onlinepubs/maccrate.html# (last visited Feb. 16, 2004).

the law school graduate to be better able to enter the practice of law and, perhaps, experience less trauma in making that transition.

V. HOW LAW FACULTY CAN BEGIN TO INCORPORATE PRACTICE-ORIENTED TEACHING IN THEIR COURSES

I teach Torts in the first year program. I continue to believe that the most important teaching goal for the first year program is to introduce law students to legal analysis and, especially, to assist them in developing strong capabilities to analyze written materials.[100]

> A good lawyer is much more than a professional. A good lawyer is a craftsman, applying his or her talents with imagination, diligence, and skill. Although the practice of law requires a combination of negotiate, counseling, research, and advocacy skills, there is one skill upon which all others depend. The good lawyer, the craftsman, must be able to write effectively.
>
> Effective legal writing combines two elements—legal method and writing.[101]

More than ever, I am committed to helping students develop the basket of skills necessary for them to engage in effective legal analysis. Thus, in my first year back from practice, I devoted more time to explaining the connections between effective briefing of cases and developing core legal analytical skills that enable the student to explain a rule of law and how it applies to a new fact pattern. Moreover, I stressed the need to identify what facts are important and why they are important as a part of the legal argument. It is not always as clear to the novice what briefing, case synthesis, or the questions we ask in class have to do with legal analysis, specifically, or, for that matter, the real world of practice. I suggest that we make it less of a mystery and tell students how this activity connects to their eventual ability to practice law, both to increase their "learning" and so that there is more of a commitment on the part of students to building the kind of foundation necessary for what may well be their long careers in the legal profession.[102]

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100. *See* Randall T. Shepard, *supra* note 90 (setting forth five expectations that the legal profession expects from law schools which includes the importance of training students so that they can be good lawyers).

101. JOHN C. DERNBACH & RICHARD V. SINGLETON II, A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD xxi (1981).

102. *See* Paula Lustbader, *From Dreams to Reality: The Emerging Role of Academic Support Programs*, 31 U.S.F. L. Rev. 839, 854 (1997) (explaining the importance of communicating to students the relationship between what is being taught and what they will be expected to do in the exam and in practice).

In the fall of 2001, I had my torts students engage in more role-plays where they prepared short motions on specific issues and argued them before a mock court. Additionally, I assigned a case file to them so that we could study, along with the theory and doctrine of negligence, the way in which cases are truly developed and the kinds of challenges and strategies that trial lawyers need to consider in the building of a case.[103] Also, whenever possible, I raised ethical questions about choices that a lawyer might make by threatening the use of a Rule 11 motion or potential conflicts of interest in representation of clients.

During the first semester of 2002, I worked more cooperatively and collaboratively with my colleague teaching the Civil Procedure course so that we could help students more effectively integrate their learning in both courses.[104] In the Civil Procedure course, the students were introduced to mediation and assigned a problem whereby they were placed in the situation of a decision-maker trying to determine the appropriateness of mediation in a given context. Approximately two weeks later in the Torts class, I had an opportunity to continue the discussion about mediation and some of the challenges the lawyer and client face in resolving the tort dispute.[105]

Students need to be exposed to more real-life practice examples that show them how the fundamental legal analysis they engage in the classroom is important and connected to the practice of law. If each professor in the first year program did at least one such exercise throughout the entire year or semester of the course, then law students would have at least eight to ten concrete examples within a year that link legal analysis to some aspect of the practice of law. The value of this kind of coordination and activities has been documented in some law school programs.[106]

VI. CONCLUSION

I was very grateful for the opportunity to return to the practice of law after more than ten years away from it in order to gain a more informed perspective on the ways in which the practice has changed, and more importantly, to help me to be more effective as a teacher in preparing students for the practice. Further, this experience will help me to develop scholarship

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103. *See* DAVID CRUMP & JEFFREY BERGMAN, THE STORY OF A CIVIL SUIT: DOMINGUEZ V. SCOTT'S FOOD STORES (3d ed. 2001).

104. Many thanks to Professor Homer La Rue at Howard University School of Law for his willingness to experiment with collaborative activities that benefited our students.

105. Another way we discussed handling this joint activity was to have the problem assigned in the Civil Procedure course and then in the Torts class, and have students actually conduct mediation with lawyers on each side. The Civil Procedure professor would be in the Torts class on that day as an observer so that we could both provide critiques to the mediation.

106. *See generally* CUNY SCHOOL OF LAW, CURRICULUM INFORMATION, *at* http://www.law.cuny.edu/OurPrograms/curricinfo/index.htm (last visited Feb. 16, 2004); UNIVERSITY OF MARYLAND SCHOOL OF LAW, THE ACADEMIC PROGRAM, *at* http://www.law.umaryland.edu/academic.asp (last visited Feb. 16, 2004).

that will hopefully enrich the scholarly community and the community of lawyer-advocates.

We have a tremendous impact on the shape of the legal profession because law schools are the gateways into the profession.[107] This is an awesome responsibility and one that should be discharged with a consciousness and appreciation for the joys and the challenges that our students will really confront in the practice of law in this century.

107. James R. P. Ogloff et al., *More Than "Learning To Think Like A Lawyer:" The Empirical Research on Legal Education,* 34 CREIGHTON L. REV. 73 (2000).

LEGAL MALPRACTICE INSURANCE: SURVIVING THE PERFECT STORM

Susan Saab Fortney[*]

I. NEW MARKET CONDITIONS

Any lawyer who has recently shopped for insurance knows that the market has changed. No longer do lawyers find the soft market conditions of the late 1990s. Rather, various forces have converged to create a "perfect storm."[1]

During the 1990s, insurers sold legal malpractice at low rates because premiums could be invested in a booming stock market.[2] Beginning in 2000, investment income was dramatically down because of poor performing markets. At the same time, insurers began to experience increased losses. Following the September 11 tragedy, insurers and reinsurers paid out the largest property and casualty loss in the history of the insurance industry, a loss approaching 70 billion dollars.[3] As a result, some insurers and reinsurers left the market.[4] Other insurers were declared insolvent.[5] Those insurers who continued to write legal malpractice insurance expect an increase in both the frequency and severity of claims.[6] Historically, following tough economic times, more litigants sue lawyers.[7] Another concern is that

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1. According to Anthony K. Greene, Director at Jamison Insurance Group in West Orange, the "sagging economy, ten years of devil-may-care underwriting by insurers, and huge claims from corporate scandals" have created the "perfect storm" for lawyers purchasing professional liability coverage." Earl Ainsworth, *Ouch! Legal Mal Rates Zooming Sky-High,* N.J. LAW., Jan. 6, 2003, at 1.

2. Anthony Lin, *Paying a Premium for Law Firm Malpractice Insurance,* RECORDER, Mar. 21, 2003, at 2 (noting that insurers were "more than happy" to sell professional liability insurance to law firms at low rates because the premium could be plowed into lucrative investments for long periods before any claims might arise).

3. RONALD E. MALLEN ET AL., LEGAL MALPRACTICE: THE LAW OFFICE GUIDE TO PURCHASING LEGAL MALPRACTICE INSURANCE § 1.1 (Ronald E. Mallen ed., 2002).

4. *Id.* (discussing the reduction in reinsurance capacity in errors and omissions markets and the destabilization of primary insurers).

5. Tom Shean, *Tennessee Says Three Malpractice Insurers Unable to Pay Claims,* VIRGINIAN PILOT, Feb. 6, 2003, *available at* 2003 WL 15165587.

6. *Managing Risk: What Law Firms Must Do to Control Liability Insurance Costs,* L. OFF. MGMT. AND ADMIN. REP. (Inst. of Mgmt. & Admin., New York, N.Y.), May 1, 2003, *available at* 2003 WL 2068161 [hereinafter *Managing Risk*] (referring to The Profile of Legal Malpractice Claims: 1996-1999, a study conducted by the ABA Standing Committee on Lawyers' Professional Liability).

7. *Why Professional Liability Insurance is Again a Major Cost & Concern for Partners,* PARTNERS REP. FOR L. FIRM OWNERS (Inst. of Mgmt. & Admin., New York, N.Y.), Apr. 1, 2003, *available at* 2003 WL 2213164 [hereinafter *Cost & Concern*] (showing historically that "clients are more likely to sue when they aren't making money, whether or not their law firms have made a mistake").

more claims will result from corporate scandals, much like what occurred during the savings and loan crisis.[8]

All of these factors have contributed to fewer insurers writing legal malpractice insurance, limited coverage offered by those insurers who remain in the market, and dramatic premium increases for those policies that are available. For example, in New Jersey the number of insurers writing legal malpractice insurance dropped from eighteen to eight or eleven, depending on whether one counts insurers who are very selective in turning down more lawyers than they insure.[9]

Solo practitioners and firm lawyers alike must deal with new limitations on coverage coupled with premium increases. Lawyers practicing in large firms appear to be the hardest hit with rates increasing from 35% to as much as 75%.[10] Smaller firms will probably face somewhat lower increases of between 25% and 30%, reflecting the lower litigation risk.[11] Some high risk practice areas with the potential for large malpractice awards are seeing 100% to 300% premium increases.[12] While most firms can expect an increase of 25% to 40%, firms with claims histories and high risk practice areas, such as plaintiffs personal injury work, can expect increases of more than 100%.[13]

In addition to being subject to higher premiums, lawyers who practice in certain high risk areas also are encountering limited coverage. For some practice areas, insurers are attempting to limit their exposure by restricting the limits of liability or requiring higher deductibles. Other insurers are now declining to write lawyers who practice in certain practice areas. For example, two of the nation's largest malpractice insurers, AIG and CNA, now refuse to write malpractice insurance for intellectual property lawyers.[14] At least one major insurer has excluded work related to insureds handling mass tort cases.[15]

Given these hard market conditions, lawyers in all practice areas must be diligent in shopping for insurance. Instead of allowing the purchase decision to be driven by the lowest premium quotation, lawyers should carefully study policy terms and insurers so that the lawyers will have coverage in the unfortunate event of suit.

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8. Lin, *supra* note 2, at 2.

9. Ainsworth, *supra* note 1, at 1.

10. Anthony Lin, *Firms Pay Heed To Insurance Hikes, Patent Prosecutions, Opinion Letters Deemed High-Risk Areas,* CONN. L. TRIB., Mar. 31, 2003, at 7.

11. *Managing Risks, supra* note 6 (quoting the New York Law Journal).

12. Earl Ainsworth, *Malpractice Insurance: A High Priced Headache for Lawyers,* N.J. LAW., Mar. 10, 2003, at A2.

13. *Cost & Concern*, *supra* note 7 (citing a San Diego insurance broker).

14. Earl Ainsworth, *Paying the Price for IP Practice Insurance,* N.J. LAW., June 30, 2003, at A5 (using an actual case to illustrate how intellectual property lawyers risk being "wiped out" because of inadequate coverage).

15. *See* Jett Hanna, *FAQs About Lawyers' Professional Liability Insurance,* TLIE LEGAL MALPRACTICE ADVISORY (Tex. L. Ins. Exchange, Austin, TX), *at* http://www.tlie.org/newslet/adv0103/art1.htm (updated Apr. 14, 2003) (noting that some companies are excluding or limiting coverage for mass tort and class action litigation).

As a first step to becoming informed consumers, lawyers should realize that policy coverage and insurers vary widely. This Article is intended to first help lawyers understand the type of insurance offered and the main features of legal malpractice insurance. Second, the Article reviews the application process, identifying factors that lawyers should consider in purchasing insurance. Finally, the Article provides suggestions for handling legal malpractice claims.

II. WHAT COVERAGE IS AVAILABLE?

In the past, professionals could purchase occurrence policies. Under such policies, coverage was triggered by an "occurrence" during the policy period. Over the years, insurers abandoned the occurrence form, largely because of the unpredictability associated with predicting claims and losses that would be paid under occurrence policies.[16] To obtain more underwriting certainty and to control their losses, insurers moved to a claims-made form. Now virtually all lawyer malpractice policies use the claims-made form.[17]

Some claims-made polices require that the claim be both made and reported within the policy period. Because such policies provide no "grace period" to report claims, lawyers who are insured under such policies must diligently report claims made or risk jeopardizing their coverage.[18] A more restrictive policy form requires that the act, error, or omission, as well as the claim, be made within the policy period. Coverage under such policies is more "illusory" than real because, in professional law practice, a claim seldom occurs in the same year that the act, error, or omission occurs.[19]

A typical claims-made policy provides coverage for claims asserted during the policy, regardless of when the incident giving rise to the claim actually occurred.[20] Under a claims-made policy, coverage is determined by the date of the claim. Some claims-made policies define "claim," while others do not. If the term "claim" is not defined, the term should be understood according to its common meaning, applying rules of construction. A claim is commonly defined as an adequate demand or assertion of a right.[21]

An important feature in a claims-made policy is prior acts coverage. Prior acts coverage provides protection for acts or omissions that occurred prior to the inception date of the policy, provided that the insured had no prior knowledge of any situation or occurrence that would give rise to the

16. MALLEN ET AL., *supra* note 3, § 2.32 (discussing the evolution of the claim-made policy form).
17. *Id.* § 2.31 (noting that occurrence policies are difficult to find, if at all and more expensive than claims made policies).
18. *Id.* § 2.33.
19. *Id.* § 2.34.
20. STANDING COMM. ON LAWYERS' PROF'L LIABILITY, AM. BAR ASS'N, THE LAWYER'S DESK GUIDE TO LEGAL MALPRACTICE 172 (1992).
21. *See* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 34.14 (5th ed. 2000) (discussing the definition of a claim).

claim or suit. Professional liability insurance applications ask if any lawyer with the firm is aware of an incident that may give rise to a claim. The policy itself will also specifically exclude claims related to those incidents.

In general terms, the legal malpractice policy has four principal parts: the declarations page, the insuring agreements, the exclusions, and the conditions. The declarations page identifies specific information applying to the named insured. The declarations page is followed by a standard form policy that sets forth the terms of coverage.

A. What Are the Specific Policy Terms for the Named Insured?

THE DECLARATIONS PAGE

The declarations page serves as the face sheet to the policy. It identifies the named insured, the policy period, the policy limits of liability on a per claim and an aggregate basis, and the deductible on a per claim or annual basis. If the policy provides for limited prior acts coverage, the effective date of the prior acts coverage may be stated on the declarations page as a retroactive date. If a retroactive date is specified, coverage is provided for acts or omissions occurring after the stated retroactive date. If no retroactive date is specified in a policy with prior acts coverage, the insured has unlimited prior acts coverage, again, provided that the insured did not know at the inception of the policy that the act or omission would give rise to a claim.

The declarations page will also identify any additions or deletions to the insurer's standard form. These deletions or additions are handled through endorsements to the policy, which are attached to and included as part of the policy. Endorsements tailor the standard declarations and policy form to the needs of the insured. For example, an endorsement to a policy can extend coverage to mediation and arbitration services provided by a licensed lawyer.

Finally, the declarations page may incorporate statements made in the application for insurance. In the application, the applicant answers questions related to the applicant's law practice, business interests, disciplinary history, knowledge of potential claims, and matters that indicate underwriting risks. When the application representations are incorporated into the policy, the application representations are treated as conditions to coverage. An insurer who becomes aware of misrepresentations in the policy application may seek to rescind the policy, asserting policy fraud.

B. What Do Policies Cover?

INSURING AGREEMENTS

No coverage exists unless the matter falls within the general language of the insuring agreements.[22] Basically, the insuring agreements describe the risk.

Beyond the named insured identified on the declarations page, the insuring agreements may identify the classes of other insured persons such as lawyers, employees, former partners, and predecessor firms. The classes of insured persons may also be defined in the policy's definition section or conditions. Only persons who fall into one of the named classes of insureds will be provided coverage.[23] Therefore, in shopping for insurance, you should make sure that you are comfortable with the description of additional or other insureds. For example, a named insured firm may prefer that new lawyers who join the firm are only treated as insured for work done on behalf of the named insured firm. Similarly, in order to limit claims under its policy, an insured firm may prefer a definition of insured that only covers former firm lawyers for work they did on behalf of the insured firm.

You should also determine how the insuring agreements or definitions treat employees such as secretaries and paralegals. Some insurers only insure such persons if the named insured makes a special request to do so.[24]

Although firm principals should be covered for vicarious liability claims associated with the work of a contract lawyer, the contract lawyer will not qualify as an insured under the policy reference to "employees." Contract lawyers and their agencies should purchase their own policies, rather than assuming that they will be protected under the policy of the firm that retained the contract services.

Under the insuring agreements, the insurer commonly agrees to pay all sums the insured becomes legally obligated to pay as money damages. An insurer may assert that claims seeking equitable relief are not covered because such claims are not "claims for money damages." On that basis, insurers may maintain that injunctive and disciplinary actions are not covered under the insuring agreement, which limits claims to those seeking money damages. Therefore, you should purchase a policy that expressly provides coverage for disciplinary matters if you want the malpractice insurer to pay the costs of defending disciplinary complaints.[25]

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22. MALLEN ET AL., *supra* note 3, § 2.10.

23. *See* DUKE NORDLINGER STERN & JO ANN FELIX-RETZKE, A PRACTICAL GUIDE TO PREVENTING LEGAL MALPRACTICE § 9:26 (1983) (discussing the various classes of insured persons that might be covered).

24. MALLEN ET AL., *supra* note 3, § 2.21.

25. *See* Elizabeth A. Alston, *Coverage for a Rainy Day: Many Malpractice Policies Will Help Pay the Costs of Defending Disciplinary Complaints,* A.B.A. J., Aug. 2003, at 29, 29 (providing guidance on making or seeking coverage for a disciplinary complaint).

On the same basis, an insurer may take the position that the policy does not cover fee disputes and sanction awards. In an opinion from the U.S. Court of Appeals for the Fourth Circuit, the court agreed with the insurer, concluding that the legal malpractice policy did not cover a court-ordered refund of excessive lawyers' fees because the fee forfeiture did not qualify as "damages" under the ordinary meaning of the word.[26] To avoid such a coverage dispute, an insurer may include a policy definition of "damages," expressly stating that sanctions and disgorgement of attorneys' fees are not covered.

Typically, the claim seeking money damages must be first made during the policy period. The point in time when the "claim" is first made operates as a "coverage trigger." Some policies may require a "double trigger" if the insuring clause requires two events during the policy period: (1) the making of the claims against the insured, and (2) the giving of notice to the insurer.[27] When the insuring clause does require claims to be both made and reported during the policy period, a lawyer should not let a policy expire without reporting, in writing, all possible claims to the insurer.

Depending on the circumstances, the policy may provide for an extended reporting period. An extended reporting period is called "tail" coverage because it allows an insured to report the claim for a specified tail period following the policy expiration date. For example, an insurance policy may allow an insured lawyer who is retiring from law practice to pay an additional premium to obtain coverage for a specified "tail" period. Provided that the claim relates to the insured's acts and omissions in rendering legal services before the insured's retirement, the claim will be covered as long as the insured reports the claim during the extended reporting period.

The policy may also require that the claim seeking money damages arise out of an act, error, or omission of the insured in rendering or failing to render professional services for others in the insured's capacity as a lawyer. If the insuring agreement specifies that the services must be rendered "to others," claims will not be covered if they arise out of rendering services to an enterprise or venture controlled by the insured lawyer. This section may also clarify that the policy is intended to cover only the insured acting in the capacity of a lawyer engaged in the legal profession. Therefore, a lawyer acting in another capacity, such as that of a broker or realtor, would not be covered under the insuring agreements. At the same time, lawyers may render investment advice and perform other services, so certain services may be considered professional services absent some limitation or exclusion in the policy.

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26. Friend v. Attorney Liab. Prot. Soc'y, No. 96-2862, 1997 WL 746761, at *2 (4th Cir. Dec. 4, 1997) (unpublished opinion).

27. John Haley, *Lawyers Professional Liability Insurance: A New York Overview, in* AVOIDING LEGAL MALPRACTICE 1998, at 390 (PLI Lit. & Admin. Practice Course, Handbook Series NO. H0-000B, 1998), *available at* 580 PLI/Lit 387.

Lawyers who perform nonlegal services should recognize that insurers may dispute coverage for claims arising out of such services.[28] In resolving coverage disputes, some courts make the coverage determination on the basis of whether the retention of the insured was principally for legal services. If so, the legal malpractice policy arguably applies even if the lawyer provides incidental nonlegal services.[29]

If a law office provides notary services, the insured should determine if the insuring agreements provide coverage for claims related to notary work. If not, the insured should seek an endorsement that adds such coverage.

Similarly, lawyers who provide services as fiduciaries should carefully examine policy provisions. Some policies provide protection for legal work performed by lawyers who serve as fiduciaries, but not other work such as investment and management services performed by the lawyer-fiduciary. If lawyers in a firm regularly serve as fiduciaries, the firm should obtain a special errors and omissions policy to insure those risks.

If the policy includes a duty to defend, the duty will be set forth in the insuring agreements. Under the insuring agreements, the insurer should agree to pay all attorneys' fees and other costs associated with the defense of a claim or suit under the policy. To determine if it has a duty to defend, the insurer should study the allegations in the complaint filed against the lawyer. An insurer must defend the suit if "the complaint states claims which, if proved, would make the insured liable to pay damages for the loss within coverage."[30]

Beyond this general test for determining whether the insurer must defend a particular claim, judicial decisions split when applying rules on the extent of the duty to defend. One approach applies the "eight corners rule."[31] Applying this rule, the complaint triggers the duty to defend by alleging at least one claim covered by the policy.[32] Once such an allegation is made, the insurer has a duty to defend the entire lawsuit if a claim has been asserted that is potentially covered by the policy.[33] Rather than using the "eight corners rule," some courts apply the "potentiality rule," focusing on whether the complaint raises a "potential for coverage."[34] Under the potentiality rule, the insurer "must look beyond the effect of the pleadings

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28. MALLEN ET AL., *supra* note 3, § 2.22 (explaining the possibility of a coverage dispute, notwithstanding the fact that courts have been liberal in interpreting "professional service" as a lawyer).

29. *Id.*

30. ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW 861 (3d ed. 2002).

31. *Id.* (explaining that "eight corners" refers to the four corners of the complaint being measured against the four corners of the insurance policy). Some courts refer to this rule as the "four corners rule," referring to the four corners of the complaint. *Id.* Other courts use the term "complaint allegation rule." St. Paul Guardian Ins. Co. v. Centrum GS Ltd., 283 F.3d 709, 713 (5th Cir. 2002) (noting that the "rule requires the trier of fact to examine only the allegations in the [underlying] complaint and the insurance policy in determining whether a duty to defend exists").

32. King v. Dallas Fire Ins. Co., 85 S.W.3d 185, 187 (Tex. 2002) (explaining that the pleading and policy language determine the duty to defend).

33. *See* Heyden Newport Chem. Corp. v. S. Gen. Ins. Co, 387 S.W.2d 22, 26 (Tex. 1965) (noting that any doubt must be resolved in favor of the insured).

34. JERRY, *supra* note 30, at 862.

and must consider any facts brought to its attention or any facts which it could reasonably discover in determining whether it has a duty to defend."[35] Therefore, a court's evaluation of the duty to defend will largely turn on whether the jurisdiction applies the "eight corners rule" or the "potentiality rule."[36]

In addition to describing the general duty to defend, the insuring agreements may specifically address the selection of defense counsel in the event that a claim is made under the policy. If the policy is silent on the issue, the insurer is likely to take the position that it will have the right to select defense counsel. If the insured wants to have a voice in the selection process, the insured should look for a policy that provides for insured input, or the insured might seek an endorsement that would at least allow the insured to make recommendations on defense counsel.

The insuring agreements will discuss the limits of liability, the amount of which is set forth on the declarations page. The limits set forth are stated on a per claim and an aggregate basis. The per claim limit is the maximum legal obligation for a single claim.[37] This per claim limit is different from the aggregate limit of liability, which is the maximum amount that the insurer pays under the entire policy for all claims during the policy year.

The limits of liability provisions may also state whether defense costs are to be deducted from the limits of liability available to pay settlements and judgments. This feature is referred to as "Expenses within Limits" (EWL). Beginning in the 1980s, insurers added this EWL feature in an attempt to cap their total exposure under a particular policy. Recognizing that most professional liability policies now require defense costs to be subtracted from the limits of liability, you should seek limits of liability sufficient to pay both defense costs and the maximum exposure for damages in the event of a suit. Otherwise, defense costs may exhaust policy limits.

In determining the amount of limits of liability to seek, you should also study the policy to determine if it provides for an additional "claims expense allowance." With such an allowance, defense costs are not subtracted from limits of liability until the insurer has paid defense costs up to the amount of the allowance. By increasing the amount available to pay de-

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35. *Id.* (citing Spivey v. Safeco Ins. Co., 865 P.2d 182, 188 (Kan. 1993)).

36. The handling of extrinsic evidence illustrates the key difference between the "eight corners rule" and the "potentiality rule." If a court applies the "eight corners rule," it should disregard evidence extrinsic to the complaint. For example, if an insured makes an admission that destroys coverage, such extrinsic evidence should not be considered by the court, provided that the complaint alleges a claim covered by the policy. In applying the "potentiality rule," a court would consider such evidence. *See, e.g.,* Senger v. Minn. Lawyers Mut. Ins. Co., 415 N.W.2d 364, 369 (Minn. Ct. App. 1987) (recognizing that admissions made by the insured in correspondence to the insurer took the claim outside of coverage of the policy).

37. One approach to selecting a per claim limit would be to determine all or most of the firm's liability for a claim arising out of a "typical" engagement, assuming that the firm were found to be 100% responsible. State Bar of California, *Purchasing Guide: Frequently-Asked Questions About Buying Professional Liabillity Insurance, at* http://www.kvi-calbar.com/guide.html (last modified Nov. 18, 2003).

fense costs, the claims expense allowance effectively increases the limits of liability for defense costs.

Finally, you should determine if the policy provides coverage for personal injury claims based on torts, such as defamation.[38] Unless the legal malpractice policy provides coverage for personal injury claims, you must obtain an endorsement adding personal injury coverage to the firm's comprehensive general liability (CGL) policy.

In a 1998 opinion, the Texas Court of Appeals held that the alleged defamation in a lawyer's solicitation letter to a prospective client was an "advertising injury" under the terms of the law firm's CGL policy.[39] According to the court, the solicitation letter did not constitute a "professional service" that would be excluded under the "professional service" exclusion in the CGL policy.[40] Understanding this opinion, lawyers should appreciate the importance of avoiding coverage gaps for personal injury claims. Such claims should either be covered under the firm's CGL policy or the firm's professional liability policy.

Those professional liability policies that provide personal injury protection vary greatly in their treatment of malicious prosecution and abuse of process claims.[41] If you learn that the standard form policy provides limited or no coverage for malicious prosecution and abuse of process claims, request an endorsement to the policy to cover such claims.[42] Otherwise, a policy's intentional torts exclusion may eliminate coverage for such claims.

C. What Policies Don't Cover—Exclusions

While the insuring agreements generally describe the risks covered under the policy, the exclusions limit the coverage by specifically identifying certain claims or activities that are not covered. Although exclusions vary depending on the policy form, exclusions generally fall into three categories: (1) those eliminating coverage not intended to be provided in a legal malpractice policy; (2) those relating to extraordinary risks; and (3) those relating to "moral" or illegal risks.

1. Exclusions Eliminating Coverage Not Intended to be Provided Under a Legal Malpractice Policy

As discussed above, the insuring agreements are written to limit coverage to claims arising out of lawyers' activities in rendering legal services.

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38. For example, an American Home/National Union Fire Insurance Company Specimen Policy (1/85) defines "personal injury" to mean false arrest, detention or imprisonment; wrongful entry or eviction; or other invasion of the right of private occupancy, or malicious prosecution.

39. Atl. Lloyd's Ins. Co. v. Susman Godfrey, L.L.P., 982 S.W.2d 472, 476 (Tex. App. 1998).

40. *Id.* at 477.

41. Linda S. Bauerschmidt & Darilyn D. David , *Gaps and Overlaps in Coverage*, 1997 A.B.A. LAW. PROF. LIAB. UPDATE 7.

42. *Id.*

In order to clarify types of claims and risks that are not covered, insurers also include specific policy exclusions. For example, the policy may exclude claims arising out of bodily injury or property damages. Such an exclusion eliminates overlapping with CGL coverage.[43]

The policy may also specifically exclude liability when a lawyer is acting in some capacity other than legal counsel. For example, many policies exclude claims relating to a lawyer's role as an officer or director. Insurers have added such a directors' and officers' (D & O) exclusion because they have found that the more costly claims involve lawyers "wearing two hats"—serving as legal counsel and as director or officer of a business enterprise. Generally the D & O exclusion in a professional liability policy eliminates coverage for the entire firm as well as the lawyer-director.[44] Therefore, commentators recommend that if you and other firm partners serve in dual capacities, your firm should obtain directors' and officers' liability insurance, as well as legal malpractice insurance.[45]

Some policies also exclude claims arising out of the insured's activities or capacity as a fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA"). An exclusion may be limited to claims arising out of any insured's activities or capacity as a fiduciary under ERISA, or both. Because other ERISA exclusions may apply to legal work done in connection with an ERISA plan, you must compare policies if you do any ERISA work.

In order to clarify that the legal malpractice policy will not insure lawyers' entrepreneurial ventures, malpractice insurance policies contain some form of business pursuits exclusion. The wording of the business pursuits exclusion varies from policy to policy. Some exclusions appear to be limited to claims arising out of the conduct of the business. A New Jersey opinion considered such a limited exclusion, which applied to claims "in connection with any business enterprise . . . which is owned by any insured or . . . which is directly or indirectly controlled, operated, or managed by any insured in a non-fiduciary capacity."[46] The court concluded that this provision did not exclude claims related to the insured lawyers' activities as owners of a mortgage company because some of the acts complained of involved legal services performed by the insured lawyers.[47] All of the claims may have been excluded under a broader exclusion written to extend to any claim arising out of professional services rendered in connection with business ventures with a client or former client, whether or not the activities involved the rendition of legal services.

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43. Haley, *supra* note 27, at 403.

44. Mary McCutcheon, *Professional Liability Insurance Issues for Lawyers Sitting on Corporate Boards*, BRIEF, Winter 1998, at 8.

45. *E.g.,* MALLEN ET AL., *supra* note 3, § 2.52.

46. Greenberg & Covitz v. Nat'l Union Fire Ins. Co., 711 A.2d 909, 913 (N.J. Super. Ct. App. Div. 1998).

47. *Id.* at 913.

In 1994, a Texas federal district court held that a business pursuits exclusion precluded coverage for claims arising from a loan transaction involving a savings and loan association owned by the insured lawyers. The court noted that the exclusion would apply even if the insured lawyers performed legal services for the claimant.[48] The applicable insurance policy contained three business pursuits exclusions. One exclusion eliminated coverage for:

> [A]ny claim based upon or arising out of work performed by the Insured, with or without compensation, with respect to any . . . business enterprise or other venture, be it charitable or otherwise, or any kind of nature in which any Insured has any pecuniary or beneficial interest, irrespective of whether or not any attorney-client relationship exists, unless such entity is named in the Declarations.[49]

Such an exclusion creates an obstacle for a legal malpractice lawyer who will try to "plead around" policy business exclusions by focusing on the legal work the lawyer-defendant performed.

Lawyers should recognize that entrepreneurial activities with clients may leave them and their clients with no insurance coverage. While it is generally imprudent to do business with a client, it is positively foolhardy to do so if the policy's business pursuits exclusion eliminates coverage for all claims relating to the business enterprise.

2. Exclusions Relating to Extraordinary Risks

Insurers associate degrees of risk with different areas of practice. Some insurers decline to write policies for lawyers who practice in areas viewed as particularly risky, such as entertainment law. Other insurers seek to avoid the risk by excluding coverage for particular types of claims.

Securities Exclusions.

Some legal malpractice insurers have sought to limit their liability for securities-related claims through exclusions eliminating coverage for any claims arising under the federal or state securities laws.[50] Because corporate and partnership work has securities aspects, you should avoid policies with securities exclusions if you are a corporate lawyer. For an extra premium, you may be able to negotiate an endorsement to delete the securities exclusion.

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48. Home Ins. Co. of Ind. v. Walsh, 854 F. Supp. 458, 461 (S.D. Tex. 1994).
49. *Id.* at 460.
50. MALLEN ET AL., *supra* note 3, § 2.48 (noting that language of exclusions varies substantially from insurer to insurer).

Regulatory Exclusions.

Following the explosion of multi-million dollar claims brought by government regulators in connection with the savings and loan bailout, insurers were reluctant to insure lawyers who represent financial institutions ("banking lawyers"). Insurers who are still concerned about the exposure of banking lawyers may refuse to underwrite banking lawyers, while other insurers may rely on "regulatory exclusions" to exclude claims brought by the Federal Deposit Insurance Corporation and other banking regulators.[51] Like securities lawyers, banking lawyers must either negotiate such exclusions out of the policy or forego coverage under the legal malpractice policy.[52]

3. Exclusions Relating to Moral or Illegal Risks

Some policies are written to exclude conduct that is considered illegal or unethical. For example, policies may exclude discrimination or sexual harassment claims. Other policies exclude claims arising out of conversion, misappropriation, or improper commingling of client funds.

All policies have some form of exclusion for dishonest, malicious, or fraudulent acts (the "fraud exclusion"). The typical fraud exclusion states that the policy does not apply "to any dishonest, fraudulent, criminal, or malicious act or omission." You must study the fraud exclusion to determine if it excludes only active and deliberate fraud or dishonesty, committed with actual or fraudulent intent. Such a limited exclusion is preferable to the more general fraud exclusion which arguably applies to unintentional or constructive fraud. In *Brooks, Tarlton, Gilbert, Douglas & Kressler v. U.S. Fire Insurance Co*., the Fifth Circuit concluded that constructive fraud did not clearly fall within the language of the fraud exclusion in the subject policy.[53] Based on the *Brooks* opinion and other case authority, two authors have suggested that lawyers can feel safe in relying upon an insurance policy to at least provide a defense for constructive fraud claims.[54] Legal malpractice experts, Ronald Mallen and Jeffrey Smith, go a step further in opining that the fraud exclusion should not eliminate coverage for constructive fraud claims or claims based on acts or omissions that are deemed fraudulent only because they are breach of the fiduciary obligations.[55]

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51. Linda Himelstein, *Insurers Dodge S & L Claims Against Lawyers*, LEGAL TIMES, Apr. 29, 1991, at 1 (referring to a nationwide campaign of malpractice insurers to eliminate exposure for claims brought against banking lawyers).

52. See Susan Saab Fortney, *Attorney's Malpractice Policies: Regulatory Exclusions and Public Policy*, 109 BANKING L.J. 116 (1992), for a discussion of the enforceability of regulatory exclusions.

53. Brooks, Tarlton, Gilbert, Douglas, & Kressler v. U.S. Fire Ins. Co., 832 F.2d 1358, 1370 (5th Cir. 1987); *cf*. Perl v. St. Paul Fire & Marine Ins. Co., 345 N.W.2d 209, 213 (Minn. 1984) (holding that the fraud exclusion does not encompass constructive fraud for breach of a fiduciary duty).

54. Andrew S. Hanen & Jett Hanna, *Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues*, 33 S. TEX. L. REV. 75, 88-89 (1992).

55. MALLEN & SMITH, *supra* note 21, § 34.23 (noting that several courts have held that the "innocent breach of fiduciary duty, which is constructive fraud, is not actual").

A standard fraud exclusion may eliminate coverage for racketeering claims. In *Purcigliotti v. Planet Insurance Co.*, the New York trial court concluded that the policy provided no coverage for racketeering claims because the insurance policy excluded "any dishonest, fraudulent, criminal, or malicious act or omission" of the insured.[56]

Under the policy terms, the fraud exclusion may be waived for any insured that neither personally participated in any fraudulent, criminal, or dishonest conduct nor remained passive after having personal knowledge of any such act or omission. This waiver is often referred to as "innocent partner" coverage and is particularly important in states where lawyers in partnerships and professional corporations share joint and several liability with the other equity holders in the firm.[57]

In addition to a standard fraud exclusion, policies may specifically exclude punitive or exemplary damages. Rather than generally excluding all punitive and exemplary damages, virtually all policies exclude certain specific causes of action that can lead to the imposition of punitive damages. For example, policies commonly exclude coverage for malicious, intentional, and criminal acts. Because the incidence of punitive and multiple damages awards has risen appreciably in recent years, you should seriously consider obtaining a policy with the more limited exclusionary language, rather than a policy with the more encompassing provision that excludes all "punitive and exemplary damages."

Some policies contain specific exclusions covering sanctions, fines, and penalties. Even in the absence of a specific exclusion, an insurer might still argue that sanctions are not covered under the insuring agreement of the policy, which limits coverage to claims for "money damages." Such an argument will not prevail if the court concludes that the policy language is ambiguous and interprets the language against the insurer. To avoid any ambiguity, an insurer may expressly exclude court-ordered sanctions. Therefore, if you are a litigator, you should examine the policy to determine if it specifically excludes court-imposed sanctions.

D. What Typical Conditions Affect Coverage

Every policy includes provisions that act as conditions precedent to coverage. Two such conditions impose duties on the insured, requiring you to give notice and to cooperate in the event of a claim.

First, a notice condition requires the insured to promptly notify the insurer of a claim. This notice requirement may not be limited to notice of actual claims. Rather, the notice condition may require that you give notice

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56. Cerisse Anderson, *Firm Denied Insurance Coverage in Fraud Suit, Judge Decides Claims Fall Outside Insurance Indemnification*, N.Y. L.J., Sept. 6, 1994, at 1.

57. *See* Aragona v. St. Paul Fire & Marine Ins. Co., 378 A.2d 1346, 1350 (Md. 1977) (holding that a policy without innocent partner protection did not afford coverage where the insured's partner misappropriated escrow funds).

of acts, omissions, or circumstances that you reasonably expect to give rise to a claim or suit.[58]

Commonly, the notice provision requires that notice be given "as soon as practicable." This prompt notice allows the insurer to investigate the claim, to gather information for the defense, to attempt to avoid or mitigate a loss, and to establish the scope of coverage. Conversely, late notice may harm or prejudice an insurer.[59] To avoid coverage disputes, lawyers should protect their coverage by promptly complying with the terms of the notice condition.

Second, you must comply with the policy condition that imposes a duty to cooperate. The typical cooperation provision requires that you assist the insurer and defense counsel in preparing and presenting a defense. Failure to do so can jeopardize coverage.[60] In order to rely on the breach of cooperation clause, many jurisdictions require that the insurer show that the insurer was prejudiced.[61]

You should also examine any policy conditions or other policy provisions that relate to the defense and settlement of claims. While almost all legal malpractice policies give the insurer the right to select defense counsel, the policies differ on the insured's role in settlement of claims. A few policies give you exclusive control of settlement by requiring that the insurer obtain your consent before settling a claim. The preferred wording prohibits the insurer from settling any claims without the consent of the insured, without limitation or exception.[62] By contrast, if you refuse to consent to a settlement offer recommended by the insurer, the insurer is not liable under some policies for any amount greater than that for which the claim could have been settled if you had agreed to the settlement offer. For example, a policy may include the following consent provision:

> "[W]e won't agree to the final settlement of any such claim without your written consent. But if you refuse to give us your consent, we

58. MALLEN ET AL., *supra* note 3, § 9.10 ("Most current claims-made professional liability policies not only cover claims arising out of errors or omissions committed during the current policy period, but also claims made during the current policy period which arise out of acts, errors, or omissions which occurred prior to the inception of coverage."); MARC I. STEINBERG, CORPORATE AND SECURITIES MALPRACTICE 402 (1992).

59. MALLEN ET AL., *supra* note 3, § 9.34 (stating that a "slight majority requires that the insurer seeking to avoid coverage show that it suffered actual prejudice as a result of an insured's delay in notification."). *But see* Hirsch v. Tex. Lawyers' Ins. Exch., 808 S.W.2d 561, 565 (Tex. App 1991) (recognizing that the requirement to show "prejudice" would rewrite the policy and interfere with the public's right to contract).

60. See JERRY, *supra* note 30, § 87 (providing an overview of what constitutes noncooperation and when noncooperation gives the insurer a valid defense).

61. MALLEN & SMITH, *supra* note 21, § 34.19. For example, Texas courts have adopted the view that the breach of the duty to cooperate may operate to discharge the insurer's obligations under the policy if the insurer is actually prejudiced or deprived of a valid defense by the actions of the insured. McGuire v. Commercial Union Ins. Co. of N.Y., 431 S.W.2d 347, 352-53 (Tex. 1968) (recognizing that an insured cannot make an agreement imposing liability upon the insurer or depriving the insurer of the use of a valid defense).

62. STERN & FELIX-RETZKE, *supra* note 23, § 9:22.

won't pay more than we would have paid had you consented to the proposed settlement."[63]

This policy provision may not trouble you if you are anxious to settle and put the matter behind you. On the other hand, you may want to control the settlement because your reputation and deductible may be at stake. If you want to control the settlement, you should avoid policies that do not require the insured's consent to settlement.

III. RECOGNIZE HOW FIRM CHANGES AFFECT COVERAGE

Various changes relating to your law firm's structure and composition may impact insurance coverage. These changes can trigger the termination of the insurance policy or limit the coverage provided.[64]

To evaluate how coverage will be affected, a firm manager should first study the insurance policy, looking for a "material change" provision. The policy provision should define what constitutes a "material change" and the consequences of a material change. A material change resulting from merger, acquisition, or an exodus of lawyers can cause the policy to be terminated. The material change provision may require notice to the insurer and may allow the named insured to purchase tail coverage.[65]

Reorganization of a firm may also trigger application of the material change provision. For example, conversion of a law partnership to a limited liability company or professional corporation could cause the policy to be terminated. To avoid termination or coverage questions, a firm manager should notify the insurer before the reorganization occurs and request a policy endorsement to address any change in the structure of the named insured.

Coverage questions also arise with respect to lateral lawyers who join a firm. The standard policy form or an endorsement to the policy may exclude prior acts coverage for claims that relate to work at the former firm. This elimination of prior acts coverage for lateral hires actually protects the new firm's insurance policy from being tapped to pay for claims related to another firm. By avoiding possible claims being made under its policy, the new firm can also avoid future premium surcharges.[66] If prior acts coverage is provided to a lateral hire, the new firm can protect itself by (1) obtaining

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63. St. Paul Fire & Marine Insurance Company, Specimen Policy (1995)

64. *See* Susan Saab Fortney, *Insurance Issues Related to Lateral Hire Musical Chairs,* 2000 PROF. LAW. 65 (analyzing the underwriting, coverage, and claims handling issues related to lawyers moving between private law firms).

65. See Bruce A. Campbell, . . . *Of Greener Grass, Bigger Bucks and Open Septic Tanks . . . Law Firm Break-ups, Spin-offs and Other Changes,* 61 TEX. B.J. 322, 326-27 (1998), for a discussion of different approaches to obtaining tail coverage following a material firm change.

66. A. Craig Fleishman, *Potential Perils of the Professional Liability Insurance Policy,* COLO. LAW., Feb. 1995, at 229. See Jett Hanna, *Legal Malpractice Insurance and Limited Liability Entities: An Analysis of Malpractice Risk and Underwriting Responses,* 39 S. TEX. L. REV. 641, 643-44 (1998), for suggestions on how lateral hires can protect themselves when prior acts coverage is not provided.

documentation of the insurance coverage maintained by the former firm and (2) by asking the lateral hire to report any potential claims to the former firm's insurer before changing firms.[67]

IV. WHAT TO CONSIDER IN PURCHASING INSURANCE?

Unless a lawyer practices in Oregon, legal malpractice insurance is not required. As a condition to limited liability, some states require that the firm maintain a certain level of insurance.[68] For example, limited liability firms in Texas must obtain insurance with limits of at least $100,000 or establish other financial responsibility.[69] Commentators have expressed different views regarding the advisability of law firms relying on the limited liability shield and reducing their insurance coverage.[70] Regardless of the efficacy of the limited liability structure as a vicarious liability shield, firms should purchase adequate levels of insurance because the firm and individual tortfeasors remain liable.[71]

When purchasing insurance the most important considerations are the actual cost of purchasing the policy and the coverage provided. Beware of a premium quote which is unusually low because it may mean that the coverage provided is very limited or the insurer may be "unable to live up to its obligations once it experiences claim activity."[72] In addition to comparing costs and the coverage provided, you should also evaluate the insurer's status, financial stability, longevity, and reputation.

With regard to status, some insurers are admitted to do business in a state, while others are non-admitted. "Admitted" means that the company has met the minimum requirements established by state statute authorizing the particular company to underwrite insurance. Generally, admitted companies are subject to more regulation than non-admitted companies. In ad-

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67. Ann E. Thar, *Don't Be Sued for Another Attorney's Malpractice,* ILL. B.J., Apr. 1995, at 199, 200.

68. See ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG & RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT § 2.05 (2001), for a description of state provisions requiring insurance for limited liability firms.

69. *See* TEX. REV. CIV. STAT. ANN. art. 6132b-3.08(d) (Vernon 2003) (providing that the insurance cover the kinds of errors, omissions, negligence, incompetence, or malfeasance for which liability is limited).

70. *Compare* Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences–The Traps of Limited Liability Law Firms,* 54 WASH. & LEE L. REV. 717, 741-745 (1997) (discussing the adverse insurance effects of reorganizing as a limited liability firm), *with* Hanna, *supra* note 66, at 645-654 (down-playing the insurance implications of firms converting to limited liability structures).

71. Thomas P. McGarry, *Limited Liability Entities: Can You Reduce Your Insurance, in* LEGAL MALPRACTICE: THE LAW OFFICE GUIDE TO PURCHASING LEGAL MALPRACTICE INSURANCE § 16.18 (Ronald E. Mallen ed., 2002) (explaining that limited liability law firms and individual partners will continue to face malpractice exposure). As noted by one author, a "common misperception is that conversion to an LLC or registration as an LLP will diminish the need for professional liability insurance. Kirsten L. Christophe, *Continuing Protection—Converting to a Limited Liability Structure Raises Key Insurance Issues,* A.B.A. J., Sept., 1995, at 92.

72. *New IOMA Data Rate Firms' Professional Liability Insurers*, 98-1 LAW OFF. MGMT. & ADMIN. REP. 6.

dition, in some states only admitted insurers participate in the state fund which provides compensation to insureds if the insurer becomes insolvent and unable to pay claims.

You should also consider an insurer's financial stability and solvency. In evaluating an insurer's finances, you can compare ratings that companies receive from insurance ratings bureaus. The most well-known insurance rating bureau is A.M. Best Company, which publishes a rating guide to liability insurance companies. Based on a company's underwriting, finances, and operations, Best assigns each company an overall rating.

In considering the stability of a company, consider the longevity of its legal malpractice program. Longevity refers to how long the company has been writing legal malpractice insurance in the state and the likelihood that the company will continue writing legal malpractice insurance when the market tightens due to changes in conditions and claims. Referring to the number of new insurers that entered the legal malpractice market in the late 1990s, one commentator warned:

> The savvy insurance buyer will be aware, however, that the rush of new insurers brings some who are not committed to the class of business. Inevitably claims will be made on these policies, and there will be some insurers who will be in a better position than others to effectively deal with and pay for these claims, due to their financial strength and long-term commitment.[73]

Five years after this warning, insurers are abandoning the market, leaving insureds to find new insurers. The trick is to purchase insurance from an insurer that will be there in "good times and bad times." A lawyer can benefit from continuity of coverage when an insurer has longevity and continues to write insurance when the market changes.

Finally, in evaluating companies, you should investigate an insurer's procedures and reputation relating to claims service and claims prevention. First, obtain information from the insurer on its claims handling procedures and claims prevention programs. For example, before you actually have a claim, you should clarify how the company selects defense counsel. Then investigate the insurer's reputation by asking other lawyers about their experiences with the insurer.

V. HOW TO APPLY FOR INSURANCE

In applying for insurance, an agent who specializes in legal malpractice insurance can provide valuable guidance. The agent assists in the application process by understanding the underwriting guidelines of the insurers,

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73. Rian D. Jorgenson, *Lawyers' Professional Liability: Overview and Current Issues*, in INSURANCE LAW 89, 100 (PLI Lit. & Admin. Practice Course, Handbook Series No. H4-5259, 1997), *available at* 563 PLI/Lit 89.

enabling the applicant to obtain the best coverage for the most reasonable premium.

In order to select an agent, obtain recommendations from other lawyers in your community. After reviewing resumes from recommended agents, interview those agents who appear to have expertise in legal malpractice insurance. Based on the interviews and recommendations, select an agent who is willing to devote time to comparing coverage.

The person who is responsible for completing the insurance application must gather a great deal of information related to the firm, its practices, procedures, and lawyers. A memorandum to all firm lawyers documents the steps taken to obtain accurate information. The memorandum could ask each firm lawyer to respond to certain questions included on the policy application. For example, the memorandum could ask each firm lawyer to indicate whether he or she has any knowledge of potential malpractice claims. If some firm lawyer identifies a potential claim, that matter should be reported to the current malpractice insurer and disclosed on the insurance application. On the other hand, if a firm lawyer fails to disclose a potential claim, the firm managers can show that they acted diligently in making an inquiry and had no knowledge that a claim would be filed. This may enable firm managers and other firm lawyers to rely on the innocent partner protection provided that they did not have notice of the particular matter.

Experts recommend that applicants be diligent in supplying information to prospective insurers.[74] Although the underwriting criteria for insurers vary, insurers commonly use the following considerations:

1. the number of claims or incidents per firm lawyer, per year;

2. the anticipated expense of these claims including the defense and indemnity costs;

3. the nature and quality of the claim;

4. the degree of fault;

5. another insurer's rejection or refusal to renew;

6. state bar disciplinary proceedings;

7. the firm's predisposition to suing clients for fees;

8. a significant increase in the limits sought;

9. a significant decrease in the deducible sought;

74. *Managing Risk*, *supra* note 6.

10. the nature of practice of firm lawyers; and

11. Martindale-Hubbell rating.[75]

In completing applications, polish all answers, recognizing that underwriters will be influenced by both their form and content. Because the application representations are commonly incorporated in the policy, be thorough and truthful in answering all application questions. You must remember that material misrepresentations or omissions by the applicant can result in rescission of the policy on the basis of policy fraud.[76]

In describing potential and past claims, try to avoid alarming the underwriter. If appropriate, describe the unique circumstances of the claim, so that the underwriter will not assume that similar claims will follow. Try to show the underwriter that you have carefully taken measures to avoid malpractice claims. For example, you should describe in detail your malpractice avoidance measures, such as conflicts of interest control and docket control systems. In short, try to communicate to the underwriter that you are a good risk.

During the application process, you should learn what credits or debits will affect the premium quote. For example, premium savings may be obtained for attending malpractice avoidance seminars. At the same time, be aware of areas that may create a charge or debit. For example, underwriters might surcharge or refuse to write certain areas of practice such as securities or intellectual property law.

The application will ask you to designate the limits of liability and deductible that you seek. Deductibles may be on a per-claim basis, with or without an aggregate for two or more claims. Limits of liability also will be stated on a per-claim and an aggregate basis.

Various factors including the limits of liability, the deductible, the length of time in practice, claims history of the insurance, and areas of practice will affect the premium charged. Because a higher deductible reduces the premium, while higher limits increase the premium, you should ask for quotations for different amounts of limits and deductibles.

Based on the quotations, you then decide on the amounts for the limits of liability and the deductible. In electing a deductible amount, you must decide what deductible amount the firm is willing and able to pay in exchange for a reduction in a premium. If you prefer to pay the annual premium on an installment basis, ask about the insurer's premium payment plan.

In deciding on the policy limits, be sure to consider whether or not the proposed limits will cover the maximum likely financial exposure for a sin-

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75. *Id.*

76. *See, e.g.,* Mt. Airy Ins. Co. v. Thomas, 954 F. Supp. 1073, 1079 (W.D. Pa. 1997) (applying an objective standard to the evaluation of whether the insured had a reasonable belief that a claim might be filed).

gle claim and the aggregate liability for multiple claims. This evaluation will largely depend on the nature of the firm's practice, the amount of likely damages that could result from lawyer malpractice, and the complexity of defending possible claims.[77] If the limits of liability include defense costs, you should evaluate whether the proposed limits will adequately cover potential liability as well as defense costs.

Finally, in choosing a policy, devote time to diligently studying coverage provided under different policies. Through this comparison exercise, you will find that policy terms vary significantly and that the purchase of comprehensive policy will protect both you and your clients.

VI. WHAT TO DO IN THE EVENT OF A CLAIM?

A. Give the Insurer Prompt Notice

While most lawyers value having legal malpractice insurance, most do not want to be in the position of having to file a claim under their policy. Some lawyers postpone filing a claim because they believe that they can resolve the matter without involving the insurance company. However, if you do so, you may jeopardize your coverage. As noted in the above discussion of policy conditions, all policies require that insureds report claims under the policy. A policy may merely require that you give the company written notice of any claims against you as soon as practicable. In interpreting the phrase "as soon as practicable," many courts have concluded that the phrase means notice that "is prompt and reasonable under the circumstances."[78]

The policy may specifically define what constitutes a "claim." For example, the policy may define "claim" to include a judicial proceeding against an insured, a demand for money damages or professional services, and a request received by an insured for an agreement tolling the statute of limitations. Any of these events would require written notice to the insurer.

Other policies require the insured to give the insurer written notice as soon as you first become "aware that a wrongful act has been committed." Any time that you are unsure whether or not to notify the insurer, you should study the policy to determine if it requires notice only of actual claims or if it requires notice any time you know of circumstances that are likely to give rise to a claim. If you have any doubts, give prompt notice to the insurer. In recommending that insureds err on the side of caution, one commentator explains, "[i]t is unquestionably wiser to report all 'circum-

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77. *See* Michael Bourgeois, *Know Your Limits*, A.B.A.J., Sept. 1998, at 74 (suggesting a "formula" for arriving at a safe level of malpractice insurance).

78. MALLEN ET AL., *supra* note 3, § 9.33. In one legal malpractice insurance case, a Texas court explained that the insured failed to comply with the notice condition that required notice "as soon as practicable," because the lawyer-insured waited more than six months after service of process to give the insurer notice of the suit. Matthews v. Home Ins. Co., 916 S.W.2d 666, 669 (Tex. App. 1996).

stances' rather than risk a decline of coverage based upon late notice, prior knowledge or a material misrepresentation in your policy application."[79] Another commentator echoes this advice in stating the "only surefire way to avoid sleepless nights and readjustment of one's retirement portfolio" is to report everything to the carrier."[80]

To avoid questions, you should notify the insurer in writing even if the policy does not require written notice. In your initial notice letter to the insurer and in other correspondence with the insurer, avoid any statements that could be interpreted as an admission of liability or any statements that might adversely affect your insurance coverage.

B. Understand Coverage Issues

Once notified, the insurer will assess the problem and appoint defense counsel if necessary. When an insurer first receives notice of a claim or suit against an insured, the insurer must promptly take one of the following actions: (i) acknowledge receipt of the notice and advise the insured that it will provide coverage; (ii) advise the insured that it will defend the insured, subject to a reservation of its right to deny coverage on one or more specified grounds; (iii) deny coverage on the grounds either that the claim is not covered under the policy or that the insured has breached a policy condition; or (iv) rescind the policy if it appears that the policy was procured through fraud, mutual mistake of fact, or the insured's misrepresentation or concealment of material facts in the application.[81]

If the insurer does not see any coverage problems, the insurer should provide an unqualified defense. When the insurer does identify some coverage problem indicating that a claim may not be covered under the terms of the policy, the insurer may agree to provide defense under a nonwaiver agreement or a reservation-of-rights letter.

The reservation-of-rights letter or non-waiver agreement notifies the insured of all possible coverage defenses and reserves the insurer's right to later deny coverage based on the coverage defenses. Both non-waiver agreements and reservation-of-rights letters enable the insurer to provide a defense without waiving any coverage defenses. The non-waiver agreement is signed by the insurer and the insured, while the reservation-of-rights letter is sent by the insurer to the insured. If you are asked to sign a non-waiver agreement or you are sent a reservation-of-rights letter, you should consider

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79. Paul Calamari, *The "Not Me" Syndrome and What Happens When it is You*, in AVOIDING LEGAL MALPRACTICE 1998, at 431, 434 (PLI/NY Lit. & Admin. Practice Course, Handbook Series NO. F0-000L, 1998), *available at* 14 PLI/NY 431.

80. Richard D. Hoffman, *Tell-All Policy,* A.B.A. J., Mar. 2003, at 57 (recommending that lawyers seek guidance from a colleague who can provide an "impartial read").

81. *See* Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 861 (Tex. 1994) (Hightower, J., dissenting) (quoting BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 2.01 (6th ed. 1993)).

hiring independent counsel for advice on coverage matters.[82] An insured should also retain experienced coverage counsel if the insurer files a declaratory judgment action seeking a court declaration as to the parties' rights and obligations under the insurance contract.

C. Do Not Write Internal Memoranda

After you report a claim to the insurer, you should not write internal memoranda about the matter. Such internal firm memoranda describing and evaluating an alleged or potential malpractice problem may not be privileged. Although some courts in other states have referred to a "self-evaluative" privilege, you should not rely on such a privilege until it is widely recognized.[83] Depending on the facts and circumstances, other privileges including the lawyer-client privilege and investigative privileges may apply. Don't assume that these privileges apply without consulting your lawyer.

D. Assist and Monitor Your Defense Counsel

You should cooperate with defense counsel and the insurer's claims representative. First, the policy requires such cooperation. Second, the problem is more likely to be resolved if the insurer and insured work in partnership. Such cooperation may help minimize both the insurer's and your own expenditure of time and money.

While cooperating with the defense lawyer, the insured should monitor developments in the case, ask questions, and raise concerns about how the case is being handled. In a controversial opinion, the Texas Supreme Court held that an insurer is not vicariously liable for the malpractice of an independent lawyer it selects to defend an insured.[84] Notwithstanding the fact that the liability insurer selects and compensates insurance defense counsel, the majority of the court refused to hold the insurer vicariously liable for the injury caused by the defense lawyer's malpractice.[85] Understanding this, an insured should monitor the case to make sure that the insurance defense lawyer is protecting the insured's interests. If your defense lawyer fails to provide you copies of filings and correspondence in the case, request copies. To evaluate the time defense counsel devotes to the case, study billing statements. Question your defense lawyer if you suspect that the defense

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82. See Kirk A. Pasich, *Disappearing Coverage*, A.B.A. J., June 1994, at 68, for recommendations on dealing with insurers on coverage disputes.

83. See Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 296-305 (1997), for a discussion of the cases and discovery problems related to internal law firm evaluations.

84. State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 628 (Tex. 1998).

85. *Id.* at 632 (citing Employers Cas. Co. v. Tilley, 496 S.W. 2d 552, 558 (Tex. 1973) for the proposition that the defense lawyer "owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured").

lawyer may be cutting corners or otherwise putting the insurer's interests before yours.

Beginning in the 1990s, insurers imposed strict cost containment measures to address rising defense costs paid under the terms of insurance policies. These cost containment measures included closely monitoring the work performed by insurance defense counsel and auditing the bills submitted by defense counsel. Such cost containment measures create conflicts for insurance defense lawyers who feel pressure to comply with the guidelines while remaining loyal to the insured. To give insurance defense lawyers some guidance in handling such conflicts, a number of ethics committees have issued advisory ethics opinions.[86] Most notably, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion in 2001, concluding that "lawyers representing insured clients must not permit the client's insurance company to require compliance with litigation management guidelines the lawyer reasonably believes will compromise materially the lawyer's professional judgment or result in her inability to provide competent representation to the insured."[87] Some commentators and lawyers believe that the practical effect of such ethics opinions is that insurers become less aggressive in micro managing litigation. [88]

Depending on the circumstances, it may be wise to hire personal counsel if your concerns are not addressed. For example, assume that the plaintiff's counsel has made a demand to settle the case within policy limits. If the defense lawyer does not recommend settlement, you may need personal counsel to apply pressure on the insurer. From the outset understand all the consequences of not settling the claim.

VII. CONCLUSION

After lawyers are sued, they learn a great deal about their professional liability coverage and their insurer. While some lawyers learn that they have comprehensive coverage, others experience disappointment when they eventually see their policy's limitations. This shock can be avoided if you compare policies and insurers so that you can make an informed decision in

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86. For example, the Texas Ethics Committee issued two opinions that underscore the duties of insurance defense counsel to protect the insured's interests. In Opinion 533 the Texas Professional Ethics Committee concluded that the Texas ethics rules prohibit lawyers from agreeing with the insurer on restrictions that interfere with the lawyer's exercise of independent professional judgment in representing the insured. Tex. Prof'l Ethics Comm., Op. 533 (2000), *available at* 2000 WL 987293. Because fee statements contain confidential information, Opinion 532 explains that the ethics rules require client informed consent before a lawyer provides the fee statements to an outside auditor working for the insurer. Tex. Prof'l Ethics Comm., Op. 532 (2000), available at 2000 WL 987291; *see also* Mary Alice Robbins, *Ethics Committee Disapproves of Insurers' Limitations on Counsel,* TEX. LAW., July 10, 2000, at 1; Jay Old, *Walking the Ethical Tightrope,* TEX B. J., Jan. 2001, at 61.

87. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-421 (2001).

88. *See, e.g.,* John Council & Brenda Sapino Jeffreys, *Winning the Battle and the War–Future Looks Brighter for Firms Doing Insurance Defense Work,* TEX. LAW., Feb. 25, 2002, at 37 (quoting an insurance defense counsel who notes that insurers "back down" when he provides copies of the ethics opinions).

purchasing legal malpractice insurance. In making an informed decision and purchasing adequate coverage, lawyers protect themselves and demonstrate professional responsibility in protecting persons injured by malpractice.

"I'M OK-YOU'RE OK"[1]: EDUCATING LAWYERS TO "MAINTAIN A NORMAL CLIENT-LAWYER RELATIONSHIP" WITH A CLIENT WITH A MENTAL DISABILITY

David A. Green[*]

The tools of the mind become burdens when the environment which made them necessary no longer exists.

----Henri Bergson[2]

If you wish to converse with me, define your terms.

----Voltaire[3]

I. INTRODUCTION

In a society where people are uncomfortable around people with mental disabilities, lawyers must take the lead in protecting their rights and treating them with respect. Discrimination remains prevalent in this country, but in most circumstances, the discrimination is subtle and covert. However, discrimination against people with mental disabilities is still overt. Because people are ignorant about mental disabilities, they are fearful of people who have such disabilities. Lawyers are just as uninformed as most citizens. Discrimination against people with mental disabilities continues to be a major problem, and they are under-represented by lawyers.

This Article discusses the importance of providing effective representation to clients with mental disabilities and the need for bar associations to provide further guidance to lawyers. The Article is limited to a discussion

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1. THOMAS A. HARRIS, I'M OK—YOU'RE OK: A PRACTICAL GUIDE TO TRANSACTIONAL ANALYSIS (1969). "This book [was] the product of a search to find answers for people who are looking for hard facts in answer to their questions about how the mind operates, why we do what we do, and how we can stop doing what we do if we wish." *Id.* at xiii.
2. *Id*. at 97.
3. *Id*. at 176.

of those clients with mental disabilities who, with effective communication and accommodations, can participate in a discussion of their legal rights. The situation of clients whose mental incompetency requires a guardian or guardian ad litem is not addressed. First, the Article reviews and critiques ABA Model Rule of Professional Conduct 1.14, which requires a lawyer to maintain a "normal client-lawyer relationship" with the client under a disability. The Article will then discuss the definition of mental disability and the different classifications of such disabilities. The Article will review the historical treatment of people with disabilities and the legislative response to the mistreatment of people with disabilities which has impacted lawyers' professional responsibility to their clients with mental disabilities. Further, the Article discusses the importance of effective communication with clients with disabilities. Finally, the Article concludes that most lawyers are not properly educated to effectively represent people with mental disabilities and that ethical rules should provide additional guidance. Moreover, the American Bar Association needs to provide more emphasis on educating lawyers about the needs of people with disabilities. Lawyers should be required to participate in mandatory training regarding clients with mental disabilities.

II. OVERVIEW AND CRITIQUE OF ABA MODEL RULE 1.14: CLIENT UNDER A DISABILITY

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.[4]

The lawyer's responsibilities to a client do not change because the client has a mental disability. Pursuant to Rule 1.14 of the Model Rules, a lawyer must maintain, insofar as possible, a "normal" relationship with his client.[5] The Rule provides:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a *normal client-lawyer relationship* with the client.

4. MODEL RULES OF PROF'L CONDUCT pmbl. para. 2 (2003).
5. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2003).

> (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest. [6]

A "normal relationship" is premised on the understanding that the lawyer can effectively communicate with his or her client and that the client understands the options available to him or her. A lawyer is required to provide effective communications with the client[7] and is required to abide

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6. *Id.* (emphasis added); s*ee also* THOMAS D. MORGAN & RONALD D. ROTUNDA, 2003 SELECTED STANDARDS ON PROF'L RESPONSIBILITY (2003). The Model Rules of Professional Conduct were adopted by the House of Delegates of the American Bar Association on August 2, 1983. They were amended through the years and were subject to substantial amendments in August 2001 and February and August 2002. Few, if any, jurisdictions have adopted the latest changes to the ABA Model Rules, though many may change in the future. The following proposed changes would not affect the discussion and analysis in this Article. The new additions are indicated by underlining, and deletions are indicated by the shaded portion:

> Rule 1.14: Client Under a Disability with Diminished Capacity
>
> (a) When a client's ability capacity to make adequately considered decisions in connection with the a representation is impaired diminished, whether because of minority, mental disability impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a *normal client-lawyer relationship* with the client.
>
> (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.).

AM. BAR ASS'N, THE 2002 CHANGES TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: A SUPPLEMENT TO THE ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 50 (5th ed. 2003).

7. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2003). The following proposed changes to the Model Rules do not affect the discussion or the analysis in this Article. The new additions are indicated by underline and the deletions by the shaded portion. The Rule provides:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

AM. BAR ASS'N, *supra* note 6, at 12-13. Further, the term "'[i]nformed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2003).

by the client's wishes regarding the objectives of the representation.[8] Although a client with a mental disability may present special challenges to the lawyer, the lawyer must maintain a normal relationship and make a special effort to accommodate the needs of each client and assure that the client understands the consequences of decisions the client makes.[9] "Normal" does not necessarily mean that a lawyer interacts with a client with a mental disability in the same manner the lawyer would interact with a client who does not have a mental disability.[10] However, it does mean that the nature of the lawyer-client relationship is the same, and the lawyer must make sure that the client understands the legal issues so the client can make meaningful decisions.

Although Rule 1.14 is laudable because it recognizes the rights of a client with a mental disability and requires that a lawyer maintain a traditional attorney-client relationship with such clients, the rule fails to provide much guidance to lawyers in carrying out this endeavor.[11] In order for a lawyer to comply with Rule 1.14, the lawyer must have a clear understanding as to a "normal client relationship" and how it relates to the lawyer's responsibilities under the ethical rules.[12] Moreover, the lawyer has to discern when a client has a disability that triggers compliance with Rule 1.14.[13] In order for a lawyer to effectively represent a client with a disability, the lawyer has to be educated on the rights of clients with disabilities and the characteristics of people with mental disabilities. Like many people in society, lawyers must overcome their prejudices and misconceptions about the abilities of people with mental disabilities.

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8. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2003) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.").

9. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-404 (1996); *see*, *e.g.*, *In re* M.R., 638 A.2d 1274, 1284-85 (N.J. 1994) (recognizing that a client with a mental disability is afforded the same rights to advocacy as any other client would receive). The rule is premised on the understanding that a client with a mental disability, with proper advice and assistance, has the capability to participate in decision-making. The court noted that "[t]he attorney's role is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes." *Id*. at 1284; s*ee also* RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY, A STUDENT'S GUIDE § 15-2 (2001).

10. *See* discussion *infra* Section V.

11. *See* Daniel L. Bray & Michael D. Ensley, *Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney,* 33 FAM. L.Q. 329, 338 (1999); *see also* Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control,* 17 N.Y.U. REV. L. & SOC. CHANGE 609, 619-21 (1989-90).

12. Bray & Ensley, *supra* note 11, at 338.

13. *Id*. at 333-34.

III. DEFINITION OF MENTAL DISABILITY AND THE DIFFERENT CLASSIFICATIONS

A. Definition of Mental Disability

Lawyers must appreciate the importance of language in order to effectively represent a person with a mental disability.[14] The use of the appropriate language is not only important to avoid confusion and offending the person with the mental disability, it can also affect the legal rights and the support services that are needed to assist the person.[15] However, the definitions of terms used in the field of mental disability law are imprecise and often disputed. Even the term "mental disability" does not have a clear and precise meaning.[16] The term is frequently used to cover "a group of impairments that affect mental or cognitive functioning . . . . Included in this term are mental illness, mental retardation, and other developmental disabilities, cognitive impairments, learning disabilities, organic brain injuries, drug addiction, and alcoholism." The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV)[17] utilizes the term "mental disorders," which includes mental retardation, psychotic disorders, and various substance abuse disorders.[18] The DSM-IV acknowledges: "that no definition adequately specifies precise boundaries for the concept of 'mental disorder.' The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations."[19] There is a lot of overlap between "mental disability" and "mental disorder," but this Article will utilize the term "mental disability." The Article will particularly look at the following classifications: developmental disability, mental retardation, mental illness, and substance abuse. This is not meant to be an exhaustive list of mental disabilities, but only a list of some of the more prevalent ones.

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14. *See* JOHN PARRY, AM. BAR ASS'N, MENTAL DISABILITY LAW: A PRIMER 1 (5th ed. 1995).

15. *Id*. Particularly, the lawyers must use appropriate language in speaking with their clients about their disability, as well as use appropriate language in the context of the representation, to the extent it comes up.

16. *See* PARRY, *supra* note 14, at 2-3; *see also* DONALD H.J. HERMANN, MENTAL HEALTH AND DISABILITY LAW IN A NUTSHELL 22 (1997).

17. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM-IV]. The DSM-IV is an important and frequently cited source for mental health classification. S*ee* Boldini v. Postmaster Gen. U.S. Postal Serv., 928 F. Supp. 125, 130 (D. N.H. 1995) (stating that "in circumstances of mental impairment, a court may give weight to a diagnosis of mental impairment which is described in the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association."); *see also* RUTH COLKER & BONNIE POITRAS TUCKER, THE LAW OF DISABILITY DISCRIMINATION HANDBOOK: STATUTES AND REGULATORY GUIDANCE 162 (3d ed 2000); HERMANN, *supra* note 16, at 25; PARRY, *supra* note 14, at 2.

18. DSM-IV, *supra* note 17, at 13-19.

19. *Id*. at xxi.

B. Developmental Disability

A person who is diagnosed with a developmental disability will have "mental, cognitive, and physical impairments—or combinations of these impairments—that begin by early adulthood."[20] The impairment is "likely to continue indefinitely, and produce severe functional impairments that adversely affect one or more of an individual's major life activities."[21] "The term developmental disability encompasses all severe and chronic disabilities that manifest before the age [of] twenty-two and can include, but not be limited to" mental retardation, epilepsy, autism, and cerebral palsy.[22] A learning disability could fall within "developmental disability" "when [the] academic impairment is *significantly* below expected levels given the individual's intellectual functioning and schooling."[23] The category of people with a learning disability deserves close attention because of their prevalence in society[24] and because of the problems with misclassification.[25] A person with a developmental disability can have substantial limitations in such major life activities as self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency.[26]

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20. PARRY, *supra* note 14, at 5; *see also* Christine O'Connor Trottier & Jennifer Hodgson, Justice for Victims with Disabilities 21 (2001) (unpublished manuscript, on file with The Journal of the Legal Profession), *at* www.cladisabilitylaw.org/victims_w_disabilities/Manuscript & Cover.doc (last visited May 29, 2003). See DSM-IV, *supra* note 18, at 65, for a more detailed discussion on developmental disorders.

21. PARRY, *supra* note 14, at 5.

22. Trottier & Hodgson, *supra* note 20, at 22; *see also* PARRY, *supra* note 14, at 5.

23. DSM-IV, *supra* note 18, at 48 (emphasis added). "Learning Disorders are diagnosed when the individual's achievement on individually administered, standardized tests in reading, mathematics, or written expression is substantially below than expected for age, schooling, and level of intelligence." *Id.* at 46.

24. *See id.* at 47 ("Approximately 5% of students in public schools in the United States are identified as having a Learning Disorder.").

25. *See* Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1428-29 (11th Cir. 1985) (finding evidence of misclassification and procedural violations, although there was insufficient evidence to demonstrate a substantive violation of § 504), *abrogation recognized by* Lee v. Etowah County Bd. of Educ., 963 F.2d 1416 (11th Cir. 1992) (abrogating on issue other than misclassification); *see* also LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW § 2.32 (2d ed. 1997). *Compare* Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) (enjoining the use of intelligence tests used in placing children in special classes for the educable mentally retarded on the grounds that they were racially and culturally discriminatory), *aff'd in part, rev'd in part*, 793 F.2d 969 (9th Cir. 1984), *with* Parents in Action on Special Educ. v. Hannon, 506 F. Supp. 831 (N.D. Ill. 1980) (finding that intelligence tests were not racially and culturally discriminatory since they did not significantly affect the score of a child taking the test and were used in conjunction with statutorily mandated other criteria for determining an appropriate educational program for a child).

26. Trottier & Hodgson, *supra* note 20, at 21-22.

C. Mental Retardation[27]

A person who is diagnosed as having mental retardation will have a "significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety."[28] Mental retardation manifests itself before age eighteen and is found in one to three percent of the population.[29] Significantly sub-average intellectual function is defined as an intelligence quotient (IQ) of about seventy or below as measured by a standardized intelligence test.[30] *"Adaptive functioning* refers to how effectively individuals cope with common life demands, and how well they meet the standards of personal independence expected of someone in that particular age group, sociocultural background and community setting."[31] There are four degrees of severity that reflect the level of intellectual impairment for a person with mental retardation: mild, moderate, severe, and profound.[32]

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27. Mental retardation is a subset of developmental disability, but because of the number of issues particular to people with mental retardation, I have provided a separate discussion.

28. DSM-IV*, supra* note 18, at 39. The definition has evolved from the 1500s when individuals with mental retardation were referred to as "idiots":

> [An idiot is] a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss. But if he have such understanding that he know and understand his letters, and do read by teaching of another man, then it seems he is not a sot or natural fool.

James W. Ellis & Ruth A Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 416 (1985) (citing SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 128 (1925) (quoting ANTHONY FITZHERBERT, NATURA BREVIUM (1534)).

29. DSM-IV, *supra* note 18, at 39; s*ee also* PARRY, *supra* note 14, at 6 (citing AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEM OF SUPPORTS (9th ed. 1992)).

30. *Id.* Examples of standardized tests are Wechsler Intelligence Scales for Children Revised, Stanford-Binet, and Kaufman Assessment Battery for Children.

31. DSM-IV, *supra* note 18, at 40.

32. *Id*. at 40-42. **Degrees of Mental Retardation**: **Mild Mental Retardation**—A person with mild mental retardation is a person whose IQ is from 50-55 to approximately 70 with academic skills approximately those of a sixth grader. This group constitutes the largest segment (about 85%) of those with the disorder. With appropriate supports, individuals with mild mental retardation can usually live successfully in the community, either independently or in a supervised setting. **Moderate Mental Retardation**—A person with moderate mental retardation has IQ scores from 35-40 to 50-55. They are unlikely to progress beyond the second-grade level in academic subjects. This group constitutes about 10% of the entire population of people with mental retardation. With appropriate supervision, they can perform their own personal care and as an adult may live in the community in an appropriately supervised setting. **Severe Mental Retardation**—A person with severe mental retardation has IQ scores from 20-25 to 35-50. They profit to only a limited extent from instruction in pre-academic subjects, such as familiarity with the alphabet and simple counting. As adults, most adapt well in group homes or continue to live with their families. The group represents 3%-4% of individuals with mental retardation. **Profound Mental Retardation**– A person with profound mental retardation has IQ scores below 20-25 and has considerable impairments in sensorimotor functioning. Most individuals with this diagnosis have an identified neurological condition that accounts for their mental retardation. They may be able to perform simple tasks in closely supervised and sheltered settings. The group represents 1%-2% of people with mental retardation. *Id.*

D. Mental Illness

A person with a mental illness "is an individual with an organic, mental or emotional disorder which substantially impairs the person's thought, perception of reality, emotional process, judgment, behavior, or ability to cope with the ordinary demands of life."[33] The term mental illness has been used to "describe[ ] a broad range of mental and emotional conditions that may interfere with a person's occupational, social and daily functions."[34] The intensity and duration of the disorder vary among individuals with mental illness and many times last only a brief period. [35] For some, the symptoms can be controlled effectively with medication or professional help and may go into remission.[36] "Severe mental illness, which includes schizophrenia, bipolar disorder, and severe depression, affect almost three percent of the adult population."[37]

An example of a mental illness is a person who has an obsessive-compulsive disorder. A person diagnosed with an obsessive-compulsive[38] disorder has obsessions or compulsions that are severe enough to be time-consuming (which is more than one hour a day), cause marked distress, or significantly interfere with the individual's normal routine, occupational functioning, or usual social activities and relationships with others.[39] Obsessive-compulsive disorder typically begins in adolescence or early adulthood but may begin in childhood.[40] Common examples of obsessive behavior are concerns about shaking someone's hand because of contamination, wondering whether you have hurt someone in a traffic accident or left the

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33. People v. Lang, 545 N.E.2d 327, 330 (Ill. App. 1986).
34. Trottier & Hodgson, *supra* note 20, at 25-26.
35. *Id.*; s*ee also* PARRY, *supra* note 14, at 3.
36. Trottier & Hodgson, *supra* note 20, at 26.
37. PARRY, *supra* note 14, at 3. Schizophrenia involves a range of cognitive and emotional dysfunctions that include perception, inferential thinking, language and communication, behavioral monitoring, affect, fluency and productivity of thought and speech, hedonic capacity, volition and drive and attention. *See also*, DSM-IV*, supra* note 18, at 274, 339, 350. A person with schizophrenia may also experience hallucinations where he or she has false sensory experiences. *Id*. There is no single symptom that is pathognomonic of schizophrenia. *Id*. Severe depression involves "changes going beyond effects on mood, possibly including body weight changes, sleep disturbance, restlessness or slowed movement, decreased energy, feelings of worthlessness and guilt, difficulty concentrating or thinking, loss of interest and pleasure in nearly all activities, and thoughts of death or suicide." PARRY, *supra* note 14, at 3. Bipolar disorder involves "cycling mood changes with periods of depression alternating with periods of mania. Manic episodes can include elevated mood, hyperactivity, rapid speech, inflated self esteem, decreased need for sleep, distractibility, and risk-taking behavior." *Id*.
38. DSM-IV, supra note 18, at 418.

> Obsessions are persistent ideas, thoughts, impulses, or images that are experienced as intrusive and inappropriate and that cause marked anxiety or distress.
>
> . . . .
>
> Compulsions are repetitive behaviors (e.g. hand washing, ordering, checking) or mental acts (e.g., praying, counting, repeating words silently) the goal of which is to prevent or reduce anxiety or distress, not to provide pleasure or gratification.

Id.
39. *Id*. at 419.
40. *Id*. at 420. ("Modal age at onset is earlier in males than in females: between ages 6 and 15 years for males and between 20 and 29 years for females.").

door unlocked, or the need to have things in a particular order.[41] The compulsive activity is the attempt by the person to reduce or prevent the anxiety or distress, which causes a person to wash his or her hands so often that the skin is raw or to return to check a door every few minutes to ensure that it is locked.[42] Obsessive-compulsive disorders can affect a person's cognitive ability when performing tasks that require concentration and cause a person to avoid objects or situations, which could severely restrict general functioning.[43]

Although mental illness is often confused with mental retardation, it is clearly a different condition.[44] "Mental illness is unrelated to intelligence and is a disturbance of thought process and emotions," while "mental retardation is not a disturbance of the thought process or emotions."[45] "Many forms of mental illness are temporary, cyclical, or episodic," while "[m]ental retardation by contrast, involves a mental impairment that is permanent."[46] Further, mental illness is a medical condition that can occur at any time in life, while mental retardation is not a disease or an illness, but a lifelong impairment, frequently developed at birth or as young children, of learning cognitive capacity.[47] Moreover, there is a significant danger in confusing mental illness and mental retardation, because the appropriate services to assist them are different.[48] While mental illness and mental retardation are different conditions, they are not mutually exclusive because there are some individuals who are mentally retarded and also mentally ill. This creates an additional burden in assuring that the individual receives appropriate services.[49]

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41. *Id*. at 418.
42. *Id.*
43. DSM-IV, *supra* note 18, at 419.
44. Ellis & Luckasson, *supra* note 28, at 423.
45. Trottier & Hodgson, *supra* note 20, at 26.
46. Ellis & Luckasson, *supra* note 28, at 424.
47. *Id.*; s*ee also* Trottier & Hodgson, *supra* note 20, at 26.
48. Ellis & Luckasson, supra note 28, at 424-25.

> Perhaps the most significant danger of confusing mental illness and mental retardation in the criminal justice systems is the failure to understand that psychiatric treatment appropriate for mentally ill people will do nothing to assist a retarded person who is not mentally ill. If the treatment is being provided to influence the mentally retarded defendant's competence to stand trial or to render the individual nondangerous, the failure to provide habilitative services tailored to the defendant's needs may result in needlessly protracted, possibly lifelong, confinement.

Id. at 424.

> The Accreditation Council for Services for Mentally Retarded and Other Developmentally Disabled Persons (AC/MRDD) defines habilitation as 'the process by which the staff of an agency assists individuals to acquire and maintain those life skills that enable them to cope more effectively with the demands of their own persons and of their environments and to raise the levels of their physical, mental, and social function. Habilitation includes, but is not limited to, programs of formal, structured education and treatment.'

Id. at 493 n.57.

49. *Id*. The authors note that the service delivery systems frequently fail to provide for the needs of an individual who is mentally retarded as well as mentally ill. They also note that mental retardation facilities often refuse to serve persons with the behavioral disorders these individuals may manifest, and

E. Substance Abuse

A person who is diagnosed with a substance-related disorder has mental and physical problems that result from abusing drugs (including alcohol[50]), the side effects of medication, including those available over the counter, or exposure to toxins.[51] The problems are often related to the improper dosage of the medication.[52] In addition, a person can be exposed to a number of chemical substances that can lead to a substance-related disorder. Volatile substances, such as fuel or paint, are classified as "inhalants" if a person is intentionally using it to become intoxicated, and they are considered "toxins" if a person is exposed to it by accident.[53]

Although many individuals with substance related problems can maintain personal relationships and maintain jobs, they often have significant impairments and severe complications.[54] They often experience a decline in their general health, which includes malnutrition due to an improper diet and inadequate personal hygiene.[55] Some problems that are caused by intoxication or withdrawal may be further complicated by trauma related to impaired motor coordination or faulty judgment.[56] A person who is diagnosed with a substance-related disorder may be prone to violence or aggressive behavior, which may be manifested by fights or criminal activity.[57] Further, in addition to the potential injury that such a person could cause to others, they often cause injury and harm to themselves, which includes committing suicide.[58]

IV. HISTORICAL TREATMENT OF PEOPLE WITH MENTAL DISABILITY AND THE LEGISLATIVE RESPONSE

A. Historical Treatment of People with Mental Disability

The history of people with mental disability has gone through a substantial change, and the change has contributed to the ethical rule that requires lawyers to treat clients with disabilities as "normal" as reasonably possible. The practice in this country was once to hide individuals with mental disability and to keep them away from "normal" people. In a society plagued

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mental illness facilities often lack any expertise or programming for the habilitation of mentally retarded persons.

50. PARRY, *supra* note 14, at 9. Alcoholism is a disease producing progressive physical, emotional, and social changes and can lead to physical and cognitive impairments and possibly death. *Id*.

51. DSM-IV, *supra* note 18, at 175.

52. *Id*.

53. *Id*.

54. *Id*. at 189.

55. *Id*. at 190.

56. DSM-IV, *supra* note 18, at 190.

57. *Id.*

58. *Id*. ("Approximately one-half of all highway fatalities involve either a driver or a pedestrian who is intoxicated. In addition, perhaps 10% of individuals with Substance Dependence commit suicide, often in the context of a Substance-Induced Mood Disorder.").

by xenophobia hysteria, individuals with a mental disability were segregated and excluded from society.[59] The treatment was cruel and inhumane. They were treated as if they had no value and their life was meaningless. The practice of mistreatment and exclusion was supported and endorsed by the American government.[60] The practice was prevalent throughout the country and "[i]n virtually every state, in inexorable fashion, people with disabilities—especially children and youth—were declared by state law-making bodies to be 'unfitted for companionship with other children,' a 'blight on mankind' whose very presence in the community was 'detrimental to normal' children, and whose 'mingling . . . with society' was 'a most baneful evil.'"[61] The goal was to put individuals with mental disabilities "out of mind and out of sight." The blatant discrimination of individuals with mental disabilities left them feeling discarded and devalued.[62] Even the United States Supreme Court did not provide a refuge for citizens with mental disabilities. In *Buck v. Bell,* the Supreme Court joined in the mistreatment of individuals with mental disability with an insensitive and harsh ruling against a woman with a mental disability.[63]

In 1927, Carrie Buck, via counsel, argued before the Supreme Court that her state-imposed sterilization, based on her mental disability, was unconstitutional. Justice Holmes described Ms. Buck as a "feeble-minded" woman who was a daughter of a "feeble-minded mother" and the mother of "an illegitimate feeble-minded child."[64] The court held that the state-imposed sterilization was constitutional. Justice Holmes wrote caustically:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already *sap the strength of the State, . . . in order to prevent our being swamped with incompetence. It is better*

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59. Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 399-403 (1991).

60. *Id*.

61. *Id*. at 400-01 (citing to laws from Mississippi, Washington, Vermont, California and Oregon).

62. ROBERT M. LEVY & LEONARD S. RUBENSTEIN, THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES: AN AMERICAN CIVIL LIBERTIES UNION HANDBOOK 4-5 (1996). The authors provide a poem by one of the founders of the self-advocacy movement, Rae Unzicker:

> To be a mental patient is to be stigmatized, ostracized, socialized, patronized, psychiatrized.
> To be a mental patient is to have everyone controlling your life but you. You're watched by your shrink, your social worker, your friends, your family. And then you're diagnosed as paranoid.
> *To be a mental patient is not to die—even if you want to—and not to be hurt, and not to be scared, and not to be angry, and not to be vulnerable, and not to laugh too loud—because, if you do, you only prove that you are a mental patient even if you are not.*
> And so you become a no-thing, in a no-world, and you are not.

Id. at 5 (quoting Rae Unzicker, *On My Own: A Personal Journey Through Madness and Re-Emergence,* 13 PSYCHOSOCIAL REHAB. J. 71 (1989)).

63. *See* Buck v. Bell, 274 U.S. 200 (1927).

64. *Id*. at 205. Justice Oliver Wendell Holmes wrote this opinion during a time when people with mental disabilities were referred to as "imbeciles," "idiots," "mental defectives," "blight on mankind," "not much above the animal," "a parasitic, predatory class," "danger to the race," and "a blight and a misfortune both to themselves and to the public." LEVY & RUBENSTEIN, *supra* note 62, at 2-3.

> *for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.*[65]

The Supreme Court told Ms. Buck that she was not a value to society and discarded her as an undesirable.

Fifty-eight years after *Buck v. Bell,* the Supreme Court joined in the present movement to treat individuals with mental disabilities with respect and recognized that they have a value to society and are entitled to self-determination. The NAACP's success in the Supreme Court's *Brown v. Board of Education* decision in 1954 inspired other organizations to adopt strategies for legal reform, and thereafter, expansion of law reform to other groups in society moved rapidly.[66] By the early 1970s, activists for individuals with mental disabilities began to challenge with success the inhumane treatment of individuals who were institutionalized.[67] Mental disability activists focused on the right to informed consent and freedom from exploitation and also addressed due process of law to housing, income, community support, and treatment that recognized personal autonomy and responsibility.[68]

In 1985, in *City of Cleburne v. Cleburne Living Center,* the Supreme Court held that a city's effort to exclude people with mental retardation from its community violated the Equal Protection Cause of the Constitution.[69] Cleburne Living Center (CLC) sought permission from the City of Cleburne to run a group home for individuals having mental retardation.[70] The City informed CLC that a special use permit would be required for the operation of the group home in the location the home was located.[71] The City determined that the proposed group home should be classified as "hospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions."[72] After holding a public hearing on CLC's application, the City Council voted three-to-one to deny a special use permit.[73] The CLC filed suit in federal district court against the City of Cleburne alleging that the zoning ordinance was invalid because it violated the Equal Protection Clause.[74] The district court upheld the zoning ordi-

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65. *Buck*, 274 U.S. at 207 (emphasis added).
66. *See* JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANG 1-2 (1978); LEVY & RUBENSTEIN, *supra* note 62, at 3; *see also* David A. Green, *Balancing Ethical Concerns Against Liberal Discovery: The Case of Rule 4.2 and the Problem of Loophole Lawyering,* 8 GEO. J. LEG. ETHICS 283, 292 (1995).
67. LEVY & RUBENSTEIN, *supra* note 62, at 2-3.
68. *Id.* at 3.
69. 473 U.S. 432 (1985).
70. *Id.* at 436.
71. *Id.*
72. *Id.*
73. *Id.* at 437.
74. *Cleburne Living Ctr.*, 473 U.S. at 437.

nance, concluding it to be "rationally related to the city's legitimate interests in 'the legal responsibility of CLC and its residents, . . . the safety and fears of residents in the adjoining neighborhood,' and the number of people to be housed in the home."[75] The Court of Appeals for the Fifth Circuit reversed, finding that mental retardation was a quasi-suspect classification and that it should assess the validity of the ordinance under an intermediate-level scrutiny.[76]

The Supreme Court, reversing the Fifth Circuit, declined to recognize mental retardation as a quasi-suspect class, and concluded that the level of review is whether the state legislation is rationally related to a legitimate state interest.[77] The Equal Protection Clause requires states to treat similarly situated people the same.[78] The general rule is that courts will uphold state legislation if it is "rationally related" to a legitimate state interest.[79] The courts have provided a different standard of review when a state statute is classified by race, alienage, or national origin.[80] When race, alienage, or national origin is at issue, the courts apply a "strict scrutiny" standard.[81] If the legislation is classified by gender, the courts will apply an intermediate review and will uphold the legislation only if it is "substantially related to a sufficiently important government interest."[82] The courts have declined to apply a different level review in the treatment of persons based on age.[83]

The Supreme Court concluded that unlike race, national origin, alienage and gender, mental retardation, like age, was not entitled to a higher level of review.[84] The Court noted that people who are mentally retarded "range from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one."[85] The Court further noted that there has been a legislative response to the "plight of those who are mentally retarded

75. *Id*. at 439.
76. *Id*. at 437-38 (citing City of Cleburne v. Cleburne Living Ctr., 726 F.2d 191 (5th Cir. 1984)).
77. *Id.* at 442.
78. *Id*. at 439 (quoting Plyer v. Doe, 457 U.S. 202, 216 (1982) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.")).
79. *Cleburne Living Ctr.*, 473 U.S. at 440.
80. *Id.*
81. *Id.*
82. *Id.* at 441.
83. *Id.*
84. *Cleburne Living Ctr.,* 473 U.S. at 446. Justice Marshall, in a powerful concurring opinion, stated that individuals who are mentally retarded deserve a higher level of scrutiny. He wrote, "I have long believed the level of scrutiny employed in an equal protection case should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.'" *Id*. at 460 (citations omitted). He noted that "the mentally retarded have been subjected to a 'lengthy and tragic history of segregation and discrimination that can only be called grotesque.'" *Id*. at 461 (citations omitted). He added that "[a] regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Id.*
85. *Id*. at 442.

[which] . . . belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[86] The Court concluded that individuals who are mentally retarded are not "politically powerless" and was concerned that applying a quasi-suspect classification would make it difficult to distinguish other groups who have immutable disabilities.[87]

Although the Supreme Court declined to apply a quasi-suspect classification for individuals who are mentally retarded, the Court concluded that the City of Cleburne's decision to deny a permit to the Cleburne Living Center could not survive muster under the rational relation standard.[88] Since the City of Cleburne did not require a special use permit for facilities such as apartment houses, fraternity or sorority houses, apartment hotels, nursing homes for convalescents or the aged, the Supreme Court had to decide whether there was a rational basis for requiring a permit for a home that housed individuals who are mentally retarded.[89] The Court noted that the City could treat them differently if the occupants in the home would threaten the legitimate interest of the City in a way that other permitted uses would not.[90] The Court concluded that "the record does not reveal any rational basis for believing that the . . . home would pose any special threat to the city's legitimate interests."[91] Furthermore, the Court concluded that "[t]he short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[92]

The Supreme Court finally acknowledged that discrimination against citizens with disabilities was a result of intentional invidious discrimination and not "the result of apathetic attitudes rather than affirmative animus."[93] The Supreme Court further acknowledged that persons with disabilities historically have been subjected to "discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws.'"[94] Because of the history of purposeful treatment against citizens with disabilities, the prejudice against them is deep rooted and difficult to reverse.[95] The injuries associated with the segregation and mistreatment of people with disabilities are analogous to segregation due to race, although the history does not include the same degree of violence associated with racial discrimination.[96]

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86. *Cleburne Living Ctr.*, 473 U.S. at 443.
87. *Id*. at 445.
88. *Id.* at 446.
89. *See id*. at 447-48.
90. *Cleburne Living Ctr.*, 473 U.S. at 448.
91. *Id.*
92. *Id.* at 450.
93. *Compare id.* at 454 (Stevens, J., concurring), *and id*. at 462 (Marshall, J., concurring in part and dissenting in part), *with* Alexander v. Choate, 469 U.S. 287, 296 (1985) (acknowledging that the discrimination against citizens who were mentally disabled was invidious and abandoned its early statement that it was unintentional).
94. School Bd. of Nassau County v. Arline, 480 U.S. 273, 279 (1987) (citation omitted).
95. Cook, *supra* note 59, at 407-08.
96. *Id*. at 409-10.

Like race, the steps to eradicating the mistreatment required enforcement by the Supreme Court and Congress.[97]

B. Legislative Response to People with Mental Disability

In 1990, Congress provided the most comprehensive legislation to support the rights of citizens with disabilities when it enacted the American with Disabilities Act (ADA).[98] Congress noted that:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[99]

The ADA has had a major impact in a variety of areas. Under Title I of the Act, people with disabilities are protected against discrimination in employment.[100] Under Title II of the Act, people with disabilities are protected against the denial of public services, which includes receiving a public education.[101] Title III provides protection against discrimination in public accommodations that are privately operated.[102]

The ADA followed legislative and judicial activities in the area of disability rights that began in the 1970s.[103] In 1973, the first major comprehensive federal law involving rights of people with disabilities, the Rehabilitation Act, was enacted.[104] Section 504 of the Rehabilitation Act provides: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[105] The Rehabilitation Act covers many programs because it covers all state programs that receive federal funding and all states presently receiving federal funding for public educational programs.[106] In 1975, Congress passed the Education for

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97. *Id.* (noting "Congress regarded *Brown* [*v. Board of Education*] as an equally important basis for eradicating disability segregation as it had been in striking down classification based upon race.").
98. 42 U.S.C. §§ 12,101-12,213 (2000).
99. *Id.* § 12101(7).
100. *Id.* §§ 12111-12117.
101. *Id.* §§ 12131-12134.
102. *Id.* §§ 12181-12189.
103. *See* ROTHSTEIN, *supra* note 25, at 74; s*ee also* TUCKER, FEDERAL DISABILITY LAW 4 (2d ed. 1998).
104. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-796 (2000)).
105. 29 U.S.C. § 794(a) (2000).
106. *See* ROTHSTEIN, *supra* note 25, at 75.

All Handicapped Children Act (EAHCA),[107] renamed the Individuals with Disabilities Education Act (IDEA),[108] placing emphasis on using the term "disability" rather than "handicap."[109] The IDEA was enacted in response to the general advocacy movement to support the rights of people with disabilities and to two federal court decisions: *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*[110] and *Mills v. Board of Education of District of Columbia.*[111] The two cases established the precedent that education for children with disabilities is subject to constitutional protection under the Fourteenth Amendment, and more specifically, that children with disabilities are entitled to equal protection and due process.[112] The IDEA provides additional financial resources to states in order for the states to provide equal education opportunities to children with disabilities.[113] Although there are many other statutes that provide support for citizens with disabilities, the ADA, the Rehabilitation Act, and the IDEA are the major laws that allow citizens with disabilities to enter the mainstream of society.[114]

While there has been some judicial support for citizens with disabilities, most of the laws that protect their rights are statutory. Consequently, it is important to engage in statutory interpretation to determine who will receive protection. Statutes that are designed to assist citizens with disabilities frequently have different definitions of the term "disability." Under the ADA, the term "disability" means: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual;[115] (B) a record of such an impairment; or (C) being regarded as having such an impairment."[116] The term "mental impairment" means: "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome,

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107. Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1405-06, 1415-20 (2000)).

108. Pub. L. No. 101-476, 104 Stat. 1103.

109. ROTHSTEIN, *supra* note 25, at 79. The term has been considered offensive because it derives from the view that a person with a disability has to beg to survive and has a "cap" in his or her "hand" to beg for money, ergo "handicap."

110. 334 F. Supp. 1257 (E.D. Pa. 1971).

111. 348 F. Supp. 866 (D. D.C. 1972).

112. ROTHSTEIN, *supra* note 25, at 76 (citing Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982), which "noted that the legislative history of the EAHCA indicates that its purpose is 'to provide assistance to the States in carrying out their responsibilities under the Constitution.'").

113. *Id.* at 76. IDEA is not a fully federally funded program, so there remain many children with disabilities who have special educational needs that are not met.

114. *See* TUCKER, *supra* note 103, at 4; s*ee also* ROTHSTEIN, *supra* note 25, at 14-18 (listing chronologically the major developments in disability law).

115. It is important to note that an impairment must "substantially limit one or more major life activities" to rise to the level of a "disability" under the ADA. 42 U.S.C. § 12102(2)(A).

> The major life activities limited by mental impairment **differ from person to person**. There is no exhaustive list of major life activities. For some people, mental impairments restrict *major life activities* such as learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, or working. Sleeping is also a major life activity that may be limited by mental impairments.

COLKER & TUCKER, *supra* note 17, at 163.

116. 42 U.S.C. § 12102(2).

emotional or mental illness, and specific learning disabilities."[117] While under the IDEA, "children with a disability" means a child:

> [A]s having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance . . . an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.[118]

Further the Social Security Act, designed to provide monetary benefits to every insured individual who is "under a disability,"[119] defines "disability" as an:

> inability to engage in any substantial gainful activity by reason of any . . . physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.[120]

Because of the different definitions of "disability," it is important that lawyers closely review the statutes to assure appropriate protection.

V. LAWYER'S RESPONSIBILITY WHEN REPRESENTING A CLIENT WITH A MENTAL DISABILITY

As discussed earlier, a lawyer's duty to her client does not change because the client has a mental disability. However, a lawyer does need a heightened sense of awareness to the needs of a client with a mental disability and may need to be more diligent in assuring effective communications and respecting the objectives of the client. The lawyer should acknowledge that there are differences between clients with mental disabilities and clients

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117. 29 C.F.R. § 1630.2(h)(2) (2003). It is important to note that not all the conditions discussed earlier per the DSM-IV are disabilities, or even impairments for purposes of the ADA. "For example, the DSM-IV lists several conditions that Congress expressly excluded from the ADA's definition of 'disability.'" COLKER & TUCKER, *supra* note 17, at 162 (noting that "[t]hese include various sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.") (citing 42 U.S.C.A. § 1211(b) (1994) and 29 C.F.R. § 1630.3(d) (1996)). Further, "[w]hile DSM-IV covers conditions involving drug abuse, the ADA provides that the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of that use." COLKER & TUCKER, *supra* note 17, at 162 (citing 42. U.S.C.A § 12210(a) (1994)).

118. 34 C.F.R. § 300.7(a)(1) (2003).

119. The Supreme Court has concluded that the statutory definitions of disability, although different, are often consistent with each other and that a receipt of Social Security Disability Insurance (SSDI) benefits does not automatically estop the recipient from pursuing an ADA claim. However, an ADA plaintiff must explain why her SSDI claim is consistent with her ADA claim. Cleveland v. Policy Mgmt. Sys. Corp., 426 U.S. 795 (1999).

120. 42 U.S.C. § 423(d)(1)(A) (2000).

without mental disabilities; however, this acknowledgment is consistent with respect for the clients and their rights. The difference does not mean that the relationship between the lawyer and client is different, but it does mean the lawyer may have to change the way he or she communicates with the client to ensure that the client understands the legal issues so the client can make meaningful decisions. Lawyers have a tendency to usurp decisions that should be left to the client, and this problem is more prevalent when the lawyer is representing a client with a mental disability.[121] Throughout the lawyer-client relationship, the client retains the right to make the decision regarding the objective of the representation, but the lawyer retains the right to determine the means.[122]

Lawyers are faced with two potential approaches they can take in their representation of clients: One approach is for the lawyer to act in the "best interest" of the client, while another approach is to act as an "advocate" for the expressed interest of the client. In the "best interest" approach, the lawyer takes a paternalistic role and usurps the decisions of the client. A lawyer who takes this approach rationalizes that she has expertise and knows what is best for the client.[123] The "advocate" approach requires the lawyer provide legal advice in order to assure that the client has sufficient information to make an informed decision. The desired outcome is for the client to make the decision that is in his or her best interest.[124] The "advocate" approach is the widely accepted approach and provides for a client-centered relationship.[125] When representing a client with a mental disability, the "advocate" approach is consistent with the requirement that the lawyer maintain a "normal" lawyer-client relationship.[126]

As a lawyer develops a relationship with his or her client, it is imperative that he or she has effective communication skills and that the lawyer makes the client feel that he or she is as important as the case.[127] The tone that is set in the initial meeting is important to establish the tone of the entire relationship. At the initial meeting, the lawyer must establish trust with the client and convey to the client the client's importance in the case.[128] The lawyer should also use this opportunity to measure the client's cognitive ability to assure that the client understands the matters being discussed. The lawyer may be able to answer the threshold questions as to whether the

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121. Herr, *supra* note 11, at 611 (noting "[f]or many lawyers, the temptation to be paternalistic is acute when representing clients with developmental or other mental disabilities.").
122. *Id.*; s*ee also* Bray & Ensley, *supra* note 11, at 338.
123. Bray & Ensley, *supra* note 11, at 340-41.
124. *Id.* at 338.
125. *See, e.g.,* Bray & Ensley, *supra* note 11, at 338-42; Herr, *supra* note 11, at 615; DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974); DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977).
126. Bray & Ensley, *supra* note 11, at 341.
127. *See* BINDER & PRICE, *supra* note 125; NOELLE C. NELSON, CONNECTING WITH YOUR CLIENT: SUCCESS THROUGH IMPROVED CLIENT COMMUNICATIONS TECHNIQUES (1996); ANDREW S. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS (1976).
128. NELSON, *supra* note 127, at 1-2.

client has an impairment.[129] However, the lawyer must find out the client's cognitive ability in a way that is not offensive and patronizing. The lawyer can establish a good relationship and learn about the client's legal problem and cognitive ability through effective communication.

When a lawyer is communicating with a client with a disability, it is important that the person is treated with respect. When a lawyer is referring to a person with a disability, it is important that the lawyer uses "people first" language. In "people first" language, the person is put first, and the disability is put second, therefore reflecting respect for the person.[130] For instance, the lawyer should say a "person with mental illness," as opposed to a "mentally ill person." It is important to the client for the lawyer to see the client first and not the client's disability. People with disabilities do not want to be portrayed as helpless or oppressed.[131] The lawyer must appreciate that the disability does not describe or identify the person, but the person may have a disability which is one of many of his or her characteristics.[132]

If a lawyer does suspect that a person has a disability, the lawyer should determine whether the person has a communicative or a cognitive disability or both.[133] The lawyer should not be afraid to discuss the disability with the client and ask the client the best way to convey information. People frequently make presumptions about the limitations and skills of a person with a disability, where the best way to determine his or her limitations and skills is to ask the person directly. The lawyer should not direct questions to a third person when the client is present and can speak on his or her own behalf. However, if a lawyer learns that a client has a disability prior to an interview, it would be beneficial if the lawyer could learn as much as possible about the characteristics associated with the disability prior to an interview.[134]

Lawyers should be aware that many clients will not be candid and forthcoming about a mental disability because of the negative stigma attached to it, the misclassification of the disability, or because they have an honest perception that their disability is not relevant to the discussion. The denial of a disability is particularly prevalent with clients who have mental retardation.[135] Clients who are mentally retarded are hurt by being called

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129. *See* Bray & Ensley, *supra* note 11, at 333; s*ee also* WATSON, *supra* note 127, at 126.

130. PARRY, *supra* note 14, at 1; ROBERT PERSKE, UNEQUAL JUSTICE? WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM 12 (1991); Trottier & Hodgson, *supra* note 20, at 12.

131. Trottier & Hodgson, *supra* note 20, at 12.

132. PARRY, *supra* note 14, at 1.

133. *Id.*

134. *Id.* Attorneys Trottier and Hodgson suggest consulting with an expert. Trattier & Hodgson, *supra* note 20, at 12. Although many experts can be expensive, there are a lot of disability rights advocates who can provide assistance at little to no cost.

135. Ellis & Luckasson, *supra* note 28, at 430. The authors note that "[i]t is not uncommon for individuals with mental retardation to overrate their own skills, either out of a genuine misreading of their own abilities or out of defensiveness about their [disability]. . . . Overrating is probably closely tied to desperate attempts to reject the stigma of mental retardation." *Id.*

retarded and "will do almost anything to disconnect themselves from it."[136] This effort to deny the disability will occur when a mentally retarded person is interacting with the police or any other person in the criminal justice system. Moreover, "many of these individuals will go to great lengths to hide their disability."[137]

When a lawyer is communicating with a client with mental retardation, the lawyer must be cognizant of the communication difficulties confronted by such clients. The client's ability to communicate and understand the judicial process will affect the client's rights and ability to seek appropriate justice.[138] There are a number of communications difficulties that will adversely affect the rights of a client with mental retardation.[139] The following three examples highlight some of the problems that affect the rights of a client with mental retardation: eagerness to please, inability to understand abstract thoughts, and communication through mimicking. Individuals with mental retardation are eager to please others, particularly people in authority. Because individuals with mental retardation seek the acceptance of authority figures, they will accept the blame for things that they have not done.[140] Obviously, in the judicial process such behavior can be dangerous. An individual with mental retardation may state that she or he has committed a crime or accept responsibility for a liability in a civil case.[141] Indi-

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136. PERSKE, *supra* note 130, at 19. The author recalls a person who is mentally retarded saying, "[b]eing called retarded hurts. As soon as you are labeled retarded, you are treated differently. You get shoved to the back of the line. Others stop talking to you." *Id.*

137. Ellis & Luckasson, *supra* note 28, at 431; s*ee also* PERSKE, *supra* note 130, at 20.

138. RONALD W. CONLEY ET AL., THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS 2 (1992); PERSKE, *supra* note 130, at 15; Ellis & Luckasson, *supra* note 28, at 445-52; s*ee also* Deborah Greenblatt, Assisting People with Mental Retardation in the Criminal Justice System: Identifying, Understanding and Communicating with People who have Cognitive Impairments Within the Criminal Justice System (unpublished manuscript, on file with The Journal of the Legal Profession).

139. See PERSKE, *supra* note 130, at 15 and Greenblatt, *supra* note 138, at 26, for a more detailed list and discussion.

140. PERSKE, *supra* note 130, at 15.

141. *See id.* at 16. Perske provides the following illustration:

> Records show how 37-year-old David Vasquez tried to please Arlington, Virginia, detectives. On January 4, 1984, they approached Vasquez while he was cleaning tables at a McDonald's restaurant and took him to headquarters. With a tape recorder running, the detectives described to Vasquez the murder of a woman who had been raped and strangled with a cord from a venetian blind.
>
> Vasquez repeated several times that he didn't know anything about the crime, until the detectives told him they had found his fingerprints in the apartment. Too naive to believe that policemen would lie, he broke down and cried for his mother. Then he tried to tell them what they wanted to know. Excerpts from the recording transcript, published in *The Washington Post*:
>
> Shelton: "Did she tell you to tie her hands behind her back?"
> Vasquez: "Ah, if she did, I did."
> Carrig: "Whatcha use?"
> Vasquez: "The ropes?"
> Carrig: "No, not the ropes. Whatcha use?"
> Vasquez: "Only my belt."
> Carrig: "No, not your belt. . . .Remember. . .cutting the venetian blind cords?"
> Vasquez: "Ah, it's the same as rope."
> Carrig: "Yeah."

viduals with mental retardation may be unable to understand abstract terms or concepts, and they may only think concretely.[142] For example, if told the cliché "that's the way the cookie crumbles," a person with mental retardation may focus on the concrete word "the cookie" and may not understand the abstract concept of consequences.[143] Or if asked by a police officer, "Do you waive your right to be silent and waive your right to have an attorney present?," individuals with mental retardation may quickly say yes and waive their rights because they may not understand the abstract meaning of the term "right." They may think of "right" versus "left." Further, they may not understand the term "waive," and think of the concept to "wave."[144] Because of their abhorrence to the term "mental retardation" and the possible detection of their disability, they will not tell the police officer that they do not understand.[145] Consistent with the desire to please others and the inability to understand abstract terms and concepts is the tendency of individuals with mental retardation to copy others. They will listen for words, look into the face of the person talking to them and copy the mood in order to give the "right" response.[146] For instance, if a police officer said, "You weren't at home at 9:00 p.m., right?," they would listen to the tone of the officer's voice and seek to give the answer they think the officer wants and respond, "Yes." They also learn to communicate by affirming the choice that has been suggested to them last.[147] In order to assure effective commu-

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> Moments later, the detectives asked Vasquez about the actual murder:
>
> Shelton: "Okay, now tell us how it went, David–tell us how you did it."
>
> Vasquez: "She told me to grab the knife, and, and, stab her, that's all."
>
> Carrig (raising his voice): "David, no, David."
>
> Vasquez: "If it did happen, and I did it, and my fingerprints were on it. . ."
>
> Carrig: (slamming his hand on the table and yelling): "*You hung her*!"
>
> Vasquez: "What?"
>
> Carrig (shouting): "*You hung her!*"
>
> Vasquez: "Okay, so I hung her." (Priest, 1989)
>
> As the pressure increased, Vasquez suddenly seemed to go into a trance. With eyes turned glassy, he stared at a spot on the table. In this dreamlike state, his meek, pleading voice became low-pitched and steady as he described how he had killed the woman. That eerie statement persuaded the prosecutor to go for the death penalty. Vasquez' court-appointed defense attorneys, however, talked him into pleading guilty and forgoing a trial, in exchange for a sentence of second-degree murder (40 years) and burglary (15 years).
>
> Later, police connected the crime to the real murderer, and Vasquez received a pardon on January 4, 1989– five years to the day after the detectives had approached him at McDonald's.

Id.

142. It is important to stress that the skill level and the limitations of people who have mental retardation varies, so every person who has mental retardation will not respond in the same manner. *See* DSM-IV, *supra* note 32.

143. *See* PERSKE, *supra* note 130, at 16; Greenblatt, *supra* note 138, at 26.

144. PERSKE, *supra* note 130, at 16.

145. *See* Ellis & Luckasson, *supra* note 28.

146. *See* PERSKE, *supra* note 130, at 17; Greenblatt, *supra* note 138, at 26-27.

147. *See* PERSKE, *supra* note 130, at 17; Greenblatt, *supra* note 138, at 26-27. Perske provides the following example:

> Q: "Were you with John?"
>
> A: "Yes."
>
> Q: "Were you with your family?"

nication, lawyers must be aware of these difficulties and take measures to get accurate information from individuals with mental retardation.

A lawyer's failure to be aware of the communications difficulty and failure to educate the courts on their client's needs can lead to an innocent person going to jail or being held civilly liable for something that they may not have done. This point can be illustrated by two cases decided by the North Carolina Supreme Court two years apart in the 1980s.[148] In both cases, the defendants were mentally retarded, the defendants were charged with serious felonies which carried mandatory life imprisonment, and the prosecution relied heavily on the defendant's confession to get a conviction.[149] In the first case, *State v. Massey,*[150] the defendant was found guilty of murder in the first degree and armed robbery. The court concluded that "after being advised of his Miranda rights the defendant voluntarily, knowingly and intelligently waived his right to an attorney and voluntarily, knowingly and intelligently made a statement to the Deputy Sheriff."[151] The court recognized that the defendant was mildly retarded, but held that the trial court's refusal to provide funds for an additional psychiatric evaluation was not an error, where the defendant has been examined by a state psychiatrist.[152] Moreover, the court concluded that the "[d]efendant has not shown that there is a reasonable likelihood that an additional psychiatrist would have materially aided in the preparation and presentation of his case or that he was denied a fair trial."[153] The court made this finding despite the fact that the pivotal issue was whether the defendant had the capacity to "voluntarily" and "intelligently" waive his rights and whether his confession was made "knowingly" and "intelligently."[154] In the second case, *State v. Moore,*[155] the defendant was convicted of first-degree sexual offense, first-

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A: "Yes."
Q: "You couldn't have been with both of them" Which is it?"
A: (Silence)
Q: "Were you with your family or were you with John?"
A: "With John"
Q: "Let's run that one by again; were you with John or were you with your family?"
A: "Family."

PERSKE, supra note 130, at 17.

148. CONLEY ET AL., *supra* note 138, at 2.

149. *Id.*

150. 342 S.E.2d 811 (N.C. 1986).

151. *Id.* at 821.

152. *Id.* at 816.

153. *Id.*

154. *See id.* at 823. In ruling on the defendant's motion to dismiss, the court made the following findings:

> Defendant's voluntary written confession reveals that Al Simpson was killed during the robbery of his store by defendant and his brother. The victim was found shot to death outside his store. The cash register was empty and two empty .22 caliber shells were found at the murder scene. Defendant's car had been seen parked in the vicinity of the victim's store around the time of the shooting. A .22 caliber rifle, later identified as the murder weapon, was found in defendant's home. Defendant admitted to his father that he had shot the victim.

Massy, 342 S.E.2d at 823.

155. 364 S.E.2d 648 (N.C. 1988).

degree burglary, and assault with a deadly weapon with the intent to kill inflicting serious injury. The court concluded that the "[d]efendant showed that the credibility of his confession was pivotal in the state's case against him"[156] and that he had "a particularized need for the assistance of a psychiatrist in the preparation of his defense."[157] The court recognized that the defendant had an IQ of fifty-one, which places him at the lowest level of mild retardation and "that he [was] 'easily led and easily influenced' by those exercising authority."[158]

The difference in the two outcomes can be explained by the level of information provided to the North Carolina Supreme Court and the court's appreciation of the communication difficulties with individuals with mental retardation.[159] Former Chief Justice of the North Carolina Supreme Court, James G. Exum, candidly admits "that judges, by and large, don't know much about mental retardation."[160] He added that lawyers are not well informed, including defense counsel.[161] He stated:

> [T]he difference in the outcome in the two cases rested in part on a difference in the level of general knowledge on the part of the court about mental retardation. But, more important, it rested on the specific factual and detailed information that counsel in *Moore* was able to gather and present at the trial level.
>
> As is illustrated by these two cases, the judiciary has a need for more information, more knowledge, and more understanding. We need lawyers who understand the difficulties and can present rich, meaningful, and detailed evidence like that in *Moore* for the edification of both the trial court initially and the appellate court ultimately.[162]

Because the court was more fully informed in the *Moore* case, the court was better able to address the communication difficulties of the defendant who has mental retardation.

In *State v. Moore,* the court stated that *State v. Massey* differed because the defendant in that case "failed to make a sufficiently specific demonstra-

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156. Id. at 653. The court further noted:
> Since [the victim] could not identify her assailant, the central issue before the jury was the perpetrator's identity. Aside from defendant's confession, and the palm print found at the scene of the assault which allegedly matched a palm print of defendant's, the state had little evidence linking defendant to the crimes in question. Thus, the state's case rested, heavily, on the jury's acceptance of defendant's confession as true.

Id.
157. *Id*.
158. *Id.*
159. CONLEY ET AL., *supra* note 138, at 2-4.
160. *Id.* at 1.
161. *Id.* at 2.
162. *Id*. at 3-4.

tion of his need for the assistance of a psychiatrist" and the "defendant did not specify the precise degree of his retardation, neither did he put on any evidence indicating the effect his particular mental condition might have had on his ability to understand either his rights or the implications of his statement."[163] Moreover, in *State v. Moore,* the court had a better appreciation of the needs of defendants with mental retardation and recognized that "even when a mentally retarded suspect's responses appear normal, his answers may not be reliable."[164] The court noted that:

> many people with mental retardation are predisposed to 'biased responding' or answering in the affirmative questions regarding behaviors they believe are desirable, and answering in the negative questions concerning behaviors they believe are prohibited. The form of a question can also directly affect the likelihood of receiving a biased response. . . . [165]

The court concluded that the assistance of a psychiatrist would enable the trial court to better assess more fully and accurately the validity of the defendant's responses, particularly, in the instant case where the defendant waived his right in response to a series of "yes-no" questions.[166]

The two cases clearly illustrate that the judiciary as well as lawyers need education into the rights of an individual with mental retardation.[167] The lack of knowledge and information by the bench and bar could lead to continued injustice.

A. Determining the Client's Objective

The lawyer's first task during the initial meeting with the client is to determine the objective of the client. People come to lawyers because they have some legal problem and they need the lawyer's expertise to assist them in solving the problem.[168] It is at this first meeting, that the client-lawyer

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163. *Moore*, 364 S.E.2d at 653.
164. *Id.* at 655.
165. *Id.* at 655-56 (citing Ellis & Luckasson, *supra* note 28, at 428).
166. *Id.* at 656. The Court further noted that:
> Responses by the mental retarded to "yes-no" questions posed by persons in authority present special problems. According to one study, the danger of response bias in this situation is so great that questioners should abandon altogether the use of "yes-no" questioning techniques.

Id. (citing Ellis & Luckasson, *supra* note 28, at 428 n.72).
167. CONLEY ET AL., *supra* note 138, at 2-4. Former Chief Justice James G. Exum states:
> As is illustrated by these two cases, the judiciary has a need for more information, more knowledge, and more understanding. We need lawyers who understand the difficulties and can present rich, meaningful, and detailed evidence like that in *Moore* for the edification of both the trial court initially and the appellate court ultimately.

Id. at 4.
168. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1, at 145-46 (1986).

relationship is established, even if the lawyer decides not to take the case.[169] The lawyer must appreciate that the appropriate phrase for the relationship being established is "client-lawyer" and not "lawyer-client" because it is the client's interests that are "primarily to be furthered."[170] The lawyer must immediately establish to the client that the client's interest and concerns are the primary reason to establish this relationship.[171] As stressed earlier, the primary reason for the relationship is the same when representing a client with a mental disability, and the lawyer must refrain from usurping the client's role. There are established ways for initiating the client-lawyer relationship; a lawyer representing a client with a mental disability does not have to abandon those methods, but may have to accommodate the particular needs of clients with mental disabilities. An effective way to determine the client's objective and legal problem is through a three-staged interview. The three stages are "Preliminary Problem Identification," "Chronological Overview," and "Theory Development and Verification."[172]

The three-stage approach allows the lawyer to receive a thorough explanation of the legal problem and sufficient information to allow the lawyer to analyze the legal problem.[173] The three-stage approach is effective when representing a client with a mental disability because it allows the lawyer to establish respect and concern for the client's legal problems, as well as allows the lawyer to measure the skills and limitations of the client.[174] The lawyer should explain to the client that the interview will be conducted in a three-stage manner and explain to the client why the lawyers is proceeding in that manner.

During the "Preliminary Problem Identification stage," the lawyer asks the client open-ended questions to allow the client to relay the legal problem and the relief he or she seeks in a way that is most comfortable for the client.[175] In the "Chronological Overview stage," the lawyer asks the client to relay the legal problem in a systematic successive manner which begins when the legal problem was created to the present.[176] After the "Chronological Overview stage," and the lawyer moves to the "Theory Development and Verification stage," the lawyer determines the possible causes of action

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169. *Id*. at 147 ("[A] lawyer who spends a half hour speaking to a client in order to determine whether or not to represent the client, and who decides not to, still incurs significant professional and legal duties. Most prominently, the lawyer incurs a duty of confidentiality.").

170. *Id*. at 145 n.1.

171. NELSON, *supra* note 127, at 1 ("[I]t is important that you begin to earn your client's trust the minute he or she walks in the door the first time.").

172. BINDER & PRICE, *supra* note 125, at 53.

173. *Id*. at 54.

174. *See id.* at 57-59 (stating that this approach "increases the likelihood that the lawyer will quickly be perceived by the client as someone who is empathetic and therefore someone to be trusted with troublesome information . . . [and ensures that] the client . . . has an opportunity at the beginning of the interview to relate whatever the client sees as important.").

175. *Id*. at 53 ("The lawyer refrains from imposing any particular order on the client's presentation and allows the client to proceed in a free-flowing narrative.").

176. BINDER & PRICE, *supra* note 125, at 53-54. Here, the lawyer does not seek a detailed explanation of the events. *See id*.

available or defenses available.[177] While this approach may not work for all cases, it provides a good framework for most situations.[178]

B. Explaining the Role of the Lawyer to the Client and the Scope of the Representation

After the lawyer has decided to represent the client and has determined the client's legal problem, the lawyer should make certain that the client understands the roles of the lawyer and the client. Because a person with a mental disability may have some cognitive limitations, the lawyer should avoid any temptation to usurp the client's role and should ensure that the client understands that it is his or her role to make the decision regarding the objective of the representation.[179] Moreover, the lawyer should make sure the client understands the scope of the representation. For instance, if the lawyer is only representing the client for a personal injury suit that arises out of a slip and fall at a supermarket, the lawyer must make sure that the client understands the limitation of the representation.[180] The lawyer must make sure that the client understands the limitations placed upon the lawyer. Particularly the lawyer can only bring meritorious claims that are based in law and fact.[181] To the extent that the client's mental disability may be used by the opposing party to attack the credibility of the client, the lawyer should have a candid conversation with the client about that possibility.[182] If the lawyer fails to explain the potential problems as soon as possible, it will lead to problems in the lawyer's relationship with the client and a lack of trust.

C. Lawyers Need to Consult Experts when Representing a Client who has a Mental Disability

Lawyers should solicit the assistance of experts when representing a client with a mental disability. If a lawyer is representing a client who has a cognitive disability, the lawyer should contact a disability rights advocate,

177. *Id.* at 52. In many situations the lawyer will not be able to complete the theory development and verification in the initial meeting. *See id*. at 99.

178. *Id.* at 58 ("Not every interview will lend itself to the three-stage approach [and sometimes] the lawyer will need to inquire into an auxiliary matter before endeavoring to fully ascertain the client's problem and legal position.").

179. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2003). The lawyer should make a particular effort to assure that the clients with mental disabilities understand the process and be mindful of suggestions for effective communications with citizens with mental disabilities. *See infra* notes 183-85.

180. *See* MODEL RULES OF PROF'L CONDUCT R.1.2(c) (2003) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

181. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003).

182. One of the most important things for lawyers in civil rights cases is to explain to the client what the law provides and what the law does not provide. Because civil rights cases are often emotional issues for victims, sometimes it is difficult for a people to understand although in their heart they believed they were treated differently because of their race, color, religion, gender or disability, it may be impossible to prove it in court.

or other expert in the field, and find out the most effective way to communicate with a client with a cognitive disability. The lawyer will learn that there are many suggestions available that will allow him or her to start an effective relationship with such a client.[183] Moreover, the preparation by the lawyer will assure the client that he or she has a lawyer who will listen and in whom the client can trust. Further, if a lawyer has a client who has a mental illness, such as bipolar disorder, the lawyer should consult an expert. It is important for the lawyer to treat the person as an adult and respect the person's intelligence. An expert in the field has suggestions as to how to best communicate with a client who has a mental illness, like bipolar.[184] There may be times where the lawyer may need to postpone a session because of symptoms associated with bipolar disorder. Further, the client may request an objective that is inconsistent with the law. If so, the lawyer must respectfully explain the law to the client and the limitations on the remedies available. The lawyer's interaction with the client will require patience and understanding. Finally, as discussed earlier, if a lawyer represents a client who has mental retardation, the lawyer should consult an expert and be assured that he or she can provide effective communication.[185]

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183. *See* Trottier & Hodson, *supra* note 20, at 28.
Tips for effective communication with people who have cognitive disabilities [are]:
1. Be understanding, calm and patient when waiting for a person to respond. Take time to assure they understand what is being said.
2. Make eye contact.
3. Use clear and simple language that expresses one idea at a time.
4. Use concrete terms rather than abstract language.
5. Do not use compound or complex sentences that may be difficult to follow or have more than one part.
6. Be prepared to give the person the same information more than once and in different ways;
7. Do not ask leading questions. People with cognitive disabilities may be eager to please and may say what they think you want to hear.
8. Have the person repeat back to you or explain in their own words what you have said to make sure there is a mutual understanding.
9. Treat adults as adults and do not speak in a loud voice.

Id.

184. *See id.* at 30-31.
Tips for effective communication with people who have mental illness [are]:
1. Speak clearly and directly using simple communication. Some mental illness may make processing sounds or information difficult.
2. Treat the individual with respect, offering to shake hands and make the individual feel valued and comfortable.
3. Make eye contact, be relaxed, and be aware of body language.
4. Listen attentively, reflect what you have heard, and then let the person respond.
5. Treat adults as adults. Do not patronize, condescend or threaten the individual.
6. Be patient and calm when waiting for a response. Do not make decisions or assume what the person's preferences may be.
7. Do not blame the person with mental illness. A person who experiences some mental illness may not be able to conform to the norms of society.
8. Let the person know you are prepared to believe them. This will enable them to relax and speak clearly with out defensiveness.

Id.

185. *See* Trottier & Hodson, *supra* note 20, at 29.
Tips for effective communication with people who have mental retardation [are]:
1. Limit distractions.

VI. CONCLUSION

Until lawyers are sensitized to and educated on the needs of people with mental disabilities, they will be ill-equipped to provide adequate representation. Lawyers must avoid the temptation to substitute their judgment for the client's judgment, particularly when the lawyer is representing a client with a mental disability. Although the ethical rules have progressed in requiring lawyers to respect the rights of clients with disabilities, the rules need to provide more guidance. Furthermore, the American Bar Association and local bars, through continuing legal education and mandatory training, should provide more training for lawyers. Lawyers should be required to participate in mandatory training that allows them to be better informed about the communication needs of clients with mental disabilities and the characteristics associated with different mental disabilities.

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2. Make eye contact a priority.
3. Limit the number of people in the conversation.
4. Ask questions in a number of ways; ask the person to repeat things back to you as they understand them.
5. Do not use compound or complex sentences requiring the individual to respond to more than one idea.
6. Wait for a response before continuing; do not ask a series of question or make multiple statements without waiting for a response. Be patient.
7. Begin by asking questions that a person of appropriate age, gender and geographical location should know to determine the level of basic knowledge of the individual.
8. Do not begin a sentence with an introductory phrase that could make the question more difficult to understand.
9. Be careful when expressing "time" as this is an abstract concept. Use concrete rather than abstract explanations.
10. Simplify written instructions and signs; explain everything orally.
11. Remember that individuals with mental retardation are highly suggestible and may answer "yes" to every question asked.
12. Ask the individual about [his or her] interests and activities to establish trust prior to formal conversation.
13. Be aware that a person with mental retardation may smile or laugh inappropriately since [he or she] may think this will get approval.

Id.

CONTRASTING THE VISION AND THE REALITY: CORE ETHICAL VALUES, ETHICS AUDIT AND ETHICS DECISION MODELS FOR ATTORNEYS

Arthur Gross Schaefer[*]
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I. INTRODUCTION

Behind the confident exterior of highly trained and competent attorneys are sometimes sad, exhausted human beings feeling empty and disillusioned.[1] Certainly this mood of despair does not affect them all to the same degree or at the same time, for there are legal professionals who will not resonate at all to the concerns raised in this Article. However, have you noticed that many attorneys are no longer laughing at lawyer jokes? Shared laughter has given way to increased anguish and a sense of growing congruence between many lawyers' self-perception and the negative standing in which they are often viewed by the general public. The public's negative feelings towards lawyers date as far back as the famous Shakespeare quote, "The first thing we do, let's kill all the lawyers."[2] The law profession has historically had a public relations problem regarding the public's view of them. Nevertheless, lawyers are increasingly demoralized by an increased feeling of devaluation and dishonor by the public and the profession itself.[3]

In the past, lawyers disregarded the public's perception that attorneys had less professional integrity as compared to other professionals. The legal profession chose to neglect their public image for two reasons. First, the profession understood that the complex legal system required them to act in

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1. Nancy McCarthy, *Pessimism for the Future*, CAL. ST. B.J., Nov. 1994, at 1, 6, 16.

2. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH, act 4, sc. 2. (Sylvan Barnet ed., Signet 1989) (1623).

3. Mary Ann Glendon, *Law in a Time of Turbulence*, VITAL SPEECHES OF THE DAY, Jan. 1994, at 69.

ways the public could not adequately understand.[4] Attorneys were aware that society was understandably misled regarding the function of lawyers, since society viewed attorneys as seekers of truth and justice. Lawyers knew all too well that the truth-finding function was reserved for the adversarial process as a whole, while the ultimate arbiters of justice were judges and juries. However, communicating that point to lay persons seemed to be a losing battle.

The second reason why the law profession chose to neglect the public's image of them was because attorneys also understood that those outside the legal profession could not fully appreciate the adversary system. The American adversarial process requires lawyers to aggressively present their client's case, even if such representation is contrary to the lawyer's own personal beliefs. Such a professional demand is easier for some practitioners than others, as evidenced by advocates who often take unpopular cases based on the belief that everyone who comes through their door is entitled to legal representation. These two public misconceptions have clearly added to the nefarious reputation of lawyers. "The lawyer whose client or cause is unpopular is not going to be well liked, no matter how capably or ethically he [or she] performs."[5]

Unquestionably, the public is frustrated by the perceived nastiness of the adversarial process. Lay persons seethe in disgust at the ability of attorneys to articulate a defense for the most repulsive actions, as well as at the seemingly endless and costly legal process. It is as if society thinks that all attorneys place their own pecuniary and egotistical needs ahead of the client and even society itself. Yet, even with an understanding of the public's view of advocates in the legal profession, such an observation does not seem sufficient in and of itself to dispel an increasingly nagging feeling that a key societal belief may indeed be accurate for many legal practitioners—that they lack integrity. Lawyers throughout the legal profession are exiting the practice in droves and those that choose to stay feel trapped in a disabling situation that is overwhelming, and from which there appears no escape.

Perhaps this feeling of being involved in a profession that frequently forces its practitioners to act in ways inconsistent with their own personal values is a key reason why an increasing number of attorneys feel that they lack integrity and have resultantly become dissatisfied with the legal field. For example, in 1994 a RAND study commissioned by the California Bar Association found that two-thirds of the attorneys polled believed that those who left the practice of law did so because of dissatisfaction with their jobs.[6] Moreover, the headline unveiling the study read, "given a second chance, half of the state's attorneys would not become lawyers."[7] Such an

4. McCarthy, *supra* note 1, at 1.
5. SLOAN BASHINSKY, KILL ALL THE LAWYERS? 2 (1986).
6. McCarthy, *supra* note 1.
7. *Id.*

overwhelming ratio of discontentment deserves significant inquiry into the causes of the vexation, stress, and frame of mind of the many individuals within the legal field. There has not been sufficient discussion in public or even among lawyers on this important topic. Rather, lawyers, like many other professionals in our culture, try to tough it out themselves. It is our contention that much of this growing sense of frustration and disillusionment is generated by conflicting expectations.

The point of this Article is to help lawyers understand, manage, and cope with both the moral and ethical demands of lawyering, as well as their career dissatisfaction with the practice in general. This Article does not simply use the various ethics rules to deal with such issues, but rather integrates psychological principles to help explain and manage career dissatisfaction among practitioners, and ethical and moral constructs to produce workable ethics solutions for practitioners. To that end, this Article will first discuss the six most common areas where lawyers experience conflicting expectations within the practice of law. Second, this Article will search for solutions to enhance lawyer morality and career satisfaction, and lastly, the Article will provide a workable ethics decision model and ethics audit, which seeks to help lawyers work through ethical and career frustrations.

II. CONFLICT OF EXPECTATIONS: THE THEORY OF COGNITIVE DISSONANCE

Too often, legal practitioners do not take sufficient time to step back and truly look to see if there is a gap between their expectations of the profession and the reality of their practice. During reflective time-outs, attorneys may find that their actions are repeatedly at a distance from their moral, ethical, and lifestyle principles. The distance between an attorney's value structure and actual law practice can be explained through the theory of cognitive dissonance. The theory of cognitive dissonance is used in psychology to express the uneasiness that a person feels when he or she does not act in accordance with his or her values and beliefs.[8] Lawyers risk losing sight altogether of what they sought to accomplish by joining the law profession, by not taking time to identify and understand the reasons for the distance between their individual expectations, convictions, and actions. When a person acts outside the boundaries set by his or her value structure, the individual's character and self-image become compromised. Ultimately, his or her goals and effectiveness can be undermined. Rather than pursuing a direction charted by his or her principles, a person often allows the gale of pressing problems or presumed professional expectations to control his or her destiny and values. This disparity, even if not fully apparent, can produce antagonism, hostility, disenchantment, and simple frustration.[9]

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8. ROBERT A. BARON, PSYCHOLOGY 638 (3d ed. 1995).

9. *See generally* Arthur Gross-Schaefer & Eric Weiss, *Clergy Burnout*, ALBAN J., Mar.-Apr. 1995, at 13.

In addition, when an attorney does not act in accordance with his or her moral values, especially over a prolonged period of time, a dangerous situation results for both the attorney and the legal system. When the goals and values of the individual lawyer get lost, the effectiveness of the legal system diminishes. Our legal system has core values that are either enhanced or diminished by the actions of its prominent players, the attorneys. Over time, the advocate's actions can corrupt and impair the legal system's ability to follow its own principles. Thus, to avoid such corruption within the legal system, practitioners need to take precious time to reflect and decide upon what their priorities are in the practice of law. Once this assessment has been made, the individual lawyer then needs to evaluate whether the articulated priorities correspond to his or her basic values. This assessment and evaluation process is critical for both the law profession and the legal system because no lawyer practices law in a vacuum. A person's activities as a lawyer are necessarily influenced by how others practice law and the general attitude within the profession. Therefore, lawyers must first recognize how the changing legal environment affects their ability to follow their own moral principles.

A. The Changing Legal Environment

The practice of law has increasingly conformed to a business model of conduct, as opposed to the traditional professional model which granted established attorneys the power to socialize new attorneys into the practice. Certainly the general society, along with many professions, appears to be heavily motivated by business considerations in light of the globalization of the American economy. The legal profession is not immune from these trends. There are two factors that have driven this change within the practice of law. The first is the Supreme Court decision of *Bates v. Arizona*, and the second is the dramatic influx of new attorneys.

Twenty-five years ago, in order for newly admitted practitioners to gain clientele, they were either required to work with or be in the good graces of established attorneys, or in the alternative, work for an established legal outfit. However, the 1977 U.S. Supreme Court case of *Bates v. Arizona* changed the traditional power structure of the legal profession.[10] Practically overnight, the decision moved the profession into the business model of conduct by granting all lawyers direct access to potential clients through advertising.[11] As a direct outgrowth of *Bates*, the traditional model's socialization process of new attorneys ceased. No longer were established practitioners able to impart traditional legal edicts, which sought to preserve the integrity of the law profession, to the masses of newly admitted lawyers. Such new comers saw no need for such a socialization process and instead

10. Bates v. Arizona, 433 U.S. 350 (1977).
11. *See id*. at 378.

began to create their own rules of edict, which deviated from those traditional edicts.[12] This new group of practitioners did not feel tied to the wall of integrity built by the previous generations of practitioners, and were instead more interested in capitalizing on the economic gains available through mass advertising. Therefore, decisions such as *Bates*, aimed at enhancing the legal profession, have, in a sense, backfired by giving rise to the greedy, ambulance chasing perception of lawyers—a perception that tears away at the integrity of the law profession.[13]

The second factor that caused the profession's adoption of the business model of conduct was the marked increase in the number of new attorneys. With the loss of older professional control, the entrance barriers into the practice of law fell. With such low entry barriers, it became a survival of the fittest in order for the more than 1,000,000 attorneys in the United States, plus the more than 50,000 nationwide bar takers each year, to survive economically.[14] Based on a study published in the California Bar Journal, sixty-three percent of California lawyers polled believed that there are too many of them in California.[15] The resulting heightened competition among lawyers for securing and retaining clients has shifted legal advocacy from the traditional duties of forming legal arguments that uphold the interests of the profession, society and justice, to an emphasis on building cases that cater to the client's or law firm's financial demands.

Furthermore, as the number of lawyers increases, the probability of repeatedly encountering the same opponents decreases. Such an adversarial system results in increased anonymity and a loss of professional accountability among the profession. As relationships between attorneys become more depersonalized, the recipients of rude or otherwise needlessly aggressive behavior can no longer be counted on to act as an internal mechanism for punishing such behavior in future encounters. With less effective peer sanctions for dishonorable and discourteous conduct, it is foreseeable that such conduct will increase. As a consequence of these changes to the legal environment, "what used to be a gentleman's profession, relying upon a code of honor more stringent than the professional ethics, has degenerated into a hostile, backbiting environment, with particular emphasis on the bottom line."[16]

Such an observation about the integrity of the legal profession raises questions relating to whether law firms are accumulating hours so they can bill larger amounts to their clients, or actually seeking to be fairly compensated for the value of their services. Criticism surrounds law firm billing structures which reward an attorney's contributions to the firm based upon

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12. McCarthy, *supra* note 1, at 6.
13. *Id.* at 1.
14. Howard Erichson, *Strengthening Ethics in a Million Lawyer World*, NAT'L L.J., Aug. 3, 1998, at A24.
15. McCarthy, *supra* note 1, at 6.
16. Deborah Aaron, *Running From the Law*, LEGAL ECON., Sept. 1988, at 45, 46.

the billable hour. In particular, pressure upon junior associates to rack-up billable hours certainly works to the detriment of their long-term professional development as lawyers, while minimally increasing their short-term productivity. The ensuing increased focus on the bottom line has contributed to an insatiable demand for more billable hours and has forced many practitioners into moral lapses as they rush to obtain these hours. Such billing practice elevates both stress levels and the moral conflicts involved with being a lawyer, while decreasing the integrity of the law profession.[17]

One of the best insights into giving up personal integrity is found in the Bible in the story of Balaam.[18] Balaam was a professional curser who was hired to destroy the Jewish tribes escaping ancient Egypt. (The Babylonian religion taught that certain persons had the power to call forth calamities by using their connections with the divine.) Balaam was one of those special people whose reputation was so well-established that the Bible records the King of Moab's statement, "he whom thou [Balaam] cursest is cursed."[19] However, the source of Balaam's power was his special relationship with God who had instructed him, "Thou shalt not curse [the Jewish] people."[20] Balaam did not tell his employer that he had been ordered by God not to fulfill his commission, thus lying to his employer and in a deeper sense, to himself. Although Balaam knew he could not curse the Jewish people as he had promised, he was blinded by his need to please his employer and obtain the large retainer given to him by the King of Moab. Balaam attempted to ignore God's divine command and planned to meet with the King of Moab. However, God sent an angel to impede his progress. While in route to Moab, Balaam was blind to the fact that an angel wielding a sword blocked his path. Although Balaam could not see the angel's threat, Balaam's donkey did see the angel and spoke to Balaam, warning him of the angel's presence. It took the experience of a talking animal and an angel wielding a sword to get Balaam's attention and open his eyes to see that his contemplated actions went against a divine command.

In a metaphoric way, this ancient story is about giving up one's personal nature, truthfulness and integrity to please the expectations of others. Similarly, many of those in the legal profession have likewise been aware that what they are doing goes against their personal code of honesty and integrity, yet still continue with their practice because of their need to please their clients and their desires for financial gain. Like the Biblical Balaam, difficult decisions are unavoidable when living in a society with seemingly endless choices which invoke internal moral conflicts. The moral choices of advocates have continually been used as examples to form modern moral ideals and values. From prophets like Balaam to modern heroes like Martin Luther King and Mahatma Gandhi, we as individuals have learned the

17. McCarthy, *supra* note 1, at 1.
18. *Numbers* 22 (King James).
19. *Numbers* 22:6 (King James).
20. *Numbers* 22:12 (King James).

power of making the difficult, but morally right decision. An individual's decision to act in accordance with his or her inner voice may go against the popular choice, or it may be contrary to the beliefs and desires of those in power, yet it is the good decision for the individual. Today, the difficulty of making a decision that goes against popular choice is a well-understood experience for attorneys.

B. More Time and More Family Disruption

This question is for attorneys. Think back to your first year of practice. What were your personal expectations about professional time commitments, compensation, community status, family disruption, and personal integrity? Now think about your current law practice, lifestyle and ethical values. How far is your reality from your expectations? How about your expectations during your third, seventh, and tenth year of practice? Is your reality that the hours are longer, the family disruption greater, your values system frustrated, and your career dissatisfaction at an all-time high? In talking with many practitioners, there appears to be a growing trend in the last ten years of even established law firm partners spending longer hours at work and less time with their families and friends. Ironically, ten years ago the professional goal of making partner within a law firm entailed obtaining increased compensation and social status, all with less pressure to actually practice law. Partnership track was a perceived easy street, since partners made more money simply advising on junior associate cases and pursuing new clientele. However, in today's law firm life, becoming a partner does not carry the rewards it once did.

Many lawyers interviewed also noted that they did not expect the extent of the discourteous and needlessly aggressive abuse from their peers. While many knew upon entrance into the profession that law could be hard on one's personality and values, they were unprepared for the moral conflict of their personal ethics with those within the profession. In short, for many of those interviewed, the reality of the practice of law was even more stressful than their expectations initially assessed. For most of the lawyers interviewed, the issue of professional ethics and personal moral integrity seemed to be the most difficult aspect of their career. Therefore, beyond the long hours and deflated expectations, perhaps the biggest problem facing the legal profession is the question of how lawyers are to deal with ethical conflicts.

C. Increased Level of Ethical Conflicts

Attorneys are advocates for their clients, their firms, the legal profession, and in a general sense, society. For ethical consideration, we can classify the focus of their advocacy as acting for the few, or as acting for the many. Lawyers are advocates for the few when they act solely in the interest of the individual client or firm they represent. However, attorneys be-

come advocates for the many when they act as officers of the court, promoting the interests of the legal profession, the legal system, and hence, society as a whole. Often, the interest of the client or the firm will not align with the best interests of the legal profession and society. Today's legal practice involves complex choices that frequently ask the attorney to compromise the moral imperatives of the many, for the moral imperatives of the few. For example, should an attorney represent a client who he or she thinks is guilty or is lying? [21] Decisions such as this one pose the greatest amount of dissonance because they may directly oppose the lawyer's personal value structure.

As the pressures of the practice builds, the need to be successful, or merely survive, may start to compromise a lawyer's professional integrity. The resulting compromise not only forces lawyers to forget why they chose to become a lawyer, but also who they are in relation to who they wanted to be. The contention here is that attorneys are faced with certain moral decisions that cause an inordinately high degree of conflict within the particular individual, which translates into dissatisfaction with his or her career. It is difficult to hold two or more conflicting beliefs or ideas without discomfort. Stress results when a person is forced to confront the conflict. Such confrontation usually occurs when the person is forced to behave in a way inconsistent with his or her strongest beliefs. Lawyers are required to behave in ways that are sometimes inconsistent with their beliefs on a daily basis. Such stress was not created by the practice alone, but began in the institution of law school.

Law schools make lawyers out of members of the general public. Most law students enter law school with the same belief systems held by mainstream society. When law school focuses on the aiding of justice, the law student's preexisting morality is not jeopardized. However, when law school turns to teaching absolute advocacy, instead of general moral and social ideas, the original beliefs held by law students are significantly challenged and altered. As one of the authors remembers, "I still recall my first day of law school when a graduating senior told us that in spite of his education, he had not lost his passion for justice. I did not know what he meant until I entered the classroom the next day. Then I knew all too well what he meant."[22] After law school, young lawyers learn career survival techniques primarily from partners and supervising attorneys. Such authority figures can strongly encourage behavior that is incompatible with the young attorney's personal beliefs, ultimately resulting in cognitive dissonance very early on in the practice of law. Cognitive dissonance can be a very stressful event and can severely hamper a young attorney's enjoyment of his or her new practice.

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21. *See* Arthur Gross-Schaefer & Peter S. Levy, *Resolving the Conflict Between the Ethical Values of Confidentiality and Saving a Life*, 29 LOY. L.A. L. REV. 1761 (1996).

22. Reflections of Dr. Gross-Schaefer's First Day at Boston University School of Law.

At this juncture, it is important to recognize that there are some lawyers who do not experience cognitive dissonance when engaging in what others may believe are morally conflicting situations. For instance, lawyers who score high on the Myers-Briggs Type Indicator psychological test (a test which measures extroversion and thinking versus feeling) experience less stressful dissonance according to a recent study.[23] According to a psychological study using the Myers-Briggs Type Indicator test, attorneys who are morally sensitive and ethically conscious are more likely to experience dissonance, higher levels of stress, and have the highest likelihood of withdrawing from the legal profession. The practical impact of such a study rests with the exit levels within the practice of law. If ethically sensitive lawyers withdraw from the practice of law, then it is logical to assume that the competitive and abrasive attorneys remain, increasing the stressful and abusive environment within the practice of law. This evolutionary process within the practice breeds an environment where only the ethically desensitized lawyers prevail.

D. Loss of Social Utility

From the public's perspective, lawyers have lost their social utility. The once held public perception that lawyers were instrumental in the envisioning, founding, building, and maintaining of America's democratic values has been unable to withstand today's tireless (and often tasteless) jokes regarding lawyers' lack of utility. Historically, many of our elected and appointed leaders were lawyers. Often law was perceived as a prerequisite to running for public office. Today, this tradition continues as many civic leaders, government representatives, and charitable organizers retain a large percentage of members from the legal profession. However, with recent scandals involving lawyers in politics (most notably, the President Clinton/Monica Lewinsky scandal), the belief that lawyers help maintain the value structure of America is quickly eroding.

Notwithstanding the profession's political self-image, the most common and traditional way in which attorneys are thought to add value to society is through pro bono work and community involvement. By providing free legal representation and participating in community functions, the legal profession as a whole gains public approval, while simultaneously providing social utility. However, in recent years, fewer and fewer law firms require their members to engage in pro bono activities, thus encouraging their attorneys to shy away from public service.

Recent discussions with entering law students strongly suggest that the current impetus for many legal aspirants appears to lack any significant societal perspective.[24] Perhaps it has always been a naive belief that the law

23. LELAND C. SWENSON, PSYCHOLOGY AND LAW FOR THE HELPING PROFESSIONS 18 (2d ed. 1997).

24. *Id.* at 14.

profession had an admirable purpose, such as helping to create a society where all people are equal in the sight of the law and fairness is to be guaranteed, no matter what a person's social standing or political affiliation. Maybe the vision of the legal profession was overstated as a noble calling which sought for the betterment of society. Certainly, today the practice of law has increasingly become one of the many career options focused on protecting and increasing individual ambition, as opposed to providing social utility.

E. Working Within an Adversarial System

The combative nature of the adversarial process intimidates many attorneys because many attorneys are not equipped to deal with the moral conflicts of fighting, especially when they believe less in their own cause than in the cause of the opposing side. For the purposes of this Article, the adversarial process as a means of resolving disputes, and the extensive literature debating its effectiveness, will not be an issue. We assume that the adversarial process guarantees "that each party will be represented by an advocate, not that each party's rights will be successfully protected by that advocate."[25] Rather, we focus on the effects that participating in the adversarial process produces for individual attorneys. There is a double-edged sword here. If the attorney is caught in a moral dilemma, performance for the client may suffer. If the attorney ignores a moral dilemma, he or she will be compromising self-worth, basic moral values, as well as the ethics rules that govern lawyer conduct.

Among the first and most important things a law student learns in law school is the skill of advocacy. Prior to learning all of the analytical skills that will be used in the professional world, the law student tries to perfect the ability to form a convincing argument. The term advocacy in and of itself is a rather simplistic way of referring to a very complex and morally challenging concept. A more in-depth look at the term reveals that the art of advocacy was debated in Socratic times as the individual's ability to produce a conviction in his or her argument that he or she was right. This concept implies that the attorney's duty is one of conviction instead of knowledge of the truth. Under such a theory, "the indifference to truth is consistent with a strong interest in persuading himself of the truth of the beliefs he wants others to accept."[26]

It is true that the attorney, who is not convinced of the beliefs that he or she is trying to impart onto others, will be a poorer advocate than the one who is convinced, unless the lawyer is a great actor. How is an individual to deal with the fact that he or she must be indifferent to truth, and sometimes disregard societal norms of moral judgment, simply to be the perfect

25. Alan Donogan, *Justifying Legal Practice in the Adversary System*, *in* THE GOOD LAWYER 123, 127 (David Luban ed. 1983).

26. Anthony T. Kronman, *Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 961 (1981).

advocate? A dichotomy is automatically imposed from the beginning of the student's journey through law school. This indifference to truth has certain effects on a person's character, especially that of the law student, who will question whether or not he or she will lose sight of what is wrong or right in order to be able to convincingly and effectively advocate a position.

Realistically, this is an exaggeration of the process of learning advocacy. However, the cultivation of the effective advocate can make a person either less inclined to reach for the truth or more cynical about truth. "The cynicism of the advocate is not the product of his [or her] having attempted to discover the truth about human affairs and failed; rather, it is the product of his [or her] having become accustomed to disregard[ing] the truthfulness to the practice of [t]his craft."[27] In essence, the process of becoming an effective advocate hardens the moral arteries and personality of the attorney. If an attorney learns such ethically numbing principles and if such principles are reinforced over and over in his or her professional life, it becomes easier for the individual to ignore his or her ethical responsibilities.

Consequently, it becomes more difficult for the attorney to make decisions that are consistent with traditional moral values and beliefs. Therefore, despite the ease of disregarding certain moral convictions, the attorney will still be faced with his or her individual dissonance and will be more likely to be dissatisfied with his or her current standing within society. For attorneys experiencing dissonance, what was once a promising career to champion causes has in essence become a detriment to the moral standing of the individual.

Another prevalent source of professional dissatisfaction stems from the way in which attorneys engage with their colleagues and their clients on the other side of the courtroom.[28] While spending years trying to perfect the necessary skills to compete in a combative environment, social skills can take a back seat, giving way to a hardened, more egotistical personality. When extreme at-any-cost tactics are associated with winning, personality traits not dissonant with using these maneuvers are reinforced. For the lawyer as an individual it is a matter of facing a conquer-or-be-conquered situation while in the courtroom setting. "Lawyers must extract their egos from their work, and avoid the temptation to internalize the quested 'win,' thus obscuring the real merits of the case and overlooking practical alternatives for addressing them."[29] This is not to say that most attorneys get so caught up with internal moral agony that they become a detriment to the client or the case. On the contrary, lawyers often get so caught up in the case and the constant combat that exists in the legal arena that they begin to doubt if the pursuit of justice has any relation to their activities. The first warning sign of disillusionment among attorneys is when the attorney begins to say to

27. *Id*. at 965.
28. McCarthy, *supra* note 1, at 1.
29. Annette J. Scieszinski, *Return of the Problem Solvers*: *The Profession Needs to Focus on Helping People, Not Just Fighting Battles*, A.B.A. J., June 1995, at 119, 119.

him or herself, "this isn't worth it." Such an indicator is not only a sign of career dissatisfaction, but also of personal dissatisfaction with the attorney's personal life.

Frequently, lawyers will extend the combative nature outside of the courtroom. Most lawyers, but most intensely those with the greatest emotional sensitivity,[30] will eventually have the stresses of courtroom combat reduce their joy in life, harm their intimate relationships, and give rise to doubts about their abilities to maintain their high standards for legal practice.

Lawyers often discover that their combative and abrasive courtroom tactics permeate into their personal relationships, causing them to become less sensitive and emotionally detached from family and friends. This desensitizing experience is consistent with what is too often learned during law school: Avoid the emotion so that you can be the consummate advocate. Relationships with loved ones become based on combat and logic, rather than understanding and caring. If not held in-check, such combative traits will promote job dissatisfaction and family conflict. Although no reliable data is available, it may be the case that attorneys have such a high divorce rate due to an unchecked combative personality.

Two of the most difficult ethical dilemmas a lawyer may face are either being pressured to advance an unfair claim or being pressured to humiliate a witness on the stand, all in the name of zealous representation. The idea of intentionally harming another individual is dissonant to the basic moral codes of most individuals. Furthermore, when the legal system itself gives the lawyer the opportunity to win a case on some technicality, even though the lawyer knows the client should lose, such a system makes it difficult for the lawyer to reconcile professional standards with personal ideals. Such a legal system makes lawyers question whether their work produces any societal good. With this dilemma within the practice of law, it makes it difficult to justify how lawyers live with themselves. It is indeed disturbing to compare the morality of the legal profession as a whole to traditional societal values, which view the legal system as producing too many unfair results.

III. THE SEARCH FOR SOLUTIONS: ENHANCING LAWYER MORALITY

In order for an attorney to place a proper perspective on his or her career, the attorney must first attempt to grasp an understanding of his or her conflicting career expectations. With such an understanding, lawyers will be able to pinpoint the source(s) of their dissatisfaction. For instance, the lawyer who is either disillusioned because he is not making enough money, or is frustrated with her firm because she is continually ignored for a part-

30. *See* Debra Cassens Moss, *Lawyer Personality: Logical Problem Solvers Happiest, Consultant Claims,* A.B.A J., Feb. 1977, at 32, 34.

nership position, must first identify that these respective sources create career dissatisfaction. Likewise, the attorney who does not fully appreciate the many long hours required for the practice of law, as compared to the marginal time spent with family, will experience dissatisfaction if time spent with family is a priority for his life. Similarly, the attorney who wants to affect change and champion causes, but instead encounters futility within the practice of law, will be dissatisfied with her career if she does not attempt to identify the conflicting expectations she holds regarding the legal system. It is critical for practitioners to first take time to analyze their various conflicts of expectations, for only with a better sense of one's own frustrations, successes, hopes, and fears, can an individual seek solutions.

Once a lawyer has analyzed the various conflicts of expectations held, he or she will have many questions regarding his or her ethical direction. The lawyer may be juggling such questions as: What does justice dictate? What about the client contract? Will I feel right about myself during the course of representation? What about my obligations regarding confidentiality? For guidance on such issues, a lawyer might turn to the American Bar Association's Rules of Professional Responsibility, or he or she may also turn to a colleague, a friend, or ultimately to his or her own moral constructs for advice. However, as a supplement to these avenues, psychologists note that the best way for professionals to deal with such stress is through displaying moral responsibility. "According to cognitive developmentalists, the reasoning skills and dispositions related to moral responsibility are best acquired in informal environments in which there is opportunity for critical reflection and dialogue about common problems."[31]

In the practice of law there is rarely any critical reflection between the client and the attorney when a moral conflict arises, primarily because clients and attorneys do not communicate from the same perspective. The client has his or her own interests to deal with because he or she is the one with the legal problem, and hence the one with the most to lose. The attorney, on the other hand, as a paid legal advisor, must address his or her legal responsibilities first because that is what he or she is being paid to perform. Yet, the attorney has an additional concern, which takes into account the repercussions the representation may create. The attorney must also represent the client's interest knowing that he or she must still interact with other legal professionals, as well as live with his or her own conscience, once the representation of the client has ceased.

The opportunity to handle moral questions properly, that is, taking time out, weighing all of the options, and selecting the right solution, is often difficult to seize with deadlines, client demands, court dates, and the traditional demands of one's personal life. The complexity of moral problems in today's internet speed practice makes searching for a solution to lawyer

31. W. Wesley Tennyson & Sharon M. Strom, *Beyond Professional Standards: Developing Responsibleness*, J. COUNSELING & DEV., Jan. 1986, at 298, 299.

morality a difficult personal journey for practitioners. To illustrate an attorney's search for solutions, we examine two basic theories of lawyer morality and how they relate to moral conflict and dissonance as attorneys make decisions in their daily professional lives. The two basic theories to be evaluated in an attempt to search for a solution to enhance lawyer morality are the amoralist view of morality and the utilitarian approach to morality.

Amoralists "assume that morality is already in the law . . . that anything legally right is morally right."[32] This ethical stance is dangerous because it assumes that laws alone can bring about justice without the intervention of moral interpretations from the legal community and society itself. The amoralists' view of morality ignores that fact that, "lawyers are not just lawyers, but human beings with a range of moral and personal commitments and values into which their professional commitments and values must be made, as comfortably as possible, to fit."[33] Ethically sensitive attorneys who choose to shut out moral decisions by adopting the amoralists' view of morality will experience internal conflict and unhappiness about themselves and their legal career. Thus, in searching for solutions that enhance lawyer morality, the amoralist view of morality does not provide a workable solution.

Another view of lawyer morality is the utilitarian explanation. This approach asks the question, "Will the lawyer's role further the good of society?" In determining whether the lawyer's role furthers a societal good, the lawyer's professional role must be defined. One social definition of the lawyer's role is that the lawyer "helps to preserve and express the autonomy of his client vis-à-vis the legal system."[34] A second view of the lawyer's societal role is also the "lawyer as a legal friend" model. This model states that the lawyer acts as a friend to the client to further the client's interests. Underlying both of these societal views of the lawyer's role is that the lawyer is an aid to society providing a beneficial function, hence furthering the good of society. In searching for a solution to lawyer morality, the utilitarian explanation of lawyer morality provides a workable framework because it forces the lawyer to ask the question, "whether . . . a decent and morally sensitive person can conduct himself according to the traditional conception of professional loyalty and still believe that what he is doing is morally worthwhile."[35]

Realistically, however, the legal profession has taken the position that lawyers should not be held personally accountable for the moral stance of their clients. Hence, when a lawyer is evaluating whether or not to represent a potential client, moral concerns tend to be the last factor in the deci-

32. David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper,* 4 AM. B. FOUND. RES. J. 637, 638 (1986).

33. Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law, in* THE GOOD LAWYER 53 (David Luban ed., 1983).

34. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J.1060, 1074 (1976).

35. *Id*. at 1065.

sion-making process. Yet, for the legal profession to fulfill their societal role and resultantly enhance their individual morality, a lawyer must be willing to take the moral high road by not automatically accepting every financially appealing case. By this process, both the profession, as well as society as a whole, will be better served.

Attempting to define the lawyer's role on such simple theoretical terms is not a complete analysis of legal ethics. After all, a lawyer's professional duties to his or her client dictate that the lawyer strive not to be a good person, but instead a good lawyer. Yet, what lawyers fail to realize is that being a good lawyer specifically entails a reasonable adherence to the moral virtues of our society. Therefore, when attempting to understand the idea of cognitive dissonance among attorneys based upon moral conflict, we must understand how the person integrates professional life with personal ideals. There is the assumption here that the reason we as people choose a particular career is because we identify with the ideals of the chosen profession. The morality choices of the lawyer and the dilemmas that lawyers face are social problems in and of themselves, rather than intra-professional problems. "They are among the questions that we as citizens must ask if we are to make and maintain our society as one in which the principles of justice are satisfied and morally important goals are achieved."[36] Each attorney has his or her own obligation to satisfy professional duties to their clients and the legal system, as well as fulfill general societal morality requirements of honesty and faithfulness. This obligation is necessary for attorneys to maintain their collective and individualistic self-worth. Although the moral obligations of honesty and faithfulness vary with each individual's moral parameters, society's values taken as a whole provide the ultimate pressure on the lawyer's moral accountability.

A. The ABA Rules of Professional Responsibility and Ethics Decision Models

In taking a more practical approach to a search for lawyer morality, the American Bar Association's ("ABA") Rules of Professional Responsibility and two available ethical decision models will be evaluated next. Yet, before delving into analysis, it is first important for lawyers to recognize their responsibilities as leaders within their respective communities and as such realize the importance of their personal moral codes. In order for lawyers to recognize their ethical responsibilities, applicable ethics codes must be made relevant and valuable while making professional decisions. The ABA Rules of Professional Responsibility ("Rules") can be a guide for lawyers making ethical decisions, and should be followed with relative certainty. Such ethical rules and codes were produced to define appropriate behavior within the practice of law. Nevertheless, simply following the Rules "can

36. Wolf, *supra* note 33, at 57.

also have the unintended effect of creating the belief that all the answers are in the [Rules]."[37]

The lawyer has particular roles outlined in the Rules, which dictate what must be disclosed, what may be disclosed, and what cannot be disclosed. Yet, the Rules are silent regarding how the lawyer is to act when balancing conflicting rules within the Rules. For example, the Rules state that the lawyer has a specific duty to promote the interests of the client, as well as a duty to not mislead the court. While overt lying is clearly forbidden, selective silence can easily violate the spirit of an attorney's duty to the court. Based on a specific situation, the lawyer must use his or her best judgment based on education, as well as traditional notions of what is right, in order to come to a decision.

There has been considerable development in the area of teaching law students the various legal ethics rules. Such courses seek to teach students ethical problem-solving skills by forcing students to apply their knowledge of various legal ethics codes and rules to real world situations. Yet, despite such education, there is still the institutional law school culture that teaches prospective lawyers that, "there is not a choice against morals, but only against regarding morals as having intellectual importance."[38] Such an institution, as psychologists might contend, create an atmosphere "where students begin to learn how to separate themselves emotionally from what they are doing intellectually."[39] Therefore, despite such efforts in academia, attorneys need ethical decision models to help navigate through the tormenting issues raised by conflicting expectations.

It is critical to teach law students and practicing attorneys a mechanism to help them think through complex ethical decisions.[40] Ethical decision models are a useful method by which one analyzes a given situation and moves along a cognitive process that reviews various considerations in order to come to a decision. The goal of such a model is to facilitate decision-making that at a minimum takes into account various ethical values.

The least complicated ethics decision-making model for lawyers to use is for them to simply presume that their decision will be made public on national television and that their parents and colleagues will be watching. If the lawyer still feels comfortable with his or her decision after the make-believe broadcast, then the lawyer's actions will probably have some ethical validity. However, this simplistic type of a model does not utilize one's core ethical values, nor does it really help one think through various options and understand the conflicting ethical considerations at play. In most com-

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37. George Thomson, *Personal Morality in a Professional Context,* 34 CANADIAN PUB. ADMIN. 21, 21 (1991).

38. THOMAS L. SHAFTER, ON BEING A CHRISTIAN AND A LAWYER 167 (B.Y.U. Press 1981).

39. Barbara Gotthelf, *From the Courtroom to the Couch*, N.J. L.J., Oct. 31, 1994, at 6.

40. The term ethics is subject to many interpretations. For purposes of this Article, the following definitions may be helpful. Basic definitions: values—beliefs which guide, direct and motivate opinions, attitudes, and actions; ethics—the study of good and bad, of moral duty and moral obligations; ethical standards—principles of conduct, how people ought to behave in a certain situation.

plex ethical decisions there are conflicting values that cry out for attention. Accordingly, a more developed decision model is required. Such an advanced model should incorporate an evaluation of the core ethical values under deliberation.

In addition, it is critical for the attorney to recognize that others, such as colleagues, clients, or even the State Bar Association's Disciplinary Committee, may have their own points of view that should be taken into account. Taking a little time to understand how others view the situation may prevent additional problems from occurring. Unfortunately, some professionals believe that a quick and forceful decision will project a sense of strong leadership. This approach is shortsighted and often leads to antagonistic relationships. Time and energy is then wasted apologizing and attempting to mend the broken fences that might not have broken if the original decision were made more carefully.

The following ethics decision model is offered simply as an option for lawyers. The model helps practitioners take into account such indicia as the lawyer's core ethical values, outside viewpoints, and the need to review additional alternative actions. However, this model should only be used as a guide, since each professional should take time to create a model that is personally comfortable and useful. A user-friendly decision model is much more practical than a complex and cumbersome one that looks good, but rarely utilized.

B. A Suggested Strategy for Ethical Decision-Making[41]

Define the problem carefully and be certain that all of the pertinent information has been gathered. Too often we act without taking time to obtain the necessary information.

1. List all the parties that you believe may be affected by the decision (stakeholders). A decision, which does not take into account the way in which it will affect others, is not an ethical one regardless of its actual consequences.[42]

2. List all the personal and work-related values that are involved in the decision.[43] These values may include:

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41. The authors used three sources to creatively derive this model. *See* TOM BEAUCHAMP & NORMAN BOWIE, ETHICAL THEORY AND BUSINESS (Tom Beauchamp & Norman Bowie eds., 2d ed. 1983); MICHAEL JOSEPHSON, MAKING ETHICAL DECISIONS (Wes Hanson ed., 2002); MANUEL G. VELASQUEZ, BUSINESS ETHICS CONCEPTS AND CASES (5th ed. 2001).

42. This part of the decision model is based on stakeholder analysis—responsible ethical decisions involve considerations of the impact of the decision on the network of persons who have a stake in the decision. Accordingly, a decision that does not take into account the way in which it may affect others is not ethical regardless of its actual consequences.

43. This part of the decision model is based on absolute values—this theory believes that there are certain ethical principles that are universal and that impose an absolute duty on a person. Kant referred to such duties as categorical imperatives because they allow for no exception.

• Honesty (truth telling, candidness, openness)

• Integrity (act on convictions, courageousness, advocacy, leadership by example)

• Promise keeping (fulfilling the spirit of commitments)

• Fidelity (loyalty, confidentiality)

• Fairness (justice, equal treatment, diversity, independence)

• Caring (compassion, kindness)

• Respect (human dignity, uniqueness)

• Citizenship (respect for law, societal consciousness)

• Excellence (quality of work)

• Accountability (responsibility, independence)

3. List all the possible alternatives of what you can or cannot do. Often we believe that we have only a limited number of options when there are several others that may resolve the situation in a way that produces either the greater good or the least harm.[44]

4. Choose and prioritize.

A. Of all the parties you listed above, select the one that you believe is most important for purposes of making this decision.

B. Of all the values you listed above, select the one you believe is most important for purposes of making this decision.

C. Of all the options you listed above, select the one you believe will cause the greatest good, or least harm.

5. Make a decision based on the above priorities.

6. Devise a strategy that will effectively implement your decision.

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44. This part of the decision model is based on utilitarianism—this theory requires the ethical person to evaluate the likely consequences of contemplated conduct and weigh the good the act may produce against the harm it may cause. This can be simplified to: the greatest good for the greatest number.

C. Creation of a More Ethical Working Environment

An attorney working for a law firm or organization will often feel constrained and guided by the perceived values of that organization. Whether it is a multi-national corporation or a small-town legal aid office, each establishment has its own ethical environment. People know by simple observation what their organization's ethical priorities are and act accordingly. In general, people will act according to how they perceive the culture of the organization as a whole. If the organization rewards one's behavior, ethical or unethical, such a system will influence how an employee will perform.[45] Yet in spite of this reality, there is rarely a bona fide, agreed upon, and accepted system that allows an organization to consistently focus and refocus on whether or not it embodies the values it professes. Clearly, individuals and organizations have great difficulty implementing a holistic self-examination. In the article, *The Moral Manager,* the author made the following conclusions about companies in general: First, few organizations step back often enough to assess the character of their workplace. Second, if such an assessment were properly and objectively conducted, it could be very revealing as to the organization's character. Third, an assessment of an organization's workplace character is probably the most serious exercise an organization will ever perform.[46]

Therefore, based on these conclusions, it is imperative for legal professionals, either individually or collectively within an institution, to observe their respective workplace character in order to better understand their institution's ethical environment. Also, it is important to remember that people do not exist and make decisions in isolation. Hence, it is imperative that organizations utilize internal audits that combine the context of individually based ethics with the social systems within which their employees operate. Moreover, any audit that purports to examine ethics inside an organization must look outside the organization as well, since situational and environmental factors have a significant impact upon the ethical behaviors and subsequent policies of an organization. What is clearly needed within an organization which employs lawyers is an ethics audit that goes beyond individually based ethical theory and includes the dimensions of the organization, the social system, and milieu in which the practice operates.

An ethics audit should be viewed as a firm's wellness tool.[47] The creation of such an audit develops a system of awareness, while simultaneously acting as a self-regulating tool. The ethics audit raises the self-awareness of unethical behavior for partners, staff attorneys, paralegals, and support staff, thereby heightening ethical actions and preventing corruption within the

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45. Arthur Gross-Schaefer & Muriel A. Finegold, *Creating a Harrasment-Free Workplace,* RISK MGMT., Feb. 1, 1995, at 53.

46. *See generally* CLARENCE C. WALTON, THE MORAL MANAGER (1988).

47. Arthur Schaefer & Anthony J. Zaller, *The Ethics Audit for Nonprofit Organizations*, PM NETWORK, Apr. 1998, at 43.

institution. When an institution uses the audit, it can become a very powerful force for change. Key categories which must be included in an ethics audit are as follows: areas of social responsibility, open communication, treatment of employees, confidentiality, respect of employees, community values, vendor relationships, leadership by example, human investment, and ecology. The following are sample questions from an ethics audit for a law firm, which attempt to incorporate the aforementioned key categories.[48]

IV. ETHICS AUDIT FOR A LAW FIRM: SAMPLE QUESTIONS

COMMUNITY ADVOCACY: An Ardent Advocate for Values in the Community

1. Does the firm take public stands and contribute its resources to public issues?

2. Is the firm known as a leader in issues of social concern?

OPEN COMMUNICATION: Keep Firm Members Informed Honestly as to All Relevant Matters

1. Are decisions made in an open and honest manner with an opportunity for input from all relevant sources?

2. Do the firm members feel that they have free and open access to the firm's leadership?

FAIR TREATMENT FOR ALL CLIENTS: Safeguard the Ability to Exercise Independent Judgment on All Matters by Avoiding Undue Influence and Conflicts of Interest

1. Do all clients feel that they have equal access to the professional and support staff?

2. Does the professional staff provide services equally to all clients regardless of financial status?

CONFIDENTIALITY AND RESPECT FOR ALL MEMBERS OF THE FIRM: Avoidance of Gossip, Cliques, and Maintaining Confidentiality

48. Arthur Gross-Schaefer, Ethics Audit for a Law Firm (1989) (unpublished manuscript on file with author).

1. Is private information about firm members (emotional stability, marriage and financial status, etc.) kept confidential and used appropriately?

2. Does the firm's leadership actively avoid engaging in gossip?

HUMAN INVESTMENT: The Provision for the Physical, Psychological, and Economic Welfare of Present, Potential, and Former (Retired) Employees

1. Does the firm provide fair benefits (pension, social security, medical, etc.) for all of its employees?

2. Does the firm have an employee handbook which clearly sets forth its policies for vacation, sick days, family leave, disability, etc?

3. Does the firm handle contract negotiations in a timely and ethical manner?

ECOLOGY: Efforts to Minimize the Negative Impact of Its Operations on the Natural Environment

1. Has the firm taken sufficient steps to conserve natural resources?

2. Does the firm attempt to support energy conservation and recycling activities?

ETHICS:

1. How seriously does the firm take the consideration of ethical issues?

2. Does the firm provide an ongoing ethics education program?

3. If the activities of the firm were to be made public, would you be proud of your association?

The time taken to create and implement both an ethical decision model and an ethics audit is time well spent improving the organization's workplace culture. Creating these ethical tools and using them as aids for measuring and understanding dissonance between a person's values and a person's actual activities will help curb employee frustrations and dissatisfaction, while ultimately cultivating a healthy workforce. These internal ethics tools are not meant to be sources of guilt, but rather as wellness devices that enhance the achievements of the modern legal professional.

V. CONCLUSION

The practice of law has drawn people from all walks of life. Each practitioner enters the practice with his or her own set of moral and ethical precepts, which must ultimately conform to both the ethics rules governing lawyers, as well his or her respective workplace culture. This reality within the practice often requires lawyers to stand against the easier, more popular ethical decisions of the masses, in order to prevent cognitive dissonance within their individual careers. The ethical decision-making process is one of the most challenging aspects of the legal profession. Yet, regardless of the inherent stresses of the changing legal profession, moral challenges can be successfully dealt with and minimized using ethical decision models and ethics audits. Understanding the many conflicts of expectations and possible ways of better managing such conflicts will assist a dissatisfied attorney, and hopefully prevent him or her from abandoning this important career.

CAN AN ELECTED JUDGE MAINTAIN THE INTEGRITY OF THE JUDICIAL SYSTEM?

I. INTRODUCTION

Judges are chosen to serve in various ways, depending on the jurisdiction and the type of judicial office. Some judges are nominated by a committee and then appointed by an executive, such as a governor, while some judges are simply appointed without a nomination process. Others are publicly elected either through partisan or nonpartisan elections.[1] This Comment focuses on those judges publicly elected to their judicial post.

As compared to other elected officials, judges are put in a unique position. In some instances, judges align with political parties and yet are prevented from espousing views regarding their position on issues that political parties generally assert as their platforms.[2] Furthermore, most judges are required to raise money in order to have a successful campaign.[3] Inevitably, the money raised comes from lawyers who will likely appear before the judge once elected or reelected.[4] In light of these circumstances, how is a judge able to protect the integrity of the court and the judicial process? This Comment examines not only the problems with political fundraising, but also the problems with partisan elections and judges' affiliation with political parties.

II. THE ABA CANONS OF JUDICIAL CONDUCT

The American Bar Association's (ABA) Model Code of Judicial Conduct sets out the standards by which judges are to act.[5] Canon 1 states:

> A Judge Shall Uphold the Integrity and Independence of the Judiciary
>
> A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establish-

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1. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 5 n.5 (2002).
2. *See* Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 291 (2002); *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 5 (2002).
3. David W. Neubauer, *Issues in Judicial Selection*, 49 LA. B.J. 450, 452 (2002) (estimating that some judicial contests reach into the millions of dollars).
4. Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 MICH. ST. DCL L. REV. 849, 856-57.
5. *See* MODEL CODE OF JUDICIAL CONDUCT pmbl. (2002).

> ing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. [6]

Canon 1 speaks directly to the integrity of the court where as Canon 2 discusses the judge's duty to avoid any impropriety or the appearance of impropriety. Canon 2 states:

> A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities
>
> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.[7]

Canon 5 speaks directly to inappropriate political activity by judges or judicial candidates. In part, Canon 5 states:

> All Judges and Candidates . . . a judge or a candidate for election . . . to judicial office shall not:
>
> (a) act as a leader or hold an office in a political organization;
>
> (b) publicly endorse or publicly oppose another candidate for public office;
>
> (c) make speeches on behalf of a political organization;
>
> (d) attend political gatherings; or
>
> (e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.[8]

Effectively, each part of the Model Code for Judicial Conduct requires that judges tread lightly when running for an elected judicial position. Most states have adopted similar canons for their judicial officers.[9] Even the ABA recognizes that complete compliance with the Canons is nearly im-

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6. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2002).
7. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2002).
8. MODEL CODE OF JUDICIAL CONDUCT Canon 5 (2002).
9. *See* James P. Schaller, *The Best Judges Money Can Buy?*, TEX. LAW., Nov. 4, 2002, at 38.

possible for elected judges, which is possibly a reason our forefathers "wisely provided for an all appointed judiciary."[10] As analyzed below, judges and the public are also finding the Canons at odds with the role of an elected judge.

III. POLITICAL PRESSURE

The judicial branch is unlike the other two branches of our government. The legislative and executive branches by nature are subject to political pressure and popular opinion; however, the judiciary is, and should be, different.[11] The purpose of the judiciary is to function outside the realm of public opinion and to apply the law to the facts of each individual case.[12] This theory is difficult to reconcile in reality with the election of judges.[13] How can a judge not be influenced by political pressures when his or her job depends on public opinion or, for that matter, the ideology of the party to which he belongs?[14]

A. Political Parties

Seventeen states have partisan elections requiring party affiliation from judges.[15] By relying on political parties for support, judges become especially vulnerable to political influences.[16] The Canons of Judicial Conduct require that judges "not be swayed by partisan interests, public clamor or fear of criticism."[17] Studies show that partisan elections may influence decisions; even more so if the decision involves political disputes.[18] Even if judges are not actually affected by their relation with political parties, other studies reveal that the public perceives political influence regardless.[19] In a national poll included in one article, four out of five Americans believed that "'elected judges [were] influenced by having to raise campaign funds'

10. *See id.* ("As Alexander Hamilton put it in 'The Federalist No. 78': 'the complete independence of the courts of justice is peculiarly essential in a limited Constitution.'").
11. Behrens & Silverman, *supra* note 2, at 287 ("The United States has two political branches: the legislative and the executive. Members of the judicial branch, however, are not direct representatives of the people, but are expected to act as impartial arbiters of cases and controversies.").
12. *See id.*
13. *See id.*; s*ee also* Schotland, *supra* note 4, at 860 ("The judge's obligation of neutrality is completely at odds with seeking the support of organized groups that have clear goals for what they want government to do or refrain from doing.").
14. *See id.*
15. Behrens & Silverman, *supra* note 2, at 281.
16. *See* John D. Fabian, *The Paradox of Elected Judges: Tension in the American Judicial System*, 15 GEO. J. LEGAL ETHICS 155, 167 (2001) ("[W]hen judges campaign as members of political parties, the potential for violations of Canon 2 is heightened").
17. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2002).
18. Behrens & Silverman, *supra* note 2, at 282.
19. *Id.* at 275-76.

and that '[j]udges decisions [were] influenced by political considerations.'"[20]

In viewing partisan elections, it is difficult to reconcile the Canons of Judicial Conduct with the behavior required of judges with respect to political parties in partisan elections.[21] One could argue that a judge's affiliation is beneficial to the public, as it provides an indicator of a judge's views on legal issues. The Canons, however, require that the judiciary retain its independence from political pressures and that judges refrain from commenting on legal issues that may come before the court.[22] There is also fear that partisan elections result in judges adopting more extreme positions in order to obtain the support of a party or the interest groups affiliated with a party.[23]

By affiliating with a party that has a political platform, judges "cannot avoid the appearance that they have at least implicitly and indirectly committed themselves" regarding certain politicized issues.[24] In effect, this violates Canon 5 which forbids candidates or judges from making promises of conduct or statements that appear to commit them to certain opinions.[25] There is also the potential of violating Canons 2 and 3 through political affiliation.[26] As stated above, Canon 3 requires that judges not be influenced by partisan interests.[27] Nonetheless, the very nature of partisan elections seemingly requires judges to be influenced by partisan interests.[28] John Fabian argues that being allied with a political party creates "per se impropriety" as it appears that the judge has been swayed by the interests of the party with which he is affiliated.[29]

B. Public Influence

Public pressure can also deteriorate a judge's appearance of impartiality and propriety.[30] Fabian analyzed judicial elections and how public opinion affects the integrity of the judiciary.[31] Using the death penalty as a political

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20. *Id.* at 282 (quoting Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1407-08 (2001)).

21. *See* J. Scott Gary, *Ethical Conduct in a Judicial Campaign: Is Campaigning An Ethical Activity?*, 57 WASH. L. REV. 119, 135 (1981) ("[T]his compels the result that the rhetoric of political campaigns consists largely of candidates expressing views on social policy issues.").

22. MODEL CODE OF JUDICIAL CONDUCT Canon 5 (2002).

23. *See* Randall T. Shepard, *Telephone Justice, Pandering, and Judges Who Speak Out of School*, 29 FORDHAM URB. L.J. 811, 820 (2002); *see also* Behrens & Silverman, *supra* note 2, at 282 ("[I]ncreased competitiveness between the parties, greater reliance on mass media, and alignment between the parties and ideological groups, may result in more judicial candidates 'adopt[ing] ideologically extreme positions to appeal to the strong partisans and the interest groups allied with that party'").

24. Fabian, *supra* note 16, at 167.

25. *Id.*; *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 5 (2002).

26. Fabian, *supra* note 16, at 167.

27. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2002).

28. Fabian, *supra* note 16, at 167.

29. *Id.*

30. *See id.*

31. *Id.* at 155.

issue that incites public discussion, Fabian found several instances where judges campaigned on the issue in order to get reelected. In the same study, Fabian also found instances where interest groups, who opposed a candidate, successfully unseated a judge based on death penalty rhetoric.[32] His article is exemplary of how public opinion can affect an elected judiciary. This is contradictory to the idea of an independent judicial system.[33]

Elected judges are likely to consider those instances where fellow members of the bench were removed because of public campaigns in response to opinions handed down.[34] Fabian asserts in his article that due to pressures from the media, the public, interest groups and political parties, judges "cannot at the same time both participate in such a highly charged electoral system and remain faithful to the Code of Judicial Conduct."[35]

IV. CAMPAIGN CONTRIBUTIONS

How can judges who take money from the very people who appear before them to advocate a position, maintain the independence and appearance of propriety?[36] This is not only a problem with lawyers, but also with interest groups whose increasing influence of judicial elections is not surprising, considering certain groups are notorious for bank-rolling elections.[37] As reported in an article advocating a move to appointed judges, a majority of the public believes that state courts are influenced by campaign contributions and politics.[38] Even more disturbing, however, is that "court personnel, attorneys, and judges share this belief."[39] The appearance of impropriety is to be avoided according to Canon 2, but how can this be accomplished when interest groups and lawyers are giving money to a judge's campaign? This problem is only compounded by the increasing expense of judicial campaigns in the past twenty years.[40]

A. Lawyers

In *Reems v. St. Joseph's Hospital and Health Center*,[41] the plaintiffs requested a judgment notwithstanding the verdict due to the judge's possible bias.[42] Reems brought a medical malpractice suit against the hospital and

32. *Id.* at 156-58.
33. Fabian, *supra* note 16.
34. *Id.* at 156-57.
35. *Id.* at 158.
36. *See* RONALD D. ROTUNDA, THE LAWYERS DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 62-3; 62-1 cmt. (2002-03) ("There is a legitimate concern about a judge's impartiality when parties whose interests come before a judge, or the lawyers who represent such parties, are known to have made contributions to the election campaigns of judicial candidates.")
37. Behrens & Silverman, *supra* note 2, at 275.
38. *Id.* at 275-76.
39. *Id.* at 276.
40. *Id.*
41. 536 N.W.2d 666 (N.D. 1995).
42. *Reems*, 536 N.W.2d at 669.

the attending physician. After a verdict for the defendant, the plaintiffs discovered that defendant's counsel was the co-chair of the judge's reelection campaign and an associate of the physician in the case was an advisor to the judge's reelection committee.[43] The court analyzed the judge's conduct under Canons 3 and 5 in determining whether he should be disqualified.[44] Canon 3 of the State's judicial code required disqualification where the judge's impartiality might reasonably be questioned, and Canon 5 referenced campaign contributions to judges.[45]

The court reviewing *Reems* relied on the statutory language to deny a reversal of the judgment entered by the allegedly biased judge.[46] Because it was a jury trial, the court reasoned that questions of fact and determinations of credibility were decided by a jury; and therefore, the possibility of bias on the part of the judge played no part in the adverse ruling.[47]

The dissent in *Reems*, however, strongly disagreed with this reasoning and suggested that a new trial was in order with a judge "untainted by any question of impartiality or self-interest."[48] As pointed out by the dissent, "even if a judge were able to put aside bias and self-interest in a particular case, the appearance of impropriety remains, and is itself a serious problem that casts disrepute upon the judiciary."[49]

In Canon 2, the appearance of impartiality or impropriety is enough to disqualify the judge. In *Reems*, a reasonable person could question the impartiality of the judge.[50] The principle that a judge should perform impartially originates in the common law, is mandated by the Code of Judicial Conduct, and is an aspect of due process.[51]

The due process argument appeared in another case involving contributions to a judicial campaign. In *Pierce v. Pierce*,[52] a divorce proceeding, the wife requested a reversal of the decree because the husband's attorney and the attorney's father had contributed to the judge's campaign. The attorney also solicited contributions on behalf of the judge.[53] The court in *Pierce* agreed that the judge should have recused himself because of the appearance of impropriety.[54] In determining whether the appearance of impropriety existed, the court used an objective standard, inquiring whether a reasonable person who knew the circumstances would question the impartiality of the judge.[55] The commentary to Canon 2 of the Model Code of Judicial

43. *See id.*
44. *Id.* at 670-671.
45. *Id.* at 671.
46. *Id.*
47. *Reems*, 536 N.W.2d at 671.
48. *Id*. at 672.
49. *Id.* at 676.
50. *Id.* at 675-76.
51. *Id*. at 675 (citing 46 AM. JUR. 2D *Judges* §§ 86, 92 (1994)).
52. 39 P.3d 791 (Okla. 2001).
53. *Pierce*, 39 P.3d at 793.
54. *Id.* at 799.
55. *Id.* at 797 ("The question of a judge's appearance of impartiality is determined by an objective standard.").

Conduct also states that "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[56]

However, the court added that the "mere fact of a lawyer's contribution to a judges campaign does not *per se* require that judge's disqualification when the lawyer comes before him."[57] Other courts have agreed with this analysis and concluded that it is not an *ipso facto* rule that the judge remove himself, but rather it requires a determination in each case of whether a reasonable person would question the impartiality of the judge.[58]

The majority in *Pierce* followed a similar argument used by the dissent in *Reems*, holding that a reversal was required because of a violation of due process.[59] An appearance of bias is enough to violate due process whether or not a bias actually occurred.[60] Nonetheless, the dissent in *Pierce* argued that the rules governing contributions and public disclosure are statutory checks on the influence that lawyers can have on judges.[61] By way of allowing lawyers to contribute and then request disqualification, the courts are creating a new way to forum shop.[62] Although the majority states that contributions are not per se evidence of impartiality, the dissent explains that the ruling creates a presumption that judges are biased if they receive a statutorily approved contribution, thus creating confusion between what is permissible in the bench and bar relationship.[63]

Another court, in examining a lawyer's contribution to a judge before whom he appeared cited an unnamed advisory opinion of the ABA Ethics Commission:

> It is not improper for lawyers to contribute financially to the campaign of a candidate for judicial office, when in their opinion the candidate merits such support and the expense of the campaign, when reasonably conducted, exceeds that which the candidate should reasonably bear himself.[64]

As evidenced by the cases above, there is no bright-line test in determining how much a judge can accept from a lawyer without giving the appearance of impropriety.[65]

One lawyer put it this way: "[w]hatever you do in responding to fundraising requests, you stand a good chance of offending someone you can't

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56. MODEL CODE OF JUDICIAL CONDUCT Canon 2 cmt. (2002).
57. *Pierce*, 39 P.3d at 798.
58. *See* Williams v. Viswanathan, 65 S.W.3d 685 (Tex. Civ. App. 2001).
59. *See Pierce*, 39 P.3d at 799.
60. *Id.*
61. *Id.* at 801-02.
62. *Id.* at 802.
63. *Id.*
64. *In re* Gorsuch, 75 N.W.2d 644, 647 (S.D. 1956).
65. *See id.*; *see also Pierce*, 39 P.3d at 791.

afford to offend; and you will spend a small fortune doing it."[66] Even if judges do not consider the lawyer's contributions to their campaigns, there is still a perception that such consideration does occur, as evidenced by this statement.[67] Other lawyers have been quoted as stating similar opinions regarding the necessity to contribute to judges' campaigns.[68] A state bar president also commented on the increase in political contributions to judges stating that "people with money to spend who are affected by Court decisions have reached the conclusion that it's a lot cheaper to buy a judge than a governor or an entire legislature and he can probably do a lot more for you."[69]

B. Interest Groups

Interest groups are becoming more actively involved in judicial elections, and with their involvement, the potential inference of impropriety due to the campaign contributions.[70] Tort reform is cited as having pulled interest groups into the fray in judicial elections with the trial lawyers up against the business community.[71] With the influx of money from interest groups, the amount spent on judicial campaigns has soared.[72] The most obvious question asks why these groups give money if they did not think it would influence the outcome of some judicial decisions.[73] With the Canons simply requiring the "appearance of impropriety," it is hard to imagine how the amounts of money spent in these judicial campaigns by special interest groups do not create that appearance.[74] One solution advocated is campaign finance.[75] However, if the success of campaign finance in non-judicial elections is any indication of success, judicial elections have a long road to hoe in bringing about such reform.

Due to the very nature of political elections and the cost of winning an election, judges have a "powerful incentive . . . to push the envelope of judicial conduct."[76] In an article examining the "pandering of votes" by judges, the author related a story where a Texas judge actually stated that if

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66. Behrens & Silverman, *supra* note 2, at 280 n.32.
67. *Id.*
68. Pamela Willis Baschab, *Putting the Cash Cow Out to Pasture: A Call to Arms for Campaign Finance Reform in the Alabama Judiciary*, 20 QUINNIPIAC L. REV. 631, 639 (2001).
69. *Id.* at 638-39 n.20.
70. *See* Behrens & Silverman, *supra* note 2, at 280-81 ("[T]he increasing involvement of interest groups in judicial elections challenges the appearance of impartiality.").
71. Neubauer, *supra* note 3, at 452; *see also* Baschab, *supra* note 68.
72. Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 CAP. U. L. REV. 523, 524 (2002).
73. *See* Baschab, *supra* note 68, at 638 ("Why would any special interest group want to contribute to a judicial candidate? Obviously, no group contributes large sums of money without some expectation of a return on the investment. What do the special interest contributors have to gain for their financial support?").
74. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 2; *see also* Neubauer, *supra* note 3, at 452.
75. *See* Neubauer, *supra* note 3, at 452 (citing Buckley v. Valeo, 424 U.S. 1 (1976)).
76. Shepard, *supra* note 23, at 820.

it were not for the support of the medical community he would not have been elected.[77] The perception of impropriety would obviously appear should that judge then sit in judgment of a medical malpractice case.[78] Would a reasonable person believe that the judge could independently weigh the issues before him when he openly conceded that he owes his position as a judge to the community against which he would have to render a verdict? In response to the same situation the article quotes a state supreme court justice as saying, "' You dance with them what brung you.'" [79]

Judges are required by the Canons of Judicial Conduct to raise or solicit money through campaign committees rather than personally soliciting funds.[80] One reason for shielding the judge from such campaign solicitation is to avoid the appearance of impropriety. However, most argue that the formation of a committee does little to avoid the appearance of justice for sale.[81] The public will likely not make the distinction between a campaign committee and a judicial candidate especially with the requirements that those who contribute be disclosed.[82]

V. PROPOSED CHANGES

The arguments raised above are often cited as reasons to change from an elected judicial system to an appointed system for judges. The arguments are that an appointed system will take the politics out of the picture, and judges will be free to act in the interest of justice rather than base their opinions on public opinion.

One need only to look at the federal appointment system to realize that an appointed system too has its flaws and political influence.[83] In the recent congressional appointment of a federal judge, the conservatives backed the judge while the liberals "mounted a publicity campaign to derail the appointment, and succeeded."[84] In an article regarding federal appointments and their tendency to be political, the author states:

> [T]he idealized myth of an apolitical judiciary is one that seems widely accepted, and which rests on the assumption that law and politics are separate spheres. Many commentators discredit this oversimplified notion, however, on the basis that legal decisions also involve applying more personal values.[85]

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77. *Id.*
78. *See id.*
79. *Id.*
80. MODEL CODE OF JUDICIAL CONDUCT Canon 5 (2002).
81. *See* Baschab, *supra* note 68, at 643.
82. *See* ROTUNDA, supra note 36, §62-3.3.
83. *See* David Reidy, *Fighting the Bad Fight*, THE RECORDER, Mar. 27, 2002, at 5.
84. *Id.*
85. *Id.*

This statement is a reflection of the difficulty in removing political pressures from judicial selections whether they be elected or appointed.

VI. CONCLUSION

In light of the many pressures that judges face when placed in a system that requires public support for election, it is difficult to balance the pressures faced with the ethical standards required of judges. Although many advocate a change to an appointed or merit-based system, it only changes where the political pressure is applied. Take for example, the federal appointment system of judicial candidates.[86] Put best, "the real impact [of reform] is to shift from a politics of the electorate to politics of the bar."[87]

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86. *See* Shepard, *supra* note 23, at 812 ("Federal judicial nomination and confirmation proceedings are openly political.").

87. Neubauer, *supra* note 3, at 451.

THE PROFESSIONAL DUTY OF PROSECUTORS TO DISCLOSE EXCULPATORY EVIDENCE TO THE DEFENSE: IMPLICATIONS OF RULE 3.8(D) OF THE MODEL RULES OF PROFESSIONAL CONDUCT

I. INTRODUCTION

Criminal prosecutors are bound both constitutionally and professionally to disclose potentially exculpatory evidence to the defense.[1] The following briefly chronicles the doctrinal development of the constitutional duty of prosecutors to disclose exculpatory evidence, but focuses on the ethical and disciplinary implications of the professional duty of prosecutors to disclose the same. Whereas the legal consequences of prosecutorial misconduct are largely beyond the scope of this Comment, the following will explore the professional implications of Rule 3.8(d) of the Model Rules of Professional Conduct and demonstrate the relative effect of prosecutorial bad faith in disciplinary sanctions for its violation.

II. THE LEGAL REQUIREMENTS OF DUE PROCESS

In *Berger v. United States*,[2] the Supreme Court outlined the government's role in a criminal prosecution as, "not that it shall win a case, but that justice shall be done";[3] and the individual prosecutor's role as "the servant of the law, [whose] twofold aim . . . is that guilt shall not escape or innocence suffer."[4] The Court, in remarking that the prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones,"[5] identified the prosecutorial function as one subject to the limitation of constitutional due process.[6]

Legal due process affects the prosecution's role in criminal discovery.[7] In *Brady v. Maryland*,[8] the prosecution withheld the extra-judicial confession of a co-defendant when that information was requested by the defense.[9]

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1. *See generally* Brady v. Maryland, 373 U.S. 83 (1963); MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2002).
2. Berger v. United States, 295 U.S. 78 (1935).
3. *Berger,* 295 U.S. at 88.
4. *Id.*
5. *Id.*
6. *See also* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.").
7. *See generally* Brady v. Maryland, 373 U.S. 83 (1963).
8. *Id.*
9. *Id.* at 84.

Such information could have operated to mitigate the jury's sentence.[10] The Court held that the prosecution's suppression of the co-defendant's statement violated Brady's Fourteenth Amendment due process right.[11] The Court accordingly outlined the rule for prosecutorial disclosure of exculpatory evidence stating: "[w]e now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[12] The Court in subsequent decisions more accurately defined this requirement of prosecutorial disclosure, but it also maintained the chief governmental interest in criminal prosecutions by noting that, "[t]he United States wins its point whenever justice is done its citizens in the courts."[13]

In *United States v. Agurs,*[14] the prosecution failed to disclose the victim's prior criminal record to the defense wherein such information could have supported the defendant's claim of self defense.[15] Unlike the facts in *Brady*, the defense counsel in *Agurs* made no request for specific information.[16] The Court, while noting that "there is . . . no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor,"[17] shifted its inquiry to the issue of materiality wherein "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a *fair trial*."[18] Such "omitted evidence creates a reasonable doubt that did not otherwise exist . . . [and] must be evaluated in the context of the entire record."[19]

United States v. Bagley[20] further articulates the outcome-based standard for mandatory disclosure of exculpatory evidence. In *Bagley*, the court held that "[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule. Such evidence is 'evidence favorable to an accused,' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal."[21] As in *Agurs*, the standard for materiality is based on the evidence's ability to affect the outcome of the trial.[22] There-

10. *Id.* at 85 ("The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by the addition of the words 'without capital punishment'").
11. *Id.*
12. *Brady*, 373 U.S. at 87.
13. *Id.* (quoting Frederick William Lehmann).
14. United States v. Agurs, 427 U.S. 97 (1976).
15. *Agurs*, 427 U.S. at 99.
16. *Id.* at 106.
17. *Id.*
18. *Id.* at 108 (emphasis added).
19. *Id.* at 112 (outlining two other situations in which *Brady* applies: when "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury"; and when the defense makes a "pretrial request for specific evidence").
20. *Agurs*, 427 U.S. at 112.
21. United States v. Bagley, 473 U.S. 667, 676 (1985) (internal citations omitted).
22. *Bagley*, 473 U.S. at 678.

fore, with respect to the defendant's right to a fair trial, "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."[23] Further defined, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different . . . [wherein a] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[24] Accordingly, as both *Agurs* and *Bagley* determine the materiality of evidence retrospectively, "the prudent prosecutor will resolve doubtful questions in favor of disclosure."[25]

More recently in *Kyles v. Whitley*,[26] the court continues to assess the materiality of exculpatory evidence by its ability to affect the outcome of the trial.[27] In so doing, it imposes an affirmative duty of disclosure on the prosecution.[28] Because the prosecution "alone can know what is undisclosed, [it] must be assigned the consequent responsibility to gauge the likely net effect of all such evidence."[29] The prosecution thus "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case."[30] Such an affirmative duty will produce the desirable effect that "it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations."[31] Thus the individual prosecutor's role in the discovery process largely affects the possibility of reviewable error and impacts the legal outcome of the case.[32]

III. THE PROFESSIONAL DUTY OF PROSECUTORS TO DISCLOSE POTENTIALLY EXCULPATORY EVIDENCE

The ethical duty of the individual prosecutor to disclose potentially exculpatory evidence to the defense mirrors the Constitutional due process requirements articulated by *Brady* and its progeny. [33] The professional role of the individual prosecutor is outlined in Rule 3.8 Comment 1 of the ABA Model Rules of Professional Conduct: "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibil-

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23. *Id.*
24. *Id.* at 682.
25. *Agurs,* 427 U.S. at 108.
26. Kyles v. Whitley, 514 U.S. 419 (1995).
27. *Kyles*, 514 U.S. at 434.
28. *Id.* at 437.
29. *Id.*
30. *Id.*
31. *Kyles*, 514 U.S. at 440.
32. *See*, *e.g.*, United States v. Bagley, 473 U.S. 667, 683-84 (1985). The legal remedies awarded to individual defendants in cases involving prosecutorial error are largely beyond the scope of this Comment. *See generally* Miller v. Pate, 386 U.S. 1 (1967); People v. Steele, 65 N.Y.S.2d 214 (N.Y. Gen. Term 1946).
33. *See Kyles*, 514 U.S. at 419; *Bagley*, 473 U.S. at 667; *Agurs*, 427 U.S. 97 (1976); *Brady*, 373 U.S. 83 (1963).

ity carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[34]

Similar to judicial prescriptions,[35] the prosecutor is ethically bound to seek justice rather than merely the conviction of the accused adversary. Accordingly, the prosecution's duty to disclose evidence favorable to the accused emerges among professional guidelines and implies an ethical obligation correspondent to that of due process.

The professional guidelines governing the prosecutorial disclosure of exculpatory evidence are set out in Rule 3.8(d) of the ABA Model Rules of Professional Conduct:

> The prosecutor in a criminal case shall:
>
> . . .
>
> (d) 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, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[36]

The rule is broadly reaching in its mandate of timely disclosure of "all evidence or information,"[37] which, coupled with the "reasonable probability" standard,[38] creates a heavy burden for prosecutorial disclosure.[39]

Failure to comply with Rule 3.8(d) necessarily implies attorney misconduct under Rule 8.4: "[it] is professional misconduct for a lawyer to [] *violate* or attempt to violate the Rules of Professional Conduct, [or] *knowingly*

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34. MODEL RULES OF PROFESSIONAL CONDUCT R. 3.8 cmt. 1 (2002). *See also Brady*, 373 U.S. at 87 (stating that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair.").

35. *See generally* Berger v. United States, 295 U.S. 78, 88 (1935) (stating that "[i]t is as much [a U.S. Attorney's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

36. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2002).

37. *Id.*

38. *Bagley*, 473 U.S. 667, 682 (1985).

39. *See generally* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103 (b) (1983) ("A public prosecutor or other government lawyer in criminal litigation *shall* make timely disclosure . . . of the *existence of evidence*, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.") (emphasis added); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1983) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely convict . . . the prosecutor *should* make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.") (emphasis added); CANONS OF PROF'L ETHICS Canon 5 (1969) ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is *highly reprehensible*.") (emphasis added).

assist or induce another to do so, or do so through the acts of another."[40] Consequently, upon such misconduct, the prosecutor is subject to discipline. Comment 1 to Rule 8.4 clearly notes, "[l]awyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct."[41] Consequently, a violation, whether intentional or not may, nevertheless, qualify under Rule 8.4 as misconduct.[42] It must then be logically considered that instances of prosecutorial misconduct marked by mere negligence[43] regarding the failure to adequately disclose exculpatory evidence are subject to less intrusive professional sanctions[44] than are those marked by the intentional[45] withholding of exculpatory information.[46]

A. Negligent Failure to Disclose Exculpatory Information

The severity of professional sanctions for prosecutorial violation of *Brady* disclosure requirements varies according to the intent driving such failure. Generally, prosecutorial negligence is sanctioned less severely than willful misconduct.[47] In *In re Brophy*,[48] the prosecutor violated his duty under *Brady*, and was found criminally liable.[49] Professionally, however, Brophy argued that his error was "inadvertent" and sought to avoid a $500 fine and the automatic suspension of his license to practice law.[50] The Court, noting Brophy's "previous unblemished record . . . [and] that he has suffered the stigma of criminal conviction," determined that "the interests of justice [would] be adequately served by a censure."[51] Thus, as Brophy demonstrated his lack of willfulness regarding the failure to disclose exculpatory evidence, he was disciplined merely by censure rather than by harsher sanctions.[52]

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40. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2002) (emphasis added).
41. *Id.* at cmt. 1.
42. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2002).
43. STANDARDS FOR IMPOSING LAWYER SANCTIONS Definitions (1986) ("'Negligence' is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.").
44. *See* Imbler v. Pachtman, 424 U.S. 409 (1976) (holding prosecutorial immunity exists for civil damages where the prosecuting attorney acted within the scope of duty).
45. STANDARDS FOR IMPOSING LAWYER SANCTIONS Definitions (1986) ("'Intent' is the conscious objective or purpose to accomplish a particular result.").
46. See Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987), for an overview of various sanctions against prosecutors for *Brady* violations.
47. *See* STANDARDS FOR IMPOSING LAWYER DISCIPLINE Standard 5.23 (1986) ("Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.").
48. *In re* Brophy, 442 N.Y.S.2d 818 (1981).
49. *Brophy*, 442 N.Y.S.2d at 819.
50. *Id.*
51. *Id.*
52. *Id.*

In *In re Attorney C.*,[53] the Court, relying on the ABA Standards for Criminal Justice requirements, held that a "prosecutor should not *intentionally* fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information 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,"[54] held that the prosecutor, though failing to make timely disclosure, nevertheless lacked the culpable intent "necessary to justify a sanction."[55]

The court declined to accept the argument that Rule 3.8(d) "does not incorporate a *Brady* constitutional materiality standard, but rather is broader and more encompassing" because such would "impose inconsistent obligations upon prosecutors attempting to comply with both procedural rules and rules of professional conduct."[56] Therefore, in Colorado, the legal requirements of Rule 3.8(d) mirror those of *Brady*, wherein sanctions for its violation require willful misconduct.[57]

In *Cuyahoga County Bar Association v. Gerstenslager*,[58] however, the prosecution did not "knowingly" violate Disciplinary Rule 7-103(b),[59] but that its "grossly negligent and 'sloppy' actions did rise to the level of egregiousness so as to constitute a violation of [Disciplinary Rule] 1-102(A)(5)."[60] The court, accordingly, publicly reprimanded Gerstenslager, demonstrating that as negligence approaches recklessness, the appropriate disciplinary sanctions employed become correspondingly severe.[61]

B. Knowing Failure to Disclose Exculpatory Evidence

As prosecutors knowingly[62] fail to disclose potentially exculpatory evidence, resultant sanctions increase in severity.[63] In *Office of Disciplinary*

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53. *In re* Attorney C., 47 P.3d 1167 (Colo. 2002).

54. *Id.* at 1174 (quoting STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-3.11(a) (3d ed. 1993); *see also* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-3.11(b) (3d ed. 1993) ("A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request. A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.").

55. *In re Attorney C.*, 47 P.3d at 1174.

56. *Id.* at 1170.

57. *Id.*

58. Cuyahoga County Bar Ass'n v. Gerstenslager, 543 N.E.2d 491 (Ohio 1989).

59. OHIO CODE OF PROF'L RESPONSIBILITY DR 7-103(b) (1970) ("A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant . . . evidence, known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.").

60. OHIO CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(5) (1970) ("A lawyer shall not: Engage in conduct that is prejudicial to the administration of justice"); s*ee also Gerstenslager*, 543 N.E.2d at 491.

61. *Id.*; s*ee also In re* Morris, 419 N.W.2d 70 (Minn. 1987).

62. STANDARDS FOR IMPOSING LAWYER SANCTIONS Definitions (1986) ("'Knowledge' is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.").

Counsel v. Jones,[64] the prosecution knowingly concealed the location of potentially exculpatory exhibits by intentionally remaining silent as to their whereabouts during the trial.[65] Such action was found to "[fly] in the face of [the prosecutor's] public mandate to protect the rights of all citizens."[66] Jones was consequently suspended from the practice of law for six months.[67]

Similarly, in *Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Ramey*,[68] the prosecutor's false statements at trial, coupled with his failure to disclose exculpatory evidence, resulted in an indefinite suspension of his license without the possibility of reinstatement for three months.[69] The court held that notwithstanding Ramey's contention that he withheld evidence was immaterial, "the duty to disclose exculpatory evidence cannot be ignored because of a prosecutor's private belief that it is beside the point."[70] Herein again, the professional sanctions attached to the disclosure violation are severe in relation to the willfulness of the misconduct.

Contrastingly, in *Read v. Virginia State Bar*,[71] the Court reversed a disciplinary order revoking Read's license to practice law. After testifying at the trial, the prosecution's witness changed his testimony.[72] Knowing this, Read neither told the defense counsel of the change nor recalled the witness, making "a conscious decision not to reveal [the witness's] change in position."[73] The court held "that a defendant must show that the failure to earlier disclose prejudiced him because it came so late that the information disclosed could not be effectively used at trial."[74] The court thus held that "[defense] counsel knew of [the] change in testimony in sufficient time to make use of his testimony at trial," and dismissed the case.[75] The court's decision in *Read* is atypical.[76]

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63. *See* STANDARDS FOR IMPOSING LAWYER DISCIPLINE Standard 5.22 (1986) ("Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and caused injury or potential injury to a party or to the integrity of the legal process.").
64. Office of Disciplinary Counsel v. Jones, 613 N.E.2d 178 (Ohio 1993).
65. *Jones*, 613 N.E.2d at 178.
66. *Id*. at 179.
67. *Id*. at 180.
68. Comm. Prof'l Ethics and Conduct Iowa State Bar Ass'n v. Ramey, 512 N.W.2d 569 (Iowa 1994).
69. *Ramey*, 512 N.W.2d at 572. Ramey also had prior instances of professional sanction. *Id*.
70. *Id*.
71. Read v. Va. State Bar, 357 S.E.2d 544 (Va. 1987).
72. *Read*, 357 S.E.2d at 545-46.
73. *Id*. at 546.
74. *Id*. at 546-47 (quoting United States v. Darwin, 757 F.2d 1193, 1201 (11th Cir. 1985)).
75. *Id*. at 546.
76. *See* Lawyer Disciplinary Bd. v. Hatcher, 483 S.E. 2d 810 (W.Va. 1997).

IV. CONCLUSION

Criminal prosecutors have a professional and a legal duty to disclose to the defense potentially exculpatory evidence. Violations of these duties may greatly affect the freedom of the accused as well as the professional status of the prosecutor. Though ethical sanctions for the prosecutorial failure to disclose evidence favorable to the accused vary in severity corresponding to the degree of willfulness driving such failure, professional discipline is nevertheless to be avoided. Therefore, regarding the disclosure of exculpatory evidence to the accused, prosecutors must make every effort to be aware of the existence of such evidence and accordingly disclose that evidence so to maintain the prescriptions of Constitutional due process, as well as to uphold the high standards of professional ethics.

Jeremy L. Carlson

A CHANGE OF DISPOSITION: THE EVOLVING PERCEPTION OF PRE-APPROVAL REQUIREMENTS UNDER 11 U.S.C. § 327

I. INTRODUCTION

"Bankruptcy" is a word that invokes horror in the most stable and valiant of men. It represents to the populace-at-large that the individual or corporation involved in the bankruptcy is nothing less then a complete and utter failure, at least insofar as managing its pocketbook. Despite this negative connotation, it is a state in which many entities will at one point find themselves.

The parties involved in a bankruptcy have little time for reflections about their moral state. They must promptly begin reporting to a court on a regular basis. The court's duty is to help guide the entity in such a way that its creditors are satisfied, and the entity may continue to exist (or, in the case of the individual, remain solvent). The other option is complete liquidation.

This is a difficult quandary to face alone, and the majority of persons and corporations that find themselves in a bankruptcy find that at some point they must rely on the services of another. To do so, the bankrupt estate, with the court's approval, is allowed to employ a professional willing to take on a job for an entity that is, unfortunately, bankrupt.[1]

Those professionals who are willing to take this assignment must then, according to traditional jurisprudence, submit themselves to the court administering the bankrupt estate in order to receive compensation.[2] The court must then determine if the professional may render service to the bankrupt estate.[3] This elaborate process for simply hiring an appraiser or auctioneer would seem to be the least of the bankrupt estate's problems; yet, because of recent court interpretations, it may be one of its largest.[4]

In 1978, the United States instituted the Bankruptcy Reform Act of 1978.[5] This new code replaced the previous controlling act, the Bankruptcy Act of 1898.[6] Not surprisingly, the change in the century-long regime of the

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1. 11 U.S.C. § 327(a) (2000). *See also* Land v. First Nat'l Bank of Alamosa, 943 F.2d 1265, 1266 (10th Cir. 1991).
2. *See Land,* 943 F.2d at 1266-67.
3. 11 U.S.C. § 541 (2000) (provides that an estate is created when an entity declares bankruptcy).
4. 11 U.S.C. § 327(a) (gives examples of what constitutes the term "professional." Specific references are made to appraisers and auctioneers, however, the term has been broadly defined by the courts). *See also In re* THC Fin. Corp., 837 F.2d 389 (9th Cir. 1988).
5. *THC Fin. Corp*., 837 F.2d at 391.
6. *Id.*

Bankruptcy Act of 1898 brought some changes that were not immediately understood or undertaken by practitioners.[7]

One of the most basic changes occurred in the section of the Bankruptcy Code which governs the employment of professionals by the debtor-in-possession or trustee of the estate. Formerly, this was governed by the straightforward Rule 215.[8] Rule 215 stated:

> No attorney or accountant for the trustee or receiver shall be employed except upon order of the court. The order shall be made only upon application of the trustee or receiver, stating the specific facts showing the necessity for such employment, the name of the attorney or accountant, the reasons for his selection, the professional services he is to render, and to the best of the applicant's knowledge all of the attorney's or accountant's connections with the bankrupt, the creditors or any other party in interest, and their respective attorneys and accountants.[9]

While somewhat strict and comprehensive, the rule, through the statement "upon application of the trustee[,]" clearly anticipated court approval of professionals prior to the professional rendering services.[10] This clear and straightforward rule was replaced with the somewhat more amorphous 11 U.S.C. § 327;[11] it states, in pertinent part:

> the trustee, with the courts approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.[12]

Section 327 maintains the basic tone of Rule 215; it still requires disinterest of those employed and approval of the court.[13] However, Section 327 dramatically expands the definition of the professional within the text and outside the definition, through the open-ended acknowledgement of "other professional persons."[14] Obviously, this has lead to an increase in the num-

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7. *See* Stephen R. Grensky, *The Problem Presented by Professionals Who Fail to Obtain Prior Court Approval of Their Employment or Nunc Pro Tunc Est Bunc,* 62 AM. BANKR. L.J. 185, 188 (1988) (outlining the statutory basis for requiring prior court approval of a trustee's hiring of a professional).

8. *THC Fin. Corp.*, 837 F.2d at 391.

9. *Id.*

10. *Id.*

11. *Id.* ("In 1978, the Bankruptcy Act of 1898 was replaced by the Bankruptcy Reform Act of 1978. Title 11 U.S.C. (1979). Rule 215 was replaced by 11 U.S.C. § 327 which took effect on November 6, 1978.").

12. 11 U.S.C. § 327(a) (2000).

13. *Compare* former FED. R. BANKR. P. 215, *with* 11 U.S.C. § 327 (2000).

14. *Compare* former FED. R. BANKR. P. 215 ("[n]o attorney or accountant …"), *with* 11 U.S.C. § 327 (2000).

ber of employees that must be court approved in order to be employed by the trustee or, in the case of a Chapter 11 reorganization, by the debtor-in-possession.[15] More importantly, however, the language does not explicitly require the professional to apply to the court prior to beginning employment. [16]

This caused quite a bit of confusion among practitioners when first instituted.[17] The courts were placed in the awkward position of deciding what the statute was attempting to imply through its non-opinionated language.[18] The majority of courts decided that the statute did indeed require pre-initiation approval of a professional's employment.[19] Shortly after this determination was made, the courts experienced a flurry of litigation involving professionals (including attorneys, but often others who may not have had knowledge of this requirement), who had provided valuable service to a bankrupt estate at cost to themselves and were facing the disallowance of fees based on a technicality.[20] Courts, faced with a seemingly inequitable task of granting a bankrupt estate a windfall and depriving hardworking professionals of a fairly earned dollar, decided that a bankruptcy court could use its equitable powers and grant a *nunc pro tunc*[21] order that allowed the professional to receive payment from the estate even if the professional had not properly submitted himself to bankruptcy jurisdiction.[22]

The *nunc pro tunc* order is used by a variety of circuit courts. In the earlier days of the *nunc pro tunc* order, courts attempted to attach a variety of somewhat criticized and confusing tests to the *nunc pro tunc* order.[23] These tests included the lengthy "Twinton tests" as well as the more common "extraordinary circumstances" test.[24] The majority of bankruptcy practitioners everywhere soon realized that it was best to simply submit to courts prior to beginning any work for a bankrupt estate, and the issue seemed to be permanently, if still unsatisfactorily, resolved.[25]

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15. *See THC Fin. Corp.*, 837 F.2d at 391. "Courts have expanded rule 215 and its precursors to require professions other than those specified to obtain prior court approval for services rendered to a bankrupt estate." *Id.*

16. 11 U.S.C. §327(a) (2000).

17. Grensky, *supra* note 7, at 187. "At the writing of this article [1988], there have been 79 reported cases which discuss this issue." *Id.* at 187 n.21. The current number is closer to 150, though most have not reached a federal appellate court.

18. *See In re* Triangle Chems. Inc., 697 F.2d 1280, 1284 (5th Cir. 1983).

19. *See id.* at 1285. *See also In re* Donald Jarvis, 53 F.3d 416 (1st Cir. 1995).

20. *See* Grensky, *supra* note 7, at 189-96.

21. This literally translates to "now for then." Grensky, *supra* note 7, at 187 n.22. This term is much maligned as a misnomer by the court, in *Jarvis*, who suggests the term "post facto." 53 F.3d at 418 n.2. This Article, while agreeing with the above court will use the term *nunc pro tunc* to avoid confusion.

22. *See* Grensky, *supra* note 7, at 189-96.

23. *Id.* at 197-201.

24. *Id.* at 197. *See also In re* Twinton Props. P'ship, 27 B.R. 817 (Bankr. M.D. Tenn. 1983); *THC Fin. Corp.*, 837 F.2d at 392; *Triangle Chems., Inc.,* 697 F.2d at 1284-85; *In re F/S Airlease II, Inc.*, 844 F.2d 99 (3d Cir. 1988).

25. Bernard Shapiro & Neil D. Wyland, *Ethical Quandries of Professionals in Bankruptcy Cases,* C836 ALI-ABA 15, 26 (1993).

However, the mid-1990s have brought a new decision from the First and Seventh Circuits which delve back into the mistitled *nunc pro tunc* application and payment. While no court seriously considered that Section 327 did not demand a pre-employment court application when the issue first arose,[26] the judicial psyche now appears to be willing to consider the possibility that Section 327 requires only a court approval prior to the payment of fees, whether this approval comes before or after the commencement of work. [27]

This Article will first discuss the initial decisions regarding Section 327 and identify the basis for a reluctance to grant *nunc pro tunc* orders despite a lack of guidance from case law. The second section of this Article will discuss the more recent decisions surrounding Section 327 and the *nunc pro tunc* payment of non-approved professionals. Finally, the third section of this Article will be a brief commentary on which path is the clearest and most beneficial for the bankrupt estate, and in which direction the case law seems to proceed.

II. IN THE BEGINNING . . . WELL, SOMETIME EARLIER ANYWAY

Prior to the Bankruptcy Reform Act of 1978 all circuits agreed that pre-approval from a bankruptcy court was required prior to a professional's employment for a bankrupt estate.[28]

This trend was continued after the Reform Act of 1978 became effective, despite the somewhat more ambiguous language used in the 1978 code.[29] Thus, it would appear that courts simply continued to assume that the professional must apply to the court prior to commencement of services.[30] This was not a universal assumption even in the early days after the passage of the Act.[31] *Twinton Properties* did question whether or not pre-employment approval was a prerequisite to compensation for professionals under the new Act.[32] Despite this questioning, the *Twinton* court proceeded to rule with the majority of courts and stated that pre-approval was required.[33] The *Twinton* court then proceeded to produce one of the more complicated and extensively criticized set of tests for *nunc pro tunc* payment.[34] This test will be discussed in the third section. The *Twinton* court

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26. Grensky, *supra* note 7, at n.30. Only one court has questioned this conclusion. In *Twinton Properties Partnership*, the court stated, "[c]ourts are not in agreement on whether pre-employment approval is a prerequisite to compensation under § 327." 27 B.R. at 817.

27. *Triangle Chems., Inc*., 697 F.2d at 1284; *In re* Singson, 41 F.3d 316 (7th Cir. 1994).

28. Grensky, *supra* note 7, at n.30.

29. *Id.*

30. See Triangle Chems., Inc., 697 F.2d at 1285-86.

31. *Twinton Props. P'ship*, 27 B.R. at 819.

32. *Id*.

33. *Id*.

34. *Id*. at 819-20. The nine-part test reads as follows:

(1.) The debtor, trustee or committee expressly contracted with the professional person to perform the services which were thereafter rendered; (2.) The party for whom the work was performed approves the entry of the nunc pro tunc order; (3.) The applicant has provided no-

was not alone in this ruling as the Fourth, Fifth, and Tenth Circuits all ruled similarly during the next decade.[35] The other circuits were in strict agreement with this, though the decisions were limited to the district bankruptcy courts.[36] The fact that the issue never reached a circuit court is in itself confirmation that the assumption was firmly entrenched in the judicial mind.[37]

However, as discussed earlier in the Article, almost no court could turn its back so completely on the unpaid professional.[38] Guidance issued by the United States Supreme Court in *Bank of Marin v. England* stated, "[t]here is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction."[39] Thus, the federal circuit courts invented an equitable solution to this difficult question with the *nunc pro tunc* application and order, which allowed a professional who had not gained pre-court approval for her services to appeal to the court for due compensation.[40]

The circuits applied this principle with differing amounts of severity. The Ninth Circuit continued to apply the same test that it previously applied prior to the Reform Act of 1978.[41] This test, illustrated in *In re THC Financial Corp.,* required that the circumstances surrounding the failure to apply for pre-approval be "extraordinary," and that the professional actually have benefited the bankrupt estate in some fashion.[42] There is little guidance provided as to what qualifies as "extraordinary,"[43] but other circuits make it clear that simple negligence on the part of the professional is not acceptable.[44]

The Fifth Circuit agreed that Section 327 required pre-employment approval by a bankruptcy court, and that professionals who were caught by this particular rule were allowed an occasional lapse in judgment.[45] The

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> tice of the application to creditors and parties in interest and has provided an opportunity for filing objections; (4.) No creditor or party in interest offers reasonable objection to the entry of the nunc pro tunc order; (5.) The professional satisfied all the criteria for the employment pursuant to 11 U.S.C.A. § 327 and Rule 215 of the Federal Rules of Bankruptcy Procedure at or before the time the services were actually commenced and remained qualified during the period of time for which services were provided; (6.) The work was performed properly, efficiently, and to a high standard of quality; (7.) No actual or potential prejudice will inure to the estate or other parties in interest; (8.) The applicant's failure to seek pre-employment approval is satisfactorily explained, and; (9.) The applicant exhibits no pattern of inattention or negligence in soliciting judicial approval for the employment of professionals.

Id. The entire test is reproduced here to illustrate the cumbersome and complicated nature of this test and others like it.

35. *See F/S Airlease II, Inc.,* 844 F.2d at 99; *Land*, 943 F.2d at 1265; *Triangle Chems., Inc*., 697 F.2d at 1280.

36. *See* Grensky, *supra* note 7, at n.31.

37. This is, admittedly, a conclusion drawn by the author, but it seems to be a reasonable inference.

38. *See In re* Laurent Watch Co., 539 F.2d 1231 (9th Cir. 1976); Stolkin v. Natchman, 472 F.2d 222 (7th Cir. 1973); Hunter Sav. Ass'n v. Baggot Law Offices Co., 34 B.R. 368 (S.D. Ohio 1983); *In re* Kroger Props. & Dev., Inc., 57 B.R. 821 (9th Cir. 1986).

39. Bank of Marin v. England, 385 U.S. 99, 103 (1966).

40. *See* cases listed, *supra* note 38.

41. *THC Fin. Corp*., 837 F.2d at 389.

42. *Id.* at 392.

43. *Id*.

44. *See Jarvis*, 53 F.3d at 416.

45. *See Triangle Chems., Inc*., 697 F.2d at 1280.

court decided, based upon the equitable powers of the bankruptcy court, that *nunc pro tunc* powers should be allowed by bankruptcy courts, but only in "rare or exceptional circumstances."[46] The court was careful to dictate that the decision was not meant to encourage the issuance of such orders, but simply to assure bankruptcy judges that they were so empowered if they chose to exercise it.[47]

The Fifth Circuit test is different from the Ninth Circuit test in one important way.[48] First, the standard, though possibly only linguistic in nature, "rare and exceptional" is unquestionably different from "extraordinary." While admittedly subtle, this somewhat arbitrary distinction could produce different interpretations of the statute between the circuits.

The Third Circuit, also holding that the professional must have prior court approval, sets forth yet another slightly different test.[49] In *In re F/S Airlease II,* the Third Circuit held that *nunc pro tunc* orders would be allowed under extraordinary circumstances.[50] The court then proceeded to lay out a list of conditions that would amount to "extraordinary circumstances."[51] These include whether the applicant or some other person had the responsibility for filing the application, whether the applicant was under time pressure to begin the work required by the estate, whether payment to the professional would prejudice other third parties, and how long the applicant delayed after learning that approval was never granted.[52] The court concludes its list with the crystalline line of "other relevant factors."[53] This test is somewhat more helpful than the previous two because it outlines a clear set of criteria that suggest only a professional who acted under severe time pressure and who also quickly corrected the oversight will be able to receive a *nunc pro tunc* payment. Unfortunately, the court does not give reasons explaining why only this sort of professional is entitled to payment,[54] nor does it clearly define any other "extraordinary circumstances" that would exist after consideration of "other relevant factors."[55]

The Tenth Circuit did little to add clarity to the fray created by other circuits with *In re Land*.[56] In *In re Land,* the Tenth Circuit agreed that the professional must receive pre-approval from the court in order to render

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46. *Id.* at 1289. The court stated, "While equitable powers may permit *nunc pro tunc* appointment in rare or exceptional circumstances, we do not intend by our holding to encourage any general non-observance of the contemplated pre-employment." *Id*.

47. *Id*.

48. *Compare Triangle Chems., Inc*., 697 F.2d at 1289, *with THC Fin. Corp*., 837 F.2d at 392.

49. *See F/S Airlease II, Inc.*, 844 F.2d at 99.

50. *Id.* at 101.

51. *Id.* at 105-06.

52. *Id*.

53. *Id.* at 106.

54. *See F/S Airlease II, Inc*., 844 F.2d at 106-07. Admittedly, the court does seem to distinguish between professionals and lay people because non-professionals are given more flexibility. However, it seems unfair to assume that all professionals, and those that consider themselves professionals, are familiar with the rules of bankruptcy procedure.

55. *Id*. at 106.

56. *Land*, 943 F.2d at 1266.

services.[57] The court specified that, pursuant to equity, *nunc pro tunc* orders were permissible if the circumstances were, again, "extraordinary."[58] Though "extraordinary" circumstances could presumably be met in a variety of unlisted ways, the court held that simple negligence did not qualify.[59] It is worth noting that the court was dealing, in this situation, with an attorney that the bankruptcy judge described as "obstinate," and the case itself as "tortured." The court also noted the attorney's four-year history of non-compliance with the Bankruptcy Code.[60]

These facts are significant because they suggest that bankruptcy courts, in most cases, grant *nunc pro tunc* applications with little or no comment, denying only the ones they feel are extraordinarily non-deserving, as opposed to those facing extraordinary circumstances.[61] There is no way to adequately measure the frequency of these situations, but it seems possible that they occur.

III. THE NEXT GENERATION

Beginning in 1994, federal circuit courts began to interpret Section 327 in a slightly different fashion.[62] The courts, being almost twenty years removed from the newfangled ways of the 1978 Bankruptcy Reform Act, began to look at the provision as standing alone and not carrying the stricter requirements of Rule 215 along with it.

This reformation first appeared in a Seventh Circuit opinion, *In re Singson*. [63] The law firm in *Singson* billed seventy-one hours beyond the approved amount in a matter dealing with a bankrupt estate.[64] The trustee of the estate petitioned the bankruptcy court to nullify the additional seventy-one hours, as they had not been pre-approved, and the judge complied.[65] This was followed by a swift application for a *nunc pro tunc* application from the law firm.[66] The bankruptcy judge agreed that the services rendered by the firm had been beneficial to the estate; however, the judge found that the firm had not faced any extraordinary circumstances and thus, could not recover the fee.[67]

The Seventh Circuit Court of Appeals, in a shocking departure from prior jurisprudence ruled that 11 U.S.C. § 327 "does not say that the ap-

57. *Id.* at 1268.
58. *Id.*
59. *Id.* at 1267.
60. *Id.*
61. This bit of conjecture is based upon the fact that most of the cases that have made it to an appellate court have contained rather extreme circumstances where the professional behaved badly. The author considers it quite likely that the majority of such applications are approved if the professional is well behaved and legitimately employed.
62. *Singson,* 41 F.3d at 318-19; *Jarvis*, 53 F.3d at 419.
63. *See Singson,* 41 F.3d at 316.
64. *Id*. at 318.
65. *Id.*
66. *Id.*
67. *Id.*

proval [of the court] must precede the engagement."[68] The court went on to explain that while pre-approval was strongly preferred, "nothing in the statute forbids or even reproves a belated authorization."[69] The court managed to keep with some of the traditional jurisprudence by stating that professionals must still seek pre-approval, as it is a prudent judicial rule.[70] This, a seemingly banal observation, is a striking finding in light of twenty plus years of opposite judiciary precedent.[71]

After this unusual finding the court continued to conquer new territory by ruling that the firm need not show any extraordinary circumstances, but instead must simply show "excusable neglect."[72] The court explained that a requirement forcing lawyers and other professionals to show extraordinary circumstances was inefficient, as it required that professionals employed by the bankruptcy estate spend an undue amount of time focused on rules and forms other than substantive bankruptcy matters.[73] Thus, a professional only need show that he has exercised ordinary care in the matter.[74] If so, then a *nunc pro tunc* application should be promptly approved.[75]

This thought process quickly caught on. In 1995, the First Circuit also took the position that Section 327 does not expressly require pre-approval of a professional's employment by a bankrupt estate.[76] The court looked to the legislative history of the statute and found no guidance.[77] Therefore, they looked to other courts for guidance and decided to adopt a position that required "extraordinary circumstances."[78] The court added the caveat that the first ruling the bankruptcy court must make is whether or not the professional would qualify under other provisions of Section 327 prior to determining the timing of the professional's application.[79] This impliedly suggests that the professional's excuse need not be very "extraordinary" as to think otherwise would require that, in the majority of such cases, bankruptcy courts would undergo unproductive and inefficient inquiries into a moot matter.

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68. *Singson,* 41 F.3d at 319.
69. *Id.*
70. *Id.*
71. *See* discussion *infra* Part II.
72. *See Singson,* 41 F.3d at 319.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Jarvis*, 53 F.3d at 419.
77. *Id.* at 418.
78. *Id.* at 420.
79. *Id.* at 421.

IV. WHERE DO WE GO FROM HERE?

A. The Argument for Court Pre-approval of Professionals.

This potential transition from a system that absolutely requires pre-approval for a professional's employment to one in which it is feasible that a court may approve a professional's fee at any time prior to payment requires that we look at the rationales for both positions.[80]

Courts in the past have provided strong rationales for requiring pre-approval. An oft-cited treatise on bankruptcy states: "The services for which compensation is required must have been performed pursuant to appropriate authority under the Code and in accordance with an order of the court. Otherwise, the person rendering services may be an officious intermeddler or a gratuitous volunteer."[81] This low opinion of unapproved professionals is rather commonplace.[82]

It may be for good reason that this opinion is widely held. The unapproved professional may well find himself disqualified after the rendering of services for a variety of reasons, including the fact that the professional was not disinterested within the statutory meaning, or that the estate did not benefit from the professional's service.[83] This result not only harms the bankrupt estate, but also the professional himself.

At times, the service of the professional can have profound consequences on the disbursement of funds from the estate to its creditors as in *In re F/S Airlease*. There, a broker was hired to rent out a plane that the bankrupt estate owned, without prior approval of the court. [84] The broker was successful at this and demanded a fee of $450,000.[85] In determining whether or not to award the fee *nunc pro tunc,* the court was faced with the fact that, while the broker's services had been valuable, and the broker was otherwise qualified to serve the estate, such a fee would almost completely deplete the company's estate. [86] The court chose not to award the fee while pointing out that this problem would not have existed if the broker had simply gained court pre-approval for the transaction, as the court would never have agreed to such a large fee.[87]

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80. *Compare Jarvis,* 53 F.3d at 416, *with THC Fin. Corp*, 837 F.2d at 391.

81. *Triangle Chems., Inc.,* 697 F.2d at 1285 (citing 2 COLLIER ON BANKRUPTCY ¶ 327.92, at 325-27).

82. *See id*. at 1284-86; *see also THC Fin. Corp*., 837 F.3d at 389.

83. *See Triangle Chems., Inc.*, 697 F.2d at 1286 (holding that counsel was not disinterested, and therefore, not able to receive payment for services. The court noted that the lawyer may have been better off seeking pre-approval in stating: "If that duty is neglected, no matter how innocently, surely they stand no better then if it had been performed. In the present case, had the facts been disclosed, the appellants would not have been appointed counsel for the receiver." (citing *In re H.L. Stratton Inc*., 51 F.2d 984 (2d Cir. 1931))); *see also THC Fin. Corp*., 837 F.3d at 389 (holding that the professional's service did not benefit the estate, and therefore, the professional would not be paid).

84. *F/S Airlease II*, *Inc.*, 844 F.2d at 100.

85. *Id*. at 101.

86. *Id*. at 105.

87. *Id.*

These problems are numerous and in the end they seem to hurt the professional as much as the bankrupt estate.[88] Thus, there is a strong argument for requiring court pre-approval for such fees simply on the basis that it is a strong prudential rule.

B. The Argument Against Pre-approval

There are numerous reasons for maintaining the status quo and requiring court pre-approval of all professionals employed by bankrupt estates. Nevertheless, the arguments for letting this requirement fade to black are equally convincing.

The legislature, in adopting Section 327 which holds that professional persons are persons such as "attorneys, accountants, appraisers, [and] auctioneers," has endorsed a judicial construction of the word professional which is seemingly endless. The courts have extended the term professional to mean almost any person employed by the bankrupt estate.[89] This is a large burden to place upon the unsuspecting auctioneer, who may have little knowledge of the law. Indeed, even a law-savvy accountant may agree to perform services only to find himself unpaid because of failure to gain pre-approval. In these sorts of situations, it is likely that the professional will choose not to participate in the administration of a bankrupt estate again.[90] If this procedure is repeated with any frequency, then the end result is that professionals who are otherwise competent and competitive will not take work for bankrupt estates. The requirement of prior court approval alone may serve as a significant barrier for the relatively unsophisticated professional who simply wishes to do his job.

Thus, it is reasonable to assume that the approval requirement has the result of shrinking the number of qualified professionals willing to work for bankrupt estates. This may produce problems for the estate in that those who are willing to do the work may then require a price higher than would otherwise be paid. This is obviously adverse to the objectives of the bankrupt estate.

Further, there is substantial evidence to show that the only person really harmed if the professional is disqualified after rendering services is the professional.[91] It is impossible to conclude that the bankrupt estate is losing anything when it has services performed for it free of charge by a profes-

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88. *See Singson*, 41 F.3d at 319 (noting that "[p]rior approval is strongly preferred because it permits close supervision of the administration of an estate, wards off 'volunteers' attracted to the kitty, and avoids duplication of effort.").

89. *In re* D'Lites of America, 108 B.R. 352 (N.D. Ga. 1989) (holding that "professional person," within the provision requiring bankruptcy court's approval for employment of professional person, "is one who takes a central role in the administration of the bankruptcy estate and in bankruptcy proceedings, as opposed to one who provides services to the debtor that are necessary whether the petition was filed or not.").

90. Grensky, *supra* note 7, at 187.

91. *See Triangle Chems., Inc.*, 697 F.2d at 1286 (citing *H.L. Stratton, Inc.,* 51 F.2d at 992); *see also THC Fin. Corp*., 837 F.3d at 389; *F/S Airlease II*, *Inc.*, 844 F.2d at 99.

sional who is eventually disqualified for one reason or another. This risk to the professional in itself may serve as enough of a safety check to keep out the "officious intermeddler" and the "gratuitous volunteer."

V. CONCLUSION

The courts, in the end, will be the ultimate interpreter of what Section 327 requires. As such, recent judicial decisions that have acknowledged that the statute does not expressly require pre-approval of professionals are steps of monumental importance. If the courts are to continue to refine the system imposed by the bankruptcy statutes in order to make them more user friendly to the bankrupt estate and to the professional employed by the estate, then the acceptance of prior-to-payment court approval as opposed to prior-to-commencement-of-services court approval, must continue to win favor among the federal circuits.

Anthony Collins, Jr.

CAN I CONDUCT THIS CASE IN ANOTHER STATE? A SURVEY OF STATE PRO HAC VICE ADMISSION

I. INTRODUCTION

It is well-settled that each state may determine its own rules governing who will be authorized to practice law in that state.[1] In general, as a matter of comity, an attorney not licensed to practice in a jurisdiction may appear in a particular case in that jurisdiction.[2] This is known as pro hac vice admission to practice.[3] This Article will cover pro hac vice admission in state courts and the courts of the District of Columbia. Federal court rules may be different than those of the local state courts.[4] This Article will review the state pro hac vice rules according to their treatment of the following requirements: proof of good standing, submission to local rules, association of local counsel, limitations on frequency of appearance, reciprocity, and lack of residency/substantial relationship with the forum state**.** Next, this Article will present an argument in favor of relaxing rigid, outdated rules into a more open, realistic approach to pro hac vice admission.

Practically all states have rules or statutes specifically addressing pro hac vice admission.[5] Moreover, these rules vary in complexity and strictness from state to state. Pennsylvania's rule is arguably one of the most lenient:

> (a) General Rule. . . . An attorney . . . who is qualified to practice in the courts of another state or of any foreign jurisdiction may be specially admitted to the bar of this Commonwealth for purposes limited to a particular matter. He or she shall not, however, thereby be authorized to act as attorney of record.
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> (b) Procedure. . . . Such admissions shall be only on motion of a member of the bar of this Commonwealth. Any court or justice shall grant such a motion unless good cause for denial shall appear.[6]

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1. Leis v. Flynt, 439 U.S. 438, 442 (1979).
2. 7 AM. JUR. 2D *Attorneys at Law* § 22 (1997).
3. Michael A. DiSabatino, Annotation, *Attorney's Right to Appear Pro Hac Vice in State Court*, 20 A.L.R. 4th 855, 858 (1983).
4. *See* Robert L. Misner, *Local Associated Counsel in the Federal District Courts: A Call for Change*, 67 CORNELL L. REV. 345 (1982); Jean F. Rydstrom, Annotation, *Attorney's Right to Appear Pro Hac Vice in Federal Court*, 33 A.L.R. FED. 799 (1977).
5. *See* DiSabatino, *supra* note 3.
6. PA. BAR ADMIS. R. 301.

On the other hand, New Jersey's rule is one of the narrowest. That state's rule provides that a non-resident attorney must provide the court an affidavit showing he is in good standing in his home state, detailed information about previous or pending disciplinary action against him in his home state, and in civil actions, the nonresident attorney must show "good cause" for admission.[7] Unfortunately, few of the states' pro hac vice rules lend themselves so easily to categorization as "broad" or "narrow." Indeed, it is difficult to categorize the rules of the several states because of the wide variation among them. For example, a state may require strict reporting of good standing in a nonresident attorney's home state, but be quite lenient with the local associated counsel requirement. Therefore, this Article will attempt to overview the degrees of strictness within each category of general requirements.

Additionally, courts may claim the right to make pro hac vice decisions regardless of a statute or rule.[8] Indeed, in many jurisdictions individual courts retain a good deal of discretion in making pro hac vice decisions, and this discretion is often expressly granted in the pertinent rule or statute.[9] This approach is exemplified in Alabama's rule, which states, "[i]f the judge . . . is not satisfied that the foreign attorney is reputable and will observe the ethical standards required of attorneys in this state, the court . . . may in its discretion revoke the authority of the attorney to appear."[10] On the other hand, a minority of states use a presumption of admission rule. For example, Pennsylvania's statute states that "[a]ny court or justice *shall* grant [a pro hac vice motion] unless good cause for denial shall appear."[11] Oregon's rule governing pro hac vice admission employs a similar presumption.[12]

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7. N.J. R. CT. 1:21-2.

8. Disabatino, *supra* note 3, at 861.

9. *See* ALA. R. ADMIS. 7 ("The court . . . in its discretion may revoke the authority of the attorney to appear."); ARIZ. SUP. CT. R. 33(c) ("Appearance pro hac vice . . . is subject to the discretion . . . of the court."); GA. ST. BAR R. & REGS. 1-203 (stating attorneys "may be permitted to appear in the courts of this state in isolated cases in the discretion of the judge of such court."). HAW. SUP. CT. R. 1.9 (allowing nonresident attorneys to appear in a specific case "at the discretion of the presiding judge."); ILL. SUP. CT. R. 707 (allowing a nonresident attorney to appear pro hac vice "in the discretion of any court of this State."); IOWA CT. R. 31.14 (allowing a nonresident attorney to conduct an action "in the discretion of the court in which the action is pending."); NEB. SUP. CT. R. 6 (allowing nonresident attorneys to appear pro hac vice "in the discretion of the court."); N.J. CT. R. 1:21-2 ("[A]t the discretion of the court," a nonresident attorney may appear pro hac vice.); N.Y. CT. R. § 520.11 (stating that an attorney may be admitted pro hac vice at the discretion of any court of record); N.C. GEN. STAT. §84-4.1 (2002) ("Compliance with the . . . requirements does not deprive the court of the discretionary power to allow or reject the application."); S.D. CODIFIED LAWS § 16-18-2 (Michie 2000) ("The judge may examine the nonresident attorney . . . [and] may in his discretion deny the motion."); UTAH JUD. ADMIN. R. 11-302 ("Admission pro hac vice under this rule is discretionary with the court in which the application . . . is made."); VT. R. CIV. P. 79.1(e) (allowing pro hac vice appearances "in the discretion of the court."). Wisconsin's rule leaves the decision completely with the judge: "A judge in this state may allow a nonresident counsel to appear . . . in a particular . . . proceeding." WIS. SUP. CT. R. 10.03(b)(4).

10. ALA. R. ADMIS. 7.

11. PA. BAR ADMIS. R. 301 (emphasis added).

12. OR. UNIF. TRIAL CT. R. 3.170.

II. GENERAL PRINCIPLES

There are several requirements an attorney must meet in order to gain pro hac vice admission that are common to most states. First, virtually all states require proof that the applicant is a member in good standing of his state bar.[13] Second, jurisdictions often require that the nonresident attorney associate a member of the bar of the forum state.[14] Third, many states require that the attorney show he does not have a substantial relation with the forum state.[15] Fourth, many states limit the number or frequency of pro hac vice appearances allowed, and a nonresident attorney must reveal all previous appearances in the forum state in order to show conformity with this requirement.[16] Finally, an attorney who is admitted pro hac vice should be aware that courts retain broad discretion to revoke their admission.[17]

A. Requirement of Submission to Local Rules

One major concern of a state considering an attorney's request to appear pro hac vice is its ability to discipline the nonresident attorney according to the rules of that jurisdiction, should it become necessary.[18] For assurance of this ability, virtually every jurisdiction requires that the nonresident lawyer submit to the rules of conduct and disciplinary body of that particular jurisdiction.[19] Further, many jurisdictions require that this submission be put in writing.[20]

B. Requirement of "Good Standing"

Virtually every state requires that a nonresident attorney show that he is in good standing with the disciplinary authority of his home state.[21] The level of proof required to show good standing varies from state to state.[22] The requirements for good standing can be divided into three basic categories: strict, intermediate, and broad.

The strict approach places the burden of proving good standing on the nonresident lawyer. A large number of states require an applicant to name

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13. DiSabatino, *supra* note 3, at 860-61.
14. *Id*. at 860.
15. *See id*. at 894-95.
16. *Id.*
17. Ronald V. Sinesio, Annotation, *Attorneys: Revocation of State Court Pro Hac Vice Admission*, 64 A.L.R. 4th 1217, 1220 (1988).
18. DiSabatino, *supra* note 3, at 861.
19. *Id*.
20. *See* ARK. ADMIS. R. 14; ARIZ. SUP. CT. R. 33; COLO. R. CIV. P. 221; IND. R. ADMIS. & DISC. 3; IOWA CT. R. 31.14; MONT. CT. ADMIS. R. § 4; N.C. GEN. STAT. § 84-4.1; OR. UNIF. TRIAL CT. R. 3.170 (stating that a nonresident attorney must "certify" that he will comply with the rules of Oregon State Bar); S.C. APP. CT. R. 404; S.D. CODIFIED LAWS § 16-8-2; UTAH JUD. ADMIN. R. 11-302(e)(5); W. VA. R. ADMIS. 8.0(b).
21. DiSabatino, *supra* note 3, at 860-61.
22. *See id*. at 884-89.

each jurisdiction in which he is admitted, along with the date of admission and written documents verifying he is in good standing. Further, in cases in which the lawyer is not in good standing, he must provide an explanation of why he is not.[23] West Virginia uses one of the strictest approaches to the good standing requirement by requiring that attorneys provide references from their home state.[24]

Some states employ an intermediate approach. One example is the District of Columbia, where the nonresident attorney is required to simply declare under penalty of perjury that he is a member in good standing in each jurisdiction in which he is admitted, and that he has no disciplinary proceedings pending and has never been disbarred.[25] Several other jurisdictions employ a similar approach.[26]

Finally, the broadest rules only require that the nonresident lawyer show he is a member of the bar in good standing in his home state or they simply leave the decision to the discretion of the court.[27] In fact, courts have applied this requirement quite literally when pro hac vice admission has been challenged.[28] For example, in *Heller Western, Inc. v. Superior Court*, a California court held that all a nonresident lawyer must do to show adequate professional reputation is to show he is a member in good standing of the bar in his home state.[29]

C. The Local Associated Counsel Requirement

Most jurisdictions require an attorney applying for pro hac vice to associate a member of the bar in that jurisdiction.[30] The responsibilities of the associated local counsel vary from jurisdiction to jurisdiction.[31] Some states require that local counsel appear in every proceeding arising from the case.[32] At least one state does not require local counsel to appear at deposi-

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23. *See* ALA. R. ADMIS. 7; ARIZ. SUP. CT. R. 33; CAL. R. CT. 983; MISS. R. APP. P. 46; MO. SUP. CT. R. 9.03 (requiring certification that neither the applying lawyer nor any member of his firm is suspended or disbarred); MONT. CT. ADMIS. R. § 4; N.J. CT. R. 1:21-2; S.C. APP. CT. R. 404 (requiring a certificate of good standing from courts where non-resident lawyer is admitted).

24. W. VA. R. ADMIS. 8.0.

25. D.C. APP. CT. R. 49.

26. COLO. R. CIV. P. 221 (requiring identification of all jurisdictions in which the lawyer has been disciplined and the nature of that discipline); FLA. R. JUD. ADMIN. 2.061; IDAHO BAR COMM'N. R. 222; IND. R. ADMIS. & DISC. 3; KAN. SUP. CT. R. 116; MINN. R. CIV. APP. P. 143.05; N.D. R. CIV. P. 11.1; OR. UNIF. TRIAL CT. R. 3.170; S.D. CODIFIED LAWS § 16-18-2; W. VA. R.ADMIS. 8.0; WYO. UNIF. R. DIST.CT. 104.

27. GA. ST. BAR R. 1-203 (leaving pro hac vice decision to discretion of the judge); HAW. SUP. CT. R. 1.9; IOWA CT. R. 31.14; KY. SUP. CT. R. 3.030; MD. BAR ADMIS. R. 14; MICH. ST. BAR R. 15; NEB. SUP. CT. R. 6; N.Y. CT. R. § 520.11; N.C. GEN. STAT. § 84-4.1; OHIO SUP. CT. PRAC. R. 1; PA. BAR ADMIS. R. 301; UTAH JUD. ADMIN. R. 11-302; VT. R. CIV. P. 79.1; VA. SUP. CT. R. 1A:4; WASH. ADMIS. PRAC. R. 8.0; WIS. SUP. CT. R. 10.03.

28. D.C. APP. CT. R. 49.

29. 168 Cal. Rptr. 785, 787 n.4 (Ct. App. 1980).

30. DiSabatino, *supra* note 3, at 856.

31. *Id.*

32. *Id.*

tions, but at other proceedings.[33] Some states leave the decision of whether local counsel must appear at a proceeding to the discretion of the judge.[34] Kentucky requires local counsel to appear at trials, but allows the judge to decide whether he must appear at other proceedings.[35] Some states do not require that local counsel be associated at all.[36] Other jurisdictions impose joint and several liability for the actions of the nonresident attorney on the local counsel.[37] Interestingly, Oklahoma employs a rule which only requires association of local counsel if the nonresident lawyer's home jurisdiction requires Oklahoma lawyers to associate local counsel in order to appear pro hac vice.[38]

This "full-participation" rule can be quite cumbersome to nonresident attorneys and to their clients. The client is forced to pay duplicative expenses for trials, hearings, and, in many cases, depositions. It is possible that the client will, therefore, be unable to afford to hire a nonresident attorney.[39] Disproportionate expenses enable clients with wholly local counsel to spend more money on litigation.[40] Additionally, the nonresident attorney and local counsel have the hassle of scheduling proceedings as to avoid conflict.

There are several reasons commonly given for the requirement of local counsel. First, the requirement ensures there will be someone with whom opposing parties and the court can communicate in connection with the case.[41] However, in the modern world of fast, electronic communication and easy travel, the concern of not being able to find or communicate with a nonresident attorney is unfounded.[42] Some states take a progressive approach to this requirement and allow the court discretion to decide the issue of association of local counsel.[43]

Another reason given is that local counsel will be more familiar with local and state rules, as well as with the idiosyncrasies of particular judges.[44] While this concern has some merit, the ease with which an attorney can access and learn local court rules in modern times lessens the strength of this assertion. The strongest justification offered by this argument is that local attorneys will be more familiar with local judges. A reasonable rule would require local counsel to serve as counsel of record. Local counsel could then "fill-in" the nonresident attorney with any pertinent information

33. MISS. R. APP. P. 46.
34. ARIZ. SUP. CT. R. 33; COLO. R. CIV. P. 221; MD. BAR ADMIS. R. 14; NEB. SUP. CT. R. 6; UTAH JUD. ADMIN. R. 11-302.
35. KY. SUP. CT. R. 3.030.
36. Edwin L. Klett, *Roadblocks to a Multi-State Litigation Practice: The Illusion of Pro Hac Vice*, LAWYERS JOURNAL, Sept. 8, 2000, at 4.
37. ALA. R. ADMIS. 7; MISS. R. APP. P. 46.
38. OKLA. STAT. ANN. tit. 5, § 5 (West 2002).
39. Klett, *supra* note 36, at 18.
40. *Id.*
41. Misner, *supra* note 4.
42. *Id.*
43. Klett, *supra* note 36, at 17.
44. Misner, *supra* note 4.

about a particular judge. This would avoid placing "duplicative and unnecessary expense upon the client."[45]

D. Limitations on Frequency of Appearance

Next, many jurisdictions impose a limit on the number of times an attorney may appear pro hac vice.[46] Yet again, the nature of these rules varies among jurisdictions. Among the strictest states, Montana limits pro hac vice appearances to two-times per lawyer absent a showing of good cause, which is not to be lightly found.[47] Some states articulate a specific numeric limit of pro hac vice appearances per year.[48] Other states expressly leave the number of appearances allowed to the discretion of the respective court.[49] Often, these states require that an attorney provide the court with records for each pro hac vice appearance; presumably in order to keep track of the number of appearances the nonresident attorney has made.[50] In addition, some states' rules expressly provide that good cause to circumvent the limit on appearances can be shown by demonstrating that the nonresident attorney has expertise in a particular area of law or that his expertise is not commonly available locally.[51]

Interestingly, at least one state imposes no limit on the number of appearances unless the home state of the nonresident attorney imposes such a limit. Idaho's rule does not give a specific number of admissions allowed to a single nonresident attorney, "except for any lawyer applying by virtue of an active membership in a jurisdiction that limits the number of limited admissions of Idaho lawyers."[52] In that case, Idaho sets a reciprocal limit on pro hac vice admissions.[53]

E. Reciprocity

Next, some states require reciprocity from the nonresident attorney's home jurisdiction before allowing a lawyer to appear pro hac vice. For example, Arkansas's pro hac vice rule states, "Unless the State in which the

45. Klett, *supra* note 36, at 18.
46. *Id.*
47. MONT. CT. ADMIS. R. § 4.
48. *See* ALA. R. ADMIS. 7 (limiting appearance to five per year unless good cause is established); D.C. APP. CT. R. 49 (limiting nonresident attorney to five applications per year); FLA. R. JUD. ADMIN. 2.061 (allowing only three pro hac vice appearances per year); MISS. R. APP. P. 46 (limiting appearances to five per year); MONT. CT. ADMIS. R. § 4 (limiting pro hac vice appearances to two per attorney, unless good cause is shown).
49. *See* ARIZ. SUP. CT. R. 33 ("Absent special circumstances, repeated appearances . . . may be cause for denial of the motion."); CAL. R. CT. 983; IND. R. ADMIS. & DISC. 3 ("Absent special, circumstances, repeated appearances by any persons or members of a single law firm . . . shall be cause for denial."); W. VA. R. ADMIS. 8.0 (deeming frequent or numerous appearance within past two years to be good cause for denying pro hac vice admission).
50. MISS. R. APP. P. 46; MD. BAR ADMIS. R. 14; S.C. APP. CT. R. 404; W. VA. R. ADMIS. 8.0.
51. MD. BAR ADMIS. R. 14; MONT. CT. ADMIS. R. § 4; N.J. CT. R. 1:21-2.
52. IDAHO BAR COMM'N R. 222.
53. *Id.*

said nonresident lawyer resides likewise accords similar comity and courtesy to Arkansas lawyers who may desire to appear and conduct cases in the courts of that State, this privilege will not be extended to such nonresident lawyer."[54] Other states use similar language.[55]

F. No Substantial Relation Requirement

Most states require an attorney seeking pro hac vice admission to be a nonresident of the state.[56] Moreover, many states prohibit pro hac vice admission for attorneys who conduct business in, or otherwise have substantial contact with, the state in question. Several states prohibit pro hac vice admission for lawyers employed in the forum state.[57] For example, South Carolina's pro hac vice statute prohibits admission for attorneys who are "regularly employed in South Carolina, or [are] regularly engaged . . . in substantial business or professional activities in South Carolina."[58]

III. AN ARGUMENT FOR BROAD PRO HAC VICE ADMISSION

In *Leis v. Flynt*, Larry Flynt and Hustler magazine were indicted in Ohio for distributing harmful material to minors.[59] The Ohio trial court prohibited Flynt's nonresident attorneys from appearing in the case.[60] Flynt then filed suit in Federal court to enjoin further prosecution of the case until there was a hearing on the pro hac vice application.[61] The United States District Court ruled for Flynt on the grounds that Flynt's lawyers had been denied their procedural due process rights.[62] The Sixth Circuit affirmed and held that there must be a meaningful hearing before the attorneys could be denied pro hac vice admission.[63]

The United States Supreme Court, in a per curiam opinion, reversed and remanded the case.[64] The Court held that the states set the standards for admission to practice law and the standards for attorneys' conduct.[65]

One policy, perhaps not explicitly articulated, underlying the requirements of associated local counsel, limitations on frequency of appearance, etc., is to protect resident lawyers from competition. However, this is no longer a legitimate policy. As Justice Stevens noted in his dissent in *Leis*,

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54. ARK. ADMIS. R. 14.
55. *See* N.C. GEN. STAT. § 84-4.1 (4); VA. SUP. CT. R. 1A:4; W. VA. R. ADMIS. 8.0.
56. DiSabatino, *supra* note 3.
57. ALA. R. ADMIS. 7; ARIZ. SUP. CT. R. 14; CAL. R. CT. 983; S.C. APP. CT. R. 404; MONT. CT. ADMIS. R. § 4.
58. S.C. APP. CT. R. 404.
59. Leis v. Flynt, 439 U.S. 438, 439 (1979).
60. *Flynt*, 439 U.S. at 440.
61. *Id.* at 440-41.
62. *Id.* at 441.
63. *Id.*
64. *Id.* at 445.
65. *Flynt*, 439 U.S. at 442.

the practice of law has "undergone a metamorphosis during the past century."[66] Furthermore, "[r]ules of ethics that once insulated the local lawyer from competition are now forbidden by the Sherman Act and by the First Amendment."[67] Additionally, modern clients conduct business both on a multi-state and multi-national basis.[68] Therefore it seems unrealistic to place undue burdens on multi-jurisdictional practice. Presumably, clients who conduct business over a wide area would expect to be able to use their favorite lawyer wherever needed.

IV. CONCLUSION

The requirements of pro hac vice admission vary widely from state to state. However, the requirements of local associated counsel, submission to local rules of professional conduct, and proof of good standing are widespread. Additionally, some states are much stricter in their admission standards than others.[69] Finally, in light of the nationalization and globalization of the practice of law, a broader approach to pro hac vice admission would ease the burden on lawyers with clients whose interests encompass more than one state or nation.

Clint Eubanks

66. *Id.* at 449.
67. *Id.*
68. Klett, *supra* note 36, at 1.
69. *See* Klett, *supra* note 36.

ATTORNEY ADVERTISING: DOES TELEVISION ADVERTISING DESERVE SPECIAL TREATMENT?

I. INTRODUCTION

States have regulated attorney advertising for some time.[1] In the past, some states prohibited attorney advertising altogether under the rationale that advertising by attorneys encouraged what was intended to be a profession of service to become more of a commercial enterprise.[2] The theory behind the ban was that advertising would foster economic competition among attorneys, and at the same time, undermine the profession's public image.[3] However, the Supreme Court stepped in and ruled that a blanket prohibition against attorney advertising was a violation of the First Amendment right to free speech. While ruling that the First Amendment protected this type of commercial speech, the Court did recognize that states could still place "reasonable restrictions" on the time, place, and manner of attorney advertisement.[4]

The need for balancing free speech with the need for protecting the public has been a continuing source of conflict.[5] In attempting to strike a balance, the Supreme Court has made a distinction between print advertisements, which are subject to First Amendment protection, and in-person solicitations, which are not.[6]

With the growing use of television advertising, states have wrestled with whether to treat this medium like print advertisements or more like in-person solicitations.[7] The purpose of this Comment is to discuss the special treatment given to television advertising and the debate surrounding such treatment.

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1. Daniel Callender, *Attorney Advertising and the Use of Dramatization in Television Advertisements*, 9 UCLA ENT. L. REV. 89, 93-94 (2001) (stating that following the ABA establishment of Canon 27 of the Professional Canon of Ethics in 1908, which specifically banned all attorney advertising, all state bars subsequently banned attorney advertising).
2. *Id*. at 93.
3. *Id*.
4. Bates v. State Bar of Ariz., 433 U.S. 350, 383-84 (1977).
5. Callender, *supra* note 1, at 98.
6. *Id*. at 98-99.
7. *Id*. at 99-100.

II. HISTORY OF ATTORNEY ADVERTISING REGULATION

A. The Lifting of the Total Ban on Attorney Advertising

Previously, advertising by attorneys was completely banned.[8] The U.S. Supreme Court decision in *Bates v. State Bar of Arizona* lifted the ban against attorney advertising in certain circumstances and extended the First Amendment's protection to include commercial speech by attorneys.[9]

In *Bates,* the Court overturned the Arizona Supreme Court's decision to uphold the disciplining of two Arizona attorneys for violating Arizona's total ban on advertising by placing an ad in a newspaper advertising their law office.[10] In its analysis, the Court recognized that the First Amendment had long been held to afford protection to commercial speech.[11] Writing for the majority, Justice Blackmun wrote, "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role. . . . In short, such speech serves individual and societal interests in assuring informed and reliable decision-making."[12]

The Court addressed and rejected a number of arguments against attorney advertising in its decision.[13] First, the Court addressed the argument that advertising would serve to commercialize what is a service-oriented profession and undermine the profession's public image.[14] The Court commended such an ideal view of the practice of law, but it also noted that the practice of law is, at least partially, a commercial enterprise in which clients do not employ "an attorney with the expectation that his services will be rendered free of charge."[15] Further, the Court was not persuaded that advertising would undermine the public's image of attorneys.[16] In fact, the Court noted that the lack of advertising by attorneys may leave the public intimidated and ill-equipped to seek the services of an attorney; further, a lack of advertising may be viewed as a failure to reach out to the public.[17]

Second, the Court reasoned that advertising by attorneys is not inherently misleading, even though, by itself, advertising would not provide a sufficient basis on which to select an attorney.[18] The Court found it hard to justify a restriction on the free flow of information on the premise that there would be an insufficient flow of information.[19]

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8. Daniel M. Filler, *Lawyers in the Yellow Pages*, 14 LAW & LIT. 169, 173 (2002).
9. *Bates,* 433 U.S. at 384.
10. *Id.*
11. *Id.* at 363.
12. *Id.* at 364.
13. *Id.* at 368-79.
14. *Bates*, 433 U.S. at 368.
15. *Id.* at 368-69.
16. *Id.* at 369.
17. *Id.* at 370.
18. *Id.* at 372-74.
19. *Bates*, 433 U.S. at 372-74.

Third, the Court found that attorney advertisements would likely not adversely impact the administration of justice.[20] The Court believed that, though advertising might increase the overall number of lawsuits filed, low and moderate income individuals who were denied access to legal services by the lack of advertising would gain access to those services. Any fraudulent claims generated by advertising would be screened by attorneys themselves.[21]

Fourth, the Court rejected the argument that advertising would increase attorney operating costs which would be passed on to clients. Generally, competition in a free market place causes consumer prices to drop.[22] The Court also rejected the assertion that if there was a proliferation of standardized fees due to advertising, the quality of legal services would be compromised by a one-size-fits-all approach.[23] Finally, the Court rejected the idea that regulating as opposed to banning attorney advertising would be unduly burdensome to state bar associations.[24]

For the above reasons, the Court found that as long as the commercial speech was limited to truthful statements about the nature and prices of legal services, it was protected by the First Amendment.[25] However, the majority in *Bates* expressly limited its holding.[26]

First, advertising that was false or misleading may be regulated.[27] Second, in-person solicitation was excluded from the scope of its ruling.[28] Third, the States may place reasonable time, place, and manner regulations on attorney advertising.[29] In addition, Justice Blackmun foreshadowed the debate over the special treatment of television advertising writing, "the special problems of advertising on the electronic broadcast media will warrant special consideration."[30]

After the *Bates* decision, the U.S. Supreme Court addressed many, but not all, of the issues left unanswered. Generally, the Court's decisions appear to fall into two categories: (1) in-person solicitations and (2) print media.[31] The Court examined regulation of in-person solicitations in *Ohralik v. Ohio State Bar*[32] and the use of print media in both *Zauderer v. Supreme Court of Ohio*[33] and *Shapero v. Kentucky Bar Association.*[34]

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20. *Id.*
21. *Id.*
22. *Id.* at 377.
23. *Id.* at 378.
24. *Bates*, 433 U.S. at 379.
25. *Id.* at 383.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Bates*, 433 U.S. at 384.
30. *Id.*
31. Callender, *supra* note 1, at 98.
32. 436 U.S. 447 (1978).
33. 471 U.S. 626 (1985).
34. 486 U.S. 466 (1988).

B. The Total Ban on In-Person Solicitation

In *Ohralik* the Supreme Court upheld Ohio's ban on in-person communication by attorneys when the purpose of the communication was to solicit business.[35] The facts of the case involved an attorney who solicited a young woman who was recovering from injuries (and was still in traction) in the hospital after being involved in a traffic accident.[36] In upholding the ban on in-person solicitation, the Court referenced the limited scope of its decision in *Bates* and noted that commercial speech, while protected by the First Amendment, is not given the same level of protection as non-commercial speech.[37] The Court reasoned that in-person solicitation was distinct from the type of advertising in *Bates* because, "[u]nlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."[38] In addition, the Court found that the potential for harm to the prospective client was greater given the vulnerable condition of the client faced with an attorney "trained in the art of persuasion."[39] In essence, such a solicitation would "disserve the individual and societal interest, identified in *Bates*, in facilitating 'informed and reliable decisionmaking.'"[40]

C. The Use of Graphics in Print Advertisements

A second case decided by the Supreme Court addressed the use of drawings and illustrations in attorney advertisements. In *Zauderer,* the majority ruled that Ohio's ban on the use of drawings and illustrations was unconstitutional because it unnecessarily regulated commercial speech that was neither false nor misleading.[41] Ohio argued that the ban was justified because the use of drawings and illustrations "create[d] unacceptable risks that the public [would] be misled, manipulated, or confused."[42] The majority wrote, "[t]he use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly."[43] The opinion was largely based on the fact that the advertising used by the attorney was a newspaper ad, which was a form of print media.[44] The Court reasoned that while it had left the door open for certain

35. Ohralik v. Ohio State Bar, 436 U.S. 447 (1978). *But see* NAACP v. Button, 371 U.S. 415 (1963) (holding that solicitation for purposes other than financial gain is permissible).
36. *Ohralik*, 436 U.S. at 450.
37. *Id.* at 456.
38. *Id.* at 457.
39. *Id.* at 465.
40. *Id.* at 458 (citing *Bates*, 433 U.S. at 398-99); *see also In re* Primus, 436 U.S. 412 (1978).
41. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647 (1985).
42. *Id.* at 648.
43. *Id.* at 647.
44. *Id.* at 641-42.

types of regulation in *Ohralik*, print advertisements did not pose the same increased risk of "overreaching or undue influence" inherent in in-person solicitations.[45] In addition, the Court recognized that the misuse of illustrations would be difficult to police, but noted:

> Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail.[46]

The Court upheld Ohio's disclosure requirements but prohibited blanket bans of drawings and illustrations in printed advertisements.[47] The Court expressly limited its holding to blanket bans on the use of drawings and illustrations in printed advertisements.[48]

D. Print Advertisements as Solicitation

Targeted direct-mailing for solicitation purposes was later addressed by the Supreme Court in *Shapero*.[49] The case involved the Kentucky Attorney Advertising Commission's denial of a proposed letter intended for potential clients who were the subjects of foreclosure proceedings.[50] At the state level, the Kentucky Supreme Court reviewed and replaced the State's rule against targeted direct-mail solicitation, but maintained the central prohibition against such correspondence initiated by lawyers for pecuniary gain.[51] On review, the U.S. Supreme Court ruled that such a blanket ban on targeted direct-mail solicitation violated the First Amendment's protection of commercial speech.[52] The Court did not agree with the Kentucky Supreme Court's finding that targeted direct-mail was analogous to the in-person solicitation in *Ohralik*.[53] The Court reasoned that, unlike in-person solicitation, written communication does not involve "the coercive force of the personal presence of a trained advocate . . . or the pressure on the potential client for an immediate yes-or-no answer."[54] Furthermore, the Court noted that the potential client was free to throw away such written communica-

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45. *Id*. at 642.
46. *Zauderer,* 471 U.S. at 646.
47. *Id*. at 655-56.
48. *Id*. at 649.
49. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988).
50. *Id*. at 469.
51. *Id*. at 471.
52. *Id*. at 472-74.
53. *Id*. at 474.
54. *Shapero*, 486 U.S. at 475 (citing *Zauderer*, 471 U.S. at 642).

tions.[55] The Court was again unpersuaded by the argument that a total ban on targeted direct mail solicitation was justified due to difficulties in policing such communications.[56] The Court reasoned that the writing itself was a record of the communication and that states could require that such letters first be filed with the state before being sent.[57] The Court emphasized its consistent treatment of printed communications noting, "[o]ur lawyer advertising cases have never distinguished among various modes of written advertising to the general public."[58]

In summary, the Supreme Court has clearly stated that attorney commercial speech is protected by the First Amendment.[59] Deceptive or misleading advertising may be banned absolutely to protect potential clients.[60] In addition, in-person solicitation may be banned because of the risk of undue influence, overreaching, and problems of policing verbal communications.[61] However, printed forms of advertising do not pose the same risks as in-person solicitations and may only be minimally regulated.[62] The Court has left unanswered whether television advertising by attorneys may be restricted, and, if so, to what extent.[63]

III. ATTORNEY ADVERTISING ON TELEVISION

A. Regulation of Television Advertisements

As noted above, it is unclear how states may constitutionally regulate attorney advertising on television. States' regulation of television advertising runs from one extreme to the other. Some states believe that both electronic media and print media should be treated alike.[64] Other states treat the two differently on the belief that electronic media poses special problems—similar to in-person solicitation—which are not present in print media.[65]

The 2002 American Bar Association (ABA) Model Rules would allow attorney advertising on television so long as it is neither false nor misleading.[66] The policy behind such a rule is that television is particularly effective at reaching low and moderate income individuals.[67] Furthermore, the ABA does not believe that it should be in the position of deciding what in-

55. *Id.* at 475-76.
56. *Id.* at 476-77.
57. *Id.* at 476.
58. *Id.* at 473.
59. *Bates*, 433 U.S. at 363.
60. *Id.* at 383.
61. *See Ohralik*, 436 U.S. at 457-58, 464-65.
62. *See Zauderer,* 471 U.S. at 642.
63. Callender, *supra* note 1, at 99.
64. *Id.* (referring to the State of California which only requires that a disclaimer be displayed during the television advertisement).
65. *Id.*
66. MODEL RULES OF PROF'L RESPONSIBILITY R. 7.1-2 (2002).
67. MODEL RULES OF PROF'L RESPONSIBILITY R. 7.2, cmt. 3 (2002).

formation is relevant to the public.[68] Some states have adopted the ABA Model Rules with slight modifications, such as a requirement that a disclaimer be displayed during the advertisement.[69] However, some states have rejected the ABA's approach and have severely restricted attorney advertisements on television.[70]

Iowa and New Jersey advertising rules are examples of severe restrictions of attorney advertising.[71] Iowa disciplinary rules allow an attorney to advertise on television only if the advertisement uses a single, non-dramatic voice with no other background sounds, and only so long as nothing is visually displayed other than the words in print that are being read by the "voice."[72] New Jersey rules prohibit the use of "drawings, animations, dramatizations, music, or lyrics . . . in connection with televised advertising."[73] Both states favor restrictions because they believe that the potential harm posed by television advertising cannot be adequately addressed by merely prohibiting false or misleading advertising.[74]

B. Constitutionality of Regulation of Television Advertising

The constitutionality of restrictions such as those in Iowa and New Jersey rules are still in question.[75] The leading case with respect to regulation of television advertising by attorneys is *Committee on Professional Ethics & Conduct v. Humphrey*.[76] That case involved the airing of three television advertisements for a small law firm in Iowa. Iowa's Ethics Committee found that the advertisement violated Iowa's rules because they contained dramatizations. The firm appealed the decision to the Iowa Supreme Court on First Amendment grounds.[77]

In their first ruling on this case, the Iowa Supreme Court upheld the Iowa rule restricting television advertising by attorneys by relying on the language in *Bates* that "referred to the 'special problems' in electronic media advertising."[78] The Iowa Supreme Court also likened television advertising to the in-person solicitation in *Ohralik* noting, "The Court has said

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68. *Id.*
69. Callender, *supra* note 1.
70. *Id.*
71. Gregory C. Sisk, *Iowa's Legal Ethics Rules—It's Time to Join the Crowd*, 47 DRAKE L. REV. 279, 313 n.157 (1999).
72. IOWA CODE OF PROF'L RESPONSIBILITY DR 2-101(B)(5) (West 1998); Sisk, *supra* note 71.
73. N.J. RULES OF PROF'L CONDUCT 7.2 (West 2002); Callender, *supra* note 1, at 100.
74. Callender, *supra* note 1.
75. Comm. on Prof'l Ethics & Conduct v. Humphrey, 377 N.W.2d 643 (Iowa 1985); *see also* John J. Watkins, *Lawyer Advertising, the Electronic Media, and the First Amendment*, 49 ARK. L. REV. 739, 763 (1997).
76. Watkins, *supra* note 75.
77. Comm. on Prof'l Ethics & Conduct v. Humphrey, 355 N.W.2d 565 (Iowa 1984). This 1984 ruling was the initial appeal of the case to the Iowa Supreme Court. The citation above references the second decision in 1985 by the Iowa Supreme Court after the U.S. Supreme Court vacated and remanded the 1984 decision. *See supra* note 75.
78. *Id.* at 570.

that the state can regulate those types of advertising which result in intrusion, intimidation, overreaching, or undue influence . . . advertisements which are inherently likely to deceive, or which the experience has proven to be subject to abuse."[79] Central to the Iowa court's opinion was the court's belief "that the *Bates* rationale does not apply to irrelevant information. . . . We think the ads here would not aid the public in making the informed decision which is subject to the protection recognized in *Bates.*"[80] The Iowa court reasoned that the television advertisements in question provided irrelevant information because their goal was the promotion of the attorney.[81]

The firm appealed the decision to the U.S. Supreme Court.[82] The Court vacated and remanded the Iowa Supreme Court's judgment for "further consideration in light of *Zauderer*" without any additional clarification.[83] As discussed above, the Court in *Zauderer* had struck down a blanket ban on the use of illustrations in all types of media saying the illustrations "serve[d] important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly."[84]

On remand, the Iowa Supreme Court again upheld its rule prohibiting attorneys from utilizing anything other than "the voice."[85] The Iowa court distinguished *Zauderer* by interpreting it narrowly as only applying to blanket bans on the use of illustrations in print and by citing *Bates* as standing for the proposition that television posed special concerns.[86] Because of the special concerns of abuse and overreaching allegedly inherent in television advertising, the Iowa court again likened television advertising to the in-person solicitation in *Ohralik* as opposed to the printed advertising in *Zauderer*.[87] In its view:

> Electronic media advertising, when contrasted with printed advertising, tolerates much less deliberation by those at whom it is aimed. Both sight and sound are immediate and can be elusive because, for the listener or viewer at least, in a flash they are gone without a trace. Lost is the opportunity accorded to the reader of printed advertisements to pause, to restudy, and to thoughtfully consider.[88]

The Iowa court also noted that electronic advertisements were more difficult to police than printed advertisements because printed advertisements

79. *Id.*
80. *Id.*
81. *Id.*
82. Humphrey v. Comm. on Prof'l Ethics & Conduct, 472 U.S. 1004 (1985).
83. *Id.*; s*ee also* discussion *infra* Part C.
84. *Zauderer,* 471 U.S. at 647.
85. *Humphrey*, 377 N.W.2d at 643.
86. *Id.* at 645-46.
87. *Id.*
88. *Id.*

were easier to document, trace, and preserve.[89] The law firm again appealed the case to the U.S. Supreme Court. To the surprise of most, the Supreme Court dismissed the appeal for want of a substantial federal question.[90] While *Humphrey* may offer little precedential value[91] in future U.S. Supreme Court cases, New Jersey has relied on it to place restrictions on television advertising.[92]

C. Criticism of Harsh Regulation of Television Advertisements

Some commentators have taken exception to the view that television advertising should be likened to in-person solicitation.[93] Television is certainly a powerful tool evidenced by the fact that businesses spend huge amounts of money on advertising.[94] The use of dramatizations and visual elements can be extremely powerful and persuasive. "The fact that a medium is powerful, however, justifies neither its regulation nor the sort of paternalism evidenced in *Humphrey*."[95] Likening television ads to in-person solicitation fails to give due credit to the public and ignores reality. The special treatment of television advertisements can be challenged on a number of fronts.

The justification for regulating the use of advertising on television by attorneys is that: (1) it may unduly influence the viewer and (2) it does not give the viewer enough information to make a rational choice.[96] This is because television ads are usually limited to a short amount of time due to their cost and format.[97] Given this limited format, television advertisements are restricted in the amount of information they may relay and generally communicate using imagery, dramatizations, print, and dialogue.[98] In addition, television advertisements often attempt to evoke emotional responses while simultaneously relaying information.[99]

First, the fear that the public is defenseless against television advertisements is misplaced.[100] The public is aware of the subjective and manipulative nature of television advertising.[101] The majority of Americans have been bombarded with print and television advertisements since they were born; so much in fact that Americans have become immune to traditional

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89. *Id*. at n.2.
90. Humphrey v. Comm. on Prof'l Ethics & Conduct, 475 U.S. 1114 (1986); *see also* Watkins, *supra* note 75 n.142.
91. Watkins, *supra* note 75, at 774.
92. *In re* Felmeister & Issacs, 518 A.2d 188 (N.J. 1986).
93. Callender, *supra* note 1; Watkins, *supra* note 75.
94. Callender, *supra* note 1; Watkins, *supra* note 75.
95. Watkins, *supra* note 75, at 778.
96. Callender, *supra* note 1, at 108.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 110; s*ee also* Watkins, *supra* note 75, at 777.
101. Callender, *supra* note 1, at 110.

forms of advertising—including television commercials.[102] In order to get our attention, companies are placing their products strategically in television shows, movies, or even in video games. Companies place their products on athletes and name stadiums after themselves. Athletes sell advertising space by tattooing company logos on their bodies.[103] Companies have even paid actors in New York City to pose as tourists and ask locals for directions while telling them the virtues of the products they are using.[104] Everyone has an angle . . . and the public knows it. Of course, there are rare exceptions. Even so, regulation should be aimed at the average man. The belief that the public will be unduly influenced by a television advertisement is unfounded and ignores the fact that the public is bombarded with television ads everyday without losing the ability to think for themselves.

Second, the fact that television ads do not give the viewer enough information to make a rational choice immediately after viewing the advertisement is not a legitimate reason to effectively ban television advertising.[105] Whether or not an advertisement is in print form or on television, a responsible decision to retain legal counsel cannot be made based on an advertisement alone.[106] The format of each form of advertising limits the amount of information that may be conveyed. Furthermore, the prospective client will have to consult with at least one attorney, maybe more, before making a decision whether to retain counsel. In this respect, print ads and television ads are similar. Therefore, it is not justifiable to treat print ads and television ads differently on this basis alone.

Third, although television ads are different from print ads, they are more like print ads than in-person solicitations.[107] First, viewers have the power to avoid watching television commercials easily by using their remote control to change the channel, by looking away, or leaving the room.[108] Television ads are one-way communications separated by time and distance.[109] In-person solicitations are two way communications that occur face-to-face in real time.[110] Moreover, unlike in-person solicitations, television advertisements do not pressure the viewer to make an immediate

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102. *Id.*

103. Michael McCarthy, *Ad Tattoos Get Under Some People's Skins*, USA TODAY, Apr. 4, 2002, *available at* 2002 WL 4723366 (reporting that more than twenty boxers and three *Celebrity Boxing* contestants—Tonya Harding, Todd Bridges, and Danny Bonaduce—placed temporary tattoos for an online casino on their bodies).

104. Melanie Wells, *A Talking Dog Isn't the Only Way to Get Noticed*, WALL ST. J., Sept. 5, 2002, *available at* 2002 WL-WSJ 3405252 (reporting that Sony Ericsson hired 120 actors to pose as tourists in Times Square to talk-up its new cell phone).

105. *See Bates*, 433 U.S. at 350; Callender, *supra* note 1, at 108. It should also be noted that the Iowa regulation in *Humphrey* did not ban television advertising. The regulation only allowed the reading of print by a non-dramatic voice. However, this arguably equates to a total ban because such regulation leaves attorneys with only a token interest in television advertising and such an ad would not be watched by viewers nor would attorneys spend much money on such ads.

106. Callender, *supra* note 1, at 108.

107. *Id.*

108. Watkins, *supra* note 75, at 778.

109. Callender, *supra* note 1, at 108.

110. *Id.*

decision.[111] Rather, the viewer has time to reflect and consider their options before taking affirmative steps to contact the attorney.[112] Furthermore, television ads are like print ads in that they can be submitted to state bars before approval is given to air them.[113] In short, television ads contain none of the pressures associated with in-person solicitations that were determinative in *Ohralik*.[114] Do we really believe that a still picture leaves the viewer with his mental facilities intact, but a moving picture does not?

Fourth, to the extent that state regulation is aimed at protecting the legal profession's image, it is likely that the current negative image of lawyers has nothing to do with advertising by attorneys.[115] Arguably the image of the profession may actually be improved by allowing television advertising.[116] Most can agree that responsible and dignified advertisements serve to improve the profession's image. However, the standard for what is dignified may be too subjective to be enforced.[117] State bars themselves can undertake television ad campaigns to improve the image of the profession. Moreover, it is likely that the market will weed out attorneys who persist in airing distasteful advertisements.[118] It would be bizarre indeed for a state bar to forego using such a powerful tool to improve the tarnished image of attorneys and hypocritical for a state bar to effectively ban television advertising and not apply the same standards to themselves.

Finally, justice may require that television advertising by attorneys be allowed.[119] Television advertising is particularly effective at reaching low to moderate income individuals.[120] Many rely on television as their main source of information either out of personal preference or necessity.[121] It should be noted that many low income individuals are functionally illiterate and television may be their only means of gaining access to legal information.[122] In addition, since most advertising is done by plaintiffs' attorneys as opposed to large firms, the type of legal work desired by the public is placed

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111. *Id.*
112. *Id.*
113. *Id.*
114. Callender, *supra* note 1, at 108.
115. Christopher M. Mensoian, *Bates, the Model Rules and Attorney Advertising*, 32 MCGEORGE L. REV. 77, 79 (2000); s*ee also* Jonathan K. Van Patten, *Lawyer Advertising, Professional Ethics, and the Constitution*, 40 S.D. L. REV. 212 (1995) (arguing that the negative image of plaintiff's attorneys is a result of marketing and litigation strategy by corporate defense attorneys).
116. *See* Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States? An Alternative Perspective and New Empirical Evidence*, 27 J. LEGAL STUD. 503 (1998); Christopher R. Lavoie, *Have You Been Injured in an Accident? The Problem of Lawyer Advertising and Solicitation*, 30 SUFFOLK U. L. REV. 413 (1997); Whitney Thier*, In A Dignified Manner: The Bar, The Court, and Lawyer Advertising*, 66 TUL. L. REV. 527 (1991).
117. Callender, *supra* note 1, at 106.
118. *Id.* at 107.
119. Watkins, *supra* note 75, at 780.
120. *Id.*
121. *Id.*
122. *Id.*; s*ee also In re* Petition for Rule of Court Governing Lawyer Adver., 564 S.W.2d 638, 643 (Tenn. 1978) (citing a study that estimated there were 40 million functionally illiterate American citizens).

out of reach for many.[123] Also, market pressures would serve to drive down prices making legal services more accessible.[124] Thus, with fewer restrictions on advertising, the market would serve to reach a segment of society that has been traditionally under-serviced.

IV. CONCLUSION

In conclusion, there is an ongoing argument concerning whether television advertisements should be given special treatment or treated in a similar fashion as print media. The ABA has taken the position that the best approach is to treat television advertising as it would print media—restricting only false or misleading speech.[125] Many state bars disagree and believe that the power of television advertising is inherently dangerous.[126] The decision by state bars on how best to regulate such advertising largely depends on their view of the American public. The more paternalistic the state bar, the more heavily they will restrict advertising on television.[127] The U.S. Supreme Court has not answered the question of constitutionality definitively.[128] The only bright line drawn by the Supreme Court with reference to television advertising so far is that it may be neither false nor misleading.[129] Arguably, any further restrictions on television advertising by attorneys infringes on First Amendment rights and is based on an irrational fear that the American public will be unduly influenced by such advertising. A more moderate approach, one that does not create a special category for television advertisements as opposed to print advertisements, would seem to be more just to attorneys and the public alike.

J. Alick Henderson

123. Watkins, *supra* note 75, at 780.
124. Mensoian, *supra* note 115, at 80.
125. MODEL RULES OF PROF'L RESPONSIBILITY R. 7.1-2 (2002).
126. Sisk, *supra* note 71, at n.157.
127. Callender, *supra* note 1, at 110.
128. *Humphrey*, 475 U.S. at 1114.
129. *Bates*, 433 U.S. at 383.

CRIMINAL DEFENDANT PERJURY: WHAT DOES ONE DO?

I. INTRODUCTION

Many people assume that a defendant is lying when he takes the stand and tells his side of the story. This is the natural reaction for many people. They automatically assume that the defendant is guilty and his side of the story is fabricated just to get himself off. The person might even believe that the defendant's lawyer knows he is lying and is helping out with this entire charade. Assume for a minute that the defendant is lying and that the lawyer knew that the defendant would be committing perjury. If this is the case, then what should the lawyer do? Essentially, that is the dilemma this Article will discuss.

First, the basic issue of potential client perjury in the criminal setting will be examined. This issue comes down to whether Mode Rule 1.6 and 1.3 carry more weight then Model Rule 3.3.[1] Next, this Article will examine the issue of identifying a perjury problem where the rules conflict with each other. Finally, there will be an examination of the different options with which a lawyer is presented if his client intends to commit perjury. The pros and cons of each option will also be discussed, which will illustrate that no one option is considered perfect.

II. BASIC ISSUE OF POTENTIAL CLIENT PERJURY

When a client tells his lawyer that he is going to commit perjury, the Model Rules suddenly come into conflict with each other. As noted professor Monroe Freedman puts it, this is called the perjury trilemma.[2] The conflict arises because Model Rules 1.3—Diligence and Rule 1.6(a)—Confidentiality of Information conflict with Rule 3.3(a)(3)—Candor Toward the Tribunal.[3]

A lawyer has the responsibility of acting "with reasonable diligence" while representing his client.[4] This incorporates that the lawyer shall act with "zeal" in their advocacy of their client.[5] Further, a lawyer is also required to "not reveal information relating to the representation of a client"; i.e., they must protect the client's confidences.[6] These two duties make up

1. MODEL RULES OF PROF'L CONDUCT R. 1.3, 1.6(a), 3.3(a)(3) (2002).
2. Monroe H. Freedman, *Controversial No More–The Perjury Trilemma Revisited*, 9 PROF. LAW. 2 (1998) (discussing the conflicts that make up the perjury trilemma).
3. MODEL RULES OF PROF'L CONDUCT R. 1.3, 1.6(a), 3.3(a)(3) (2002).
4. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2002).
5. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2002).
6. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2002).

one side of the issue. Finally, a lawyer "shall not knowingly . . . offer evidence that the lawyer knows to be false."[7] Here if the lawyer "knows" the client intends on committing perjury, then the lawyer must try to dissuade the client from the perjury, not allow the testimony, try to withdraw, or if none of these are possible, disclose to the court the client's intention to commit perjury.[8]

These rules lead to a choice for the lawyer faced with a client that intends to commit perjury. The lawyer must choose between being a zealous advocate and protecting the client's confidences versus honoring his duty to the court of being truthful by not offering false evidence. As stated by one of the most eminent ethics experts, Professor Geoffrey Hazard, "these duties are inherently incompatible."[9] One cannot disclose intended perjury and at the same time be a zealous advocate for the client and protect his confidences. Therefore, when the lawyer decides what course of action to take, he will, in essence, choose which of the rules he values most.

III. IS THERE A PERJURY PROBLEM?

The trilemma does not necessarily come into play every time one might think their client is going to lie on the stand. There must be something more substantial than a mere suspicion or hunch that a client intends to commit perjury. The lawyer must *know* that the client intends to commit perjury before the duty to disclose can even arise.[10] The question then becomes, when does a lawyer know that his client intends on committing perjury?

The Model Rules provide some direction in helping one find out what "know" means.[11] They tell us that knowledge is not a "reasonable belief that evidence is false."[12] The ABA says that knowledge is generally "based on admissions the client has made to the lawyer."[13] Knowledge, as the Model Rules state, "may be inferred from [the] circumstances."[14] This means even though there is not a client admission the lawyer "cannot ignore an obvious falsehood."[15] Thus, under the Model Rules and the ABA, a lawyer can know of perjury through the client's admission prior to his committing perjury. The lawyer might also know through inference, which means

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7. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2002).
8. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 353 (1987) (lawyer's responsibility with relation to client perjury).
9. Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 HOFSTRA L. REV. 1041, 1049 (1997) (explaining how the duties in the different Model Rules, are incompatible with each other).
10. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 353 (1987) (lawyer's responsibility with relation to client perjury).
11. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 8 (2002).
12. *Id*.
13. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 353 (1987) (lawyer's responsibility with relation to client perjury).
14. MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (2002).
15. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 8 (2002).

that one can not put their head in the sand and say "I did not know." Finally, knowledge is something higher than having a reasonable belief.

Irrespective of what the above rules state, many jurisdictions have come up with their own level of knowledge or what constitutes knowledge. The most famous case involving intended client perjury is the Supreme Court case of *Nix v. Whiteside*.[16] The client, Whiteside, was convicted of second degree murder. Whiteside originally told his lawyer that he was acting in self defense because he had seen the victim reaching for a gun.[17] His lawyer then learned from Whiteside that he had not actually seen the gun, but that he was convinced that the victim had one.[18] A week before the trial was to begin, Whiteside, for the first time, stated that he saw something metallic in his victim's hand.[19] Whiteside then said "[i]f I don't say I saw a gun, I'm dead."[20] Whiteside's attorney concluded that Whiteside's new version of the story would be perjury. The lawyer then told Whiteside that he could not present perjury and that if Whiteside insisted on testifying to this new version then it would have to be disclosed to the court.[21] Whiteside ended up testifying truthfully and was subsequently convicted.

Whiteside then brought a writ of habeas corpus action saying that he was denied effective assistance of counsel and denied his right to present a defense because his attorney refused to allow him to testify in the manner that he wanted.[22] The Court allowed the client's express admission of a clear intent to go through with perjury as sufficient to amount to actual knowledge by the defense lawyer.[23] *Nix* is an example of the Court following the ABA standard of knowledge.

In other cases, such as *Whiteside v. Scurr*, the Eighth Circuit adopted a "firm factual basis" standard, which means a lawyer must possess a firm factual basis to conclude that the client is going to commit perjury.[24] Yet other courts have used the "beyond a reasonable doubt" standard, such as in *Commonwealth v Alderman*.[25]

These are some of the different standards of "knowing" which illustrate that the definition of knowledge depends on the jurisdiction. If the standard is met, the option of disclosure becomes available to the lawyer. Once that occurs, the conflicting duties of an attorney come into play. The next section presents the options available to the attorney when he knows the client intends on committing perjury.

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16. Nix v. Whiteside, 475 U.S. 157 (1986).
17. *Nix*, 475 U.S. at 160.
18. *Id.*
19. *Id.* at 161.
20. *Id.*
21. *Id.*
22. *Nix*, 475 U.S. at 162.
23. *Id.* at 174.
24. 744 F.2d. 1323 (8th Cir. 1984), *rev'd sub nom.* Nix v. Whiteside, 475 U.S. 157 (1986).
25. 437 A.2d 36 (Pa. Super. Ct. 1981).

IV. OPTIONS AVAILABLE TO THE ATTORNEY

Assuming the attorney "knows" that the client intends on committing perjury, what are the different courses of action that he may take? None of the alternatives give a perfect answer—meaning one allowing the attorney to meet all of his duties—but they are essentially the only options currently available. The attorney's choice comes down to his own value system and what he treats as more important, client confidentiality or truth to the court.

A. Persuade the Client Not to Commit Perjury

No matter what alternative is chosen, an attorney must first make an attempt at persuasion against perjury. The Supreme Court has said "[i]t is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct."[26] The Model Rules also agree "the lawyer should seek to persuade the client that the evidence should not be offered."[27]

The lawyer should present to the client the risks and adverse effects of client perjury. The lawyer can tell the client that a liar is often caught when attempting to do so in court.[28] Also, the lawyer should tell the client that their story will be viewed with doubt and that doubt only increases when the prosecutor seizes "upon inconsistencies and discrepancies in the client's testimony."[29] If exposed, the inconsistencies and discrepancies will make the client appear to be even guiltier.[30] Further, if the judge believes that the client is lying, the judge may consider this in sentencing and increase the client's sentence.[31]

Some clients, in fact probably most, will reconsider their course of action after such warnings against perjury have been presented. If the client decides not to commit perjury, the issue is over—case closed. What, however, does the attorney do if the client still insists on lying? The following are alternatives the attorney may elect.

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26. *Nix*, 475 U.S. at 169.

27. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 6 (2002).

28. Charles F. Thompson, Jr., *The Attorney's Ethical Obligations when Faced with Client Perjury*, 42 S.C. L. REV. 973, 989 (1991) (providing risks of perjury that can be explained to the client in an attempt to dissuade the client from perjury).

29. *Id*.

30. Brian Slipakoff & Roshini Thayaparan, *The Criminal Defense Attorney Facing Prospective Client Perjury*, 15 GEO. J. LEGAL ETHICS 935, 948 (2002) (providing risks of perjury that can be explained to the client in an attempt to dissuade the client from perjury).

31. Donald Liskov, *Criminal Defendant Perjury: A Lawyer's Choice Between Ethics, the Constitution, and the Truth*, 28 NEW ENG. L. REV. 881, 900 (1994) (explaining risk of an increased sentence if the client is found guilty and the judge believes the client was committing perjury).

B. The Model Rules Approach—Disclosure

The Model Rules and ABA say that the first thing a lawyer should do is try to persuade the client from committing perjury.[32] Further, the attorney should tell the client about his duty to report perjury to the court.[33] The attorney can still have the client testify on matters that the attorney thinks the client will testify truthfully, but cannot elicit testimony from the client that he knows is false.[34] If, however, the client still intends on testifying falsely, there is not any truthful testimony to elicit, and it is not possible for the attorney to withdraw, then the attorney should reveal to the court the intended perjury by the client.[35]

This alternative places the lawyer's duty to the court over his or her duty to the client to keep confidences and to be a zealous advocate. One advantage of this approach is that it allows "involvement of the judge as a neutral arbiter in testing whether or not defense counsels' conclusion that the defendant does in fact intend to give perjured testimony is justified, and if so, what to do about [it]."[36] This method also places the search for the truth as the most important, which some people say is the purpose of the legal system.[37]

Nonetheless, there are numerous criticisms of the disclosure approach advocated in the Model Rules. The first criticism is disclosure may cause severe harm to the attorney-client relationship.[38] If a lawyer discloses to the court, the client will certainly not trust the lawyer any further if he or she tries to continue on with the representation. Also, as one commentator has noted, the warning that the attorney would disclose intended client perjury, is "a jarring note of discord in a relationship meant to be one of trust, confidence, and zealous devotion of lawyer to client."[39]

Another criticism is that threatening disclosure will cause clients to be less forthcoming with their attorney.[40] If the client suspects that the lawyer will disclose confidential information, the client will simply not tell his lawyer the full story. The client may withhold information so that the attor-

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32. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 6 (2002).
33. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 353 (1987) (lawyer's responsibility with relation to client perjury).
34. MODEL RULES OF PROFESSIONAL CONDUCT R. 3.3 cmt. 6 (2002).
35. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 353 (1987) (lawyer's responsibility with relation to client perjury).
36. Slipakoff & Thayaparan, *supra* note 30, at 949 (discussing the benefits of the disclosure method).
37. *Id.*
38. *Id.* (discussing the criticisms of the disclosure method, including destruction of the attorney-client relationship).
39. Marvin E. Frankel, *Clients' Perjury and Lawyers' Options*, 1 J. INST. FOR STUDY LEGAL ETHICS 25, 35 (1996) (discussing how a warning to a client that the lawyer must disclose perjury can cause major disruption in the attorney-client relationship).
40. Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1953 (1988) (explaining how disclosure or the threat will cause clients to not give much information to the attorney).

ney is not able to pick up on the perjury and, as such, will not be forced to disclose. Basically, the client becomes very reluctant to give the attorney information if it is known that the attorney very well might disclose such information to the court.[41] All of this adds up to the attorney not getting all the information needed to "construct a defense, thus, jeopardizing the effectiveness of counsel's representation."[42]

Another objection is disclosure actually hinders the search for the truth, which so many people claim the disclosure rules are aimed at achieving.[43] The argument goes: if allowed to commit the perjury, the jury could pick up the sensational story which actually gives a strong indication of guilt.[44] This does not happen if disclosure to the court occurs so that the client is not able to take the stand. If allowed to testify, the jury would now have this extra piece of information—the client is a liar—which would cast doubt upon his entire defense strategy.[45]

Finally, the issue that one is dealing with here is potential client perjury. The client has not actually committed perjury; rather, he/she is only contemplating perjury.[46] The lawyer "must accurately predict the actual testimony of the defendant at a particular point in the future."[47] So, there must be a judgment before anything wrong or illegal has actually occurred. All of this criticism has caused Professor Hazard to conclude that "requiring a criminal defense lawyer to 'blow the whistle' on client perjury is futile or counterproductive."[48]

C. The Narrative Approach

The next alternative is called the narrative approach. If the attorney believes that client will commit perjury and the defendant goes ahead with his testimony, the attorney allows the client to give a narrative version of his side of the story and does not help.[49] The attorney does not ask any questions and just lets the client talk and tell his side. Additionally, the attorney does not refer to the client's testimony during opening or closing arguments.[50]

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41. Jay Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 418 (1994).
42. *Id.*
43. *Id.* at 355 (explaining how allowing a client to commit perjury actually helps the search for the truth, not hinder it).
44. *Id.*
45. *Id.*
46. Slipakoff & Thayaparan, *supra* note 30, at 949 (providing one criticism of the disclosure rules as involving potential client perjury and not actual perjury at this stage).
47. Silver, *supra* note 41, at 388 (explaining the difficult task of having to predict future testimony when one decides to disclose intended client perjury).
48. Hazard, *supra* note 9, at 1060 (concluding that requiring disclosure of perjury is futile).
49. Silver, *supra* note 41, at 419 (describing the narrative approach).
50. *Id.* at 419-20.

The Supreme Court does not particularly like this method,[51] nor does the ABA.[52] Despite this, numerous courts have approved the narrative approach.[53] Depending on one's jurisdiction, the narrative approach might be an accepted alternative.

One advantage of the narrative approach is that it "leaves the lawyer's hands clean of any wrongdoing."[54] The lawyer is not "actively presenting perjury to the court."[55] Another advantage is the attorney-client relationship can still be preserved or, at least, has a better chance of being preserved than the disclosure alternative.[56]

Additionally, it is claimed that if the lawyer uses the narrative approach and he is incorrect about his assumption that the client will lie, then this approach best mitigates the harm of the incorrect assumption.[57] This occurs because once the lawyer realizes during the narrative that the client is testifying truthfully, the attorney can begin engaging the client in the traditional manner. This technique also might persuade the client from committing the perjury.[58] If the client knows that he will not be engaged by his lawyer in the normal manner, this might be enough to convince the client not to commit perjury or not to testify.[59]

This method, however, has been harshly criticized because it effectively discloses that the attorney believes his client is committing perjury.[60] This method, as mentioned earlier, is very different then the normal direct examination of a defendant. This means that it immediately becomes apparent to all what is happening and what it means. Therefore this method "implicitly informs the court that counsel believes that the defendant is testifying falsely."[61] Furthermore, even if this is not obvious to the jury, the prosecutor will certainly make it obvious to them in cross-examination and in clos-

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51. *Nix*, 475 U.S. at 170-71.

52. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 353 (1987) (stating that "lawyer can no longer rely on the narrative approach to insulate the lawyer from a charge of assisting the client's perjury").

53. Lowery v. Cardwell, 575 F.2d 727, 731 (9th Cir. 1978); Coleman v. State, 621 P.2d 869, 881 (Alaska, 1980); State v. Layton, 432 S.E.2d 740, 754-55 (W. Va. 1993); Butler v. United States, 414 A.2d 844, 850 (D.C. Cir. 1980); Sanborn v. State, 474 So. 2d 309, 313 (Fla. Dist. Ct. App. 1985); Shockley v. State, 565 A.2d 1373, 1377 (Del. 1989); State v. Fosnight, 679 P.2d 174, 180-81 (Kan. 1984); People v. Bartee, 566 N.E.2d 855, 857 (Ill. App. Ct. 1991).

54. Slipakoff & Thayaparan, *supra* note 30, at 951 (discussing the advantages of the narrative approach to potential client perjury).

55. *Id*.

56. *Id*. at 952.

57. *Id*. at 951.

58. Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 546 (1988) (stating that the narrative approach might dissuade clients from perjury if they knew the attorney was not going to engage them in the normal manner).

59. Slipakoff & Thayaparan, *supra* note 30, at 952 (stating that the narrative approach might dissuade clients from perjury if they knew the attorney was not going to engage them in the normal manner).

60. Liskov, *supra* note 31, at 906 (stating the narrative method makes it obvious that the attorney believes the client is committing perjury).

61. Slipakoff & Thayaparan, *supra* note 30, at 952 (suggesting that narrative method does not come out and make a direct disclosure but it has the same practical effect).

ing argument. This method, therefore, attempts to avoid disclosure, but, in effect, still discloses client perjury.

Another criticism is that this technique taints the entire narrative.[62] The client might falsely testify about only a portion of his testimony, but the taint of perjury would likely apply to all of the testimony.[63] Further, the lack of questioning and helping the client present his testimony would limit the effectiveness of this technique.[64] Also the attorney is required to be a zealous advocate.[65] This duty is not met by the narrative approach, as this method does not help the client present his testimony; while, at the same time, it effectively discloses to everyone that the testimony is perjury.

D. Allow the Perjury

In complete opposition to the Model Rules, another alternative is to help with the presentation of the perjury and, as such, allow it to happen. This view is championed by Monroe Freedman, who says that a criminal attorney can knowingly present perjury without having to disclose it.[66] Freedman argues that the attorney should first try to dissuade the client from the intended perjury.[67] He then argues the attorney should lay out the negative consequences of perjury and getting caught committing perjury, but should not threaten the client with disclosure to the court.[68] Finally, he says that if the client still intends on committing perjury, the attorney should withdraw, if possible, but if not, then the attorney should present the client's testimony in the normal way and proceed as if the testimony is true.[69] This method places the client's confidentiality and zealous advocacy as more important then the duty of candor to the court.

One advantage claimed by this method is it best preserves the defendant's right to testify. As set out in *Rock v. Arkansas*, a criminal defendant has a constitutional right to testify.[70] By allowing the defendant to testify, this right is hampered in the least possible way. Another positive is based on the theory that the criminal justice system assumes perjury.[71] This assumption is held in check by cross-examination, which will bring to light any client perjury.[72] This alternative allows perjury, but the cross-

62. Silver, *supra* note 41, at 422 (stating the narrative approach taints all the testimony including the truthful testimony).
63. *Id.*
64. Slipakoff & Thayaparan, *supra* note 30, at 952 (suggesting that the narrative method is not that effective since the attorney does not ask questions and in no way helps the client present the testimony).
65. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2002).
66. Freedman, *supra* note 2, at 2 (providing a brief explanation of his approach).
67. Freedman, *supra* note 40, at 1953 (explaining thoroughly what he thinks should be done if faced with potential client perjury).
68. *Id.*
69. *Id.*
70. 483 U.S. 44, 49 (1987).
71. Freedman, *supra* note 40, at 1950 (explaining how the criminal justice system assumes perjury will occur).
72. *Id.*

examination is the check that will ensure that the system works in the proper manner. Basically, "when a client's fabrication is so obvious that counsel must be held to know that it is such, then the fabrication probably will also be obvious to the trier of fact," especially after cross-examination.[73] Additionally, as mentioned earlier, the disclosure rules hurt the truth process by not allowing the jury to hear from the lying defendant, the converse would be true here under this alternative. [74]

Another positive with this method is the attorney will more easily come to know about the intended client perjury.[75] If any other alternative was used, then the client would not tell the attorney about the perjury, but rather, would hide it and go forward with the perjury unknown to the attorney.[76] This alternative allows the client to tell the attorney without fear of disclosure. Now, since the attorney knows about the perjury, the attorney is at least given the chance to dissuade the client from the perjury, explaining all the attendant risks and consequences.[77]

Finally, this alternative claims to fully save the attorney-client relationship because it does not destroy the relationship in the manner which disclosure does.[78] This method ensures confidentiality and trust, on which the attorney-client relationship is built. This approach puts the client's rights first, which is even more important, considering this is threatened perjury and no perjury has yet been committed.[79]

On the other hand, there are numerous criticisms of this approach. First, no court has adopted this view, which means the attorney will likely have no protection if he proceeds in this manner.[80] Also, even though the client does have a right to testify, the client does not have a right to testify falsely.[81]

Furthermore, as one commentator stated, if a client is going to commit perjury despite warnings by the attorney, there was not much of an attorney-client relationship to begin with for the disclosure to destroy.[82] Another argument against this method is simply one based on principle, the attorney should not have a duty to protect clients that reveal their intention to commit

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73. Hazard, *supra* note 9, at 1052 (stating that perjury will be obvious, even if the attorney is not required to disclose it).

74. *See* Silver, *supra* note 41 and accompanying text.

75. Freedman, *supra* note 40 (discussing how the client will be more willing to tell the attorney about intended perjury if the client knows it will not be disclosed and as such the attorney will now be able to at least try to talk the client out of the perjury).

76. *Id*.

77. *Id*.

78. *See id*. (discussing how disclosure would cause less information flow and how the attorney should keep his duty of confidentiality).

79. Slipakoff & Thayaparan, *supra* note 30, at 950 (discussing the rights of clients, which can be viewed as more important when one is talking about intended client perjury and not perjury that has already been committed).

80. *Id*.

81. *Nix*, 475 U.S. at 173.

82. Thompson, *supra* note 28, at 990 (stating a client that disregards the attorney's advice not to commit perjury does not have much of an attorney-client relationship).

a crime, perjury in this case.[83] If this were allowed, it would act "to foster a significant corruption of defense counsel's appropriate role in the justice system."[84]

E. Withdrawal

The withdrawal approach is allowed by the Model Rules if the client cannot be persuaded from committing perjury.[85] Assuming a court would allow withdrawal, this generally would be a lawyer's next step if dissuasion does not work.[86] This method, however, is mentioned last because it has been almost universally criticized.

The most important argument against withdrawal as an option is that it does not solve the perjury problem. All withdrawal does is get the problem off the current attorney's shoulders and passes it to the next attorney's shoulders.[87] The pass-the-buck method only shifts the problem and does not solve it.

Also, it is likely that a client will be less forthcoming with the new lawyer based upon his experience with his first lawyer.[88] The client probably will not make the same mistakes with the new attorney. Therefore, this increases the chances that the new lawyer will put on the perjury without knowing it.[89] In fact, the client could even be motivated to "lawyer shop" until he finds a lawyer that will present the perjury, or until he finds a lawyer that he can trick into presenting the perjury.[90] So, this method might help the lawyer but it in no way solves the original perjury problem.

V. CONCLUSION

As illustrated above, there is not an alternative that is without downsides and criticisms. They all represent different forms of tradeoffs. Hopefully, persuasion will get the client to change his mind. However, if the client still intends to commit perjury, the attorney must make a decision. The choice will probably depend upon which method is sanctioned in the jurisdiction and the attorney's moral beliefs. The choice will probably also depend on what the attorney values more: maintaining the confidences of the client and being the client's zealous advocate versus his duty of candor to the court.

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83. Lefstein, *supra* note 58, at 546 (stating that an attorney should not have a duty to protect clients that tell the attorney they are going to commit a crime).

84. *Id.* at 524-25.

85. MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1), 3.3 cmt. 10 (2002).

86. *Nix*, 475 U.S. at 170.

87. Lefstein, *supra* note 58, at 526 (stating withdrawal simply passes the client perjury problem onto the next attorney that represents the client).

88. *Id.*

89. *Id.*

90. Thompson, *supra* note 28, at 990 (explaining client might try to lawyer shop by getting attorney to withdraw so as to find one that will allow the client to commit perjury).

Factoring in the above arguments, it seems that the narrative method is the most solid choice, especially if it is allowed by one's controlling jurisdiction. It allows the attorney to take a wait-and-see approach with the intended perjury. If the client ends up testifying truthfully, the attorney can address the client in the customary fashion. Furthermore, strict disclosure has the big drawback of being an all-or-nothing approach. In addition, the attorney must try to accurately predict the testimony of the client. Conversely, allowing the client to commit the perjury and actually helping with it seems to be something completely at odds with the purpose of the criminal justice system. In the world of academia, people might claim that perjury will be obvious if presented in the normal manner. If this were the case, then this would not be an issue because everyone could spot it, and there would be no need for disclosure. Viewing the advantages and drawbacks of each method, the narrative approach appears to provide the most positives with the least amount of negatives.

Ward Henneker

PROSECUTORIAL DEALING WITH THE MEDIA: DUTIES, REMEDIES, AND LIABILITY

I. INTRODUCTION

With the advent of the technological age, more information is available to society at a faster rate than ever before. Necessarily, this affects the legal realm. In regards to criminal law, the largest problems come about when the potential jury pool is contaminated. These problems are compounded by the fact that the Fifth and Fourteenth Amendments constitutionally guarantee the accused due process of law, which is essentially a fair trial. Improper conduct on the part of prosecutors can lead to these types of problems:

> The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial.[1]

The Supreme Court recognized this to be true in 1878, and also set forth a strict standard leaving little recourse to be had if these problems are not

1. Reynolds v. United States, 98 U.S. 145, 155-56 (1878).

corrected during trial. While it may be difficult, it is, of course, possible for an accused to obtain relief after conviction.

II. A PROSECUTOR'S DUTY

The A.B.A. Model Rules of Professional Conduct provide a source of guidance as to the duties that a prosecutor has when making extrajudicial statements to the media. Model Rule 3.8(f), Special Responsibilities of a Prosecutor, directs that a prosecutor not make statements that "have a substantial likelihood of heightening public condemnation of the accused."[2] Statements that are "necessary to inform the public of the nature and the extent of the prosecutor's action and that serve a legitimate law enforcement purpose" are excepted.[3] Additionally, this rule requires that prosecutors exercise reasonable care to prevent other law enforcement personnel from making these types of statements.[4]

The "Trial Publicity Rule," Rule 3.6, is referenced in Rule 3.8 as well. The rule prohibits "[a] lawyer who is participating or has participated in the investigation . . . of a matter" from making "an extrajudicial statement that the lawyer knows or . . . should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing" the proceedings.[5] Specifically, in criminal cases, a lawyer may disseminate the name of the accused, his or her address, occupation, and family status, as well as information necessary to apprehend him or her, the circumstances of his or her arrest, and the investigator's name.[6] This standard would pass constitutional muster.[7] The Seventh Circuit has previously considered that a "reasonably likely to interfere" rule was constitutional as applied to prosecutors, but should not be the standard to judge defense counsel.[8] The court's discussion implies that the prosecutor's obligations are more widespread than those of the defense, and their ability to prejudice the proceedings is greater.[9]

The rights of the accused are not the only ones that a prosecutor may violate through extrajudicial statements. The prosecutor should also refrain from making comments about judicial and legal officials unless he knows them to be true.[10] Not only could the prosecutor face disciplinary action, he could alienate court personnel or even the judge, thereby making his own job harder in the long run.

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2. MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2002).
3. *Id.*
4. *Id.*
5. MODEL RULES OF PROF'L CONDUCT R. 3.6 (2002).
6. *Id.*
7. Gentile v. State Bar, 501 U.S. 1030 (1991).
8. Chi. Council of Lawyers v. Bauer, 522 F.2d 242, 249-253 (7th Cir. 1975).
9. *See id.*
10. MODEL RULES OF PROF'L CONDUCT R. 8.2 (2002).

Due to a combination of ethical rules and constitutional guarantees to an accused, a prosecutor must limit extrajudicial statements to accommodate these rules and rights. Also, a prosecutor must reasonably ensure that subordinates do not make statements of this nature. Prosecutors should refrain from making statements concerning grand jury material, references to the defendant's bad character, the heinous nature of the crime, existence or details of a confession, and the criminal record of the accused.[11] Also, the prosecutor should not use information in the public record to create prejudice or talk about trial strategy.[12] The same rules should be observed after or during trial as before for the same reasons of fairness. After a verdict, the prosecutor should not make any comments that might affect the defendant's sentencing.[13]

A prosecutor should also not discuss the need for legislation in certain areas, specifically after a guilty verdict and before sentencing. Public comment by the prosecutor could unfairly influence the sentencing of the defendant. In *Stroble v. California,* a prosecutor made comments about legislation concerning Stroble's offense and the newspapers published Stroble's name and case details along with these comments.[14]

Essentially, before, during and after trial, a prosecutor should make no comments that may prejudice the defendant. The rules of evidence provide a helpful rule of thumb in deciding what a prosecutor can and cannot discuss with the press: If the evidentiary rules bar a matter from being raised at trial, then that same matter should not be aired before the press. Statements to the media can cause problems for a prosecutor in cases involving a defendant's silence, cooperation or lack thereof, or confession. Not only is the potential for disciplinary proceedings present, but cases could possibly be lost due to statements to the press.

In *Sheppard v Maxwell,* an Assistant County Attorney "sharply criticized the refusal of the Sheppard family to permit his immediate questioning, [and] [f]rom there on headline stories repeatedly stressed Sheppard's lack of cooperation with the police and other officials."[15] Later, the attorney commented on Sheppard's refusal to take a lie detector test.[16] The Supreme Court reversed the decision, leaving it to the state to bring charges and conduct the trial properly if they so desired.[17] The result in the case can, however, be misleading. The reason for the reversal was not only the prosecutor's statements, but also the lack of curative measures instituted by the trial judge.[18] "The fact that many of the prejudicial news items can be traced to

11. BENNETT L GERSHMAN, PROSECUTORIAL MISCONDUCT §§ 6:3-6:7 (2d ed. 2002).
12. *Id.* §§ 6:8-6:9.
13. *Id.* § 6:12.
14. Stroble v. California, 343 U.S. 181, 193 (1952).
15. 384 U.S. 333, 338 (1996).
16. *Sheppard,* 384 U.S. at 339.
17. *See Sheppard,* 384 U.S. 333.
18. *Id.* at 361.

the prosecution . . . aggravates the judge's failure to take any action."[19] The court goes on to lay out the various remedies that could have been used, but were not, to correct the prejudice.[20]

Revealing the existence of a confession, or any details of that confession, to the media is also a violation of ethical rules and a probable violation of the defendant's Fifth and Fourteenth Amendment due process rights. In *Stroble,* the accused claimed that a fair trial was impossible because of newspaper reports the D.A. had inspired.[21] As Stroble gave a confession, the District Attorney was releasing it at periodic intervals.[22] The entire text was later reprinted in the news.[23] Also, "[t]he District Attorney announced to the press his belief that petitioner was guilty and sane."[24] While the court announced that it did not endorse and in fact "deprecate[d]" the actions of the District Attorney, the ruling was affirmed because Stroble failed to show the prejudice he claimed.[25]

III. REMEDIES

In both *Sheppard* and *Stroble,* the prosecutors violated their ethical duties regarding the media.[26] Thus, the rights of the accused were violated. However, just because a prosecutor does violate one of these duties, the error is not terminal.[27] Often there are little or no sanctions for this behavior.[28] For this to be a terminal error, more than simply prosecutorial misconduct is required because the court itself has a duty, as well as several available remedies, to cure these errors during trial.[29] Remedies such as voir dire, change of venue, granting a continuance, sequestration, dismissal of a juror, and contempt can redress these wrongs.[30] In *Sheppard,* the court expressed its preference for remedial measures to cure prejudice at the trial itself rather than relying upon the appellate court for a reversal.[31]

Voir dire can be used to redress statements to the media that have created prejudice. Voir dire eliminated the problems present in *Stroble*:

> [T]he jurors were all thoroughly examined and all definitely stated that they would give to the defendant the benefit of the presumption of innocence. . . . There is nothing to show those jurors ever saw

19. *Id.*
20. *Id.*
21. *See Stroble*, 343 U.S. 181.
22. *Id.* at 192.
23. *Id.*
24. *Id.*
25. *Id*. at 193.
26. *See Sheppard*, 384 U.S. at 333; *see Stroble*, 343 U.S. at 181.
27. *See Sheppard* at 360-62.
28. *Id.*
29. GERSHMAN, *supra* note 11, § 6:14.
30. GERSHMAN, *supra* note 11, §§ 6:14-6:37.
31. *Sheppard*, 384 U.S. at 363.

> those papers or ever read those papers. They were fully examined so far as defense counsel desired as to any knowledge or information they might have of the case.[32]

However, in *Rideau v. Louisiana,* the court reversed because of the lack of remedial measures employed by the trial judge.[33] Three members of the jury had seen and heard Rideau's confession played on the news.[34] The trial judge denied the defense's challenges for cause in this case, and these individuals were on the jury because the defense had used all of its preemptory challenges.[35]

Also, by granting a continuance a judge can allow the effect of pretrial publicity and prejudice to dissipate. In *Sheppard,* the Supreme Court endorsed the granting of continuances as a remedy to the publicity problem, even though *Stroble* was affirmed.[36] In *Sheppard,* a continuance was the proper remedy for a news broadcast made during the trial by a radio station.[37] However, both the granting of continuances and voir dire, while acceptable remedies in the eyes of the law, carry the assumption that the court fixes the problem with these remedies. Yet, in *Sheppard*, it did not seem to really fix the problem. The information was still disseminated. Neither of these remedies seems to fix the problem.

A change of venue can also be used to cure prejudice by moving the trial to a locality that has not been inundated with the prejudicial news reports. In *Rideau,* the defense moved for a change of venue, but was denied.[38] The defendant's confession, released to the media by the sheriff, was broadcast three times within twenty-four hours of the defendant's apprehension.[39] The district attorney should have made reasonable efforts to control the sheriff in such a situation. Because no other remedies were available to the trial judge, a change of venue might have been the best curative measure for the judge to take in this circumstance. For example, the Oklahoma City bombing trial had a change of venue for similar reasons.[40]

In addition, the jury can be sequestered in response to a defense motion or on the courts own initiative.[41] Sequestration prevents the jury from being exposed to reports that are generated after the start of the trial.[42] Also, a juror can be dismissed if he or she is found to be biased at any time.[43] "In

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32. *Stroble,* 343 U.S. at 194 (alteration in original).
33. Rideau v. Louisiana, 373 U.S. 723 (1963).
34. *Id*.
35. *Id*. at 725.
36. *Sheppard*, 384 U.S. at 363.
37. *Id*. at 346.
38. *Rideau*, 373 U.S. at 724.
39. *Id.*
40. United States v. McVeigh, 955 F. Supp. 1281, 1282 (D. Colo. 1997).
41. GERSHMAN, *supra* note 11, § 6:19.
42. *See Shepard*, 384 U.S. 333.
43. GERSHMAN, *supra* note 11, § 6:20.

cases of pervasive prosecutor-inspired publicity, the trial court has a duty to undertake a voir dire—every day if necessary—to determine whether the publicity has prejudiced any juror."[44]

A new trial can also be ordered to cure extensive prejudice. Although none of these remedies fix the problem completely, some corrective action must be taken by the court. The Supreme Court summarized the issue in *Sheppard* stating:

> [W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered.[45]

Relief due and objections to prejudice of this nature may be waived if not asserted at trial.[46] While the judge should himself consider sequestration, thereby providing some ground for appellate review, at voir dire, the defense counsel should question the jury as to the extent of their knowledge. In addition, a change of venue must be requested by way of motion, otherwise the venue will lie with the original court.

IV. SANCTIONS

More drastic measures, in the format of sanctions, may be imposed for gross levels of misconduct that cannot be or are not remedied by the trial judge. These include: appellate rebuke, reversal, dismissal of indictments, mistrial as a bar to re-prosecution, contempt, and disqualification.[47] Although the more drastic remedies are seldom used, their imposition usually results from the appellate review of a case where the trial judge did little or nothing to correct the prejudice at trial.[48]

First, appellate rebuke of a prosecutor is a sanction that can be imposed for misconduct. "Rebuke by an appellate court is an effective sanction for media-related misconduct by a prosecutor."[49] In *Allen v. United States* the circuit court stated, "[m]ore reprehensible is the conduct of a prosecuting attorney seeking notoriety."[50] While the Supreme Court utilized this "sanction" in *Stroble*, the Court concluded that the result would have been the

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44. *Id.* § 6:21.
45. *Sheppard*, 384 U.S. at 363.
46. *Id.*
47. GERSHMAN, *supra* note 11.
48. *See Sheppard*, 384 U.S. 333.
49. GERSHMAN, *supra* note 11, § 6:34.
50. Allen v. United States, 4 F.2d 688, 697 (7th Cir. 1924).

same regardless of the misconduct.[51] Appellate rebuke of a prosecutor does not seem to cure the problem or even deter future behavior. The only effect of this sanction is that the court criticizes the prosecutor, while the goal of the misconduct is nevertheless accomplished, and its effect remains in force.

Second, reversal sanctions a prosecutor because the case must be retried. Due process violations can lead to a reversal, or it can occur under a court's supervisory power.[52] In *Sheppard,* there was ultimately a reversal.[53] While the prosecutor's statements contributed to the overall situation, the Court seemed to blame the trial judge because he "did not fulfill his duty to protect Sheppard from the inherent prejudicial publicity."[54]

Third, pretrial publicity that cannot be cured in the judge's opinion can be grounds for a mistrial.[55] If the prosecutor intentionally provokes a mistrial by making improper statements, then his or her actions should bar reprosecution. However, no court has found that a prosecutor has engaged in such action intentionally to provoke a mistrial.[56]

Fourth, contempt can be used to punish a prosecutor for extrajudicial statements.[57] While this does not cure the prejudice, it is a direct sanction on the prosecutor. It is the only sanction, other than disciplinary measures, that punishes the individual prosecutor instead of society.[58] The contempt sanction can be used to punish the prosecutor for statements regarding the accused as well as other parts of the tribunal, such as the judge.[59] "However, in highly publicized cases when a prosecutor participates in publicity, criminal intent is difficult to prove. For this reason, the contempt sanction has been used sparingly."[60]

Fifth, a prosecutor may also be disqualified for making comments to the media that evidence the prosecutor's own personal interests.[61] Pretrial promises of convicting a person or statements that procedure will be disregarded may get a prosecutor disqualified.[62] This is a direct sanction on a prosecutor that will deter more bad-faith behavior because it is levied directly against the prosecutor.

Finally, a prosecutor's dealings with the media may also lead to ethics complaints and disciplinary action by the bar.[63] Violations of ethics rules can subject the attorney to action by his or her local bar association, the

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51. *Stroble*, 343 U.S. at 193.
52. GERSHMAN, *supra* note 11, § 6:26.
53. *See Sheppard*, 384 U.S. at 333.
54. *Id.* at 363.
55. GERSHMAN, *supra* note 11, § 6:20.
56. GERSHMAN, *supra* note 11, § 6:28.
57. *Id.*
58. *Id.* at § 6:29.
59. *Id.*
60. GERSHMAN, *supra* note 11.
61. *Id.*
62. *Id.* at § 6:33.
63. *Id.*

A.B.A., and any other body that governs with ethical rules of which he or she is a member.

Overall, the remedies provided by the court system and the sanctions that may be imposed on prosecutors do not seem to fully address the seriousness of constitutionally depriving an accused of his rights. The remedies only nominally correct the problem, and sanctions are under-imposed and insufficient to deter improper behavior.

V. A PROSECUTOR'S PERSONAL LIABILITY

A prosecutor can, in some instances, be held personally liable for prejudice resulting from publicity. Under 42 U.S.C. §1983, one who acts under the color of state law to deprive another of his or her constitutional rights can be held to answer in a suit for damages. This statute, however, does not provide carte blanche authority to sue prosecutors. Prosecutors enjoy qualified immunity in some instances, and absolute immunity in others, depending on the nature of the allegations.

In *Imbler v. Pachtman,* the Supreme Court concluded that in initiating a prosecution and presenting the state's case prosecutors enjoy absolute immunity from liability.[64] The justifications for this absolute immunity were threefold: (1) at common law, during the time of § 1983, prosecutors enjoyed absolute immunity; (2) frivolous litigation might distract the prosecutor from duty; and (3) the prosecutor's decision-making to protect the public would be impaired.[65] The court limited its holding to this situation.[66]

In *Burns v. Reed,* the Court took a more functional approach, looking at actions of the prosecutor.[67] In *Burns,* the prosecutor had absolute immunity for participation in a pretrial hearing, but not for giving legal advice about the investigation to the police.[68] This investigative function was not shielded by immunity at common law and was not in this instance either. The Court reasoned that in this type of situation, qualified immunity is enough protection.[69] "Under this form of immunity, government officials are not subject to damages liability for the performance of their discretionary functions when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[70] Under *Burns,* the burden is on the proponent of the defense of qualified immunity. The prosecutor in that case failed to meet the burden as to the giving of legal advice during the investigative process.[71]

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64. 424 U.S. 409 (1976).
65. *Id.*
66. *Imbler*, 424 U.S. at 427.
67. 500 U.S. 478 (1991).
68. *Burns*, 500 U.S. at 478.
69. *Id.* at 486-87.
70. Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
71. *See Burns,* 500 U.S. at 478.

In *Buckley v. Fitzsimmons,* the Supreme Court set forth a functional approach for determining whether an action was protected by qualified or absolute immunity. The test evaluates the "nature of the function performed, not the identity of the actor who performed it."[72] To be protected by absolute immunity, the action must be closely associated with the judicial process. In *Buckley*, a prosecutor was only protected by qualified immunity for investigative work he himself had done and for statements to the media.[73] The act is not tied to the judicial function simply because it was executed by a prosecutor. Qualified immunity is all that protects the attorney's advice about the investigation, and all that protects him from investigation he does himself. However, if a prosecutor is performing the "special functions" of a prosecutor, such as being in court and presenting the state's case and evidence, he is entitled to absolute immunity.

VI. CONCLUSION

A prosecutor has a duty to "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and [to] exercise reasonable care to prevent" other law enforcement personnel from doing the same.[74] More importantly, they must also not make statements that they know or reasonably should know "will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[75] However, there are few direct sanctions that can result if the prosecutor breaches these duties. Disciplinary action from ethics boards, contempt, and appellate rebuke seem to be some of the more direct sanctions a prosecutor can face. However, the courtroom remedies employed to cure problems of this nature seem to do little to actually protect an accused subjected to prosecutorial misconduct or actually fix the problem.

Richard W. Holmes

72. *Buckley,* 509 U.S. at 269 (quoting Forrester v. White, 484 U.S. 219, 229 (1988)).
73. *Id.* at 268.
74. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2002).
75. MODEL RULES OF PROF'L CONDUCT R. 3.6 (2002).

SUFFERING IN SILENCE: QUESTIONS REGARDING AN APPLICANT'S MENTAL HEALTH ON BAR APPLICATIONS AND THEIR EFFECT ON LAW STUDENTS NEEDING TREATMENT

I. INTRODUCTION

Ask any attorney what they thought of law school and chances are, whether his or her experience was good or bad, they will tell you that it was one of the most challenging experiences of their life. It may begin with a move to a new city and the need to make new friends and find their way around a new town. This is similar to the experiences one faces when going away to college for the first time. However, with law school and some other particularly rigorous graduate programs, there are the added pressures of a demanding and sometimes overwhelming load of coursework, extreme competition among students for top grades and scarce jobs, and the Socratic method, which can make even the most confident and prepared students, especially in the first year, feel nervous about their competency. We may add to these pressures the fact that many law students are constantly worried about finances since they may be unable to work while in school and are accumulating more and more debt just to support themselves.

These factors, in addition to the general social, family, and other pressures that people face, can lead to a highly stressful experience. While certainly most students handle the stress successfully, others may have a need for extra help from a mental health professional. Students may come to law school with already developed emotional or psychological conditions that worsen under stress. Unfortunately, some students truly needing help may decide against it because the state bar application asks about an applicant's mental health history. How effective are mental health questions? Are they worth the trouble they may cause?

This Article will discuss the purpose of mental health questions on bar applications. It will consider the effects of those questions on bar applicants, including the possible deterrent effect toward those seeking mental health treatment. Finally, it will discuss possible solutions so that examiners can achieve their desired objectives with minimum potential harm to applicants.

II. PURPOSE OF QUESTIONS REGARDING MENTAL HEALTH ON BAR APPLICATIONS

All fifty states require good moral character in attorneys admitted to the bar and place the burden on the applicant to demonstrate his or her good

character.[1] State bar applications ask questions regarding an applicant's character and fitness in order to exclude those who are "morally weak."[2] The primary objective of character and fitness screening is protecting the public.[3] Due to the unequal relationship attorneys have with clients, it is important to ensure that attorneys are capable of fulfilling their duties for their clients' protection.[4] For example, the Virginia Board of Bar Examiners reviews applications before licensing to ensure that each applicant is a "person of honest demeanor and good moral character, is over the age of eighteen and possesses the requisite fitness to perform the obligations and responsibilities of a practicing attorney at law."[5] The bar application's character assessment often involves a screening process that includes consideration of psychological difficulties.[6] The Virginia Board requires that all applicants answer a question regarding mental health as part of the screening process.[7]

Courts recognize the possible danger to clients and the public when attorneys are affected by untreated mental or emotional illness.[8] It is also recognized that an attorney's mental or emotional illness, if left untreated and uncontrolled, can result in injury to clients and the public.[9] Many mental illnesses exist that can adversely affect an individual's ability to practice law.[10]

Since state bars cannot require an applicant to undergo continuous counseling or treatment as a condition of licensing, they must screen out those with problems before they are licensed.[11] Dr. Charles B. Mutter, a psychiatrist who defends mental health inquiries on bar applications, states that "attorneys, as protectors of clients' rights and assets, hold a special position of trust with the public which must be safeguarded with mental health pre-screening."[12]

Despite many recent controversies, many courts hold tightly to the importance of the mental health questions on bar applications.[13] The types of questions on bar applications vary from state to state. Seven states ask no

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1. *See* Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 438 (E.D. Va. 1995).
2. Hilary Duke, *The Narrowing of State Bar Examiner Inquiries into the Mental Health of Bar Applicants: Bar Examiner Objectives Are Met Better Through Attorney Education, Rehabilitation, and Discipline*, 11 GEO. J. LEGAL ETHICS 101 (1997).
3. *Id.* at 120.
4. *Id.* at 104.
5. *See Clark*, 880 F. Supp. at 433.
6. Duke, *supra* note 2, at 101.
7. *Clark*, 880 F. Supp. at 431 (noting that the question asks, "[h]ave you within the past five (5) years been treated or counseled for any mental, emotional or nervous disorders?").
8. *Id*. at 436.
9. *Id.*
10. *Id.*
11. *Id.* at 435.
12. *Clark*, 880 F. Supp. at 436.
13. *See, e.g.,* Florida Bd. of Bar Exam'rs Re: Applicant, 443 So. 2d 71, 75 (Fla. 1984) (stating that "the pressures placed on an attorney are enormous and his mental and emotional stability should be at such a level that he is able to handle his responsibilities.").

mental health questions at all.[14] Ten ask only about hospitalization or institutionalization for mental impairment or illness.[15] Arkansas limits its question to continuous treatment for mental or emotional disorder, and thirteen states limit their question to specific diagnoses or ask whether the disorder will affect the applicant's ability to practice law.[16] Finally, eighteen states ask much broader questions.[17] For example, Nevada's bar application asks, "[h]ave you ever been treated for mental or emotional illness, disease, incapacity or disorder of any kind or nature, or have you ever been committed to any institution, sanatorium or hospital for the treatment of such condition?"[18] It seems that, technically, an applicant would have to report treatments like grief counseling, which are private and seemingly unrelated to the practice of law. A question this broad does not seem to be effective in weeding out those not capable of handling a legal career without placing an unnecessary burden on others who have received minor treatments.

III. MENTAL HEALTH QUESTIONS AS A DETERRENT TO SEEKING PSYCHOLOGICAL COUNSELING

The possibility of questions regarding mental health on bar applications may deter students from seeking necessary counseling or treatment.[19] Law students have higher stress levels and more resulting mental health problems than other professionals.[20] Probably due to this elevated stress, legal professionals are subject to higher levels of depression, alcoholism, and substance abuse than the general population.[21] In a survey of law school students, 41% admitted that they would seek assistance from a substance abuse program if they were assured that bar officials would not have access to that information.[22] The results of this survey indicate that law students are considering their professional future before seeking help with mental or emotional difficulties. Many students seek counseling while in law school.[23] Students who worried whether treatment would affect their bar application were relieved when they were assured that the services were

14. *Clark*, 880 F. Supp. at 439 (noting that Arizona, Massachusetts, and more recently, Hawaii, Illinois, New Mexico, Pennsylvania, and Utah have no mental health questions on their bar applications).
15. *Id*. at 438.
16. *Id.* at 439.
17. *Id.* at 440.
18. *Id*. at 438.
19. *Clark*, 880 F. Supp. at 438.
20. Allison Wielobob, *Bar Application Mental Health Inquiries: Unwise and Unlawful*, HUM. RTS., Winter 1997, at 12 (quoting Marilyn Heins et al., *Perceived Stress in Medical, Law, and Graduate Students*, 59 J. MED. EDUC. 169 (1984)).
21. *See* Mary Elizabeth Cisneros, Note, *A Proposal to Eliminate Broad Mental Health Inquiries on Bar Examination Applications: Assessing an Applicant's Fitness to Practice Law by Alternative Means*, 8 GEO. J. LEGAL ETHICS 401, 412-14 (1995).
22. *In re* Petition and Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996).
23. *In re Petition and Questionnaire for Admission to the R.I. Bar*, 683 A.2d at 1336.

confidential and could not be reported to professional authorities.[24] Does this mean that those not having that assurance do not get treatment at all? Some experts believe it does.[25] It can discourage future applicants from learning healthy ways to deal with stress before they are licensed and begin to practice law, which may turn out to be as stressful as their education.[26] Even those who do seek professional help may not be fully honest with their doctor or therapist for fear that the doctor will be required to disclose the student's diagnosis and treatment information.[27]

In some states, an affirmative answer to a question asking an applicant if they have been treated for a psychological or emotional condition may require the applicant to authorize a release of all medical records and waive rights to confidentiality.[28] While doctor-patient relationships are generally kept confidential, the privilege is lost when an applicant submits himself to the bar's character assessment.[29] Many bar applications asking about mental health include a preamble to the question telling applicants not to let the question influence their decision to get help.[30] For example, the Florida application states, "your decision to seek counseling should not be colored by your bar application."[31] Despite this attempt to mitigate potential harm, experts have found that those applicants who are intimidated by the application process will not follow the advice.[32]

In addition to the harm caused to students as a result of the deterrent effect of mental health questions, it also leads to the ineffectiveness of the questions. If an applicant does not seek treatment and is never diagnosed with any condition, he may not answer affirmatively on the questions.[33] Therefore, the bar examiner has no knowledge of the condition and is not able to consider that condition when evaluating the fitness of the applicant.

IV. OTHER PROBLEMS WITH QUESTIONS REGARDING MENTAL HEALTH

A. Violation of the Americans with Disabilities Act

There is an ongoing debate between bar examiners, who seek to protect the public from those not fit to practice law, and disability rights activists, who argue that mental health inquiries are overly intrusive.[34] There was little that disability groups could do to challenge the bar's review process until the Americans with Disabilities Act (ADA) became effective in

24. *Id.*
25. *Clark*, 880 F. Supp. at 438.
26. *In re Petition and Questionnaire for Admission to the R.I. Bar,* 683 A.2d at 1336.
27. *See Clark*, 880 F. Supp. at 438.
28. *See, e.g.*, Ellen v. Fla. Bd. of Bar Exam'rs, 859 F. Supp. 1489, 1491 (Fla. 1994).
29. *See Fla. Bar of Exam'rs Re: Applicant*, 443 So. 2d at 76-77.
30. *See, e.g., Clark*, 880 F. Supp. at 438.
31. Duke, *supra* note 2, at 122 (quoting *Clark*, 880 F. Supp. at 437).
32. Duke, *supra* note 2, at 122-23.
33. *Id.*
34. *Id.* at 110-11.

1992.[35] What resulted was the issue of whether these types of questions on bar applications violate the ADA, which prohibits a public entity from discriminating against disabled persons.[36] The Act states that, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[37] To qualify for this protection, an applicant must "meet the essential eligibility requirements for receipt of services or for participation in a public entity's program, activities, or services. An individual who poses a 'direct threat' to the health or the safety of others will not be 'qualified.'"[38]

The licensing boards, as public entities, argue that the ADA does not apply to the mental health questions, and even if it did, mental health questions fall under a "necessity exception" which permits questions that have the effect of screening out those with disabilities if the individual "poses a direct threat to the health or safety of others."[39] Rejecting this argument, courts have generally found that the ADA applies to mental health questions on bar applications.[40] Courts have also rejected the argument that the Tenth Amendment prohibits the application of the ADA to state bar licensing procedures.[41] Bar examiners argue that attorney licensing is a "quintessential sovereign function of the states" and that Congress did not intend for the ADA to apply to this function.[42] Congress must show a clear intent to regulate a procedure that is traditionally under state control.[43] However, courts have found that the language of the statute shows Congress' intent to regulate this type of state activity since it indicated its authority to govern states through the Commerce Clause and the Fourteenth Amendment.[44]

The ADA gave courts a new standard for reviewing what types of questions can be asked.[45] Generally, courts have found that broad questions regarding treatment of a mental or emotional condition violate the ADA.[46] The narrowing of questions may protect those who sought counseling for temporary conditions such as grief or divorce counseling or other specific situations not at all related to a person's ability to practice law.[47] Some courts provide guidance on the types of narrow questions that may be asked and others eliminate mental health questions altogether.[48] In 1994, the

35. *Id.* at 108-12.
36. 42 U.S.C. §§ 12101-12213 (2000).
37. 42 U.S.C. § 12132 (1994).
38. *In re* Petition and Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1335 (R.I. 1996).
39. Duke, *supra* note 2, at 111.
40. *Id.*
41. *See, e.g.*, Ellen v. Fla. Bd. of Bar Exam'rs, 859 F. Supp. 1489, 1494 (Fla. 1994).
42. *Id.*
43. *Id.*
44. *Id.*
45. Duke, *supra* note 2, at 102.
46. *Id.*
47. *Id.*
48. *Id.*

American Bar Association adopted a resolution stating that questions regarding mental health should be limited to cover narrow time periods and subject matter.[49] This resolution gives guidance to the type of questions that are appropriate and gives bar examiners three objectives to use in forming questions:

> 1. To admit only qualified applicants worthy of the public trust. This is the same as the bar examiners' earlier stated purpose of protecting the public.
>
> 2. To elicit information about current fitness to practice law.
>
> 3. To ensure that questions do not discourage applicants from seeking needed mental health care.[50]

In a 1995 Virginia case, the court found that the question "[h]ave you within the past five (5) years been treated or counseled for any mental or emotional problems?" was too broad and violated the applicant's rights under the ADA.[51] The type of narrow question that is generally found appropriate under the ADA is, for example, "[a]re you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect your ability to practice law?"[52] The acceptable mental health question in Oklahoma reads as follows:

> 21. Within the past five years, have you been diagnosed with or have you been treated for bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?
>
> 22. A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?

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49. *Id*. at 119. The objectives accomplished through the resolution are stated as:
(1) to acknowledge that the broad questions used by bar examiners are flawed and must be changed; (2) to protect the privacy interests of applicants by requiring that questions "(a) be tailored narrowly, (b) elicit information about current rather than past fitness to practice law, and (c) be targeted at an applicant's behavior or conduct or at a current impairment affecting the applicant's ability to practice law"; (3) to neither support nor refute the ADA's prohibition of such questions, but to address the inquiries on privacy grounds; and (4) to ensure that the ABA and the resolution's primary sponsors would work with local bar associations to revise questions.
Id.

50. Duke, *supra* note 2, at 120.

51. *See* Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 445 (E.D. Va. 1995).

52. Duke, *supra* note 2, at 107.

> B. If your answer to Question 22(A) is affirmative, are the limitations or impairments caused by your mental health condition or substance abuse problem reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?
>
> If your answer to Question 22 (A or B) is affirmative, complete FORMS 16 and 17. … As used in Question 22, 'currently' means recently enough so that the condition could reasonably have impact on you ability to function as a lawyer.
>
> ….
>
> 23. Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation; any inquiry or other proceeding; or any proposed termination by an educational institution, employer, government agency, professional organization, or licensing authority? If you answered yes, furnish a thorough explanation below.[53]

B. Violation of an Individual's Right to Privacy

There have also been privacy rights arguments regarding the requirement that applicants release their medical history.[54] However, the extent of an applicant's privacy rights are considered in the context and not independent of those circumstances.[55] An applicant does not have a constitutional right to be admitted to the bar as the practice of law is a privilege.[56] The fact that the applicant has applied to the bar and submitted to the character screening limits his right of privacy.[57] In addition, the fact that the information obtained by the bar is confidential also limits the intrusion into the applicant's privacy.[58] In *Florida Bar of Examiners Re: Applicant*

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53. Kelly R. Becton, *Attorneys: The Americans with Disabilities Act Should Not Impair Regulation of the Legal Profession Where Mental Health is an Issue*, 49 OKLA. L. REV. 353, 374 (1996).

54. *See* Fla. Bd. of Exam'rs Re: Applicant, 443 So. 2d 71, 74 (Fla. 1983); *In re* Petition and Questionnaire for Admission to R.I. Bar, 683 A.2d 1333 (R.I. 1996) (holding that the bar examiners must use the applicant's private information to adequately make a judgment regarding their character).

55. *Fla. Bd of Exam'rs Re: Aplicant*, 443 So. 2d at 74; *In re Petition and Questionnaire for Admission to R.I. Bar*, 683 A.2d at 1333.

56. *Fla. Bd of Exam'rs Re: Aplicant*, 443 So. 2d at 74; *In re Petition and Questionnaire for Admission to R.I. Bar*, 683 A.2d at 1333.

57. *Fla. Bd of Exam'rs Re: Aplicant*, 443 So. 2d at 74; *In re Petition and Questionnaire for Admission to R.I. Bar*, 683 A.2d at 1333.

58. *Fla. Bd of Exam'rs Re: Aplicant*, 443 So. 2d at 74; *In re Petition and Questionnaire for Admission to R.I. Bar*, 683 A.2d at 1333.

(1983), the court decided that the Florida bar had a legitimate need for intrusion and that the applicant's right to privacy was not violated.[59]

C. Lack of Effectiveness

These violations of an applicant's rights are not the only problem with mental health questions. There is much room for argument that bar application questions regarding mental health are not effective in determining a candidate's future conduct and ability to practice law. One problem is that it is difficult for drafters to come up with appropriate questions since there is no uniformity among people with psychological problems.[60] Also, the lawyers reviewing bar applications do not have the proper medical training to evaluate the answers and predict behavior.[61] Even experts would have a hard time predicting how mental health problems would affect an individual's future ability to practice law.[62] Furthermore, there is no evidence that those who have had psychiatric treatment have a greater incidence of disciplinary action by the bar than those who had no psychiatric treatment.[63] In fact, disciplinary problems are more likely to occur when an attorney has been practicing for a number of years.[64] In most cases, there were no indicators at the time of licensing that the applicants would have future trouble.[65]

Additionally, these types of questions may consume more resources than they are worth. Fitness assessments are expensive and time-consuming, even though they provide a low level of public protection.[66] The investigations may cause delays that put further stress on the applicant and hinder the start of a new job.[67]

The American Psychiatric Association (APA) does not find mental health questions effective for meeting the goals of bar examiners.[68] According to the APA, psychiatric history is not an accurate predictor of fitness and should not be included on bar applications.[69] Since the ADA does not

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59. *Florida Bd. of Exam'rs Re: Applicant*, 443 So. 2d at 74; *In re Petition and Questionnaire for Admission to R.I. Bar*, 683 A.2d 1333.

60. Duke, *supra* note 2, at 105.

61. *Id.*

62. *In re Petition and Questionnaire for Admission to the R.I. Bar*, 683 A.2d at 1335.

63. *Id.*; Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 435 (E.D. Va. 1995).

64. *In re Petition and Questionnaire for Admission to the R.I. Bar*, 683 A.2d at 1335; *Clark*, 880 F. Supp. at 435.

65. *In re Petition and Questionnaire for Admission to the R.I. Bar*, 683 A.2d at 1335; *Clark*, 880 F. Supp. at 435.

66. Duke, *supra* note 2, at 124.

67. *Id.*

68. *Clark*, 880 F. Supp. at 435.

69. *Id.* The APA offers these guidelines for licensing boards:

> 1. Prior psychiatric treatment is, per se, not relevant to the question of current impairment. It is not appropriate or informative to ask about past psychiatric treatment except in the context of understanding current functioning. A past history of work impairment, but not simply of past treatment or leaves of absence, may be gathered.

allow broad questioning in many instances, most states have significantly narrowed their questions. Dr. Charles B. Mutter, a University of Miami School of Medicine psychiatrist, however, insists that broad questions are necessary for determining an applicant's fitness.[70] He believes that narrower questions "are inadequate [indicators of fitness] because they allow applicants to filter their responses and provide self-promoting answers."[71] An applicant who is potentially mentally or emotionally unfit to practice law could avoid an affirmative response on a mental health question if the question is not worded in a way to include their specific treatment or condition. If the ADA does not allow broad questions, and narrow questions are not effective, then how can bar examiners meet their objective of protecting the public by screening out applicants who are mentally or emotionally unfit to practice law?

V. SOLUTIONS

One solution is to eliminate mental health questions altogether. Some states have already removed the questions finding that the negative effect the questions had in deterring students from getting counseling outweighed the necessity of the questions.[72]

Many courts and other authorities agree that a better way to determine an applicant's ability to practice law is through evidence of past behavior obtained from questions regarding work experience, military service, and academic achievement.[73] Sample questions include, "[h]ave you ever been expelled, suspended from, or had disciplinary action taken against you by any educational institution?…Have you ever been fired from, or asked to leave, or had disciplinary action taken against you in any job?…Have you ever been absent from school or a job for more than 30 consecutive days?"[74] Dr. Zozana, Director of the Law and Psychiatric Division and Professor of Clinical Psychology at the Yale University School of Medicine, refers to these types of questions as "characterological" questions.[75] The examiners

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2. The salient concern is always the individual's current capacity to function and/or current impairment. Only information about current impairing disorder affecting the capacity to function as a physician, and which is relevant to present practice, should be disclosed on application forms. Types of impairment may include emotional or mental difficulties, physical illness, or dependency upon alcohol or other drugs.

3. Applicants must be informed of the potential for public disclosure of any information they provide on applications.

Id.

70. *Id.*

71. *Id.* at 436.

72. *See, e.g., In re* Frickey, 515 N.W. 2d 741 (Minn. 1994).

73. *See Clark*, 880 F. Supp. at 435; Becton, *supra* note 53, at 378.

74. Duke, *supra* note 2, at 122.

75. *Clark*, 880 F. Supp. at 435. (stating that "[u]nlike mental health questions, 'characterological' or 'behavioral' questions are those questions which are designed to elicit information about applicants' character from evidence of past behavior (e.g., work experience, military service, academic achievements, etc).").

can consider an applicant's past behavior to determine significant character traits that can lead to questions regarding an applicant's fitness to practice law that need to be examined more closely. Even if the conduct occurred as a result of psychiatric illness, the focus will be on the conduct itself, and not the underlying disability.[76] This can be accomplished without any questions regarding the applicant's mental health history or current condition.

Another solution lies in educating law students and attorneys about mental health and professional conduct.[77] Education "can help students identify inappropriate behavior and misconduct that may stem from mental health problems."[78] This is effective because it is ultimately not the attorney's mental health that we are concerned with, but the resulting behavior. Furthermore, counseling programs offered in law schools are usually helpful if the student can be assured that the program is confidential.[79] These types of programs can help reduce stress-related illness and substance abuse problems.[80]

VI. CONCLUSIONS

Because bar exam questions regarding mental health can deter students from seeking necessary help, they may be unlawful or ineffective or both. Therefore, they should be excluded from bar applications. Instead, state bars should focus on an applicant's behavior and not his mental health status. Examiners should ask specific behavior-related questions in order to determine if there are any potential problems with mental health and, if so, whether they will detrimentally affect the applicant's performance as an attorney. This is most accurately predicted through examination of behavior, not through the use of medical and psychological diagnosis.

Jennifer McPherson Hughes

76. Duke, *supra* note 2, at 122.
77. *Id.* at 125.
78. *Id.*
79. *Id.*
80. *Id.*

SCREENING OUT CONFLICT-OF-INTERESTS ISSUES INVOLVING FORMER CLIENTS: EFFECTUATING CLIENT CHOICE AND LAWYER AUTONOMY WHILE PROTECTING CLIENT CONFIDENCES

I. INTRODUCTION

As one can infer from the title, this Article addresses the effort to reconcile the tension between some of the key goals of the legal profession. Section two of the Article explains the reasons that we have these tensions in the first place. We find the origin in the American Bar Association's Model Rules of Professional Conduct (hereinafter Model Rules).[1] The focus on the Model Rules continues in section three where we examine the substantial relationship test of the Model Rules.[2] We then turn to screening, in section four, as the developing trend that seeks to reconcile the tension of client choice and lawyer autonomy versus the protection of client confidences. The concept of screening is further expounded upon in section five. This section presents a survey of case law on screening and how different circuits have reacted to its progression. Next, section six discusses why screening has become so important in recent years and sections seven and eight discuss arguments for and against screening. The final section of the Article incorporates language from case law and commentary in order to give an idea of what is needed for a firm to create an effective screen.

II. THE MODEL RULE ORIGIN OF CONFLICTS OF INTEREST

Model Rule 1.9 is the general rule concerning conflicts of interests between a current client and former client.[3] According to this rule:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.[4]

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1. MODEL RULES OF PROF'L CONDUCT (2003).
2. MODEL RULES OF PROF'L CONDUCT R. 1.10 (b) (2003).
3. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2003).
4. MODEL RULES OF PROF'L CONDUCT R. 1.9 (a) (2003).

Model Rule 1.9(b) extends this rule to include, as the lawyer's former clients, all the former clients of his firm that were clients of that firm while he was employed there even if he no longer is associated at that firm.[5] With the combination of this rule and Rule 1.10,[6] attorneys in the firm with which the lawyer is now associated are also encumbered by Rule 1.9(b).[7] However, if the lawyer had no knowledge of the case of the prior client, he and his firm would be allowed to represent a client in a case even if it bore substantial similarity to the former case.[8]

III. THE SUBSTANTIAL RELATIONSHIP TEST

The substantial relationship test has developed as the primary tool for courts to use in deciding whether or not to remove a lawyer from a case where a disqualification motion has been filed on behalf of a former client.[9] There are two policy goals of this substantial relationship test and the debate over whether a conflict-of-interest issue is present frequently turns on which purpose the test is primarily intended to effectuate.[10] These two policy concerns are client loyalty and client confidentiality.[11] While some courts see these concerns as mutually exclusive, the debate has been reconciled by one court, which stated that the duty of loyalty only extends so far as the attorney learned client confidences in a substantially related matter.[12]

IV. MOVEMENT TOWARDS SCREENING AS AN OPTION

Since client confidence is a key concern and lawyer mobility is also desirable, the concept of screening, which helps achieve both, has been developing as a valuable tool extending into private law practice.[13] The scenario in which screening is rapidly becoming a useful tool involves an attorney who changes firms at some point in his/her career. When that attorney changes firms, he brings with him the confidences of all his former clients as well as those clients of other members of his former firm. Therefore, if an attorney in his new firm is chosen to represent a client in a case that would give rise to a conflict-of-interest, the other attorneys in the new firm are also precluded from representing that client.[14] This disqualification is what screening is used to prevent.

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5. MODEL RULES OF PROF'L CONDUCT R. 1.9 (b) (2003).
6. MODEL RULES OF PROF'L CONDUCT R. 1.10 (2003) (imputation of conflicts-of-interest).
7. MODEL RULES OF PROF'L CONDUCT R. 1.9 (b)-.10 (2003).
8. MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 5 (2003).
9. *Conflicts of Interests: Representation Adverse to Former Client*, [18 Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) 490, at 498 (Aug. 14, 2002) [hereinafter *Conflicts*].
10. *Id.*
11. *Id.*
12. *Id.* at 490.
13. *See, e.g., id.*; MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 4 (2003).
14. MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 4 (2003).

Screening would put an imaginary wall, sometimes referred to as a "chinese wall"[15] or "ethical wall,"[16] between the attorney who had crossed-over from the other firm and the other attorneys at that firm.[17] Although screening is not mentioned in the Model Rules,[18] except in reference to government employees,[19] it has been debated and litigated and the acceptance of screening as a tool to avoid conflict-of-interest disqualification seems to be the trend.[20] This is true even in cases where the moving lawyer had some knowledge of the former client's confidential information.[21]

The ABA Ethics 2000 Commission recommended that screening be explicitly allowed.[22] However, this change did not make its way into the Model Rules in 2002.[23] This marks a major divergence between the ABA and much of the case law.[24] Five circuits currently have allowed screening to some extent, five have not allowed screening, and one circuit has not allowed it but alluded to a willingness to consider it.[25]

V. DECISIONAL LAW ON THE CONCEPT OF SCREENING

The Seventh Circuit uses a three-prong test to decide when to disqualify an attorney for a conflict-of-interest resulting from a change in firm association.[26] The first consideration is directly from Model Rule 1.9[27]—the substantial relationship test.[28] This test involves whether the subject matter of the current case is substantially related to the prior case.[29] The comments to the Model Rules further explain this test by stating that matters are substantially related "if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially

15. Ronald C. Minkoff, *Ethics After Enron: Protecting Your Firm or Corporate Law Department: A Satellite Program, in* A SCREENING PRIMER 181, 183 (PLI N.Y. Practice Skills Course Handbook Series No. F0-00GL, 2002).
16. *Id.*
17. *Id.*
18. MODEL RULES OF PROF'L CONDUCT (2003).
19. MODEL RULES OF PROF'L CONDUCT R. 1.11 (2003).
20. *Id.*
21. ROBERT H. ARONSON & DONALD T. WEKSTEIN, PROFESSIONAL RESPONSIBILITY IN A NUTSHELL 251-52 (2d ed. 1991).
22. *Ethics Commission Releases its Report with Recommended Changes to Model Rules*, [16 Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) 672 (Dec. 6, 2000) [hereinafter *Commission*].
23. *Compare id*., *with* MODEL RULES OF PROF'L CONDUCT (2002).
24. Christopher J. Dunnigan, *The Art Formerly Known as the Chinese Wall: Screening in Law Firms: Why, When, Where, and How*, 11 GEO. J. LEGAL ETHICS 291, 295 (1998); s*ee also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-358 (1990).
25. Dunnigan*, supra* note 24 ("Currently, the Second, Third, Sixth, Seventh, and Eleventh Circuits have allowed some degree of screening, while the First, Fourth, Fifth, Eighth, and Tenth Circuits have not. The Ninth Circuit has specifically chosen not to endorse screening, but has indicated that it might be willing to consider it. The D.C. Circuit Court of Appeals has not dealt with the issue.").
26. United States v. Goot, 894 F.2d 231, 234 (7th Cir. 1990) (citing Schiessle v. Stephens, 717 F.2d 417, 420-21 (7th Cir. 1983)).
27. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2003).
28. *Goot*, 894 F.2d at 234 (citing *Schiessle*, 717 F.2d at 420-21).
29. *Id.*

advance the client's position in the subsequent matter."[30] The Ninth Circuit explained the standard, which they referred to as the "substantially factually related standard,"[31] in the following way: "If there is a reasonable probability that confidences were disclosed [in an earlier representation] which could be used against the client in [a] later, adverse representation, a substantial relation between the two cases is presumed."[32] The second and third prongs of the test involve the presumption alluded to in Model Rule 1.10[33]—that client confidences are shared among all the members of a law firm.[34] The presumption with respect to one of the two representations must be rebutted in order for the attorney to not be disqualified from representation.[35] Screening may be used to rebut this presumption in some jurisdictions.[36]

In *LaSalle National Bank v. County of Lake*, the Seventh Circuit held that the shared confidence presumption could be rebutted if "specific institutional mechanisms" were enacted in order to keep any confidential information known by the attorney who had changed firms from being obtained by other attorneys at the new firm.[37] Factors that are considered in the Seventh Circuit to determine whether or not the screen is effective include the following:

> the size and structural divisions of the law firm involved, the likelihood of contact between the "infected" attorney and the specific attorneys responsible for the present representation, the existence of rules which prevent the "infected attorney" from access to relevant files or other information pertaining to the present litigation or which prevent him from sharing in the fees derived from such litigation.[38]

The Sixth Circuit applied this test in *Manning v. Waring*.[39] Many factors seemed to point to a conclusion that the screen in that case was effective in maintaining client confidences. First, the firm involved in this case was the largest one in the state and was divided into departments.[40] Second, the attorney, who held confidences about a former client whose interest was in conflict with a current client of the firm, was in a separate department

30. MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (2003).
31. *In re* County of L.A. v. Forsyth, 223 F.3d 990, 994 (9th Cir. 2000).
32. *Id.* (quoting Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980)).
33. MODEL RULES OF PROF'L CONDUCT R. 1.10 (2003).
34. *Goot*, 894 F.2d at 234 (citing *Schiessle*, 717 F.2d at 420-21).
35. *Id.*
36. *See, e.g., Forsyth*, 223 F.3d at 994.
37. *Schiessle*, 717 F.2d at 421 (citing LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 259 (7th Cir. 1983)).
38. *Id.*
39. Manning v. Waring, 849 F.2d 222, 225 (6th Cir. 1988).
40. *Id.* at 224.

from the one that was handling the current case.[41] Third, the firm had a rule in place that the attorney possessing the confidential information was not allowed to communicate with other attorneys at the firm concerning the current case. Finally, the attorney's files were kept separate from the other attorneys' files.[42]

The Ninth Circuit, at one point, disallowed screening as a tool to rebut the presumption of shared confidences.[43] In fact, the presumption was not rebuttable by any means.[44] However, since federal circuit courts apply state law to disqualification issues, recent decisions by the California Supreme Court have led the Ninth Circuit to believe that this rule may be changing.[45] In *People ex rel. Department of Corps. v. Speedee Oil Change Systems, Inc.*, the California Supreme Court did not specifically allow screening to rebut the shared confidences presumption, but left it open for later case decisions.[46] Other circuits, however, such as the Tenth Circuit, still hold to the irrebutable presumption of shared confidences without regard to screening measures.[47]

VI. REASONS FOR THE INCREASING NEED FOR SCREENING AS A TOOL IN PRIVATE LAW FIRMS

Why has screening in private practice just recently come to the forefront? The Sixth Circuit Court of Appeals noted that motions to vicariously disqualify law firms because of these types of conflict-of-interests have developed as popular strategic moves in lawsuits.[48] Taking away your opposition's attorney is a powerful weapon.[49] The Sixth Circuit cites the changes in the way legal services are provided as the reason for more conflicts of this type.[50] It seems that clients' choices for legal services have become concentrated into fewer offices than before.[51] Today huge law firms, which have groups of attorneys practicing in most every area of law, mark a pointed contrast to the past in which single practitioners, who practiced in a limited number of areas, were the norm.[52] Today it is common for lawyers to move laterally from one firm to another; bringing with them a

41. *Id.*
42. *Id.*
43. *Forsyth*, 223 F.3d at 990.
44. *Id.* at 995; s*ee also* Henriksen v. Great Am. Savs. & Loan, 14 Cal. Rptr. 2d 184, 186 (Ct. App. 1992); Klein v. Superior Court, 244 Cal. Rptr. 226, 234 (Ct. App. 1988).
45. *Forsyth*, 223 F.3d at 995.
46. People *ex rel*. Dep't of Corps. v. Speedee Oil Change Sys., Inc. 980 P.2d 371, 382 (Cal. 1999).
47. *See* Graham v. Wyeth Labs., 906 F.2d 1419, 1421 (10th Cir. 1990); Parker v. Volkswagenwerk Aktiengesellschaft, 781 P.2d 1099, 1106-07 (Kan. 1989) (holding that screening could not prevent a firm from being allowed to represent a client where the firm would have been disqualified but for the screening measures being implemented).
48. *Manning*, 849 F.2d at 224.
49. *Id.*
50. *Id.* at 224-25.
51. *Id.* at 225.
52. *Id.* at 224-25.

host of former clients' confidences which can be the subject of liabilities for the new firm in the way of conflict-of-interests.[53]

VII. SUPPORT FOR SCREENING

Even though the Model Rules of Professional Conduct do not mention screening in either Rule 1.9[54] or Rule 1.10,[55] screening is specifically listed as a way to overcome a conflict-of-interests issue in a situation in which a former government employee has moved to a firm to engage in private practice.[56] The reason for this exception, as cited by a comment to the Model Rules, is to "prevent the disqualification rule from imposing too severe a deterrent against entering public service."[57] The Rules seek to make transfer from government service to private practice as nonrestrictive as possible.[58] Because of this express allowance of screening as a tool to avoid conflict-of-interests involving government employees, some believe that changing the way legal services are offered to the public in the private sector should trigger an extension of screening to use in cases where attorneys change firms.[59] It might be that the American Bar Association sees government attorneys as fulfilling a much-needed public goal and, therefore, is particularly lenient in restrictions on their practice. However, favoring one practice over another is seen to some as "simply unfair."[60] One commentator states that "[P]ure logic suggests that if screening is sufficient to protect client interests in the government-to-private hiring context, it should be sufficient in the private-to-private hiring context as well."[61]

Many believe that it is also against the public interest to be so restrictive on the private sector of attorneys. One commentator broke down the pros of screening into distinct arguments.[62] First, people should be afforded the right to choose who represents them.[63] This choice is one of the key features of our adversary system.[64] Second, there are many problems that arise when a motion to disqualify an attorney comes to the table.[65] The tool of disqualification motions has begun to be used more as a strategic move in

53. *Manning*, 849 F.2d at 225.
54. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2003).
55. MODEL RULES OF PROF'L CONDUCT R. 1.10 (2003).
56. MODEL RULES OF PROF'L CONDUCT R. 1.9-.11 (2003). MODEL RULES OF PROF'L CONDUCT R. 1.11(b)(1) (stating that, in order to overcome the conflict-of-interest, "the disqualified lawyer [must be] timely screened from any participation in the matter and is apportioned no part of the fee therefrom.").
57. MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. 4 (2003).
58. *Id.*
59. *See, e.g.*,. *Manning*, 849 F.2d at 226 (holding that screening can adequately rebut the presumption of shared confidences in cases where an attorney moving from one firm to another brings knowledge of a former case that would otherwise be considered a conflict-of-interest for the entire firm).
60. *See, e.g.*, Robert A. Creamer, *Three Myths About Lateral Screening*, PROF. LAW., Dec. 2002, at 20.
61. Minkoff, *supra* note 15, at 190.
62. Dunnigan, *supra* note 24, at 296.
63. *Id.*; s*ee also* Creamer, *supra* note 60, at 22.
64. Dunnigan, *supra* note 24, at 296.
65. *Id.*

litigation rather than for the ethical purpose for which it was intended.[66] When this remedy is used, the client whose attorney has been disqualified is disadvantaged, not only because he loses his counsel of choice, but also because of the extra time, effort, and expense that goes into a change in representation; especially if the lawsuit is relatively far along.[67] The time and expense also takes a toll on the court system.[68] Moreover, the legal profession suffers due to the fact that being disqualified may cause the lawyer to look like he was trying to betray confidences when in fact he did not intend to do anything of the kind.[69] Finally, private lawyer services are changing by the advent of firms, and the increasing number of lateral hires[70] and these changes make it necessary to find some way to get around conflict-of-interests disqualification without compromising client confidences.

VIII. RATIONALES AGAINST SCREENING

There are obvious problems with screening, the most apparent being that it is easily possible to breach a screen.[71] Screening procedures can only be enforced from within the firm; third parties, including clients and courts, must rely on the lawyers themselves to observe proper screening procedures.[72] Risks involved include the inadvertent breach of a screen as well as the possibility of intentional breach.[73] For attorneys involved in high-stakes litigation, the ability to breach a screen could prove to be a very appealing option.[74] In addition, allowing an exception to the imputation of confidences rule might reflect poorly on the legal profession.[75] Former clients are likely to be concerned about the situation even if the screen is seemingly effective because of disbelief that their former counsel will, in fact, keep their confidences.[76] Some people in the legal profession think it is wrong to allow even "the appearance of impropriety" in the way of breaching a former client's confidences.[77] A bad reflection must be viewed, however, in light of the previously mentioned fact that when an otherwise qualified attorney is disqualified, despite the "infected" attorney having been screened, it also reflects badly on the legal profession.[78]

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66. *Id.* at 296-97.
67. Dunnigan, *supra* note 24, at 297.
68. *Id.*
69. *Id.*
70. *See id.*; *Manning*, 849 F.2d at 226.
71. *See* Dunnigan, *supra* note 24, at 298.
72. Minkoff, *supra* note 15, at 190.
73. *Id.*
74. *Id.*
75. Dunnigan, *supra* note 24, at 297.
76. *Id.* at 299.
77. *Id.*
78. *Id.* at 297.

IX. WHAT IS AN EFFECTIVE SCREEN?

In *LaSalle National Bank v. County of Lake*,[79] the Seventh Circuit laid out characteristics of an effective screening system.[80] The attorney possessing confidential information relating to a former client cannot have access to files concerning the current case, cannot receive any fees or profits gained from the current case, and cannot be shown any of the documents concerning the current case.[81] All meetings concerning the case in question should be formal—that is, the names of the attending attorneys should be in writing.[82] Additional desirable requirements include "intra-firm education," [83] whereby all other attorneys in the law firm must not speak with the disqualified attorney about the current case and must keep any related documents from him.[84] Keeping the files for the case locked with access limited to one or two partners and only allowing other attorneys access on a "need to know" basis is another way of making a screen effective.[85] The running theme throughout approved screening methods is specificity.[86] It is not enough to simply say there is a screen—there must be specific requirements such as having all the attorneys at the law firm confirm, under oath, that the requirements were met.[87] Lastly, it is imperative that the screening measures be implemented in a timely fashion.[88]

In addition to the firm's diligence in creating an effective screen, courts that take screens into consideration also look at factors beyond the law firm's control. The larger the firm, the more likely it is that a court will find that the screening is effective.[89] Additionally, courts will likely find screening more effective if the "infected" attorney is in a specialty of law different to the one involved in the current case. All of these factors combine in a court's effort to determine whether the goal of protecting client confidences has been achieved despite the potential conflict-of-interest.

X. CONCLUSION

We can be certain that as long as protecting client confidence, protecting client choice, and lawyer autonomy remain goals of the legal system, a

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79. LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983).
80. *Id.* at 259.
81. *Id.* (citing Armstrong v. McAlpin, 625 F.2d 433, 442-43 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981)).
82. Dunnigan, *supra* note 24, at 301.
83. *Id.* at 299.
84. *See id.*; *LaSalle National Bank*, 703 F.2d at 259 (citing Kesselhaut v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977)).
85. *LaSalle Nat'l Bank*, 703 F.2d at 259 (citing *Kesselhaut*, 555 F.2d at 793).
86. *Id.*
87. *Id.*
88. *Id.* (holding that the District Court did not abuse its discretion in disqualifying an attorney in a firm in which there was an attorney possessing confidential information that gave rise to a conflict-of-interests and screening measures were not enacted until after the disqualification motion was filed).
89. Dunnigan, *supra* note 24, at 302.

major tension will exist. This tension must be relaxed by a noted compromise. It seems that screening is the most obvious compromise. It seems best suited to ensure that clients' confidences are kept in confidence while conflicts-of-interests do not become so rampant that they destroy the possibility of an attorney moving to a more favorable work situation. Further, it would ensure that clients have a real choice as to who represents him or her in what is likely, at least to that client, the most important case in the world.

Amanda Kay Morgan

HUMAN REPRODUCTIVE CLONING: CURRENT LEGAL, ETHICAL, AND PUBLIC POLICY CONSIDERATIONS

I. INTRODUCTION

Modern advances in biomedical research have significantly influenced the medical community in its approach to abating human disease and suffering. For example, genetically-engineered (transgenic) animals are routinely used to examine the effect(s) of gene alterations in mammalian species. These genetic manipulations allow scientists to induce disease-specific mutations in these animals. Biomedical researchers empirically test their hypotheses by developing novel treatment methodologies targeting the genetically altered animals, thereby furthering our understanding of therapeutic intervention *in vivo*. It is common practice for the scientific community to extrapolate these findings from transgenic animals to humans in order to provide future researchers with insight into potential cures for human disease and illness.

While the use of transgenic animals for biomedical research has become widely accepted, the advent of other modern research strategies are met with passionate opposition. Today, the most polarizing topic in the scientific and public arena is the notion of human reproductive cloning. This debate centers around the use of somatic cell nuclear transfer technology to implant a "cloned" embryo into the womb, thereby resulting in a genetically identical "twin" of an existing—or previously existing—person. The genesis of this heated debate over human reproductive cloning "has led certain religious coalitions, environmental groups and bioethicists to oppose almost every aspect of biotechnology, from patenting genes and transgenic plants to cloning humans."[1] Consequently, significant legal, ethical, and public policy considerations are raised regarding the potential implementation of this controversial technology in the United States.

Part I of this note gives the requisite scientific background to understand this issue from a biomedical perspective. Part II discusses the relevant legal considerations of human reproductive cloning, focusing on an analysis of the constitutional right to privacy and reproductive freedom. Part III considers the ethical and public policy implications impinged in the human reproductive cloning debate. Finally, Part IV will undertake the ambitious task of melding the foregoing considerations discussed in Parts I-III into a

1. Warren D. Woessner, *The Evolution of Patents on Life – Transgenic Animals, Clones and Stem Cells*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 830, 839 (2001).

"consensus opinion" regarding the future of human reproductive cloning in the United States.

II. THE SCIENCE OF HUMAN REPRODUCTIVE CLONING

A clone, as defined by Dorland's Medical Dictionary, is "one or a group of genetically identical cells, organisms, or plants derived . . . from a single hybrid DNA molecule . . . by replication in a eukaryotic . . . host cell."[2] Cloning, therefore, simply represents the production of an almost genetically identical organism (e.g., animal, plant) from the manipulation of non-reproductive cells to give rise to a virtual copy, or "twin," of the organism that donated the nuclear DNA. In the context of the controversial human cloning debate, "cloning is a way to create later-born twins of an individual who is living or has already lived."[3]

Contrary to public perception, there are actually three distinct types of cloning proposed by the scientific and medical communities.[4] First, embryonic cloning (a.k.a. experimental twinning) involves the "embryonic duplication produced by purposeful external intervention."[5] In this situation, "an embryo [is activated] to produce twins and is in essence a duplication of the natural process that produces 'identical twins.'"[6] The technical significance of embryonic cloning (or experimental twinning) is that "[t]hese cloned embryos contain an exact copy of the nuclear DNA as well as copies of the mitochondrial DNA from the original embryo."[7]

A second type of cloning is termed therapeutic cloning, which involves the "most foreseeable benefits to mankind."[8] This cloning technique "differs from [experimental] twinning [or embryonic cloning] in that the mitochondrial DNA of the unfertilized egg is retained in the developing clone."[9] This is significant because the "donor's mitochondrial DNA is not transferred," therefore, therapeutic cloning does not produce an exact genetic replica as does embryonic cloning (or experimental twinning).[10] Therapeutic cloning techniques further differ from other cloning methodologies as therapeutic cloning "produces tissue or an entire healthy organ for transplantation into the [nuclear] DNA donor"[11] rather than producing an entire

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2. Dorland's Illustrated Medical Dictionary 346 (27th ed. 1988).
3. Lori B. Andrews, *Is there a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J.L. & TECH. 643, 647 (1998).
4. Paul Lesko & Kevin Buckley, *Attack of the Clones . . . and the Issues of Clones*, 3 COLUM. SCI. & TECH. L. REV. 1, 11 (2001). *See also* Sherry M. Knowles & Stephanie D. Adams, *Who Owns My DNA?: The National and International Intellectual Property Laws on Human Embryonic Tissue and Cloning*, 32 CUMB. L. REV. 475 (2002) (summarizing the history and recent developments relating to the national and international intellectual property laws on human embryonic tissue and cloning).
5. Dorland's Illustrated Medical Dictionary 1778 (27th ed. 1988).
6. Lesko & Buckley, *supra* note 4, at 12.
7. *Id.*
8. *Id.* at 13.
9. *Id.*
10. *Id.*
11. Lesko & Buckley, *supra* note 4, at 14.

genetically identical organism. Consequently, therapeutic cloning is a method proposed by the medical and scientific communities as a way to combat host rejection of transplanted organs. This has led many to postulate that a market for therapeutic cloning "of just over $17 billion dollars exists in the U.S. alone."[12]

A third type of cloning methodology, and, in many circles, the most controversial of the cloning techniques, is reproductive cloning. In reproductive cloning, "the cloned embryo produced by nuclear transfer is implanted into a womb" and allowed to "develop into a new human or other organism depending on the origin of the [nuclear] DNA transferred."[13] In contrast with a naturally born monozygotic (i.e., identical) twin, however, a reproductive cloning "twin" would not be 100% genetically identical to the donor of the nuclear DNA.[14] This is because the "'twin' would have genetically identical nuclear DNA, but would differ physically because of embryological factors including womb placement, nutrient uptake and treatment in the womb."[15] Moreover, lest we forget that, in addition to genetic factors, evolutionary dogma dictates that environmental factors play a significant role in the development, adaptation, and survival of any organism.[16]

The remainder of this note will address the specific legal, ethical, and public policy concerns entangled with this third type of cloning—namely, human reproductive cloning. It is here, in the area of human reproductive cloning, that recent events[17] have sparked intense debate over this polarizing issue on a worldwide spectrum.

III. LEGAL CONSIDERATIONS OF HUMAN REPRODUCTIVE CLONING

The constitutionality of regulating the marital right to privacy and reproductive freedom were addressed in two seminal United States Supreme Court cases. In *Griswold v. Connecticut*, a licensed physician serving as executive of the Planned Parenthood League of Connecticut counseled a married couple about contraception.[18] The physician and married couple were each convicted and fined $100 as accessories for violation of §§ 53-32 and 54-196 of the General Statutes of Connecticut.[19] The issue in *Griswold*

12. *Id.* at 19.
13. *Id.* at 15.
14. *Id.*
15. *Id.*
16. Charles Darwin, THE ORIGIN OF SPECIES 169-72 (J.W. Burrow ed., Penguin Books 1985) (1859).
17. *See* Jim Loney, *Sect Says First Cloned Baby Goes Home*, REUTERS, Dec. 30, 2002 (announcing Clonaid "has produced the first human clone"); *see also Overreaction to Cloning Claim Poses Other Risks*, USA TODAY, Jan. 3, 2003, *available at* 2003 WL 5302508 (debating human cloning); Malcolm Ritter, *Company Claims Birth of Human Clone*, MIAMI HERALD, Dec. 27, 2002, *available at* http://www.miami.com/mld/miamiherald/4818822.
htm?template=contentModules/printstory.jsp (announcing that Clonaid "would soon produce the first human clone").
18. Griswold v. Connecticut, 381 U.S. 479, 480 (1965).
19. *Griswold*, 381 U.S. at 480.

rested on whether § 53-32[20] and § 54-196[21] violated the constitutional rights of marital privacy. The Court asserted that the issue before them "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[22] Moreover, the Court further asserted that it is not within its scope to "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[23] The Court held that "Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy."[24]

In *Eisenstadt v. Baird*, William Baird ("Baird") was convicted of violating a Massachusetts General statute on two separate counts.[25] First, Baird was convicted for "exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of [predominantly unmarried] students at Boston University."[26] Second, Baird was convicted for "giving a young [unmarried] woman a package of . . . vaginal [contraceptive] foam" at the conclusion of his lecture.[27] The issue in *Eisenstadt* was "whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under Massachusetts General Laws."[28] In holding that the Massachusetts General Laws violate the Equal Protection Clause of the Fourteenth Amendment, the Court elaborated by asserting "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, *to be free from unwarranted governmental*

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20. *Id.* Section 53-32 states: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Id*.

21. *Id.* Section 54-196 states: "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." *Id*.

22. *Id.* at 485.

23. *Id.* at 482.

24. *Griswold*, 381 U.S. at 486.

25. Eisenstadt v. Baird, 405 U.S. 438, 440-42 (1972). The Court specifically referred to chapter 272, section 21 of the Massachusetts General Laws:

> under which Baird was convicted, provides a maximum five-year term of imprisonment for "whoever. . . gives away. . .any drug, medicine, instrument or article whatever for the prevention of conception," except as authorized in § 21A. Under § 21A, "(a) registered physician may administer to or prescribe for any *married* person drugs or articles intended for the prevention of pregnancy or conception. (And a) registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any *married* person presenting a prescription from a registered physician." As interpreted by the State Supreme Judicial Court, these provisions make it a felony for anyone, other than a registered physician or pharmacist acting in accordance with the terms of § 21A, to dispense any article with the intention that it be used for the prevention of conception. The statutory scheme distinguishes among three distinct classes of distributees- first, *married* persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; second, *single persons may not obtain contraceptives from anyone to prevent pregnancy*; and, third, married or single persons may obtain contraceptives from anyone to prevent, not pregnancy, but the spread of disease."

Id. (emphasis added).

26. *Eisenstadt*, 405 U.S. at 440.

27. *Id.*

28. *Id.* at 447.

intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[29]

In light of the broad decisions by the United States Supreme Court in *Griswold* and *Eisenstadt*, the Court's position regarding the right to marital privacy and reproductive freedom may "arguably encompass . . . assisted reproductive technologies [such as human reproductive cloning]."[30] Clearly, the right to reproductive freedom provides the right to choose contraception to prevent pregnancy without the fear of governmental intervention.[31] In addition, "the right to reproductive freedom arguably [also] includes the right to take affirmative steps, through the use of assisted reproductive technologies [including human reproductive cloning], to become pregnant."[32] Moreover, "[i]t seems inconsistent that a society would recognize the right of the fertile to conceive coitally, and not also recognize the right of the infertile to conceive noncoitally."[33] Until the Court actually addresses the issue of human reproductive cloning, however, "it is unclear whether the choice to create a child through [human reproductive] cloning would be viewed in the same light as the *fundamental right to procreative liberty*,"[34] as held in *Griswold* and *Eisenstadt*.

While the United States Supreme Court has remained silent on the issue of human cloning, over half of the states have recently implemented legislation addressing this issue.[35] The primary areas of anti-cloning legislation include: "prohibiting governmental expenditures for any research using cloned cells or tissue; banning governmental expenditures for cloning an entire individual; banning any research using cloned cells or tissue; and banning cloning of an entire individual."[36] Additional anti-cloning proposals in some state legislatures include the "prohibit[ion] [of] human cloning by qualifying the human cloning research as a Class B felony."[37] Therefore, state legislatures do not appear to align themselves with the broad interpretation of the right to marital privacy and reproductive freedom promulgated by the United States Supreme Court, at least as it applies to human reproductive cloning.

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29. *Id.* at 453 (emphasis added).
30. Shannon H. Smith, *Ignorance is Not Bliss: Why a Ban on Human Cloning is Unacceptable*, 9 HEALTH MATRIX 311, 321 (1999).
31. *Id.* at 322.
32. *Id.*
33. Christi D. Ahnen, *Disputes Over Frozen Embryos: Who Wins, Who Loses, and How Do We Decide?*, 24 CREIGHTON L. REV. 1299, 1308 (1991).
34. Smith, *supra* note 30, at 321 (emphasis added).
35. May Mon Post, *Human Cloning: New Hope, New Implications, New Challenges*, 15 TEMP. INT'L & COMP. L.J. 171, 176 n.50 (2001). The twenty-seven states that have recently enacted anti-cloning legislation are: "Alabama, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Maryland, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and Wisconsin." *Id.* (citing Kimberly M. Jackson, Comment, *Well, Hello Dolly! The Advent of Cloning Legislation and Its Constitutional Implications*, 52 SMU L. REV. 283, 292 (1999)).
36. *Id.*
37. *Id.* at 176-77.

The question remains whether there is a constitutional right to clone humans under the protections of the marital right to privacy and reproductive freedom. Proponents of human cloning will advance the theory that the Court has gone to great lengths to avoid governmental intrusion in matters concerning these freedoms. Advocates of cloning also assert that "a ban on human cloning . . . unduly interferes with a right of scientific inquiry."[38] Proponents of cloning concede that "there is no specifically enumerated right to research in the U.S. Constitution."[39] However, it could be argued that "support for such a right could be derived from the Fourteenth Amendment right to personal liberty and the First Amendment right to free speech."[40] In particular, the "right to research consists of the freedom to pursue knowledge" and "[t]he strongest claims have been made for a First Amendment right of scientific inquiry."[41]

Opponents to human cloning, on the other hand, advocate that "[t]he Court should be most reluctant to invoke the due process clause to strike down [anti-cloning] legislation on substantive grounds."[42] In previous decisions by the Court, opponents of human cloning contend, "the Court has acted . . . because of an implicit understanding that the case did not . . . involve substantive due process."[43] Opponents bespeak heightened judicial deference for anti-cloning legislation, as "the area of cloning is a prime arena for [such] deference."[44] Anti-cloning legislation, therefore, should not be held as unconstitutional "[u]nless there is some problem in the *process* that led to the law under review."[45] It is further argued by opponents of human cloning that "the Constitution does not create a presumptively protected right [to clone human beings for reproductive purposes]—and thus the government is not required to show more than a rational justification for its actions."[46] Here, according to some, "the government has such a justification."[47] If and until the United States Supreme Court addresses this hot button issue, we will not have anything but speculation on behalf of either proponents or opponents regarding human reproductive cloning.

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38. Andrews, *supra* note 3, at 661.
39. *Id.*
40. *Id.*
41. *Id.* at 662.
42. Cass R. Sunstein, *Is there a Constitutional Right to Clone?*, 53 HASTINGS L.J. 987, 1004 (2002).
43. *Id.*
44. *Id.*
45. *Id.* (emphasis added).
46. *Id.* at 1005.
47. Sunstein, *supra* note 42, at 1005.

IV. ETHICAL AND PUBLIC POLICY CONSIDERATIONS OF HUMAN REPRODUCTIVE CLONING

Law is not a sterile and static body of rules and regulations. Rather, "[l]aw embodies the [dynamic] moral judgments of a society."[48] "Once the people decide which of many, often-competing moral views they desire, law can provide the tool to create the desired outcome."[49] For example, in 1997, the initial public response to the idea that human reproductive cloning "moved further away from science fiction and closer to a genuine possibility" with the successful cloning of a sheep named "Dolly," was one of concern.[50] Almost immediately, "President Clinton instituted a ban on federal funding related to attempts to clone human beings in this manner."[51] While this Executive decision does not affect a scientist's ability to obtain *private funding* for human cloning research, "except as it regards the interests of the subject or the general public affected by the research,"[52] it did send a sharp and decisive signal to those contemplating this type of human experimentation. Most importantly, however, the banning of federal funding for human cloning research was the crucial first step in laying the groundwork for future anti-cloning legislation. As "the government can constitutionally restrict the funds it grants to research, and because a large portion of research depends on government funds, the prohibition is bound to [negatively] affect the progress of research in genetic manipulation."[53] A delicate balancing act of sorts, however, must be attained between proposing legislation that proscribes any form of human cloning and legislation permitting "*legitimate research*[] on topics such as the regeneration of nerve tissue or skin for burn victims."[54]

The most compelling reason given by advocates of human reproductive cloning is that it allows "an infertile couple to have a genetically related child."[55] "Cloning, they argue, is just the next step after *in vitro* fertilization, which remains largely unregulated" after more than twenty years since its inception as a treatment for infertility.[56] In this context, the "use of [human] reproductive cloning presents a potential method of obtaining the biological or genetic connection to one's children that is so crucial to society's conception of reproduction and family."[57] Moreover, human reproductive

48. Susan R. Martyn, *Human Cloning: The Role of the Law*, 32 U. TOL. L. REV. 375, 375 (2001).
49. *Id.*
50. Harold T. Shapiro, *Ethical and Policy Issues of Human Cloning*, SCI., July 11, 1997, at 195.
51. *Id.*
52. Jonathan F.X. O'Brien, *Cinderella's Dilemma: Does the In Vitro Statute Fit? Cloning and Science in French and American Law*, 6 TUL. J. INT'L & COMP. L. 525, 549 (1998). S*ee also* IRA H. CARMEN, CLONING AND THE CONSTITUTION 52-53 (1986).
53. O'Brien, *supra* note 52, at 549.
54. David Kestenbaum, *Cloning Plan Spawns Ethics Debate*, SCI., Jan. 16, 1998, at 315 (emphasis added).
55. *Id.*
56. Martyn, *supra* note 48, at 379 (emphasis added).
57. John A. Robertson, *Why Human Reproductive Cloning Should Not In All Cases Be Prohibited*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 35, 37 (2000).

cloning, "like all other forms of assisted reproduction technology, should be presumptively protected as part of a fundamental right to have children, unless some *compelling harm* requires its prohibition."[58]

Anti-cloning advocates assert that the compelling harm mentioned above is ostensibly the "fears about harm to the children who may be created in this manner, particularly psychological harm associated with a possibly diminished sense of individuality and personal autonomy."[59] Therefore, this compelling harm should override any presumptive right to have children and prohibit the use of human reproductive cloning. Proponents of cloning counter this concern by asserting that "[b]ut for the use of the [human reproductive cloning] technique . . . the child would never have been born."[60] At the core of this counter-argument is the assumption that the "child is worse off if born through cloning than if never born at all."[61] This rationale parallels that found in "wrongful life tort cases" and has found little support under "American tort law."[62]

An additional concern for opponents of human reproductive cloning is the fear of implementing this methodology to "undermine important social values by opening the door to a form of eugenics."[63] Proponents of human reproductive cloning acknowledge that this concern is "worthy of widespread and intensive debate."[64] However, proponents contend that the mere concern over the possibility of eugenics is subservient to the broader concerns of "important social and constitutional values."[65] The values proponents of cloning rely most heavily upon include "protecting the widest possible sphere of personal choice, particularly in matters pertaining to procreation and child rearing; maintaining privacy; protecting the freedom of scientific inquiry; and encouraging the possible development of new biomedical breakthroughs."[66]

There are plausible ethical and policy arguments on both sides of the human reproductive cloning issue. We all must keep in mind, however, that the law is simply a reflection of the social and ethical values of the people it governs. As such, the American legal system must proceed with great caution and apprehension before setting sail to the uncharted waters of human reproductive cloning. If not, we may lose the opportunity "to get our hands

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58. *Id.* at 39 (emphasis added).
59. Shapiro, *supra* note 50, at 195.
60. Robertson, *supra* note 57, at 40.
61. *Id.*
62. *Id.* (citing Robak v. United States, 685 F.2d 471, 474 n.3 (7th Cir. 1981) "Every jurisdiction that has considered actions for wrongful life, except for California, has held that no such cause of action exists." *Id*.
63. Shapiro, *supra* note 50, at 195.
64. *Id.*
65. *Id.*
66. *Id.*

on the wheel of the runaway train now headed for a post-human world and to steer it toward a more dignified human future."[67]

V. "CONSENSUS OPINION" OF HUMAN REPRODUCTIVE CLONING?

While preparing a true "consensus opinion" on a matter as controversial and polarizing as human reproductive cloning may not be realistic, a few "[g]eneral observations can be made about the current world legislative landscape" regarding human cloning methodologies.[68] First, a movement toward banning human reproductive cloning while allowing other forms of human cloning (e.g., therapeutic cloning) is quickly gaining support in the International arena.[69] Second, there are surprisingly few International prohibitions on human cloning currently in place.[70] Specifically, "human cloning is legal in the almost 180 countries worldwide which are silent on the matter."[71] Finally, no country has assumed the leadership role on this issue and taken the first step to prohibit all human cloning—including embryonic, therapeutic, and reproductive forms of human cloning.[72]

Turning our attention back to the United States, the *Griswold* Court "established the principle that the right to freedom of speech includes freedom of inquiry, freedom of thought, and freedom to teach."[73] These freedoms are constitutionally guaranteed to all private citizens of the United States "by the penumbras emanating from the First, Third, Fourth, Fifth and Ninth Amendments."[74] However, the freedom of scientific expression of private citizens must be tempered with ethical and societal concerns when the "research has an effect beyond the confines of the scientist's private domain."[75] It is here, at the threshold point of the state's interest in society as a whole, that society's concerns should override the individual's private right to scientific freedom thereby granting "the state…ample rights to interfere."[76]

On July 11, 2002, the President's Council on Bioethics prepared its highly anticipated recommendations for a federal policy on human cloning to President George W. Bush.[77] The Council recommended "that the government should [permanently] ban [any] cloning for reproductive purposes and observe a 4-year moratorium on cloning for biomedical research."[78]

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67. Stephen S. Hall, *Human Cloning: President's Bioethics Council Delivers*, SCI., July 19, 2002, at 323.
68. Lesko & Buckley, *supra* note 4, at 9.
69. *Id.*
70. *Id.*
71. *Id.* at 10.
72. *Id.*
73. O'Brien, *supra* note 52, at 547 (citing *Griswold*, supra note 18).
74. *Id.* (citing *Griswold*, 381 U.S. at 480).
75. *Id.* at 547-48.
76. *Id.*
77. Hall, *supra* note 67, at 322.
78. *Id.*

While the Council was deeply divided on many issues, including "favor[ing] the moratorium [on cloning for biomedical research] by a [narrow] 10-7 margin," one point of consensus among this distinguished group of scientists, physicians, and bioethicists was a "unanimous agreement to recommend a [permanent] ban on reproductive [human] cloning."[79]

While this note has focused specifically on the conundrum of human reproductive cloning, "[human reproductive] cloning is merely a harbinger of a broader problem: adapting to technology enabling the alteration of the human genome prior to birth."[80] The bigger question that we must face as a society today is "whether one has the *right* not only to reproduce, but also to *totally select the genome of his or her offspring*."[81] While the scope of this Note provides a current legal, ethical, and public policy perspective on the issue of human reproductive cloning, the issue itself remains largely unresolved. Furthermore, it will remain unresolved until that much anticipated day when the United States Supreme Court addresses the issue of human reproductive cloning and the constitutional right to marital privacy and reproductive freedom. I suspect that this day is closer than we realize.

Richard J. Pearson, Jr., Ph.D.

79. *Id.* at 323.
80. Robertson, *supra* note 57, at 43.
81. *Id.* at 9 (emphasis added).

A "REST IN PEACE" GUIDE OF ESTATE PLANNING ETHICS

I. INTRODUCTION

Having your estate plan contested or revoked because of conflicts of interest is enough to make you turn over in your grave. It may also be enough to make the drafting attorney who is facing a potential malpractice suit wish he could join you. This Article explores the potential conflict of interest situations a drafting attorney faces in trust and estate representation. These include, but are not limited to: (1) an attorney representing spouses; (2) an attorney representing multiple family members in estate planning; (3) a drafting attorney named as a beneficiary in the will; and (4) a drafting attorney named as the fiduciary of the probate estate. This Article will also examine the inadequacy of the Model Rules of Professional Conduct in providing direction to estate planners, while examining commentaries that supplement the Model Rules by providing more detailed guidelines.

The purpose of this Article is to provide potential solutions for preventing possible conflicts and liability in estate planning by providing guidance on following the Model Rules of Professional Conduct. Part I of this Article presents the purpose of the Article as well as its importance for estate and trust lawyers. Part II discusses the current ethical guidelines that are available for estate and trust attorneys and the advantages and disadvantages these guidelines offer. Part III discusses conflicts of interest when representing multiple clients, specifically spouses and multiple family members. Part IV presents conflicts that may occur when an attorney takes on multiple roles. Part IV, section A discusses a drafting attorney as a named beneficiary, and Part IV, section B explains procedures an attorney needs to take before naming him or herself fiduciary of the estate. Part V suggests additional remedies that an attorney may use to help avoid ethical violations.

Both attorneys and testators need to be aware of the potential conflicts. Unfortunately, the current attorney liability law does not adequately protect beneficiaries and testators. The malpractice provisions mainly protect estate planning lawyers through the use of the privity defense. A recent Alabama case held that a devisee did not have standing as a third-party beneficiary to sue the attorney who failed to destroy a will at the testator's request.[1] Although the standing defense is being abandoned—leading to better planning—it has led to the lowering of the law's standards, thereby making it easier for attorneys. This is unfortunate since estate planning is one of the most important areas of law because it deals with issues involving the entire

1. Robinson v. Benton, 842 So. 2d 631, 638 (Ala. 2002).

estate of a client. In order for the profession's integrity to survive, lawyers need to be placed on notice that conflicts run rampant through the law of estate planning and that guidelines provided through the Model Rules do not offer adequate guidance. It is essential for clients and attorneys to become aware of these conflicts and to take measures to prevent them.

II. CURRENT ETHICAL GUIDELINES FOR ESTATE AND TRUST ATTORNEYS

The preamble of the ABA Model Rules of Professional Conduct, adopted by most states,[2] reads:

> The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.[3]

Self-governance of the legal profession leaves much of the profession's reputation to the personal values of individual lawyers—one reason that the guidelines do not provide a direct answer to all conflicting situations. With this self-governing concept, the ABA has provided guidelines through the years to direct a lawyer towards proper conduct.[4] The majority of the ethical standards have been just that—merely aspirational guidelines instead of strict disciplinary rules. This aspirational governance continues to lead to the protection of the legal profession unless the lawyers take it upon themselves to act in the best interests of clients—illustrating the importance of this Article.

In 1908, the ABA established the first ethical code called the Canons of Professional Ethics.[5] The Canons were very broad statements of standards describing how a lawyer should act. They were also highly aspirational and did not have much teeth in governing attorneys. In 1969, the ABA adopted the Code of Professional Responsibility, which established more disciplinary rules than the Canons.[6] The Code is still used in some jurisdictions

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2. *ACTEC Commentaries on the Model Rules of Professional Conduct*, 28 REAL PROP. PROB. & TR. J. 865, 874-76 (1994) [hereinafter *ACTEC Commentaries*] (stating that the 1983 ABA Model Rules of Professional Conduct have been adopted by most of the states). The 2002 Model Rules of Professional Conduct have been issued and are pending adoption by the states. *See* MODEL RULES OF PROF'L CONDUCT editor's note (2002).

3. MODEL RULES OF PROF'L CONDUCT pmbl., cmt. 12 (2002) (A Lawyer's Responsibilities).

4. *See* MODEL RULES OF PROF'L CONDUCT (2002).

5. Joseph W. deFuria, Jr., *A Matter of Ethics Ignored: The Attorney-Draftsman as Testamentary Fiduciary*, 36 U. KAN. L. REV. 275, 278 n.17 (1988); CANONS OF PROF'L ETHICS (1908).

6. deFuria, *supra* note 5, at 282; MODEL CODE OF PROF'L RESPONSIBILITY (1969).

today.[7] Nonetheless, like the Canons and the current Model Rules, the Code mostly aspired to provide lawyers with guidelines to uphold the reputation of the legal profession, not strict discipline. As illustrated in the Code's preamble:

> Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession.[8]

Like the Code, the Model Rules, issued in 1983 by the ABA[9] and amended in 2002,[10] provide disciplinary rules as well as mere professional guidelines.[11] But in some areas of estate planning ethics, the Model Rules actually watered down the Code's rulings by increasing generality instead of specificity.[12]

Although the ABA ethical guidelines leave much to the discretion of the attorney and often provide the bare minimum on what an attorney can do to prevent discipline, one court provides a warning signal practitioners should heed. The Iowa Supreme Court stated, "[t]he purpose of the canons as explained by the ethical considerations, disciplinary rules, and adjudicated decisions is to show [a lawyer] the professionally acceptable route through questions or doubts he may have regarding such conflicts."[13] The court continued,

> But it is obvious the canons cannot contain enough "thou shalt nots" to identify every ethical temptation a lawyer will encounter in his or her practice. Members of the bar can be assumed to know that certain kinds of conduct, generally condemned by responsible persons, will be grounds for disciplinary action.[14]

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7. *See ACTEC Commentaries*, supra note 2, at 874-76.
8. MODEL CODE OF PROF'L RESPONSIBILITY pmbl. (1969).
9. deFuria, *supra* note 5, at 292.
10. MODEL CODE OF PROF'L RESPONSIBILITY editor's note (2002).
11. deFuria, *supra* note 5, at 292.
12. *Compare* MODEL CODE OF PROF'L RESPONSIBILITY EC 5.6, *with* MODEL RULES OF PROF'L CONDUCT R. 1.7.
13. Comm. on Prof'l Ethics & Conduct v. Behnke, 276 N.W.2d 838, 840 (Iowa 1979) (quoting *In re* Frerichs, 238 N.W.2d 764, 769 (Iowa 1976)).
14. *Id.* at 843 (citation omitted).

Like the Iowa Supreme Court, the Model Rules also place within its Scope a "but" provision. [15]

> Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.[16]

Lawyers should take note that the rules and standards provided by the ABA are merely guidelines,[17] and they need to be aware of potential conflicts and problems that might arise, which could subject them to disciplinary action or civil liability suits and injure their client. Estate planners, however, as stated above by the Iowa Supreme Court and the Model Rules cannot rely strictly on the ABA guidelines because of their generality.[18] The preamble to the Model Rules addresses the lawyer in roles of an advisor, advocate, negotiator, and evaluator, which are mainly adversarial roles.[19] Though estate planners conduct mainly nonadverserial work, they too must be extremely careful in following the Model Rules and, furthermore, must implement guidelines of their own in order to adequately serve clients and remain ethical.

Fortunately, there are additional guidelines which help an estate and trust practitioner by supplementing the Model Rules. ACTEC, an organization of wills, trusts and estate lawyers, has attempted to bridge the gap between the Model Rules—written with the litigator in mind—and the trusts and estate lawyer. ACTEC Commentaries provide the trust and estate lawyer with rules directly affecting their mostly nonadverserial nature.[20] The Commentaries' basic themes include "the utility and propriety, in this area of law, of representing multiple clients, whose interests may differ but are not necessarily adversarial; and . . . the opportunity, with full disclosure, to moderate or eliminate many problems that might otherwise arise under the Model Rules."[21] Because the practice of trusts and estate law might lead to different representations than litigation or other areas, it is essential to find guidance in rules specifically addressing this area of law instead of merely relying on the general Model Rules. For example, multiple clients pose potential conflicts, but in the trusts and estates area they are a common

15. MODEL RULES OF PROF'L CONDUCT scope (2002).
16. *Id.* at cmt. 16.
17. *See id*.
18. *See id.*; *Behnke*, 276 N.W.2d at 840.
19. MODEL RULES OF PROF'L CONDUCT pmbl., cmt. 2 (2002).
20. *ACTEC Commentaries*, *supra* note 2, at 867.
21. *Id.*

situation. The ACTEC Commentaries, unlike the Model Rules, help an attorney decide how to handle multiple clients without the conflicts, possibly providing a more economical and efficient representation to the client.[22] Using these supplements, as well as preventive measures that will be discussed under the remedies section of this note, an estate and trust attorney can ethically prepare for the conflicts of estate planning.

III. CONFLICTS: MULTIPLE CLIENTS

In estate planning, conflicts of interests will most often arise with the representation of multiple clients. At first glance, both the layperson and the attorney may overlook potential problems. For example, when husband and wife draft their wills it is more than likely they will use the same attorney. Unfortunately, this normal marital tendency can lead to potential conflicts, which place strain on the attorney-client relationship with both spouses. Likewise, a son or daughter may consult their current attorney about drafting a will for their mother. Normally, a mother trusts her son's or daughter's recommendation for an attorney. However, this recommendation can lead to conflicts between clients if the parent and child have adverse interests. But, in the practice of trusts and estates law, representing multiple clients may provide more efficient and economical results.[23] Therefore, lawyers need guidance not only in how to avoid conflicts, but also how to represent multiple clients, preventing conflicts from the start.

A. Representing Spouses

Many conflicts can arise with the representation of both spouses. First, spouses may disagree as to how to provide for their children from prior marriages.[24] Second, the issue of separate versus community property comes into play, especially with forced election, where one spouse must forego interest in community property or lose the right to take under the will.[25] Third, disinheritance can affect an estate plan, especially if it is disinheritance of a spouse, another client, or that spouse's child.[26] In addition, general issues resulting in potential conflicts involve giving outright gifts versus a trust (which can limit the surviving spouse's enjoyment over the assets), choice of trustee or executor, and changing of the will later affecting the other spouse's estate plan.[27]

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22. *See id*.
23. *Id*. at 867-68.
24. April A. Fegyveresi, *Conflicts of Interests in Trust and Estate Practice*, 8 GEO. J. LEGAL ETHICS 987, 1001 (1995); Isabel Miranda, *Ethical Issues and Malpractice in Estate Planning and Administration, in* BASIC WILL DRAFTING 2002, at 201 (PLI Tax Law & Estate Planning Handbook Series No. D0-008V, 2002).
25. Fegyveresi, *supra* note 24; Miranda, *supra* note 24.
26. Fegyversi, *supra* note 24, at 1001-02; Miranda, *supra* note 24.
27. Fegyversi, *supra* note 24, at 1001-02; Miranda, *supra* note 24.

Each of the above situations poses confidence issues. Three types of confidences that could affect representation are: (1) action-related, where the lawyer is asked to prepare a document or give advice without the other client knowing; (2) prejudice to defeat interests of the other spouse; and (3) factual confidences defeating the expectations of the other spouse.[28]

ABA Model Rule 1.6 requires that a lawyer "shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation."[29] Further, the lawyer may only reveal confidences if the information relating to the representation of a client will likely prevent reasonably certain death or bodily harm.[30] In estate planning, however, any harm is likely to be of a financial nature. If an attorney represents both spouses, one spouse may reveal secret information, such as a secret bank account or a mistress beneficiary, which could have a substantial effect on the other spouse's estate plan. This presents a huge conflict for the lawyer who now knows information that can harm one client, but has a confidence to the other client. The clients' interests are now adverse invoking Model Rule 1.7 which states "[a] lawyer shall not represent a client if the representation involves a concurrent conflict of interest," meaning the representation of one client is "directly adverse" to the other or presents a "significant risk" to "another client, former client, or third person."[31] However, if the lawyer feels he can still represent both clients competently and diligently and the client gives informed consent, then the lawyer can continue representation.[32]

Unfortunately, an attorney must be alert to this situation because the Model Rules only cover substantial conflicts and do not advise an attorney on potential ones. Once the conflict has become substantial, it may be too late, and the lawyer must then withdraw. For example, a conflict may not arise until a client needs to make subsequent changes in an estate plan; or the clients may divorce, making their interests adverse. Also, attorneys need to consider whether they may represent the surviving spouse if he or she contests the will. Considering the attorney-client privilege survives the client's death,[33] the attorney still has the responsibility to his former client—the deceased spouse. With all the potential conflicts, an attorney needs to take preventive measures before he takes on both spouses by seeking guidance from other sources, such as the ACTEC Commentaries,[34] ABA and

28. Fegyveresi, *supra* note 24, at 999; *ACTEC Commentaries, supra* note 2, at 921.
29. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2003).
30. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2003).
31. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1)-(2) (2003).
32. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1), (4) (2003).
33. Swidler & Berlin v. United States, 524 U.S. 399 (1998).
34. *ACTEC Commentaries*, *supra* note 2.

state ethics opinions on the subject,[35] continuing legal education materials,[36] and cases.[37]

The ACTEC Commentaries suggest a lawyer may represent more than one client with related, but not identical, interests within the parameters of Model Rules 1.6 and 1.7.[38] Certain steps, nonetheless, must be followed to ensure compatibility with ethical standards.

> When the lawyer is first consulted by the multiple potential clients, the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them. The principal terms should, but need not, be reflected in a writing, a copy of which is given to each client.[39]

Distinguishing the type of representation of the spouses is a good start—joint versus separate representation.[40] In joint representation, the clients agree to share all confidences between them.[41] However, confidentiality will be maintained as to all other matters and matters not relevant to the representation.[42] Unless otherwise stated, joint representation is presumed when a lawyer represents multiple clients in related legal matters.[43] Not all jurisdictions, however, accept this type representation. NYSBA Opinion 72-258 ethically bars joint representation.[44] In fact, in one case, joint representation was held to be grounds for disqualification.[45] Nonetheless, even when joint representation is allowed and agreed upon by the clients, problems often arise after representation begins.

For example, once a lawyer receives information from one client that the client does not wish to be shared with the other joint client, the lawyer is placed in a situation threatening his ability to represent the clients. The lawyer should immediately take action and decide the best possible route.

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35. *See* Miranda, *supra* note 24, at 209. Also, the attorney should consult the local and state ethical opinions issued in the location where he or she practices law.
36. *See* Miranda, *supra* note 24; Randall W. Roth, *Avoiding Ethical Dilemma*, *in* ADVANCED ESTATE PLANNING TECHNIQUES 191 (ALI-ABA Course of Study, Feb. 21-23, 2002), WL SG062 A.L.I.-A.B.A. 191; Jeffery N. Pennell, *Ethics, Professionalism, and Malpractice Issues in Estate Planning and Administration*, *in* Estate PLANNING IN DEPTH 67 (ALI-ABA Course of Study, June 14, 1998), WL SC75 A.L.I.-A.B.A. 67.
37. *See* Cinema Five, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976); A. v. B., 726 A.2d 924 (N.J. 1999); Corcoran v. Corcoran, 425 N.Y.S.2d 402 (App. Div. 1980); Greene v. Greene, 391 N.E.2d 1355 (N.Y. 1979).
38. *ACTEC Commentaries, supra* note 2, at 916.
39. *Id.* at 917.
40. Fegyveresi, *supra* note 24, at 999-1000.
41. *Id.* at 1000.
42. *ACTEC Commentaries, supra* note 2, at 917.
43. *Id.*
44. Miranda, *supra* note 24, at 209.
45. *Corcoran*, 425 N.Y.S.2d at 402.

> The potential courses of action include . . . (1) taking no action with respect to communications regarding irrelevant (or trivial) matters; (2) encouraging the communicating client to provide the information to the other client or to allow the lawyer to do so; and (3) withdrawing from the representation if the communication reflects serious adversity between the parties.[46]

The lawyer needs to communicate with the client who refuses to share the confidences, explaining the lawyer's obligation to the joint client as well as the possible legal consequences for the joint clients and the attorney in regards to a disciplinary or malpractice suit.[47] In making his decisions, the lawyer should consider his duties of impartiality and loyalty to the clients, an agreement of communication made between the clients, the reasonable expectations of the clients, and the harm the confidence may bring if not disclosed.[48] "In some instances the lawyer must also consider whether the situation involves such adversity that the lawyer can no longer effectively represent both clients and is required to withdraw from representing one or both of them."[49]

In the *ABA Special Probate and Trust Division Study Committee on Professional Responsibility Study* results, two recommendations were made for lawyers representing spouses:

> (1) that in the absence of a contrary agreement the husband and wife are joint clients, which involves the application of implicit disclosure rules; and (2) that "the lawyer may define and limit his or her duty to require immediate disclosure and withdrawal and may agree that in some cases the lawyer will determine neither to disclose nor to withdraw, despite the existence of an adversity."[50]

The ABA recommends having a written agreement setting grounds for representation to avoid later problems.[51] The ABA Committee concluded with the advice that, "the lawyer must balance the potential for material harm arising from an unexpected withdrawal against the potential for material harm arising from the failure to disclose the confidence to the other spouse."[52]

Separate representation, on the other hand, is when a lawyer represents two clients in related matters. There does not appear to be authority authorizing separate representation.[53] In fact, Rule 1.7 does not allow attorneys to

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46. *ACTEC Commentaries, supra* note 2, at 918.
47. *Id.* at 919.
48. *Id.*
49. *Id.*
50. *Id.* at 920.
51. *ACTEC Commentaries*, *supra* note 2, at 920.
52. *Id.* at 921.
53. *Id.* at 917.

represent clients with adverse interests, which could easily happen when representing related matters.[54] This representation also may affect an attorney's independence of judgment required under Model Rule 2.1.[55] However, the ACTEC states if there is full disclosure and consent of the clients, separate representation may occur.[56] But a lawyer who undertakes this type of representation "should do so with great care because of the stress it necessarily places on the lawyer's duties of impartiality and loyalty and the extent to which it may limit the lawyer's ability to advise each of the clients adequately."[57] For example, a lawyer may not be able to represent each client zealously and diligently, as required under Model Rule 1.3[58] for fear it will hurt his representation of the other client.

Where adverse interest is not involved, however, a lawyer is not banned from representing multiple clients. The ACTEC Commentaries provide more guidelines than the general Model Rule 1.7:

> It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, co-fiduciaries of an estate or trust, or more than one of the investors in a closely held business. In some instances, the clients may actually be better served by such representation, which can result in more economical and better coordinated estate plans. . . . Recognition should be given to the fact that estate planning is fundamentally nonadverserial and estate administration is usually nonadversarial.[59]

Attorneys, however, need to be careful. A conflict that looked tolerable at the outset of representation may grow into one that prohibits continued representation of the multiple clients. One court ruled "[w]here the relationship is a continuing one, adverse representation is prima facia improper,"[60] while another court held representation of clients with conflicting interests as a breach of the fiduciary duty of loyalty.[61] To be safe, one should always perform a conflicts check prior to the engagement.

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54. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).
55. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.").
56. *ACTEC Commentaries*, *supra* note 2, at 917.
57. *Id.*
58. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2002).
59. Charles J. Groppe, *Ethical Considerations*, *in* BASIC WILL DRAFTING 2002, at 149 (PLI Tax & Estate Planning Course Handbook Series No. D0-008V, 2002).
60. *Cinema Five*, 528 F.2d at 1387.
61. *Greene,* 391 N.E.2d at 1357.

B. Representing Multiple Family Members

Parent-child relationships affect confidences similar to those expressed above. The parent and child relationship may also yield adverse interests, invoking the same conflicts mentioned above. In relationships involving parents and children, it is important to remember who your client is.

> If the child was your client previously, you would avoid involving yourself in representing the parent unless you are absolutely convinced that the parent truly wanted the change, had full capacity and was not under undue influence. If there was no prior relationship you should also want to be convinced that the client has requisite capacity and is free of undue influence. Remember, the parent is the client irrespective of your relationship with the child.[62]

The same caution used in the representation of spouses should be used in the representation of multiple family members.[63]

IV. CONFLICTS: ATTORNEY IN MULTIPLE ROLES

The other area rampant with potential conflicts is where attorneys take on multiple roles such as a beneficiary or an executor of the estate. Whereas multiple roles are often good hearted and beneficial for the estate, they can lead to presumptions of undue influence and overreaching of the attorney.

A. Drafting Attorney Named As Beneficiary

Model Rule 1.8(c) states:

> A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client . . . . related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.[64]

This conflict commonly occurs in three types of situations: (1) an elderly client with little or no family, (2) a client rewarding an attorney for

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62. Groppe, *supra* note 59, at 183.
63. *See* discussion *infra* Part III.A.
64. MODEL RULES OF PROF'L CONDUCT R. 1.8(c) (2002).

good work, and (3) an attorney preparing a will for a relative or good friend.[65]

The problem that an attorney brings on by naming himself as a beneficiary in a will he has drafted is that he creates a personal interest in the client's estate for himself. This can interfere with his ability to render independent legal advice, as required under Model Rule 2.1.[66]

Though Model Rule 1.8 appears to provide clear guidance to estate planners, it falters somewhat because of the word "substantial."[67] A particular lawyer's definition of substantial can differ from another's perception of the word. Therefore, lawyers are still left to decide for themselves whether or not their act is ethical.

The ACTEC Commentaries offer more guidance on this issue. The Commentaries state that a lawyer may prepare a will that benefits the lawyer, the lawyer's spouse, children, siblings, or parents for a client who is closely related to the lawyer or his or her spouse.[68] If the gift is disproportionately large in relation to other gifts in the will, the presumption of undue influence becomes greater.[69] However, if the lawyer is not related to the person whose will he is drafting and he is a beneficiary, he should decline assistance. "Neither the lawyer nor anyone associated with the lawyer should assist a client who is not closely related to the lawyer or to the lawyer's spouse to make a substantial gift to the lawyer or the lawyer's spouse, children, parents, or siblings."[70]

ACTEC defines "closely related" as one or one's spouse who is entitled to receive part or all of the client's estate if the client were to die intestate with no surviving spouse.[71] To determine whether a gift is "substantial," one must reference the size of the estate and the size of the estate of the lawyer or the lawyer's spouse or children.[72]

Because there is a presumption of undue influence and overreaching in these situations, an attorney must be careful in accepting a testamentary gift devised in a will he drafted. A leading New York case on the matter established the "Putnam Rule,"[73] which is as follows:

> Attorneys for clients who intend to leave them or their families a bequest would do well to have the will drawn by some other lawyer. . . . In the absences of any explanation [of the circumstances of the bequest] a jury may be justified in drawing the inference of undue

65. Fegyveresi, *supra* note 24, at 990.
66. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002).
67. Fegyveresi, *supra* note 24, at 991.
68. *ACTEC Commentaries, supra* note 2, at 948.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 949.
73. *In re* Will of Putnam, 177 N.E. 399 (N.Y. 1931).

> influence, although the burden of proving it never shifts from the contestant.[74]

Other cases have presented a possible duty to discourage the gift.[75] Some cases have held that an attorney must show evidence that the gift was "willingly made," and absent such evidence, the trier of fact may draw an inference of undue influence.[76] Still, other cases go even farther, following the approach taken by the New York State Bar Association Committee on Professional Ethics, and require that the attorney must resign as counsel or refuse the bequest.[77]

Additionally, caselaw does not support an attorney drafting the will of an unrelated person when the attorney is a beneficiary.[78] For example, in Montana, the state supreme court found an attorney guilty of unduly influencing an incompetent client when drafting a will in which the attorney received half of the estate.[79] Recently, in Mississippi, the state supreme court denied an attorney's attempt to rebut the general presumption of undue influence arising from the confidential relationship between the attorney and the client, although the attorney actually took the client to another attorney to draft the final will.[80] Additionally, a South Dakota lawyer received a two-year suspension for taking advantage of an uncle through drafting a will that enriched himself and his wife.[81] Attorneys should be alert to these conflicts, or they will likely face disciplinary action.

B. Drafting Attorney Named as Fiduciary of the Estate

The situation of a drafting attorney naming him or herself a fiduciary of the estate also creates presumptions of undue influence and overreaching.[82] An attorney may be seen as soliciting more business or double dipping by getting paid for both services. Though an attorney is an excellent choice for

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74. Groppe, *supra* note 59, at 151 (citing *Putnam*, 177 N.E. at 400).

75. Miranda, supra note 24, at 214 (citing In re Will of Tank, 503 N.Y.S.2d 495, 498 (Sur. Ct. 1986); In re Will of Cromwell, 552 N.Y.S.2d 480 (Sur. Ct. 1989)).

76. Miranda, *supra* note 24, at 214 (citing Estate of Lawson, 428 N.Y.S.2d 106, 110 (App. Div. 1980)).

77. *Id.*

78. *See In re* Krotenberg, 527 P.2d 510 (Ariz. 1974); Colorado v. Berge, 620 P.2d 23 (Colo. 1980); Comm. on Prof'l Ethics and Conduct v. Behnke, 276 N.W.2d 838 (Iowa 1979); Comm. on Prof'l Ethics and Conduct v. Randall, 285 N.W.2d 161 (Iowa 1979), *cert denied*, 446 U.S. 946 (1980); *In re* Estate of Karabatian, 170 N.W.2d 166 (Mich. Ct. App. 1969); Mahoning County Bar Ass'n v. Theofilos, 521 N.E.2d 797 (Ohio 1988); Columbus Bar Ass'n v Ramey, 290 N.E.2d 831, 835 (Ohio 1972); *In re* Gonyo, 245 N.W.2d 893 (Wis. 1976); Phillip White Jr., Annotation, *Attorneys at Law: Disciplinary Proceedings for Drafting Instrument such as Will or Trust under which Attorney-Drafter or Member of Attorney's Family or Law Firm is Beneficiary, Grantee, Legatee, or Devisee*, 80 A.L.R.5th 597 (2002).

79. Estate of Axvig v. Estate of Axvig, 996 P.2d 882 (Mont. 1999) (unpublished opinion).

80. *In re* estate of Smith v. Streater, 827 So. 2d 673 (Miss. 2002).

81. *In re* Mattson, 651 N.W.2d 278 (S.D. 2002).

82. *See* Paula A. Monopoli, *Fiduciary Duty: New Ethical Paradigm for Lawyer/Fiduciaries,* 67 MO. L. REV. 309 (2002); *ACTEC Commentaries*, *supra* note 2, at 935.

the fiduciary role, it is the client's decision and an attorney's duty to inform the client about alternate persons and financial concerns.

Taking into consideration the knowledge they possess and today's mobile society, which spreads apart families, lawyers appear to be well qualified for the fiduciary role.[83] "The problem is that lawyers work for money—making it hard to separate money as motivation for taking on the mantle of fiduciary from the genuine concern that family or friends might have in taking on the same role."[84] Also, many clients do not understand that a family member or layperson can hire a lawyer to help with the role, which may be beneficial from an economic standpoint compared to what a lawyer receives.

ACTEC's comment on Model Rule 1.7 states:

> An individual is generally free to select and appoint whomever he or she wishes to a fiduciary office. None of the provisions of the Model Rules deals explicitly with the propriety of a lawyer preparing for a client a will or document that appoints the lawyer to a fiduciary office. . . . As a general proposition lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries. Accordingly, a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rules of Model Rule 1.7 . . . and the appointment is not the product of undue influence or improper solicitation by the lawyer.[85]

A client is properly informed if he is provided with information regarding the role and duties of the fiduciary, the ability of a lay person to serve in a fiduciary role with legal assistance, and the costs of appointing the lawyer as compared to appointing another person as fiduciary.[86] The lawyer should also explain to the client in full any benefits the attorney might receive.[87]

If the lawyer does not fully explain the facts surrounding his or her being appointed as fiduciary, undue influence or overreaching may be presumed. The "Weinstock Rule," established by a leading case on this subject, stands for the proposition that overreaching by the attorney to induce nomination by the testator can result in denial of letters by the Surrogate at the probate stage.[88]

The Model Rules in this area falter somewhat from the Model Code because they dropped the EC 5-6 provision, which provided that a lawyer

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83. Monopoli, *supra* note 82, at 334.
84. *Id.*
85. *ACTEC Commentaries, supra* note 2, at 935.
86. *Id.* at 936.
87. *Id.* at 935.
88. *Id.*

should not consciously influence a client to name the lawyer as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name the lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.[89] There is no similar provision in the Model Rules. The ABA Model Rules replaced the Model Code's EC 5-6 with Model Rules 1.7[90] and 1.8[91], which are more general. However, the ACTEC guidelines stated above bring more specificity to the general Model Rules. Also, several state ethics opinions provide that a lawyer who does not promote appointment or exercise undue influence may draft an instrument appointing the lawyer as fiduciary if the a lawyer makes a full disclosure to the client, obtains written consent, and charges a reasonable fee.[92] To avoid problems, the attorney needs to explain financial conditions relating to appointment and availability of alternative candidates.[93]

V. REMEDIES

Serious conflicts in estate and trust law can be avoided through advance discussion and planning. First, an attorney needs to disclose, in full, all information pertaining to the representation. Second, the attorney needs to limit the representation and define its scope in a written document given to the client and retained by the attorney. Third, an attorney should obtain written consent from the client before the representation starts, making sure the client understands the representation to the fullest extent. For example, an attorney could send a letter to the client and have them return a letter acknowledging their understanding.[94] Fourth, an attorney needs to collect and document evidence to be used to rebut undue influence or overreaching presumptions. For instance, an attorney should make written records of everything, especially internal memorandums, to help refresh the attorney's recollection.[95] Finally, a standard conflicts check and engagement letter/brochure should be used with every new client.[96]

The above suggestions are not exclusive. An attorney should create some of his own checks and balances to ensure an ethical practice. In doing so an estate planner must know who his client is and let that client make

89. MODEL CODE OF PROF'L RESPONSIBILITY EC 5-6 (1969).
90. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).
91. MODEL RULES OF PROF'L CONDUCT R. 1.8 (2002).
92. *See* Ga. State Bar Ass'n, Formal Op. 91-1 (1991) (stating that a lawyer who neither promotes appointment or exercises undue influence with full disclosure, written consent and reasonable fee can draft an instrument appointing himself as attorney); S.C. Bar Ethics Advisory Comm., Op. 91-07 (1991) (stating that it is ethical to prepare a will naming the lawyer as fiduciary upon direction of the client, except under circumstances governed by Model Rule 1.8-substantial gifts); Va. State Bar Ass'n Standing Comm. on Legal Ethics, Op. 1358 (1990) (stating that a lawyer may draft a will that appoints him fiduciary if the client gives informed consent of alternate representatives, fees, and lawyer's own financial interest).
93. Monopoli, *supra* note 82, at 330.
94. Miranda, *supra* note 24, at 218.
95. *Id.*
96. *Id.*

informed decisions. The planner should not make the decision for the client. Documentary evidence showing it was the client's informed decision can be used to help rebut the presumption of undue influence.

VI. CONCLUSION

As society continues to move towards more complex and complicated family structures, and trust and estate practice continues to promote long-term trusting relationships between clients and attorneys, conflict of interests will continue to create possible ethical violations for attorneys. Since the current Model Rules provide little specificity for estate planning situations, attorneys need to consult other guidelines to learn to handle the potential conflicts of estate and trust law. Requiring written disclosures and written consents will help both the client and attorney to be better informed about and protected from potential ethical violations. In order to be a responsible estate planner, one should take a more strict view of their position and become aware of proper ethical actions, which will provide a more peaceful rest to both decedents and estate lawyers.

Catherine Houston Richardson

THE MINIMAL REQUIREMENTS OF CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AS FURTHER REDUCED BY THE PROCEDURAL DEFAULT DOCTRINE LEAVES LITTLE ROOM FOR ERROR BY THE TRIAL ATTORNEY

I. INTRODUCTION

The courts are no longer providing recourse for capital defendants when their attorney's performance is deficient.[1] As a result, there is a great burden upon capital defense attorneys to realize that the defendant will severely pay for any failure on the attorney's part. Rarely will the courts excuse the defendant from the adverse consequences of an attorney's actions;[2] thus, there is an ethical obligation upon capital defense lawyers to meet a higher standard of care than is required by the courts.

The burden placed upon capital defense attorneys is not an easy one to carry. Considering the serious lack of funding for court appointed counsel, especially in capital cases, it is an unfair and nearly unbearable responsibility.[3] However, until the law is changed, this is where the burden must lie. The defendant has given his voice to his counsel, who is charged to zealously represent the client's interest. Despite this difficult challenge, ethical members of the bar should not allow a voiceless defendant to pay for the attorney's mistakes.

Two areas of law in particular have evolved to preclude capital defendants from having their constitutional or federal claims reviewed by federal courts. The Supreme Court's decisions regarding its refusal to exercise jurisdiction due to procedural defaults, coupled with its definition of constitutionally required effective assistance of counsel, have made it painfully clear that the defendant will pay the price for his or her attorney's failures.[4] Counsel has a duty to be aware of this lack of margin for error.

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1. *See* Stewart v. Smith, 536 U.S. 856 (2002) (holding that ineffective assistance of counsel claim was not reviewable in federal habeas proceedings); *see also* Gray v. Netherland, 518 U.S. 152 (1996) (preventing federal habeas review of defaulted *Brady* claim); Coleman v. Thompson, 501 U.S. 722 (1991) (holding that constitutional claims presented for first time in state post conviction proceeding were not subject to review in federal habeas proceeding).

2. *See* Strickland v. Washington, 466 U.S. 668, 695 (1984).

3. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, but for the Worst Lawyer*, 103 YALE L.J. 1835, 1853-55 (1994).

4. *See Stewart,* 536 U.S. at 856; Murray v. Carrier*,* 477 U.S. 478, 524 (1986); *Strickland*, 466 U.S. at 695.

This Note will first describe the evolution of the procedural default doctrine and how the courts have continually narrowed the circumstances under which they choose to exercise their jurisdiction to review constitutional claims. Second, this Note will illustrate the ramifications of the Court's interpretation of the Sixth Amendment guarantee to effective assistance of counsel. Third, this note will examine the results of the combination of the procedural default doctrine and ineffective assistance of counsel interpretation to make clear the gravity of capital defense counsel's errors.

II. PROCEDURAL DEFAULT

People in the United States are being executed without federal consideration of whether their constitutional rights were violated. [5] Many constitutional claims presented to the State either on direct review or state post-conviction proceedings are barred due to defense counsel's violation of procedural rules. [6] Under the procedural default doctrine, this violation by the defendant's attorney in state court often also bars federal review, thereby precluding an entire avenue for potential relief. This rule applies in equal force to all cases, including those in which the death penalty has been imposed.

A defendant is said to have procedurally defaulted his or her constitutional claims when a state court refuses to address those claims because the defendant has failed to comply with state procedural requirements. [7] The doctrine of procedural default bars the defendant from raising constitutional claims in future proceedings. Federal habeas review of those claims is also barred if the state court judgment rested on independent and adequate state grounds. [8] However, a defendant's procedural default can be excused, under very narrow circumstances, thereby allowing federal habeas review.[9] To be excused, it is incumbent upon the individual to show both just cause for non-compliance with the state procedural rule and prejudice resulting from the constitutional violation; alternatively, the defendant may demonstrate that a "failure to consider [his] claims will result in a fundamental miscarriage of justice."[10]

A. Independent and Adequate State Grounds

A prisoner's right to federal habeas review of a state court's denial of a federal constitutional claim is precluded if the state court's decision rested on a procedural default that was independent from the federal question and

5. *See Gray,* 518 U.S. at 152 (preventing federal habeas review of defaulted *Brady* claim); *see also* Smith v. Murray, 477 U.S. 527 (1986).
6. *See Stewart*, 536 U.S. at 857-61; *see also Coleman*, 501 U.S. at 750.
7. *See, e.g., Coleman,* 501 U.S. at 729-32.
8. *Id.*
9. *Id.* at 750.
10. *Id.*

is adequate alone to support the prisoner's continued confinement or sentence.[11]

1. Independent State Grounds

The Court has limited the availability of federal habeas review by reversing the presumption of non-independence when a state court's judgment is ambiguous.

Often state court judgments are ambiguous; therefore, it is difficult to ascertain whether the motion to dismiss is granted solely upon procedural default or if federal claims were also considered.[12] If the federal claims were considered, then the procedural default was not independent of federal law and federal habeas review is permissible. [13]

In response to the difficulty of ambiguity, the Supreme Court first adopted a conclusive presumption that the federal courts would exercise jurisdiction when a state court judgment did not clearly and expressly rely on independent and adequate state grounds.[14] The Court held that if the States wanted the integrity of their procedure to hold up, they should explicitly express that they had passed judgment based upon independent and adequate state grounds.[15] However, the cases where the presumption of jurisdiction was initially applied were direct review cases.[16] The Court subsequently applied the requirement to federal habeas review.[17]

The presumption of a non-independent state ground absent a clear statement to the contrary was severely limited in *Coleman v. Thompson.* In *Coleman*, the Supreme Court considered whether or not the Virginia Supreme Court's dismissal based upon procedural default was independent from Coleman's constitutional claims.[18] The defendant was held to have procedurally defaulted when his attorney filed his notice of appeal three days late.[19] The State then filed a motion to dismiss the defendant's constitutional claims due to the tardiness of the filing.[20] The Virginia Supreme Court did not act upon this motion immediately.[21] In fact, after the motion to dismiss was filed, yet before the judgment was issued, both parties filed

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11. *See, e.g.,* Wainwright v. Sykes, 433 U.S. 72, 81 (1977).
12. *Coleman,* 501 U.S. at 732.
13. *See id*.
14. Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). The Court held that there is a presumption of no adequate and independent state ground when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the . . . face of the opinion." *Id.*
15. *Long,* 463 U.S. at 1041.
16. *Harris v. Reed*, 489 U.S. 255, 262-63 (1989).
17. *Harris,* 489 U.S. at 263.
18. *Coleman,* 501 U.S. at 729.
19. *Id*. at 727.
20. *Id*.
21. *Id.*

several briefs pertaining to the constitutional claims.[22] After reviewing the briefs, the court issued an order simply and ambiguously stating, "[u]pon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed."[23]

The majority held that the Virginia Supreme Courts dismissal of the claim was independent of Constitutional claims as it was based upon the procedural default of filing the notice of appeal three days late.[24] Justice O'Connor, writing for the court, held that the state court judgment must "fairly appear[ ] to rest primarily on federal law" in order to apply the presumption that the court should exercise federal jurisdiction. [25]

Because the Virginia Supreme Court used language pertaining to granting the motion to dismiss while ambiguously stating "upon consideration whereof" the court held that the predicate "fairly appears to rest primarily on federal law, or to be interwoven with the federal law" was not met.[26] Therefore, the procedural default was considered independent and an exercise of federal jurisdiction was held to be improper. [27] Thus, the presumption towards federal habeas review in cases of ambiguity was all but destroyed and replaced with a presumption towards abstaining if the court does not "fairly appear[ ] to rest primarily on federal law."[28]

It is important to note that when the court denies review due to the procedural default doctrine, there are diverse reasons for that denial. Direct review differs from habeas review in that direct review deals only with jurisdictional issues. The Supreme Court has no power on direct review to review a state decision that is sufficient to support the judgment.[29] Thus, on direct review, if the procedural default is independent, then the federal court's ruling on constitutional claims could not affect the judgment and would therefore be advisory.[30] This is not the case in habeas review.

In habeas, the court is reviewing whether the custody of the defendant is in violation of the Constitution; it is not reviewing the judgment.[31] Therefore, in a habeas proceeding, the basis for abstaining from review when the state judgment is decided upon independent and adequate grounds is not a

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22. *Id.*
23. *Coleman*, 501 U.S. at 728.
24. *See id.* at 722.
25. *Id.* at 734.
26. *Id.*
27. *Id.*
28. *See*, *e.g.*, *Stewart,* 536 U.S. at 856 (state court determination that ineffective assistance of counsel claim was waived because of failure to raise it in prior state post-conviction relief petitions was not ruling on merits, under state procedural rule that did not require federal constitutional ruling on the merits, and thus, state court procedural default ruling was independent of federal law, barring federal habeas review); Julius v. Johnson, 840 F.2d 1533 (M.D. Ala. 1988), *modified on denial of reh'g,* 854 F.2d 400 (11th Cir. 1988), *cert. denied*, 488 U.S. 960 (1988) (noting that, for federal habeas review, the assertion by an Alabama court that it did not find any errors upon its independent review of the record did not constitute ruling on the merits; therefore, state claim was independent).
29. *Coleman*, 501 U.S. at 730.
30. *Id.*
31. *See* 28 U.S.C. § 2254 (1996).

lack of jurisdiction. [32] It is rather a choice by the court to refrain from exercising jurisdiction. [33]

2. Adequate State Grounds

Whether or not a procedural bar is adequate is a federal question which determines whether federal review of the constitutional claims is permissible.

A petitioner for federal habeas review may also challenge the adequacy of the state procedural bar. If the court finds that the procedural bar is inadequate, the court is permitted to hear the constitutional claims.[34]

B. Limitation of Procedural Default Excuses

Federal review is further reduced by limiting the excuses that will allow federal habeas review despite the state court's judgment relying on independent and adequate procedural default grounds. The Supreme Court has held that it is inappropriate for a federal court to exercise its jurisdiction to hear federal question claims when a state court has refused to hear those claims due to a procedural default unless the defendant successfully shows just cause for the noncompliance with the state procedural rule as well as actual prejudice resulting from the alleged constitutional violation.[35]

1. History

The evolution of the Court's treatment of procedurally defaulted claims due to counsel's failures began requiring strict adherence to state rules. This was followed by a period where more weight was placed on fundamental justice. Finally, the pendulum has swung back to its current state where finality and the State's interest of proper allocation of costs are valued more than fundamental principles of justice.

From 1953 to 1963, the Court under *Brown v. Allen* held that federal habeas was barred unless a prisoner could show that he was "detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials."[36] There, the prisoner was one day late in filing his appeal as of right in the North Carolina Supreme Court and was there-

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32. *Coleman,* 501 U.S. at 730.

33. *Id.*; *see also* Fay v. Noia, 372 U.S. 391, 438 (1963), *overturned in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

34. *See, e.g.,* Lee v. Kemna, 534 U.S. 362, 376. "Ordinarily, violation of 'firmly established and regularly followed' state rules . . . will be adequate to foreclose review of a federal claim. There are, however, exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Id.* (citations omitted).

35. *Coleman*, 501 U.S. at 750; *Smith*, 477 U.S. at 533; *Wainwright,* 433 U.S at 84; *Carrier*, 477 U.S. at 485.

36. 344 U.S 443, 485-86 (1953).

fore barred by that court in filing his claim.[37] The Supreme Court held that the federal habeas petition was also barred. [38]

The Supreme Court then reanalyzed the importance of the interests being weighed, thus, *Allen* was overruled in 1963 by *Fay v. Noia*.[39] In *Fay*, the state prisoner was held not to have defaulted federal habeas review by failing to appeal his conviction of felony murder because he did not have an intelligent understanding of the waiver.[40] *Fay* held that a procedural default in state court does not bar federal habeas review unless the petitioner deliberately and intelligently bypassed state proceedings.[41] This ruling allowed prisoners to overcome the procedural default by showing that they personally had not "knowingly," "understandingly," or "deliberately" sidestepped the state court.[42]

The *Fay* Court's rationale was that the prisoner's forfeiture of his state remedies was sufficient to satisfy the State's interest, and any residual interest would not outweigh the interest of providing remedy for a constitutional violation.[43] The procedural default doctrine under *Fay* avoided placing the responsibility of incompetent and ineffective representation upon the defendant who had little to no control over the procedural aspects of the case. *Fay*'s ruling placed great value on the interests of the defendant in pursuing his constitutional claims.

In 1979, however, the Court in *Wainwright* replaced *Fay's* weighted interest in the defendant's constitutional rights with "respect" for the state's procedural rules and an interest in enhanced finality.[44] *Wainwright* replaced *Fay's* "deliberate bypass" standard with the "cause and prejudice" standard.[45] The shift was drastic. The law we have today is a slight refinement of the *Wainwright* cause and prejudice standard.

2. Cause

Meeting the cause requirement in order to have the procedural default excused is a nearly insurmountable challenge. In order to meet the cause requirement to excuse a procedural default, the court has held that the prisoner must show, "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[46] Mere neglect or ignorance on the part of the prisoner's attorney will not suffice.[47]

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37. *See id*. at 484-85.
38. *Id.* at 485.
39. *Fay*, 372 U.S. at 391.
40. *Id.*
41. *Id*. at 438.
42. *Id.* at 439.
43. *Coleman*, 501 U.S. at 745.
44. *Wainwright*, 433 U.S. at 72.
45. *Id*. at 85, 87.
46. *Carrier,* 477 U.S. at 488.
47. *Id*.

Attacks on defense counsel's performance must rise to the level of constitutional deprivation of effective assistance of counsel.[48]

C. The Supreme Court's Interpretation Effective Assistance of Counsel

The Supreme Court's interpretation of what is constitutionally required effective assistance of counsel has severely limited a defendant's recourse. A defendant in a criminal case is guaranteed the effective assistance of counsel by the Sixth Amendment of the United States Constitution,[49] which is applied to the states through the Fourteenth Amendment.[50] After *Powell*, it seemed that defendants would actually receive effective assistance and would therefore be afforded a fair trial. However, the court's more recent interpretation of what constitutes effective assistance has all but eliminated the reality of the right.[51]

In *Strickland v. Washington,* the Court held that in order to require reversal, a defendant must show that counsel's performance was so deficient as to fall below an objective standard of reasonableness, as well as a probability that, but for counsel's unreasonable performance, the result of the proceeding would have been different.[52]

1. Performance

Justice O'Connor clearly stated that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[53] The court then went on to provide that there is a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance."[54] This strong presumption reduces the attorney performance standard drastically. To illustrate this point, Stephen Bright quoted Judge Alvin Rubin of the Fifth Circuit as follows:

> The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. . . . Consequently, accused persons who are represented by "not-legally-ineffective" lawyers may be condemned to die when the same accused, if represented by effective counsel, would receive at least the clemency of a life sentence.[55]

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48. *Id.*
49. Powell v. Alabama, 287 U.S. 45, 66 (1932).
50. Cuyler v. Sullivan, 446 U.S. 335, 343 (1980).
51. *See* Bright, *supra* note 3.
52. 466 U.S. 668, 688, 694 (1984).
53. *Id.* at 688.
54. *Id.* at 689.
55. Bright, s*upra* note 3, at 1858 (quoting *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring)).

Justice O'Connor stated that "[t]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation."[56] This it most certainly has not done. "Courts employ a lesser standard for judging the competence of lawyers in a capital case than the standard for malpractice for doctors, accountants, and architects."[57] The Eleventh Circuit has made the standard even lower by holding, "even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that *no* reasonable lawyer, in the circumstances, would have done so."[58]

Justice Marshall's dissent exposed a major flaw in the *Strickland* test for ineffective assistance of counsel:

> To tell lawyers and the lower courts that counsel for a criminal defendant must behave "reasonably" and must act like "a reasonably competent attorney," is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel. In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower court to exercise theirs.[59]

A common method of justifying an attorney's otherwise deficient performance as constitutionally effective assistance of counsel is to describe the lawyer's poor performance as strategy or tactic. This is a readily available excuse because the *Strickland* court declared that a court should do everything possible to avoid the benefit of hindsight.[60] It seems that a confusion of the rationale has been upheld. It is one thing to guard against declaring thoughtful, though unsuccessful, strategies as constitutionally ineffective; it is another to justify incompetent representation by calling it "strategy."

It seems the *Strickland* Court assumes that the right to effective assistance of counsel is well protected.[61] This would not be a problem if defendants were actually receiving effective representation. However, studies

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56. *Strickland*, 466 U.S. at 689.
57. Bright, *supra* note 3, at 1858.
58. *Id*. at n.138 (quoting *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994)) (emphasis added) (holding also that, contrary to other decisions by different panels of the same court, a decision not to investigate can also be considered strategy).
59. *Strickland*, 466 U.S. at 707-08 (Marshall, J., dissenting).
60. *Id*. at 689.
61. *See* Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating the Effective Assistance of Counsel*, 77 GEO. L.J. 413, 415 (1988).

overwhelmingly show that defendants are too often denied effective assistance.[62]

2. Prejudice

Reversal under the *Strickland* test is extremely rare.[63] Even if the defendant's attorney's performance is found to be constitutionally ineffective, it must also be shown that, but for the counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different.[64] It is not exactly clear how probable the standard of "reasonable probability" must be, other than it must be "sufficient to undermine the confidence in the outcome."[65] But it is clear that it does not mean "more likely than not."[66] The ultimate question is, did the deficient performance render a result of the trial that is unreliable or fundamentally unfair. [67]

But what the court is considering as fundamentally fair is dumbfounding. Falling asleep[68] and coming to court drunk[69] mark a couple of the cases where the court has either found counsel's performance effective or that it did not sufficiently prejudice the defendant.

III. FEDERAL HABEAS REVIEW OF A PRISONER'S CONSTITUTIONAL CLAIMS

The Court has severely limited federal habeas review of a prisoner's constitutional claims by requiring as an acceptable excuse to a procedurally defaulted state claim that his attorney's conduct, which resulted in the default, is deficient enough to overcome the nearly insurmountable presumption of effective assistance of counsel. One all too common deficiency is trial defense counsel's failure to assert potentially valid claims at trial and thereby waive the defendant's right to appeal those claims in a later proceeding. Whether this is based upon "ignorance, neglect, or failure to discover and rely upon proper grounds or facts, even in the heat of trial, [courts] will bar federal review of that issue."[70] However, due to the lax

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62. *Id.* at 430-31. The author notes that a Second Circuit survey of 40-plus judges indicated that between 10-12% of the attorneys appearing before them in civil and criminal cases "lacked basic knowledge of the fundamental tools of advocacy," and responses of more than 1000 judges implied that 20% of attorneys appearing before them are either "partially incompetent" or "predominately incompetent." *Id*. (citing Dorothy Linder Maddi, *Trial Advocacy Competence,* 1978 AM. B. FOUND. RES. J. 105, 106). Further, a Federal Judicial Center Survey report found that 41.3% of the federal judges who responded thought there to be a serious problem of inadequate trial advocacy in their court." *Id*.

63. *See* Calhoun, *supra* note 61, at 415.

64. *Darden v. Wainwright*, 477 U.S. 168, 184 (1986).

65. *Strickland*, 466 U.S. at 694.

66. *Id.*

67. *See id.* at 697.

68. Bright, *supra* note 3, at 1840 n.35.

69. *Id*. at 1835.

70. *Id.* at 1862.

standard of performance necessary to be considered effective assistance, rarely will this procedural default be excused as cause.

The point is perfectly illustrated in *Smith v. Murray*.[71] There, the court held, "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default."[72] In *Murray*, defense counsel failed to recognize and assign error to the admission of the psychiatrist's testimony as a violation of the defendant's Fifth and Fourteenth Amendment rights.[73] The psychiatrist did not inform the defendant during or prior to the interview that he had a right to remain silent or that his statements may later be used against him.[74] The psychiatrist testified at the defendant's sentencing hearing describing a previously undisclosed bad act by the defendant that he learned about from the defendant in the interview.[75] Defense counsel objected, but did not assign any error in his appeal to the Virginia Supreme Court.[76] He explained that he decided not to raise this issue on appeal as he determined that Virginia case law would not support the claim.[77] Nevertheless, the Virginia Supreme Court was notified of this issue by an amicus curiae brief, but, decided not to address it.[78]

The defendant first argued the error of the admission of the psychiatrist's testimony in violation of his right against self-incrimination at the state post-conviction proceeding.[79] The court, however, ruled that the claim was procedurally defaulted.[80] The court also denied the defendant's subsequent ineffective assistance claim by finding that his "counsel exercised reasonable judgment in deciding not to preserve the objection on appeal, and . . . this decision resulted from informed, professional deliberation."[81] After the Virginia Supreme Court declined to accept his appeal, the defendant sought federal habeas review.[82]

Justice O'Connor, speaking for the majority held that the defendant failed to demonstrate cause for his noncompliance with the state procedural rule.[83] When considering whether defense counsel's deliberate decision not to pursue his objection constituted ineffective assistance of counsel under *Strickland*, Justice O'Connor stated that it "falls far short of meeting that rigorous standard."[84] The Court stated that often the most informed attor-

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71. *Murray,* 477 U.S. at 535.
72. *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 486-87 (1986)).
73. *Id.* at 531.
74. *Id*. at 530.
75. *Id.*
76. *Murray,* 477 U.S. at 531.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Murray,* 477 U.S. at 532.
82. *Id.*
83. *Id*. at 533.
84. *Id*. at 535.

neys will fail to estimate the likelihood that a federal habeas court will repudiate established state law.

Justice Brennan's dissent reasons that the deterrent effect on noncompliance with state rules from strictly enforcing procedural default is lost when referring to a situation as this where counsel is unaware of a claim or of the duty to raise it at a particular time.[85] The dissent questions the majority's failure to distinguish between saying the defendant should be bound to the tactical decisions and strategies of his lawyer, and saying the defendant should be bound to his lawyer's inadvertent mistakes.[86] This is an especially profound idea when referring to defendants facing the death penalty.

One other point made by Justice Brennan in his dissent is that a defendant loses nothing by raising all possible claims at trial.[87] Therefore, it could never be considered reasonable strategy to fail to raise a potential claim. This advice should not be taken lightly by capital trial defense attorneys.

Despite the sound logic of Justice Brennan's dissent, it is clearly not the law today. The federal courts have declared on so many occasions that a failure to preserve an issue will result in a procedural default and thereby preclude the federal courts from supervising the state's compliance with constitutional guarantees. Hence, it is absolutely incompetent for a capital defense attorney to fail to raise every possible constitutional claim at trial. However, the court has ruled that it is not so incompetent as to suffice as a constitutional violation itself and therefore is not sufficient to excuse procedural default.

IV. LIMITS ON RECOURSE TO DEFENDANTS FOR THEIR ATTORNEY'S UNETHICAL CONDUCT

The Supreme Court's Decision that the Sixth Amendment guarantee to effective assistance of counsel does not apply to post conviction proceedings coupled with the strict procedural default doctrine drastically limits recourse to defendants for their attorney's unethical conduct. In *Coleman v. Thompson,* Coleman had alleged ineffective assistance of counsel in violation of his Sixth Amendment right since his original trial. At that time, however, Virginia criminal procedure prevented filing of an ineffective assistance claim until the post conviction proceeding.[88] Coleman's claims, including the ineffective assistance of counsel at the trial level, were denied in his first state post-conviction proceeding. [89] On appeal from that proceeding, his lawyer filed his notice of appeal three days late.[90] Due to this

85. *Carrier,* 477 U.S. at 524.
86. *Id.*
87. *Id.*
88. *Coleman*, 501 U.S. at 728.
89. *Id.*
90. *Id.* at 727.

tardy filing, the Virginia Supreme Court held that his entire appeal was procedurally barred.[91]

Coleman petitioned for federal habeas review asserting that his post conviction attorney's failure to timely file his appeal was itself ineffective assistance of counsel and was cause for the noncompliance with the state procedural rule. He petitioned the federal court to excuse the procedural default and to hear his constitutional claims.[92] Justice O'Connor, writing for the Court, held that his attorney's late filing of his state habeas appeal cannot demonstrate "cause."[93] The Court declared that effective representation in post conviction proceedings is not guaranteed under the Sixth Amendment so that incompetent performance, with prejudice, can never constitute ineffective assistance as constitutionally protected, which is a requirement to excuse default.[94] The Court acknowledged that this was no doubt an inadvertent error, but rationalized the application of the strict procedural default because no matter the *cause* for the default, the state's costs associated with the default are still the same.[95] The majority also recognized that the habeas writ "is a bulwark against convictions that violate fundamental fairness," but added that "the Great Writ entails significant costs."[96] The Court also admitted to applying the rigid procedural default doctrine even in cases where the "alleged constitutional error impaired the truth finding function of the trial."[97]

The Court has gone too far in restricting federal habeas review. The dissent said it best by concluding:

> In a sleight of logic that would be ironic if not for its tragic consequences, the majority concludes that a state prisoner pursuing state collateral relief must bear the risk of his attorney's grave errors—even if the result of those errors is that the prisoner will be executed without having presented his federal claims to a federal court—because this attribution of risk represents the appropriate "allocation of costs."[98]

V. CONCLUSION

The delicate balance between justice and finality has been lost. The minimal requirements necessary for constitutionally effective assistance of counsel and the further narrowing of appeals by the procedural default doctrine has contributed to the placement of almost the entire burden of defend-

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91. *Id.* at 728.
92. *Id.*
93. *Coleman*, 501 U.S. at 752-53.
94. *Id.* (relying on *Carrier*, 477 U.S. at 488).
95. *Id.* at 752.
96. *Id.* at 747-48 (citing Engle v. Isaac, 456 U.S. 107, 126 (1982)).
97. *Id.* at 747.
98. *Coleman,* 501 U.S. at 771.

ing those charged with capital offenses upon the trial counsel. If trial counsel fails, the defendant will pay the price.

A minimal review of the law will quickly reveal this to any defense attorney. Therefore, to not discover these strict procedural doctrines is plain incompetence. Just because the courts have seldom considered this failure as sufficient to grant a reversal for ineffective assistance of counsel does not mean that the failure is ethically excusable. As a matter of fact, *because* the courts have seldom considered this failure as sufficient to constitute reversal, a defense attorney's ethical duty is enhanced. They bear the entire duty. The courts have illustrated clearly that they will provide little assistance.

Deanna Weidner

MISSING CLIENTS: WHAT TO DO WHEN YOUR CLIENT HAS VANISHED

I. INTRODUCTION

It happens all the time. A client presents his or herself to a law firm with a possible cause of action; however, during the interim, while the attorney is determining whether to pursue the claim, the client mysteriously vanishes. This leaves the attorney in a difficult position with difficult decisions to make on a multitude of issues. First, the attorney must now decide whether to file the action to toll the statute of limitations.[1] However, this issue alone immediately presents two other issues: does the attorney have the authority to file the action and, if so, does he or she have enough information to file an adequate complaint?[2]

A second issue fraught with difficulty is that of offers to settle. In order to make a settlement binding, there must be consent from the settling party. The only way around this provision is to obtain express authority from the client, thus allowing the attorney to settle the case on his or her behalf.[3] In the event no authority was given and the client is now at-large, the potential for a losing situation exists for both the client and the attorney. Here, the client may be losing the only opportunity to be compensated for his or her injuries.[4] Meanwhile, depending on the fee agreement, the attorney may be unable to collect any fees until the settlement has been executed.[5] In this situation, the client and the attorney lose while the defendant escapes unscathed and perhaps even enriched.[6]

The problems associated with missing clients are plentiful, yet there has been little done to formally address the problem. Due to the lack of standardization, it is very important to check local rules and statutes to avoid any malpractice liability. Additionally, it will be necessary to determine what that jurisdiction considers an adequate attempt to locate the client in the event of his or her disappearance.[7] As with most things in lawyering,

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1. Arthur Garwin, *Lost in America*, 79 A.B.A. J. 103 (1993).

2. Karen J. Dilbert, *The Mysterious Case of The Missing Client*, 89 ILL. B.J. 663 (2001). *See also* FED. R. CIV. P. 8 (stating that a complaint shall contain, among other things, the type of relief sought by the pleader and a demand for judgment based on the relief the pleader seeks).

3. Peguero v. Grant, 394 N.Y.S.2d 818 (N.Y. City Civ. Ct. 1977).

4. Gonzalez v. Diaz, 398 N.Y.S.2d 484 (N.Y. City Civ. Ct. 1977).

5. Giannakoulopoulos v. Koukoumelis, 625 N.Y.S.2d 424 (N.Y. Sup. Ct. 1995).

6. *Gonzalez*, 398 N.Y.S.2d at 485 (stating that had the settlement not been approved by the court, the defendant would have gained an interest free net profit of over $500).

7. *See* R.I. Sup. Ct. Ethics Advisory Panel, Op. 93-1 (1993) (stating that a phone call and a letter mailed to clients last known address may be insufficient as a diligent effort in locating a client). *But see*

however, the best solution to the problem is prevention, and there are many preliminary steps that can be taken to reduce the chances of a vanishing client.[8]

II. FILING: WHETHER A DUTY EXISTS TO FILE AN ACTION AS TO TOLL THE STATUTE OF LIMITATIONS

It is well settled that a lawyer has the duty to diligently represent his client to the best of his ability.[9] Accordingly, this requires a lawyer to carry through to completion all matters undertaken for a client.[10] A missing client, however, complicates this requirement because a lawyer cannot carry the action through to completion or diligently represent his client if he or she does not have enough information to file the complaint.[11] Additionally, dependent upon the jurisdiction, the attorney may not be able to withdraw from the case until after a complaint has been filed to preserve the missing client's cause of action.[12]

In an informal opinion, the American Bar Association Committee on Ethics and Professional Responsibility took the position that a lawyer does not have the duty to file an action on behalf of a client who is missing in an effort to toll the statute of limitations.[13] Nonetheless, the Committee hedged the breadth of their opinion by limiting it to situations where the loss of communication with the client is through no fault of the lawyer.[14] If the lawyer has lost contact with the client as a result of neglect, the lawyer has violated a Model Rule and may be subject to disciplinary proceedings.[15] Additionally, the Committee stated that, while there is no duty to file an action on behalf of a missing client, this statement in no way addressed the malpractice liability issues a lawyer might face in failing to file the client's action.[16]

In an effort to avoid malpractice liability, a lawyer would be better off following the approach taken by a Pennsylvania opinion.[17] The opinion suggests that a writ be served as to toll the statute of limitations in an effort to preserve the client's cause of action.[18] If, however, the client still cannot be located, the attorney may ask the court for permission to withdraw as

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ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1467 (1981) (stating that a lawyer should execute a "reasonable inquiry" as to the whereabouts of their client).

8. *See* Dilbert, *supra* note 2, at 663.

9. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 (2002); *see also* R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 8 (3d ed. 1989).

10. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (1992).

11. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2002).

12. Va. State Bar Ass'n Standing Comm. on Legal Ethics, Informal Op. 841 (1987).

13. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1467 (1981).

14. *Id.*

15. *Id.*; s*ee also* MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101(A)(3) (1980) (stating that an attorney shall "not neglect a legal matter entrusted to him.").

16. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1467 (1981).

17. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 93-21 (1993).

18. *Id.*

counsel.[19] Virginia also seems to take a middle of the road path. There, an attorney may file suit on behalf of a missing client to preserve the action, but then, he or she may also file a motion to withdraw as counsel.[20] In most jurisdictions, it is within the best interest of both the client and the attorney to file a complaint in order to preserve the cause of action.[21] The attorney, upon jumping through all the proverbial hoops in his jurisdiction, may then move to withdraw as counsel from the case in the event the client still cannot be located.

When an attorney may "safely" withdraw from an action involving a missing client is also littered with many jurisdictional discrepancies. For instance, in an Alabama opinion, it was stated that "[a] lawyer who has done *everything possible* to locate his client but cannot contact him and has attempted to fulfill the contract of employment may close his file on the client and not file suit in the client's behalf."[22] Alabama's standard of "everything possible"[23] is clearly a much higher standard than the ABA standard of a "reasonable inquiry"[24] into the whereabouts of a missing client.[25] When a client disappears, the lawyer's duty does not automatically terminate.[26] Also, due to the varying standards required of an attorney's search efforts to locate missing clients, it is very important to consult local statutes and ethical rules to reduce the likelihood of any negligence or malpractice actions.[27]

III. SETTLEMENTS: WHAT OPTIONS ARE AVAILABLE WHEN YOUR CLIENT IS MISSING IN ACTION

It is well-established that no one can be held to a settlement offer unless the party upon whom it is binding gives his or her consent.[28] Once hired, an attorney is the agent of his or her client.[29] The client, acting as the principal,

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19. *Id.*; s*ee also* MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(6) (2002) (stating that a lawyer may withdraw if "the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.").

20. Va. Bar Ass'n Standing Comm. on Legal Ethics, Informal Op. 841 (1986); *see also* Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 94-10 (1994) (stating that a reasonably prudent and competent lawyer must file on behalf of the missing client as to toll the statute of limitations).

21. *See* N.C. State Bar, Op. RPC 223 (1996) (reasoning that the disappearance of a client is considered a "constructive discharge of the lawyer"); *but see* Arthur Garwin, supra note 1 (citing R.I. Sup. Ct. Ethics Advisory Panel, Op. 93-1 (1993)) (stating that "a lawyer should attempt a personal visit to the client's last known address and perhaps even contact the post office and the vehicle registration department to locate the client before taking *any* action or withdrawing").

22. Ala. Ethics Comm., Op. 87-98 (1987).

23. *Id.*

24. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1467 (1981).

25. *Id.*; *see also* Colo. Bar Ass'n Ethics Comm., Formal Op. 95 (1993) (stating that reasonable efforts should be made in locating a missing client).

26. *But see* N.C. State Bar, Op. RPC 223 (1996) (reasoning that the disappearance of a client is considered a "constructive discharge of the lawyer").

27. *See also* Dilbert, *supra* note 2, at 663 (suggesting that an attorney with a missing client consult her professional liability insurer in the event they have additional advice on the matter).

28. *Stein*, 309 N.Y.S.2d at 979.

29. *Giannakoulopoulos*, 625 N.Y.S.2d at 426.

has the authority to either maintain the decision-making power in the lawsuit or may choose to delegate this authority to his or her lawyer.[30] It is also true that an action is for the benefit of the client and not for the benefit of the lawyer.[31] To say otherwise would be "inconsistent with the notion of modern jurisprudence."[32] As a public policy, it is sensible and practical to allow the client to have decision-making authority. It was the client, after all, who suffered the injury. This standard, however, creates problems when clients cannot consent to a settlement offer because they are missing.

A. The Missing Client Has Authorized the Attorney to Settle on Their Behalf

In the ideal situation, the client is available and ready to execute the release when the settlement is proposed. Be that as it may, when a client is missing, the best situation is for the attorney to have authority to consent to a settlement favorable to the missing client's interests.[33] This is the preferred situation because, typically, when a client is missing at the time a settlement is offered, the attorney has very few options. The lack of attorney-authority directly jeopardizes the client's interests, as well as the representing counselor. To the contrary, if the attorney has the authority to bind his client to the settlement proposal, the interests of both the client and her attorney are better protected.

In almost all situations, an attorney must have the clear authority to settle on behalf of the client. As noted in *Hallock v. State of New York*, an attorney may only accept or decline a settlement offer if the client has given her express or implied actual authority.[34] If the attorney accepts the settlement offer, the client's interests will be duly served because the attorney has secured some type of compensation for the client. Additionally, the lawyer's interests will be served because when the client authorizes the attorney to settle on his or her behalf, the client also authorizes the attorney to take the entitled fees and costs immediately upon the acceptance of the settlement.[35] It is clearly the most ideal situation for both the client and his lawyer when the missing client has granted settlement authority to his attorney. Nonetheless, a new issue may arise once the attorney has finalized a settlement if the client is still missing because the attorney must then decide what to do with the remaining balance of settlement funds.[36]

Consultation of local rules and statutes is necessary when trying to determine what should be done with a missing client's settlement fund bal-

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30. *Id.* at 426.
31. *Id.*
32. *Id.* at 427.
33. S*ee* Or. State Bar Ass'n, Formal Op. 1991-33 (1991) (stating that an attorney may not accept even a favorable settlement proposal for her client in the absence of the client's consent).
34. Hallock v. New York, 64 N.Y.2d 224 (1984).
35. Ill. State Bar Ass'n, Op. 88-4 (1989).
36. Colo. Bar Ass'n Ethics Comm., Formal Op. 95 (1993).

ance. The jurisdictional discrepancies in this area are great and a violation of the local rules could prove detrimental to the acting lawyer's career.[37] General guidelines are provided by the Model Rules of Professional Conduct regarding a settlement balance and can be found within the provisions of Safekeeping Property.[38] The Rules, however, fail to address specific issues concerning a missing client's settlement balance; therefore, varying state laws apply.

For example, some states provide that when a client disappears, either after executing a settlement agreement or having delegated the authority to her attorney, and there is a balance of settlement funds remaining, the attorney has the obligation to hold the property in a fiduciary capacity for a period of seven years.[39] If, during the seven years, no contact has been established with the client, and the client has failed to show any interest in the property by re-establishing contact with his attorney, the property will be deemed abandoned.[40]

Alternatively, some states provide that an attorney has an obligation to use reasonable efforts to locate the client.[41] Then, in the event the lawyer is unable to locate the client, he or she must maintain the funds in a trust account in addition to following the local jurisdictional rules concerning the Disposition of Unclaimed Property Act.[42] Other jurisdictions provide that if a lawyer ceases to maintain a trust account and the client has not been located, the lawyer may donate the missing client's fund to a local legal services organization.[43]

Lastly, the American Bar Association Committee on Ethics and Professional Responsibility determined that it would not be unethical for a lawyer, who had previously obtained client consent, to donate any settlement balance to a legal services program for the poor if the client could not be located.[44] In an effort to minimize malpractice liability, it is vital to consult local and state laws concerning abandoned property due to the wide array of differing jurisdictional procedures.

B. The Missing Client Has Not Authorized the Attorney to Settle on His or Her Behalf

The second, much less favorable situation occurs when the attorney has not been given authority to settle on behalf of the client and the client is now missing. Here, both the client and the attorney are in a losing situa-

37. *In re* Walner, 519 N.E.2d 903 (1988).
38. *See* MODEL RULES OF PROF'L CONDUCT R. 1.15 (2002).
39. Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 95-27 (1995).
40. *Id.*
41. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-369 (1992).
42. *Id.*
43. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 91-63 (1991). *But see* Or. State Bar Ass'n, Formal Op. 1991-48 (1991) (requiring lawyers to continue efforts to locate clients even when the funds have already been surrendered to the appropriate agency).
44. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1391 (1977).

tion.[45] The client is put at a disadvantage because this may be the only opportunity to receive compensation for the alleged injuries.[46] Additionally, this may be the best offer available, and to not accept the offer because she did not know about it deprives the client of the right to be made whole. On the other side of the equation is the lawyer, who has spent time and expended resources in the cultivation of a settlement agreement.[47]

If the initial fee agreement was set up on a contingency basis, the attorney has provided the necessary funds in furtherance of the client's cause of action with the hope the action will be successful. Now, supposing a settlement is offered, the attorney does not have the authority to bind the client and is left without recourse as to the expenditures made in the client's case.[48] The effects of this scenario can be seen in *In re Walner*, where the court held that even though there was no clear evidence of a dishonest motive or economic harm to his client, the attorney violated his fiduciary duty by accepting a settlement on behalf of his missing client.[49] The attorney in *Walner* had attempted to contact and locate his client, without success.[50] As punishment for accepting the settlement, the attorney was censured.[51] While the attorney in *Walner* received only a reprimand, often, much more severe sanctions are imposed.[52]

Another example, which seemingly provides more flexibility, is the model followed in New Hampshire.[53] New Hampshire proposes that it is possible for an attorney to accept a settlement agreement and hold the entire settlement amount in an escrow account until the client's consent is obtained.[54] In this situation, however, the offeror of the settlement must be made aware that the client's whereabouts are unknown, and that the case cannot be closed until the client agrees to the settlement.[55] While this may

45. *Gonzalez*, 398 N.Y.S.2d at 486 (allowing an attorney to settle the client's claim without obtaining prior client consent because the client's statute of limitations had long since run and the attorney who had put in the time and money to effectuate a settlement would be left without any form of compensation and expressing concern that the defendant was going to be unjustly enriched by the settlement amount because they had been permitted to hold the offered amount for five-year interest free).

46. *Id*. at 487.

47. Cord v. Cutola, 467 N.Y.S.2d 751, 751 (1983) (discussing the burdens placed on the plaintiff's lawyer who accepts a case on a contingency basis, in that the lawyer "bears the effort of maintaining the action to the point where settlement is offered only to have those efforts nullified by the client's unavailability" yet reasoning that settling a lawsuit is for the benefit of the client and not for the benefit of the lawyer, despite the fact the lawyer has made expenditures in furtherance of the client's interests); *see also Giannakoulopoulos*, 625 N.Y.S.2d at 428 (stating that "[w]hile the result reached here might be considered unfavorable to counsel in terms of their fee, this is one of the pitfalls of a law practice, especially in matters involving contingency fees.").

48. *Giannakoulopoulos*, 625 N.Y.S.2d at 428.

49. *Walner,* 519 N.E.2d at 909.

50. *Id*.

51. *Id*.

52. *See In re* Stillo, 368 N.E.2d 897, 899 (1977) (ordering a disbarment of the respondent and stating that "[f]or an attorney to settle a personal injury case and direct the cashing of settlement checks without authorization by his client is itself an impropriety requiring discipline").

53. N.H. Bar Ass'n Ethics Comm., Formal Op.1980-81/ 1 (1981).

54. *Id.; see* WILLIAM H. FORTUNE ET AL., MODERN LITIGATION AND PROF'L RESPONSIBILITY HANDBOOK § 17.11.1 (2d ed. 1996).

55. N.H. Bar Ass'n Ethics Comm., Formal Op.1980-81/ 1 (1981).

provide a way to preserve the client's interest of recouping his losses, it is possible that the offeror of the settlement will revoke his offer upon learning that the client is missing.

As illustrated above, courts are reluctant to give the attorney of a missing client any additional authority to effectuate a settlement of the client's cause of action. Courts have stressed the importance of keeping the interests of the client ahead of the interests of the attorney.[56] Nonetheless, the court in *Gonzalez v. Diaz* departed from the typical authority-limiting ruling.[57]

In *Gonzalez*, the court opined that because the clients had disappeared prior to approving the settlement agreement, the attorney should be granted leave of court to effectuate the settlement proposal and to collect his fees.[58] *Gonzalez* is an oddity, at best. Nevertheless, it raises an interesting point concerning the unjust enrichment of a defendant when the client is missing.[59] There, the court was persuaded to allow the execution of the settlement agreement by the attorney because the defendant was unjustly enriched by the settlement amount.[60] The court in *Gonzalez* also reasoned that, while the defendant would benefit, the plaintiffs' counsel would be deprived of obtaining any compensation for his diligence in handling the case.[61] The court stated that the defendant had already unjustly reaped benefits of the settlement because they were able to use the settlement fund for over five years, interest free.[62] The court in *Gonzalez,* acting in an equitable manner, preserved the interests of the clients by allowing the settlement, as well as the interests of the attorney in allowing him to recover his fees.[63] Meanwhile, the defendant was required to pay for the injuries caused to the plaintiffs.[64]

Putting equity aside, the court's decision in *Gonzalez* poses itself on a slippery slope. If the reasoning by the *Gonzalez* court were widely adopted, it could lead to a reversal in the attorney-client role, thus placing an attorney's interests ahead of the client's.[65] If an attorney were able to place his or her interests before the client's, it would defeat the purpose of the judicial system, which is to first and foremost attempt to make the injured plaintiff whole.[66] While the court in *Gonzalez* had an equitable ending, "[w]e have not yet arrived at a system of justice which exists only to compensate law-

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56. *Cord*, 467 N.Y.S.2d at 751; *Gonzalez*, 398 N.Y.S.2d at 486.
57. Gonzalez, 398 N.Y.S.2d at 486.
58. *Id.* at 487.
59. *Id.* at 485.
60. *Id.*
61. *Id.*
62. *Gonzalez*, 398 N.Y.S.2d at 485.
63. *Id*. at 487.
64. *Id.*. *But see Cord*, 467 N.Y.S.2d at 751 (criticizing the *Gonzalez* court in holding that it is completely inappropriate for a court to allow a settlement without the consent of the client because to hold otherwise puts the interests of the attorney over that of the client).
65. *See Cord*, 467 N.Y.S.2d at 751
66. *Giannakoulopoulos*, 398 N.Y.S.2d at 427.

yers for punishing wrongs without regard to whether the clients benefit or even display an interest in the litigation."[67]

IV. PREVENTION: THE KEY TO AVOIDING A VANISHING CLIENT

A. The Initial Client Interview

An attorney's first line of defense is to take an aggressive, proactive approach by securing necessary client information during the initial meeting with a client. The primary tool to be utilized is client screening. An attorney should look for nomadic tendencies and for any ties the prospective client has to the local community.[68] Community ties, including family, friends, and employment are helpful because these people may be able to provide information in the event the client disappears.[69] A red flag should go up for the attorney if the prospective client does not have steady employment, any family in the area, and has a tendency to frequently move.[70] Simply because a prospective client possesses some or all of these rootless, nomadic propensities, however, does not mean the attorney should decline representation. The attorney needs only to take a few extra precautionary measures.

Realistically, an attorney should be encouraged to treat most clients as though they are likely to disappear because doing so will significantly reduce the chances of it happening. Suggested information to obtain includes, but is not limited to: the name and telephone numbers of any treating physicians; the names, telephone numbers, and addresses of at least one responsible person in the client's life; the client's employer; any nicknames your client has; and your client's social security number, date of birth, and driver's license number.[71]

B. The Power of a Retainer Agreement

An attorney's second line of defense, and perhaps the most powerful, is found within the retainer agreement. First, an attorney may include within the retainer agreement a specific provision authorizing the attorney to effectuate a settlement in the event the client disappears.[72] An attorney would be well advised to include this provision as to ensure flexibility in the handling of the case.

Second, the ABA has stated that a lawyer may place a provision in the retainer agreement stating that a failure of the client to disclose any changes to the client's address may release the lawyer from any obligation to pro-

67. *Cord*, 467 N.Y.S.2d at 751 (criticizing the decision made by the court in *Gonzalez*).
68. Dilbert, s*upra* note 2, at 663.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Giannakoulopoulos*, 625 N.Y.S.2d at 426.

ceed with the lawsuit.[73] The ABA also noted that the inclusion of such a condition is not itself a violation of the Model Code.[74] Nonetheless, if an attorney chooses to include either of the above stipulations in a retainer agreement, he or she should make the client fully aware of all potential consequences.[75] Additionally, the ABA requires that "a full explanation is given to the client and no pressure is exerted to secure the consent."[76]

Third, some jurisdictions allow the inclusion of an additional provision in the retainer agreement, allowing the attorney reasonable usage of a client's settlement fund to search for the missing client.[77] While it may be more difficult to obtain the client's consent on this provision, the benefits to the client and her attorney would be worth the extra effort. Ideally, the attorney will be able to obtain consent for all of the above-mentioned provisions. Doing so would enable the lawyer to serve the interests of the client to the fullest extent, while also protecting his or her own interests.

C. Attorney-Client Communication

Once an official attorney-client relationship has been established, the attorney may be able to reduce the likelihood of the client's disappearance through regular client contact. This can be accomplished with relative ease by regularly sending status letters to the client.[78] Status letters serve multiple purposes. First, they keep the client informed regarding the furtherance of the action.[79] Second, they allow the attorney to know early on if the client has moved. Third, they may help to build client rapport, which could prove invaluable if a midnight-flight were being considered.[80] Also, calling the client, especially when he or she has nomadic tendencies, may prove to be worth the time to avoid the costly trouble of looking for the client later. Prevention is the best way to avoid the minimally guided, complex problems involved with a missing client.[81]

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73. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1467 (1981); s*ee* R.I. Sup. Ct. Ethics Advisory Panel, Op. 95-48 (1995) (stating that a lawyer must diligently attempt to locate their client within purpose of the retainer agreement); s*ee also* Marcia L. Proctor, *"Smart" Fee Agreements*, 72 MICH. B.J. 1304, 1306 (1993) (stating that "[a] lawyer can guard against the impact of such an event by providing in the retainer agreement that the client is responsible for keeping the lawyer timely advised of the client's whereabouts, and specifying how client property will be maintained in the event the client cannot be contacted.").

74. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1467 (1981); s*ee also* MODEL RULES OF PROF'L RESPONSIBILITIY DR 6-102 (1980) (stating that a lawyer cannot attempt to exonerate himself from malpractice liability to his client).

75. MODEL RULES OF PROF'L RESPONSIBILITY DR 6-102 (1980).

76. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1391 (1977).

77. Colo. Bar Ass'n Ethics Comm., Formal Op. 95 (1993).

78. Dilbert, *supra* note 2, at 663.

79. *Id.*

80. *Id.*

81. *Id.*

V. RELOCATION: YOUR CLIENT HAS VANISHED, NOW WHAT?

While the lawyer can obtain a multitude of information, clients still disappear. Unfortunately, even the most careful and thorough lawyers will have clients disappear. Attempting to locate a missing client may prove to be very costly in both man-hours and monetary resources.[82] A diligent search for your missing client, however, will assist the attorney in avoiding malpractice liability and negligence actions.[83]

Assuming that the client disappears despite all other efforts, the attorney may be responsible for trying to relocate the client.[84] This daunting task has been made slightly easier with the advent of the Internet.[85] There are a number of search engines[86] that are designed to locate people using a variety of information.[87] The more detailed searches usually require a fee. Nonetheless, the amount expended will likely be nominal compared to the potential amount involved in an out-of-office search, or worse, the cost of defending oneself in a malpractice action.

Another option to consider in the search for a client is the U.S. Postal Service or the Department of Motor Vehicles.[88] Perhaps, a lawyer could run a skip trace on the client or telephone the client's physician.[89] A personal visit to the client's last known address may allow a lawyer to obtain information regarding the client's location from neighbors or the current resident.[90] As demonstrated above, there are a variety of tools and ways to locate a missing client. It is important to be creative when searching and to utilize all the information given.[91]

VI. CONCLUSION

While the thought of a client disappearing is dreadful, there are many steps to take before resolving oneself to the lengthy wait-and-see approach. Initially, a lawyer should make sure the client's file is armed with a multitude of information. This information will assist the lawyer-based search team in successfully finding the client that has vanished into thin air.

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82. *Id*. at 664.
83. Dilbert, *supra* note 2, at 664.
84. Garwin, *supra* note 1; Ala. Ethics Comm., Op. 87-98; ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1467 (1981).
85. Dilbert, *supra* note 2, at 663.
86. *See* http://www.google.com entering "find people" as the search criteria; *see also* http://www.yahoo.com entering "People Search" as the search criteria; http://www.ussearch.com.
87. Dilbert, *supra* note 2, at 663.
88. R.I. Sup. Ct. Ethics Advisory Panel, Op. 95-24 (1995).
89. Dilbert, *supra* note 2, at 664.
90. R.I. Sup. Ct. Ethics Advisory Panel, Op. 93-1 (1993) (suggesting, when attempting to locate the client, that a personal visit to the client's last known address be made before taking any action on behalf of the client's case).
91. Dilbert, *supra* note 2, at 664.

Next, an attorney should be proactive in protecting his or herself and the client by having a well-drafted retainer agreement. Ideally, the retainer agreement should provide the authority to execute a favorable settlement offer on the client's behalf, in his or her absence. The agreement should also contain language that will relieve the lawyer of the obligation to represent the client in the event the client fails to provide notification concerning significant changes in their personal information, such as a forwarding address. A lawyer should take advantage of this stipulation because it will provide a solution to the many issues involved with missing clients. This stipulation is also beneficial because it passes some of the responsibility to the client by requiring participation in the case. While the attorney has a duty not to neglect the client, there is no rule stating that he or she must call everyday to ensure that the client has not disappeared.

Additionally, the retainer agreement should include a clause allowing for a reasonable expenditure of client settlement funds to assist with a missing client search. The attorney must also remember to obtain the client's express informed consent regarding the provisions in the retainer agreement. Lastly, one should not forget to check local statutes regarding the enforceability of the retainer agreement provisions in your jurisdiction.

In the event some or all of the preventative measures fail, one should not despair. There is a possibility that the client will reappear on his or her own. In the meantime, however, an attorney needs to be certain to check all local statutes, ethical rules, and opinions before doing *anything*. If the client is missing-in-action, it is vitally important that *all* actions taken to locate the client are documented. This is the time to dot all the "i's" and cross all the "t's" because, if and when the case is presented to the court for withdrawal, it will look closely at the attorney's actions to ensure that the loss of the client was not merely a product of neglect.

By remembering the following four key points, you will be better prepared and better protected in the event of a missing client: (1) prevention; (2) proactive retainer agreements; (3) consistent client contact; and (4) consulting local statutes for proper missing client procedures.

Allison Elizabeth Williams

CHANGING CORPORATE ETHICS CODES AFTER ENRON AND HOW TO KNOW IF THE CHANGES PROVED USEFUL?

I. INTRODUCTION

In the wake of Enron's collapse, ethics policies in corporations have become a topic of many discussions. A few years ago most people were not even aware of the existence of corporate ethics policies. Today, these policies are receiving a great deal of attention and many are being changed as companies re-examine their ethics policies.[1] As companies begin to make changes in their ethics policies they look to many sources in developing the right policy, including other corporations, the Sarbanes-Oxley Act ("Act") passed by Congress concerning requirements in such policies, SEC requirements, and other sources.

II. CORPORATE ETHICS CODES

Effective corporate codes seem to have several common qualities.[2] The first of these is that they are organic, meaning that they "are rooted in the strategic vision of an organization and the business philosophy of its leaders and stakeholders."[3] In other words, corporations create an ethics policy to fulfill the specific needs inside the company rather than just generic considerations for ethical behavior. Thus, it is important, when a company generates a new ethics code or improves an already existing code, it should ensure that the ethics code fits the business for which it is developed and encourages policies which in turn help create business for the company.

Second, most of these policies are based on values rather than general statements concerning the ethical standard expected from employees.[4] Many corporations have a tendency to have a rulebook with employer expectations in it without any sort of ethical company policy as a foundation.[5] However, in creating a new ethical policy it is important to base them on an ethical philosophy developed by the leaders of the company. This will re-

1. Andrew Hill, *Comment & Analysis: Genuine reform depends on a combination of the formal rules that companies dislike and the self-regulation that they prefer—and on market forces,* FINANCIAL TIMES, Dec. 30, 2002, at 13, *available at* 2002 WL 104189671.

2. Theodore Kinni, *Words to Work By: Crafting Meaningful Corporate Ethics Statements; Is your ethics policy just a piece of paper or a true behavioral compass for employees?* HARV. MGMT. COMMUNICATION LETTER, Jan. 1, 2003, *available at* 2003 WL 6627672.

3. *Id.*

4. *Id.*

5. *Id.*

late to employees within the ethical direction of the company, which affects all other employee rules that the company may set forth.

The third common trait is that most effective ethical policies are tailored for the specific businesses to which they apply. According to Patrick E. Murphy, a professor at the Mendoza College of Business at the University of Notre Dame and director of its Institute for Ethical Business Worldwide, "It is desirable to include things that are unique to your business or details about your philosophy that make it stand out from other companies."[6] Therefore, it is important to have an ethics policy that fits your company and the goals it has set, as opposed to a general code of ethics that could be used by any business. Again, this calls for business leaders to figure out what values are most important to their particular business and to pass on those values to employees in the ethics strategy they develop.

The fourth concept found in successful ethical policies is that they are available as part of the public record.[7] This leads to more public confidence in the company and availability for the public to know how each company views ethics in today's corporate world. In light of Enron and other ethical failures in corporate America, the public has lost faith in the business world. Thus, having a code of ethics that people can read and appreciate before deciding about purchasing stock is a good way to regain public respect.

Efficient ethical policies also tend to be updated regularly, leading to actual impacts on the day-to-day activities of the company.[8] In light of this trait, companies need to be sure that the ethics code on the books for their company stays up-to-date and is in compliance with all business changes that are likely to occur in such an environment as corporate America.

Therefore, by looking to other corporate codes on ethics, a corporation can see how best to structure such a document and make it work for the success of the business to which it applies.[9] Research shows that where there are strong ethics programs, employees have a high sense of the company's integrity and feel less pressure to commit misconduct.[10]

The next source to which a corporation must look in creating a code of ethics is the recently enacted Sarbanes-Oxley Act of 2002 which was signed into law by President Bush on July 30, 2002.[11] This Act is arguably the most sweeping piece of reform legislation covering governance of and disclosures by public corporations since the 1930s and was designed to, among other things, establish higher standards for corporate governance.[12] Among

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6. *Id.*
7. Kinni, *supra* note 2.
8. *Id.*
9. Richard Y. Roberts, Ethics and Corporate Responsibility Following Enron, Address at Annual Fall Compliance Conference (Sept. 12, 2002) (transcript available at http://www.d-r-patent.com/articles/articles/ethics_and_corporate_responsibility.pdf).
10. *Id*.
11. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).
12. Roberts, supra note 9.

the many provisions within the Act concerning corporate governance, one in particular focuses on the Securities and Exchange Commission (SEC) being required to adopt rules that will require pubic companies to disclose whether or not, and if not, why, it has adopted a code of ethics for senior financial officers. In particular, this provision will apply to the principle financial officer or the principal accounting officer. The major change in policy under the Act in this portion tends to be the actual requirement of a code of ethics, which has not been in effect before. This might result in companies that have never even discussed ethics having to establish a code for the company. However, it does seem odd for the government to be playing such a powerful role in how corporations are run. These new rules of ethics, which are consistent with the report on changes needed in corporate ethics by the NYSE Corporate Accountability and Listing Standards Committee, must be proposed by the SEC before January 26, 2003.[13] The code of ethics required by the Act must cover conflicts of interest, disclosure policies, and compliance with governmental requirements.[14] Although many corporations already have such a code of ethics in effect, Congress seems to be reinforcing the importance of corporate governance as well as requiring a minimum level of integrity among corporations by requiring companies to enact such documents.

The Act also requires new rules for the minimum standards for attorneys and the professional conduct required of them when representing public companies before the SEC.[15] These requirements have gotten much public attention both because of the possible requirement of lawyers to become whistle blowers based on the acts of their clients and due to lawyers' new responsibility to share such information within the company. Under the new rules, attorneys are required to report evidence of a material violation of securities laws or a breach of fiduciary duty or similar violation by the company or its agent to the company's chief legal counsel or CEO.[16] Many people feel that this requirement is asking too much of attorneys who will be required to document their clients law violations and then report them to government prosecutors.[17] Many attorneys see the Act as putting a damper on the attorney-client privilege which allows open and effective communication between lawyers and their clients.[18] If the critics of these requirements succeed then it is likely that the Act will not be fully enforced as it is now written. It seems as if some of the basic principles underlying our roles as lawyers may be in jeopardy, and therefore, these requirements need to be

13. *Id.*
14. *Id.*
15. *See* Sarbanes-Oxley Act, supra note 11.
16. Roberta S. Karmel, *A Bid to Regulate the Entire Bar,* 228 N.Y.L.J. 3 (2002) (discussing new securities litigation).
17. *See* Sean Flynn, *Enron Whistle Blower Tells Chilling Tale of Corporate Ruin*, Samford News, Feb. 19, 2003.
18. Karmel, *supra* note 16, at 4.

considered further by Congress and those who feel it is the answer to the Enron disaster and similar problems.

Another aspect of the Act enhances criminal sanctions for corporate wrongdoers by creating new federal criminal offenses, amending existing federal criminal offenses, and increasing penalties for existing federal criminal offenses.[19] Within these categories of enhanced criminal sanctions, there seems to be a more likely effect of increased maximum penalties for existing crimes, and the likely major effect will be increased prosecutorial discretion and power.[20] Because of the increased penalties for the already existing crimes, criminals who are guilty will have more to lose by not agreeing to a plea bargain. Furthermore, the power of the prosecutors to negotiate such bargains will increase as well.[21] However, because many of the new rules only repeat what was established in the existing rules, the effect of deterring such criminal behavior would not seem to reasonably result from mere repetition.[22]

The final source from which a corporation should gain information for creating a corporate code of ethics can be found in new requirements established by the Securities and Exchange Commission on its own. The SEC has instituted a new rule requiring CEOs to personally vouch for the truthfulness of the numbers their companies submit.[23] This could result in personal liability where a CEO knowingly submits false or inaccurate numbers to the SEC.[24] Although controversial and against the concept of limited liability to protect most corporate officers, it seems as if someone should be responsible to the shareholders hurt by inaccurate accounting practices and other dishonest corporate activities. Therefore, when an ethics policy is put together for a company, the chief financial officers should play a role in its development as well as show how such policy should be put into play in all corporate activities.

All in all, these qualities can help form a useful and applicable ethics policy; however, it is up to company leaders to ensure it is effective. "Spreading those changes into the heart of the company and then making sure they are adopted will require the vigilance not only of boards and executives but also of shareholders and regulators."[25] Encouraging employees to read and follow the ethics policies is of utmost importance or else a disaster like Enron could happen again. "If we [do not] have the parallel and required changes in the actual management practices, I don't think the best board in the world can carry out all the responsibilities that we expect of

19. Recent Legislation, *Corporate Law--Congress Passes Corporate and Accounting Fraud Legislation.--Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.)*, 116 HARV. L. REV. 728 (2002).
20. *Id.* at 728-29.
21. *Id.* at 733.
22. *Id.* at 734.
23. *See* Sarbanes-Oxley Act, *supra* note 11.
24. *Id.*
25. Hill, *supra* note 1.

them."[26] Perhaps the most important role of an ethics code in corporate America is both the establishment of such principles and also an active approach to be sure these policies are put into practice. Therefore, we can easily see that no matter how well drafted and updated an ethics policy may be, without it being implemented and applied by all employees, it will be of little or no use. In the same sense, it is very important for ethical leaders to emerge from companies because this will create ethical environments which would seem to increase ethical behavior on all levels of organizations.[27]

III. WHAT'S NEXT

Now that the making of a successful ethics policy has been established, where does one start in trying to ensure that Enron does not happen again? There are many opinions based on who is to blame for such corporate leadership failures and many people and groups have responded with what or whom they feel is to blame. For example, Mr. William L. Rhey, dean of Jacksonville University's College of Business and former director of the University of Tampa's Center for Ethics, believes that the teaching of ethics needs to begin with young people.[28] He suggests that colleges and business schools offer more ethical training.[29] Within this training, he feels that the ethical reputation and behavior of a company should be given priority when one is deciding on an employer.[30] According to him, this would involve looking at things like employee turnover rates, local reputation, and how it treats its vendors.[31] His opinion obviously calls for a lot more than a look at company ethics policies when choosing an employer and even tends to suggest that actions speak louder than any words one might find in such a code.

Another view of how to rebuild public trust in corporations comes from Peter J. Wallison who is co-director of the Financial Deregulation Project at the American Enterprise Institute.[32] According to him:

> To the extent that the recent reforms usher in a period of better management by boards of directors and better performance by auditors, it will not be because of the new laws and regulations. It will be the result of a change in the culture that prevails in the boardrooms and within auditing firms.[33]

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26. *Id.*
27. Roberts, *supra* note 9.
28. Timothy J. Gibbons, *Bankrupt Behavior Focus on Ethics Intensified in Culture of Corporate Crime,* AUGUSTA CHRON., Dec. 21, 2002, at D5.
29. *Id.*
30. *Id.*
31. *Id.*
32. Peter Grier, *Enron's Effect: Corporate Life a Year Later*, THE CHRISTIAN SCIENCE MONITOR, Dec. 5, 2002, at 1.
33. *Id.*

Wallison's opinion places the responsibility of needed changes in the hands of corporate leaders, which would seem to make sense in light of Enron and other major corporate leadership failures.

Other possible changes were suggested in a survey of Georgia CEO's on business ethics conducted by The Southern Institute for Business and Professional Ethics in April of 2002.[34] The survey revealed that many businesses, especially small businesses, do little or nothing to promote an ethical culture.[35] It seems that small businesses feel they do not need an ethical code for their employees because they have few employees, and because of their sense that within small scale companies the ethical behavior of employees naturally exists.[36] According to John C. Knapp, president of the Southern Institute, there are things that corporations can do to indirectly encourage unethical behavior, such as setting aggressive financial goals or project deadlines.[37] Knapp was quoted as saying:

> One of the things that people misunderstand about ethics is that it's about people choosing to do wrong for their own gain. The much larger problem is people doing things that they think are good for the business. It's actually an easier problem to root out the bad apples...who, when faced with a decision between right and wrong, choose wrong because it personally profits them. That's a fairly minor problem compared to the larger issue of people who cut corners and make compromises because they believe it's in the best interest of the company or that the company would condone or even encourage that activity.[38]

The survey also revealed that ninety-nine percent of Georgia CEOs said that high ethical standards strengthen a company's competitive position in the long run.[39] This finding came from the same CEOs of which eighty-two percent believe "businesses are more likely to make ethical compromises during economic downturns."[40] The survey seems to show inconsistencies, at least among Georgia CEOs, in deciding how a company should act and how a company may be forced to act in bad economic conditions.[41] Therefore, this seems to increase the importance of having a strong ethical code that applies to all employees, so that when opportunities to compromise one's ethical standards arise, the company will be able to withstand the pressure.

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34. *See* Erica Stephens, *Post-Enron Survey of CEOs Reveals Insight to Ethics Leadership, Compliance*, ATLANTA BUS. CHRON., June 14, 2002, at B1.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. Stephens, *supra* note 34.
40. *Id.*
41. *Id.*

Another issue that appeared in the survey has concerned other people in this post-Enron business world. Because the standards enacted by the SEC and Congress are "one-size-fits-all"[42] and do not differentiate between small and large companies, many smaller companies could have a harder time dealing with the new provisions.[43] Many of these smaller companies are doing good to survive as publicly held companies at all.[44] These concerns yield the solution that different-sized public companies should be held to different ethical policy standards. Therefore, giant publicly held corporations would have one set of standards, and smaller businesses with fewer stockholders would have a different set.

Another opinion on changes needed to ensure that no more Enron-like disasters occur can be found in Business Ethics Magazine which outlined four principles for better ethics within corporations.[45] First, the magazine suggested making sure auditors really audit by making them fully independent.[46] The second suggestion is to bar law-breaking companies from entering into government contracts.[47] Third, and most applicable to this Article, the magazine suggests creating a broad duty of loyalty in law to the public good.[48] The article stated:

> Today a corporate duty of loyalty is due only to shareholders, not to...other stakeholders and Enron behaved accordingly...Such piracy against the public good would be outlawed under a state Code for Corporate Citizenship, proposed by Robert Hinkly, formerly a partner with the law firm Skadden, Arps, Slate, Meaghen and Flom. His change to the law of directors' duties would leave the current duty to shareholders in place, but amend it to say shareholder gain may not be pursued at the expense of the community, the employees or the environment.[49]

Although these suggestions tend to coincide with common sense and general public good, when analyzing Enron it seems obvious that such expectations cannot survive without them being in writing and required within corporations. The final principle suggested by the magazine is for companies to find "truly knowledgeable directors: Employees."[50] This would seem to increase the knowledge used by a board in making corporate deci-

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42. Susan Feyder, *The Year in Review; Truth or Consequences; This Year Regulators Cracked Down on Some of Wall Street's Villians. But the question Remains: Will Tough New Regulations Work?,* STAR TRIBUNE, Dec. 29, 2002, at 1D.
43. *Id.*
44. *Id.*
45. Majorie Kelly, *Four Ideas for Reforming Corporate Governance After Enron,* Business Ethics, March/April 2002, *available at* http://www.business-ethics.com/FourIdeasReform.htm.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. Kelly, *supra* note 45.

sions as well as to increase the awareness of the board of possible unethical conduct. When employees who have seen the day-to-day business activities are setting company goals and deadlines, the likelihood of lower-ranking employees being pressured to act unethically would seem to decrease.

IV. DO ETHICS POLICIES HELP

Although much attention is being paid to ethics policies and ensuring that corporations have them in place, many people question whether regulations can effectively deter what occurred at Enron.[51] When the actual ethics policies of Enron are examined, one can see that, on paper, the company's corporate governance was admirable.[52] In fact, the roles were split as was needed to ensure quality and supervision.[53] According to Lynn Paine, professor of business ethics at Harvard, she went online to buy an Enron Ethics document on eBay soon after the company filed for Bankruptcy, and noticed it was advertised as "mint condition–never been read."[54] Here we see what was probably the major problem with Enron, a lack of knowledge of and access to the ethics policies within the corporation. Another such concern as to how Enron is different from other companies comes from Barb Remley, Chief Financial Officer of Makemusic Inc., who said, "[t]hose companies got in trouble because people were dishonest, and I don't know if regulations can stop that. If... People are dishonest, you punish them send them to jail."[55] It seems as if Remley's idea offers a better alternative to the new and still evolving regulations aimed at preventing another Enron-like collapse. When the top executives at a corporation choose to be dishonest, it is hard to say that a new regulation on the books will stop them from continuing to do whatever will benefit them most.

In light of such questions, how will we know whether the ethics policy put into place by a corporation is fulfilling the role for which it was established? Probably the most realistic option for deciding when and how one can tell if an ethics policy has been a success is to wait and see. Although there are obvious "long-standing flaws in our system, we will need to reexamine every assumption, every rule and regulation" according to SEC Chairman Harvey Pitt.[56] Pitt went on to say "I believe business, law and accounting classes will spend entire semesters, if not full academic years, analyzing the issues raised by Enron in the coming years."[57] This tends to

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51. *See* Flynn, *supra* note 17.

52. Insert Steel: How to Toughen Corporate Governance, THE ECONOMIST, Jan. 11, 2003, 2003 WL 6244531.

53. *Id.*

54. *Observer—Good Read Observer*, FINANCIAL TIMES, Jan. 10, 2003, at 16, available at 2003 WL 3431081 [hereinafter *Observer*].

55. *Id.*

56. Harvey L. Pitt, Public Statement by SEC Chairman: Remarks at the Winter Bench and Bar Conference of the Federal Bar Council (Feb. 19, 2002), *at* http://www.sec.gov/news/speech/spch539.htm (last visited Jan. 25, 2004).

57. *Id.*

show the extreme thought and analysis that will go into watching changing corporate ethics policies and determining if they have been successful. What this makes obvious is the fact that what counts in the end is how directors behave and what questions they ask, not whether they have an ethics policy in place or can explain why they do not have a financial professional on the audit committee.[58]

One way companies are actually keeping their ethics codes in check is through the use of hotlines.[59] Companies hire hotline operators to give the appearance that their company is complying with the law under the Sarbanes-Oxley Act.[60] This option also provides an in-house way to deal with unethical behavior, as the information received by the hotline is not turned over to government regulators or law enforcement agencies, but is, instead, shared with the appropriate person within the corporation.[61] The hotline options seems to fill a void where companies that are not ready to completely remake their own corporate governance procedures but instead, are willing to ensure that there is a place where reports can be made, without the pressures presented by not having the anonymity. While it is yet to be seen how successful such businesses will be, considering that the inquiries into one such hotline services have tripled since the corporate governance law was passed in the summer of 2002,[62] it is obvious that, for now, this option is one of the most cost-effective when it comes to implementation of ethics policies within companies.[63]

V. CONCLUSION

There seems to be many aspects of other corporate ethics policies from which a company could gain insight into how to improve their code of ethics. Furthermore, the new SEC Regulations as well as the Sarbanes-Oxley Act, is required when creating the ethics code of a corporation. However, unless directors and leaders of companies put the ethics policies into action and incorporate them into every day activities of the company, they are unlikely to do any good. Also, in determining whether the policy is working, a corporation can just wait and see how things seem over time, or they may take a more proactive approach and hire a hotline service to ensure the goals for the ethics policies are being met. One thing is for sure, if any corporation can honestly sell its Ethics Code on eBay while boasting it is in

58. *Id.*
59. Krissah Williams, *Hotlines Hope Reform is Profitable; Companies Retool Services to Help Clients Comply with Corporate Ethics Rules*, WASH. POST, Dec. 30, 2002, at E1.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*

"mint condition—never been read" it is not likely to yield the corporate governance one would hope for in light of Enron.[64]

Leah Wilson

64. *Observer*, *supra* note 54 (quoting Lynn Paine, professor of business ethics at Harvard, referring to the online sellers advertisement).

RECENT ETHICS OPINIONS AND CASES OF SIGNIFICANCE

This Article is a continuation of *The Journal of Legal Profession's* annual survey of ethics opinions. This Article focuses on judicial decisions made in regard to the Model Rules of Professional Conduct.

I. PROFESSIONAL COMPETENCE–MODEL RULE 1.1.

In re Rumsey, 71 P.3d 1150 (Kan. 2003).

An attorney with thirty years of experience was charged with multiple violations of the Model Rules of Professional Conduct. The first charge claimed that the attorney had told a client that a divorce action must be filed in a county other than the one in which the client resided. The second claimed that the attorney had failed to file a workers compensation claim in a timely fashion. This second lapse resulted in the client losing her cause of action.

The attorney was found to have failed to act competently; a violation of Model Rule 1.1, as well as several other violations. The attorney suggested that he be placed on one year of probation. The court referred to the attorney in a very harsh light, and ruled that the only appropriate punishment was a one year suspension.

II. DISINTEREST OF JUDGE–MODEL RULE 1.12

In re Application for Disciplinary Action Against Hoffman, 670 N.W.2d 500 (N.D. 2003).

A district court judge in North Dakota presided over a divorce case in which the wife was granted summary judgment. In January of the following year the Judge resigned his position in order to return to private practice. The resignation was to become effective in April of the same year.

In February, while still in his office as a judge, the judge filed a motion to amend the judgment in the divorce proceeding that he had presided over. He then informed the wife that he was now representing her husband. The wife was, by all accounts, greatly distressed by this development.

The Supreme Court of North Dakota ruled that, as a matter of law, presiding over a divorce action as judge constitutes substantial involvement. Further, the court found that the wife had not granted her consent. As a result of this violation, and several unrelated ones, the former judge was suspended from practice for one year.

III. FAILING TO KEEP COMPLETE RECORDS OF CLIENT AND THIRD PARTY FUNDS–MODEL RULE 1.15

In re Clower, 831 A.2d 1030 (D.C. 2003).

A lawyer was engaged to represent a client in a personal injury action. The client had received treatment for her injuries from a chiropractor, and the lawyer agreed to pay the chiropractor his fees out of any settlement that might be recovered for the client.

The client was awarded $100,000 following a trial. The lawyer received the funds and agreed to hold the funds for the client for a period of time. Eventually, the settlement money was disbursed to the client. The lawyer did not send the chiropractor the agreed amount for services provided to the client, nor did he notify the chiropractor that settlement had been reached. When the chiropractor inquired about the case two years later, he was informed that all settlement monies had been disbursed.

The court found that the lawyer had failed to keep documentary evidence regarding the chiropractor's claim to settlement monies, and that the lawyer had failed to pay an interested third party. Therefore, the court ruled that the lawyer had violated Model Rules 1.15(a) & (b), and that he should be publicly censured for these violations.

IV. ACTING WITH REASONABLE PROMPTNESS AND DILIGENCE–MODEL RULE 1.3

In re Group, 78 P.3d 812 (Kan. 2003).

An attorney was retained in various matters, all of which required the attorney to file briefs with an appellate court. In both cases the attorney filed several requests for extension of time. Ultimately, the attorney failed to either file the brief or to request more time. The court eventually dismissed the attorney as counsel and allowed the appeals to continue with new counsel. The court also referred the attorney to the disciplinary board.

The disciplinary board found that the attorney had an excellent reputation in the community, and had enjoyed a long and successful career as a lawyer. However, the board also found that the attorney was severely depressed, and the depression had caused him to not file the required briefs. The commission ordered a suspension of the attorney's license until he obtained professional help for his depression and submitted a workable probation plan. The attorney did not seek help, nor did he cease the practice of law during the required time. The Supreme Court of Kansas suspended his license indefinitely in response to the attorney's failure to seek help or obey the sanctions leveled by the disciplinary board.

V. UNREASONABLE FEES–MODEL 1.5

Cortinez v. Ark. Sup. Ct. Comm. on Prof'l Conduct, 111 S.W.3d 369 (Ark. 2003).

An attorney was engaged by a 71-year-old woman to obtain her husband's release from a hospital. The attorney charged the woman $5,750 in order to obtain the release. According to the record, the attorney made several phone calls and faxed some documents to the hospital. The husband was then released. The woman then requested that the attorney draft a trust for her, and he charged her $10,000 for the drafting of the trust.

A formal hearing found that the $5,750 fee violated Model Rule 1.5(c), and that the lawyers should be cautioned. However, no restitution was ordered to be paid. On rehearing, the Supreme Court of Arkansas ruled that a breach of Model Rule 1.5 does not automatically warrant restitution to the client.

City of Sioux Falls v. Johnson, 670 N.W.2d 360 (S.D. 2003).

A law firm was hired by a client to sue a municipality for a condemnation proceeding. The law firm prevailed in the action, which resulted in an award of $1,100,000 to the client. A statute in South Dakota directed that attorney's fees be paid by the defendant city in such cases. The court awarded the law firm $174,900 in attorney's fees. The city appealed, claiming the attorney's fees were unreasonable.

The trial court, on remand, used the factors in Model Rule 1.5 to determine the reasonableness of the fees. The court found the following: (1) the usual fee in this case was contingent; (2) the firm performed with skill; (3) the results for the client were excellent; (4) the firm expended over three hundred hours in the case; and (5) there was not a lengthy relationship between the client and the law firm.

Pursuant to these finding the Supreme Court of South Dakota affirmed the ruling.

VI. CONFIDENTIALITY–MODEL RULE 1.6

Spratley v. State Farm Mut. Auto. Ins. Co., 78 P.3d 603 (Utah 2003).

Two lawyers were hired by State Farm Insurance Company to be in-house litigation and claims counsel. In this capacity, the attorneys were required to represent the interests of State Farm, as well as State Farm's insureds. Eventually, the lawyers felt that State Farm was requiring them to violate their ethical duties to the insureds. The lawyers resigned their employment and took many files of confidential information with them. The lawyers retained counsel and sued State Farm for a variety of tort and con-

tract claims. In their pleadings they included many confidential documents relating to both State Farm and their insureds.

The trial court found that the lawyers had an attorney-client relationship with both State Farm and their insureds, and therefore, all documents involving these clients were inadmissible in the lawyer's claim against State Farm.

The Supreme Court of Utah agreed that an attorney-client relationship existed between the lawyers, State Farm and the insureds in question. However, the supreme court ruled that all confidences between State Farm and the lawyers could be admitted due to the exception in the Model Rules allowing a lawyer to reveal confidences as necessary in order to make a claim against a client. The supreme court instructed the trial court to use all necessary means to keep such submissions confidential. The court maintained the ban on the use of the insureds' material, unless the attorneys could obtain express permission to use the materials from the insureds.

In re Disciplinary Proceeding Against Schafer, 66 P.3d 1036 (Wash. 2003).

Douglas Schafer, an attorney, was hired to form a corporation to hold a bowling alley. During the course of the representation, Schafer learned that the owner of the bowling alley was an estate, and that the trustee was "milking" the estate. The estate sold the bowling alley for a low price.

Subsequently, the administrator of the estate was appointed as a judge in the county where Schafer practiced law. Some years later, the judge dismissed one of Schafer's complaints and sanctioned him. Schafer then began a personal crusade to have the judge removed from the bench based on his earlier administration of the bowling alley estate.

Schafer released numerous documents to the press, including all of the transactional papers that he had produced while working to acquire the bowling alley. The client who had hired Schafer to form the corporation filed a formal complaint against Schafer, alleging that in doing so he had violated attorney-client privilege.

Schafer claimed that the revelation was warranted under Model Rule 1.6(c) which allows revelation of confidences or secrets to a tribunal to show a breach of fiduciary duty, among other things.

The Supreme Court of Utah rejected this argument and suspended Schafer's license for six months. The court ruled that, while 1.6(c) may have justified the reporting of confidences regarding the judge, it did not warrant revelation of his client's confidences as well. Further, the court held that the rule only allowed revelations to be made to an appropriate tribunal, and not to the press or public officials. The court also emphasized that a breach of confidentiality did not require that the client be harmed, as the purpose of the rule is to maintain the public's trust in attorneys.

VII. CONFLICT OF INTERESTS AND IMPUTATION OF CONFLICTS– MODEL RULES 1.7 AND 1.10

Lennartson v. Anoka-Hennepin Indep. Sch. Dist. No. 11, 662 N.W.2d 125 (Minn. 2003).

A law firm representing a school board in a discrimination claim hired an associate attorney. The associate had previously worked for a plaintiff's attorney that had filed an action against the school board. While in the employ of the plaintiff's attorney, the associate had taken a deposition in the action against the school board.

The law firm took precautions to avoid the conflict, including raising an "ethical wall" between the associate and the school board case. Further, the law firm made sure that all attorneys representing the school board were officed on different floors from the associate.

The Supreme Court of Minnesota ruled that Model Rule 1.10 must be read conjunctively, and as a result, there is no action that a law firm can take to avoid an imputed conflict, when the disqualified attorney is aware of information that is "likely to be significant" to the matter at issue.

Madison County v. Hopkins, 857 So. 2d 43 (Miss. 2003).

A sheriff's department brought claims under the Federal Fair Labor Standard's act against the county that employed them, seeking overtime pay. The sheriff, in his official capacity, was a plaintiff in this suit. The attorneys representing the sheriff's department then sued the sheriff in his personal capacity, seeking overtime pay. A lower court held that this was a conflict of interest, and the sheriff was due legal fees to defend himself from the personal claims.

The Supreme Court of Mississippi reversed this ruling and held that there was no conflict of interest present. In so ruling, the court noted that "[a] person sued in his official capacity has no stake, as an individual in the outcome of the litigation." Therefore, no conflict existed where the law firm represented the sheriff in his official capacity as a plaintiff, and then sued him in a personal capacity, in relation to the same action.

Leibowitz v. Eighth Judicial Dist. Ct. of the State of Nev. ex rel. County of Clark, 78 P.3d 515 (Nev. 2003).

A domestic law firm hired a legal assistant from another domestic law firm. The legal assistant admitted during the hiring process that she had knowledge of a case in which both firms were adversely involved. The firm that hired the legal assistant instructed her that she could not communicate with any of the firm's other employees about the case. Further, the firm did not allow her access to computer files relating to the case. The trial court disqualified the hiring firm from the case, and said firm appealed.

The Supreme Court of Nevada held that disqualification of an attorney could be imputed through a nonlawyer employee. However, the court stated that simple secretarial work would not be sufficient to disqualify the nonlawyer employee. Instead, said employee must have confidential and privileged knowledge of a case in order to be disqualified.

The court also ruled that, while screening was not allowed to cure imputed conflicts for attorneys, that screening could cure disqualification for nonlawyer employees. The court laid out four requirements for nonlawyer screening: (1) the employee must be warned not to discuss the case with other members of the firm; (2) the employee must not be allowed to work on the case at issue; (3) the employee should not work on matters related to issues he or she worked on in prior employment positions; and (4) a waiver must be obtained from opposing counsel.

Sorci v. Iowa Dist. Ct. For Polk County, 671 N.W.2d 482 (Iowa 2003).

A lawyer was employed by a county attorney's office. In this capacity the lawyer was responsible for children's affairs in the county, including the determination of which cases the county should prosecute regarding child abuse and custody matters. The lawyer resigned this position and took a position as the head of a non-profit organization which provided free legal services to children. The organization was contracted through the public defender's office to handle child abuse and custody cases.

Upon assuming the position at the organization, the lawyer was immediately questioned about her extensive prosecutorial involvement in many of the cases. Eventually, this problem culminated in the lawyer being disqualified from approximately eleven hundred (1,100) cases which she had been involved in as a county attorney. Further, the district judge who determined the disqualification held that the conflict had been imputed to the entire non-profit organization, and subsequently disqualified the organization from the same 1,100 cases. The lawyer then resigned her post at the organization.

The Supreme Court of Iowa ruled that the attorney had violated the model rules in creating this conflict, and that the conflict had been imputed to the organization. However, the court found that, due to the crucial niche which the organization held in the county, that the imputation should have ended upon the resignation of the lawyer. The court reinstated the organization as counsel in the cases at issue.

Jones v. Arkansas, No. CR03-401, 2003 WL 22925123 (Ark. Dec. 11, 2003).

A man was convicted of several criminal charges and sentenced to jail time. On appeal, the man argued that he was entitled to a new trial because of the fact that his court appointed defense attorney had previously represented his child as a guardian ad litem, and as such, had rendered ineffective assistance of counsel.

The Arkansas Supreme Court found that the man's defense counsel had indeed represented the man's child as a guardian ad litem in a previous case. The court held that the attorney had not been directly involved in the case in which he was guardian ad litem, and that there was no actual conflict of interest. Nevertheless, the court found that a new trial could be an appropriate remedy where there was an appearance of conflict, if the defendant was prejudiced. The court found that the defendant was not prejudiced in this case.

State ex rel. S.G., 814 A.2d 612 (N.J. 2003).

A man shot several persons on a street corner and was arrested. One of the victims of this shooting was hospitalized for seven days before he died. The shooter's family engaged a law firm to represent him in criminal charges related to the shootings. A partner in the law firm entered his appearance for the shooter. Coincidentally, another member of the law firm was representing the victim of the shooting in an unrelated narcotics charge at the same time. The conflict was noticed and a motion for dismissal was brought in the district court. The district court ruled that the conflict ended when the victim died, and that the firm could continue to represent the shooter.

The Supreme Court of New Jersey disagreed. The court noted that while the victim had died roughly one week into the case against the shooter, the narcotics charge was not dismissed for another three weeks. Additionally, the court stressed that criminal defendants had a heightened need for unconflicted counsel, and that the judiciary bears the responsibility of preserving the fiduciary responsibility that lawyers owe their clients. The court also noted that a person accused of a crime and his alleged victim have direct adverse interests in criminal and potential civil proceedings. Finally, the court ruled that the death of one party in a conflict does not erase the conflict, and that the law firm must be disqualified from the proceeding.

Whaley v. Kroger Co., 98 S.W.3d 824 (Ark. 2003).

A plaintiff brought suit against Kroger, claiming that the grocery store was liable for an electric shock that he had received while shopping. During the course of the proceeding, the plaintiff's attorney filed a motion for sanctions against defense counsel for Kroger, claiming that he had failed to comply with discovery.

Defense counsel apparently took the position that he would no longer participate in settlement negotiations unless the motion for sanctions was withdrawn. The plaintiff's lawyer refused to withdraw the motion, and the case proceeded to trial. The result was a verdict for Kroger.

The plaintiff's attorney appealed, claming that defense counsel had violated Model Rule 1.7, because he became personally involved with the case.

The trial became a "vent of personal animus that went beyond the bounds of the authorized and desired practice of law." Plaintiff argued that because of this personal animus, defense counsel breached his duty of loyalty to his client, and should have been disqualified.

The Supreme Court of Arkansas ruled that disqualification is only appropriate where an attorney has a prior relationship with an adverse party, and is in possession of confidential information adverse to the former client. The court found that there was no basis in the law or fact for this appeal and awarded sanctions and fees to defense counsel.

VIII. CANDOR TOWARDS THE TRIBUNAL–MODEL RULE 3.3

Commonwealth v. Mitchell, 781 N.E.2d 1237 (Mass. 2003).

A criminal defendant was arrested and charged with two counts of murder. He obtained counsel to assist in his defense. At the beginning of the trial, the defendant told his lawyer that he had not committed the murders, but he changed his story some time later and told his lawyer that he had committed the murders. As trial approached, the defendant again changed his story and claimed that he had not committed the murders.

At trial, the defense lawyer approached the bench and requested a sidebar with the judge. At the sidebar, the lawyer informed the judge that he believed that his client was going to commit a fraud on the court. The lawyer told the judge that he had encouraged his client not to lie and that he would not withdraw from the case. The judge instructed the attorney to allow the defendant to give narrative testimony to the jury and to avoid the testimony in his closing argument. The lawyer did as he was instructed.

The defendant was convicted of murder, and appealed, claiming that he had been denied effective assistant of counsel. Specifically, he claimed that the lawyer had not "known" with enough certainty that a fraud was going to be committed on the court, and that his lawyer's subsequent nonparticipation in his testimony had damaged his defense.

The Supreme Judicial Court of Massachusetts determined that the proper standard to be employed by attorneys "mandates that a lawyer act in good faith based on objective circumstances firmly rooted in fact." The court noted that such a standard requires more than mere belief and inconsistent statements by the defendant. The court ruled, however, that a direct admission of guilt by the defendant constituted more than inconsistent statements and that the invocation of Rule 3.3 was proper.

In re Bilbe, 841 So. 2d 729 (La. 2003).

An immigration lawyer agreed to represent a client in an effort to obtain citizenship status in the United States. The actual hearing date was put on hold until the Immigration and Naturalization Service could make a determination on citizenship status. During the subsequent hold, the lawyer de-

cided that she wished to reset the hearing for an even later date, as she would be unavailable on the date the hold would expire. Opposing counsel did not agree to the extension and informed the lawyer of this in a phone conversation.

The lawyer then appeared at the judge's chambers and requested the extension. When asked if opposing counsel agreed to the extension, the lawyer stated that he did. The lawyer went on to lie to the judge about the client's immigration status and visa approval, even after the judge pointed out that she did not possess the necessary paperwork. The lawyer continued to insist that she did have the necessary documents. The judge removed her from the case and granted the client an extension to find new counsel.

The Supreme Court of Louisiana found that the lawyer had violated Model Rule 3.3, as well as a litany of other model rules concerning honesty. Due to the lawyer's combative nature and failure to admit wrongdoing, the court suspended her license to practice law for three years.

IX. FAIRNESS TO OPPOSING COUNSEL–MODEL RULE 3.4

Feld's Case, 815 A.2d 383 (N.H. 2003).

Feld, a lawyer, agreed to represent several defendants in an equity action involving a parcel of property. During the course of this representation, opposing counsel served Feld's clients with interrogatories that were proper according to the applicable rules of civil procedure. Feld's clients provided certain responses which were later discovered to be false.

Feld was recommended to the disciplinary committee in New Hampshire. This body found that Feld had violated Model Rule 3.4 by failing to correct his clients' false answers.

Feld appealed and argued that he had not falsified evidence or disobeyed obligations but had simply failed to make necessary corrections in the interrogatories, and therefore had not violated Model Rule 3.4(b). However, the New Hampshire Supreme Court reasoned that since Feld had known that the responses in the interrogatories were incorrect, that he had, in effect, falsified the evidence. It must be noted that New Hampshire has not adopted Model Rule 3.3, which directly prohibits attorneys from aiding their clients in presenting false evidence to the court. The court also found that Feld violated Model Rules 3.4(c) and 3.4(d) through his actions. The court ruled that Feld did not show good faith in this instance and that his remorse would not act as a mitigating factor. As a result, the court suspended him from practice for one year.

X. FAILURE TO COMPLY WITH THE LAW–MODEL RULE 3.5

Lewellen v. Sup. Ct. Comm. on Prof'l Conduct, 110 S.W.3d 263 (Ark. 2003).

An attorney retained to file an appeal of a criminal conviction failed to file a motion for appeal in a timely fashion. The attorney argued that the time for filing an appeal was delayed when he filed a motion for a new trial. The Supreme Court of Arkansas adjudged that the case law on the appropriate time to file an appeal was clear, and, therefore, the attorney had violated his obligation to comply with the law.

In so ruling, the Supreme Court of Arkansas noted that an attorney is expected to know the law, though an attorney may not be found to be at fault where case law has not been settled. Further, the court ruled that a public and permanent caution on an attorney's record was necessary to maintain the integrity of the profession, where a public hearing had been held on an ethical issue.

Gillaspie v. Ligon, 117 S.W.3d 587 (Ark. 2003).

A criminal defense attorney failed to timely file an appeal after a verdict was rendered against his client. The attorney filed a brief requesting that an appeal be granted and admitting that he failed to comply with the statutory time limits controlling appeals. The Committee on Discipline suspended the attorney's license for three months.

The attorney moved for a stay of the three month suspension on the basis that imposition of the sanction would irreparably harm his clients. In this motion the attorney alleged that: (1) he was a solo practitioner; (2) he currently had over fifty criminal defendant clients, many of whom were in the last stages of their criminal proceedings; and (3) being forced to withdraw in these matters would irreparably harm said clients' interests. Further, the attorney pointed out that he posed no danger to the public because he had failed to file an appeal in a timely fashion.

The Supreme Court of Arkansas agreed that he posed no threat to the public. Further, the court found that his busy litigation schedule made imposition of the sanctions potentially damaging to his clients. Thus, the court agreed to stay the sanctions if the attorney would provide a $5,000 appeals bond and avoid any other formal complaints during the three month time period.

XI. EXTRA-JUDICIAL STATEMENTS–MODEL RULE 3.6

Attorney Grievance Comm'n v. Gansler, 835 A.2d 548 (Md. 2003).

A prosecutor in Maryland was in the habit of holding press conferences shortly after criminal defendants were charged with crimes. In the first relevant press conference, the prosecutor referenced a confession that the

defendant had given, as well as a walkthrough of the crime scene that the defendant had performed with the police. In the second, the prosecutor made repeated references to the suspect's past criminal record, to evidence in the case involving a shoe print found at the crime scene, and the suspect's shoes. The prosecutor also stated that he was "more than confident" that they had apprehended the right person. In the third such press conference, the prosecutor indicated that he would offer the suspect a plea bargain which would allow him to avoid the death penalty, because anyone facing death should have the choice to live.

A disciplinary hearing was convened to determine if the prosecutor's comments were in violation of Model Rule 3.6. The prosecutor argued that all of these statements were allowed under model Rule 3.6(c), as all of the comments were in the public record. The disciplinary commission found that the only comment not covered by this exception was the comment regarding the shoe print, which was not public knowledge, or in the public record. Significantly, the commission noted that the term "public record" alone did not provide proper guidance for attorneys in this matter.

The Supreme Court of Maryland considered this matter at length and agreed that, due to ambiguity of the term "public record," many of the prosecutor's statements could not be found to be violations of model Rule 3.6. However, the court found that the prosecutor's reference of the confession, and the details of it, violated the rule even under the broadest definition. Additionally, the court found that the statements regarding the offered plea bargain were a violation. Similarly, the court stated that all of the prosecutor's statements regarding the guilt of the suspects violated the rule, however, the attorneys for the defendants had not argued that these violations had caused prejudice to the defendants, therefore, no violation could be found.

Finally, the court defined "information in a public record" as "only . . . public government records—the records and papers on file with a government entity to which an ordinary citizen would have lawful access." The court further stated that this would be construed very strictly against prosecutors, as they act as ministers of justice, and not simply as advocates.

XII. DUTY OF PROSECUTOR TO TURN OVER EVIDENCE TO THE DEFENSE– MODEL RULE 3.8

State v. Wade, 839 A.2d 559 (Vt. 2003).

A man was arrested for engaging in a bar room brawl in Bellows Falls, Vermont, and charged with aggravated assault. He obtained defense counsel, who requested discovery from the prosecutor. Later, at a pre-trial conference, the prosecution stated that they had turned over all relevant information.

However, during the trial, the defense discovered that the prosecution had not informed defense counsel of two additional officers who partici-

pated in the arrest, a video tape of the incident and a written report filed after the incident. The man was eventually convicted, and his defense counsel filed a motion asking for dismissal of the conviction due to the prosecution's serious ethical violation.

The trial court dismissed the conviction, noting that the violations in this case were clear and serious. Additionally, the trial court noted that the prosecutor's office had a record of such violations. However, the Supreme Court of Vermont ruled that reversal of a conviction was not an appropriate sanction against the prosecutor's office because the violation had not prejudiced the defendant. The court did agree that the prosecutor's office had made clear and serious violations, and that there was a pattern of such behavior by the prosecutor's office. Thus, the court ruled that the office must be referred to the state bar disciplinary commission

XIII. EX-PARTE CONDUCT–MODEL RULE 4.2

Clark v. Beverly Health and Rehab. Servs., Inc., 797 N.E.2d 905 (Mass. 2003).

An attorney filed a wrongful death claim against a nursing home. The nursing home retained counsel, and discovery began in earnest. The plaintiff's attorney found that one nurse who had been working at the nursing home the night of the accident was no longer employed by the nursing home. He located the nurse, found that she was not personally represented by a lawyer, and obtained her consent to speak with him without a lawyer present. The record showed that the nurse was directly involved in the subject matter of the litigation.

The nursing home sought a protective order prohibiting the plaintiff's attorney from ex parte communication with former employees of the nursing home, unless the nursing home's defense counsel was present. The trial court granted the order.

The Supreme Judicial Court of Massachusetts disagreed and ruled that Model Rule 4.2 did not apply to former employees of a defendant. The court reasoned that the rule does not even purport to protect ex-employees, but instead is intended solely to prohibit lawyers from contacting persons involved in litigation who are represented by counsel.

XIV. DISPARAGING COMMENTS TOWARDS THE JUDICIARY–MODEL RULE 8.2

Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425 (Ohio 2003).

An attorney was engaged to file an appeal for a criminal defendant in an Ohio appellate court. The appeal alleged that the defendant had been convicted of a crime that he had not committed. However, the appellate court affirmed the conviction.

The attorney then filed a motion for reconsideration of the matter, or a certification of a conflict to the court. In the motion, the attorney repeatedly accused the appellate court of being dishonest and making judgments that were inconsistent with well-established case law. Further, the attorney alleged that the court was so biased towards the prosecution that it was incapable of deciding a case fairly, that the court distorted the truth, that the court was using the law as a hammer to crush citizens, and that the court corrupted the law and the truth.

In response, the court found that he had violated Ohio law by making disparaging comments about the judiciary and recommended that his license to practice law be suspended for six months. The Supreme Court of Ohio affirmed the decision.

The Supreme Court of Ohio ruled that neither the United States' nor Ohio's Constitutional right to free speech protected the lawyer's comments. Further the court ruled that the comments were not hyperbole or conjecture. In so ruling, the court rejected that the comments were made with actual malice and stated that the appropriate standard was an objective determination of whether "a lawyer's statement about a judicial officer is made with knowledge or reckless disregard of its falsity."

XV. DUTY TO REPORT ETHICAL VIOLATIONS–MODEL RULE 8.3

In re Discipline of Eicher, 661 N.W.2d 354 (S.D. 2003).

Eicher, an attorney, filed a brief with a court indicating that the opposing party was "shockingly greedy" and wished to "make certain that her fangs are bared for all to see." Further, Eicher contended that the lawsuit in question was simply "another dose of acidic bile" from the opposing party. Additionally, Eicher claimed that opposing counsel needed a lecture in "good lawyering" and that he was a "novice." Opposing counsel filed a disciplinary action against Eichner.

In response to the disciplinary action, Eichner contacted the opposing counsel and offered not to file an appeal for the case in question if the opposing counsel would drop his ethics complaint. Opposing counsel rejected this offer and reported this subsequent action to the disciplinary committee as well.

The Supreme Court of South Dakota ruled that Eicher's derogatory remarks in the briefs were a violation of the South Dakota's Rules of Professional Conduct. Further, they ruled that Eicher's offer not to file an appeal if opposing counsel dropped his complaint constituted a violation of Rule 8.3, in that Eicher was interfering in opposing counsel's duty to report ethical violations to the proper authorities. Eicher, due to these violations and several others, was suspended from practice for one hundred (100) days.

XVI. DISHONESTY, FRAUD, DECEIT AND MISREPRESENTATION–MODEL RULE 8.4(B)

In re Disciplinary Proceedings against Marks, 665 N.W.2d 836 (Wis. 2003).

An attorney was hired by a personal injury victim to file suit against a tortfeasor. The attorney diligently worked on this case for a number of months. At some point, the victim decided that another lawyer could better handle the claim and retained another firm to represent him.

The original attorney was demonstrably upset by this, and had several conversations with the new firm. Eventually, it was agreed that the firm would reduce its contingency fee by the amount necessary to pay the original attorney for his work. The original attorney then notified the tortfeasor's insurance company that he was maintaining a twenty-five (25%) percent lien on any recovery that may be had.

The Supreme Court of Wisconsin held that a client has a right to terminate representation in any matter, and that the victim in this case had done so properly. Due to this fact, the court further held that the original attorney had made a misrepresentation when he informed the tortfeasor's insurance that he had a lien on the proceeds of the case. The court suspended the original attorney's license for an indeterminate period of time for this infraction.

Anthony Collins

RECENT LAW REVIEW ARTICLES CONCERNING THE LEGAL PROFESSION

In keeping with the tradition of *The Journal of the Legal Profession*, the following section represents a selection of Law Review and Journal articles centered on the subject of the legal profession that were published in the last year. Brief summaries accompany selected entries.

I. THE ATTORNEY-CLIENT RELATIONSHIP

Robert M. Contois, Jr., *Ethical Considerations: Independent Professional Judgment, Candid Advice, and Reference to NonLegal Considerations*, 77 TUL. L. REV. 1223 (2003).

Gerald E. DeLoss, *HIPAA Requirements for Lawyers—Business Associate Contracts*, 79 N.D. L. REV. 41 (2003).

Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519 (2003).

Jennifer Tulin McGrath, *The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples*, 27 SEATTLE U. L. REV. 75 (2003).

Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1 (2003).

II. CONFIDENTIALITY AND THE ATTORNEY-CLIENT PRIVILEGE

Alan F. Blakley, *To Squeal or Not To Squeal: Ethical Obligations of Officers of the Court in Possession of Information of Public Interest*, 34 CUMB. L. REV. 65 (2003-2004).

Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469 (2003).

Clark D. Cunningham, *How to Explain Confidentiality?*, 9 CLINICAL L. REV. 579 (2003).

Charles S. Doskow, *The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case and Its Aftermath (a Two-Year Journey to Nowhere)*, 25 WHITTIER L. REV. 21 (2003).

Michael J. Riordan, *The Attorney-Client Privilege & the "Posthumous" Corporation—Should the Privilege Apply?*, 34 TEX. TECH L. REV. 237 (2003). In this article, Riordan examines the viability of the attorney-client privilege in the context of a statutorily dissolved corporate entity. By exam-

ining the historical and legal significance of the attorney-client privilege with respect to the "natural person," the author argues that, notwithstanding a statutory provision, the applicability of the attorney-client privilege to dissolved corporate entities exists only insofar as the "relative importance of the communication" outweighs the "need to disclose" the information.

American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307 (2003).

III. CONFLICTS OF INTEREST

Yvette Golan, *Restrictive Settlement Agreements: A Critique of Model Rule 5.6(b)*, 33 SW. U. L. REV. 1 (2003).

Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry Into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581 (2003).

Claudia T. Salomon & Jeremy D. Andersen, *Imputing Conflicts Across Firms*, 27 J. LEGAL PROF. 81 (2002-2003). In this article, Salomon and Anderson discuss the current ethical treatment of imputing conflicts of interest among different law firms that had previously maintained the co-counsel relationship. The authors note that courts largely examine the facts surrounding the firms' relationship rather than automatically disqualify co-counsel. The authors then outline the burden-shifting procedure utilized in determining the appropriateness of co-counsel disqualification.

Susan P. Shapiro, *Bushwacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87 (2003).

William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent? An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57 (2003).

IV. ATTORNEY COMMUNICATION

Louise L. Hill, *Publicity Rules of the Legal Professions Within the United Kingdom*, 20 ARIZ. J. INT'L & COMP. L. 323 (2003).

Jeffrey A. Parness, *Civil Claim Settlement Talks Involving Third Parties and Insurance Company Adjusters: When Should Lawyer Conduct Standards Apply?*, 77 ST. JOHN'S L. REV. 603 (2003).

Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2(Part I)*, 70 TENN. L. REV. 121 (2003).

Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2(Part II)*, 70 TENN. L. REV. 321 (2003).

Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2(Part III)*, 70 TENN. L. REV. 643 (2003).

Amy Dunn Taylor, *Mass Tort Litigation Management and Ethics*, 44 S. TEX. L. REV. 483 (2003).

V. ATTORNEY'S FEES

Lloyd C. Anderson, *Equitable Power to Award Attorney's Fees: The Seductive Appeal of "Benefit,"* 48 S.D. L. REV. 217 (2003).

Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65 (2003).

Albert Choi, *Allocating Settlement Authority Under a Contingent-Fee Arrangement*, 32 J. LEGAL STUD. 585 (2003).

Susan Saab Fortney, *I Don't Have Time to be Ethical: Addressing the Effects of Billable Hour Pressure*, 39 IDAHO L. REV. 305 (2003).

William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813 (2003).

Christine Hurt, *Counselor, Gatekeeper, Shareholder, Thief: Why Attorneys Who Invest in Their Clients in a Post-Enron World Are "Selling Out," Not "Buying In,"* 64 OHIO ST. L.J. 897 (2003).

James E. Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223 (2003). In this article, Molitnero argues that ethics rules proscribing a lawyer from providing financial assistance to a client or from acquiring an interest in the client's litigation should be discarded. After examining the historic background of champerty, maintenance, and barratry, the author challenges the modern reservations preventing the revision of these rules. The author argues that neither conflict of interest, the risk of frivolous litigation, nor the threat of unfair "client-getting" practices supports the continuation of these rules, and that they should accordingly be abrogated.

Edward A. Morse, *Taxing Plaintiffs: A Look at Tax Accounting for Attorney's Fees and Litigation Costs*, 107 DICK. L. REV. 405 (2003).

Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT'L L. 125 (2003).

VI. ATTORNEY AS ADVOCATE

David S. Caudill, *Advocacy, Witnesses, and the Limits of Scientific Knowledge: Is There an Ethical Duty to Evaluate Your Expert's Testimony?*, 39 IDAHO L. REV. 341 (2003).

Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Fathers*, 78 N.Y.U. L. REV. 2103 (2003). Etienne argues that the zealous advocacy of criminal defense lawyers detrimentally results in increased sentences for their clients. The article asserts that federal judges using the Federal Sentencing Guidelines respond to the defense attorney's "overzealous advocacy" by interpreting such as indicative of the defendant's insufficient "remorse." Etienne argues that by using the "acceptance of responsibility" provision of the federal guidelines, judges increase the defendant's sentence to punish both the de-

fendant and the "overzealous" lawyer. The author argues that this adversely affects the attorney-client relationship, as well as the role of the lawyer as zealous advocate.

Geoffrey C. Hazard, Jr., *Lawyer as Wise Counselor*, 49 LOY. L. REV. 215 (2003).

Anthony C. Infanti, *Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar*, 22 VA. TAX REV. 589 (2003).

VII. THE PRO-SE LITIGANT AND THE RIGHT TO COUNSEL

Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55 (2003).

Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288 (2003).

VIII. REPRESENTING THE CORPORATE CLIENT

John M. Burman, *Ethical Considerations When Representing Organizations*, 3 WYO. L. REV. 581 (2003).

James D. Cox, *Managing and Monitoring Conflicts of Interest: Empowering the Outside Directors with Independent Counsel*, 48 VILL. L. REV. 1077 (2003).

Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859 (2003).

Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097 (2003).

Robert W. Gordon, *A New Role For Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003).

Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195 (2003).

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