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Social Media Networking For lawyers: A Practical Guide to Facebook, LinkedIn, Twitter and Blogging

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About the Author

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What a difference five years makes. Social media has exploded. Over 800 million people now connect with each other using Facebook—more than one-half on a daily basis. And hundreds of millions more connect using other social networking websites like LinkedIn, Twitter and YouTube, just to name a few. News feeds report stories live in real time. Blogs are often the fastest and best source for cutting-edge legal commentary.

And the tools are constantly evolving. Smartphones and tablets (such as iPads) allow people to access online content and post updates 24/7 from anywhere they have a wireless or cell connection. The rise of social media has fundamentally changed how we all communicate in both our personal and professional worlds.

Younger people today have grown up with technology all around them, and it is intertwined in every aspect of their lives. Nearly all the younger lawyers at your firm will have Facebook profiles they check daily, many will have already uploaded their résumés on LinkedIn and some may tweet links to online content of some sort. And social media is not the exclusive preserve of the young. Networking sites are seeing a spike in adult membership, including senior lawyers.

How are law firms approaching social media? Just two short years ago, the appropriate law firm response to social media was still being debated. Like any other change in law firm policy or operations, getting to consensus was painful. It's no secret: Lawyers don't like change.

At the outset, firm management simply didn't know what to make of these tools. IT professionals expressed concern over security lapses and breaches of confidentiality. Marketing directors feared that firm image would be compromised by the improper use of the firm's logo or imprudent 25-year-olds engaged in flame wars. HR people assumed staff would go online and waste valuable work time.

The typical response: Access to MySpace, Facebook and instant messaging was routinely blocked. Blogs were viewed with suspicion. Few firms saw the need to develop coherent social media policies to guide the use of these new-fangled communication tools, let alone to encourage experimentation or allow staff to use them.

But times have changed. Given the trends noted above, engagement with social media has become a functional imperative for all law firms. Lawyers are beginning to realize the potential of social media to market their services, build connections with other lawyers and potential clients, or gather and share information about the law and practice. So the question now is not whether law firms can engage with social media, but how? Creating a policy that gives law firm lawyers and staff clear direction on what they can and can't do is essential.

The morass of social media services may seem bewildering— there are thousands of them—but with a bit of research and guidance you can sort out which ones have the potential to do something for you and your firm.

Here is a quick overview of the four main social media tools you should consider using: Facebook, LinkedIn, Twitter and blogs. In the pages following this article, four lawyers that actively use these tools share their advice for making the most of them.

FACEBOOK

Facebook is becoming the social and communications hub for all aspects of the lives of millions of people. They use it to share information with friends and work colleagues, and it is their preferred means of communication. For many, Facebook's private message feature is replacing email.

As the largest social networking site on the Web, Facebook poses opportunities and challenges for lawyers and law firms. Any place where you can meet 800 million unique people is clearly a lucrative marketing opportunity. And while initially, most people saw Facebook as a personal networking tool, it is being used increasingly as a successful business marketing tool as well.

But herein lies the challenge many lawyers will face when they consider using Facebook. Links to interesting cases or wall posts to potential clients shouldn't be sullied by nearby photos of your sister-in-law's bachelorette party in Vegas.

Confidentiality obligations imposed by ethics rules make it awkward, if not impossible, for lawyers to overlap their personal and professional worlds.

While many lawyers are still scratching their heads—and rightfully so—some lawyers are making it work for them. Many have a personal Facebook account and a separate page for their firm. Task No. 1 for any lawyer using Facebook is mastering the site's ever-changing privacy and personalization settings. You need to understand and carefully control what the world can see.

Facebook has just introduced its "smart lists" feature, which automatically assigns friends to categories—work, school, family and city. Users can then add or remove their friends from categories after Facebook makes its recommendation. The functionality and longevity of this feature is still unclear, but smart lists may be a helpful way for lawyers to separate professional and personal contacts.

LINKEDIN

The so-called Facebook for professionals, LinkedIn is in a different category than many other social media tools because of its express business focus.

LinkedIn allows users to create public profiles that are much like Facebook profiles, only without the bachelorette party photostream. It allows professionals to upload a picture of themselves—usually the standard company headshot—and most of the information you would find on a standard résumé, including employment history, education, skills, publications and awards. LinkedIn users can see each other's profiles and connections (called "contacts") when they connect to each other.

Smart firms actively encourage all their lawyers to be on LinkedIn and to actively find real contacts (as opposed to wannabe friends) by relying on the power of exponential networking to identify connections to potential clients. They also request that lawyer profiles use consistent firm branding and language to ensure they make a professional presentation. A firm of 20 lawyers who each have 100 contacts may have more than 2,000 potential contacts at only one degree of separation. The trick is to connect these contacts to business development strategies.

LinkedIn is a goldmine for potential firm hires, many of whom use the site to forge connections with practicing lawyers working in their desired area. The site offers a number of advanced features, including status updates, newsfeeds and interactive discussion forums, which provide a platform for firm outreach and marketing efforts. Smart law firms appreciate this by soliciting interest in job openings on LinkedIn. LinkedIn permits users to make recommendations or to endorse the services and performance of others, which raises obvious ethical issues.

LinkedIn also has the feature of asking questions of those within one's network and responding with answers. This blurs the difficult dividing line between professional development and the provision of legal advice.

TWITTER

Twitter gives you yet another way to send information to all who might be interested in things you might say. The interesting and overriding condition is that all Twitter updates, or "tweets," can have no more than 140 characters. Your tweets simultaneously go to your "followers," all those people who agreed to receive your tweets. You can choose to follow anyone on Twitter, including friends, business associates, colleagues within your firm or even total strangers. Tweets can be sent from any computer or smartphone.

Like Facebook, the Twitterverse abounds with users who use the service for personal communication. But by controlling who you "follow," or by setting up a Twitter account using the name of your firm, you can create an online community of people interested in the legal content you are tweeting.

Many are skeptical about how short Twitter updates that are just 140 characters long can have any marketing value. However, with over 200 million distinct users, few other platforms have similar instant reach. Tweeting what followers flock to hear is building reputations and delivering clients to some lawyers.

BLOGS

Law blogging, or “blawging,” is a quick and useful way to report current developments to colleagues, clients and the general public.

The appeal of a blog is how easily and reliably it produces quality content in a timely fashion. All that a contributor needs to do is write and click to submit; there is no cumbersome editing process or having to wait for a print publication. For this reason, blogs have the potential to provide cutting-edge legal commentary about emerging issues before the journals. Relative to the other social media tools, it takes more work to create a blog. The regular writing you must do to keep posting updates can be a chore, but the rewards can be large, especially if you establish yourself as one of the go-to people in a given area of the law.

Many firms are focusing their efforts on firm-wide blogs or practice group blogs. Enlisting a group of colleagues, usually specialists in a given area, to commit to posting on a regular schedule helps spread the writing load around. It also means the blog remains a firm asset if one of the people posting to it leaves. Blogs with good reputations reflect well upon the expertise and diligence of lawyers, and present valuable client development opportunities from within the readership. They can generate real leads.

And if the mainstream media follows your blog, you’ll find yourself quoted or invited to comment on television or radio—not a bad payback for something that requires little out-of-pocket investment, but your attention and time.

GOOGLE+

The newest kid on the social networking block is Google+ (pronounced “Google Plus”). Launched a few months ago, this is the search giant’s most recent effort at social networking. Google+ allows users to send messages, post links and share photos with friends, family, etc. The platform’s similarity to Facebook, its main competitor, is striking.

Google+ has leapfrogged other social networking sites with its ability to easily share information with specifically targeted groups of people, called “circles.” Users can place work colleagues in one circle, clients in another, and personal contacts in another, allowing them to tailor their communication to each group. This achieves the same effect as grouping contacts on Facebook or increasing privacy settings on rival sites, but in a more streamlined and user-friendly way.

It may be too early to integrate Google+ into your law firm’s social media strategy. It’s still evolving and finding its way. As of November 2011, businesses could have a business page on Google+. And while it has a significant number of fairly geeky users, Google+ does not yet have a critical mass of mainstream users. One of the biggest challenges for Google+ is that Facebook users are completely immersed and pulling them away will be a challenge.

Smart firms should make clear that their policy regarding the use of networking sites applies equally to Google+. As Google starts to integrate all those other Google tools we use every day, more people will be drawn into using Google+. Keep a close eye on its growth. The social media landscape may look different in the next year or two, with Google+ playing a more prominent role.

Specialized Legal Communities

There are social networking sites focused only on lawyers, both in-house and in law firms.

Legal Onramp is the best known of the sites aimed at legal professionals, specifically targeted at establishing close Web-based relationships between corporate counsel and outside counsel. It requires private law firm lawyers using the service to contribute substantive content (such as marketing materials) regularly. Access to Legal Onramp is controlled. Corporate counsel may join as of right now, but outside lawyers and third-party service providers need to be invited.

The site currently has over 12,000 members from over 40 countries, roughly 50% of whom are in-house counsel. Legal Onramp does contain closed sub-communities, where discussions can take place that are not accessible to the general membership.

Martindale-Hubbell Connected is Lexisnexis' social networking site for lawyers, which permits the establishment of contact networks, as well as a rich professional discussion environment.

JD Supra is a Web-based closed community of lawyers in the private sector and the business world. The prime advantage of all these services is the quality of the audience—you're addressing your peers, and in-house counsel who may just need your services. The challenge is that it takes work to build presence. You must engage with the community—work won't come the way of the lurkers.

THE UNPROFESSIONAL SIDES OF SOCIAL MEDIA AND SOCIAL NETWORKING: HOW CURRENT STANDARDS FALL SHORT

INTRODUCTION

Facebook. Twitter. Google Chat. *Above the Law*. We are the information-sharing generation. Social media and social networking are constant and ubiquitous.[1] The legal community has certainly not escaped this phenomenon. The Judicial Conference of the United States has characterized the "explosion in social media [and] social networking" as "[t]he latest chapter in the evolution of online activities."[2] A 2010 ABA survey revealed that fifty-six percent of attorneys belong to at least one online social network.[3] However, the practice of law seems at odds with this information-sharing revolution. Lawyers are ethically obligated to guard and to filter the information provided to them. They are bound by duties of confidence and discretion. As a matter of decorum, a lawyer is expected to be thoughtful, reserved, and circumspect—

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[1] *See* David Carr, *Keep Your Thumbs Still While I'm Talking to You*, NY TIMES, Apr. 17, 2011, at ST1, *available at* http://www.nytimes.com/2011/04/17/fashion/17TEXT.html?pagewanted=1&_r=1.

[2] COMM. ON CODES OF CONDUCT JUDICIAL CONFERENCE OF THE UNITED STATES, RESOURCE PACKET FOR DEVELOPING GUIDELINES ON USE OF SOCIAL MEDIA BY JUDICIAL EMPLOYEES (2010) [hereinafter JUDICIAL CONFERENCE, RESOURCE PACKET], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/SocialMediaLayout.pdf.

[3] *The Linked-in Lawyer: How Lawyers Are Using Social Networks*, ABA BOOK BRIEFS BLOG (June 11, 2010), (citing excerpts from 2010 ABA LEGAL TECHNOLOGY SURVEY REPORT: WEB AND COMMUNICATION TECHNOLOGY). Commentators have noted the coincidence between digital devices, social networking sites, and the general decline in American civility. *See, e.g.*, Kerry Howley, *Individualism Interrupted Your Speech, Taylor Swift!*, SLATE (Sept. 16, 2009), http://www.doublex.com/blog/xxfactor/individualism-interrupted-your-speech-taylor-swift. The professional community has not escaped this trend. Raoul L. Felder, Op-Ed., *I'm Paid to Be Rude*, N.Y. TIMES, July 17, 1997, at A23; Sue Shellenbarger, *Texting During Meetings, the Decline of Civility*, WSJ THE JUGGLE (May 24, 2010, 7:00 PM), http://blogs.wsj.com/juggle/2010/05/24/texting-during-meetings-the-decline-of-civility. Commentators have also discussed at length the decline of civility in politics. *See, e.g.*, Barbara Basler, *The Decline of Civility and Why It Matters*, AARP BULLETIN (Sept. 16, 2009), http://www.aarp.org/politics-society/government-elections/info-09-2009/the_decline_of_civility_and_why_it_matters.html.

anything but information-impulsive. Given these tensions, the legal community faces a unique challenge to understand the relationship between professionalism and social networking.

Though the issue has received some attention in bar journals and practice institutes, the legal scholarship has yet to consider in depth the professional implications of social media and networking.[4] The professionalism aspects of the challenge—which are separate and distinct from its ethical aspects—have been largely overlooked. The legal community would be well served by a dialogue on this topic that addresses how our norms of professionalism have changed, or have failed to change, in light of social media and networking. This Essay hopes to begin and to advance that conversation.[5]

In the Essay, I argue that the trend among young lawyers to share and share alike on the Internet requires the profession to revisit its standards of professionalism in light of the social media phenomenon. In so doing, it should consider not only how to regulate social networking

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[4] Others have discussed the ethics of social networking. *See, e.g.*, Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113 (2009); Angela O'Brien, Comment, *Are Attorneys and Judges One, Tweet, Blog or Friend Request Away from Facing A Disciplinary Committee?*, 11 LOY. J. PUB. INT. L. 511 (2010). The focus of this Essay is professionalism and I discuss the rules of ethics only to the extent that they bear on our standards of professionalism and shed light on how those standards might adapt to social media and networking.

[5] The specific ethical issues implicated by social media, including discovery or investigation abuse, improper marketing and advertising, and juror use, are beyond the scope of the paper. For a sampling of the scholarship on those issues, see sources cited in Kathleen Elliot Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It*, 41 U. MEM. L. REV. 355, 389-93, 395-97, 402-04 (2010). Also, with respect to evidentiary issues, compare Ass'n of the Bar of the City of New York Comm. on Prof'l Ethics, Formal Op. 2010-2 (2010), http://www.abcny.org/pdf/report/uploads/20071997-FormalOpinion2010-2.pdf, with Phila. Bar. Ass'n Prof'l Guidance Comm., Formal Op. 2009-2 (2009), http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf. With respect to advertising, the *Wall Street Journal* reported last year that "[l]aw firms, particularly those that represent plaintiffs, are increasingly devoting resources to developing a presence online, where consumers—and potential clients—congregate. And some of those firms are also creating news sites . . . with content created by employees." Nathan Koppel, *Using Social Networking as a Legal Tool*, WSJ, June 15, 2010, http://online.wsj.com/article/SB10001424052748704324304575306581598351428.html.

and media but also how to reshape professional norms. The Essay contains three Parts. Part I discusses the distinction between professionalism and ethics and explains how social media relates specifically to professionalism. Part II defines the professionalism-related problems with social media. It provides a concrete framework for thinking about the professionalism pitfalls of these online technologies, explaining four types of unprofessional conduct that arise from social media and networking. The framework illustrates how existing rules, standards, and analogies that could be said to apply are inadequate to regulate social media use, as it affects professionalism specifically. Part III argues that more regulation is needed because the current rules and norms fall short, with sweeping implications for the social and economic health of the legal community. It then suggests a more unified approach to regulating social media use through the implementation of a Model Rule of Professional Conduct and argues that, in addition to rule-making, it is also important to establish professional norms regarding social media and networking.

I. THE INTERSECTION OF PROFESSIONALISM AND SOCIAL MEDIA[6]

'Professionalism,' as distinct from ethics, is usually couched in terms of civility—issues of etiquette, demeanor, and conduct. Many of the recent conversations about professionalism have focused on the so-called decline in lawyerly civility, as it has been a topic of much concern by the bar and bench. Much of the literature on professionalism discusses four types of such incivility: overzealousness, discovery abuse, threats and insults, and bad faith litigation.[7]

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[6] Though I sometimes refer only to "social media" or "social networking" in the remainder of this Essay, for ease of reference, I generally use the terms interchangeably.

[7] In general, there is much written "about the collapsing image of the legal profession." James A. George, *The "Rambo" Problem: Is Mandatory CLE The Way Back to Atticus?*, 62 LA. L. REV. 467, 483-84 (2002) (citing examples, other scholarship, and ABA studies); *see also* Joseph J. Ortego & Lindsay Maleson, *Under Attack: Professionalism in the Practice of Law*, NIXON PEABODY (Mar. 20, 2003),

However, "[a]lthough fairness and good manners are certainly part of professionalism, the notion of professionalism is a much broader concept."[8] This Part first explains why other types of putatively unprofessional conduct, such as social networking, have been overlooked, steering the professionalism conversation in a different direction.

A) Professionalism and Ethics: Is Professional Optional?

What does it mean to be professional? Dean Roscoe Pound of Harvard once characterized a "profession" as "pursuing a learned art as a common calling in the spirit of public service."[9] Professionalism—the conduct that characterizes a professional—"refers to a related set of values, ideas, and attitudes shared by a group of professionals that distinguishes the group from other professionals as well as lay persons."[10] In the legal field, one scholar described "[l]egal professionalism as a subject of inquiry focuse[d] on the inculcation of lawyering norms and values, as well as the shaping of lawyer behavior."[11] Our collective understanding of lawyerly professionalism includes certain general features, such as competency, etiquette, altruism, and "respect for the justice system and its participants."[12] Professionalism standards

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http://www.nixonpeabody.com/publications_detail3.asp?ID=303#ref15 (discussing examples of incivility). Bills gives as examples of unprofessional or uncivil behavior "foul and profane language, . . . dilatory or 'Rambo' tactics, name calling, and other belligerent behavior." Bronson D. Bills, *To Be or Not To Be: Civility and the Young Lawyer*, 5 CONN. PUB. INT. L. J. 31, 32 (2005). He notes "[o]ther uncivil conduct includes sarcastic or terse questions by counsel or the judge; head shaking and pained facial expressions during opposing counsel's arguments; hardball, slash and burn tactics; and sarcastic, vituperative, scurrilous, or other disparaging remarks." *Id.* at n.4.

[8] George, *supra* note 7, at 472 (quoting Frank X. Neuner, Jr. *Professionalism: Charting a Different Course for the New Millennium*, 73 TUL. L. REV. 2041, 2043 (1999)).

[9] ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).

[10] Philip C. Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251, 256 (1986).

[11] Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 116 (1995).

[12] John E. Montgomery, *Incorporating Emotional Intelligence Concepts Into Legal Education: Strengthening the Professionalism of Law Students*, 39 U. TOL. L. REV. 323, 330-332 (2008); W.

are for the benefit of the public and clients, to gain and maintain their trust.[13] Comporting ourselves professionally also benefits the profession at large, as it fosters respect and trust among colleagues and sustains commitment to self-regulation and continuing legal education.[14]

These are all lofty ideals, but they are ephemeral. As the President of the Louisiana State Bar Association once noted, "[the] basic problem is in the use of the term 'professionalism'[;] . . . no standard definition is available."[15] This is a common criticism leveled against the concept of professionalism.[16] The elusive quality of professionalism stands in contrast to our ethical obligations, which are codified in rules of professional conduct and fleshed out by disciplinary and advisory opinions by local bars, courts, and the American Bar Association ("ABA"). If legal ethics is the black and white of law governing lawyers, professionalism is the grey. The ephemeral quality of professionalism makes it more difficult to sustain attention on the various types of conduct that might be unprofessional as distinct from unethical.

The aspirational quality of professionalism compounds this problem. As compared to the rules of ethics, professionalism, as it is often described, seems like an ethical 'bonus'—do the best you can. As one leading commentator on professionalism discussed the difference between professionalism and ethics, "rules of ethics tell us what we must do and professionalism teaches us what we should do . . . . [P]rofessionalism can be described as living by the 'Golden Rule.'"[17] Views from the bench reinforce the aspirational quality of professionalism. For example, Justice

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Bradley Wendel, *Morality, Motivation, and the Professionalism Movement*, 52 S.C. L. REV. 557, 560 (2001).

[13] *See* Montgomery, *supra*, at 330.

[14] *See id.* (noting self-regulation as one defining features of the profession, "that is organized in such a way as to assure the public and the courts that its members are competent, to not violate the client's trust and transcend their own self interest").

[15] George, *supra* note 7, at 472-73.

[16] *See, e.g.*, Wendel, *supra* note 12, at 560.

[17] George, *supra* note 7, at 472.

Benham of the Georgia Supreme Court has stated that "ethics is that which is required and professionalism is that which is expected."[18] In similar spirit, the preamble to the civility code for the Seventh Circuit Court of Appeals caveats that its "standards shall not be used as a basis for litigation or for sanctions or penalties."[19] Rather, they "serve as a valuable teaching and discussion guide."[20] Indeed, of those jurisdictions that have adopted professionalism codes apart from their ethical codes, many have made them largely aspirational in nature.[21]

Given these qualities, the formal risks of noncompliance are basically nonexistent, barring truly egregious conduct that also rises to the level of an ethical breach. As Aaronson recognizes,

> [c]ompliance with the new civility codes . . . is likely to be fairly problematic. The facial incentives to conform are especially weak—much weaker, for example, than those regarding conventional legal ethics or the disciplinary ambit of Rule 11 of the Federal Rules of Civil Procedure. Unlike these now standard measures for regulating attorney behavior, civility codes are not necessarily intended to be formally enforced.[22]

Consequently, the motivation to revise the definition of unprofessionalism, and consider what other types of attorney conduct might fall under its heading, is relatively low.

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[18] Evanoff v. Evanoff, 418 S.E.2d 62, 63 (Ga. 1992) (quotations omitted).
[19] Aaronson, *supra* note 11, at 115.
[20] *Id.*
[21] *See* Revson v. Cinque & Cinque, 70 F. Supp. 2d 415, 434, 435 (S.D.N.Y. 1999) (noting that "[a] number of 'civility' codes have been adopted [which] are aspirational in nature"). Though some might question "what's in a name," others may find it illustrative that the D.C. Bar's promulgated code is entitled *Voluntary Standards of Civility in Professional Conduct*, *see* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/voluntary_standards_for_civility/index.cfm (last visited May 21, 2011); the Florida Bar has published *Ideals and Goals of Professionalism*, *see* http://www.floridabar.org/tfb/TFBProfess.nsf/5d2a29f983dc81ef85256709006a486a/deafda73c03233e985256b2f006ccd5e?OpenDocument (last visited May 21, 2011); and Georgia's civility code is called *A lawyer's Creed and Aspirational Statement on Professionalism*, *see* http://www.gabar.org/related_organizations/chief_justices_commission_on_professionalism/lawyers_creed (last visited May 21, 2011).
[22] Aaronson, *supra* note 11, at 113.

Similarly, there is little incentive to teach and learn professionalism as a subject apart from ethics and, as a result, professionalism is underemphasized in law school curricula.[23] A recent survey of law school courses on professionalism suggests that many focus on ethical issues; few exclusively treat the softer notions of conduct, decorum, and etiquette.[24] Deborah Rhode has noted that the move in most states to adopt the multistate professional responsibility exam has prompted law schools to concentrate on objective rules and multiple choice testing.[25] "[I]n many institutions," she writes, "professional responsibility has found its identity as a course in statutory analysis of ABA codes."[26] Thus, young lawyers, in law school and in preparing for the bar examination, learn their ethical obligations as mostly tied to concrete rules. These ethical obligations deal with, among others, the duties to maintain client confidences and to be candid with the court, and to avoid conflicts of interest and the comingling of funds.[27] However, these rules do not account for a broad swath of conduct that likely fits within the rubric of professionalism but, because of the disincentives discussed above, is neglected.

For all of these reasons, the professionalism implications of a major new trend in attorney conduct—social media use and networking—have been slow to percolate through the legal field. Though there has been some attention dedicated to the ethical concerns associated with social media, there has been no discussion of related conduct that might not rise to the level of ethical

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[23] *See* Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J. L. ETHICS & PUB. POL'Y 117, 118-119 (2001).

[24] *See generally* ABA STANDING COMM. ON PROFESSIONALISM, REPORT ON A SURVEY OF LAW SCHOOL PROFESSIONALISM PROGRAMS (2006) [hereinafter ABA SURVEY] (detailing the various professionalism courses at surveyed law schools). Of the forty-one schools surveyed, ninety-three percent of schools' mandatory ethics course covered more than just the basic rules including, "philosophical foundation of our legal system"; "natural law"; and "faith based values." *Id.* at 69-70.

[25] Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 33, 41 (1992).

[26] *Id.*

[27] MODEL RULES OF PROF'L CONDUCT RR. 1.6, 3.3, 1.8-.11, 1.5 (2010).

breach but is, nonetheless, unprofessional.[28] But the story is not all bad. Professionalism is a capacious concept and, as such, flexible enough to expand to address conduct that escapes the strictures of the ethical rules. The balance of this Essay demonstrates how social media and networking, a new and rapidly evolving type of attorney conduct, falls squarely within professionalism's bailiwick. To that end, the next Section provides a brief overview of social media and social networking and places it in the context of professionalism.

B) The Unprofessional Side of Social Media

As noted earlier, the types of unprofessionalism most frequently addressed are those related to litigation, such as the mistreatment or disrespect of opposing counsel or the court. Though certainly troubling, the number of attorneys who behave in this fashion is probably low. In contrast, there is now one type of conduct that over half the profession engages in, which has the potential to be unprofessional in several respects: social media and social networking.

1. Social Media Primer

Social media, also sometimes referred to as "Web 2.0," is "the second generation of web design and software development, which places heavy emphasis on communication, collaboration, and sharing among Internet users."[29] "Social networks," which are one form of social media "are Internet-based meeting places where users with similar interests and backgrounds can communicate with each other."[30] Users create profile pages with personal information and make connections with other users, which allow the sharing of the profile information as well as the ability to comment or "post" on the information on another person's

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[28] *See supra* note 5.
[29] United States District Court for the District of Rhode Island Social Media Policy/Guidelines, *quoted in* JUDICIAL CONFERENCE, RESOURCE PACKET, *supra* note 2, at 27.
[30] Judicial Ethics Opinions, Op. 08-176, January 29, 2009, http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm.

page. As Ted Ullyot, General Counsel of Facebook phrased it, social networking is all about "sharing" and "connecting."[31]

Facebook is probably the best known example of social networking, and it is the leading social networking site.[32] Facebook users make connections called "friends" with whom they share photos, videos, messages, weblinks, and news stories. Users can post comments on the content of their friends' postings (or uploads) and can also express a preference, or "like" (denoted with a "thumbs up" symbol), certain postings, organizations, or stories. MySpace is another social networking site that also allows users to create profiles and add content. LinkedIn is a social networking site dedicated to developing professional connections. Users form a list of contacts, and any one user's contacts can form connections with the user's other connections, and so on and so forth.[33] Lastly, Google Mail's ("Gmail") chat feature ("Gchat"), which is used to chat with friends and co-workers throughout the workday, is also a means of social networking.

Blogging, a type of social media, is popular in the legal community. One commentator described a blog as "an entry of commentary, description of an event or events, web link, graphics, or video posted on a website."[34] Law blogs tend to comment on legal news and scholarly developments, or other relevant events in the legal world. Similar to social network sites, readers can leave comments in response to blogged posts. Of particular interest to this Essay is the social media site, *Above the Law*, which is part "legal tabloid" and part blog. Most in the legal profession understand it to be *the* repository of legal gossip, ranging from risqué

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[31] Theodore W. Ullyot, General Counsel of Facebook, offered this characterization during a panel discussion at the Third Circuit Judicial Conference, on May 5, 2011.
[32] *Id.*
[33] Ethan Zelizer, *Embracing and Controlling Social Media in the Workplace*, 24-Oct. CBA REC. 52, 52-53 (2010) (describing these sites).
[34] *Id.*

stories about associates, summer associates, partners, and law firms, to pay scales and the latest Supreme Court clerk hires.[35] Other blogs are more like "personal online diaries."[36] As will be seen, some attorneys have these too. Twitter is also in the blog family. Twitter allows subscribers to "micro-blog" short, 140-character messages called "tweets" that are blasted out to all of the users' "followers." Interestingly, most Twitter activities occur during prime business hours of 11 a.m. and 3 p.m.[37]

Finally, YouTube is a social media site that supports video sharing. Users upload videos that can be searched and shared.[38] There are many YouTube clips created by law students, mocking or joking about some aspect of their legal education.[39]

Social media is ubiquitous. Facebook has over 600 million users.[40] It is also time-consuming. The average Facebook user spends seven hours a month on that site.[41] Zelizer provides some other interesting statistics: "three out of four Americans use social media; (2) two thirds of the global Internet population visit social networks; and (3) visiting social media sites is now the fourth most popular online activity—ahead of personal email."[42] Attorneys are no exception. According to a 2009 survey by Leader Networks,

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[35] I note that there is a wide variety of legal blogs that discuss substantive legal developments. As those do not appear to implicate professionalism in the same way that an attorney's personal blog or *Above the Law* does, I do not discuss them.
[36] Zelizer, *supra* note 33, at 53.
[37] *Id.*
[38] JUDICIAL CONFERENCE, RESOURCE PACKET, *supra* note 2, at 12.
[39] *See, e.g.*, *PDA In The Law School*, YOUTUBE (Feb. 10, 2010), http://www.youtube.com/watch?v=bvMgqa-VQA4; *How the World Views Law School*, YOUTUBE (Apr. 4, 2007), http://www.youtube.com/watch?gl=US&feature=related&hl=iw&v=e_yDaYy5AHY.
[40] Theodore W. Ullyot, Facebook Gen. Counsel, Remarks at the Third Circuit Judicial Conference, Panel on Ethics in the Digital Age (May 5, 2011).
[41] *Id.*
[42] Zelizer, *supra* note 33, at 53-54.

> approximately three-quarters of attorneys reported that they are members of a social network such as MySpace, Facebook, or LinkedIn. Over a third of attorneys surveyed read and comment on articles, blogs, and other online content. Of those engaged in these online social networking activities, three-quarters do so on at least a weekly basis.[43]

In 2011, one imagines that these numbers have only increased given Facebook's tremendous growth.[44]

2. Social Networking at Work

Though social media use and networking smacks of personal playtime, most do not draw the line at work. Some have observed that

> [m]ost employees don't think they are doing anything wrong when they access social media websites at work. Rather, they consider it a use of their break time or simply a quick way to update a friend or significant other about real life commitments without the need to pick up the phone.[45]

As evidence of that sentiment, "15% of all social media updates in the workplace come from employer-provided Blackberries or similar mobile devices."[46]

There is some anecdotal evidence of employees speaking inappropriately about their jobs. One article, entitled *Twitter Gets You Fired in 140 Characters or Less* described a tweet by a Cisco new hire: "Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work." The tweet prompted a response tweet from one of the company's channel partner advocates, remarking, "Who is the hiring manager. I'm sure they would love to know that you will hate the work. We here at Cisco

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[43] O'Brien, *supra* note 4, at n.2
[44] *Facebook's Growth Exceeds Expectations—WSJ*, REUTERS, May 1, 2011, http://www.reuters.com/article/2011/05/02/facebook-wsj-idUSN0117780720110502 (noting that as of May 2011 Facebook was on track for a $100 billion valuation when it goes public in 2012).
[45] Zelizer, *supra* note 33, at 54.
[46] *Id.* at 53.

are versed in the web."[47] The author of that article wryly concluded, "thanks to Twitter further eroding the wall between your big mouth and a moment required to download some good sense, the Internet is now empowered to get you fired faster than ever."[48] In another news story, a stadium operator for the Philadelphia Eagles was so upset that the team let a player sign with another team that he posted on his Facebook page: "Dan is [expletive] devastated about Dawkins signing with Denver . . . Dam[n] Eagles R Retar[d]ed!!"[49] He was fired. Lawyers have also been known to cross the line. Take the Florida lawyer, for instance, who was sanctioned by the State Supreme Court for calling a judge before whom he had appeared an "evil, unfair witch" in his personal blog.[50]

The penchant to share and connect is driven by the youngest generation of lawyers' reduced notions of privacy, particularly on the web. As one commentator notes, "some lawyers (just like people) are willing to share the most amazingly intimate details of their lives on Facebook and other social media."[51] The propensity to 'let loose' online is reinforced by the sense of anonymity that comes with online sharing and the misperception that one's online conduct is above reproach. It is "[d]ue to perceived anonymity, [that] an employee may engage in conduct online that the employee might refrain from in person, without understanding that

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[47] Helen A.S. Popkin, *Twitter Gets You Fired in 140 Characters Or Less*, MSNBC.COM (Mar. 23, 2009), http://www.msnbc.msn.com/id/29796962.
[48] *Id.*
[49] *Facebook Post Gets Worker Fired*, ESPN.COM (Mar. 9, 2009 5:41 PM), http://sports.espn.go.com/nfl/news/story?id=3965039.
[50] *Florida Supreme Court Upholds Sanction Against Lawyer Who Called Judge a "Witch" on a Blog*, JONATHAN TURLEY.COM (Sept. 1, 2009), http://jonathanturley.org/2009/09/30/florida-supreme-court-upholds-sanction-against-lawyer-who-called-judge-a-witch-on-a-blog.
[51] Susan Craig Robertson, *Social Media Is Calling. How Should Lawyers Answer?*, 47-Mar. TENN. BAR J. 16, 17 (2011).

online communications may be traced to a particular user."[52] Not only does this sense of anonymity or distance encourage indiscretion, it has also created a "breeding ground for rude[ness]" in social media.[53] In sum, because these sites allow for the frequent and voluminous sharing of information with a user's wide audience, social media both instigates inappropriate comments and serves as a conduit of these comments that might not otherwise have been made at all.[54] Thus, social media, though useful and entertaining in many ways, poses real dangers to professionalism in the legal field.

Section I.A suggested that the legal profession should devote more energy toward determining how social media and networking fits within the professionalism milieu. This Section made the case for that prescription by explaining how social networking has become a significant part of young lawyers' personal and professional lives. Taken together, one senses the gaping hole in professionalism standards that has left young lawyers to pursue their social networking endeavors at work just as they would at home. The next Part argues that the best approach to addressing this issue is to depart from the traditional standards of professionalism—those applied to the typical bad-mannered-litigator case—and develop new standards of professionalism that apply specifically to the social media context. I offer a four-part framework for thinking about what these standards should be.

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[52] JUDICIAL CONFERENCE, RESOURCE PACKET, *supra* note 2, at 6; *see also* Cari Pixler & Lori A. Higuera, *Social Media: Ethical Challenges Create Need for Law Firm Policies*, 47-Apr. ARIZ. ATT'Y 35, 36 (2011) (noting that, "[b]ecause of the impersonal nature of social media, people are more willing to share intimate life details about themselves with others online, to a greater extent than they would share in a face-to-face encounter").

[53] WEBER SHANDWICK, CIVILITY IN AMERICA: A NATIONWIDE STUDY 4 (2010).

[54] One author has described the "hallmarks of social networking" as "permanence, searchability, replicability, and unintended audiences." Vinson, *supra* note 5, at 369.

II. DEFINING THE PROBLEM: A FRAMEWORK FOR ANALYZING HOW AND WHEN SOCIAL MEDIA IS UNPROFESSIONAL

As mentioned above, the social media and network phenomena are fueled by individuals' desire to share and connect. This Part suggests that there are four ways in which attorney sharing and connecting via social media implicates their professionalism. Though I refer to the "firm" I also include within the term, or sometimes refer separately to, judicial "chambers," as one major focus of my Essay is young attorneys—associates and law clerks. In each area, I demonstrate how there is a considerable range of social media/networking conduct that is left unaddressed by existing rules of ethics or traditional thinking on professionalism but which should be circumscribed by more targeted standards of professionalism. Specifically, I provide examples of putatively unprofessional social media use, discuss analogies to existing rules, norms, or real-world examples, and highlight the gap between them.

A) Intrafirm Professionalism (The Duty of Loyalty Online)

The first area of professionalism implicated by attorney social media use deals with the standard of decorum that attorneys owe to their law firms and law clerks to their judicial chambers. Social networking and media use has introduced a variety of ways in which young lawyers can violate those organizations' trust—that is, the trust that lawyers will not air their proprietary information or 'dirty laundry.' Here, when speaking about the type of respect one owes to an organization (firm or chambers) there are few close analogues in the ethical rules and professional codes. Thus, the gap between our current thinking on professionalism and lawyerly conduct seems widest in this area, and so I address it first.

Law firms and judges have certain types of information that, though perhaps not confidential *per se*, is information that they expect to be kept in-house. Of course, the amount of information a law firm considers private will vary depending on the culture of the firm, but a few

examples might include pay scale and bonus data, embarrassing interoffice e-mails, or interoffice memoranda discussing firm policy. Private firm information that is blogged about on *Above the Law* is perhaps the most troubling example. That site posts information about associate bonuses[55] and salaries.[56] Though sharers of this information would argue that these posts increase transparency and improve the free market of young associate labor, that is not a satisfying response to a professionalism complaint; at most, it suggests a need to weigh the good of social networking against the bad when fine-tuning the appropriate standard. Aside from financial information, *Above the Law* also exposes law firms' snafus. The site has an entire thread dedicated to "Email Scandals,"[57] and each summer there are inevitably a few posts about summer associates' inappropriate (and sometimes humiliating) behavior.[58] The potential for reputational harm to the firm from such sharing is obvious.

There is less sharing on *Above the Law* about inner-chambers workings. The difference might be normative. Canon 3 of the Judicial Employee Code instructs law clerks to "adhere to appropriate standards in performing the duties of office,"[59] which arguably includes discretion. There is also an informal taboo against speaking about chambers-related issues. Breaking this taboo has met with some criticism, especially when revealing information about the Supreme

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[55] *Associate Bonus Watch 2010*, ABOVE THE LAW, http://abovethelaw.com/associate-bonus-watch-2010 (last visited May 22, 2011).
[56] *Associate Salaries*, ABOVE THE LAW, http://abovethelaw.com/associate-salaries (last visited May 22, 2011).
[57] *Email Scandals*, ABOVE THE LAW, http://abovethelaw.com/email-scandals (last visited May 22, 2011).
[58] *Summer Associate Etiquette 101: Share Your Bottle of Wine*, ABOVE THE LAW (Aug. 9, 2010 10:58 AM), http://abovethelaw.com/2010/08/summer-associate-etiquette-101-share-your-bottle-of-wine/#more-29712; Elie Mystal, *Akin Gump Summers Ice Some Bros*, ABOVE THE LAW (July 27, 2010 12:26 PM), http://abovethelaw.com/2010/07/akin-gump-summers-ice-some-bros/#more-28569.
[59] JUDICIAL CONFERENCE, RESOURCE PACKET, *supra* note 2, at 15.

Court's inner sanctum.[60] It is unclear, though, whether the taboo/norm has been extended to social media sharing. A more cynical view is that the difference is self-preservative and does not come from normative notions of discretion, at least where anonymous sharing or commenting occurs (on a blog like *Above the Law*). With only three or four law clerks per chamber, a post with any modicum of detail is likely to identify that clerk. The identity of a law firm associate-poster might be harder to peg. Whatever the reason may be, this type of improper sharing seems more pervasive at the law firm.

However, beyond an individual firm's office policies, it is not clear that the broader legal community has considered the implications of sharing "personal" firm information on social media and networking sites. Yet basic principles of agency law suggest that sharing of this nature is unprofessional. The law firm and the lawyer, as employer and employee, have a principal-agent relationship. In agency law, an agent owes its principal a duty of loyalty. According to the *Restatement*, that duty requires "an agent . . . to act loyally for the principal's benefit in all matters connected with the agency relationship."[61] Similarly, the tentative draft of the new *Restatement on Employment Law* includes a section entitled "Employee Duty of Loyalty." The "core obligation" is that "[e]mployees owe a duty of loyalty to their employer in matters related to the employment relationship."[62] The duty of loyalty includes admonitions

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[60] Edward Lazarus's book, *Closed Chambers*, was considered a daring break with this informal taboo. EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT (1998); *see also* Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835 (1999) (book review); Evan Fray-Witzer, *The End of a Gag Order: A Former U.S. Supreme Court Clerk Breaks a Taboo and Tells a Few Unflattering Tales Out of Chambers*, BOSTON GLOBE, Apr. 19, 1998, at N1, *available at* http://www.boston.com/globe/search/stories/books/edward_lazarus.htm.

[61] RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

[62] Gordon Smith, *In Defense of Loyalty*, CONGLOMERATE (May 18, 2011), http://www.theconglomerate.org/2011/05/in-defense-of-loyalty.html.

against use of the principal's property and communication of confidential information for the agent's own purposes.[63] With respect to the first obligation, the *Restatement* explains that:

> [t]he rule is . . . a corollary of a principal's right, as an owner of property, to exclude usage by others. An agent is subject to this duty whether or not the agent uses property of the principal to compete with the principal or causes harm to the principal through the use.[64]

The *Restatement* defines "confidential information" to include a broad range of private information. To illustrate the concept, it states that:

> [m]any employees and other agents are given access by the principal to information that the principal would not wish to be revealed or used, except as the principal directs. Such information may pertain to the principal's business plans, personnel, nonpublic financial results, and operational practices, among a range of possibilities.[65]

As such, agency law has obvious applicability to this area of social media use and networking. Private law firm data, gossip, policy, or strategy is arguably the firm's property and sharing the information outside the firm could cause economic or reputational harm to it. The firm has given its attorneys "access" to this information. If the firm does not wish for it to be shared to wide, public audiences via social media and networking sites, then the duty of loyalty seems to prohibit such sharing. Though the duty of loyalty has yet to be applied in this way, it certainly could be. Some participants in the *Restatement* project have decried the duty as "ill-defined."[66] Professor Gordon Smith, however, has noted the benefits to an undelimited duty of loyalty because, as such, it remains unconstrained to account for new types of disloyal conduct.[67] To his point, the duty of loyalty could apply to attorneys' sharing of firm information through

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[63] RESTATEMENT, § 8.05.
[64] *Id.* cmt. b.
[65] *Id.* cmt. c.
[66] Smith, *supra* note 62.
[67] *Id.*

social media. Arguably, social media behavior that is fairly said to be disloyal should also be considered unprofessional, though it currently is not.

B) Extrafirm Professionalism

Facebook allows users to post where and for whom they work at the top of their profile pages. Depending on one's privacy settings, this allows other users who view a person's Facebook page to immediately learn of his or her employer. The simultaneous sharing of this information together with the montage of photos, comments, and "likes" on the profile reflects on a lawyer's firm or judge. Because of this feature, not only does that lawyer's "direct" postings—those about work—implicate professionalism but also does his or her "indirect" postings—personal postings that somehow suggest the lawyer's competence, maturity, or discretion. I examine each of these facets of extrafirm professionalism in turn.

1. Direct Postings: "Case and Client" Posts and "Venting" Posts

Direct postings are those about work. While posting about confidential client matters is an obvious breach of a lawyer's ethical duty of confidentiality, less clear is whether posting innuendo about clients or cases on Facebook, in conjunction with one's employment information, is unprofessional.

There are two types of direct postings: those about matters ("case and client posts") and those about how much you like your job ("vent posts"). The media and scholarship have documented recent examples of both. In one case, a Minnesota prosecutor made negative comments about Somalis on her Facebook page in connection with one of her cases.[68] One

[68] Abby Simmons, *Judge Denies Requests for New Trial Based on Prosecutor's Alleged Facebook Postings*, STAR TRIB., Mar. 11, 2010, http://www.startribune.com/local/minneapolis/87360937.html?source.

Texas judge, Judge Criss,[69] reported that she saw a post from a lawyer who complained about having to handle a motion in front of her.[70] That Judge further commented that she "has seen lawyers on the verge of crossing, if not entirely crossing, ethical lines when they complain about clients and opposing counsel."[71] With respect to venting about one's job on Facebook, it is more common than one would expect. As one observer wrote, "attorneys, like other professionals, vent about work and clients through social media."[72]

Though most rules committees have said nothing concrete about social media, there is solid ground for expanding professionalism rules and standards to encompass both of these types of direct, work-related posts. The ABA has recently considered ethical questions in connection with lawyer websites.[73] A social networking site, like Facebook, is similar to the ABA's characterization of a "website" insofar as social networking, like websites, may also "provide biographical information about lawyers, including educational background, experience, area of practice, and contact information . . . . A website also may add information about the law firm, such as its history, experience, and areas of practice . . . ."[74] The ABA points out that Rule 7.1,[75] which governs any "communication about a lawyer or the lawyer's services," as well as Rules

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[69] Judge Criss, of the 212th District Court in Galveston, Texas, was known for her judicial blog, *As the Island Floats*.

[70] Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, ABA J. (July 31, 2009), http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago.

[71] *Id.*

[72] Pixler & Higuera, *supra* note 52, at 37.

[73] ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-457, 1 (2010).

[74] *Id.*

[75] "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

5.1[76] and 5.3,[77] which obligate managerial lawyers to make efforts to ensure the firm has measures in place that give "reasonable assurance" that firm lawyers comply with the rules, all apply to websites.

Arguably, Facebook posts—of both the client and case and vent varieties—fall within the broad heading of a "communication about a lawyer or the lawyer's services." However, applying the Model Rules to these types of social networking behaviors is unlikely. Rule 7.1 technically applies only to "false or misleading communication[s] about the lawyer or the lawyer's services," which is too narrow to capture the social media conduct discussed here. Rule 8.4(d), which prohibits attorneys from "engag[ing] in conduct that is prejudicial to the administration of justice," might apply, though many would no doubt argue that such a vague proscription could not be fairly applied to direct, extrafirm social networking conduct.

Current professionalism norms might not cover this conduct either. Commenting to a friend in person that you are working on a motion to dismiss is probably not unprofessional, even though that friend knows that you work for Smith & Jones law firm.[78] But posting such message on Facebook or on an away message is different: direct postings shared in the social media world pose much greater reputational risks than would the same sharing imparted offline. A typical Facebook user has between 500 and 1500 friends. The viral capability of any one

[76] Rule 5.1(a) provides: "A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."
[77] Rule 5.3 extends the obligation to "nonlawyer assistants."
[78] Professor Orin Kerr has suggested that many of the ethical questions that arise with social media use and social networking can be resolved by reference to offline analogies, that is, asking ourselves whether the action would be unethical if done in person. Professor Orin Kerr, Remarks at the Third Circuit Judicial Conference, Panel on Ethics in the Digital Age (May 5, 2011). While I agree with Professor Kerr that this is a helpful test, I think more guidance is necessary with respect to what is professional.

comment magnifies the risk of speculation (*i.e.*, "she's probably working on the Johnson case"), negative or incorrect inferences about one's work (*i.e.*, "she seems not to be working on the Johnson case very hard" or "the Johnson case must be really tough"), or one's competence (*i.e.*, "she must be distracted from the Johnson case because she is also on Facebook"). Herein lies the gap between existing ethical rules and vague professional norms in this area.

2. Indirect Postings: "Reputational" Posts

It is well understood that a lawyer is expected to conform his or her behavior to the rules of professional conduct at all times, not just while at work. Translated to the language of social media, this means that a lawyer should be mindful of his or her "indirect posts."

Indirect posts consist of shared information or preferences that suggest something negative about a lawyer's reputation or integrity and, consequently, that person's professionalism. Many young associates and law clerks do not realize that their social networking conduct, particularly on Facebook, where real names and not "screen names" are used, creates an e-image of themselves for which they should also be professionally responsible.

Imagine a litigant's reaction to viewing a profile of a law clerk, which proudly lists him as "Law Clerk to US District Judge John Smith at the United States District Court for Eastern Carolina." Below that biographical information is a picture of the clerk disheveled and disoriented, with alcoholic drinks in hand. What impression does that give, whether true or not, of that clerk, his work, and the judge for whom he works? That hypothetical is not at all far-fetched. Facebook gives lawyers the ability to list the court and judge or the name of a law firm in their profiles. And members of the bench and bar do look at profiles: Judge Susan Criss

mentions that she once saw on Facebook a lawyer's postings "detailing her week of drinking, going out and partying."[79]

It is difficult to find a good ethical rule or professionalism norm analogy to extract any guidance from in this area of social networking. The Canon for Judicial Employees touches on it indirectly. Canon 4 states: "In engaging in outside activities, a judicial employee should avoid the risk of conflict with official duties, should avoid the appearance of impropriety, and should comply with the disclosure requirements."[80] The Judicial Conference has applied this Canon directly to social media and suggests that the "posting of inappropriate photos or videos," which could detract from the dignity of the court, is an example of conduct falling under Canon 4.[81] It is unclear how widespread law clerks' knowledge of these Canons is and to what extent they are given firm instruction. It is clear, however, that such a norm has not gained much traction among law clerks and the same conduct of young associates is apparently not regulated, absent specific law firm policies and monitoring.

In terms of extrafirm social networking, the profession would be wise to differentiate its expectations for lawyerly conduct between on- and off-line and hold social media conduct to a higher standard of professionalism. The next two parts of the framework deal with interpersonal professional relationships, those between the lawyer and client and those between same-level associates.

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[79] Ashley L. Belleau, *How Social Networking Impacts Lawyers*, Feb.-58 FED. LAWYER, 3, 4 (2011).
[80] JUDICIAL CONFERENCE, RESOURCE PACKET, *supra* note 2, at 15.
[81] *Id.* at 16.

C) Lawyer-client Professionalism

The third component of the framework touches on the professional relationship between an attorney and the client.[82] Many of the professionalism concerns here have been covered above in connection with intrafirm and extrafirm social media use. Even so, it is worth carving out this third area to underscore that there are important norms of professionalism that govern the working relationship between lawyer and client that are different from the ethical obligations that flow from that relationship.

Sharing a post on Facebook that a lawyer is "working on a motion to dismiss for ABC case" or even a more general "staying late to finish this brief on new case" not only invites improper conjecture and reputational harm (a breach of extrafirm professionalism) but also, if brought to the client's attention, undermines the respect and trust the client has for his attorney. The same goes for any nonanonymous blog posts or tweets.

There are material disclosure concerns as well. In civil or criminal matters where corporations are parties, implying or divulging any details about a suit, legal proceeding, or transaction from which information could be gleaned, presents risk of speculation about the financial health of that corporation. Indeed, many hedge funds are known for using this "mosaic" approach of piecing together tidbits of information to paint a picture of material activities that can affect securities pricing.[83] For example, sharing on Facebook that one is

[82] In terms of the lawyer-client relationship, others have already touched upon the concerns related to inadvertently forming an attorney-client relationship or giving advice. As these issues address ethical violations rather than professionalism, I shall not address them here. *See* David Hricik, Communication & the Internet: Facebook, E-mail & Beyond, Dec. 2009, *available at* http://ssrn.com/abstract=1557033.

[83] Perhaps one of the more interesting revelations that has come from the Galleon proceedings is the sophisticated strategies that hedge funds employ to attempt to gain knowledge advantages over public markets. In his defense, Raj Rajaratnam consistently referred to this mosaic approach as the basis of his ability to act before information became public and markets moved.

traveling to Minnesota for work, could lead other users to piece together the existence of a deal with one of the few major Minnesota-based corporations on one end, particularly if that lawyer is known to work in a mergers and acquisitions practice group. Or, if that lawyer is known to work in a white-collar group, and a local CEO is under suspicion for securities violations, one could surmise that a federal investigation has moved to the next level. Because a Facebook post is shared with so wide an audience, if that company is public, there is real possibility that it could cause movement in the market. An employee at an investment bank would surely be punished for such disclosure. To the extent that a lawyer's cavalier social networking has the same effect, it too is, at a minimum, unprofessional.

D) Interlawyer Professionalism (Incivility Online)

Just as attorneys owe a duty of discretion to their law firms or chambers and clients, attorneys also owe a similar duty of tactfulness to one another. Saying that we are obligated to be respectful to opposing counsel, clients, and witnesses is, of course, nothing new. Indeed, the notion of interlawyer unprofessionalism is probably closest to the classical conception of lawyerly unprofessionalism—incivility. However, civility norms, heretofore focused on opposing or neutral parties in the litigation process, leave us with little guidance on interlawyer social media norms.

While in his particular case it became apparent that he went beyond the use of this mosaic theory by employing "expert networks," it is nonetheless evident that hedge funds do operate legally using the mosaic theory. *See, e.g.*, Petter Lattman & Azam Ahmed, *Galleon Conviction Likely To Embolden Prosecutors*, N.Y. TIMES DEALBOOK, May 11, 2011, http://dealbook.nytimes.com/2011/05/11/galleon-conviction-is-expected-to-embolden-prosecutors; Neil Stewart, *Galleon Case Puts Mosaic Theory on Trial*, BUS. INSIDER, Mar. 7, 2011, http://www.businessinsider.com/galleon-case-puts-mosaic-theory-on-trial-2011-3; *The Mosaic Defense: Raj Rajaratnam Defends His Investment Strategy in Court*, ECONOMIST, Apr. 14, 2011, http://www.economist.com/node/18561025?story_id=18561025.

Examples of incivility in the traditional sense are easy to find in the literature and case law. Some deal with insults. In *Nachbaur v. American Transit Insurance Co.*, for instance, a lawyer was sanctioned for sending a letter to the court insulting opposing counsel.[84] Other lawyers have been "criticized" by local review boards for writing demeaning letters to opposing counsel, using adjectives such as "fool, idiot, punk, boy, honey, sweetheart, sweetie pie and baby cakes."[85] "[R]acist," "insulting," and "degrading" remarks[86] are readily labeled unprofessional. Explosive behavior both in and out of court also grabs attention. An example occurred in the *Saldana v. Kmart Corp.* case before the Third Circuit.[87] There, attorney Lee Rohn used the "f" word four times in two telephone conversations with other attorneys and in two asides to attorneys during depositions.[88] Related are the vituperative attacks during depositions, which are similarly well documented. In *Carroll v. Jaques*, attorney Jaques (being deposed as a defendant in the case) "verbally abused counsel for Plaintiff with profanity," responding that "only an ass would ask those questions."[89] Another famous example is the attorney for Paramount in *Paramount Communications, Inc. v. QVC Network, Inc.*, who attacked opposing counsel during a deposition, lambasting his skill as a lawyer.[90] Surely, all would agree such uncivil conduct is unprofessional.

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[84] Nachbaur v. Am. Transit Ins. Co., 300 A.D. 2d 74 (N.Y. App. Div. 2002).
[85] Ortego & Maleson, *supra* note 7, at 1 (citing Thomas P. Sukowicz & Thomas P. McGarry, *Feathers May Fly for Using Foul Language*, CHI. L., Dec. 2002, at 14).
[86] *Id.*
[87] Saldana v. Kmart Corp., 260 F.3d 228 (3d Cir. 2001).
[88] *Id.* at 237.
[89] Carroll v. Jaques Admiralty L. Firm, 926 F. Supp. 1282, 1285-86 (E.D. Tex. 1996).
[90] The Delaware Supreme Court barred the attorney from appearing before it again. For a copy of the abrasive colloquy, see, George, *supra* note 7, at 478. *See also* Jean M. Cary, *Rambo Depositions: Controlling and Ethical Cancer In Civil Litigation*, 25 HOFSTRA L. REV. 561 (1996).

However, the above conceptualization of interlawyer incivility is too narrow in the social media age, as it fails to imagine what incivility looks like online. In the era of social media, incivility increasingly happens on the Internet and comes in different forms. In general, Americans have sensed "[a] growing proliferation of incivility on the Internet."[91] Studies report that mentions of "online incivility" grew sixty-three percent from 2008 to 2009, with social media contributing to this trend.[92] In 2010, fifty-one percent of Americans considered blogs the most uncivil, followed by other social networking sites (43%) and Twitter (35%).[93] Though these figures reflect broad trends in American popular culture, they suggest that there is real risk that attorneys engage in social media and networking behaviors that the legal profession should view as unprofessional.

The tendency among uninhibited and impulsive lawyers to share stories, pictures, or comments on Facebook, Gchat, or *Above the Law* risks the embarrassment and ire of one's co-workers. These harms from uncivil social media use do not directly disrupt the litigation process, but rather the relationships with one's fellow associates and clerks, and the tenor of the office environment more generally. Such incidence of interlawyer incivility, which arises purely from social media use or networking does not, therefore, fit the incivility typecast described above, which is focused on the litigation process and opposing or neutral parties.

Because *un*social media conduct falls outside the traditional incivility mold, it is unclear whether it would (or could fairly) be punished. Usually, in responding to incidents of incivility, courts and disciplinary committees seem to punish behavior that directly disrupts the litigation process because, though labeled "unprofessional" or "uncivil," we also feel comfortable labeling

[91] SHANDWICK, *supra* note 53, at 1.
[92] *Id.* at 4.
[93] *Id.*

as "unethical." With respect to the examples cited above, the attorney in *Nachbaur* was disbarred and the attorney in *Jaques* sanctioned for bad faith litigation. The insulting letter-writers were admonished. Interestingly, in Rohn's case, because the conduct "did not occur in the presence of the Court and there [was] no evidence that it affected either the affairs of the Court or the 'orderly and expeditious disposition' of any cases," it believed that her "use of language, while certainly not pretty, did not rise to the level necessary to trigger sanctions, at least under the Court's inherent powers."[94]

In fact, it is unclear whether codes of civility or professionalism even cover social media and networking incivility. These codes also focus on litigation and the treatment of other players in the legal process. To the extent they address interlawyer incivility, they endeavor to stymie basic rudeness. The Virginia Bar Association Creed, for example, tells lawyers to "[e]xercise courtesy and civility in all communications and avoid rudeness and other acts of disrespect in all meetings, including depositions and negotiations."[95] The Delaware Code advises, "[a] lawyer should represent a client with vigor, dedication and commitment. Such representation, however, does not justify conduct that unnecessarily delays matters, or is abusive, rude or disrespectful."[96] The D.C. Bar's general principles on civility reiterate their applicability to incidents affecting the

[94] Saldana v. Kmart Corp., 260 F.3d 228, 237-38 (3d Cir. 2001); *compare Jaques*, 926 F. Supp. 1282 (relying on its inherent power, the court sanctioned an attorney who insulted and cursed at opposing counsel).

[95] VA. BAR ASS'N, VA. BAR. ASS'N CREED ¶ 4 ("as to opposing parties and their counsel and other colleagues in the practice of law"), *available at* http://216.230.13.18/aboutus.htm#creed. That Code also addresses obligations to "the Courts and other tribunals" and "to clients and the public."

[96] PRINCIPLES OF PROFESSIONALISM FOR DEL. LAWYERS ¶ 4 (2003), *available at* http://courts.state.de.us/forms/download.aspx?id=39428.

"legal process."[97] The Seventh Circuit's Code, which admonishes its attorneys to "treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications," is one of the more general statements that this author has seen and would, arguably, capture social media activity. Then again, without explicit reference to social media, it remains unclear whether that jurisdiction could fairly hold accountable its attorneys for their social media use under its Code.[98] In short, what is perhaps the most broadly addressed aspect of lawyerly professionalism—civility—offers very little instruction on what is civil in the social media space.

Overall, the examples and analogies above confirm that our traditional thinking on professionalism provides inadequate guidance. The framework demonstrates why it is important to regain our grasp on professionalism and develop clear standards of conduct as they relate to social media that are separate, and probably more expansive, than the existing ethical rules. With a tangible framework in mind, the conversation might avoid some of the qualities that have heretofore shackled professionalism from advancing beyond the hortatory. Moreover, with the problem already defined, the legal community might dedicate more energy to designing a solution. The next Part is a start in that direction.

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[97] DC BAR, VOLUNTARY STANDARDS FOR CIVILITY (general principles), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/voluntary_standards_for_civility/general.cfm.

[98] STANDARDS FOR PROF'L CONDUCT WITHIN THE SEVENTH FED. JUDICIAL CIRCUIT ¶ (lawyer's duties to other counsel), *available at* http://www.ca7.uscourts.gov/Rules/rules.htm#standards. The same point applies to portions of the Delaware Code, which advises attorneys that "[p]rofessional civility is conduct that shows respect not only for the courts and colleagues, but also for all people encountered in practice." PRINCIPLES OF PROFESSIONALISM FOR DEL. LAWYERS, *supra*, note 96, ¶ 4.

III. EXPANDING STANDARDS: RULE-MAKING & NORM-SETTING

Resolving the professionalism questions set out above requires some movement away from the aspirational and elusive qualities of professionalism discussed in Part I. A model rule, together with a normative reorientation, could accomplish this shift. This Part first answers why social media should be regulated by a separate rule. It then considers what a Model Rule on social media use and networking might look like. Part III ends on a pedagogical note, and suggests that teaching the appropriate social media and networking norms in law school should be a key component to any approach to the problem.

A) Why More Regulation?

Some might be skeptical that more regulation is needed and believe that the current rules and standards are enough, or that even if they are not, more regulation is undesirable for some other reason.[99] As the Essay has argued throughout, much social media use and networking conduct falls between the cracks of ethical rules and other professional codes and creeds. To the extent the current rules apply, they do not apply with any specificity; thus, guidance is lacking regarding behavior that is not obviously unethical but which is probably unprofessional. For the continued skeptics, however, I offer the following two-fold response.

1. The Tradeoff Between Social Networking and Social Capital

Perhaps the best insight into the potential harm from unprofessional social media use is gained from the civil society literature on social capital. Robert Putnam, one of the seminal thinkers on social capital theory, explains that "social capital refers to connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from

[99] Some have proposed more training and education, in law firms and law schools, as the solution to the legal and ethical problems posed by social networking, as opposed to more centralized regulation by the ABA. *See* Vinson, *supra* note 5, at 405.

them."[100] In general, social capital is built up through individuals' interactions with one another, through which relationships develop.[101] Trust is the byproduct of these relationships.[102] Putnam identifies the "positive consequences of social capital," and the norms that it engenders, as "mutual support, cooperation, trust, [and] institutional effectiveness."[103]

Social capital theories have been used to understand community cohesiveness as well as civic participation and engagement.[104] In his empirical research, Putnam found greater levels of social capital to be correlated with more active, engaged, and civic-minded citizens.[105] However, social capital theory applies with equal force to organizations,[106] such as law firms.[107] It suggests that healthy relationships between law firm associates indicates norms of trust and reciprocity between them, which, in turn, affects the level of social capital in the firm "community."

On this understanding, improper social networking behavior could deplete social capital in a few ways. For one, it could damage trust between associates. The fear that one's comments or mistakes will be shared online could very well stiffen interlawyer relationships, weakening the workplace bonds between associates. Moreover, as attorneys spend more of their downtime at work turned inward and online, to the social networking world, they spend less energy outward,

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[100] ROBERT D. PUTNAM, BOWLING ALONE 19 (2000).
[101] *See* JAMES S. COLEMEN, FOUNDATIONS OF SOCIAL THEORY 306 (1990).
[102] *See* Fiona M. Kay & John Hagan, *Building Trust: Social Capital, Distributive Justice, and Loyalty to the Firm*, 23 L. & SOC. INQUIRY 483, 488 (2003).
[103] PUTNAM, *supra* note 100, at 22.
[104] *See* Bob Edwards & Michael W. Foley, *Civil Society & Social Capital: A Primer*, *in* BEYOND DETOQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN COMPARATIVE PERSPECTIVE 1, 8 (Bob Edwards, Michael W. Foley & Mario Diani eds., 2001).
[105] ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993).
[106] *See* SOCIAL CAPITAL OF ORGANIZATIONS (Shaul M. Gabbay, Roger Th. A. J. Leenders eds., 2001).
[107] Kay & Hagain, *supra* note 102, at 483.

strengthening their personal relationships with other associates.[108] Facebook time has replaced "water cooler" time.[109]

This is problematic because a firm's social capital is valuable to it. A solid supply of social capital is key to a productive law firm culture. If unprofessional social media use reduces social capital, the firm's working environment could become less efficient.[110] As Putnam writes, "[t]rustworthiness lubricates social life."[111] Applying that idea to the law firm setting, Kay and Hagan have found that "[i]n the practice of law, trust serves as a social lubricant in the work relations of firm lawyers."[112] Trust, after all, is the fabric of reciprocity, which establishes norms of mutual expectation and obligation in any community. At a firm, reciprocity can be specific, between individual attorneys, or generalized, between one attorney and the unknown other, encountered in the office sometime "down the road."[113] Related, are the concepts of thick and thin trust: that is, "trust embedded in personal relations that are strong, frequent, and nested," as compared to "trust in the 'generalized other.'"[114] Arguably, if the associate-to-associate bonds of

[108] Putnam was concerned about the Internet's deleterious effect on social capital. *See* Robert N. Bellah et al., Introduction to *Habits of the Heart*, *in* THE CIVIL SOCIETY READER 328, 335 (Virginia A. Hodgkinson & Michael W. Foley eds., 2003) (noting that "Putnam also worries that the Internet, the electronic town meeting, and other much ballyhooed new technological devices are probably civically vacuous, because they do not sustain civic engagement").
[109] *See* PUTNAM, *supra* note 100, at 85.
[110] The relationship between productivity and social capital is most consistent with Pierre Bourdieu's and James Coleman's theories of social capital, which view social capital on par with financial and human capital, and vital to productivity as "instrumental in the flow of goods and services to individuals and groups." Edwards & Foley, *supra* note 104, at 8-9.
[111] PUTNAM, *supra* note 100, at 21.
[112] Kay & Hagan, *supra* note 102, at 509.
[113] PUTNAM, *supra* note 100, at 134 (describing the concept of generalized reciprocity as "[t]he touchstone of social capital" and the principle that "I'll do this for you now, without expecting anything immediately in return and perhaps without even knowing you, confident that down the road you or someone else will return the favor").
[114] *Id.* at 136.

thick trust are strong, then the firm community will also follow principles of generalized reciprocity or thin trust.[115]

Both types of bonds are important for maximizing firm productivity, though generalized reciprocity is perhaps the most valuable. A society characterized by generalized reciprocity is "more efficient than a distrustful society" because "social networks and norms of reciprocity facilitate cooperation for mutual benefit."[116] Generalized reciprocity could also boost the firm's competitive advantage. In Putnam's view, communities that follow principles of generalized reciprocity have "measurable economic advantages" over those that do not, due to the concomitant reduction in the "transaction costs" of life and business. Thus, a combination of thick and thin trust, which flows horizontally and vertically in the firm hierarchy, will keep the firm humming.

Social capital is also important for a happy law firm culture. In the law firm setting, "[t]rust builds personal commitment to the organization, and this in turn produces longer term loyalty."[117] It is also "an anchor for the cultural solidarity of the firm."[118] Trust, as a feature of social capital, is thus critical to a law firm's high morale and attorney retention. Research suggests that social capital might be particularly important for associate happiness and work satisfaction. As Kay and Hagan have hypothesized, "[t]he underlying foundation and durability of trust within firms may be particularly important in the career development of junior associates."[119] More empirical research would be needed to bear this out, but it is reasonable to

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[115] *See* Kay & Hagan, *supra* note 102, at 497 (finding a .47 correlation between trust that exists between attorneys and trust that the attorney has in the organization overall).
[116] PUTNAM, *supra* note 100, at 21.
[117] Kay & Hagan, *supra* note 102, at 485 (citations omitted).
[118] *Id.* at 509.
[119] *Id.* at 485.

conjecture that a firm with a culture of trust and reciprocity is also one that is eager to mentor young attorneys and otherwise invest in their success.

Beyond the firm, social-capital-depleting behavior between lawyers could ripple out to the public in general, diminishing its trust in the administration of justice. Just as bad manners disrupt the justice system—and so we punish or frown upon them—so too does improper social media use. In fact, the risks that social networking conduct poses to the justice system and the legal community at large exceed those posed by litigation-related incivility. Offline incivility—attorneys' rancorous conduct—is both a "public relations headache for the legal profession," and also threatens to "undermine public trust in the administration of justice."[120] The same is true of unprofessional social media use, but the risks are magnified. Sharing negative or embarrassing comments about one's co-workers on the Internet makes the profession look petty and impulsive, just as temper tantrums and hurling insults do. Yet social media sharing, unlike explosive or insulting behavior, "can never truly be erased or deleted."[121] "The ability to preserve and replicate an Internet message or image for many years exacerbates the potential risks"[122] of a deteriorating public image and an erosion of public trust that follows.

2. Economic Incentives To Regulate

There are also strong economic reasons why the legal community, and law firms especially, should devote their attention to developing concrete guidance on social media use. The legal economy has undergone a "sea change" in the last several years, marked by a decline

[120] Christopher J. Piazzola, *Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule*, 74 U. COLO. L. REV. 1197, 1210 (2003).
[121] JUDICIAL CONFERENCE, RESOURCE PACKET, *supra* note 2, at 5-6.
[122] "The ability to preserve and replicate an Internet message or image for many years exacerbates the potential risks." *Id.* at 5.

in demand for legal services and resulting layoffs.[123] A 2011 report on the future of the legal profession by the New York State Bar Association stated that "[s]ince 2009 . . . the demand for legal services has been stagnant or has decreased. Many large law firms laid off attorneys, the average size of associate classes has decreased, and fewer associates have been promoted to the status of equity partner."[124] The year 2010 marked the second consecutive year of declining headcount, at a 1.1% decline; an improvement over 2009's reported 4% decline, but nonetheless the biggest two-year decline in the history of the *National Law Journal* survey that reported this data.[125]

Admittedly, these economic trends are the product of a recession and will probably neutralize over the next few hiring cycles. Even so, there were lasting impacts from the recession that seem here to stay. Firms have come under pressure to trim excess and clients are unlikely to accept as normal the same level of hours billed to their accounts.[126] To the extent that improper social media and networking use decreases a lawyer's productivity and dredges law firm resources, law firms will remain concerned about the issue.[127] Associates should be equally keen to ensure their online activity is professional, not only to avoid layoff in the near term but also to demonstrate their long-term value-added to the firm.

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[123] N.Y. STATE BAR ASS'N, REPORT OF THE TASK FORCE ON THE FUTURE OF THE LEGAL PROFESSION 12-31 (2011) [hereinafter NYSBA REPORT].
[124] *Id.* at 16.
[125] Leigh Jones, *Vanishing Act: Year II*, NAT'L L. J. (Nov. 8, 2010), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202474471365.
[126] *See* NYSBA REPORT, *supra* note 123, at 15, 18-19.
[127] *Cf.* Piazolla, *supra* note 120, at 1209 (noting that "efficiency is perhaps the most common rationale for civility" and the conclusions in the Seventh Circuit's final report on civility that incivility can increase litigation costs and waste judicial resources).

B) The ABA Model Rules of Professional Conduct

A good starting place for regulation is the Model Rules of Professional Conduct. A rule that is specific to social media and addresses the types of behavior outlined above could go far in filling the vacuum of guidance in these areas. It is important for the ABA to take the lead in rule-making. Though the organization has addressed law firm websites and e-mail through advisory opinions, it has not yet addressed social media.[128] Others have expressed a similar hope for ABA guidance. Ross Fishman, CEO of Fishman Marketing, commented that "[t]he old rules should cover new media tools like Facebook and blogs, but it would be helpful if the ABA clarified this point directly."[129] Without a model rule to spur action, many state bars have similarly been slow to provide clarification on social media and networking issues, and merely tell their attorneys that the "regular rules still apply."[130] For example, when the new edition of the New York Rules of Professional Conduct went into effect on April 1, 2009, they did not mention social networking or any of its related problems.[131] It is unclear whether social media will be included in newer versions of other states' ethical codes without some impetus from the ABA.

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[128] *See* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-457 (2010) (lawyer websites); ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006) (use of metadata found in e-mail and other electronically sent data). Others have noticed this lag. Arizona attorneys Carrie Pixler and Lori A. Higuera note that "[s]imilar to how ethics committee guidance on e-mail and the Internet lagged behind the development of electronic communication, new guidelines for social media tools are barely evolving alongside attorneys' expanding use of social media." Pixler & Higuera, *supra* note 52, at 35.

[129] Jay D. Strother, *Just Being Social*, 30 L. MGMT. 32, 34 (2011).

[130] Pixler & Higuera, *supra* note 52, at 35 (noting that, for Arizona attorneys, "given the absence of ethics guidance defining the boundaries of . . . social media, lawyers should assume that all communications in which their status as a lawyer is apparent are subject to the ethical rules"); Robertson, *supra* note 51, at 21 (noting that "[f]ew states do have specific rules").

[131] Joel Stashenko, *N.Y. Bar: Beware the Pitfalls of Social Networking*, N.Y.L.J LAW TECH. NEWS (Feb. 5, 2010), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202442016509&slreturn=1&hbxlogin=1.

An ABA rule is preferable to leaving regulation to individual firms and judges who could otherwise reprimand or fire wayward employees. A Model Rule that is specific to social media use, but still broadly worded, will gain content as it is applied. These applications will generate fodder for advisory opinions, which local jurisdictions can then use to guide their own applications of analogous rules.[132] Thus, a Model Rule and the local rules it inspires will not only set uniform expectations but also will clarify these expectations both now and over time as social media and networks evolve. The effect is a profession-wide perspective shift toward viewing certain social media uses as unprofessional. By contrast, a micro, firm-level approach would create uneven standards across the profession (as policies would no doubt differ by firm culture), creating confusion for associates who move laterally and a weaker sense of what is unprofessional about social media use.

In fashioning a model rule, there are some general points to bear in mind. First, the rule must be a compromise between the "old" and "new" generation of lawyers. Given the degree to which these sites have permeated popular culture, an outright ban of them would be untenable and perceived as draconian. The drafters must consider that

> today's new lawyers have grown up with different expectations of privacy, and as a result have different reactions to how information is communicated online; [the ABA and] state bars will need to take this generational shift in thinking into account when considering whether new rules are necessary to cover the brave new world of social media.[133]

Another blogger cautions against implementation of social media polices by older generation lawyers "who have never used social media" "and writ[ing] absurd policies that would be

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[132] *Cf.* Christina Parajon, Comment, *Discovery Audits: Model Rule 3.8(d) and the Prosecutor's Duty to Disclose*, 119 YALE L.J. 1339 (2010) (discussing how guidance on the scope and expectation of a Model Rule is gained through increased application of the Rule and accompanying evaluations/advisory opinions by the relevant regulatory body).

[133] Tom Mighell, *Avoiding a Grievance in 140 Characters or Less: Ethical Issues in Social Media and Online Activities*, 52 ADVOC. (TEXAS) 8, 8 (2010).

impossible to enforce in any event."[134] It also bears emphasis that Facebook and Gchat are one of the main ways that people now stay in touch with friends and loved ones. Firms that expect employees to work lengthy hours should also allow for the appropriate work-life balance by accommodating attorneys who need to keep in touch while at the office. A feasible rule, therefore, should reflect a balance of these interests.

Interest balancing is not only realistic but will also account for the upsides to social media use and networking, which the ABA should not chill. For one, through social media participation, many lawyers have become more active in the legal community and their communities more generally. Jayne Navarre, a marketing expert who works with attorney websites, explains that employees like social media because "[i]t gives them a voice, one that used to be only available via a one-on-one conversation."[135] Further, as their names suggest, the sites are, in fact, often good for professional development. "[A]ttorneys can build potential networks they could never hope to do in person through cocktail parties and receptions."[136] Finally, properly consulted, social media is a good educational tool. Taking Twitter as an example,

> [i]t's a way that, if you are the first to know about a legal development, the passage of legislation or a decision in a case and you post a Tweet about it, then your followers will say, 'Hey, [she] is the first to know about this case. Let me call her and see if she knows how our company should react to this new legislation.'[137]

The profession already uses social media and networking sites for productive ends. As just a few examples, the Tennessee Supreme Court uses Twitter to give updates on opinions and

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[134] *Law Clerks and Facebook*, VOLOKH CONSPIRACY (May 4, 2011 10:11 AM), http://volokh.com/2011/05/04/law-clerks-and-facebook.
[135] Strother, *supra* note 129, at 37.
[136] Stashenko, *supra* note 131.
[137] *Id.*

other time sensitive issues. That state's bar association uses Facebook to communicate with its lawyers.[138] The Illinois Supreme Court also has a Twitter feed.[139] As for blogging from the bench and bar, the *New York State Bar Association Journal* has a blog[140] and apparently, even Justice Kennedy of the Supreme Court looks to law blogs for the latest legal scholarship.[141]

1. A Survey of Existing Approaches

With these points in mind, we can gain purchase on the idea of a new model rule from various corners of the legal and professional communities. To begin, the approaches that law firms have taken, or have been advised to take, are instructive. My sense is that, while most experts and firm managers believe that firms should have a policy in place, many firms still lack one. However, those that do exist (and are findable) address some of the professionalism concerns identified above.

The managerial and marketing community has voiced an urgency to develop policies.[142] One professional writes,

> If your law firm does not yet have a social-media policy, shame on your law firm. Law firms, like any other business, are accountable for the conduct of their employees. And employees are using social media. Ignoring this reality will not reduce your firm's exposure to risk. The only way to manage exposure is to tackle it head on. And the best way to tackle social media is to educate employees about the firm's expectations with a well-drafted policy.[143]

Mayer Brown has likewise impressed that

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[138] Robertson, *supra* note 51, at 16.
[139] *IL Supreme Court*, http://twitter.com/#!/illinoiscourts (last visited May 22, 2011).
[140] N.Y. STATE BAR ASS'N J., http://nysbar.com/blogs/barjournal (last visited May 24, 2011).
[141] Kevin O'Keefe, *Supreme Court Justice Kennedy Kicks Off Discussion on Influence of Law Blogs*, REAL LAWYERS HAVE BLOGS (Sept. 6, 2010), http://kevin.lexblog.com.
[142] *But see* Adrian Dayton, *Open Letter to Law Firms: Control the Message*, MARKETING STRATEGY & L. (Apr. 14, 2009), http://adriandayton.com/2009/04/control (urging law firms not to try to control attorneys' use of social media).
[143] Molly DiBianca, *Social-Media Policies for Law Firms*, ABA LAW PRAC. TODAY (Oct. 2010), http://apps.americanbar.org/lpm/lpt/articles/ftr10101.shtml.

> [o]rganizations need to get on top of this trend *now*, rather than waiting for circumstances to force the issue. As with all new technologies, communications via Web 2.0 systems like social networking sites *will* be used by your organization, *will* be recognized by the courts, *will* be subject to regulation and *will* be sought in discovery. The best strategy for any organization is to proactively adapt to this evolution and invest in the proverbial "ounce of prevention."[144]

There are only a few publicly available firm policies or statements suggesting what the policy might be. Hogan Lovells acknowledges that "[c]ertain social media activities of employees create risks that may be unforeseen by the employee," including discussion of the company if perceived to have the company's imprimatur, complaining about one's job, and inappropriate statements about other employees.[145] One blogger, who does not identify her firm, reports that it has a policy that "concentrates . . . on making sure we comply with ethics standards for our jurisdictions when using these mediums."[146] She describes a few highlights of her firm's policy as follows:

1. The Internet is not anonymous, nor does it forget.
2. There is no clear line between your work life & your personal life in these mediums. Always be honest & respectful in both capacities.
3. Avoid hazardous materials—defamatory, harassing or indecent statements.[147]

In general, therefore, although firms might not have a solid understanding of how to regulate social media use, they do sense the risks involved.[148]

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[144] Mayer Brown, *The Next Generation of E-Discovery: Social Networking & Other Emerging Web 2.0 Technologies* (July 31 2009), http://www.mayerbrown.com/publications/article.asp?id=7339&nid=6.

[145] Hogan & Hartson LLP, *Intellectual Property Update: Navigating Social Media in the Business World* (Sept. 24, 2009), http://www.hoganlovells.com/files/Publication/39796391-451f-46aa-841e-e0de925eb769/Presentation/PublicationAttachment/9c19fdd6-7bd7-42b0-a7f6-495df3a88572/IPUpdate.pdf.

[146] Melanie Green, Comment to *Does Your Firm Have A Social Media Policy*?, LAWYERIST.COM (June 2, 2009 4:08 PM), http://lawyerist.com/does-your-firm-have-a-social-media-policy.

[147] *Id.*

[148] *See* Trenton C. Dykes, DLA Piper, *Do Your Corporate Policies Consider Social Media* (June 2, 2009), http://www.dlapiper.com/do-your-corporate-policies-consider-social-media.

We can also gain insight from the judicial community. Judges have scrutinized the propriety of their own use of social media, blogs in particular, and have converged around the following principles: do not comment on pending matters or express opinions on issues that could lead to recusal; do not mix personal and professional; adhere to the ethical canons; and be mindful of security and safety issues.[149] A recent panel on *Ethics in the Digital Age* at the Third Circuit Judicial Conference provoked some discussion in the blogosphere about if and how law clerks should use social media and social networks. One blogger had some comical advice, to which there is considerable truth. This person, a self-described judicial hopeful, said that he plans to tell his future law clerks the following:

> I feel a little sorry for you. I came up just when e-mail and the Internet became established, we didn't have these social media tools, and unless someone saved your e-mail they would not be able to track you down the rest of your life. But this is an important moment in your transition from student to professional. It will certainly not be the last time you have to subordinate what you want to do online to what an employer—or CLIENT—would want to see. And you also need to think of it like this. If YOU are doing something online, to litigants before the court, it's like—I—am doing it.[150]

The Judicial Conference has also provided some useful social-media-specific hypotheticals. Under Canon 3 of the Code for Judicial Employees, which governs confidentiality, the Conference notes that a "status update" that "hints at the outcome of a pending case" or "commenting on a blog to the same effect" would run amiss of that Canon.[151] Under Canon 1, "A judicial employee should uphold the integrity and independence of the judiciary and of the judicial employee's office."[152] Here, the Conference suggests that posting

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[149] Heather Singer, *Bench Blogging*, CASE IN POINT (Nat'l Judicial Coll., Reno, Nev.), Spring/Summer 2007, at 3, 5-7, http://www.judges.org/pdf/cip_summer07.pdf (quoting various judges).
[150] *Law Clerks and Facebook*, *supra* note 134, posting at May 4, 2009 9:59 AM.
[151] JUDICIAL CONFERENCE, RESOURCE PACKET, *supra* note 2, at 15.
[152] *Id.*

messages or comments that are unfavorable or negative about a law firm or counsel's competence could suggest special access or favoritism.[153]

The District of Rhode Island has issued a policy specific to that court, which offers employees some "broad guidelines" to follow. One such guideline advises employees to use common sense and to "[t]hink before you post," keeping in mind that nothing is really private.[154] The policy proposes a "simple rule: if you are not speaking to someone directly or over a secure landline, you must assume that anything you say or write is available for public consumption."[155] Court personnel are also reminded to speak for themselves, not the institution. Specifically, it notes that listing your employment underscores you are a representative of the Court and, therefore, you should not "bring embarrassment upon yourself and/or the Court" with pictures and posts.[156] The general message of the Rhode Island policy is to behave appropriately and with dignity, which means not speaking about internal processes (including those of a nonconfidential nature) and refraining from political or partisan activity that questions the court's independence.[157]

Finally, there is value in considering how other sectors have handled employees' use of social media and networking.[158] Of particular note is the media industry, where confidentiality has a similarly strong influence on the rules of ethics and norms of professionalism. The *Wall*

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[153] *Id.* at 16. This would also run afoul of Canon 2, "A judicial employee should avoid impropriety and the appearance of impropriety in all activities." *Id.* at 15.
[154] *Id.* at 28.
[155] *Id.* at 29.
[156] *Id.*
[157] *Id.* at 29-30.
[158] For an overview of the various corporate social media policies that exist, see Lydia Dishman, *Corporate Social Media Policies: The Good, the Mediocre, and the Ugly*, FAST CO. (July 9, 2009), http://www.fastcompany.com/1668368/social-media-policies-the-good-the-bad-and-the-ugly; Lydia Dishman, *More Social Media Policies: LA Times, Harvard Law, Microsoft, and Cisco*, FAST CO. (July 15, 2010), http://www.fastcompany.com/1670530/social-media-policies-part-deux.

Street Journal recently gave its staff social networking rules.[159] These include prohibitions on disparaging the work of colleagues or competitors, aggressive self-promotion, and "[a]ll postings on Dow Jones sites that may be controversial or that deal with sensitive subjects" before clearing the post. It urges that "[c]ommon sense should prevail, but if you are in doubt about the appropriateness of a Tweet or posting, discuss it with your editor before sending."[160] In a similar vein, Reuters's 2010 social media policy proscribes their journalists from breaking news on Twitter.[161]

These approaches, considered together with the four aspects of the professionalism problem identified in Part III, provide a solid basis for outlining the contours of a model rule.

2. An Outline of a Rule

Based on the foregoing, there are four specific types of social media use or social networking conduct that should be addressed in any model rule: (1) status updates or away messages; (2) posting links or comments, sending articles, and sending event invitations; (3) publishing stories or ideas; and (4) sharing identifying information.

a. Status Updates and Away Messages

Facebook allows users to continuously update their "status," a feature used to tell friends what the user is doing at any given time. Similarly, people post "away messages" on their Gchat boxes for the same purpose. Because these constant updates have the potential to share matters being worked on, cases under consideration, or a co-worker's latest morning gaffe, the rule

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[159] Robert J. Ambrogi, *Rules of Conduct for Social Networking*, LAW.COM LEGAL BLOG WATCH (May 14, 2009 2:47 PM), http://legalblogwatch.typepad.com/legal_blog_watch/2009/05/my-entry.html.
[160] *Id.*
[161] *Handbook of Journalism, Reporting from the Internet*, REUTERS, http://handbook.reuters.com/index.php/Reporting_from_the_internet#Social_media_guidelines (last visited May 24, 2011).

should address their use. Attorney-users should be warned that sharing work information—regardless whether confidences are exposed—is unprofessional. Innuendo about co-workers is similarly so, even if the brief message would only be considered mildly embarrassing.

b. Links, Comments, Articles, Invites

Here, the danger to professionalism is that a lawyer's endorsement of events, organizations, or viewpoints could be attributed to the law firm or judge. A firm associate should be careful not to suggest endorsement or communication with an adverse party or ruling.[162] One can imagine a scenario in which a lawyer blogs a positive post about a recent opinion, much to the dismay of a firm client, who was adversely affected by the ruling.

Federal judicial law clerks are not supposed to participate in partisan political activities.[163] Accordingly, it seems inappropriate for a law clerk to post on Facebook both his position with a court and specific judge and his political party affiliation or position on the political spectrum (*i.e.*, "liberal" or "conservative"). Likewise, endorsing candidates on Facebook or sending and posting invitations to partisan political fundraisers casts doubt on a chamber's political independence.

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[162] Though beyond the scope of this Essay, I note that others have pointed out that it is questionable whether employers subject to the Railway Labor Act could discipline employees for union-related organizing activities if there is evidence that the employer harbors antiunion sentiment. *See* Chris Hollinger & China R. Ross, *Airline and Railroad Labor and Employment Law: A Comprehensive Analysis*, 2010 ALI-ABA 79. For a recent case in which the National Labor Relations Board filed a complaint alleging that a nonprofit unlawfully discharged employees after criticizing working conditions on Facebook, see *Complaint Issued Against New York Nonprofit for Unlawfully Discharging Employees Following Facebook Posts*, NAT'L LAB. REL. BD. (May 18, 2011), http://nlrb.gov/news/complaint-issued-against-new-york-nonprofit-unlawfully-discharging-employees-following-facebook.

[163] Under Canon 5 of the Employee Code, "A judicial employee should refrain from inappropriate political activity." JUDICIAL CONFERENCE, RESOURCE PACKET, *supra* note 2, at 15.

c. Posting Stories and Responsive Comments

The concern with publication-type social media use and networking is the divulgence of proprietary information, particularly that which is nonconfidential but sensitive, and shared on the basis of firm-attorney trust. Additionally, lawyers should be admonished not to vent about work or air the firm's problems. Gossip blogging should also be frowned upon.[164]

d. Identifying Information

The extent to which a lawyer may share the firm name, court, and judge for whom he or she works should be addressed. How much detail an attorney may share about his or her employer will likely be a function of how far the rule restricts the above forms of sharing and connecting.[165]

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[164] This part of the rule would have to be modified for government employees such as law clerks, who have First Amendment protections of their speech. The Supreme Court has developed a two-part test to assess public employee speech rights under the First Amendment. *See* Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Ed., 391 U.S. 563 (1968). Under that test, an employee must first show that the speech involves a matter of "public concern." Then, the Court balances the employee's speech rights and the government employer's interest in efficiency. *See* David L. Hudson, Jr., *9th Circuit: College Has Right To Keep 'Political Neutrality,'* FIRSTAMENDMENTCENTER.ORG (Apr. 25, 2005), http://www.firstamendmentcenter.com/news.aspx?id=15168 (describing the test). Subject to a *Pickering-Connick* analysis, therefore, a judge or other government employer could probably not punish derogatory speech or nonwork related speech.

[165] It is worth noting with respect to Facebook that the site offers a range of privacy settings that allow a user to conceal information or data so that only that user, his or her friends, or friends of friends can see it. Some find it challenging to understanding the privacy settings, and perhaps for that reason, their efficacy has been a subject of some skepticism. *See, e.g.*, *Facebook Privacy: A Bewildering Tangle of Options*, N.Y. TIMES, May 12, 2010, http://www.nytimes.com/interactive/2010/05/12/business/facebook-privacy.html. That said, Facebook has recently improved some of its privacy settings. As of May 2010, users can choose to make some information private, such as hometown, residence, favorites, and friend lists. Vinson, *supra* note 5, at 368. Even so, as one author notes,

> users should not take privacy for granted. These controls are not automatic and still reveal personal information by default. By default, privacy settings allow everyone to find a user in a search. Further, as the features and applications of Facebook continue to grow, so does the amount of information available about its users.

In sum, the ABA's drafting, circulation, and implementation of a rule that targets the unprofessional ways in which lawyers use social media would serve an important gap-filling function and halt the consequences of unprofessional social networking, outlined above. Over time, the application of a model rule to specific scenarios and subsequent publication of advisory opinions would further solidify the lawyer's duty to use social media and networks professionally. In addition to the rule-based approach, it is also important for the legal community to focus on norm-shifting. Where social media and networking is concerned, that process should begin in law school.

C) Teaching Social Media Norms

Professionalism standards are not comprised of rules alone. Social networking norms are also an important part of them. Generally speaking, "[g]roups use norms to set a standard of ordinary or expected behavior." [166] As one scholar wrote, "social organization and, in particular, community norms, are almost always more important influences on individual conduct than formal rules."[167]

For young lawyers, uninhibited social networking is currently 'the norm.' The newest wave of attorneys to hit the legal market is the first to have gone through college with Facebook.[168] Gmail and Gchat were also launched during these lawyers' college years. Young

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Id. at 369.

[166] Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 813 (2000).

[167] *Id.* at 803.

[168] Facebook was launched in 2004. *See* John Schwartz, *The Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, Sept. 12, 2009, http://www.nytimes.com/2009/09/13/us/13lawyers.html (quoting Professor Stephen Gillers for his observation that "young people who grew up with Facebook and other social media enter a profession governed by centuries of legal tradition").

lawyers are therefore accustomed to the "casual, personal use" [169] of social media and networking and, at least according to one ethics professor, are "initially . . . unaware of the consequences of using social-networking sites and the responsibilities of a lawyer."[170] The casual attitude toward social networking is left to thrive in law school, where there is often a lack of emphasis on professionalism in general.[171]

1. Pedagogy

Law schools could reverse the nonchalant attitude toward social media by incorporating social media issues into their professionalism curricula. One component of a norm-shifting strategy should, therefore, be pedagogical. That recommendation begs the question of how to teach professional norms of social networking.

Law schools have varied approaches to teaching legal ethics and professionalism, including clinical programs, mentor programs, lectures and seminars, and coursework.[172] As one important scholar on the pedagogy of ethics and professionalism notes, nearly all professional responsibility training has two objectives: one, "to increase students' understanding of ethical problems and of regulatory responses, including relevant codes, doctrine, and committee decisions"; and two, "to broaden and deepen individuals' understanding of professional roles . . . [t]hrough cross-professional, cross-cultural, and interdisciplinary materials" so that "students can

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[169] Tiffany M. Williams, *Social Networking Sites Carry Ethics Traps & Reminders*, ABA LITIGATION NEWS (Aug. 27, 2009), http://apps.americanbar.org/litigation/litigationnews/top_stories/social-networking-ethics.html.
[170] Jennifer Valentino-DeVries, *Q&A: Lawyers, Ethics and Social Networking*, WSJ DIGITS BLOG (Mar. 19, 2010 12:40 PM), http://blogs.wsj.com/digits/2010/03/19/qa-lawyers-ethics-and-social-networking.
[171] *See* Deborah L. Rhode, *The Professional Responsibilities of Professional Schools: Pervasive Ethics in Perspective*, *in* TEACHING AND LEARNING PROFESSIONALISM 25, 26 (1997); Rhode, *supra* note 25, at 46.
[172] ABA SURVEY, *supra* note 24.

explore the merits of particular occupational norms and regulatory structures."[173] Because code-based guidance and regulatory responses have yet to develop in the area of social networking and social media use, a good pedagogical starting point is with the second objective. Law schools should consider how they might create a more self-reflective sense among students of how social media use can be unprofessional.[174]

Social media use and networking pose a niche set of professionalism problems, so integrating these topics into schools' current professionalism training could prove difficult at first. In general, there are recognized challenges to the success of academic efforts to "teach" professionalism, and expanding programs seems an uphill battle at many institutions. One author wrote that professional responsibility is the "dog of the law school [curriculum]—hard to teach, disappointing to take, and often presented to vacant seats or vacant minds."[175] However, social media might be better received. The professionalism issues associated with social media use and networking are relevant to law students' lives in ways that other legal ethics and professionalism issues are not yet. Students will more readily see the practical applications, and find it easier to draw connections between problem and solution, than they might in other standard courses. New programs on social media use could, therefore, avoid some of the abstractness that has made teaching professionalism difficult in the past.

Rather than re-arranging current syllabi to address these topics, an alternative way to introduce the topic is through a mandatory orientation program. There is already some traction for such programs. As of 2006, eighty percent of schools had a professionalism orientation. Some used lecture format (85%), some small discussion groups (61%), and some used panels

[173] Rhode, *supra* note 25, at 42-43.
[174] *Id.* at 42.
[175] Rhode, *supra* note 25, at 40 (alternation in original).

(42%).[176] Sixty-four percent of schools with professionalism orientation programs used hypotheticals.[177] An orientation session in any of these formats, and probably most usefully with some use of hypothetical social networking issues, would raise awareness of the issue in the beginning of students' law school experience. As an isolated training session, an orientation program could be a smoother way of adding social media and networking topics into the professionalism curricula. Orientation programs could also be more impactful than a one-off session on social media issues in a course otherwise dedicated to the rules of ethics or more traditional ethical dilemmas. Ideally, the program would be mandatory for all students. As Rhode has noted, the benefit of mandatory training in professionalism is that it forces students to think about "what kind of [professionals] [they] want to be and what kind of profession [they] want to serve."[178]

2. Policy

A second component of a law school's norm-shifting strategy is applied, through effective law school policies on professionalism. Developing, publishing, and enforcing policies that govern law students' use of social media and networking is key.[179] As the ABA noted in its survey of law school policies on conduct and integrity, "[i]t is important for students who are preparing to be part of the legal profession to learn to accept the full responsibilities that are entailed in such participation and the ramifications for not adhering to those responsibilities."[180]

The College of Law at West Virginia University has such a policy. It "encourage[s] students to use [social media] as a professional tool, [and] educate[s] them about etiquette, ethics

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[176] ABA SURVEY, *supra* note 24, at 42.
[177] *Id.*
[178] Rhode, *supra* note 25, at 44.
[179] *See* Vinson, *supra* note 5, at 406 (advocating for the use of law school policies and guidelines on social networking).
[180] ABA SURVEY, *supra* note 24, at 11.

and best practices. [The University] seek[s] to model how social networking can contribute to a professional public presence by using it to communicate with the world."[181] Harvard Law School also has a policy in place, though its concern is more so with the use of the Harvard domain name for publishing blogs and websites and less so the question of whether social media use is professional.[182] Regardless of the policy, it should be applied and enforced through the use of review boards (which include student members) and be subject to an appeals process, to mimic the type of regulatory responses students will see as members of the professional bar.[183]

Overall, inculcating professional norms for social media use will ease students' transition from academia to the regulated profession, ideally, avoiding incidence of misunderstanding or censure in their early careers. In those jurisdictions that adopt a rule without disciplinary capability, norm-shifting is an especially important goal for law schools because, with solid norms in place, the new attorneys that they train will be more likely to adjust their conduct. As with many social norms, "[a]ctors might come to obey [them] even when they would suffer no adverse consequences if they did not."[184] If a lawyer "who violates a norm can expect to suffer a range of external but nonlegal sanctions, including a loss of reputation as well as raised eyebrows, disparaging remarks, and other social 'punishments,'" then this could be an effective way to incentivize him or her to forgo questionable online behavior.[185] Indeed, "[a]ttorneys and judges have a wide variety of tools for punishing norm violations [and] [n]egative gossip is

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[181] Joyce E. McConnell, *Social Networking: A Reality for Lawyers and Law Students*, 2011 W. VA. LAW. 16, 17.
[182] *Weblogs at Harvard Law School*, HARVARD L. SCH., http://blogs.law.harvard.edu/terms-of-use (last visited May 24, 2011).
[183] *See* ABA SURVEY, *supra* note 24, at 11-12.
[184] Lynn A. Stout, *Social Norms and Other-Regarding Preferences*, *in* NORMS AND THE LAW 13, 28 (Josh N. Drobak ed., 2006).
[185] *Id*.

invariably documented as a sanction."[186] Because "[r]eputation and credibility are a form of social capital that can make a substantial difference to the attorney's material well-being,"[187] such a 'soft' sanction will go far in reining in unprofessional social media use.

CONCLUSION

This Essay has demonstrated how attorneys' use of social media and networking implicates their professionalism. It argued that our current standards of professionalism, and the ethical rules on which they lean, are inadequate to curtail unprofessional social media use and networking. But, for better or for worse, we live in the Facebook age. Unregulated, these tools pose risks to our professionalism. However, with proper guidance, they can be powerful and productive tools for the legal community.

[186] Brown, *supra* note 166, at 811.
[187] *Id.* at 812.

The Top Ten Malpractice Traps and How to Avoid Them

Trap #1: Missing Deadlines. Calendaring errors remain a leading cause of malpractice claims. Common mistakes include data entry errors, failing to use file review dates, absence of a back-up calendar and procrastinating until the last minute to file documents. To avoid this trap, an office must have at its organizational core an office-wide calendar and practices in place regarding its use. The system should contain the following characteristics:

- Be easy to use, maintain and teach to new personnel
- Include some redundancy, either through multiple paper calendars or the computer
- Contain an off-site calendar backup in the event of a fire or other disaster
- Have the capacity to crosscheck between the master calendar and the back up calendar to catch calendaring errors
- Have at least one docket date for every open file to ensure that all files are reviewed regularly
- Include tracking procedures that enable the firm to identify who made any given entry
- Make all attorney and non-attorney staff accountable

A standard calendaring system sets forth all items to be calendared, the frequency of reminder dates, the applicable deadlines for the various types of cases the firm handles and the firm's own deadlines for events it considers critical. For example, a firm might require all lawsuits to be filed no later than three months prior to the running of the statute of limitations. When the office accepts a tort claim, for example, support staff knows that a 3-month date (which indicates the imminent running of the statute of limitations) must be calendared. Critical firm deadline dates of this type will dictate the calendar entries made by the staff. Of course, it is the attorney's responsibility to calculate those important dates, and it is recommended that the attorney place his or her initials on the file intake sheet to identify who is responsible for the calculating of a particular date.

Trap #2: Stress and Substance Abuse. It takes just one dysfunctional attorney to ruin a firm's reputation and add significantly to its malpractice claims history. All too often the problem is compounded by inaction on the part of the law firm. Certain practices can reduce the chances of encountering such a problem.

> ***Improved Communications Among Firm Members*** Does your firm have an open door policy? Can problems be discussed confidentially within the confines of the firm? Too many attorneys today view partnership as a purely economic relationship and feel no sense of loyalty to one another. In this setting dysfunctional or troubled attorneys have no one in whom they can confide. Monthly meetings, sharing advice or insights on a matter and getting together in non-work settings can help build effective and satisfying working relationships.

The Committee wishes to thank Mark C. S. Bassingthwaighte, J.D., Loss Control Specialist and Robert D. Reis, Risk Manager from Attorneys Liability Protection Society, A Mutual Risk Retention Group for their considerable contributions to this article's second edition.

You may also consider appointing a fair-minded and well-respected partner as an ombudsman for intra-firm problems and conflicts. Sole practitioners can find this support by seeking out other lawyers similarly situated, though confidentiality concerns and other business and ethical constraints require caution in this type of a situation.

Workloads. Stress can push predisposed attorneys into clinical depression or cause other mental health problems, including anxiety disorders. Although it may be impossible to remove stress completely from the workplace, it is possible to manage and reduce the level of stress.

Does the firm measure attorney worth solely on billable hours or the number of open files being handled? While such a system may be necessary to some degree, it can not and should not be the sole measure of one's value. Caseloads should be reviewed periodically to ensure a fair division of labor. Reasonable limits should be placed on the number of files or cases that may be handled at one time.

Are firm members able to take personal time off without feeling guilty or without being penalized? Firm members should feel some flexibility insofar as being able to take the occasional hour or so for a child's school activity or to run a personal errand that cannot be handled after hours. Instituting a of policy requiring attorneys to take vacations away from town and away from files and clients can contribute significantly to maintaining morale and ensuring enthusiasm in the workplace.

Sensitivity and accommodation for the attorney who is dealing with the added stress of personal crises is mandatory. During this period, reduced workload or other adjustments should be made. Stress should not be ignored. Everyone has a breaking point.

Know the Signs of Substance Abuse and Depression. Symptoms of substance abuse include frequent Monday morning tardiness, missing deadlines, neglecting mail and phone calls and missing appointments. There is a slow but steady deterioration in work product and productivity and an increase in frequency of excuses in personal relationships. Apparent behavioral changes could include drinking, defiance, impatience, intolerance, unpredictability or impulsiveness.

Other apparent behavioral changes associated with depression include inappropriate anger (often in men), tearfulness, self-criticism, distractibility and lack of interest in pursuing activities that once brought pleasure, difficulty concentrating and forgetfulness.

Seek Help from Professionals in Cases of Mental Health Problems or Substance Abuse. Most attorneys acknowledge that substance abuse and mental health issues can increase tremendously the risk of a malpractice claim and can devastate families, professionals and entire social circles. Unfortunately, far fewer will take the risk to intervene and help a colleague find help unless or until the problem has reached crisis proportions. By the time that point is reached, the neglect, misconduct or mistake has occurred and the cost to the firm could be substantial. In the presence of indicia of mental health issues or substance abuse, one should be encouraged to seek professional help. These problems are treatable, particularly if recognized and dealt with at an early stage. For substance abuse issues, state bar

committees are a good place to begin. Typically, they are a committed group of people who have faced similar challenges successfully.

Trap #3: Poor Client Relations. Every malpractice claim begins with a dissatisfied client. Poor client relations and conflicted working relationships can transpire into malpractice claims with amazing haste. Inadequate attorney-client communication usually is at the heart of the problem. Typical mistakes include failure to obtain client consent, failure to inform a client of a case development or failure to follow the client's instructions. Many client relationship errors can be avoided by adopting a simple, commonsense approach to working with clients.

- Explain clearly to each new client orally ***and in writing*** the purpose for which the firm was hired, the fee arrangements, the reporting and billing procedures and the client's obligations.
- Listen to the client. Clients may want to pursue non-litigation avenues. Time should be taken at the beginning of the attorney-client relationship to identify clearly the client's goals or objectives.
- Realistic client expectations should be encouraged. Clear and documented explanations about the services to be performed or not to be performed are crucial. Legal procedures should be explained in simple, clear language so the client understands what to expect from the representation and has a clear timetable in mind.
- Maintenance of good client communications requires the prompt return of all telephone calls, keeping appointment times with clients and not keeping them waiting, sending regular case status reports and reporting negative information promptly. If the client is copied with correspondence or pleadings, the client must be informed as to their meaning and purpose. Assignments should be completed on a timely basis. If an unforeseen delay arises, it should be explained and a revised expected completion date should be given. Clients should be billed regularly and all charges should be explained fully. Clients should be encouraged to provide ongoing feedback on the quality of the representation they are receiving.
- All discussions, recommendations and actions taken, including a decision not to accept a client, should be documented.
- Letters of closure should be used at the end of the representation to document what was accomplished.
- Support staff should be taught the importance of courtesy, timeliness, professionalism and confidentiality when dealing with clients. Staff provides the interface between attorneys and clients. If staff is depressed, overworked, feel taken for granted or dissatisfied generally, it is important to understand that negative messages, however unintended, are being sent to clients.

Trap # 4: Ineffective Client Screening

After being served with a malpractice action, attorneys will often mutter "I knew I shouldn't have taken on that client." These "problem" clients are often the result of ineffective client screening. Successful practitioners augment their "gut feelings" with standardized office-wide screening procedures. A firm-wide policy of screening each prospective client according to a predetermined set of standards is critical. Each member of the firm is responsible for the clients the other members bring to the firm. With a standardized and effective screening process, potential disaster clients may be identified and avoided.

A set of screening questions subject to review and modification goes a long way toward weaning out undesirable clients. A periodic review of problem cases to decipher warning signs of potential danger also makes sense. Since screening needs vary greatly by practice area, it is wise to check with experienced and respected practitioners in the geographical area in which one practices to see what aids are being used and for what other practitioners are screening. It is also a good practice to analyze the office screening procedures periodically, perhaps annually, to see that they are netting matters and clients desired, match firm expertise and style and will be profitable for the firm.

- ***Do you have the time to take on the new case and give it the proper attention that the case deserves?*** If not, say no.

- ***Do you have the expertise necessary to handle the case?*** Don't dabble! There is no such thing as a simple will or a cut-and-dried personal injury case. If you are not prepared to handle the difficult cases in a given area of practice, do not accept the seemingly simple things. Often you fail to see where the problems are. Yes, you can develop the expertise given sufficient time, but keep in mind that sufficient time will be far more than meets the eye at first glance and the client will not be willing to pay for your education.

- ***If this is a contingency fee case, do you have adequate funds to take the case?*** You want to avoid being placed in the situation where case management decisions are being dictated by economics instead of by legal judgment.

- ***Can the client afford your services?*** If not, say no. A fee dispute is in the making if you accept a client who is on a different financial footing. Minimally, collection is likely to become an issue, and if you are compelled to collect the fee, the odds of facing a malpractice claim increase significantly.

- ***Is the prospective client a family member or friend?*** Don't be fooled. First, if the work is not satisfactory, favor or not, even the family member or friend will sue. Accepting work under this situation is foolhardy. Second, if you are unqualified to represent a stranger in a particular matter, likewise you are unqualified to represent a friend or family member. Don't be pushed into something you are uncomfortable handling.

- ***Has the prospective client brought you the matter at the eleventh hour?*** If so, say no. If you do not have adequate time to perform a thorough investigation, you run the risk of missing a possible claim, failing to identify a defendant or letting the statute of limitations run. You don't want to end up paying for your client's procrastination.

- ***Has the prospective client had several different attorneys?*** Heed the warning light! The client may wish to avoid paying fees, may be impossible to satisfy, may be bringing a case all others before you believed lacked merit or will be impossible to resolve satisfactorily.

- ***Does the prospective client behave irrationally or appear confrontational?*** If you are unable to work effectively with someone during the initial interview, it is unlikely to get better over time. The difficult client all too readily becomes the angry client who will not hesitate to bring a suit.

- ***Does the client have unrealistic expectations?*** You cannot guarantee results nor obtain a million-dollar judgment on a simple slip and fall. Do not take on clients whose expectations are simply unobtainable.

Trap #5: Inadequate Research and Investigation

The ABA has reported that substantive errors account for over 46% of malpractice claims. Common errors include failure to know or properly apply the law, failure to know or ascertain a deadline, inadequate discovery or investigation and planning or procedural choice errors.

Many of these errors can be prevented through careful, methodical research and procedures. It is important to review carefully the work of all staff, including contract attorneys and other professionals. The attorney of record is responsible ultimately for the work of these individuals. Experts should be consulted if uncertainty about a point of law exists. Lawyers should take the time to study and keep abreast of new developments in the law and should check closed files in the face of new statutory and case law that might affect clients' positions and rights. Association with expert co-counsel on significant matters outside one's practice area is crucial.

As the law changes, the standard of care does not decrease. Lawyers must continue to study the law by reading, attending seminars, seeking expert consultation and by researching particular issues that need to be addressed by clients.

Trap #6: Conflicts of Interest and Conflicts of Matter

Conflicts of interest and conflicts of matter can arise from a variety of situations. Each firm must establish stringent procedures for identifying and resolving situations in which these unexpected conflicts may arise. Practitioners should be wary of these situations.

- Representation of two parties, such as a divorcing couple, an estate and its beneficiaries or a buyer and a seller who announce "we agreed to the property settlement and we just want you to write the agreement."

- Representation of opposing theories of law for different, but similarly situated clients, i.e. a "conflict of matter" situation.

- Representation of opposing sides of an issue, even though the clients are not involved with one another, such as Exxon and Greenpeace.

- Personal involvement in a client's business interests.

- Service as a director or officer of a client company.

- An unclear statement of non-representation in situations where a clear conflict of interest exists.

- Conflicts arising from law firm acquisitions and lateral hires.

Lawyers must be vigilant about the possibility of conflicts of interest and conflicts of matter in undertaking representation. The following guidelines offer some helpful hints.

- Establish a conflict system to disclose conflicts as early as possible.
- Avoid suing former clients.
- Take only one side of any case or transaction. Confirm this in writing.
- Avoid becoming a director, officer or shareholder of a corporation concurrent with acting as its lawyer. Reject offers of remuneration in the form of stock.
- Avoid joint representation in potential conflict situations if there is any risk of an actual conflict materializing.
- If any possibility of conflict exists, seek permission from each client to disclose your representation and its effect on all clients before accepting representation. Absent permission, withdrawal is the only option.
- If you intend to engage in a joint or multiple client representation, give full disclosure to all clients regarding potential and reasonably foreseeable conflicts of interest and their ramifications. Discuss the effect of both potential and actual conflicts upon your representation of all clients. Advise the multiple clients that there is no confidentiality between them on matters concerning the joint representation. Advise multiple clients to seek the advice of independent counsel on the issue of whether joint representation is appropriate. Obtain the written consent of each of the multiple clients after full disclosure and before continuing the representation.
- Strongly urge consultation with independent counsel in cases of actual conflict. Seriously consider not proceeding with representation if the clients refuse to consult with independent counsel regarding the issue of joint representation. Have independent counsel acknowledge in writing the fact of having been consulted with regard to a multiple representation situation.
- Do not work for a real estate commission, which is based on percentage, while being asked for your legal opinion regarding a transaction or project.
- Do not represent clients with potentially inconsistent defenses or differing liability in civil or criminal cases without written disclosures, as described above, and the clients' written consent. If their potential conflicts become actual conflicts, you cannot represent them jointly, even with their informed, written consent.

Memories alone are insufficient to record and check potential conflicts of interest and conflicts of matter. Law practices need systematized procedures for documenting and analyzing potential conflicts for every new client and new matter accepted by the firm. A two-part system is recommended.

The first part should provide for a method of matching names, which can be accomplished either manually or by computer. Large firms should have a computerized system. Additionally, firms with more than one office need a database with matters and names from all offices, as well as communications capability to access the entire database from any office. The database, whether consisting of index cards at the receptionist's desk or a computer program, should include many parties. The list found at the end of this chapter, developed by the Professional Liability Fund that insurers all Oregon attorneys, is the best quick reference discovered.

The second part should include a practice of circulating a "new matter memo" to all professionals and support staff whenever the firm accepts a new case. This serves as a good conflict of opposing theories check. The memo should include the following information: identification of all parties, identification of the intake attorney, all relevant administrative details, a statement of the case and a description of the work to be performed. In addition to serving as a further updated conflicts check, circulation of this information allows everyone in the office to pool resources and thus contribute to the efficient handling of the matter. It also serves as a warning against accepting a subsequent matter that would require advancing a theory or position that would be contrary to the new client's interests.

A current and complete database enables the firm to identify and advise clients of relevant changes in the law affecting their cases. Such a system also permits the firm to analyze the strengths and weaknesses of certain practice areas and to address them through education, improved planning and revised procedures.

It is important to remember that a conflicts-checking system is only as good as the people who use it. It must be used rigorously and consistently to be effective. The database must be checked and updated every time a new case is accepted. New matter memos must be circulated and returned to the intake attorney in a prompt fashion and must have affirmative documentation confirming their review by all attorneys and staff.

Trap #7: Inappropriate Involvement in Client Interests

A lawyer's inappropriate involvement in a client's entrepreneurial interests raises conflict of interest issues and is increasingly a significant basis for legal malpractice. This involvement can take several forms.

- Acting as director or officer of a client company.
- Investing in client securities.
- Becoming involved in one-to-one business deals with a client.
- Accepting stock from a client in lieu of a cash fee.
- Agreeing to contingent cash fees.
- Soliciting other investors on behalf of a client's enterprise.

Problems caused by these activities are many, including: (1) inadequate or nonexistent directors' and officers' insurance for the lawyer acting both as outside counsel and director of a company; (2) vicarious liability of the law firm for the acts of a firm member serving as a director or officer of a client company; (3) higher standard of care and due diligence imposed under federal securities laws on a director who is also the company's lawyer, as compared to a director who is not the company's lawyer; (4) weakened defense to a malpractice claim by third parties in cases where a lawyer is also a director of the company and (5) serious conflict-of-interest issues arising out of a lawyer or law firm's personal involvement or investment in a client's business interests.

Robert E. O'Malley, vice chairman of the Board and Loss Prevention Counsel for Attorneys' Liability Assurance Society, suggests six commandments for lawyer involvement in client interests.

- Do not permit any partner or employee of the law firm to serve as chair, president, chief executive officer, chief operating officer, chief financial officer or general partner of any publicly held client.

- Do not permit any partner or employee of the law firm to be a director or officer of a start-up company that is financing itself with an initial public offering where the law firm is securities counsel to the company or the underwriter.

- If the law firm is acting as securities counsel to the issuer or the underwriter in an initial public offering under the Security Act of 1933, neither the firm itself nor any partner or employee of the firm should invest in the underwriter's original allotment (as distinguished from the aftermarket).

- If the law firm is acting as securities counsel to the issuer in any public offering under the Security Act of 1933, the firm should not agree to accept any part of the stock in lieu of a cash fee.

- If the law firm, partner or employee of the firm owns securities of a company that is about to make an initial public offering, the law firm should not act as securities counsel to either the issuer or the underwriter, unless such securities are redeemed prior to the offering or are "locked up," so that there is no possibility of a quick windfall profit for the firm or any of its partners or employees as a result of the public offering.

- If the law firm is acting as securities counsel to the issuer or the underwriter in any public offering under the Security Act of 1933, the firm should avoid any advance agreement whereby a substantial portion of its fee is explicitly contingent on the marketing of the offering.

Trap #8: Lack of Adequate Documentation of Work

Insufficient documentation of work accounts for many of the client relations and missed-deadline errors associated with legal malpractice claims. Simple office procedures can prevent many of these errors from occurring. Each firm or practice should have in place a system for checking the accuracy and content of all outgoing documents, such as letters, briefs, contracts and motions. The system should include provisions for cross-checking of these matters by more than one person.

Good file management should include maintaining a file on all documents prepared or received by the lawyer for each client matter. Telephone messages and memoranda should also be logged for future reference. Daily filing procedures help to ensure that information is not lost and is available when needed. Office files should be reviewed regularly to avoid missing deadlines and to ensure that the system is performing as intended.

As the practice of law keeps pace with our evolving paperless world, the importance of administrative details - the seemingly menial side of a law practice - becomes more important, not less. Consideration of how electronic files will be stored, backed up, kept secure and retrieved is essential to an efficient office operation. Consciously designing a uniform computer filing system, reviewing it regularly and updating it often to assure that files are maintained confidentially and retrieved easily, is critical. Making certain there is a relatively current back up copy of all data and programs, which is

kept at all times in a secure place outside the office, is mandatory to this evolving paperless computer driven world. Adhering to these measures will permit prompt resumption of work should a catastrophe occur, and will assure attorneys' compliance with their obligations to safeguard client information.

Trap #9: Zealous Efforts to Collect a Fee

Fee disputes are at the heart of a significant percentage of all legal malpractice claims brought against attorneys each year. Typically, the attorney sues the client for unpaid fees and then is countersued for legal malpractice. In some cases, merely mailing a final bill triggers a threat of legal malpractice. In order to avoid fee disputes, use of the following rules in billing and collecting fees for legal services is important.

Don't accept clients who cannot afford your legal services: It is a lose/lose situation to take on a client who is overly concerned about fees and who ultimately will not be able to pay his or her legal bill. If you represent such clients, you will be torn between putting in the required number of hours and minimizing the final costs. Learn to say "no" to these clients.

Written fee arrangements: Consider documenting fees and the scope of work to be done in all matters. Doing work without a written agreement should be extremely rare. Each engagement letter or contingent fee agreement should contain a clear explanation of the legal fees that will be charged for the work to be performed. Any restriction on the scope of work must be detailed in this agreement. In addition, be specific and itemize the types of out-of-pocket expenses for which the client will be responsible, such as filing fees, court costs, expert witness fees, photocopying charges and computer research. Clients are often astonished by the amount of out-of-pocket expenses incurred on their behalf. Finally, it is inadvisable to adopt a new fee structure or draft a subsequent fee agreement while the client's matter is pending.

Bill on a monthly basis: Attorneys who charge an hourly fee should always bill the client on at least a monthly basis, unless the client has specifically requested another arrangement. Avoid billing the client at the project's completion, unless the total cost of the representation has been agreed upon in advance. The key to hourly billing is to send bills and collect your fees on a frequent basis in order to avoid large, unexpected bills. For improved client communication and satisfaction, it is good practice to send a zero balance bill on occasion, along with a note indicating why no charges were made in a particular month, and advising that you are proceeding on the case.

Detailed billing statements: Provide detailed billing statements that describe the work performed by each attorney or paralegal on a daily basis and how long it took. Entries such as 20 hours for "research" are unacceptable. Rather, the entry should read "research state case law on piercing the corporate veil."

Daily time entries: Every attorney and paralegal that bills on an hourly basis must record his or her time on a daily basis. Keep a time sheet or pad of paper next to your desk on which you record your work or make regular entries in the computerized timekeeping system. It has been proven that attorneys fail to record all of their time more often when regular timekeeping is not required. Require each attorney to submit his or her time sheets for the preceding week every Monday morning.

Review all bills: The attorney responsible for the case or matter should review each bill for errors before it is mailed to the client. In addition to looking for errors, an ongoing assessment of the charges and the value received for the work should be made. If the time expended was greater than what would have been spent by an attorney with experience in the area, consider writing off some of the time.

Copy the client on all meaningful correspondence and other materials relating to the client's matter: Ask yourself who is more likely to pay his or her bill? Choice A: the client who has not received a single sheet of paper from the attorney in three months. Choice B: the client who receives informational copies from the attorney on a regular basis. It is equally important, however, to avoid forwarding a mass of paper to the client that confuses rather than communicates. Be sure the office and the client understand from the outset what communication is necessary and desirable. Follow the agreed upon plan, straying only to send more not less, and never allowing a copy to go to the client that is not explained by prior developments or an attached note.

Take prompt action on accounts in arrears: This is the single biggest mistake that attorneys make with respect to fee disputes. Most attorneys joined the legal profession in order to practice law, not to collect delinquent fees. Unfortunately, the client who cannot pay a fee today is not likely to pay it tomorrow. The key to being paid is no secret. The key is doing the unpleasant, that is, working on past due bills early and with conviction.

First, the firm's partners should review all past due accounts on a monthly basis. Be sure that engagement letters and contracts of employment state the consequences to the client for failing to stay current with the legal fees, such as withdrawal conditions. Next, the partner responsible for a matter in arrears should contact the client and inform him or her that the firm will withdraw from the matter or enforce the other stated conditions if the past due fees are not paid within a stated grace period. Although courts place many restrictions on withdrawal, the vast majority of clients with fee payment problems who start off paying slowly become even slower at time goes on. Exercising the firm's withdrawal or other options early in the matter is far more likely to produce the desired results.

Beware of clients who promise you money "next month." It usually does not materialize. The moral of the story is that it is better to withdraw and cut your losses when you are owed $1,000 than wait in hopes of payment only to find yourself suing later to collect a $10,000 arrearage.

Some firms have begun to accept credit cards for fees. This may be a good option but should be examined carefully. Among other concerns, there is the need to account for the issuing bank's fees. For example, if an advance for fees is charged to a credit card and the credit is given to the client by depositing it into the client trust fund, the trust fund must equal the gross amount of the card charge, not the net you will receive. In some cases this will necessitate a deposit in addition to what is received on the account from the bank.

Never sue for fees: Establish a strict policy against suing for fees. If you cannot work out a realistic payment plan with the client, consider other alternatives such as arbitration or mediation. If you are tempted to sue for fees, consider this: the counterclaim for legal malpractice usually seeks an amount far in excess of the legal fees in dispute. In a recent case, a sole practitioner sued his client for $9,000 in legal fees and received a counterclaim for an amount in excess of $250,000. In the vast majority of these cases, the attorney ends up dropping his fee suit to get rid of the malpractice claim.

Collect retainers: If you are having difficulty collecting fees on a regular basis, require a retainer fee up front. If the client takes his or her business elsewhere because you were realistic in setting the fee and in asking for a significant percentage of the fee as a retainer, this may be a client you are better off not having. The area with the largest accounts receivables is family law. The family law attorneys who are most successful in being paid promptly have well-crafted retainer agreements which require the client to maintain a certain amount on deposit and allow the attorney to withdraw if fees are in arrears.

Have another attorney do a thorough, objective file review: There are times when, regardless of having obtained a retainer up front, an increasing number of unforeseen hours is spent on a case that outstrips the initial retainer funds. If this occurs, and even if the client has no intention of paying, it is a good idea to have an independent attorney (preferably a senior member of the firm or a member of the local bar skilled in the practice area and in duties owed clients) review the case to assess whether due diligence was performed. Once a client is in your pocket for a significant sum, it is nearly impossible to be objective about the file and the work that you have done for that client.

Call the client: Far more success results from personal telephone calls from the attorney to the client than from letters from the accounting department or collection agency. Even if the client steadfastly refuses to pay the bill, at least you have made a good faith effort to collect and if there is any client dissatisfaction, most likely your conversation has yielded that information. Keeping in mind that the precipitating factor for a professional liability claim is the perception of the client more than the reality of the facts, information from the call may provide a good indication as to whether further collection efforts are warranted.

If you decide to pursue collection activity, never do this work yourself: One of the most important services provided a client in an attorney-client relationship is the objectivity of a knowledgeable third party whose goal it is to protect his or her client's interests. Avail yourself of the benefits of an attorney-client fee dispute specialist who can be objective and mediate concerns that may arise.

Trap #10: Unwillingness to Believe You May be Sued for Malpractice

In spite of all the publicity that legal malpractice claims have received in the past few years, many attorneys believe erroneously that either because they perform adequately for their clients, or they know their clients so well, they will never be the targets of a malpractice claim. Trends in the frequency and dollar value of claims suggest otherwise. At present attorneys in private practice have between a 4 percent and 17 percent chance of being sued for malpractice each year depending on the jurisdiction and the nature of their practices.

As the law becomes more complex, the standard of care does not decrease. Lawyers must continue to study the law through reading, attending CLE seminars, consulting with experts on difficult legal issues and researching issues that need to be addressed by their clients.

While you may be one of the lucky ones who are not targeted for malpractice during your career, you cannot count on it. The key to minimizing your risk is to be acutely aware of the malpractice exposure of each and every case you take on. Only by recognizing your malpractice risk and by implementing effective prevention procedures will you lessen the chances of becoming a malpractice statistic.

Washington State Bar Association

Creed of Professionalism

As a proud member of the legal profession practicing in the state of Washington, I endorse the following principles of civil professional conduct, intended to inspire and guide lawyers in the practice of law:

- In my dealings with lawyers, parties, witnesses, members of the bench, and court staff, I will be civil and courteous and guided by fundamental tenets of integrity and fairness.
- My word is my bond in my dealings with the court, with fellow counsel and with others.
- I will endeavor to resolve differences through cooperation and negotiation, giving due consideration to alternative dispute resolution.
- I will honor appointments, commitments and case schedules, and be timely in all my communications.
- I will design the timing, manner of service, and scheduling of hearings only for proper purposes, and never for the objective of oppressing or inconveniencing my opponent.
- I will conduct myself professionally during depositions, negotiations and any other interaction with opposing counsel as if I were in the presence of a judge.
- I will be forthright and honest in my dealings with the court, opposing counsel and others.
- I will be respectful of the court, the legal profession and the litigation process in my attire and in my demeanor.
- As an officer of the court, as an advocate and as a lawyer, I will uphold the honor and dignity of the court and of the profession of law. I will strive always to instill and encourage a respectful attitude toward the courts, the litigation process and the legal profession.

This creed is a statement of professional aspiration adopted by the Washington State Bar Association Board of Governors on July 27, 2001, and does not supplant or modify the Washington Rules of Professional Conduct.

RPC RULE 8.3
REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judges fitness for office should inform the appropriate authority.

(c) This Rule does not permit a lawyer to report the professional misconduct of another lawyer or a judge to the appropriate authority if doing so would require the lawyer to disclose information otherwise protected by Rule 1.6.

Comment

[1] [Washington revision] Lawyers are not required to report the misconduct of other lawyers or judges. Self-regulation of the legal profession, however, creates an aspiration that members of the profession report misconduct to the appropriate disciplinary authority when they know of a serious violation of the Rules of Professional Conduct. Lawyers have a similar aspiration with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] [Reserved.]

[3] [Washington revision] While lawyers are not obliged to report every violation of the Rules, the failure to report a serious violation may undermine the belief that lawyers should be a self-regulating profession. A measure of judgment is, therefore, required in deciding whether to report a violation. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made whenever a lawyer's conduct raises a serious question as to the honesty, trustworthiness or fitness to practice. Similar considerations apply to the reporting of judicial misconduct.

[4] [Washington revision] This Rule does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] [Washington revision] Information about a lawyer's or judge's

misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, there is no requirement or aspiration of reporting. Admission to Practice Rule 19(b) makes confidential communications between lawyer-clients and staff or peer counselors of the Lawyers' Assistance Program (LAP) of the WSBA privileged. Likewise, Discipline Rule for Judges 14(e) makes confidential communications between judges and peer counselors and the Judicial Assistance Committees of the various judges associations or the LAP of the WSBA privileged. Lawyers and judges should not hesitate to seek assistance from these programs and to help prevent additional harm to their professional careers and additional injury to the welfare of clients and the public.

Don't Take It Personally: High Conflict Personalities Don't Realize They're Jerks

by Mercedes Riggs

We've all struggled with difficult people who have high conflict personalities. I can think of several former clients and a past boss or two who tended to lash out and try to shift the blame when something happened that they didn't like. Recently, I spoke with Bill Eddy of the High Conflict Institute about high conflict personalities (HCP) and some methods to make interacting with them a little easier.[1]

Characteristics of High Conflict Personalities

Eddy describes a high conflict personality as having four characteristics: 1) "all or nothing" thinking; 2) an excessive amount of emotions that they haven't managed; 3) an excessive amount of extreme behavior; and 4) a preoccupation with blaming others. These characteristics are an unchangeable part of their personality. HCPs aren't aware of their behavior; they think they do what's normal and necessary. HCPs believe that they do what needs doing in a particular situation and that the situation justifies their behavior. Meanwhile, people around them often perceive this behavior as extreme and unjustified.

According to Eddy, there are other behaviors to watch out for when dealing with HCPs. First, HCPs tend to lie more than the average person. HCPs distort information and believe their distortions. Not all HCPs are liars, and some may be obsessively honest. In general, though, Eddy notes that HCPs tend to shade the truth knowingly — so don't take everything that they say as accurate.

Second, watch out for cognitive distortions, which are extreme and inaccurate negative thoughts, including all-or-nothing thinking, jumping to conclusions, "mind reading," emotional reasoning, exaggerated fears, and projection. For example, HCPs project onto other people what they really think and feel. If they say that the other side lied and plans to leave town without paying their bills, it may in fact be the HCP who thinks that way.

Third, HCPs are also frequently guilty of "splitting," which is the tendency to see other people as extremely good or extremely bad. This view helps drive HCPs' behavior, including their work as attorneys. HCPs tend to imagine that the other person did awful things, when in fact they have not. Since these cognitive distortions are unconscious, discerning what is true and what is distorted may be extremely difficult. Trying to reason with an HCP may feel like hitting your head against a wall.

Zealous Advocate vs. High Conflict Attorney

There is a difference between a zealous advocate and a high conflict attorney. A zealous advocate turns his adversarial nature on and off as needed, but high conflict counsel can't turn off this integral part of his personality. For example, a zealous advocate emphasizes the opposing side's bad behavior in court, but can find common ground when necessary, such as when trying to settle.

In contrast, high conflict counsel can't switch back and forth; they want to blame the opposing side at all times. High conflict counsel might do things like refuse to talk, or slam down the phone and hang up on the person they've been speaking with. High conflict counsel might also avoid settlement discussions, since they are constantly stuck in the adversarial mindset. Most communities and areas of practice have about six or eight lawyers who are HCP and aren't aware of it — they think they are special; that they are heroes. In reality, these high conflict lawyers just don't have the ability to negotiate and turn off the adversarial part of their personality.

How to Deal with High Conflict Personalities

According to Eddy, you can calm high conflict personalities by giving them an "E.A.R": Empathy, Attention, and Respect.[2] HCPs need this, and giving someone empathy, attention, and respect does not cost anything. Undoubtedly, there are times when you will feel like strangling the HCP in your life, but if you treat her with E.A.R, you will be able to calm down. When dealing with HCPs, Eddy says not to try to give them insight into their own behavior, because it might make them highly defensive. They just won't get it. Instead, swallow your pride and focus on your relationship with the person, and getting the best result from your interactions.

When it comes to high conflict clients, Eddy recommends heeding advice that he learned as a therapist — "Don't work harder than your clients." You should also involve your HCP clients in the decision-making process, and allow them to choose from various courses of action. First, you want to educate your high conflict clients and explain things thoroughly. Next, you need to find tasks for them. Furthermore, you should talk to your high conflict clients about con-

sequences of their behavior and decisions. You should say in a non-threatening way, "You may not realize it, but if you take this course of action, you may look bad, and you may lose." Otherwise, if you don't involve the HCP in the work and the decision-making process, they may blame you for the result. The more you involve your clients in decision-making, the less they are likely to turn on you when things go wrong.

Conclusion

As a young attorney, it is important to consult with more experienced attorneys regarding other techniques in managing HCPs. It is also important to honestly assess your own behavior to determine whether the conflict is of your own making, rather than the product of a high conflict personality. Remember to tell yourself that you aren't responsible for their outcome and that, ultimately, you're responsible only for doing your job. You need to remember that it's not about you, and that the HCPs' blaming behavior is part of their personality — they do this to almost everyone they interact with.

Your approach to dealing with high conflict personalities should be the same, regardless of whether the person is an attorney or client, boss or subordinate. Although you might want to throttle someone with a high conflict personality, at the end of the day you just need to remember that it's part of who they are and to not take it personally. Using some of the techniques discussed above can help you take a step back from the HCP's bad behavior and to make real progress in your interactions. ◊

Mercedes Riggs lives in Vancouver, WA, and recently started her own practice. She can be reached at riggs.mercedes@gmail.com.

Notes

1. Eddy is one of the co-founders of the High Conflict Institute and was a therapist before he became an attorney. He developed the High Conflict Personality Theory after dealing with years of high conflict disputes. His website, http://billeddyhighconflictinstitute.blogspot.com, has articles and other resources on how to deal with high conflict personalities.

2. To learn more on calming HCPs down with E.A.R., read Eddy's article at http://ezinearticles.com/?Calming-Upset-High-Conflict-People-With-EAR&id=5860266.

The Cap on Attorney Fees: A Primary Obstacle to Protecting Prisoners' Civil Rights

by Nathan Nanfelt

Sometimes good intentions are not enough. A case in point: the Prison Litigation Reform Act (PLRA). Congress enacted the PLRA primarily in response to a growing number of prisoner filings, which burdened an already cash- and time-strapped judicial system. However, the PLRA has not stemmed the tide of frivolous filings as planned; rather, it has created substantial obstacles for prisoner litigants seeking to obtain legal representation. By capping attorney fees, the PLRA removes the financial incentive for attorneys to take prisoner civil rights cases. Consequently, in many instances, the courts — not attorneys — manage prisoner civil rights cases, and most prisoner litigants navigate the complex court system without the benefit of an attorney. It doesn't have to be this way.

The Problem

The PLRA allows an award of attorney fees "[w]henever a monetary judgment is awarded in [an action brought by a prisoner]."[1] Attorney fees are capped at 150 percent of the monetary judgment awarded to prisoners, which doesn't amount to much if, for instance, a prisoner is awarded only nominal damages of a dollar.

Seeking to avoid this harsh result, several circuits, including the Ninth Circuit, have interpreted the relevant statute to limit attorney fees whenever only damages are awarded. Under this interpretation, when the court grants injunctive relief, it may award reasonable attorney fees that are not contingent upon any amount awarded to the prevailing prisoner.[2] However, even the Ninth Circuit's interpretation does not provide a legal basis for awarding reasonable attorney fees in cases where no injunctive relief is awarded. The effect of requiring an award of damages or injunctive relief as a pre-condition for an award of attorney fees is that, pro bono cases notwithstanding, fewer attorneys take prisoner civil rights cases.

In addition to deterring attorneys from taking prisoner cases, the PLRA cap on attorney fees also burdens courts. With fewer attorneys getting involved in prisoner cases, prisoners proceed *pro se* and are forced to rely solely on the courts to process their claims. Courts handle a large volume of prisoner cases and therefore require a large staff to cope with the problem. The high ratio of frivolous-to-meritorious cases exacerbates the problem. In 2010, nearly one in three cases filed in the Ninth Circuit was a prisoner civil rights case; the vast majority did not settle or go to trial.[3] As one justice commented, "It must prejudice the occasional meritorious [prisoner] application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[4]

The Case for Eliminating the Cap on Attorney Fees for Prisoner Cases

In many other areas of civil litigation, plaintiffs' attorneys screen and manage cases, weeding out frivolous ones before they are ever filed. For instance, plaintiffs firms offer free consultations to potential clients as a way of determining which cases have merit. Attorneys compete for cases according to their likelihood of success. Eliminating the PLRA cap on attorney fees will bring back the financial incentive, and attorneys will compete to represent prisoners based on the merits of the alleged civil rights violations.

Eliminating the PLRA cap on attorney fees benefits courts as well. By replacing the cap on fees with the usual attorney market incentive structure, prisoner litigants can focus on securing effective representation rather than on attempting to litigate complex claims on their own. With potential claims directed to attorneys rather than to

Civility: The Preservation of Access to Justice

BY RONALD R. WARD

An immigrant person who does not speak English, or speaks it only with limited facility, facing an unwarranted and unlawful eviction and having no place else to turn, musters the courage to approach a courthouse counter, unaware that the clerk cannot give legal advice. The clerk — all too human in his reality — under the increasing pressure wrought by decreased justice system funding, an ever-increasing workload, and a line of people stretching out the door, responds abruptly and impatiently. The person is alarmed, fearful, dispirited — and walks away. She never seeks legal advice and she and her family are ultimately evicted from their home.

For many in our society, the mere act of entering a courthouse is something to be feared, let alone availing oneself of the potential justice to be acquired there. Those persons can include, but are not limited to: parents who desire custody of their children to protect them from a household with domestic violence and/or child abuse; elderly people who are fraudulently swindled out of their homes by predatory lenders; families who are denied essential support services (e.g., health insurance for their children) to which they are legally entitled; people with developmental disabilities who are unlawfully evicted from their housing; and many others.

There are myriad reasons that may spawn a barrier to access to justice: lack of education, unawareness of rights, inadequate economic means, inequality of economic resources, and, yes, the incivility at times found within the justice system itself.

Incivility of legal counsel — manifested by those who think that to be obnoxious, or abusive, or intimidating is to be effective — can rank high in the primacy of obstacles to the attainment of access to justice.

Most of us came into the law envisioning it as what it is: a noble profession that improves people's lives; resolves disputes peaceably; improves the quality of life; and is a vehicle to heal the community. It is not intended to be an incivility vehicle which brutalizes everything it touches: clients, judges, and other lawyers. Our societal role as problem-solvers, advocates, guardians, teachers, counselors, and leaders requires us to seek justice and find reasonable solutions to conflict for all.

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Public trust and confidence in our courts is critical to our nation's civic health. Our courts must be fair, open, and protective of the rights of every individual, and they must be perceived by the public to be so. Sadly, this is increasingly not the case. Ongoing surveys indicate it is not just specific groups of people who see inequality. It is the public at large.

Even so, people from all over the globe continue risking everything, even their very lives, to reach American shores. One of the primary reasons (aside from economics) is their perception of this justice system and the access to equal justice which it offers. People *do* — and *should* — expect the very best of all of us, lawyers and judges alike, in terms of our competence, humanity, civility, and our commitment to equal justice; and we should be ever ready to provide this and no less.

In January 2010, I read an article in which Kent Hickey, principal at Seattle Prep School, talked about *curis personalis*, Latin for "care for the person." He said, "The words are meaningless unless they are lived, even if living them out is difficult or unpopular. When we voice a commitment to *curis personalis*, but then pick and choose to whom we should extend our care, then I would question our real commitment to this principle." I respect and embrace Mr. Hickey's sentiment. It compellingly applies to the concept of equal justice and the question of whether we as a society will achieve *recognition* of our *shared* humanity; whether we will achieve the reality that *each* person in this country has *equal worth*. It often starts with civility.

Lawyers are leaders in this society and will continue to be, to the degree we focus on our role as problem-solvers, on serving our clients and society, and on the core values of the profession. Those core values are truth, integrity, and honesty. We need an ongoing unified commitment from lawyers to advance the interests of the profession, with primacy on achievement of access to justice. We can advance access to justice by doing pro bono work, by considering the economic costs of litigation, and by treating all parties with care and respect as we work towards fair outcomes. We have an obligation to our clients and to the justice system to search for justice. We must use consciousness, creativity, and community to foster and maintain the civility that will spawn the truth and assure the success of our quest.

Ronald Ward is the current president of the Washington State Bar Foundation, former president of the Washington State Bar Association, a member of the Advisory Council of the Washington Equal Justice Coalition for the provision and support of legal services to deprived citizens, and the founder of the nationally honored WSBA Leadership Institute.

Professionalism in the Courtroom

Judge John Erlick offers practical advice on protocol and professional courtesies expected of counsel

BY JUDGE JOHN P. ERLICK

If you Google the phrase "lawyers and professionalism," you get about 1,620,000 hits. That's a lot of commentary. The purpose of this article is not to debate academically what is or is not professional conduct on the part of attorneys, but rather to provide a more practical guide based on one judge's perspective from the bench. Defining professionalism may be done using a multiplicity of sources, including the Rules of Professional Conduct (RPCs), which set a minimum standard of conduct, and the local culture in the courtroom, and within the bar.

Local culture or protocol is important to understand, because expected courtroom conduct varies greatly. For example, I recently returned from observing a trial being held in Old Bailey, London's criminal courts, where the barristers bow to the judge when entering the courtroom and refer to the judge as "Your Lordship." While those customs are not observed here, counsel in our local federal courts must stand at a podium when addressing the court or examining witnesses, a requirement generally not imposed in our state trial courts.

What *does* our culture expect of counsel appearing in our courtrooms? Again, that culture may vary from courtroom to courtroom across the state. Nonetheless, there is some uniformity of protocol and professional courtesies expected from counsel. At minimum, counsel should at least consider these issues when appearing in superior court.

Professionalism and the jury

Don't waste the jurors' time. Remember, they are taking time away from their jobs, their families, and their lives to hear your case. When you're late returning to court from recess, you're holding up the judge, the lower bench, opposing counsel and other parties, and 12 jurors (plus alternates). Along these same lines, make sure you have your witnesses ready to testify. It is better to have one witness waiting in the hallway for 20 or 30 minutes than to hold up the entire courtroom because your witness is late or a prior witness's examination concluded earlier than you had anticipated.

Respect jurors' privacy. When I first started practicing law, it was not uncommon to inquire about a juror's religion during *voir dire*. Conventional wisdom among jury consultants was that Methodists would decide tort damages differently from Baptists or Jews. We have (thankfully) moved on from that type of blanket stereotyping. The point is that before you ask a sensitive personal question of the jury panel or individual, ask yourself whether you truly need that information for this case and what you will do with the information. Most judges will provide for prospective jurors to discuss highly personal matters outside the presence of the others. If you sense a would-be juror's discomfort responding to a particular question, it may be appropriate to assuage his or her concerns by offering that option.

Limit your sidebars and requests that the jury be excused. Sidebars and excusing the jury are sometimes necessary, particularly when you have to address evidentiary issues. However, repeated sidebars and excusing of the jury can be disruptive to the proceedings and annoying to the jurors. Ask yourself whether the objection you have in mind is one you could make for the record in open court while the jury is present, and then reserve supplementation of the record or further argument until the jury is excused for a normal recess.

Respect the jury's "space." In state courts, you are generally free to move about the courtroom. However, in doing so, you should respect the jury's space in the jury box. Don't approach right up to the jury box and don't lean into it.

Don't say, "I'll be brief" when you're not going to be. Attorneys rely on their credibility, particularly before juries. When you say, "I'll be brief," and then launch into a 45-minute soliloquy, what is that communicating to the jury?

Be realistic about the length of your case. Jurors plan and rearrange their lives around the representations of counsel that a case will last a certain period of time. They have to arrange for child care and absences from work, not to mention rescheduling personal appointments and trips. It is better to

be realistic on the length of a case. On the best of days, there are five hours of trial testimony. That assumes no interruptions and no delays in witnesses, the jury, or counsel. Generally, with a four-day trial week, that computes to a maximum of 20 hours of trial testimony. A good exercise is to map out all the anticipated witnesses in a case beforehand. Estimate the length of each direct, cross, and re-direct examination. In civil cases, you will need to add time for questions from the jury. Then add time for jury selection, opening statements, and closing arguments. You may need to take time during the trial day to work on jury instructions (although I typically attempt to work with counsel on those after hours). This will give you a rough estimate of how long your case may actually be.

Professionalism and witnesses

Don't interrupt a witness or cut off the witness's answers. Time and again, I've seen attorneys abruptly cut off a witness who is legitimately trying to explain or elaborate upon an answer. Of course, there are circumstances where a witness veers off course, rambles, or is nonresponsive. In those situations, it may be appropriate to ask the court to strike or repeat the question and instruct the witness to answer it. However, too often I've observed an attorney attempt to cut off a witness in mid-sentence. It comes across at minimum as rude — and as trying to keep something from the jury as if you were afraid of what the witness is going to say. Also, when two people are talking at the same time, the record gets compromised.

Don't hover over the witness. I doubt if many attorneys have actually sat in the witness chair during a trial. For parties and lay witnesses unfamiliar with the courtroom setting, it can be a daunting, intimidating experience. If you must approach an adverse witness to hand him or her an exhibit, ask to approach, and then step back. Stepping back during examination lowers the tension and shows respect.

After a witness has answered, don't add gratuitous editorial comments. Proper procedure is to ask a question and let the witness answer. I had one case in which I had to admonish counsel because he repeatedly would comment after a witness's answers with phrases such as, "Oh, I see," or "So that's your answer." It's inappropriate and unprofessional.

Professionalism and opposing counsel

In the heat of litigation, emotions and zealous advocacy sometimes get the best of an attorney. I've rarely seen aggressive conduct be effective in the courtroom. Rather, respectful and reasoned presentations are much more persuasive. This means not interrupting your opposing counsel's argument. You'll have your opportunity to respond. That's the appropriate time to address the points opposing counsel has made with which you disagree. In addition, whether the court has a court reporter or is recorded, interruption of counsel, witnesses, or the court compromises your record. If you have a court-reported courtroom, the reporter is likely to advise counsel that he or she cannot report with two people talking simultaneously. With a video or audio taped recording, you get no such warning and the recording may be garbled.

Don't address your arguments toward opposing counsel. Don't turn to him or her and state, "I did so provide those documents to you." Such conduct rapidly turns up the heat in the courtroom; it personalizes an attack on counsel. Proper practice and common courtesy is to address the court. Direct colloquy with counsel during argument is inappropriate.

Professionalism and the lower bench

Know who they are and what they do. The court clerk handles the exhibits, records the minutes, and assists attorneys with trial notebooks and numbering and marking exhibits. If the courtroom has an audio or video tape record, the clerk is in charge of that. The bailiff does the judge's scheduling; answers the phones; coordinates motions and hearings; manages juries; and coordinates trial readiness, pretrial conferences, and trial calendars. If the record is not automated, the courtroom court reporter creates the official record.

During trial, please understand that while the bailiff and the clerk are there partly to assist you, they still have their other courtroom responsibilities such as managing the jury, answering phones, and assisting the judge. Please don't ask the lower bench to make copies for you. Also, our phones are extremely busy. To keep the lines available, we ask that you not use the court phones.

Professionalism and the court

When addressing the court, please don't refer to us as as "Sir" or "Ma'am." Reserve that for your parents or commanding officer. The proper way to address the Court is "Your Honor" or "Judge _____." (Until one of us starts wearing a powdered wig, "Your Lordship" would be entirely unwarranted.) Some judges prefer that attorneys stand when addressing the court. Find out whether the judge before whom you are appearing has such a preference and what other protocols apply in that courtroom. The bailiff will be familiar with the judge's preferences in this regard, or they may be posted on the judge's website.

When we've ruled, we've ruled. If you truly need clarification of a judge's ruling, you may ask for it. But don't use it as an opportunity to re-argue your motion. Similarly, as is my practice, if the judge asks whether there are any questions, this is *not* an invitation to continue arguing or to re-argue your point. Once we've ruled, if you want further relief, you have the option of a motion for reconsideration.

Be prepared. Know your case law, your exhibits, and your record. As judges, we do our best to prepare for oral argument on motions and trial issues. That said, during argument, counsel often refer to particular evidence or facts. You should be prepared to cite specifically in the record where we can find it. That makes for a much more efficient hearing. If it's not in the record, we can't rely on it in our decision.

Conclusion

The above is one judge's perspective on professionalism in the courtroom. It is not exclusive or comprehensive of all issues involving professional conduct in the courtroom. I suspect an entire edition of *Bar News* could be devoted to the topic. Another edition could be devoted to attorney professionalism outside the courtroom. And I'm confident that other judges would have different perspectives — and different priorities than those I've discussed above. I also believe there are some universalities about professionalism in the courtroom — courtesies toward the lower bench, respect for the jury, patience with witnesses, and civility toward opposing counsel. As for the court, the best guidance I can give is to know your judge and the judge's courtroom.

Judge John P. Erlick was elected to the King County Superior Court in September 2000, after concentrating in private practice on defense of professional liability cases. He is currently the King County Superior Court chief civil judge. He serves on the State Commission on Judicial Conduct and chairs the Superior Court Judges' Association (SCJA) Ethics Committee. He previously served as the SCJA appointee to the State's Ethics Advisory Committee. Judge Erlick teaches as an adjunct professor at Seattle University School of Law in professional responsibility and the judicial externship seminar.

Incivility: A View from the Bench

By Judge Richard McDermott

Over the past few months I have been asked to speak at a number of seminars or continuing education meetings on the topic of "Incivility: A View from the Bench." At the beginning of the year, it seems to me that this is a good time to examine our own conduct and make changes if necessary.

First, let me say that the vast majority of attorneys are professional and well behaved. However, my colleagues on the bench and I are observing a trend that is alarming and definitely creates cause for concern - an increasing rudeness and willingness to stretch the truth combined with a basic mistrust of our fellow members of the bar. Perhaps it is a sign of society.

I have always thought that the way lawyers act is often dictated by the way society behaves and the consequent pressures placed upon us to win at any cost. Remember the last election campaign when truth and honesty were somehow forgotten values and the public was left with the impression that fabricating facts and misrepresenting history were acceptable conduct. Please understand that this is not acceptable and that we expect attorneys to adhere to a much higher standard of conduct.

The Rules of Professional Conduct have no specific rule that says, "Treat each other with civility," but there are many RPCs that certainly require it. Yet we see unacceptable behavior routinely. I asked several of my colleagues on the King County bench to send me examples and I was flooded with responses.

Several include arguing with the judge after a ruling has been made, and setting a deposition when one attorney knows the other is going to be out of town (when proper notice had been given), then making a motion for terms when the vacationing attorney failed to appear (even though they had confirmed that they were out of town and not available). Sending mountains of interrogatories and then making a motion to compel when the requesting attorney knows that completion within the given time period would have been impossible is a favorite. Another is when attorney A copies the overly burdensome set of interrogatories sent by Attorney B and serves them back on Attorney B. Of course one of them objects to the discovery as overly burdensome.

A frequent flyer for us is what we lovingly refer to as a "speaking objection." Karl Tegland in *Washington Practice* seems to have missed this one, but many of you adopt it as part of your standard repertoire. You know what I'm talking about: During trial an attorney objects by telling you whatever information he or she feels is important regardless of the rules of evidence. It is mildly objectionable if this is done only in a non-jury trial, but when this is done in front of a jury, it creates potential grounds for a mistrial.

Several years ago I called two senior litigators into my courtroom because they had several discovery disputes that to me seemed ridiculous. They were not willing to budge off their positions. I thought there was plenty of room for agreement. I suggested they go into my jury room to confer and reach an accommodation. Four hours later they were still at a stalemate. It was 5 p.m. I called my wife in front of them and had her cancel our dinner plans and told them I was prepared to stay until Monday if necessary (it was Friday evening) and that they were not going to leave until an agreement was reached. One of them had an important dinner engagement. I told him I did not care. They were staying. Fifteen minutes later an agreement was magically reached.

Truthfulness can sometimes be a lost concept. I experienced an attorney who told me in open court that he was out of town on an emergency business trip (which is why he missed his hearing a week earlier), while his secretary had told my bailiff that he was in Hawaii with his wife on vacation. That one cost him $1,000. Other judges have had lawyers make assertions about what previous judges said or what was previously ordered. An examination of the court file or a brief conversation with the last judge assigned to the case often discloses different information.

Recently one of my colleagues had to spend more than two hours reviewing a file and refereeing a dispute that included turning over medical records allegedly supporting a claim for exclusive visitation with the family DOG. Another judge had to enter an order concerning email communications with the judge and then that order was appealed!

Have we lost our collective common sense? What in the world are we doing?

Lawyers are special in our system of justice and should be held to a higher standard of care. To abuse that standard is simply unacceptable. It is time for us to return to the days of a handshake being a person's bond and of never even shading the truth.

I often think of my dad. If he were alive, he would have celebrated his birthday this past January 10. I remember with fondness that he told me that we only take one thing with us when we die, our reputation.

10 Tips Toward Professional Behavior . . . In the Courtroom and Out

BY JUDGE ELLEN KALAMA CLARK

I know what you're thinking — professionalism? Again? Haven't we been through this enough? I'll make you a deal. I'm not going to talk about the Rules of Professional Conduct, or the Rules for Enforcement of Lawyer Conduct, or the WSBA Creed of Professionalism. Professionalism is basically behavior, conduct, and attitude. What you do affects the public's impression of us. Lawyers once were respected and honored — that's not so much anymore.

Let's focus on two questions: How do you want to be treated by the professionals in your life, and how should we as professional lawyers treat others? Try some role reversal. Put yourself in the place of your client. Get up and walk around your desk and sit in the client's chair. Imagine yourself meeting with your doctor, the architect designing your house, or your investment counselor. What do you expect from that person?

Treat others as you would like to be treated. Here are 10 tips.

1. Be courteous and treat others with respect.

Let's say you're watching a televised debate between two candidates running for public office. One talks about her qualifications, addresses issues and ideas, and politely but firmly points out the problems in her opponent's policies. The other resorts to name-calling, innuendo, and personal attacks. Which candidate do you want representing you and making decisions about the future?

The following happened in my courtroom earlier this year — a motion for summary judgment. Responding party files responses late, no question about it. Moving party asks to strike the response. Responding party acknowledges the lateness of the documents, no excuses, asks for a continuance and offers to pay terms/fees to the moving party. *Offers to pay*. He's accepting responsibility, not blaming others, and trying to compensate for having caused a problem for the other side. So I grant the continuance and ask the first attorney for a suggestion as to his costs and fees. The story gets even better — because the attorney for the moving party says: "Your Honor, I don't want any terms. That wouldn't be very collegial." I don't think many lawyers would have taken that step. I greatly admire that attorney for his professionalism.

2. Be on time.

Don't you just hate it when you sit in the doctor's waiting room for an hour? Your time is valuable and you have other things to do. So do the people you deal with as a lawyer. Think of how many people that involves: Not just your client but the other party, the other attorney, the judicial officer and court staff in your case, and the people in the next case.

3. Be competent, knowledgeable, and prepared.

If you went to an accountant who was using a tax code book from 1998, who said, "Oh yeah, there probably have been some changes, but this is the right basic stuff," you'd go somewhere else. From where I sit, I see the look on your client's face and his reaction when you start referring to the children when they have no children. Or you say they've been married for six years when it's really been 35. You have a lot of cases, there are lots of details, and it's easy to get mixed up. But your clients lose confidence in you when you forget the details and haven't prepared.

4. Be up front about your bill.

Have you ever received a bill from a stay in the hospital, where they charge you for every little Q-tip and include countless unexplained charges? Isn't that confusing and irritating? Charging reasonable fees and clearly explaining your bills is important to you and your clients. Don't run up bills with unnecessary costs, and be sure you explain each cost so the client can understand it.

5. Solve the problem.

When you go to someone else for help, you want him to solve the problem, whether it's a medical condition, your car not working, or a hole in your roof. Address an issue when it first comes up, rather than putting it off. It is entirely professional to say: "I don't know. I'll have to check and get back to you." And make sure you do.

6. Keep your client advised of what's happening.

If people don't know what's going on, they get frightened and nervous and imagine the worst. Say you have a medical procedure. You were told you'd get the results in two or three days and a week goes by and you've heard nothing. You would think, "Oh my God, they don't want to tell me the bad

news, I must be dying." Let your client know she's not dying! Send copies of pleadings, return phone calls, and inform her of all court decisions.

One morning a couple of months ago, I had six criminal motions to hear. I took the files home the night before, read them, and was ready to go at 9 a.m. At about 8:50, an intern from one of the attorneys' offices came in and told my JA that both attorneys had to be in federal court, so that motion was being stricken. They didn't know before that morning that they had this conflict? Of course, it was the file with the most reading and most complicated issues, and I had spent the most time with it. The prosecutor showed up and wasn't told either. We were both rather annoyed, but we couldn't take it out on the poor intern. I heard the other motions, finished around 11:45, and got ready to leave the bench. A young man who had been in the courtroom all morning stood up, gave me his name, and asked about his motion. He was the client of the attorneys who had stricken the motion — they hadn't even told their own client that they weren't going to be arguing the motion!

7. Be honest.

Tell the truth, even if it's not what the client wants to hear. If you tell people only what you think they want to hear, it usually backfires.

8. Do what you said you'd do.

9. Look the part.

The world has become much more casual — casual Fridays have given way to a more relaxed appearance just about every day. Your office practice is up to you (although I might suggest that people feel better about paying you a big retainer, or $300 per hour, if you look like a lawyer), but once you come into court, remember it is still a place of rules and formality. Men have it pretty easy — coat and tie. Women have a lot more choices. This has been an issue for me and my colleagues. Are women attorneys required to wear jackets? Are short sleeves okay? When is a blouse too low-cut, and should you bring that to someone's attention? (I will be the first to admit I have no fashion sense, but since I get to wear a lovely black robe, I have it pretty easy.) If you went to the dentist and instead of one of those clean, crisp lab coats the dentist wore a T-shirt saying "Bite me" and raggedy shorts — you would think twice about letting him stick his hand in your mouth.

10. Explain things in understandable terms.

If your auto mechanic tells you, "Your OBD2 is throwing a P430 code," you're probably just going to be baffled. So if you tell your client, "We have to set a show cause and move the court for vacation of the decree pursuant to CR 60(b)(9)," he probably won't get it either. He'll be thinking, "What? I just hired this lawyer and she's already talking about vacations?" Try, "We have to go to court and ask the judge to throw out the divorce orders your spouse had the judge sign because you were in ICU after having suffered a massive heart attack and couldn't get back to Spokane to respond to the case."

The impression you give with your words and actions affects your reputation. Your reputation is all you have, and once it's set it's hard to change. Most importantly, clients talk, and they remember things. If you want to be well-respected and remembered in a positive way, be professional.

Judge Ellen Kalama Clark graduated from the Gonzaga University School of Law in 1982. She has served as a judicial officer on the Spokane County Superior Court bench for 15 years, as a court commissioner from 1993 to 1999, and as a judge since 1999.

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Incivility: An Insult to the Professional and the Profession

Joseph J. Ortego and Lindsay Maleson
AUTHORS

A perception exists that incivility, rudeness, and the use of offensive tactics among lawyers are on the rise. Two authors discuss the differences between professionalism and ethics and highlight conduct that is on the borderline between civil, zealous representation and inappropriate, unprofessional conduct. While courts and review boards may disagree on where the line should be drawn, the authors maintain that unprofessional behavior never helps a lawyer's client. They review proposals to keep incivility to a minimum and suggest that the true solution is rooted in education, awareness, self-monitoring, and conscience.

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Incivility: An Insult to the Professional and the Profession

By Joseph J. Ortego and Lindsay Maleson

If you do not already know from personal experience, unprofessional behavior comes in many different forms.

Consider the following anecdotes. Several years ago, a lawyer in Illinois was criticized by that state's review board for writing letters to opposing counsel and others using words such as "fool, idiot, punk, boy, honey, sweetheart, sweetie pie and baby cakes."[1] This same lawyer also asked correspondents to place their letters "in that bodily orifice into which no sun shines."[2] There are also cases where lawyers have made racist remarks as well as remarks insulting and degrading certain religions.[3] In a deposition in New York, a female associate was called "little lady," "little girl," and a "little mouse," and told to "pipe down," "be quiet," and to "go away" when she merely was doing her job representing a fourth-party defendant.[4]

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For many years now, there has been a perception that incivility, rudeness, and the use of offensive tactics among lawyers are on the rise.[5] Many courts,[6] columnists, legal journal authors, and conference organizers recently have focused on professionalism and civility, or the lack thereof, in the practice of law. In addition, several aspirational "civility codes" have been adopted,[7] indicating that the "legal profession deems itself to be in crisis."[8]

While both professional and unprofessional behavior can be readily identified when witnessed, various authors have attempted to define professionalism, which is also known as civility. One author, struggling with the difference between ethics and professionalism, states that "the basic distinction between ethics and professionalism is that rules of ethics tell us what we must do and professionalism teaches us what we should do."[9] The U.S. District Court for the Southern District of New York explained that "[c]ivility refers to 'more than surface politeness; it is an approach that seeks to diminish rancor, to reconcile, to be open to nonlitigious resolution.'"[10] Civility is inconsistent with "Rambo" lawyering, which includes:

- a mindset that litigation is war and that describes trial practice in military terms;
- a conviction that it is invariably in your interest to make life miserable for your opponent;
- a disdain for common courtesy and civility, assuming that they are ill-suited for the true warrior;
- a wondrous facility for manipulating facts and engaging in revisionist history;
- a hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact finding; and
- an urge to put the trial lawyer on center stage rather than the client or his [or her] cause.[11]

It seems to be easier to define incivility rather than to define civility or professionalism. Incivility has been quite concisely described as "[a]ll manner of adversarial excess. Personal attacks on other lawyers, hostility, boorish behavior, rudeness, insulting behavior, and obstructionist conduct all fall under the general rubric of incivility."[12]

The question is, then, what are the boundaries of civility? When does incivility rise to the level of the unethical, and when is it just harmless rudeness or acceptable behavior? What behavior is so egregious that it is sanctionable, and, on the other hand, what can lawyers

"get away with" under the rubric of zealous representation?[13] According to one commentator, "The courtroom is marked by a variety of boundaries that delineate sanctionable misconduct, but only some of them are bright lines. Others become visible only once crossed."[14]

Indeed, courts do not have an easy time determining what behavior is sanctionable and what behavior should be touted as zealous representation. As the U.S. Court of Appeals for the Second Circuit has remarked:

> We are cognizant of the unique dilemma that sanctions present. On the one hand, a court should discipline those who harass their opponents and waste judicial resources by abusing the legal process. On the other hand, in our adversarial system, we expect a litigant and his or her attorney to pursue a claim zealously within the boundaries of the law and ethical rules. Given these interests, determining whether a case or conduct falls beyond the pale is perhaps one of the most difficult and unenviable tasks for a court.[15]

The Second Circuit also noted in another case that the language and conduct of attorneys must be considered in the context of what is currently acceptable in public discourse, which is difficult to identify as well.[16]

This article, through example, highlights conduct that is on the borderline between civil, zealous representation and inappropriate, unprofessional conduct. While courts or review boards disagree on exactly where the line should be drawn, it is important that we use these examples and this discussion to decide what level of conduct we expect of ourselves and others. The reader should put herself in the position of the judge or the jury who is presented with the obstructive, abusive, and insulting tactics discussed below. This will inevitably lead to the conclusion that unprofessional tactics do not work, i.e., they will never help your client.[17]

Our first set of examples comes from the area of discovery abuse, especially insulting and obstructive tactics used during depositions. Depositions are significant, and oftentimes pivotal, to the process of developing the facts in a case and identifying the theory of liability or the defense that should be adopted. However, "[v]irtually all litigators know that depositions are the forum where lawyer incivility is often the rule, rather than the exception."[18] Thus, unprofessional conduct during depositions is an extremely important topic to consider.

Second, we discuss threats. Threats may be used to obtain settlement or some other desired result. Reputation or publicity may be inappropriately threatened. The examples presented show that it is difficult to identify when threatening language actually becomes unprofessional.

Third, we review some cases involving bad-faith litigation through the assertion of baseless claims, inappropriate accusations, and name-calling. This is an area where lack of professionalism seems slightly easier to identify.

After focusing on certain instances of abusive tactics, we discuss whether we can or should live with these attacks. Finally, we review some solutions that have been proposed to keep invective and abuse to a minimum, or even to eliminate them completely.

Vicious and Obstructive Depositions

Probably the most infamous example of vituperative speech and abuse during discovery is the statements, threats, and insults made by a well-known Houston plaintiffs lawyer in the high-profile case of *Paramount Communications Inc. v. QVC Network Inc.*[19] In an addendum to its opinion on the merits of the case, the Delaware Supreme Court, raising the issue sua sponte "as part of [its] exclusive supervisory responsibility to regulate and enforce appropriate conduct of lawyers appearing in Delaware proceedings,"[20] scolded the Texas attorney for "an astonishing lack of professionalism and civility that is worthy of special note."[21]

The attorney, who was neither a member of the Delaware bar nor admitted *pro hac vice*, personally represented one of the directors of Paramount, who was a witness in a deposition that took place in Texas.[22] As noted by the Delaware Supreme Court, depositions are the "factual battleground" where much of the litigation actually occurs.[23] As depositions are the device for revealing and challenging all of the factual allegations central to the case, much injustice can result from the abuse of depositions. There are several examples of the criticized attorney's abusive and unprofessional conduct throughout the deposition.

First, the attorney attempted to obstruct his adversary's ability to question the witness and peppered his attacks with obscenities and personal insults. When the witness was asked a question, the examining attorney was told that the attorney was going to "shut it down if [he] didn't go on to [the] next question." The attorney at issue then proceeded to call the examining attorney an "asshole" and warned: "You can ask some questions but get off of that. I'm tired of you. You could gag a maggot off a meat wagon."[24] After the attorneys went back and forth, the attorney told his opponent to "shut up," and that the deposition was going to end in one hour, "period."[25] He attacked his adversary's skills, commenting that he had "no concept" of what he was doing. He eventually admonished the examining attorney not to question the witness further: "Don't even talk with this witness."[26] Such abusive behavior was not new for this attorney, who once shoved another attorney into the wall outside a courtroom.[27]

The Delaware Supreme Court, viewing the Houston attorney's behavior as "outrageous and unacceptable"[28] and with "gravity and revulsion,"[29] found that he "abused the privilege of representing a witness in a Delaware proceeding" by "improperly direct[ing] the witness not to

answer certain questions," being "extraordinarily rude, uncivil and vulgar," and "obstruct[ing] the ability of the questioner to elicit testimony to assist the Court in this matter."[30] Since he was not a member of the Delaware bar and was not admitted *pro hac vice*, he was not subject to Delaware disciplinary rules or Delaware's rules of conduct.[31] Left without a clear remedy, the court invited the scolded attorney to voluntarily appear before it to explain his conduct and to show cause regarding why his conduct should not be considered as a bar to any future appearance by him in a Delaware proceeding.[32] He responded in the press with vulgarities and insults, stating, "I'd rather has [sic] a nose on my ass than go to Delaware for any reason," since, he believes, the Delaware Supreme Court has animosity for "exceptional lawyers" like himself.[33]

Coercion and Threats

According to *National Law Journal* journalist Richard F. Ziegler, the well-known "'maggot' rhetoric has now been displaced by a new classic in incivility."[34] The U.S. District Court for the Southern District of New York ordered a New York litigator to pay $50,000 in sanctions for his conduct during a case, most notably, for his presuit letter threatening the prospective defendant (who was an attorney) with the "legal equivalent of a proctology exam" and a "tarnish[ing]" of his reputation if the claims were not settled prior to filing the complaint.[35]

In addition to these threats, the district court found that this attorney made a sham offer to settle; threatened to add a RICO claim; threatened to sue the defendant individually and to seek discovery of his personal finances; threatened to send a letter to the court accusing the defendant of criminal conduct if he did not submit to plaintiff's demands; made good on his threat to "tarnish" defendant's reputation by contacting a reporter before trial and supplying the reporter with documents and information; and repeatedly attacked defendant's reputation as an attorney, calling him "a lawyer who . . . has acted in a manner that shames all of us in the profession," "a disgrace to the legal profession," and "slimy."[36]

The attorney at issue argued that his tactics were examples of proper zealous and aggressive representation and that he always acted reasonably and appropriately. The court disagreed:

> A lawyer's duty to represent his client zealously does not permit him to treat his adversary or parties in an offensive and demeaning manner or to engage in a course of conduct intended to coerce a settlement through improper threats and harassment. Although a lawyer must represent his client zealously, he must do so within the bounds of the law. An attorney is a professional and an officer of the court, not a hired gun or mercenary whose sole motivation is to win or an attack dog whose sole purpose is to destroy.[37]

On appeal, the Second Circuit reversed the district court's holding, concluding that the attorney's conduct was not sanctionable.[38] The circuit court found that to impose sanctions under the authority of 28 U.S.C. § 1927 or under the court's inherent power, the "trial court must find clear evidence that (1) the offending party's claims were entirely meritless and (2) the party acted for improper purposes."[39] Regarding the "proctology exam" letter, the court held that although this letter was harsh, and the reference to proctology was "repugnant," it is "reflective of a general decline in the decorum level of even polite public discourse," and, therefore, less than sanctionable.[40]

The Second Circuit also found that the attorney's threat to "tarnish" the defendant's reputation was not sanctionable. According to the court, "An attorney is entitled to warn the opposing party of his intention to assert colorable claims, as well as to speculate about the likely effect of those claims being brought."[41] Moreover, the circuit court held that the subject attorney's characterizations of the defendant as, among other things, a disgrace to the legal profession were mere "colorful tropes" and "not necessarily injudicious discourse."[42]

In a similar case, also involving an effort to induce settlement, this time by threatening adverse publicity, the Second Circuit also reversed a district court judge's $50,000 sanction against a Washington, D.C., attorney.[43] In a presuit letter, the attorney at issue wrote:

> This is a matter of extreme urgency because, in the absence of any satisfactory resolution of our differences, the lawsuit will be filed in New York within the next ten days. . . . If this controversy erupts into public view with the filing of our lawsuit and the inception of the Israeli proceeding, it will not only result in a grave injustice to individuals who have been among Israel's most constant and generous supporters, but will seriously damage foreign investment in Israel in the future.[44]

The court of appeals found that "[i]t is hardly unusual for a would-be plaintiff to seek to resolve disputes without resorting to legal action; prelitigation letters airing grievances and threatening litigation if they are not resolved are commonplace, sometimes with salutary results, and do not suffice to show an improper purpose if nonfrivolous litigation is eventually commenced."[45]

Finally, it should be noted that in addition to threats of reputation damage and adverse publicity, threats of physical violence unfortunately arise more often than we would like to think. In one case, an examining attorney in a deposition told the deponent that he would like "to be locked in a room with [her] naked with a sharp knife," and that he needed "a big bag" to put her in "without the mouth cut out."[46] The South Carolina Supreme Court publicly reprimanded this attorney for his conduct.[47]

Tactics Used in Bad Faith

Another area of interest in this review is when attorneys engage in the assertion of baseless claims, groundless accusations, and name-calling. In *Nachbaur v. American Transit Insurance Co.*, a Queens attorney was sanctioned $5,000 for disparaging remarks made about his adversary in a letter to the court, plus an additional $5,000 and attorney fees for filing a frivolous appeal.[48] In referring to his adversary in a letter to the judge, the sanctioned attorney noted that the adversary's conduct "indicates that she fits more as a clown in a circus than an attorney in a court of law."[49] Under the totality of the circumstances, the appellate division held that the motion court's imposition of sanctions was proper: the attorney made "repetitive and meritless motions," the complaint was frivolous, and the motion papers submitted were "utterly useless."[50]

The appellate division imposed further sanctions and an award of attorney fees for the prosecution of the appeal, where the "appellate briefs submitted by plaintiff's attorney, completely devoid of relevant discussion, [were] vividly reflective of the appeal's utter lack of even arguable merit."[51] In addition, the sanctioned attorney also repeated the insult made about his adversary, made "baseless, serious accusations against the motion court, [made] unsupported accusations against defendant, seriously mischaracterize[d] the record and [made] no reference to recent adverse authority."[52]

This New York attorney was disbarred from the Appellate Division, Second Department, as well as from the Southern District of New York.[53] These disciplinary actions followed disbarment from the United States Supreme Court, which occurred when the attorney called the Second Circuit chief judge "chief injustice" in his petitions for certiorari.[54]

Still another lawyer was suspended for making unfounded accusations in a personal dispute he had with a former employer. The attorney was suspended for filing a motion containing vulgar language and false accusations of bribery; calling and sending faxes to clients of his former employer calling her a fraud, a thief, and a liar, and alleging that she did not pay her bills; and in a deposition, accusing her of giving him a venereal disease.[55]

Calling the judge and opposing attorneys names or making unfounded, irrelevant, or inappropriate remarks about them seems to be sanctionable or worthy of discipline in many instances. As the U.S. District Court for the Southern District of New York noted, "In the ordinary litigated matter, the court and counsel are not involved except in their professional capacities, and irrelevant personal or ad hominem attacks on them merely distract from the merits of the litigation."[56] Thus, where an attorney told a judge, "you are corrupt and you stink," he was sanctioned.[57] Another attorney in New York was disciplined for speculating that opposing counsel was involved in organized crime.[58]

Incivility Hurts the Professional and the Profession

Can we live with discovery abuse, threats, bad-faith claims, accusations, and name-calling? Is it a necessary evil and a mere byproduct of the adversary system? We do not believe so. Zealousness is no excuse for vulgar, insulting, and unprofessional actions. Even attempting to label such actions and words as zealous advocacy cheapens and mocks the true meaning of this concept. In *Paramount*, the Delaware Supreme Court explained that zealousness ends where the client's cause is no longer advanced:

> Staunch advocacy on behalf of a client is proper and fully consistent with the finest effectuation of skill and professionalism. Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process. A lawyer who engages in the type of behavior exemplified by Mr. Jamail on the record of the Liedtke deposition is not properly representing his client, and the client's cause of action is not advanced by a lawyer who engages in unprofessional conduct of this nature.[59]

Where language or tactics have no identifiable purpose other than to threaten, embarrass, delay, criticize, or attack opposing counsel, the client's interests have been abandoned. Judge Chin, the district court judge who wrote opinions in the *Revson* and *Sussman* cases discussed above, aptly stated, "Although an attorney must represent his client zealously, he cannot be a 'zealot.'"[60]

Some believe that we should not and cannot live with the professional misconduct that occurs around the nation. In the words of the Honorable Sandra Day O'Connor:

> [T]he justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public's eyes.
>
> . . . In my view, incivility disserves the client because it wastes time and energy—time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.[61]

Short-Term and Long-Term Solutions

It seems that most of us would agree that the legal profession would be more enjoyable and effective without threats, name-calling, and Rambo tactics. But how do we get control over the invective, abuse, and vituperative speech that seems to plague our legal system? There are several "Band-Aids" that can fix a problem as soon as it occurs. While many of these remedies

may be the fastest and best way to solve individual problems, they probably do not do much in the way of deterrence or prevention. Thus, as possible solutions are reviewed below, it is important to question whether the remedy is a short-term Band-Aid or a mechanism of protection against future attacks.

Report bullies. The examining attorney in the *Paramount* deposition stated that while he was "gratified" that the court addressed the abuse, it was not his intention to "seek relief" from the court.[62] Lawyers are not as willing to report unprofessional behavior as they should be.[63] As one law professor has advised:

> Lawyers must stop their passivity about Rambo depositions. Not only should they report name-calling, demeaning gestures, and personal threats occurring during depositions to judges and bar disciplinary committees, but they should create an atmosphere in their firm where young associates will feel comfortable to complain about their mistreatment by opposing attorneys in depositions.[64]

In *Paramount* the court had to raise the issue of the Texas attorney's uncivil behavior sua sponte. Lawyers should help the courts and the bar associations make their litigation environments livable. Some suggest that every attorney should keep a "Rambo file," documenting all instances of unprofessional conduct in a case.[65] Such a file could be used at fee hearings to impose sanctions and penalties.[66] According to the professor quoted above, "When Rambo behavior begins to cost money, then it will stop."[67]

Communicate with the court. Some authors advocate for the "judge on call" system to help lawyers when they find themselves engaged in a deposition or other out-of-court proceeding that has gone wrong.[68] This service can be provided by magistrates,[69] but in other areas, judges would be rotated, just like on-call physicians.[70] The judge on call would be available for on-the-spot telephone hearings in which he would have the authority to make immediate rulings.[71]

The Delaware Supreme Court specifically subscribed to such a solution in *Paramount*. The court advised that when misconduct occurs outside its presence, "the aggrieved party should recess the deposition and engage in a dialogue with the offending lawyer to obviate the need to call the trial judge. If all else fails and it is necessary to call the trial judge, sanctions may be appropriate against the offending lawyer or party, or against the complaining lawyer or party if the request for court relief is unjustified."[72] The court reminds attorneys that "Delaware trial courts are 'but a phone call away' and would be responsive to the plight of a party and its counsel bearing the brunt of such misconduct."[73] The court could then turn to the discovery rules for the proper remedy, whether a protective order or the imposition of sanctions.[74]

Record the abuse. The abusive tactics displayed in *Paramount* spawned a multitude of discussions over the obstructive and abusive tactics used during depositions.[75] In an interview conducted by *Inside Litigation*, litigators were asked to identify the most difficult situations in conducting and defending depositions.[76] Attorneys said that the biggest problems from the perspective of the examining attorney are various forms of obstruction, including speaking objections and instructing the witness not to answer questions.[77] From the perspective of defending depositions, attorneys said that the biggest problem is "attempts to lure deponents into inconsistencies through broad and tiresome questioning."[78] Such tactics are still considered uncivil behavior and also cannot be justified in the name of zealous advocacy.[79] One commentator explains that when she puts such abuses on the record, she is able to stop them from recurring.[80]

Early and continuing education. While standing up to bullies, reporting Rambo behavior, putting uncivil behavior on the record, and involving the court are ways to defuse uncivil situations already in progress, education may help to prevent unprofessional behavior. One author suggests that rather than enacting a written civility code, "what is needed is the reemergence of the unwritten, but universally accepted, code of conduct adhered to by an earlier generation of lawyers."[81] Such an unwritten code would encourage the bar and lawyers to return to self-regulation of lawyers' conduct. Bar associations could promote discussions about uncivil behavior by hosting events that encourage participation among the attendees.[82] In this way, lawyers could become educated or reeducated in the significance of civil conduct. Continuing legal education programs could also be useful forums for educating lawyers on civility.[83] Finally, law schools should discuss the problem of uncivil behavior and the use of invective and abusive tactics.[84] Students should begin to think about their own conduct and what they expect of themselves and others before they even become attorneys.

Conclusion

Finally, we submit that while standing up to bullies, asking courts for assistance, and putting invective on the record are ways to Band-Aid the problem of attacks and verbal abuse, the true panacea is education, awareness, self-monitoring, and conscience. An expansive reflection on civility suggested:

> As lawyers and judges, we live out who we are by our actions. Professionalism is not something to don at the office or take off with our suits and our robes; our behavior continuously demonstrates who we are. We can improve our own lives and spirits, those of our clients, opposing counsel and parties and the community as a whole, if we simply remember that our part in the system gives us tremendous power, to make life better for every citizen . . . . If every lawyer and judge . . . would analyze every action she or he takes in light of the goal of ensuring that the system works fairly and efficiently for everyone, questions about profes-

> sionalism would simply disappear—and tremendous good would result for our community.[85]

As one commentator so aptly stated, we will know when professionalism returns to the practice of law when we begin to hear, in common usage, the phrase "ethical as a lawyer."[86] This is a worthy challenge for our profession and a profound concept to carry with us at all times. ■

Notes

1. Thomas P. Sukowicz & Thomas P. McGarry, *Feathers May Fly for Using Foul Language*, CHI. LAW., Dec. 2002, at 14.

2. *Id.*

3. *See id.* (giving examples of an attorney who was suspended for 18 months after referring to courtroom deputies as "'honkies'" and "'white pigs'" and another attorney who was reviewed after making anti-Semitic remarks in a letter to opposing counsel).

4. Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561, 568 (1996) (referring to Principe v. Assay Partners, 586 N.Y.S.2d 182, 184 (Sup. Ct. 1992)).

5. Sukowicz & McGarry, *supra* note 1.

6. *See* Revson v. Cinque & Cinque, 70 F. Supp. 2d 415, 434 (S.D.N.Y. 1999) ("In recent years, much concern has been expressed by the bench and the bar over the rise of 'Rambo' tactics in litigation and the lack of civility in the practice of law.").

7. *Id.* at 435. Links to over 100 of these codes are available at www.abanet.org/cpr/professionalism/profcodes.html.

8. James A. George, *The "Rambo" Problem: Is Mandatory CLE the Way Back to Atticus?*, 62 LA. L. REV. 467, 472 (2002).

9. *Id.* at 472 (quoting Frank X. Neuner, Jr., *Professionalism: Charting a Different Course for the New Millennium*, 73 TUL. L. REV. 2041, 2042–43 (1999)).

10. *Revson*, 70 F. Supp. 2d at 434 (quoting Jerome J. Shestack, *Defining Our Calling*, 83 A.B.A. J. 8, 8 (Sept. 1997)).

11. *Id.* (quoting Robert N. Sayler, *Why Hardball Tactics Don't Work*, 74 A.B.A. J. 78, 79 (Mar. 1988)).

12. Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks*, 34 TEX. TECH. L. REV. 3, 7 (2002) (quoting Kohlmayer v. Nat'l R.R. Passenger Corp., 124 F. Supp. 2d 877, 879 (D.N.J. 2000)).

13. Courts have justified their sanctions against unprofessional and uncivil lawyers under the Federal Rules of Civil Procedure (Rules 30 and 37), 28 U.S.C. § 1927, and courts' inherent power to regulate conduct. Cary, *supra* note 4, at 588–94. In addition, uncivil lawyers can be subject to discipline under a particular state's version of the Code or Rules of Professional Responsibility. For example, in New York, the Code of Professional Responsibility "prohibits a lawyer from acting in an uncivil, demeaning, or harassing manner." *Revson*, 70 F. Supp. 2d at 435 (citing Canon 7). Various disciplinary rules prohibit tactics that merely "harass or maliciously injure another." *Id.* While a number of "civility" codes have been adopted around the nation, they are merely aspirational in nature, providing guidance to courts. *Id.*

14. Richard F. Ziegler, *The Price of Incivility*, NAT'L L.J., Feb. 7, 2000, at A16.

15. Schlaifer Nance & Co., Inc. v. Estate of Andy Warhol, 194 F.3d 323, 341 (2d Cir. 1999).

16. Revson v. Cinque & Cinque, 221 F.3d 71, 79 (2d Cir. 2000) (noting that an attorney's reference to a proctology exam was "offensive and distinctly lacking in grace and civility" but "reflective of a general decline in the decorum level of even polite public discourse").

17. *See Revson*, 70 F. Supp. 2d at 435 ("The bar should take note, as this case well shows, that Rambo tactics do not work. Judges and juries do not like them.").

18. J. Stratton Shartel, *Abuses in Depositions: Litigators Describe Response Strategies*, INSIDE LITIG., July 1994.

19. 637 A.2d 34 (Del. 1994).

20. *Id.* at 52 n.23.

21. *Id.* at 52.

22. *Id.* at 53.

23. *Id.* at 55 n.34 (quoting Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993)).

24. *Id.* at 53–54

25. *Id.* at 54.

26. *Id.* at 54.

27. Brenda Sapino, *Jamail Unfazed by Delaware Court's Blast*, TEX. LAW., Feb. 14, 1994, at 11.

28. *Paramount*, 637 A.2d at 55.

29. *Id.* at 56.

30. *Id.* at 53.

31. *Id.* at 53, 56.

32. *Id.* at 56.

33. Sapino, *supra* note 27.

34. Ziegler, *supra* note 14.

35. *Revson*, 70 F. Supp. 2d at 420–21.

36. *Id.* at 417.

37. *Id.* at 417–18.

38. *Revson*, 221 F.3d at 78.

39. *Id.* at 79.

40. *Id.*

41. *Id.* at 80.

42. *Id.* at 82.

43. Sussman v. Bank of Israel, 56 F.3d 450 (2d Cir. 1995).

44. *Id.* at 453.

45. *Id.* at 459.

46. Richmond, *supra* note 12, at 9.

47. *Id.*

48. 752 N.Y.S.2d 605, 2002 N.Y. App. Div. LEXIS 12029 (1st Dep't 2002).

49. Anthony Lin, *Queens Attorney Hit with Sanctions over Insult*, N.Y. L.J., Dec. 11, 2002, at 1.

50. *Nachbaur*, 2002 N.Y. App. Div. LEXIS 12029 at *3–4.

51. *Id.* at *4.

52. *Id.* at *5. The court was particularly disapproving of this attorney's failure to cite adverse authority since he was involved in a case addressing many of the same issues only weeks earlier, and was aware of such adverse authority.

53. Lin, *supra* note 49; *In re* Teddy I. Moore, 177 F. Supp. 2d 197 (S.D.N.Y. 2001).

54. Lin, *supra* note 49; *In re* Teddy I. Moore, 529 U.S. 1127 (2000). Mr. Moore's motion for vacation of disbarment and reinstatement to the Bar of the Supreme Court was denied in 2007. 127 S. Ct. 1904; 2007 LEXIS 3776 (March 26, 2007).

55. Sukowicz & McGarry, *supra* note 1.

56. *Revson*, 221 F.3d at 82.

57. *In re* Dinhofer, 257 A.D.2d 326, 328 (1st Dep't 1999).

58. *In re* Kavanagh, 189 A.D.2d 521, 522–23 (1st Dep't 1993).

59. *Paramount*, 637 A.2d at 54.

60. *Revson*, 70 F. Supp. 2d at 442.

61. *Paramount*, 637 A.2d at 52 n.24 (alteration in original) (quoting The Honorable Sandra Day O'Connor, Civil Justice System Improvements, Speech to American Bar Association at 5 (Dec. 14, 1993)).

62. Sapino, *supra* note 27.

63. *See* Cornelia Honchar, *Putting Up with Abuse May Only Perpetuate It*, CHI. DAILY L. BULL., Mar. 4, 1994, at 6 ("Perhaps, it's the belief that real lawyers and real men expect and put up with rudeness and to protest would be a sign of weakness. . . . This is the true weakness: the lack of courage to stand up to rude lawyers.").

64. Cary, *supra* note 4, at 596.

65. *Id.* at 595–96.

66. *Id.*

67. *Id.* at 596.

68. *Id.* at 593.

69. *See* Shartel, *supra* note 18 (noting that one commentator stopped a deposition to call the Magistrate when her opponent began abusing a client).

70. Cary, *supra* note 4, at 593–94.

71. *Id.*

72. *Paramount*, 637 A.2d at 55 n.31.

73. *Id.* at 55.

74. *Id.* "Sanctions could include exclusion of obstreperous counsel from attending the deposition, . . . ordering the deposition recessed and reconvened promptly in Delaware, or the appointment of a master to preside at the deposition." *Id.*

75. Honchar, *supra* note 63.

76. Shartel, *supra* note 18.

77. *Id.* A speaking objection is a "lengthy objection on the record by the defending attorney during which the attorney in some way improperly attempts to send a message to or 'coach' his client, the deponent." *Id.*

78. *Id.*

79. Richmond, *supra* note 12, at 20.

80. Shartel, *supra* note 18.

81. Cary, *supra* note 4, at 597.

82. *Id.* at 597–98. *See* George, *supra* note 8, at 491–92, for a discussion of how a bar association's attempts to force attorneys to "make nice" could violate a lawyer's duty of zealous advocacy.

83. Cary, *supra* note 4, at 599.

84. *Id.* at 600; George, *supra* note 8, at 497–502.

85. *Revson*, 70 F. Supp. at 436 (alterations in original) (quoting Wallace P. Carson, Jr. & Barrie J. Herbold, *Why "Kill All the Lawyers"?*, 59 OR. ST. B. BULL. 9, 12 (Jan. 1999)).

86. George, *supra* note 8, at 507 (quoting Judge Howard Markey).

ABA PRACTICE ESSENTIALS
ARTICLES

Incivility: An Insult to the Professional and the Profession

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On Professionalism
Civility:
Power Beyond Politeness
By Stella Rebaut

Consider civility. Few words have been as poorly served by their dictionary definition. The dynamic power of "civility" is trivialized when defined as no more than:

> Formal politeness and courtesy in behavior or speech
>
> — *Oxford English Dictionary*

The dynamic of civility has evolved beyond its definition to now describe an attitude and pattern of behavior that has great value and power. Civility is tough, substantive and impactful upon others. Not surprising, since it is essentially a habit of the heart.

Major league baseball recently provided a memorable story. In the summer of 2010, a well-intentioned and experienced major league baseball umpire made a mistaken call with great consequences. The pitcher, Armando Galarraga of the Detroit Tigers, had pitched a perfect game into the ninth inning. Then he was robbed by a mistaken call from umpire Jim Joyce. The pitcher's response was one of compelling civility; he embraced the human nature of Joyce by simply stating, "We all make mistakes." His manager reinforced this by calling Joyce "one of the best in the business." Forgiveness can be the highest form of civility as couched in graceful words. George Will commented later that through this remarkable civility, the pitcher and his manager had created a more rare and memorable moment in baseball lore than simply another perfect game. Most memories of the action from last season have vanished, but not this story. Such is the power of civility.

In our law practice we may find ourselves being misquoted, misrepresented or demeaned by colleagues. The challenge of responding with civility is a tough one. Ours is a profession that does little to emphasize or encourage patience or humility. Some argue that acting with civility is weak, bordering on "unethical," not zealously pursuing the client's interests.

I am increasingly curious about civility. At the heart of the art of practicing law is the skill of using language and presence with care and civility. By contrast, conversations with colleagues frequently end up with tales of egregious acts of incivility. Thus, I have read articles and books, tuning my antennae for positive stories from our work settings. Core themes are arising, and I have come to believe these three simple statements:

• Civility is contagious.

• Civility is good for our health.

• Civility is good for the bottom line.

Assuming these three propositions to be true, questions arise: Is civility a natural skill that we either have or don't? Can it be taught and learned? Has each one of us been heavily influenced in this matter by our own family culture and personal life story? What behaviors promote practicing law with civility?

Three themes are important when considering the development of intentionally civil behavior. These are consciousness, creativity and community. Let me explore these briefly.

Consciousness

The practice of mindfulness is one pathway to living and practicing more consciously, that is, intentionally. This is crucial for practicing law with civility. Living with awareness gives us the ability to manage skillfully both our own emotions and emotional reactivity by others. Daniel Goleman has described this as the essence of "emotional intelligence." Rather than reacting emotionally to and escalating rudeness or another's act of incivility, a more aware response can shift the context and transform the moment.

Creativity

Engaging in creative processes fosters civility by exercising the brain muscles that enable us to imagine ourselves "outside of the box." Creative acts such as making music, producing visual art, writing for pleasure, dancing, acting and any type of playing enable us to slow down and be in the moment. These types of activities reduce stress and make us more likely to feel joy. They also sharpen our ability to maintain an open mind, see situations from multiple perspectives, listen without predetermination and remain flexible. All of this supports interactions that are civil, leading to best outcomes.

Community

While concern for another's well-being may seem beyond the call of duty, it is not beyond the call to civility. A deep appreciation for our individuality and our membership in shared community lies at the core of civil behavior. Self-interest can co-exist with altruism in a form of "reciprocal altruism."

Evolutionary psychology now tells us that sympathy for others is as deeply ingrained in human nature as the competitive instinct. Collaboration and bonding are "epigenetic principles." "Survival of the kindest" parallels "survival of the fittest." Courteous behavior is not required by law, but it is in our nature. We become stressed when we forsake it. Ironically, we forsake it when we become stressed.

Much of law practice is competition and conflict-based. Combine this with the demands and pace at which we live and we have the recipe for incivility. Communal experiences that provide mutual social support reduce stress and generate civility. Civility may begin as "formal politeness and courtesy." Consider the remarkable debasement of the use of language in society today. The issue of how we humans talk with one another rises all the way to the question of the survival of the species. The stakes are high and rising. This may not be reflected in the dictionary, but it is happening on the ground.

5 Steps to Improving Civility

BY WASHINGTON STATE ATTORNEY GENERAL ROB MCKENNA

> *"Civility . . . means employing a sense of decency and consideration for all involved, thinking through the strength of your case, fully understanding the ramifications of your actions, and displaying respect for all parties."*

It's the first principle in the Washington State Bar Association's Creed of Professionalism:

In my dealings with lawyers, parties, witnesses, members of the bench and court staff, I will be civil and courteous and guided by fundamental tenets of integrity and fairness.

Professionalism is as simple as holding the door for opposing counsel, returning phone calls, or providing documents in a timely manner. Professionalism is embodied in the tone and tenor of all our interactions with one another.

You can find this principle at work at its highest level in the U.S. Supreme Court, where parties are required to collaborate on joint appendices and Supreme Court justices refer to opposing counsel as "friends." We find shining examples of civility and professionalism every day across our profession.

Unfortunately, at the same time, we face a continuing erosion of this basic principle. This lack of civility is found in angry or offensive emails, refusal to respond to motions for discovery necessary to establish the basic facts in a case, or at-

tacking opposing counsel in the media.

It's been said, "To whom much is given, much is expected." Seattle University Law Professor Paula Lustbader alluded to this in her January 2011 *Bar News* article announcing Robert's Fund, a new foundation created in honor of her uncle, Robert Lustbader, to encourage increased civility in society. Lustbader points out, "Lawyers exert a powerful influence within our society . . . they shape our values and laws as judges and politicians… serve vital roles in private industry… [and] serve as leaders in our respective communities in their capacity as lawyers or as members of a group." "Like it or not," she writes, "as lawyers we are role models for many people."

Much has been said about the root of incivility in our world today. Some blame the large number of attorneys now practicing for the decline of civility, claiming that because attorneys know they may never see opposing counsel or their clients again, they give themselves a pass when it comes to polite behavior. Similarly, a lack of familiarity among lawyers furthers a lack of trust and defensiveness that breeds incivility. Others claim greater competition in the field leads attorneys to compromise civility toward one another in the name of zealous advocacy on behalf of their clients. To these people, the end justifies the means. Still others theorize that older attorneys and legal educators are failing to instill in younger attorneys the importance of civility in our profession.

Regardless of the root of the problem, I'm inspired by the Washington State Bar Association's commitment to recognize, reward, and revive civility in the legal field. Civility is the foundation of the professionalism training we provide to new assistant attorneys general at our Attorney General's Office (AGO) Academy. We also feature professionalism as a segment in our continuing legal education (CLE) seminar on "Effective Public Lawyering." I'd like to draw upon this training in suggesting five things we can all do to increase civility and, in turn, improve professionalism.

1. Recognize the power we have to change lives and use it wisely.

In his presentation at the Effective Public Lawyering CLE, AGO Chief Deputy Brian Moran counsels assistant attorneys general to remember the power attorneys have to change lives for the better — and for the worse. As lawyers, we all play an important role in people's lives. Whether trying family law cases involving abuse, trying complex consumer protection cases, or giving advice to a person facing home foreclosure, one mistake can tear a family apart, destroy a business's reputation, or ruin a person's life. Civility in this case means employing a sense of decency and consideration for all involved, thinking through the strength of your case, fully understanding the ramifications of your actions, and displaying respect for all parties.

2. Communicate effectively.

Communication is a two-way street. Listen to your clients, to the public, to opposing counsel, and to the bench. As per the Creed of Professionalism, be forthright and honest in your dealings with them. Review your correspondence for tone and tenor. Avoid sending email or leaving voicemail messages when you're angry. While the legal universe may seem expansive, your reputation is important and displaying civility in communication — on a personal level, in public and in the courtroom — is an important way to enhance that reputation.

3. Value candor and integrity.

Rule of Professional Conduct 3.3 requires candor toward the tribunal, but that candor should be applied to all. As the Creed of Professionalism suggests, your word "is your bond in (your) dealings with the court, with fellow counsel and with others." It also

encourages us to "be forthright and honest in (your) dealings with the court, opposing counsel and others."

Discredit yourself at your own peril. Despite the sheer number of attorneys, the legal community is a connected network that is smaller than it might seem. Maintaining your integrity is critical to your reputation.

4. Demonstrate a healthy work ethic.

Demonstrating respect is key to civility and professionalism — and, beyond communicating civilly and exhibiting candor and integrity, displaying a strong work ethic shows your opponent, your client, the bench, and the public that you value them, their time, and the legal profession as a whole. The Creed of Professionalism directs us to "honor appointments, commitments, or case schedules and be timely in all your communications." Beyond that, excellent briefing, witness preparation, and overall preparation for oral argument demonstrates respect not only for yourself, your client, and our profession, but also for the judge, jury, and opposing counsel. A strong work ethic doesn't only establish you as a professional and civil advocate, it tends to persuade both judges and potential jurors to listen more favorably to your case.

5. Learn that winning comes in many forms.

As mentioned earlier, many believe one of the roots of incivility today is the "win-at-all-costs" mentality prevalent in so many areas of modern life. But winning depends upon how that term is defined. Is it avoiding mediation with a winner-take-all strategy? Is it racking up prosecutions? Some might say yes — and in today's super-competitive world, it might seem that is the case. The Creed of Professionalism suggests otherwise, encouraging us to "endeavor to resolve differences through cooperation and negotiation, giving due consideration to alternative dispute resolution."

In the Attorney General's Office, we encourage our assistant attorneys general to do the right thing for the right reason. Oftentimes, in liability cases, the state recognizes its liability and employs early dispute resolution to help make the victim whole while reducing exposure for taxpayers. Similarly, we strive to work with businesses accused of violating the consumer protection act or groups charged with defying the state's campaign finance laws to bring justice without prolonged litigation.

In a time when the media, the entertainment industry, and society as a whole seem to increasingly value the sharp comeback, political gamesmanship, deceit, disrespect, and disdain toward others, I agree with the Washington State Bar Association that civility starts with us.

As Chief Justice Warren Burger noted 40 years ago when he gave his famous speech on civility to the American Law Institute:

> . . . lawyers who know how to think but have not learned how to behave are a menace and a liability not an asset to the administration of justice . . . I suggest the necessity for civility is relevant to lawyers because they are the living exemplars — and thus teachers — every day in every case and in every court; and their worst conduct will be emulated . . . more readily than their best.

We have a duty to our profession, to our communities, and to our nation to continue our efforts to return civility and professionalism to our society.

Rob McKenna is serving his second term as Washington's attorney general. He is the 2011–2012 president of the National Association of Attorneys General and co-chair of the 2011–2012 Campaign for Equal Justice.

Achieving Life/Work Balance Through Effective Time Management

By Kathleen Brady
August 2009
Managing your time effectively doesn't necessarily mean doing more throughout your day.

Time has an elastic quality to it. When you are busy and engaged in what you are doing, there doesn't seem to be enough of it. When you are bored, it stretches on endlessly. While 24 hours is the same for everyone, it is the *perception* of time that is different.

The ultimate intent of time management is to improve the quality and balance of your life—not just to speed it up. Trying to squeeze more into a day leads you to do less of it well and makes it all less enjoyable. By striving for balance and harmony in all areas of your life, you can alter your current perception of time thereby reducing your stress and increasing your productivity.

Being "productive" does not mean "doing more." Sometimes the most productive thing you can do is nothing - to give your battery a chance to recharge. Try to schedule at least 30 minutes each day to do something "indulgent" for yourself. Take a bath, go for a walk, hit the gym, read a magazine, watch TV. Without downtime, you will eventually burn out and be of no use at work or at home! Slow down and you will become more effective and fulfilled.

The secret to time management boils down to the *choices* you make. Everything you do requires a choice. There are the big choices: where to live, what career path to follow, who to share your life with, your faith, etc. Then there are the small choices: what time to wake up each morning; what to eat, what to wear, how to spend the day, how to respond to people and events. The small choices seem inconsequential. Some people would argue they aren't really choices at all, but rather decisions dictated by life's external pressures or requirements. But they *are* choices. You choose to get up at 6 a.m. to catch the 7:09 train to get to work despite the fact you'd rather sleep till noon because you know that the price you would have to pay to sleep till noon is too high to pay. If your goal truly is to sleep till noon each day, you would choose a different job and lifestyle to accommodate that goal. The seemingly small choices you make day in and day out determine your perception of time and ultimately, the quality of your life.

Consider the various activities that currently drain your energy. Divide them into categories (work/home/friends/family). Review your list and determine what choices you could make to minimize or eliminate each drain. Next, list the reasons preventing you from making the choice. How could you modify the choice to eliminate the reason?

People get so busy in the day to day tasks and obligations of living their lives that they forget they have choices. By learning to control your time on a daily level, you are more inclined to be successful at managing the obligations and achieving your overall goals.

The first thing you need to do is examine routine activities. Consider every mundane activity from the moment you get out of bed until the moment you go to sleep at night. Studying existing

procedures will enable you to question the value of each activity and consider if it could be altered, delegated, or eliminated to save time. Then you can develop new procedures.

Developing the procedure is the easy part. Applying the new procedure is the hardest step. You must be disciplined so as not to slip back into your old habits and allow yourself to form a new time-saving "habit."

For example, perhaps you notice you spend 10 – 15 minutes each morning searching for your keys. You determine this is time that could be better spent, so you develop a procedure whereby each night when you walk in the door, you place your keys in a glass bowl on the table next to the door. Over the next few days, you apply this new procedure with various degrees of success. You might catch yourself stuffing the keys in your pocket or perhaps one night you notice the keys on the kitchen counter while you are making dinner. When that happens, stop what you are doing immediately and go place them in the bowl. If you do this with enough discipline, in a short time, you will form a new habit and the keys will be placed in the bowl automatically each time you walk in the door, freeing up 10 minutes of your day to reallocate. Then you can move on to the next routine activity that needs to be altered.

Eliminate Clutter

The success of every project depends on the initial planning stage so get organized. Start by establishing structures for routine activities to create a semblance of order. That will reduce your stress because you won't have to rethink activities over and over and over again.

Next, put things where you need them. Think in terms of traffic flow. Winter sweaters should be in the front of the closet in December and in the back of the closet in July. Active files should be within arms reach while dormant projects can be filed further away. Also, decide on a filing system or organization structure that plays to your logic track to avoid wasting time looking for needed information or things. Simply having a designated place for everything from your important papers to your keys to your checkbook to the scotch tape and scissors will make your life more manageable.

Things create the illusion of success but can sometimes create more work. Perhaps your closet is bursting with 500 sweaters that you must plow through daily to find one of the half dozen or so that you actually wear or your garage is filled with tools you never use because you can never find them on your workbench. Take a hard look at your things and determine what to keep and what can be tossed.

Paperwork may be the biggest *thing* cluttering your life. When thinking about your personal or professional "paperwork" recognize there is a difference between "data" and "information." Data is the entire universe of facts and statistics on a given topic while information is data that has value to you. It is important to cull through the data and only retain the necessary information. That will eliminate the need to sift through mountains of paper when you need to retrieve information.

Like things, relationships can also clutter your life and zap your energy. Identify the toxic relationships in your life. Who are the arsonists, the dramatics, the critics and judges? Eliminate those you can and develop strategies to minimize the time you spend with those you can't eliminate entirely.

Get Organized

No matter the size of the project, for the best results, always start at the end and work backwards. Consider the deadline, estimate the length of time each task will take, consider if several tasks can be completed simultaneously and examine the resources you *have* versus the resources you *need* to make contingency plans to get the job done despite any obstacles. Consider related issues that may impact the success of your project (e.g. conference room availability or other anticipated demands on your time, etc.) Finally, always ask yourself *"who else needs to know?"* to make sure your project does not adversely impact the work or lives of others.

This is true at home and at work. For example, consider the example of preparing Thanksgiving dinner for a dozen guests.

You invite twelve guests are for a 3 p.m. Thanksgiving dinner. Sadly, you do not discover until noon that your 20 pound bird needs to cook at least 5 hours, delaying serving time until after 5pm. Needless to say, the guests are starving and cranky. The potatoes and stuffing get cold because they were finished at 3 p.m., the crescent dinner rolls are burnt because they were cooked at a higher temperature than recommended in the hopes they would cook faster and the you forgot to buy cranberry sauce and must impose on your sibling to hunt for an open supermarket with cranberry sauce still on the shelf at 4 p.m. Thanksgiving evening. When the meal is finally ready to be served, you realize you only have ten chairs for twelve guests. Ultimately, everyone is fed, but no one is particularly thankful.

Perhaps you have had a similar experience at work. You are managing a project with a definitive deadline. You underestimate how long the main task will take, so the secondary tasks you completed earlier become outmoded and need to be updated, creating more work and more stress. You are forced to race through a task that ideally requires more time and attention and then something you completely forgot sends you scrambling and working late into the night. The people involved are crabby and stressed. The job gets done, but the cost is high.

So what IS the time management recipe for success?

Plan and Execute

Continuing with our Thanksgiving dinner example, you would start by considering who will be invited and what food will be served. As you prepare the menu, you estimate how long each dish will take to cook. When you realize the size of your oven will not accommodate the turkey, stuffing and baked potatoes, you decide to amend the menu to prepare mashed potatoes instead. (Crisis averted!) Next, you might draft your shopping list and decide when you will have an opportunity to shop during the week. (Competing responsibilities balanced.) Then, you determine what food can be prepared and tasks can be tended to, the day before your guests

arrive. (Stress level reduced). Finally you contact the housekeeper and ask her to come on Tuesday instead of her usual Wednesday so you will not be in each other's way as you each perform tasks critical to the success of the project. (Relationship preserved.)

It is often said, *"the devil is in the details."* The only way to stay ahead of the devil is to invest the time to think through the details of each project to ensure you have all the necessary "chairs" or resources available when you need them. Depending on the complexity of each project, this critical step could take 5 minutes or 5 hours. Either way, the time invested in the beginning of the project is likely to pay off tenfold in time saved and stress reduction over the life of the project.

Use Time Efficiently

Because you have planned and organized, you can map out the sequence of the various tasks that need to be accomplished. You can determine how to use the smaller tasks to fill in any "wait" time created by the larger tasks. Once you put the turkey in the oven Thanksgiving morning, you can dice the vegetables, prepare the cranberry sauce, set the table, etc. before the guests arrive. Then you will have time to visit with and enjoy your company.

Similarly, at work, it makes sense to start with the biggest task that will take the longest time to complete. Once the project is underway, you can use the time when you must wait for the partner's approval or to hear back from the client or sitting at the printers to:

- proofread documents;
- respond to emails;
- return phone calls;
- tend to administrative tasks (e.g., reimbursements, time sheets);
- draft a letter;
- catch up on professional reading; or
- tend to quick personal tasks.

The key error most people make is to focus solely on the immediate task at hand. Such an approach causes us to operate constantly in reactive mode. By opting to think through the longer term projects first and getting them underway (particularly if they involve other people), you will be able to identify the smaller tasks to fill in any downtime, thereby using your time more efficiently.

Delegate

Many hands make light work. People want to help. In the workplace, they are *paid* to help. Let them. Consider their abilities and expertise. Ask Aunt Martha, the pastry chef, to bring dessert and your brother-in-law, the wine steward to pick up the wine. Not only is that two fewer things you need to worry about, but you can feel confident that the tasks will be completed more effectively and efficiently by the experts than you could have done yourself. The result is a more enjoyable dinner for all, for which you will receive the credit.

Communicate

We all have our preferred styles of work. Some cooks prefer to be alone in the kitchen. Others like to make meal preparation a community event. Your guests can't read your mind, so you need to tell them. *"I've got in under control in here. Please make yourself comfortable in the other room."* However, if you do want them in the kitchen, give people age appropriate tasks. Have your seven year old niece serve the appetizers instead of dicing the onions. Provide on-going feedback to ensure the tasks are being completed correctly rather than redo them after the helper has left the kitchen. Also, remember to thank people for their assistance.

People can't read your mind at work either. Talk to members of the project to ensure everyone is clear about roles and responsibilities, tasks and deadlines. Provide meaningful, timely feedback to ensure tasks are done correctly to avoid wasting time redoing tasks or putting out fires. Communicate directly: provide detailed instructions and ask questions for clarification when needed. This will reduce the stress levels of everyone involve and produce an end result of higher quality.

There is no magic to time management. Invest the time to plan each project in order to minimize the amount to time you spend in "reactive" mode. Careful planning will enable you to reduce the number of crisis in your life so that you will have the energy, stamina and time to react when a true crisis does occurs and to live a well balanced life.

WSBA: What is Work-Life Balance?

Work-life balance involves setting boundaries with your work so it does not overwhelm the rest of your life. It can also involve treating your personal life as an equal priority. Real satisfaction requires fulfillment in both of these areas.

Challenges for Lawyers to Achieving Work-Life Balance

- Workplace challenges, such as billable hour requirements and volume of work
- Competing demands of work and family priorities
- Psychological effects of chronic stress due to intense, high-demand work, leading to burnout or compassion fatigue
- Physical health effects of chronic stress, such as hypertension
- Adversarial nature of the profession
- Attitudes and behaviors inherent to the profession, such as workaholism, pessimism and perfectionism
- Increased vulnerability to depression and anxiety disorders

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Strategies for Achieving Work-Life Balance

There are ways to more effectively manage your career and personal life:

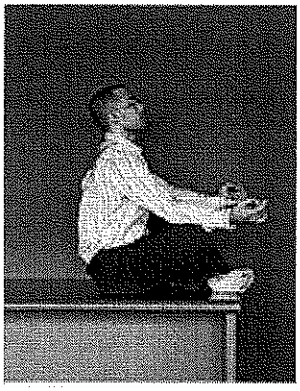
- **Values and priorities**. Knowing what really matters to you can help you structure your life in a way that supports the goals you want to accomplish.
- **Identify what's getting in the way**. Often there are implicit or explicit beliefs we hold that impede our ability to achieve our balance-related goals. Consistently putting the needs of others before our own, or feeling we must meet the expectations of others, are a few. Perfectionism, workaholism and fear of change can also be barriers.
- **Become a Peak Performer.** Research shows that "peak performers" generally set more manageable goals for themselves, and thus experience a more frequent sense of success.
- **Collegial Support**. The sense of connection and support of other lawyers - your peers - is a necessity. They will understand your experiences, allow for debriefing and are often your best resources.
- **Self-care.** Getting enough exercise and sleep, as well as eating properly, require active attention. Enjoying vacations, hobbies and interests outside the law is crucial to well-being as well. A program of self-care is not only good for your health, it allows you to enjoy a higher quality of life.
- **Create Accountability**. Having some accountability built into activities of all kinds makes ongoing participation more likely. In the same way, it's helpful to schedule special family times and make regular 'dates' with friends.

- **Social and Family Relationships**. Strong relationships with family and friends is a significant element of a meaningful work-life balance. Structuring your life effectively to allow for opportunities to spend quality time with family and friends is the key to keeping this part of your life vital.
- **Create a vision.** Crafting a vision of a more balanced and fulfilling life can be a powerful tool in helping you achieve your goals. In considering how to create this vision, ask yourself: what would a more balanced life allow you time to do? What parts of your life are being underemphasized?

Keep Calm and Practice Law: Mindfulness in the Legal Profession

From Washington Lawyer, March 2015

By Anna Stolley Persky



On more days than not, Andrew Whitman, a second-year student at Georgetown University Law Center, could be seen walking to a classroom with a handful or so of his classmates.

At this particular moment, in the middle of the day, Whitman and his classmates are not heading into a civil procedure lecture. There's no danger that a professor will ask them to state the holding of a case. They are not preparing for a moot court competition, and they are not going to discuss law review papers or an upcoming exam. And they certainly are not there to worry about whether they will have a job upon graduation.

They are there, actually, to deliberately ignore the pressure and accompanying anxiety of law school. They are there to meditate. This is the time they gather to "focus on breathing, to focus on the present moment," says Whitman, co-director of the school's Contemplative Law Society.

Some days Whitman leads the group, other days it's someone else guiding the meditation, like a faculty member from the school's program on mindfulness.

Whitman and his classmates are far from alone in their quest for perspective and calmness in the chaotic life of law school or the stress-filled practice of law. In fact, lawyers throughout the region have, in recent years, become fascinated with the concept of mindfulness as a way to relax and keep anxiety at bay.

The so-called "mindfulness movement" encourages individuals to concentrate on their present emotions rather than rehash the past or worry about the future. There are a variety of paths to mindfulness, but generally meditation is involved. Regular meditation, advocates say, increases an individual's ability to concentrate and connect with other people.

Adherents of a mindfulness practice tout its benefits—serenity in a crisis, self-reflection throughout their lives, and being present in each moment, which they argue is an important life skill.

"Mindfulness and meditation can bring you back to what is actually happening now, not stressing about what could happen," says Beth Tossell, co-coordinator of the D.C. Area Contemplative Law Group, an organization for local lawyers practicing mindfulness. "What am I actually feeling? What am I actually thinking? It's a good way to ground myself in a difficult moment."

For Whitman, meditation helped him to stay calm and focused before exams. Meditation, he says, helped him avoid much of the intensity and competitiveness of law school culture.

Whitman says he's not sure that he could have survived his first year of law school without meditation to remind him that every moment is a gift.

"What's stressful about law school is that you don't know things, and then you don't know what you don't know, and you end up with a generalized feeling of anxiety," he says. "But if you just focus on what's in your control, what's right in front of you, law school is easier."

From Marginal to Mainstream

The concept of mindfulness is, in fact, nothing new. Mindfulness, and its accompanying practices of meditation and yoga, is an integral part of Buddhism, and people all over the United States, Buddhist or not, have practiced mindfulness over the years. While meditation and yoga were a counterculture hit in the 1960s and beyond, mindfulness was never a mainstream concept in this country, until now, advocates say.

The current mindfulness movement is largely secular and has reached individuals, companies, and seemingly entire sectors of the population. War veterans have been encouraged to meditate to help relieve symptoms of post-traumatic stress disorder. Companies such as Google and Target offer mindfulness classes for their employees. Schools, colleges, and universities from Portland, Oregon, to Lancaster, Pennsylvania, have started introducing programs to encourage mindfulness in their students.

The legal profession has also been swept up in the movement, with local bars offering classes steeped in the concept of mindfulness. Lawyer groups that focus on the contemplative mindset encourage and provide support for meditation, yoga, and other ways of practicing mindfulness.

For the most part, mindfulness training involves meditation and stretching exercises, with an emphasis on breathing, living in the moment, and focusing inward. Some mindfulness advocates say the practice can help improve an individual's ability to practice law and, in general, boost one's mood. It is also believed that regular practice can help mold kinder and more compassionate people by connecting them to their own humanity.

"Mindfulness is about making space to take a look at our journey," says Lisa Britton, founder of Practicing Wellness, LLC who teaches the "Yoga-for-Lawyers" class being offered by the D.C. Bar Sections Office. "It's about looking deep inside into who we are and how we relate to the world. It's about taking our phones away and taking a deep breath, taking a minute to say, 'We are human beings. We are not machines.'"

There are other paths to mindfulness, such as journaling and taking up martial arts.

"Mindfulness is like vegetarianism," says Jon Katz, a criminal defense attorney based in Fairfax, Virginia. "A couple decades ago maybe it was seen as weird, and now it's more mainstream."

Even U.S. Supreme Court Justice Stephen Breyer meditates.

Law schools have picked up on the trend, with several providing programs to increase students' ability to focus on their inner selves through meditation and other practices.

"I think that in a lot of countries we would be laughed at because mindfulness is such an ancient practice. But for us in this country it is a trend, a big trend," says Elizabeth Vaughan, a solo practitioner in Leesburg, Virginia, who practices yoga regularly and, on occasion, meditates. "I'm hoping it won't just be a trend. I'm hoping that people will see how much it improves our lives and it will become a part of [our] culture, as it is a part of other cultures."

Vaughan adds that learning how to let go of stress is simple: "Well, if you Google how to calm yourself down, you will find mindfulness. You can do that from your phone in the grocery line if you want."

Mindfulness is an ancient concept deeply ingrained in Buddhist tradition and some Eastern cultures. Human beings have been meditating for at least 5,000 years, and some of the earliest records pertaining to meditation date to about 1500 B.C. The roots of meditation can be traced to India and China, fanning out to other countries such as Japan.

The religions and philosophies of Buddhism and Hinduism eventually traveled their way west, gaining momentum in the United States in the 20th century. Eventually, some high-profile Western scholars, such as Swiss psychiatrist Carl Jung, discussed the attributes of mindfulness.

However, it wasn't until the 1960s and '70s that mindfulness, yoga, and meditation became popularized in the United States and other Western countries.

"Transcendental meditation was hot in the counterculture, but it wasn't mainstream," says Michael Goldman, who helped found Georgetown Law's "Lawyers in Balance" program. "Yoga was probably a little more marginal."

Observers often credit Jon Kabat-Zinn, who developed the Mindfulness-Based Stress Reduction (MBSR) program at the University of Massachusetts Medical School in 1979, for the recent mindfulness movement. The MBSR program has "evolved into a common form of complementary medicine addressing a variety of health problems."

Over the years, mindfulness has been used to help patients with a variety of issues, from alcoholism to anxiety disorders. As Kabat-Zinn describes it, mindfulness means "paying attention in a particular way; on purpose, in the present moment, and nonjudgmentally."

Revolution to Clear the Mind

The modern mindfulness movement, or "revolution" as some advocates call it, has moved beyond clinical applications to gain widespread popularity, especially in professional circles.

Generally, trend spotters and followers like to debate why a particular fad is gaining popularity, and mindfulness is its own subject of debate. Why mindfulness and why now? Some say that yoga, the latest fitness fad, has brought mindfulness to the forefront. Yoga is touted for its ability to promote calmness and wellness, increase flexibility, and tone physiques.

Throughout the Washington, D.C., area, gyms offer a variety of yoga classes, from gentle, restorative types to the more physically strenuous forms of practice. Bikram yoga, a series of 26 postures and two breathing exercises performed in 105-degree heat, has exploded into the mainstream, with studios popping up throughout the region.

But some mindfulness practitioners say the philosophy and its accompanying restorative activities are becoming increasingly popular because people in this country have a desperate need for calm and focus, thanks to our busy lives and technology becoming more intrusive.

Vaughan, for example, points out how modern families are typically overscheduled. Busy parents juggle work and personal life, with little time left for anything else. And then, rather than use any down time for contemplation, relaxation, or self-examination, people in this country turn to their phones.

Before cell phones, individuals in long grocery checkout lines could use the wait times to reflect on their lives; these days they play games on their phones or engage in frenetic texting, Vaughan says.

"We use our phones to play games, literally filling every minute of our day," she says. "You don't have to think in the grocery store line anymore, you can play Candy Crush instead."

"When you fill every minute, your body and mind will react. People feel overwhelmed and anxious, and they are now looking for a way to calm themselves down and clear their minds," Vaughan adds.

A Diluted Practice?

Certainly, not everybody is on board with the mindfulness movement, and some observers find the trend problematic. For one, critics cite its religious origins as concerning, going so far as to declare the movement anti-Christian.

"One of the difficulties mindfulness will face as it sweeps across the globe is that it quite clearly in fact is a religion, however much it might shy away from the word," London-based journalist Melanie McDonagh wrote in the British magazine The Spectator in November 2014. "It's ritual for those who don't pray; communal practice for the individualist. . . . But mindfulness is squarely based on Buddhism."

Added McDonagh: "One of the best things about the collective culture is that we have a strong moral sense; we consider selfish behaviour unacceptable and hold others to account. Where Buddhism causes us to go within ourselves, to meditate inwardly, Christianity takes you out of yourself—to God and from there, to others."

Other critics say the secularization of mindfulness has, in fact, weakened it. Stripped of its religious aspects, mindfulness is but a shadow of its former self, they claim.

Ron Purser, a professor of management at San Francisco State University College of Business, and Zen teacher David Loy argued that today's version of a deeply religious concept is being marketed as a "universal panacea," but has become spoiled through dilution.

"Uncoupling mindfulness from its ethical and religious Buddhist context is understandable as an expedient move to make such training a viable product on the open market," Purser and Loy wrote in the *Huffington Post in* July 2013. "But the rush to secularize and commodify mindfulness into a marketable technique may be leading to an unfortunate denaturing of this ancient practice, which was intended for far more than relieving a headache, reducing blood pressure, or helping executives become better focused and more productive."

Loy and Purser, whose scholarly work has focused on Buddhism and the concept of mindfulness, explained in their article "Beyond McMindfulness" that the current movement has become a cottage industry for the business savvy.

"Rather than applying mindfulness as a means to awaken individuals and organizations from the unwholesome roots of greed, ill will and delusion, it is usually being refashioned into a banal, therapeutic, self-help technique that can actually reinforce those roots," the two wrote.

Katz, on the other hand, believes it's "possible to get all the benefits of mindfulness without the religion." That being said, spirituality, Katz insists, "is integral to mindfulness even if one is an atheist."

Lawyers who have not yet joined the movement express disinterest, skepticism, or perhaps mild curiosity toward mindfulness. Some local lawyers say they have already found their path to maintaining equilibrium in the chaotic practice of law.

Todd Daubert, a partner in the Washington, D.C., office of the international law firm Dentons, has a treadmill desk in his office and estimates that he walks about 75 miles per week "at a gentle pace." Daubert says walking "improves his concentration and focus."

At the mention of the mindfulness concept of "living in the moment," Daubert chuckles briefly.

"I've thought that for a long time. I was mindful before it was a movement," says Daubert, who chairs the firm's legacy communications and technology sectors. "We have to live in the moment. We may not be here tomorrow."

While Daubert doesn't meditate or follow the latest developments in the mindfulness movement, he sees the benefits for the legal industry.

"The very best lawyers are the ones who are actually counselors," Daubert says. "Ultimately, the best attorneys are counselors who bring not only knowledge of black letter law but also insight and wisdom. Anybody who is even aware enough to think about something like mindfulness is likely able to view the world in a way that better helps their clients."

To Daubert, a mindful lawyer is also somebody who "understands the importance of taking their role seriously and with humility."

Remedy for Stressed-Out Lawyers

While Daubert and others may have found a way to maintain balance in their lives without meditation or yoga, there are plenty of stressed-out, unhappy lawyers in the country.

Tossell, of the D.C. Area Contemplative Law Group, says lawyers are particularly prone to worrying, a seemingly inevitable byproduct of depositions, trials, business deals, and anxious clients.

"As lawyers, we are always thinking three steps ahead, 'What's the worst thing that can happen?'" Tossell says.

Another problem for lawyers is that they often have a limited worldview, perhaps due to their training, according to Goldman, who serves as Jewish chaplain at Georgetown's law and medicine centers.

"Lawyers live in their heads. They live in logic, which is a limited view of the world," Goldman says. "If your mind is always going and you are always worrying, you aren't connected with your humanity."

In study after study, lawyers express dissatisfaction with the practice of law. The work can be demanding and time consuming. Practicing law can be repetitive and dull, and it can also bring conflict with opposing counsel or others.

The American Psychological Association reports that lawyers are 3.6 times more likely to be depressed than the general population. And, according to the Centers for Disease Control and Prevention, lawyers rank fourth in suicide rates when compared to other professions. The American Bar Association has estimated that between 15 percent and 20 percent of lawyers abuse alcohol or other substances. Moreover, in recent years, there has been great upheaval in the legal profession, and lawyers must work with the added stress of financial uncertainty.

As a result of the failing job market, many lawyers have found themselves seemingly stuck in the trap of temporary work, which they often describe as demeaning and boring.

"The lawyers I know experience high levels of stress," Tossell says. "It can be such a demanding profession, and there are very high expectations. It can lead to feeling overwhelmed."

Given the demanding nature of the profession, supporters of the mindfulness movement say that lawyers in particular could benefit from meditation, yoga, and other contemplative practices. Through meditation they could reduce stress and perhaps even live longer and happier lives, mindfulness advocates say.

"Yes, there are a lot of dissatisfied lawyers," Katz says. "But if you practice mindfulness, you are reveling in each moment. So it's hard to be upset about document review or other tedious things if you are present and enjoying each moment."

Individuals who practice mindfulness and, in particular, meditation often cite several clinical studies suggesting that meditation may change brain and immune functions in a positive way. So why not try it and attempt to bring a little joy into each breathing moment?

Mindfulness, Goldman says, "allows lawyers to be in touch with themselves and their humanity. It allows them to not be all about the logic. It allows them to handle the stress and strains and conflicts that are inherent in the practice of law. It makes the emotional and stress-filled roller coaster of lawyering a lot more bearable."

Denise Perme, manager of the D.C. Bar Lawyer Assistance Program, says that for lawyers, especially those in the District, "the pace is so frenetic."

"In law school, people are taught to rely on their thoughts much more than their emotional experience," Perme says. "Mindfulness teaches you to be aware of how your body feels. Focus on your breathing. It's helpful for lawyers to focus on muscle tension, to change their brain patterns, and to become more self-aware."

"Being self-aware can be calming. It allows people to take a step back, address the tension in your body and what you are feeling, and not to react right away, but to wait to react," she adds.

In mindfulness training, practitioners learn techniques on how to slow down and take a breather from their fast-paced lives.

"We need to learn to slow down. In a world where people are checking their phones 10, 20, 30 times a day, we are not connected to the pace of nature anymore. We are connected to the [digital pace]," Britton says.

People should learn to create space, to "feel the joy that radiates from inside," Britton adds.

Learning to 'Check In' With Self

In Washington, D.C., several organizations, including the Mindfulness Training Institute of Washington, provide training, seminars, workshops, and retreats aimed at helping individuals cultivate mindfulness in their lives.

Local lawyers' organizations, such as the D.C. Area Contemplative Law Group, exist as a forum for legal professionals to discuss mindfulness and to meditate. The group meets once a month and also includes law students, judges, paralegals, and professors.

"We often talk about how to balance the adversarial nature of law with having a mindfulness practice," Tossell says.

The D.C. Bar provides help and information on mental health and stress issues in the legal profession, and has offered classes on bringing yoga and meditation into the practice of law.

One such class, "Yoga-for-Lawyers," sponsored by the Bar's Section's Office, is taught by Britton. In it, she guides attendees on ways to find peaceful moments in the midst of chaos, whether in the office, the hallway, or in the car.

"I want to give people tools for relaxation that they can bring into the real world," says Britton, who has an international tax consulting practice in Washington, D.C. "I want to help them get in touch with their bodies and minds, to have a peaceful moment, feel their own compassion, get in touch with their breath."

Some lawyers say another benefit of being involved in the mindfulness movement is the opportunity to meet other like-minded lawyers. Last year, the New York Times published a piece discussing the networking benefits of meditation groups.

Law firms have taken notice, sometimes offering meditation or yoga classes on site or during retreats. And blogs reflect the number of lawyers who are willing to discuss aspects of their contemplative law practice with a larger audience.

Law schools also have picked up on the trend. For example, the University of Miami School of Law has a program specifically incorporating mindfulness into its legal studies curriculum.

In the Washington metropolitan area, law schools also offer similar classes and training. Georgetown Law Center's "Lawyers in Balance," a mindfulness meditation program dedicated to enhancing awareness of contemplative practice, allows students to "check in on themselves" through meditation, according to Goldman.

"Instead of ignoring their feelings, they learn to recognize them and reflect on them," Goldman says. "They learn to acknowledge their stress by facing it, appreciating that that is what it is, and then they learn how to go forward from there."

Many Paths to Clarity

As Britton puts it, there are many ways to achieve mindfulness. For some individuals, for example, meeting with others to meditate or discuss mindfulness may not be the best choice. But practicing mindfulness can be as simple as putting on your coat and walking outside.

"You can take a walk to clear your mind, and that walk can be a moving meditation," Britton says.

For some individuals, journaling is a way to ponder the present and achieve a thoughtful mindset. Journaling can certainly be done alone, in the privacy of one's office or at home.

Katz, the attorney from Fairfax, practices t'ai chi ch'uan, described as Chinese calisthenics that can be a deadly martial art. Since incorporating t'ai chi into his life, Katz has found that he is better able to handle surprises in the courtroom.

"If I practice at night and in the morning, I am prepared for the bows and arrows of trial work," he says.

Katz's office also reflects his mindfulness practice. There is a small fountain in the reception area so that people can hear "the soft sounds of the water." In his office, there are four different Buddha statues, a Bodhisattva sculpture, and a mentor's calligraphy.

"There's a lot of serenity here," Katz says. "It helps with everybody who walks in here."

For Vaughan, who specializes in adoption and child abuse cases, yoga is the activity of choice. Vaughan says yoga helps her with stress management and also "works the kinks" out of her body, especially after a day of sitting in the office.

"Not everyone likes yoga, but why not try?" Vaughan says. "To breathe and move is good for everyone. If you are an introvert, start with videos. Try it and see how it goes."

When Vaughan decides to simply meditate, she doesn't tend to join a group. She says she just sits either in her chair or cross-legged on the floor.

"I just focus on my breath," she says. "I think about what it's like sitting there—is it hot or is it cold? And then I try to slow down my breathing. Any thoughts that come up, I just sort of dismiss them; I think, 'I don't need you right now,' and I let them float away."

Another way to pursue mindfulness, especially for the busy professional, is to hire a personal instructor or coach.

Kelly Newsome, a Washington, D.C.-based corporate lawyer-turned-yoga instructor, helps her clients from all over the world to live "mindfully, without judgment," and to pursue a holistic approach to their lives. Newsome says she guides her clients through a variety of "care rituals" and offers them a "totally supportive space" where they have no responsibilities other than taking care of themselves.

Newsome started her business Higher Ground Yoga in 2009. At that time, she offered private yoga sessions. But she soon learned that her clients, many of them busy female professionals with children, needed something more: They needed to learn ways to keep themselves centered while juggling work and family responsibilities. This prompted Newsome to start Ritual Care, an umbrella company under which Higher Ground Yoga now operates.

By being mindful, Newsome says individuals, and lawyers in particular, can determine for themselves whether they want to continue with their normal way of doing business. For example, they can examine certain practices like working through the night or worrying over billable hours.

"In the legal profession, it's like a badge of honor: 'Oh, I had an all-nighter,'" Newsome says. "We tend to complain about it, but yet we glorify it. Mindfulness can help you understand whether or not you really do like doing that. When you are mindful about your life, you understand—'I love this' or 'I'm not sure.'"

Real-Life Benefits

Lawyers who practice mindfulness are quick to declare its benefits, such as an increased ability to remain calm when faced with contentious opposing counsel or a fast-approaching deadline.

In both her current and past jobs, Tossell, a Washington, D.C.-based lawyer, has worked with children and their parents going through difficult situations.

"Sometimes I receive calls from parents who are upset," Tossell says. "I find that meditation and yoga have been essential for me not to get overwhelmed, to experience someone else's pain or anger while staying balanced myself." Practicing mindfulness has helped her become better at "handling the unexpected."

Katz, on the other hand, says t'ai chi allows him to remain "calm in the eye of the storm." Katz says he is in court a fair amount of time defending clients, and daily t'ai chi keeps him ready for any battling he must do on their behalf.

A time or two, Katz admits some judges have gotten frustrated with him, even yelled at him. But Katz says he can stay even-keeled, even smile, in the most challenging of situations.

"I focus on my breathing," he says. "I'm not exactly able to chant a mantra in the middle of the courtroom, but I can tap on my mala beads and feel centered."

Lawyers who practice mindfulness also say the emphasis on listening to themselves without judgment during meditation translates to improved ability to empathize with and listen in the moment to others.

For Goldman, mindfulness is about "access to perspective, crucial for people who give advice and must keep the big picture in mind."

Whitman, the Georgetown Law student, believes meditation will continue to help him after he graduates from law school.

"Meditating can be awkward in the beginning when you don't know how to do it," Whitman says. "You are supposed to sit quietly, with your eyes closed, focus on the present moment, and not let your mind wander. That's hard at first. But once you learn the practice, you can then apply that to many aspects of your life. It helps you to not feel overwhelmed no matter what is going on around you."

Newsome warns that achieving mindfulness could be life-changing: "Being mindful helps you to taste your life, to be present for it. Once you are awake, it's very hard to go back to sleep. It's almost like the best drug. It's hard to turn that off, and why would you want to?"

Anna Stolley Persky, a regular contributor to Washington Lawyer, wrote about the continuing battle over abortion access, 42 years post-Roe v. Wade, in the January issue.

A Happy Lawyer Is a Professional Lawyer

Finding enjoyment in your career can make you a better and more effective attorney

BY IRENE LEONARD

"Find a job you enjoy doing and you will not have to work a day in your life." Many lawyers have found that kind of job in their law practices. This article is about them — how they find enjoyment in the practice of law and how it helps them to be more professional.

Happy Lawyers Do Exist

"In my 20th year of practicing law," says Stacey Romberg, a Seattle business attorney, "I'm pleased and happy that I like it — and I'm ready for 20 more!" Her enthusiasm stems from several sources. First and foremost, Stacey believes good health creates a foundation that allows her positive attitude in her life and practice to thrive. Stacey points out the necessity of controlling the things you can control. "We can't control everything about our health, but we can control some things — especially whether we sleep seven to eight hours on a regular basis, whether we exercise, and what we choose to eat."

Second, Stacey tells me how important it is to have fun. "I'm fortunate to have some truly great clients. I not only enjoy working with them, I also enjoy having dinner with them and just chatting! If you can do interesting work, and then have a fun and team-like approach with your clients to produce solid results, what's not to like about that?"

Wayne Blair, now an arbitrator and mediator with JAMS, enjoyed a similar team-like approach working with his clients during his 35 years as a lawyer with Montgomery Purdue Blankinship & Austin. "I particularly enjoyed the intellectual challenge of my practice and working with the same clients for many years on a day-to-day basis to develop good working relationships." Early in his career, Wayne knew himself well enough to know that being strongly involved in the activities of the King County and Washington State bar associations would provide him with enormous satisfaction. His volunteer work with the associations "added some balance to my professional life, allowed me an opportunity to work with many lawyers and judges in a collegial setting, and gave some perspective to a stressful and busy practice." Wayne strongly believes that lawyers, in their own way, "should contribute to the legal profession and the community as part of a satisfying, well-rounded, professional practice."

Lish Whitson, another well-respected Seattle lawyer who enjoys his practice, agrees with Wayne about the rewards that come from volunteer activities. Lish believes: "If every attorney, after caring for his or her family, devotes the rest of their considerable talent and intellect to helping others, they will eventually look back on a life well lived with both pride and satisfaction." Lish goes even further to point out that "the greatest joy comes from helping others who cannot help themselves." He truly believes "the practice of law is a noble profession that allows us to live and prosper while doing something we love."

Qualities of Happy Lawyers

Lawyers who enjoy their practice have many things in common. They:

- Choose work that aligns with their values and strengths.
- Have a positive, resourceful attitude

and turn worries into action by solving the problem the worry represents.
- Balance working hard with maintaining quality family relationships, health, and fun.
- Take pleasure from producing results in which they feel they accomplished something or helped someone.
- Are confident in their abilities and their appearance.
- Are continually learning, and embrace intellectual challenge.
- Strive to be the best at what they do.
- Give of themselves.
- Have many solid, respectful relationships.
- Have some degree of control over their work.

Lawyers who enjoy their practice pay attention to what they need to do to stay engaged in their practice. That means knowing themselves well enough to know what's important and striving to achieve goals that will keep their practice fulfilling.

Happy Lawyers Experience Flow

Mihaly Csikszentmihalyi (pronounced chick-SENT-me-high), renowned professor of psychology and education at the University of Chicago and director of the Quality of Life Research Center at the Drucker School, is the architect of the notion of flow. A flow state is when you are so fully absorbed in an activity that you lose your sense of time. "It is the full involvement of flow, rather than happiness, that makes for excellence in life," Professor Csikszentmihalyi states. "When we are in flow, we are not happy, because to experience happiness we must focus on our inner states, and that would take away attention from the task at hand." He goes on to say, "Only after the task is completed do we have the leisure to look back on what has happened, and then we are flooded with gratitude for the excellence of that experience — then, in retrospect, we are happy." And finally, "The happiness that follows flow is of our making, and it leads to increasing complexity and growth in consciousness."[1]

Lawyers who enjoy their practice pay attention to what they need to do to stay engaged in their practice. That means knowing themselves well enough to know what's important and striving to achieve goals that will keep their practice fulfilling.

How many times have you been so absorbed in your work that you experienced flow? Felt happy? The next time you're in the flow and complete a task, reflect on how you feel afterward. You may feel happy or satisfied but like many lawyers, be reluctant to describe it as such. The act of calling it happiness will increase your pleasure in the task and help you savor the positive feeling your work instills in you.

Irene Leonard provides services as a business coach for lawyers after enjoying practicing law for over 18 years. She can be reached at 206-723-9900 or through her website, www.coachingforchange.com.

NOTES

1. Csikszentmihalyi, Mihaly, *Finding Flow: The Psychology of Engagement with Everyday Life* (1998), p. 32.

RULE 1.6
CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer to the extent the lawyer reasonably believes necessary:

(1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime;

(3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with these Rules;

(5) may reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) may reveal information relating to the representation of a client to comply with a court order; or

(7) may reveal information relating to the representation of a client to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court appointed fiduciary such as a guardian, personal representative, or receiver.

Comment

See also Washington Comment [19].

[1] [Washington revision] This Rule governs the disclosure by a lawyer of information relating to the representation of a client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special

circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] [Washington revision] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] [Reserved.]

[8] [Reserved.]

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding

and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] [Reserved.]

[13] [Washington revision] A lawyer may be ordered to reveal information relating to the representation of a client by a court. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

See also Washington Comment [24].

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] [Washington revision] Paragraphs (b)(2) through (b)(7) permit but do not require the disclosure of information relating to a client's representation to accomplish the purposes specified in those paragraphs. In exercising the discretion conferred by those paragraphs, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction

and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 3.3, 4.1(b), and 8.1. See also Rule 1.13(c), which permits disclosure in some circumstances whether or not Rule 1.6 permits the disclosure.

See also Washington Comment [23].

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Additional Washington Comments (19 - 26)

[19] The phrase "information relating to the representation" should be interpreted broadly. The "information" protected by this Rule includes, but is not necessarily limited to, confidences and secrets. "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the professional

relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Disclosure Adverse to Client

[20] Washington's Rule 1.6(b)(2), which authorizes disclosure to prevent a client from committing a crime, is significantly broader than the corresponding exception in the Model Rule. While the Model Rule permits a lawyer to reveal information relating to the representation to prevent the client from "committing a crime . . . that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer's services," Washington's Rule permits the lawyer to reveal such information to prevent the commission of any crime.

[21] [Reserved.]

[22] [Reserved.]

[23] The exceptions to the general rule prohibiting unauthorized disclosure of information relating to the representation "should not be carelessly invoked." In re Boelter, 139 Wn.2d 81, 91, 985 P.2d 328 (1999). A lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of avoidable disclosure.

[24] Washington has not adopted that portion of Model Rule 1.6(b)(6) permitting a lawyer to reveal information related to the representation to comply with "other law." Washington's omission of this phrase arises from a concern that it would authorize the lawyer to decide whether a disclosure is required by "other law," even though the right to confidentiality and the right to waive confidentiality belong to the client. The decision to waive confidentiality should only be made by a fully informed client after consultation with the client's lawyer or by a court of competent jurisdiction. Limiting the exception to compliance with a court order protects the client's interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court. It is the need for a judicial resolution of such issues that necessitates the omission of "other law" from this Rule.

Withdrawal

[25] After withdrawal the lawyer is required to refrain from disclosing the client's confidences, except as otherwise permitted by Rules 1.6 or 1.9. A

lawyer is not prohibited from giving notice of the fact of withdrawal by this Rule, Rule 1.8(b), or Rule 1.9(c). If the lawyer's services will be used by the client in furthering a course of criminal or fraudulent conduct, the lawyer must withdraw. See Rule 1.16(a)(1). Upon withdrawal from the representation in such circumstances, the lawyer may also disaffirm or withdraw any opinion, document, affirmation, or the like. If the client is an organization, the lawyer may be in doubt about whether contemplated conduct will actually be carried out by the organization. When a lawyer requires guidance about compliance with this Rule in connection with an organizational client, the lawyer may proceed under the provisions of Rule 1.13(b).

Other

[26] This Rule does not relieve a lawyer of his or her obligations under Rule 5.4(b) of the Rules for Enforcement of Lawyer Conduct.

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To: ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, Individuals, and Entities

From: ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies[1]

Re: For Comment: Issues Paper Concerning Client Confidentiality and Lawyers' Use of Technology

Date: September 20, 2010

I. Introduction

The American Bar Association's Commission on Ethics 20/20 is examining technology's impact on the legal profession, including confidentiality-related concerns that arise from lawyers' increasing transmission and storage of electronic information.[2] One of the Commission's objectives is to determine what guidance to offer to lawyers who want to ensure that their use of technology complies with their ethical obligations to protect clients' confidential information. The goal of this paper is to invite comments on the Commission's efforts to date and, specifically, to the questions posed at the end of this paper. Comments may be posted to the Commission's website and should be sent to the Commission as requested below by **December 15, 2010.**

The Commission has taken no positions about the matters addressed in this paper. Rather, the Commission expects to use any comments that it receives to supplement the research that the Commission has completed and to facilitate the development of various reports and proposals that the Commission plans to draft during the next two years.

II. A Brief Overview of Law Practice Technology

The Working Group and Commission have focused on two related types of technology that lawyers commonly employ. The first type has become known as "cloud computing,"[3] a term that usually refers to services that are controlled by third-parties and accessed over the Internet.

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[1] Members of the Working Group are: Fred S. Ury and Carole Silver (Co-Chairs), Robert E. Lutz, Herman J. Russomanno, Judith A. Miller, Carl Pierce (ABA Standing Committee on Delivery of Legal Services), Michael P. Downey (ABA Law Practice Management Section), Paula Frederick (ABA Standing Committee on Ethics and Professional Responsibility), Stephen J. Curley (ABA Litigation Section), Youshea A. Berry (ABA Young Lawyers' Division). Andrew M. Perlman serves as Reporter, and Will Hornsby, Martin Whittaker, and Sue Michmerhuizen provide counsel.

[2] The Commission is considering other technology-related ethical concerns, but the goal of this paper is to solicit feedback only on issues relating to confidentiality.

[3] There are many different types of cloud computing. This paper uses the term generically to refer to any service provided online and operated by a third party.

Examples include online data storage (e.g., Mozy.com, Carbonite.com), Internet-based email (e.g., AOL, Yahoo, or Gmail), and software as a service ("SaaS").[4] SaaS includes a variety of services that lawyers now use, such as law practice management applications that can help lawyers with conflicts checking, document management and storage, trust account management, timekeeping, and billing.

The second type of technology – technology controlled by lawyers or their employees – has received less recent media attention than cloud computing, but it is more ubiquitous and raises similar confidentiality-related concerns as cloud computing. This category includes many devices that can store or transmit confidential electronic information, such as laptops, cell phones, flash drives, and even photocopiers (e.g., copiers that scan and retain information).

I. Confidentiality-Related Issues of Interest to the Commission

The Commission is studying how lawyers use these forms of technology as well as the current state of data security measures for each form of technology. The Commission's efforts have been guided by the reality that information, whether in electronic or physical form, is susceptible to theft, loss, or inadvertent disclosure. The Commission's goal is to offer recommendations and proposals regarding how lawyers should address these risks. To that end, the Commission invites comments on several confidentiality-related issues arising from lawyers' use of technology.

A. The Form of the Commission's Recommendations

As an initial matter, the Commission recognizes that there may be a gap between technology-related security measures that are ethically required and security measures that are merely consistent with "best practices." For example, it may be consistent with best practices to install sophisticated firewalls and various protections against malware (such as viruses and spyware), but lawyers who fail to do so or who install a more basic level of protection are not necessarily engaged in unethical conduct. Similarly, it might be inadvisable to use a cloud computing provider that does not comply with industry standards regarding encryption, but it is not necessarily unethical if a lawyer decides to do so.

In light of these distinctions, the Commission is currently considering three options, which are not mutually exclusive. First, the Commission could produce a white paper or some other form of practice guidance with regard to lawyers' use of technology. The Commission invites comments on whether the Commission should offer such guidance, and if so, how specific the guidance should (or could) be given the rapid pace

[4] In the past, software had to be installed on a computer to take advantage of certain applications, such as word processing. Today, it is possible to access similar applications online without installing the software on a computer or storing the data (such as word processing files) locally. These online applications are known as "software as a service" and, depending on how they are configured, enable multiple users to access information from different locations. *See* ABA Legal Technology Resource Center, FYI: Software as a Service (SaaS) for Lawyers (2010), http://www.abanet.org/tech/ltrc/fyidocs/saas.html.

of technological change. Moreover, the Commission is interested in learning how lawyers currently determine their ethical obligations in these areas. For example, do lawyers hire technology experts or consultants? Do lawyers review bar association materials, including ethics opinions and best practices guidelines, and if so, which materials do they review and find to be helpful? The Commission is also interested in learning whether any guidance it offers should vary depending on a law office's size, its resources, its practice areas, and the type of clients it serves.

A second option is to create an online resource that describes existing practices and emerging standards regarding lawyers' use of technology. This resource could be operated and continuously updated by the American Bar Association in coordination with various entities, such as the ABA Center for Professional Responsibility, the ABA Legal Technology Resource Center, the ABA's Division for Legal Services, and outside experts on legal technology and legal ethics. This approach has the benefit of ensuring that lawyers have access to regularly updated information about security standards as new technology-related ethical concerns arise.

Finally, a third option (either instead of or in addition to offering a white paper or an interactive online practice guide) is for the Commission to propose amendments to the Model Rules of Professional Conduct, such as Model Rules 1.1 (competency), 1.6 (duty of confidentiality), 1.15 (safeguarding client property), or the comments to those Rules. These amendments could emphasize that lawyers have particular ethical duties to protect clients' electronic information beyond mere practice norms. The Commission invites comments on which Rules or comments should be amended and what issues those amendments should address.

The Commission recognizes that any guidance or rule amendments that it offers would have to operate within an increasingly large body of law that governs data privacy, some of which already applies to lawyers. For example, Massachusetts recently adopted a rigorous law on data privacy, http://www.mass.gov/Eoca/docs/idtheft/201CMR1700reg.pdf, which applies to many lawyers and law firms (including those outside of Massachusetts) that have confidential information about Massachusetts residents. The Commission invites comments on whether any existing state or federal regulations, or any guidance offered in non-legal industries, would serve as a good model for the legal profession.

B. Confidentiality-Related Concerns from Cloud Computing

Lawyers in different practice settings have taken advantage of cloud computing's many benefits, but cloud computing also raises several specific issues and possible concerns relating to the potential theft, loss, or disclosure of confidential information. They include:

● unauthorized access to confidential client information by a vendor's employees (or sub-contractors) or by outside parties (e.g., hackers) via the Internet

● the storage of information on servers in countries with fewer legal protections for electronically stored information

● a vendor's failure to back up data adequately

● unclear policies regarding ownership of stored data

● the ability to access the data using easily accessible software in the event that the lawyer terminates the relationship with the cloud computing provider or the provider changes businesses or goes out of business

● the provider's procedures for responding to (or when appropriate, resisting) government requests for access to information

● policies for notifying customers of security breaches

● policies for data destruction when a lawyer no longer wants the relevant data available or transferring the data if a client switches law firms

● insufficient data encryption

● the extent to which lawyers need to obtain client consent before using cloud computing services to store or transmit the client's confidential information

The Commission invites comments on how it should approach each of these issues as well as information about other confidentiality-related concerns that the Commission should be addressing with regard to cloud computing.

1. Cloud Computing and Outsourcing

Because cloud computing is arguably a form of outsourcing, the Commission welcomes feedback on the extent to which the procedures outlined in ABA Formal Ethics Opinion 08-451 (describing a lawyer's obligations when outsourcing work to lawyers and non-lawyers) should apply in the cloud computing context.

Similarly, the Commission seeks input into whether cloud computing should affect the Commission's ongoing examination of possible amendments to Model Rule of Professional Conduct 5.3 and the comments to that Rule. In particular, Model Rule 5.3 currently describes a lawyer's ethical obligations when supervising non-lawyer assistants, and a comment to that Rule clarifies that the duty extends to non-lawyers who serve as independent contractors. The Commission is considering possible amendments that would clarify the extent to which lawyers have a duty to supervise non-lawyer assistants who perform their work outside of the law firm. The Commission invites comments on whether Model Rule 5.3 or its comments should be revised to reflect that cloud computing falls under the Rule and, if so, what a lawyer's ethical obligations should be when using cloud computing services.

2. Cloud Computing Industry Standards and Terms and Conditions

The Commission seeks more information about existing cloud computing industry standards with regard to data privacy and security. The Commission also seeks to determine which terms and conditions (if any) are essential for lawyers. Such terms and conditions could address:

- the ownership and physical location of stored data
- the provider's backup policies
- the accessibility of stored data by the provider's employees or sub-contractors
- the provider's compliance with particular state and federal laws governing data privacy (including notifications regarding security breaches)
- the format of the stored data (and whether it is compatible with software available through other providers)
- the type of data encryption
- policies regarding the retrieval of data upon the termination of services

The Commission invites comments on whether lawyers have an obligation to negotiate particular terms and conditions before incorporating cloud computing services into their law practices. And if lawyers should have such an obligation, the Commission seeks input into what the terms and conditions should state and what the Commission's recommendations in this area should be.

C. Confidentiality-Related Concerns from "Local" Technology

Forms of technology other than cloud computing can produce just as many confidentiality-related concerns, such as when laptops, flash drives, and smart phones are lost or stolen. Because these forms of technology can store vast amounts of confidential information, the Commission is considering whether to recommend that lawyers take certain precautions, such as:

- providing adequate physical protection for devices (e.g., laptops) or having methods for deleting data remotely in the event that a device is lost or stolen
- encouraging the use of strong passwords
- purging data from devices before they are replaced (e.g., computers, smart phones, and copiers with scanners)

● installing appropriate safeguards against malware (e.g., virus protection, spyware protection)

● installing adequate firewalls to prevent unauthorized access to locally stored data

● ensuring frequent backups of data

● updating computer operating systems to ensure that they contain the latest security protections

● configuring software and network settings to minimize security risks

● encrypting sensitive information, and identifying (and, when appropriate, eliminating) metadata from electronic documents before sending them[5]

● avoiding "wifi hotspots" in public places as a means of transmitting confidential information (e.g., sending an email to a client)

The Commission invites comments on how it should approach each of these issues as well as information about other confidentiality-related concerns that the Commission should be addressing.

D. Cyberinsurance and Cyberliability Insurance

The Commission has learned of the increasing availability of cyberinsurance and cyberliability insurance. Cyberinsurance provides coverage for some technology-related losses, such as the cost to replace lost information due to cyberattacks or the expense of post-cyberattack compliance obligations. A related insurance product is cyberliability insurance, which provides coverage for lawsuits that might not be covered by some professional liability policies, such as claims by third parties arising out of a lawyer's failure to protect confidential electronic information.

The Commission seeks more information about cyberinsurance and cyberliability insurance, including the underwriting requirements for such insurance and whether typical professional liability policies provide inadequate coverage for technology-related claims and losses. The Commission invites comments on the prevalence of cyberinsurance and cyberliability insurance among lawyers, how lawyers currently manage the risks associated with technology (including whether lawyers believe their

[5] The Commission is considering two other issues that relate to the subject of metadata but are outside the scope of this paper. In particular, the Commission is considering whether any guidance is needed beyond ABA Formal Opinion 06-442 concerning a lawyer's surreptitious review of another party's metadata. The Commission is also considering whether any guidance is needed regarding a lawyer's receipt of materials from a third party that the lawyer knows or has reason to believe were unlawfully obtained, such as through a cyberattack.

current professional liability policies provide adequate coverage), and whether the advisability of such policies should vary depending on a law office's size, its resources, its practice areas, and the type of clients it serves. The Commission also seeks to learn whether smaller law firms and solo practitioners have had difficulty obtaining cyberinsurance or cyberliability insurance because of the underwriting requirements involved.

II. Conclusion

Lawyers must take reasonable precautions to ensure that their clients' confidential information remains secure. When data was strictly in hard copy form, lawyers could easily discern how to satisfy their professional obligations and did not need elaborate ethical guidance. Now that data is predominantly in electronic form, however, the necessary precautions are more difficult to identify. One of the Commission's goals is to identify the precautions that are either ethically necessary or professionally advisable. To that end, the Commission invites comments on the questions and issues posed above, including the following:

1. Should the Commission offer some form of white paper that offers practice guidance with regard to lawyers' use of technology? (See Part III.A above.)

    a. If so, which issues should the document address and what advice should it offer? Should the guidance vary depending on a law office's size, its resources, its practice areas, and the type of clients it serves?

    b. How do lawyers currently determine their ethical obligations when using technology? For example, do they rely on information technology experts (either full or part-time)? Do they consult bar association materials, including ethics opinions and best practices guidelines, and if so, which materials do they consult? Are there resources other than the materials listed in the bibliography at the end of this paper that the Commission should review?

2. Should the Commission recommend that the ABA create an online and continuously updated resource that describes existing practices and emerging standards regarding lawyers' use of technology? (See Part III.A above.)

3. Should the Commission propose any amendments to the Model Rules of Professional Conduct, such as Model Rules 1.1 (competency), 1.6 (duty of confidentiality), or 1.15 (safeguarding client property), or the comments to those Rules? If so, which Rules or comments should be amended and what issues should those amendments address? (See Part III.A above.)

4. Do any existing state or federal regulations, or any best practices documents offered in non-legal industries, serve as a good model for the legal profession regarding the use of technology? For example, for law firms that have had to

comply with the new Massachusetts statute on data security, have those law firms found the new requirements to be consistent with existing practices, and if not, are the new requirements useful? Do the requirements impose any unnecessary burdens on law practices? (See Part III.A. above.)

5. With regard to cloud computing, which confidentiality-related issues require the Commission's attention, and what particular guidance should the Commission offer regarding those issues? (See Part III.B above).

    a. Is cloud computing a form of outsourcing that should be analyzed under ABA Formal Ethics Opinion 08-451 or governed by Model Rule 5.3 and its comments? (See III.B.1 above.)

    b. Should lawyers have an obligation to negotiate particular terms and conditions before incorporating cloud computing services into their law practices? If so, which terms and conditions are essential, and what should the Commission's recommendations be regarding these terms and conditions? (See III.B.2 above.)

    c. What are the cloud computing industry's standards regarding data security? Does the industry have standard terms and conditions? To what extent are they negotiable? (See III.B.2 above.)

6. Should the Commission offer guidance on various precautions that lawyers should take regarding the use of various devices that are capable of storing or transmitting confidential information, such as laptops, flash drives, smart phones, and photocopiers? If so, which precautions should the Commission recommend? And should those recommendations take the form of practice guidance or proposed amendments to the Model Rules of Professional Conduct? (See III.C above.)

7. Do professional liability policies typically cover claims arising out of technology-related thefts, losses, or inadvertent disclosures of confidential digital information? If not, should lawyers consider purchasing cyberinsurance or cyberliability insurance? Should the decision to buy such coverage depend on a law office's size, its resources, its practice areas, and the type of clients it serves? What are the underwriting requirements for such insurance? Have lawyers and law firms had difficulty satisfying the underwriting requirements for such policies? (See III.D above.)

Responses to these questions or comments on any related issues should be directed by **December 15, 2010**, to:

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Comments received may be posted to the Commission's website.

Select Bibliography

The Commission has had the benefit of reviewing numerous materials, a select number of which are included in this sample bibliography. The Working Group and Commission welcome recommendations for additional resources that address the issues in this paper.

Ethics Opinions and Related Materials

1. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008).
2. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999).
3. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 95-398 (1995).
4. State Bar of Arizona Op. 09-04 (2009).
5. State Bar of Arizona Op. 05-04 (2005).
6. Florida Bar Op. 06-01 (2006).
7. Illinois State Bar Ass'n Op. 96-10 (1997).
8. Maine Prof'l Ethics Comm'n Op. no. 194 (2008).
9. Nevada State Bar Formal Op. 33 (2006).
10. New Jersey Advisory Comm. on Prof'l Ethics Op. 701 (2006).
11. New York State Bar Ass'n Op. 820 (2008).

12. New York State Bar Ass'n Op. 782 (2004).

13. North Carolina Bar Ass'n Proposed Op. 7 (2010).

14. State Bar Ass'n of N. Dakota Op. 99-03 (1999).

15. Pennsylvania Bar Ass'n Inquiry No. 2010-014 (2010).

16. Pennsylvania Bar Ass'n Op. 2005-105 (2005).

17. Technology Advisory Comm. of North Carolina Bar Ass'n, Comments to State Bar's Request for Comments on Ethics Opinion (May 10, 2010).

18. Memorandum from the ABA eLawyering Task Force of the Law Practice Management Section, to the North Carolina Ethics Committee, *"Cloud Computing", Solos and Small Law Firms, and Consumer Access Affordable Legal Services* (Oct. 15, 2009).

19. Letter from Carolyn Elefant, Attorney, Creator of MyShingle.com, to Alice Neece Mine, Assistant Executive Director, North Carolina State Bar, *Re: Ethics Inquiry on Cloud Computing*, (April 9, 2010).

Background on Cloud Computing

20. ABA Legal Technology Resource Center, FYI: Software as a Service (SaaS) for Lawyers (2010).

21. Roland L. Trope & Claudia Ray, *The Real Realities of Cloud Computing: Ethical Issues for Lawyers, Law Firms, and Judges* (2010).

22. David Bilinksky and Matt Kesner, *Introduction to Cloud Computing*, ABA Techshow (2010).

23. Nicole Black, *Lawyers Should Not Be Wary of Cloud Computing*, 72 Tex. B.J. 746 (2009).

24. Stephanie Kimbro, *Chapter 3: Choosing the Technology, Cloud Computing and Software as a Service (SaaS), in* Delivering Legal Services Online: How to Set Up and Operate a Virtual Law Practice (2010).

25. Edward A. Pisacreta, A Checklist for Cloud Computing Deals (2010).

26. Catherine Reach and Erik Mazzone, *Hey, You, Get ~~Off of~~ Onto My Cloud: Tools to Run Your Practice in the Cloud*, ABA Techshow (2010).

Background on Lawyers' Use of Technology

27. Erik Mazzone & David Ries, *A Techno-Ethics Checklist, Basics for Being Safe, Not Sorry*, ABA Law Practice Magazine, Vol. 35 No. 2 (2009).

28. Roland L. Trope & E. Michael Power, *Lessons in Data Governance: A Survey of Legal Developments in Data Management, Privacy and Security*, 61 Bus. Law. 471 (2005).

29. John D. Comerford, *Competent Computing: A Lawyer's Ethical Duty to Safeguard the Confidentiality and Integrity of Client Information Stored on Computers and Computer Networks*, 19 Geo. J. Legal Ethics 629 (2006).

30. Faith M. Heikkila, *Data Privacy in the Law Firm*, 88-JUL Mich. B.J. 33 (2009).

31. Tonya L. Johnson, *Is Your Copy Machine A Security Risk?*, ABA Site-tation Posts (May 18, 2010).

32. Ash Mayfield, *Decrypting the Code of Ethics: The Relationship Between an Attorney's Ethical Duties and Network Security*, 60 Okla. L. Rev. 547 (2007).

33. Dan Pinnington, Managing the Security and Privacy of Electronic Data in a Law Office- Part 1, Law Practice Today (Jan. 2005).

RPC RULE 1.4
COMMUNICATION

(a) A lawyer shall;

(1) promptly inform the client of any decision of 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.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless that client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty

will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the

appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

RPC RULE 2.1
ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

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LEGAL REPRESENTATION AND THE NEXT STEPS TOWARD CLIENT CONTROL: ATTORNEY MALPRACTICE FOR THE FAILURE TO ALLOW THE CLIENT TO CONTROL NEGOTIATION AND PURSUE ALTERNATIVES TO LITIGATION

Robert F. Cochran, Jr.

LEGAL REPRESENTATION AND THE NEXT STEPS TOWARD CLIENT CONTROL: ATTORNEY MALPRACTICE FOR THE FAILURE TO ALLOW THE CLIENT TO CONTROL NEGOTIATION AND PURSUE ALTERNATIVES TO LITIGATION

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I. INTRODUCTION

There is a broad consensus within Western ethical systems in support of the principle of autonomy; to the extent reasonably possible, individuals should control decisions that affect them.[1] Based on this principle of autonomy, doctors are subject to malpractice liability if they fail to obtain the informed consent of patients prior to medical treatment; they must inform the patients of the risks[2] of and alternatives[3] to medical treatment, and allow the patient to choose whether to undergo the treatment. However, the legal system has been slow to apply a similar duty to lawyers. While lawyers have a professional duty to allow clients to make some choices during legal representation,[4] they are not required to allow clients to make many other significant decisions.[5] It is ironic that the lawyer, who under our system of legal representation is intended to protect the client's autonomy from unjustifiable interference by the state or other individuals, can become an additional source of interference with the client's autonomy. This article addresses the question of what decisions the client should control during legal representation, and the steps that courts are likely to take in the development of a right of client control.

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1. *See infra* notes 37-47, accompanying text, and sources cited therein.

2. *See, e.g.*, Haley v. United States, 739 F.2d 1502 (10th Cir. 1984); Unthank v. United States, 732 F.2d 1517 (10th Cir. 1984); Holt v. Nelson, 11 Wash. App. 230, 523 P.2d 211 (1974); Scaria v. St. Paul Fire & Marine Ins. Co., 68 Wis. 1, 227 N.W.2d 647 (1975).

3. *See, e.g.*, Marino v. Ballestas, 749 F.2d 162 (3d Cir. 1984); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Jacobs v. Painter, 530 A.2d 231 (Me. 1987). See also the following statutes which require disclosure of alternative methods of treatment, FLA. STAT. § 768.46 (1986); ME. REV. STAT. ANN. tit. 24, § 2905 (1990); N.C. GEN. STAT. § 90-21.13 (1985).

4. *See infra* notes 28-32, cases cited therein, and accompanying text.

5. *See, e.g.*, sources cited at notes 23 and 35. Some courts and lawyer professional codes suggest that the lawyer should allow the client to choose the ends of the representation and that the lawyer should control the means used to obtain those ends. See sources cited *infra* at notes 22-23. An examination of this standard and the cases that purport to apply it reveal its weaknesses. Courts have difficulty determining what decisions are ends decisions and what decisions are means decisions, and the cases in this area do not appear to actually apply the ends/means standard. *See infra* text accompanying notes 22-36. What courts have done is to identify specific choices within legal representation that the client is entitled to make. *See infra* text accompanying notes 28-32.

At issue is the role of the lawyer. Should lawyers use their power to do what they think is best for the client or should they empower the client to do what the client chooses to do? This article will argue that, in general, clients should make the significant choices in legal representation,[6] not only

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6. Ellmann suggests that people can exercise free choice when: 1) They are aware of the decisions to be made and that they are entitled to make them; 2) They know the choices and the costs and benefits of these choices; and 3) They understand their values and emotional needs. *See* Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 727-28 (1987).

Binder & Price present a helpful model for helping the client to reach decisions. *See* D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977). They suggest that lawyers enable clients to make decisions by helping them to consider "potential solutions, with their probable positive and negative consequences. . . ." D. BINDER & S. PRICE, *supra*, at 135.

Binder & Price suggest that the lawyer first identify the potential solutions to a problem. Then, for each potential solution, the lawyer should identify the legal consequences, the client should identify the psychological and social consequences, and together they should identify the economic consequences. D. BINDER & S. PRICE, *supra*, at 143-45. They suggest a simple method of enabling the client to weigh these factors:

> When the alternatives are initially presented by the lawyer, they can simultaneously be jotted down on a piece of paper. All the alternatives, including any mentioned by the client, are listed horizontally across the page. Under each alternative, there is a brief description. The description attempts to summarize the essence of the alternative in terms of its legal consequences. . . . When all the alternatives have been listed across the page, spaces are made beneath each alternative for listing the advantages and disadvantages. As the lawyer and client examine the alternatives, the lawyer jots down each consequence on the sheet of paper as each consequence is mentioned. The consequence is listed as either an advantage or disadvantage.

D. BINDER & S. PRICE, *supra*, at 184. The client can use the paper to make the decision, either in the lawyer's office or at home. D. BINDER & S. PRICE, *supra*, at 186.

The Binder & Price method appears to be very influential. Their book is in use at 90 law schools. Ellmann, *supra*, at 781. Their method is taught and advocated in other recent law school skills textbooks. *See e.g.*, D. GIFFORD, LEGAL NEGOTIATIONS, THEORY AND APPLICATIONS (1989); L. RISKIN & J. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS (1987). Bellow & Moulton present a similar model for enabling the client to make decisions. G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY 998-1017 (1978).

The lawyer should explain the alternatives and potential consequences in terms that the client can understand. This may require different language, depending on the sophistication of the client. Lawyers should avoid the problem that some medical informed consent forms create for some patients. One study found that medical informed consent forms were written in language at the undergraduate or graduate level. Grundner, *On the Readability of Surgical Consent Forms*, 302 NEW ENG. J. MED. 900 (1980), *cited in* Meisel & Roth, *Toward an Informed Discussion of Informed Consent: A Review and Critique of the Empirical Studies*, 25 ARIZ. L. REV. 265, 298 (1983).

Client counseling requires more than merely presenting the client with options and allowing the client to choose. Client counseling requires the lawyer to discuss the risks of various choices with the client. As one court said in a case in which the client initially opposed settlement and the attorney did not pursue a discussion of settlement:

> The fact the client is initially opposed to settlement does not excuse the duty to advise and counsel the client about settlement if such advice and counsel is otherwise appropriate. After all, the lawyer's superior skill and knowledge is what the client is paying for. . . . It is not uncommon for the client to have an unwarranted faith

because of the client's interest in autonomy,[7] but because client control is likely to improve the quality of legal representation that clients obtain.[8] Client control of legal representation requires an informed client and an informed client is likely to supervise an attorney's work more carefully. Client control would also improve the quality of legal representation because it would lessen the effects of attorney-client conflicts of interest that are inherent in most legal representation.[9]

A difficulty with establishing a rule of client control is identifying what choices the client should make. Even the simplest legal matter involves many choices. In representation concerning a dispute, choices include everything from whether to bring a suit to whether to cite seven or eight cases for a proposition in a memorandum. In representation concerning a business transaction, choices include everything from whether to form a partnership or corporation to what language to use in an employment contract.

This article advocates that courts require lawyers to allow clients to make those choices which a reasonable person, in what the lawyer knows or should know to be the position of the client, would want to make.[10] If a lawyer's failure to allow a client to make such decisions results in a loss to the client, the lawyer should be subject to malpractice liability.[11] Courts should also continue to identify specific choices that as a matter of law are for the client.

It is likely that the next steps in the development of the right of the client to control legal representation will be the recognition of a duty that attorneys allow clients to control the significant decisions during negotiation,[12] in both legal disputes and transactions,[13] and to allow clients to

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in the righteousness of his position. The lawyer's job is to bring rationality, objectivity and experience to bear on the matter.

Garris v. Severson, Merson, Berke & Melchior, 252 Cal. Rptr. 204, 207 (Cal. Ct. App. 1988) (ordered not published) (citation omitted) (attorney represented both defendant and his liability insurance company).

7. *See infra* text accompanying notes 37-47.

8. *See infra* text accompanying notes 48-61.

9. *See infra* text accompanying notes 62-65.

10. *See infra* text accompanying notes 147-50.

11. A few commentators have advocated malpractice liability for the failure to allow the client to control legal representation. *See* D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 125 (1974); Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 72-73 (1979) (advocates requiring lawyers "to obtain informed consent when client values or lawyer conflicts of interest are involved"); Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy* 65 N.C.L. REV. 315, 349 (1987) (advocates attorney liability for failure to provide client with adequate information, but does not advocate specific standards).

12. *See infra* text accompanying notes 155-200.

13. Most persons who seek a lawyer's counsel . . . do not do so for help in resolving a dispute. Rather, most clients present their lawyers with transactional or planning problems. These clients may want legal assistance in establishing a joint venture or in concluding another business deal; in purchasing a home or in planning an estate; in complying with government regulations or in understanding the tax implications

choose to pursue mediation and arbitration as alternatives to litigation.[14] Courts are likely to hold lawyers liable for the failure to allow the client to make these decisions for several reasons.

First, the failure to allow a client to make significant choices during negotiations and to choose mediation or arbitration could cause the client to suffer a significant loss. If a trial or negotiation of a transaction is unsuccessful, and a client, given the opportunity and sufficient information, would have made a different decision that would have benefited the client, the failure of the attorney to allow the client to make that choice has injured the client.[15]

Second, generally, a client can competently make the significant choices that arise in negotiations, and the choice whether to pursue an alternative means of dispute resolution. Unlike some choices that must be made during litigation, the major decisions related to negotiation, mediation, and arbitration generally are not urgent, nor are they so technical that the ordinary client could not make them intelligently.

Third, the imposition of civil liability on an attorney for the failure to allow the client to choose and control alternatives to litigation would build on well established precedents that give the client the right to choose whether to accept an offer of settlement[16] and precedents that give the medical patient the right to be informed about and to choose alternatives to a proposed medical procedure.[17]

Finally, courts and commentators increasingly recognize the value of alternative means of dispute resolution, both because of the great cost of litigation to the legal system and to individuals,[18] and the capacity of alternative means of dispute resolution to foster reconciliation between parties.[19] It is likely that more clients, when informed of the advantages of mediation and arbitration and given the opportunity to choose to pursue them, would do so, and that more disputes would be resolved through these methods.

> of a particular investment. In the majority of such matters, the client needs to reach an agreement or understanding with some other person or legal entity. To assist the client in achieving that type of goal, the lawyer most often will negotiate with the representative of the other person or entity to arrive at a mutually satisfactory outcome.

R. BASTRESS & J. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATION: SKILLS FOR EFFECTIVE REPRESENTATION 342 (1990).

14. *See infra* text accompanying notes 201-54.

15. For a discussion of the difficulty clients are likely to have showing the injury that an attorney's failure to allow them to choose has caused, see *infra* text accompanying notes 255-71.

16. *See* cases cited *infra* note 32, and *infra* text accompanying notes 166-82.

17. *See* cases cited *supra* note 3, and *infra* text accompanying notes 66-83.

18. *See infra* text accompanying notes 208-14 and 234-39.

19. *See infra* text accompanying notes 215-20 and 240-42.

In recent years, some commentators have objected to proposals that would push litigants toward alternative means of dispute resolution. *See* Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). This position is discussed *infra* at text accompanying notes 243-54.

Part II of this article will discuss the existing law concerning the right to control legal representation. Part III will discuss the benefits and risks of client control. Part IV will propose that courts require attorneys to allow clients to make those choices that the reasonable client, in what the attorney knows or should know is the client's position, would want to make, and that courts continue to identify specific choices that are for the client. Part V will propose that clients have the right to make some specific decisions during negotiations, and the right to be informed of and to choose whether to adopt mediation or arbitration as a means of dispute resolution. It will also discuss the advantages to the client and the legal system of alternative means of dispute resolution and the difficult causation problem that would arise when clients allege that a case would have been resolved more favorably had they been allowed to control the significant choices.

II. THE STATE OF THE LAW: AN ASPIRATION OF CLIENT CONTROL, THE UNHELPFUL ENDS/MEANS STANDARD, AND A FEW SPECIFIC CHOICES RESERVED FOR THE CLIENT

An examination of the lawyer professional codes and relevant cases reveals some confusion in the law concerning control of legal representation. The lawyer codes hold up client control as an aspiration.[20] However, those portions of the code that encourage client control do not require it.[21]

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20. Courts have disciplined attorneys in a few cases for making decisions beyond client authority. *See* Silver v. State Bar of California, 13 Cal.3d 134, 528 P.2d 1157, 117 Cal. Rptr. 821 (1974) (attorney executed settlement agreement without client's knowledge or consent); In re John P. Montrey, 511 S.W.2d 805 (Mo. 1974) (attorney settled case and permitted judgment to be entered in amount in excess of his authority and failed to inform client of facts); In re Stern, 81 N.J. 297, 406 A.2d 970 (1979) (attorney misrepresented to client that suit had been filed and secretly accepted settlement offer despite client's refusal of the offer); In re Jon H. Paauwe, 294 Or. 171, 654 P.2d 1117 (1982) (plaintiff's attorney failed to apprise clients of result of trial).

21. The ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter MODEL CODE], was adopted by the ABA in 1969 and presently regulates lawyers in about half of the states. *See* ABA/ANA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 1:3. It contains Ethical Considerations (ECs), which are aspirational norms, the violation of which will not subject an attorney to discipline, and Disciplinary Rules (DRs), the violation of which will subject the attorney to discipline. MODEL CODE, Preliminary Statement.

EC 7-7 encourages lawyers to allow clients to make a broad range of decisions in the legal representation. It states that lawyers may make decisions:

> not affecting the merits of the cause or substantially prejudicing the rights of a client. . . . But otherwise the authority to make decisions is exclusively that of the client. . . .

MODEL CODE, EC 7-7. This appears to leave the important decisions to the client, because almost any decision in a case may affect the merits or substantially prejudice the rights of the client. *See* Spiegel, *supra* note 11, at 65. EC 7-7 gives examples of decisions that belong to the client: in civil cases, the right to accept settlement offers and the right to wave affirmative defenses, and in criminal cases, the right to decide what plea to take and whether to appeal. EC 7-7 does not discuss decisions such as what theory of the case to adopt, what witnesses to call, and what settlement offers to make, all of which arguably might substantially prejudice

The mandatory sections of the lawyer professional codes,[22] as well as

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the rights of the client.

The Model Code's aspiration of client control, however, is not backed up by its Disciplinary Rules. For a discussion of the Disciplinary Rules from the Model Code that deal with client authority, see *infra* note 22.

The ABA MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter MODEL RULES], adopted by the ABA in 1983, are applicable in most of the states that do not apply the Model Code. ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 1:3. The Model Rules do not contain Ethical Considerations. They contain Model Rules (MRs), the violation of which will subject a lawyer to discipline. The authors of the Model Rules discuss the meaning of the MRs in official comments.

MR 1.2 leaves "decisions concerning the objectives of representation" to the client. MR 1.2(a). As the discussion *infra* at text accompanying notes 24-36 indicates, the question of what is an objective (or end) of the representation is a confusing one and the objectives of the representation can be defined very narrowly. Under MR 1.2(a), the lawyer is required to "consult with the client as to the means by which [the objectives] are to be pursued." The official comment to MR 1.2 helps to define the control that should exist when lawyers "consult with the client as to the means." It says:

> In questions of means, the lawyer . . . *should* defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

MR 1.2, Official Comment [1] (emphasis added). Note that the Comment uses the term "should," rather than "must". Therefore, in the Model Rules, as in the Model Code, in general, client control is an aspiration, rather than a rule.

22. MODEL CODE, *supra* note 21, DR 7-101. The only standard in the Model Code which subjects attorneys to discipline based on their failure to allow clients to control representation, DR 7-101 states that the "lawyer shall not intentionally: (1) "[f]ail to seek the lawful objectives of his client," and that "where permissible" the attorney may use discretion to "wave or fail to assert a right or position of his client." *Id.* This provision reserves ends ("objectives") decisions for the client, but it is somewhat unclear what decisions it reserves for the lawyer. The key question is, of course, when is it "permissible" for the lawyer to "wave or fail to assert a right or position of the client," but the Disciplinary Rules do not give further explanation. "Where permissible" probably means where permitted by the substantive law of the jurisdiction. The courts in most jurisdictions state that they leave to the lawyer the "means decisions." *See infra* cases cited at note 23.

As discussed *supra* at note 21, MR 1.2 of the Model Rules leaves the "decisions concerning the objectives of representation" to the client and requires the lawyer to "consult with the client as to the means by which they are to be pursued." MODEL RULES, *supra*, MR 1.2(a). The Comment to that section explains the requirement that the lawyer consult the client concerning means. It states:

> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. . . . A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

Comment [1] to MR 1.2. Under this Comment to the Model Rules, technical decisions concerning means are for the lawyer to make. As noted *supra*, note 21, the Comment states

many cases,[23] attempt to define the line between the client's decisionmaking authority and that of the attorney in terms of ends and means. The client is to choose the ends of the representation, and the lawyer is to choose the means to be used in pursuit of those ends.

There are two major problems with the ends/means division of authority. First, the ends/means line is unclear. In many cases, it will be difficult to distinguish the ends from the means. As David Luban has said:

> [The ends/means rule] assumes a sharp dichotomy between ends and means, according to which a certain result (acquittal, a favorable settlement, *etc.*) is all that the client desires, while the legal tactics and arguments are merely routes to that result. No doubt this is true in many cases, but it need not be: the client may want to win acquittal *by* asserting a certain right, because it vindicates him in a way that matters to him; or he may wish to obtain a settlement without using a certain tactic, because he disapproves of the tactic. In that case, what the lawyer takes to be mere means are really part of the client's ends.[24]

The difficulty of identifying many decisions as either ends or means decisions is illustrated by cases in which one court has identified a decision as an ends decision for the attorney while another court has identified the same decision as a means decision for the client.[25]

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that lawyers *should* allow the client to make some of the means decisions.

The Comment does not explicitly state the criteria for determining which means decisions are for the client but it gives a few examples. The examples of means decisions reserved for the client—the expense to be incurred and decisions that might adversely affect third parties—are decisions that the typical client could make intelligently and that are likely to be very important to the client. These two factors, the ability of the client to make an intelligent choice, and the importance of the means decision to the client, are probably the proper criteria for determining who should have responsibility for making decisions under the Model Rules. The ability of the client to make an intelligent choice and the importance to the client of the choice, will be most important in determining whether the reasonable client would want to make the decision at issue. This article advocates that those decisions the reasonable client would want to make should be reserved for the client. *See infra* text accompanying notes 147-50.

23. The division of the realms of client and lawyer decision making has been variously phrased as ends-means, substance-procedure, strategy-tactics, or objectives-means. Each grouping probably refers to the same basic division between the goal toward which steps are taken and the steps themselves.

C. WOLFRAM, MODERN LEGAL ETHICS 156 (1986). For cases adopting the ends/means line of client/attorney authority and criticism of them, see Spiegel, *supra* note 11, at 57-58; Strauss, *supra* note 11, at 318-20.

24. Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 459 n.9. Luban also suggests that the reason that paternalism is an issue for professionals is that they tend by the very nature of their training to view all of their client's problems as technical and professional ones. *Id.* at 454.

25. *See, e.g.*, Spiegel, *supra* note 11, at 57 n.56-58 (citing Duffy v. Griffith, Co., 206 Cal. App. 2d 780, 24 Cal. Rptr. 161 (1962); Harness v. Pacific Curtainwall Co., 235 Cal. App. 2d 485, 45 Cal. Rptr. 454 (1965)).

A second difficulty with the ends/means distinction is that clients will often have many ends,[26] and a means that is designed to meet one end may conflict with other client ends.[27] It is not sufficient that the client merely identify a priority of ends. Choices among the means employed will carry different risks as to each of the ends of the client.

An examination of the lawyer codes and some of the cases which have presented courts with the issue of client control reveals that courts often do not follow the ends/means distinction. What they have done is allot the client some of the specific choices that are commonly made during the course of legal representation.

In criminal defense cases, courts have identified several decisions that are for the client. These are summarized in the A.B.A. Standards for Criminal Justice, which states that the defendant/client is entitled to choose:

(i) what plea to enter;
(ii) whether to waive jury trial; and
(iii) whether to testify in [the defendant's] own behalf.[28]

Lawyers' professional codes and courts have identified several negotiation decisions in both civil and criminal cases that the client should make. The attorney must have client approval for any settlement offer.[29] The decision whether to accept an offer of settlement in a civil case[30] or a plea bargain offer in a criminal case[31] is for the client. In civil cases in which lawyers have failed to present settlement offers to clients, courts have imposed liability on the attorneys for failure to keep their clients properly informed and failure to allow clients to control this choice.[32]

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26. *See* Spiegel, *supra* note 11, at 41.

27. For example, a plaintiff may want to settle a case, avoid having to testify, and still get as much money as possible. Should the lawyer use negotiation tactics that are likely to gain the highest recovery, but which carry a greater risk of deadlock?

28. 1 A.B.A. STANDARDS FOR CRIMINAL JUSTICE, ch.4, Standard 4-5.2 (2d ed. 1980 & Supp. 1982) states:

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:
>
> (i) what plea to enter;
>
> (ii) whether to waive jury trial; and
>
> (iii) whether to testify in his or her own behalf.
>
> (b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.

29. *See* C. WOLFRAM, *supra* note 23, at 169-72.

30. *See* cases cited *infra* note 32.

31. *See* C. WOLFRAM, *supra* note 23, at 165 (citing Harris v. State, 437 N.E.2d 44 (Ind. 1982); People v. Whitfield, 40 Ill.2d 308, 239 N.E.2d 850 (1968); State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983)).

32. *See, e.g.*, Whiteaker v. State, 382 N.W.2d 112 (Iowa 1986); Joos v. Auto-owners Ins. Co., 94 Mich. App. 419, 288 N.W.2d 443,445 (1979), *later appealed*, Joos v. Drillock,

Many of these decisions that courts explicitly leave to the client are probably best classified as means decisions. In criminal cases, the client's end is generally acquittal or limitation of the penalty. Whether to try the case before a jury and whether the client should take the stand and testify are means choices that may determine whether the client's ends are met, and yet these decisions are reserved for the client.[33] In civil cases, the client's end is generally to receive as much, or pay as little, money as possible. An attorney's independent rejection of an offer may be a means of negotiating a good settlement, but clients are entitled to decide whether to accept a settlement offer.[34]

An examination of the cases that initially adopted the ends/means distinction between client and attorney authority may explain why courts adopted it. As Professor Spiegel has pointed out, the ends/means test was drawn initially in cases in which a third party was trying to bind the client to a decision made by the client's attorney without client authority.[35] The

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127 Mich. App. 99, 338 N.W.2d 736 (1983) (". . . an attorney has, as a matter of law, a duty to disclose and discuss with his or her client good faith offers to settle."); Rubenstein v. Rubenstein, 31 A.D.2d 615, 615, 295 N.Y.S.2d 876, 877 (1968) *aff'd*, 25 N.Y.2d 751, 250 N.E.2d 570, 303 N.Y.S.2d 508 (1969) ("failure to disclose an offer of settlement and submit to the client's judgment for acceptance or rejection is improper practice"); Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (1989).

The decisions that require attorneys to pass settlement offers to clients can be explained on two grounds. First, the decision whether to accept the offer is extremely important to the client. Rejection of a settlement offer may result in litigation, in which the client may obtain a poorer result than the client would have obtained had the client accepted the settlement offer. Second, the lawyer is likely to have a conflict of interest with the client over whether or not the offer should be accepted. If the case is being handled on an hourly basis, it may be in the interest of the lawyer to reject the offer and continue the employment. If the case is being handled on a contingency fee basis, it may be in the lawyer's interest to either accept or reject the offer, depending on the terms of the contingency fee agreement, the anticipated time required if the case is tried, the amount of the offer, and the likely verdict. Rosenthal demonstrates that in automobile collision personal injury cases it is generally in the interest of plaintiffs' attorneys to settle rather than to try cases. D. ROSENTHAL, *supra* note 11, at 98. A lawyer's decisions may also be affected by the possible publicity if a case is tried. *See, e.g.*, Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (Pa. 1989), discussed *infra* in text accompanying notes 167-82 and 192.

The problem with the settlement offer rule is not that it is difficult to justify, but that it is difficult to explain why the client has the right to accept or reject a settlement offer, and does not have the right to make other key negotiation decisions. Other negotiation decisions are also important to the client and are likely to present a conflict of interest between the attorney and the client. The possibility of expanding the right of the client to make decisions in settlement negotiations to encompass the right to make other decisions related to negotiation is discussed in a later section. See *infra* text accompanying notes 155-200.

In addition to giving the client the right to make some decisions, the Model Code and the Model Rules both impose on the lawyer the responsibility to assist the client in making decisions. MODEL CODE, *supra* note 21, EC 7-8; MODEL RULES, *supra* note 21, MR 2.1.

33. *See supra* note 28.

34. *See supra* note 32.

35. *See* Spiegel, *supra* note 11, at 57-58 (citing Duffy v. Griffith Co., 206 Cal. App. 2d 780, 24 Cal. Rptr. 161 (1962) (court found that attorney had no authority to stipulate client's interest in litigation)); *see also* Harness v. Pacific Curtainwall Co., 235 Cal. App. 2d 485, 45 Cal. Rptr. 454 (1965).

courts bound the client to the decision of the attorney, labeling the decision made by the attorney a means decision.

It may be that the interests of third parties and the courts in the finality of decisions justify binding a client to some choices made by the attorney, but those interests should not be the tail that wags the dog of attorney/client decisionmaking authority. If an attorney makes a decision for the client that should have been made by the client, the interests of a third party may justify binding the client to the decision in an action with the third party, but the interests of the third party do not justify relieving the attorney of responsibility to the client. The rules governing a cause of action by the client against the attorney based on the failure of the attorney to allow the client to control decisions should protect the interests of clients in decisionmaking authority.[36]

III. Justifications for and Problems With Expanded Client Control

A. Justifications for Client Control

1. The Client's Autonomy

Courts should allow clients to control legal representation out of a concern for the client's autonomy: that is the client's right of self-determination. One of the purposes of the attorney is to protect the client's autonomy from interference by the state and other individuals,[37] and an attorney should not be another source of interference with the client's autonomy. Individual autonomy finds support in utilitarian, Kantian, and Judeo-Christian theories of ethics.[38] The attorney and the law should respect

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36. For a suggested division of decisionmaking responsibility between the client and the attorney, see *infra* text accompanying notes 147-50.

37. *See* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060 (1976).

38. Every moral theory has some conception of equality among moral agents, some conception according to which we are to regard others as equal to ourselves. For the utilitarian, equality is represented in the theory by the claim that in calculating utility the interests of each person are to count equally. For the natural rights theorist, all persons are assumed to have equal rights. For the Kantian, I may act only in that way that I am prepared to will all others act. For the religious moralist we are all children of God.

Corresponding to these notions of equality are various devices for preserving this fundamental equality in the process of moral reasoning. According to the utilitarian an action is justified when an impartial observer would view the action as maximizing the total amount of utility in the given community. For the rights theorist and the Kantian a justification must be acceptable to each of the individuals affected. A similar motive underlies the Golden Rule that is found in most major religious theories.

Underlying the various techniques of moral justification is a prohibition against treating others in such a way that they cannot share the purposes of those who are so treating them. And behind this is a conception of the nature of persons as

the autonomy of the client out of a desire to do good for the client and out of concern for the goodness of the client.

Respect for the autonomy of the client will be good for the client, in an instrumental sense, in that it is likely to result in choices that will work to the benefit of the client. This argument is made in the following section.[39] An additional justification for autonomy is "the intrinsic desirability of exercising the capacity for self-determination."[40] As Gerald Dworkin has said:

> [T]here is value connected with being self-determining that is not a matter either of bringing about good results or the pleasures of the process itself. This is the intrinsic desirability of exercising the capacity for self-determination. We desire to be recognized by others as the kind of creature capable of determining our own destiny. Our own sense of self-respect is tied to the respect of others—and this is not just a matter of psychology. Second, notions of creativity, of risk-taking, of adherence to principle, of responsibility are all linked conceptually to the possibility of autonomous action. These desirable features of a good life are not possible (logically) for nonautonomous creatures. In general, autonomy is linked to activity, to making rather than being, to those higher forms of consciousness that are distinctive of human potential.[41]

In addition to the fact that autonomy is likely to yield good results and that the exercise of autonomy is an important aspect of being human, autonomy provides the client with an opportunity to be good, to make moral choices and to grow in moral understanding. This aspect of autonomy

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> independent sources of moral agency. It is as distinct loci of consciousness, of purposive action, as distinct selves, that others must be respected and taken into account when each of us decides what he shall do. It is because other persons are creators of their own lives, are shapers of their own values, are the originators of projects and plans, that their interests must be taken into account, their rights respected, their projects valued.
>
> What makes an individual the particular person he is reflects his pursuit of autonomy, his construction of meaning in his life.

G. DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 110 (1988).

39. *See infra* text accompanying notes 48-61. The utilitarian justification for autonomy is based on the assumption that clients will make the choices that are most to their benefit and that when autonomous choices which are best for individual clients are multiplied by all of the choices made by all clients, client control will work to the good of the greatest number. Of course, it can be argued that many of the choices of clients that are made in legal representation will work to the detriment of others. Courts attempt to balance the conflicting interests of parties. Whether or not our legal system ultimately resolves cases in a manner for the greatest good of the greatest number is a legitimate subject of inquiry, but courts probably will be in a better position to determine the interests of the parties if attorneys pursue what their clients perceive to be the clients' interest.

40. G. DWORKIN, *supra* note 38, at 112.

41. *Id.*

is important, both for Immanuel Kant[42] and those writing from a Judeo-Christian perspective, such as Thomas Shaffer.[43]

For Kant, autonomy was the precondition of moral choice and one who acted autonomously would act morally. This conclusion followed from Kant's definition of autonomy as the absence of any influence other than reason, and his belief that moral decisions would follow automatically from reason.[44] For Kant, therefore, autonomy was more than the ability to make choices, it was freedom from any influence other than reason. Anything that interfered with one's ability to act rationally, including one's "inclinations and impulses", interfered with one's autonomy and therefore one's ability to act morally.[45] Client choice would create the possibility for autonomous, and therefore moral, choice, but the fact that the lawyer allows the client to make the choice will not, by itself, lead to client autonomy. There might be other influences that would interfere with the client's ability to make the autonomous, rational, moral choice. An attorney who has a goal of Kantian client autonomy, therefore, will seek not only to avoid influencing client choices, but will seek to assist clients in freeing themselves from their "inclinations and impulses" and other influences that might interfere with their choices.

Thomas Shaffer does not believe a moral choice will automatically flow from autonomy, but argues that autonomy, in the sense of freedom to choose, is important because it gives the client the opportunity to make a moral choice.

> [Autonomy] is not only freedom but freedom *for*. The object of law office discourse as moral discourse is to serve the goodness of

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42. *See* I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (1959) (L. Beck trans.).

43. *See* Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW. 231 (1979).

44. [T]his "ought" [the moral law] is properly a "would" that is valid for every rational being provided reason is practical for him without hindrance [i.e., exclusively determines his action]. For beings who like ourselves are affected by the senses as incentives different from reason and who do not always do that which reason for itself would have done, that necessity of action is expressed only as an "ought."

I. KANT, *supra* note 42, at 67-68.

Kant believed that autonomy not only would lead to morality, but that it was a necessary precondition to morality. *See id.* at 59.

Since Kant believed that morality would automatically flow from autonomy, he could say that his moral principle of universality, that one must act in a way that one could will that everyone would act, is a principle of autonomy. *Id.* at 59.

45. When we present examples of honesty of purpose, of steadfastness in following good maxims, and of sympathy and general benevolence even with great sacrifice of advantages and comfort, there is no man, not even the most malicious villain (provided he is otherwise accustomed to using his reason), who does not wish that he also might have these qualities. But because of his inclinations and impulses he cannot bring this about, yet at the same time he wishes to be free from such inclinations which are burdensome even to himself.

Id. at 73.

> the client, and many of us feel that there is more to goodness than autonomy.[46]

If attorneys are concerned that the client be autonomous, then they will help clients to understand the moral, as well as the other implications of their choices.[47]

2. Better Results

Not only should the client control the representation because of the intrinsic value of client autonomy, the client should control the representation because client control is likely to yield better results than attorney control, whether we measure the results based on the subjective goals of the individual client, or based on goals held by clients generally.[48]

Client control is likely to provide more satisfying results to the individual client than attorney control because clients are likely to be the best judges of their own interests.[49] The choices a client makes may be quite different than an attorney would expect for two reasons. First, a client may have different values than the attorney.[50] For example, during negotiations, a client may prefer that an attorney engage in cooperative bargaining rather than competitive bargaining, either out of compassion for or a desire to maintain a good relationship with the opposing party.[51] Second, a client may have different risk preferences than the attorney.[52] The client might have a great fear of going to trial, and prefer negotiation tactics that avoid a risk of deadlock.

It might be suggested that with a knowledge of the client's goals, the lawyer will be able to make choices for the client, but clients will often be unable to quantify the value that they place on various goals. A client may

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46. Shaffer, *supra* note 43, at 247.

47. *See id.* at 246. For a discussion of the lawyer's role in ethical choices during legal representation, see *infra* text accompanying notes 94-101.

48. It might be argued that lawyers make better decisions than clients. As Strauss has pointed out, this argument is based on three highly questionable assumptions: 1) Lawyers understand the needs and interests of the client; 2) Lawyers will act to satisfy them; and 3) Lawyers are uniquely equipped to make them. Strauss, *supra* note 11, at 328-29.

> 49. [B]eing able to shape one's own choices and values makes it more likely that one's life will be satisfying than if others, even benevolent others, do the shaping. This is the traditional liberal argument that people are better judges of their own interests than others.

G. DWORKIN, *supra* note 38, at 111-12.

50. *See* D. BINDER & S. PRICE, *supra* note 6, at 148-49; Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307, 315 (1985); Spiegel, *supra* note 11, at 86 (suggesting that client is better decisionmaker because client has better knowledge of relationship between facts and client's values and objectives).

51. Competitive and cooperative bargaining are discussed *infra* at text accompanying notes 184-87.

52. *See* D. BINDER & S. PRICE, *supra* note 6, at 149-50; Spiegel, *supra* note 11, at 100.

have incompatible goals,[53] such as obtaining more money and avoiding trial, and a choice which increases the likelihood that the client will obtain one goal may create a risk that the client will fail to achieve the other goal.[54] In many cases, it will be impossible for the lawyer to determine what choices will provide maximum client satisfaction.[55]

When clients control the representation, they not only are more likely to obtain better results as judged by their subjective standards, but they are also likely to obtain better results when judged by standards shared by clients generally, such as financial benefit.[56] An empirical study conducted by Professor Rosenthal of the results in automobile personal injury cases, both those tried and those settled, found that plaintiffs who are actively involved in decisions concerning their cases obtain higher recoveries than those that allow their lawyers to control the cases.[57]

Clients that are involved in decisionmaking in their cases are likely to obtain better results for several reasons. First, they may ensure that their attorneys do not neglect their cases. Lawyers that are tempted to spend time on other matters are more likely to work on a case when a client is regularly involved in decisionmaking. Second, clients may catch mistakes that the attorney alone might overlook.[58] Attorneys may think through their cases more thoroughly when they have to explain alternatives and justify

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53. *See* D. BINDER & S. PRICE, *supra* note 6, at 149; Spiegel, *supra* note 11, at 101 (because lawyers cannot know relative weights of competing values of their clients, they cannot be sure that their decisions will satisfy clients' real needs).

54. For discussions of the subjectivity of the choices, see G. BELLOW & B. MOULTON, *supra* note 6, at 1055; D. BINDER & S. PRICE, *supra* note 6, at 148-53; G. HAZARD, ETHICS IN THE PRACTICE OF LAW 136-38 (1978).

55. D. BINDER & S. PRICE, *supra* note 6, at 149.

56. Some commentators have advocated client control of legal representation as a means of stimulating attorney competency. *See* D. ROSENTHAL, *supra* note 11, at 28; Martyn, *supra* note 50, at 310; Spiegel, *supra* note 11, at 90-92.

57. Rosenthal had a panel of experts calculate the value of 59 automobile personal injury cases. ROSENTHAL, *supra* note 11, at 36-37. The panel consisted of two experienced plaintiffs' attorneys, one insurance company adjuster, one insurance company attorney, and one attorney that had represented both plaintiffs and insurance companies. *Id.* at 37. Rosenthal did not consider two cases because there was a substantial deviation as to the value among the panel. *Id.* He evaluated the results the attorneys obtained in the remaining 57 cases based on the valuation of the expert panel. Of the plaintiffs that were actively involved in their cases, 75% received good results and 25% received poor results. *Id.* at 57. Of the plaintiffs that were not actively involved, 41% received good results and 59% received poor results. *Id.* Rosenthal found that the most important predictor of good results was follow-up demands for attention by the client. *Id.* at 46.

The Rosenthal study evaluated only the effectiveness of clients that, on their own initiative, were involved actively in their cases. It is likely that clients would be even more effective if their attorneys initiate and encourage client involvement. Clients who on their own initiative attempt to get involved in their cases are unlikely to know what involvement will most help their case. If the lawyer systematically involves the client, this is likely to result in more effective decisionmaking. For an effective method of client involvement in decisionmaking, see D. BINDER & S. PRICE, *supra* note 6, at 147-53.

58. *See* D. ROSENTHAL, *supra* note 11, at 169.

suggestions to the clients. Third, clients that are actively involved in their cases may disclose relevant factual information to their attorneys that the clients might otherwise have thought irrelevant.[59] Finally, the client and the attorney both bring distinct abilities to the attorney-client relationship, which may be lost if the attorney controls the representation.[60] The tendencies of clients toward intuition and feeling can complement the tendencies of attorneys toward a logical focus on the facts, and may help to make choices that will provide the greatest benefit to the client.[61]

3. Attorney Conflicts of Interest

An additional reason that client control may yield better results than attorney control is that, in many of the decisions that are made in legal representation, the client's goals may conflict with those of the lawyer. As to the unusual, subjective goals of the client, lawyers may have a conflict because it is in the reputational interest of the lawyer to get what the community will perceive as a successful result. If client control of a decision leads to what the community will perceive as a poor result, it may harm the lawyer's reputation.

In addition to the likelihood that the attorney's interests will conflict with the unusual goals of the client, the attorney's interests may conflict with goals that are more common to clients. Attorneys have interests which conflict with client interests in a number of common situations. For example, if a lawyer is handling a case on a contingency fee basis, one study has shown that it is generally in the lawyer's interest to get a quick settlement.[62] In such cases, the client's interests might be better served through litigation or more negotiation. If lawyers are overworked, they will be tempted to make decisions that will give them less work, and if they are underworked, they will be tempted to make decisions that will give them more work.[63] In addition, some have observed a tendency of corporate attorneys to "over-deliver" legal services, *i.e.*, to do more work than might be cost effective for the client.[64] In some situations, lawyers are tempted to handle a case in

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59. *See* Spiegel, *supra* note 11, at 103-104.

60. T. SHAFFER, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL 52-63 (1976).

61. Thomas Shaffer makes this argument based on Jung's theory of psychic function that each person operates on two spectrums, a thinking/feeling spectrum, and a sensation (reliance on facts)/intuition spectrum. *Id.* at 60-63.

62. *See* D. ROSENTHAL, *supra* note 11, at 96-99 ("[F]or all but the largest claims, an attorney makes less money by thoroughly preparing a case and not settling it early." *Id.* at 105); Clermont & Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 536 (1978).

63. *See* Strauss, *supra* note 11, at 329-30 (attorneys concern about their "time, profit, and other personal interests affect, perhaps subconsciously, the choices [they make] for the client").

64. There is a "tendency in corporate practice to overdeliver legal services. . . .Lawyers, especially in New York, travel like Nuns—in pairs or three at a time." *See* Spiegel, *supra* note 11, at 99 n.241 (quoting N.Y. Times, Aug. 10, 1977, at D1, col. 2).

a way that will get them favorable publicity at the expense of the client.[65] Client control may serve to counterbalance these conflicts of interest.

4. Consistency With Medical Informed Consent

As Jay Katz has pointed out, rules imposing liability on doctors for medical malpractice have preceded and provided precedent for rules imposing liability on lawyers for legal malpractice.[66] Medical malpractice first developed in the fourteenth century;[67] legal malpractice in the eighteenth century.[68] American courts originally imposed liability on doctors under a negligence theory for the failure to inform patients of the risks of and alternatives to surgery in 1960.[69] It may be that these medical informed

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65. *See, e.g.*, Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58, 64 (1989) (where court stated that there was evidence that lawyer wanted case to go to trial, rather than settle, so that he could get "a reputation as a negligence attorney").

66. Katz, *On Professional Responsibility*, COM. L.J. 380, 384 (Sept. 1975).

67. *Id.* (citing Y. B. Hill, 48 Edw. III, f.6, pl.11 (1374)).

68. *Id.* (citing Pitt v. Yalden, 98 Eng. Rep. 74 (K.B. 1767)).

69. Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960) (court stated that patient did not give informed consent to radiation treatment because her physician failed to warn of hazards involved), *reh'g denied*, 187 Kan. 186, 354 P.2d 670; Mitchell v. Robinson, 334 S.W.2d 11, 19 (Mo. 1960) (court held that "doctors owed their patients, [who are] in possession of [their] faculties the duty to inform [them] . . . of the possible serious collateral hazards or [dangers]" of shock therapy), *rev'd on other grounds*, 396 S.W.2d 668, 675.

The right of informed consent in medical malpractice cases had its origins in battery cases brought against doctors who failed to inform patients of the risks that accompanied surgery. The failure to give the patient this information negated the consent and the doctor was subject to liability for battery. *See, e.g.*, Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905), *rev'd on other grounds*, 80 N.W.2d 859; Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 105 N.E. 92 (1914), *rev'd on other grounds*, 163 N.Y.S.2d 3, 143 N.E.2d 1. Justice Cardozo stated the basis for the patient's right as follows:

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault for which he is liable in damages.

Schloendorff, 211 N.Y. at 128-130, 105 N.E. at 93-94 (operation performed after patient's express prohibition).

In the informed consent battery cases, the doctors lacked the malicious intent that generally accompanies battery and, in 1957, Professor McCoid suggested that the better basis for liability in such cases was negligence—defined as the failure of the doctor to give the patient information that a reasonable doctor would give. *See* McCoid, *A Reappraisal of Liability for Unauthorized Medical Treatment*, 41 MINN. L. REV. 381, 434 (1957). He suggested that doctors be subject to malpractice liability whenever they treat a patient without informing the patient of the risks of and alternatives to the treatment given. McCord, *supra*, at 434. This suggestion was adopted by *Mitchell* and *Natanson* in 1960. Other courts rapidly adopted negligence as the basis of liability. *See, e.g.*, Karp v. Cooley, 349 F. Supp. 827 (S.D. Tex. 1972), *aff'd*, 493 F.2d 408 (5th Cir.), *reh'g denied*, 496 F.2d 878, *cert. denied*, 419 U.S. 845 (1974); Dunham v. Wright, 302 F. Supp. 1108 (M.D. Pa. 1969), *aff'd*, 423 F.2d 940 (3d Cir. 1970); Williams v. Menehan, 191 Kan. 6, 379 P.2d 292 (1963).

In medical malpractice cases, the standard of care was traditionally established by the general practices of the profession. *See infra* notes 128-38 and accompanying text for a discussion of this rule and the comparable rule in legal malpractice cases. Most courts now

consent cases will provide a precedent for a general duty to allow clients to control legal representation. This time it should not take the courts four centuries. The following section will compare the possibility of a client control cause of action with the present medical informed consent cause of action.

a. The Interests at Stake: The Right to Control What is Done With One's Body and the Right to Control What is Done With One's Legal Rights

The duty to obtain informed consent to medical treatment protects patients' interest in autonomy and bodily integrity.[70] A duty to allow a client to control legal representation would protect clients' interests in autonomy and their legal rights. It is understandable that the right of medical informed consent would develop before a right of client control. An individual's interest in bodily integrity has been of special legal concern since the early days of the common-law.[71] Although, in general, courts have not given one's interest in control of legal rights as much protection as the interest in bodily integrity, one's legal rights often protect interests that have a high priority within our society, such as personal liberty or child custody.

One might argue that the interest at issue in most legal representation is not as important as liberty or child custody, but is merely a matter of money. Money is an important commodity, especially to those who do not have much, but the interest at stake in the client control cases is of far greater concern than the amount of money at issue. It is a matter of the client's legal rights, and who controls the pursuit of those rights. The American colonies fought the American Revolution, not because they were taxed, a mere financial matter, but because they were taxed without representation, a matter of financial *rights*. Additionally, the Constitution, legislatures, and courts in this country have taken great steps in protecting the ability of people to defend their legal rights. For example, the Section 1983 cause of action,[72] recognized by Congress, and given an expansive

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require the doctor to disclose material risks, those of which the reasonable patient would want to be informed. *See infra* note 147 and accompanying text.

The medical informed consent cases present a difficult cause-in-fact issue. Even if a doctor fails to inform a patient of risks of or alternatives to surgery and the patient suffers harm from the surgery, the failure of the doctor to give the patient the information did not cause the loss unless the patient would not have had the surgery in light of the risks or alternatives. This cause-in-fact issue is discussed *infra* at text accompanying notes 255-71 in a section which deals with the similar cause-in-fact problems that would arise in some client choice cases.

70. *See, e.g.*, Schneyer, *Informed Consent and the Danger of Bias in the Formulation of Medical Disclosure Practices*, 1976 WIS. L. REV. 124, 129 (suggesting that right to informed consent in medical cases is based on high value of personal integrity).

71. *See, e.g.*, Cole v. Turner, 6 Modern Rep. 149, 90 Eng. Rep. 958 (Nisi Prius 1704).

72. 42 U.S.C. 1983 (1988).

reading by the federal courts,[73] protects the right of citizens to pursue legal remedies. The due process clause of the Constitution protects the right of people to due process of law.[74] The issue in client control cases is the question of who controls those rights, and the possessor of the rights should have control over what is done with them.

b. The Doctor's and the Lawyer's Conflict of Interest

In both the doctor/patient and the lawyer/client relationship, the professionals are subject to conflicts of interest when presented with alternative means of handling a case.[75] It will be in the interest of doctors and lawyers to choose the method that will be most financially rewarding to them. The doctor's financial interest may push the doctor toward adopting the more intrusive, and more expensive, treatment. The lawyer's financial interest may push the lawyer who is being paid on a contingency fee basis toward a quick settlement; it may push the lawyer who is being paid on an hourly basis to spend an excessive amount of time on a case.[76]

Even doctors and lawyers who are not motivated by material rewards are subject to conflicts of interest. They may favor a choice that would be in the interest of society, but not in the interest of the individual patient or client. A doctor who is developing a new medical technology will want to use it. Similarly, a lawyer who has a good test case that may establish the rights of the poor will want to litigate it. These factors are likely to affect a professional, whether consciously or unconsciously,[77] and the conflict of interest justifies the right of patients to control their medical treatment and the right of clients to control their legal representation.

c. The Ability of the Lawyer and Doctor to Communicate and the Ability of the Client and Patient to Understand

In some respects, there may be a stronger case for client control of legal representation than for patient control of medical treatment. One objection that might be raised to imposing a duty on the doctor to obtain informed consent is that doctors are not skilled, necessarily, in the ability to communicate. They are skilled at treating disease. Lawyers, on the other hand, generally must have good communication skills. They must be able to convey to others difficult concepts in understandable language, whether

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73. *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), *remanded*, 474 F. Supp. 901, *aff'd*, 661 F.2d 940 (1981); Taliferro v. Augle, 757 F.2d 157 (7th Cir. 1985); Heyn v. Board of Supervisors, 417 F. Supp. 603 (E.D. La. 1976).

74. U.S. CONST. amend. XIV, § 1.

75. The conflict of interest lawyers have in negotiation decisions is discussed *infra* at text accompanying notes 156-61. The conflict of interest lawyers have in the choice whether to adopt mediation or arbitration is discussed *infra* at text accompanying notes 232-33.

76. *See supra* text accompanying notes 62-65.

77. *See* Schneyer, *supra* note 70, at 136-37 (arguing that fact that doctors will gain financially consciously or unconsciously will affect their judgment).

they are arguing before a judge or jury, negotiating with another attorney, or interviewing a client. These communication skills should enable the lawyer to explain to a client the risks and benefits of alternative methods of handling a case, whereas the doctor may have difficulty explaining the risks and benefits of alternative methods of medical treatment.

In addition to the fact that the lawyer may be better able to communicate than the doctor, many legal issues are more understandable to the layperson than are many medical issues.[78] For example, the factors to be considered when determining tactics during negotiation or when deciding whether to pursue an alternative means of dispute resolution are generally within the understanding of the layperson.[79] In the medical malpractice cases, however, the choice between alternative methods of medical treatment may require an understanding of much more difficult technical concepts.[80]

d. The Extent of the Loss if There is a "Poor" Choice by the Patient or Client

This article is premised on the belief that, in general, people should have a right of autonomy. There is, however, great controversy as to whether people should have the right to make choices that place them at risk of death or serious injury. Some laws prevent people from exposing themselves to risks.[81] For example, there are laws which require vehicle occupants to wear seat belts and laws which prohibit the sale of medical drugs before the approval of the United States Food and Drug Administration. However, under the doctrine of informed consent, a patient is entitled to make choices that may present great risk of loss of life.[82]

By comparison, a client's choices during legal representation generally do not create risks of the magnitude that a patient's choices during medical care create because choices made in the course of legal representation are not generally a matter of life and death.[83] It may be that, in this respect,

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78. *See* Peck, *A New Tort Liability for Lack of Informed Consent In Legal Matters*, 44 LA. L. REV. 1289, 1296 (1984).

79. This article advocates that clients be allowed to make such decisions. For a discussion of the ability of the client to understand negotiation decisions, see *supra* text accompanying notes 162-65.

80. *Cf.* Note, *Duty of Doctor to Inform Patient of Risks of Treatments: Battery or Negligence?* 34 S. CAL. L. REV. 217, 223-24 (1961) (doctors suggest that patients may not be able to understand).

81. This conflict arises in many cases, including right to die cases. *See, e.g.*, Barber v. Superior Court, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983); In re Quinlan, 70 J.J. 10, 355 A.2d 647 (Me. 1976), *cert. denied*, 429 U.S. 922; Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986); In re Guardianship of Barry, 445 So. 2d 365, 370 (Fla. Dist. Ct. App. 1984).

82. *See* Comment, *Informed Consent: The Illusion of Patient Choice*, 23 EMORY L.J. 503, 516 (1974) (discussing sanctity of life issue in medical informed consent cases).

83. In those cases in which the client is a criminal defendant charged with an offense that carries the risk of the death penalty, the choices made can be a matter of life or death. Courts have already held that the criminal defendant has the right to accept or reject plea

there is a greater justification for leaving legal choices to clients than medical choices to patients, because the loss that the client might suffer would be less if the client makes an unwise choice than the loss that the patient might suffer if the patient makes an unwise choice.

B. Objections to Client Control

1. The Risk of a Poor Choice

Several objections can be raised to client control of legal representation. One is the risk that the client will make a poor choice. An attorney might believe that a client choice is a poor choice for one of two reasons. First, the attorney might disagree with the client's goals.[84] The argument that clients do not know what goals are good for them and that they should be denied the right to make choices on that basis is paternalistic. It runs counter to the traditional liberal belief that individuals are the best judges of their own interests. Paternalism is contrary to respect for autonomy, and the argument for client autonomy is made in an earlier section.[85]

Attorneys might also argue that a client might make choices in technical matters that are not likely to achieve the goals of the client.[86] Many of the decisions that materially affect the client will require a consideration of both technical legal issues and the goals of the client. Choices made during legal representation should be both technically wise and consistent with the client's ends.

There are two ways to make a wise technical choice that is consistent with the goals of the client. The lawyer can attempt to determine the goals of the client, so that the lawyer can make technical decisions in light of the client's goals, or the lawyer can explain the risks of the alternatives to the client and allow the client to make the decision in light of the client's goals. The lawyer should allow the client to choose either of these two methods, but generally, the second method is preferable. Clients are likely to have multiple goals, some of which may justify different choices. In many cases, it will be unlikely that the client can quantify the importance of each goal

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bargain offers. *See supra* note 31. This article proposes that the client in a criminal case be entitled to determine whether to initiate plea bargain discussions. The choice by the client to pursue a plea bargain, of course, would be a choice for a less risky alternative, unlike a case in which the patient might choose a risky option.

84. The term "goal" here is used in the broadest possible sense to mean anything that the client desires. It includes "goals" that the cases and lawyer professional codes would not normally consider to be an end of the representation. *See supra* notes 22-23. For example, the client's desire not to embarrass an opposing witness would be a goal, as used here, though the lawyer codes would not consider this an end of the representation.

85. *See supra* notes 37-47 and accompanying text.

86. For a discussion of whether the lawyer should control decisions in light of the lawyer's greater technical knowledge, see Speigel, *supra* note 11, at 100-04.

in a way that will enable the lawyer to make the choice that yields maximum client satisfaction.[87]

In most cases, lawyers can explain choices in a manner that will enable clients to make intelligent choices. Lawyers are skilled at presenting technical information in understandable language. There will be limits, however, to the ability of the client to understand technical legal information. Studies of medical informed consent practices show that at some point, patient understanding diminishes as doctors present more information.[88] The issue of how much information to give a client is complicated because the point at which additional information becomes counterproductive will vary from client-to-client, depending on the sophistication of the client, and will vary from issue-to-issue, depending on the technical difficulty of the issue. In a later section, this article advocates that the right of the client to control legal representation should vary with the complexity of the issue and the sophistication of the client; that the client should be entitled to make those choices which a reasonable person, in the position which the lawyer knows or should know the client to be in, would want to make.[89]

2. The Urgency of Some Decisions

A second objection that can be made to client control of legal representation is that, especially in litigation, many decisions must be made quickly and it would be very difficult to have the client make them. Many decisions must be made in the heat of trial and it would create a great burden on the court system, and in some cases harm the interests of the client, to have to recess a trial to enable the client to make the decisions. For these reasons, the right of the client to choose should not extend to decisions that must be made in the heat of a trial. However, many of the issues that arise during a trial should be anticipated by the attorney and discussed with the client prior to trial.[90]

This article proposes that the client have the right to make the significant decisions in negotiation[91] and the right to choose to pursue mediation or arbitration.[92] These decisions generally are not urgent and the client can resolve them without damaging the interests of the client or the legal system.

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87. *See* D. BINDER & S. PRICE, *supra* note 6, at 148-49.

88. *See* Smith, *Myocardial Infarction—Case Studies of Ethics in the Consent Situation*, 8 SOC. SCI. MED. 399 (1974), *cited in* Martyn, *supra* note 50, at 315.

The duty to warn in products liability cases creates the same difficulty. At some point, additional warnings dilute the effectiveness of prior warnings. *See* Twerski, Weinstein, Donaher, & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 514-16 (1976).

89. *See infra* text accompanying notes 147-50.

90. For a discussion of the decisionmaking authority a client should generally have, see *infra* text accompanying notes 147-50.

91. *See infra* text accompanying notes 155-200.

92. *See infra* text accompanying notes 201-54.

3. The Risk of Illegal and Unethical Decisionmaking

It might be argued that if courts give clients the right to control the representation, they will make illegal and unethical choices. "Illegal choices" here refers to choices that violate the law or the lawyer codes of professional conduct. "Unethical choices" refers to choices that violate broader ethical standards. The problem of the risk of illegal choices is easily resolved. Client control of the representation should not lead to illegal choices. Under the lawyer codes of professional conduct, the lawyer is and should be required to refuse any requests that violate the law or the lawyer codes.[93]

The more difficult problem concerns choices that are not prohibited by law or the lawyer codes, but which raise ethical concerns. Examples are whether an attorney should subject an opposing witness to degrading cross-examination that might undercut the credibility of the witness, and whether in negotiation of a settlement an attorney should take advantage of the fears of the other party that litigation would reveal embarrassing information. Even the basic question of whether to assert a legal claim that would work to the disadvantage of another person involves an ethical choice. Almost all legal representation raises ethical issues.[94]

As to whether the lawyer or the client should control ethical choices that arise in legal representation, several points are worth making. First, it may be very difficult to determine what is the proper ethical choice. Recall that these are choices that the lawyer professional codes have not resolved. The choices are likely to be difficult, and people disagree over what is ethical. That is not to say that there are not objective ethical standards, but only that no one has a perfect ability to discern those standards or to determine how they should apply.

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93. The ABA Model Rules and Model Code encourage client decisionmaking, see *supra* text accompanying notes 20-22, but prohibit the lawyer from taking actions that are illegal or would violate the professional rules. MODEL CODE, *supra* note 21, DR 7-102(A)(8); MODEL RULES, *supra* note 21, MR 1.16(a)(1).

94. [L]aw office conversations are almost always moral conversations. This is so because they involve law; law is a claim which people make on one another—a claim resting on obligation, a moral claim—and one upon which they may seek the sanction and coercion of the state. In this derivative sense, a conversation about rights and duties is by definition a moral conversation. A conversation of this sort also usually involves issues on what to do about rights and duties, and of consequences to third persons. Often the moral content is implicit—whether to file a claim for damages for physical injury, whether to probate one's father's will—but moral content is always present. The claim for damages or the distribution of a dead person's property rests on normative considerations as well as objective rules. And when one takes advantage of the rule, he has decided that he ought to take advantage of it. He might have decided that he ought not. Law office choices and decisions often involve consideration of the social effect of what clients do, and of an effect on the character of a particular institution, such as a family or a business within the civil community. If it is possible for a serious conversation, between a lawyer and a client, in a law office, to be without moral content, I cannot think of an example.

Shaffer, *supra* note 43, at 232.

Second, clients may make decisions that are more ethical than those attorneys would make. We should not assume that clients will necessarily make a self-serving choice.[95] Clients have ethical values and may act in accord with them.[96] In fact, it is possible that lawyers make choices on behalf of a client that are less ethical than the client would make for himself. When attorneys are faced with ethical issues that are not controlled by the law or professional rules, it is likely that they will make the choices that they perceive as most beneficial to the client, irrespective of the ethical implications. It may even be that the lawyer's duty to zealously represent a client[97] requires lawyers to make choices that would benefit the client. Were clients to control these choices, they might not make the self-serving choice.

Finally, if the client controls decisions that have ethical implications, this does not mean that the lawyer has no role in these decisions. The lawyer's role should be to aid the client in making an informed choice, and this should include helping the client to consider ethical, as well as legal and financial implications of a decision.[98] Lawyers may be able to see ethical implications of decisions that would escape the client. The professional rules encourage lawyers to raise and discuss the moral implications of decisions

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95. Robert Bastress appears to make this assumption when he states that clients "do not prescribe moral choices according to some world view that takes into account competing values." Bastress, *Client Centered Counseling and Moral Accountability for Lawyers*, 10 J. LEGAL PROF. 97 (1985). Bastress advocates that lawyers make an independent ethical judgement about choices that arise in legal representation, discuss the ethical implications of the choices with the client, and withdraw if the client fails to satisfy the lawyer's ethical concerns. *Id.*

96. *See* T. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS 39 (1985); Fried, *supra* note 37, at 1088. Fried says:

> [The lawyer should not] assume that the client is not a decent, moral person, has no desire to fulfill his moral obligations, and is asking only what is the minimum that he must do to stay within the law. On the contrary, to assume this about anyone is itself a form of immorality because it is a form of disrespect between persons. Thus in very many situations a lawyer will be advising a client who wants to effectuate his purposes within the law, to be sure, but who also wants to behave as a decent, moral person.

Id.

97. MODEL CODE, *supra* note 21, DR 7-101(A), states:

> A lawyer shall not intentionally . . . (f)ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules. . . .

Professor Simon argues that, when confronted with an ethical issue, lawyers are likely to make the client-serving choice. *See* Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 53-59 (1978).

98. Thomas Shaffer contrasts three views of professional responsibility. The ethics of role would say that the role of the attorney is as advocate only and that, except for the restrictions of the attorney codes, the attorney should not be involved in the ethical choices of the client. The ethics of isolation would say that the attorney should not do anything for the client that violates the attorney's ethical standards and that the attorney should withdraw when the client makes what the attorney believes to be an unethical choice. The ethics of care would say that the attorney should engage the client in ethical discourse about the decisions and help the client to see the ethical implications of the choices to be made, but that the client should control the choice. *See* Shaffer, *supra* note 43.

with their clients,[99] and many clients will want their lawyers to help them to make ethical decisions.[100] In the end, if the lawyer believes that the client's decision clearly is unethical and the lawyer does not want to participate further, the lawyer can withdraw from the representation.[101]

4. Clients May Want Lawyer Control

Many attorneys do not leave significant choices to the client,[102] and apparently many clients have not demanded this right. The fact that clients, who in most cases are paying the bills, have not demanded the right to control legal representation might generate two very different reactions. One might argue, as Richard Epstein has argued as to medical patients,[103] that clients have not demanded control because they do not want control. Or, one could argue that clients that do not control legal representation do not realize that they should control it.[104] This article will take the position that the client should be permitted to allow the attorney to control the representation, but only after the attorney presents the opportunity for and explains the advantages of client control.

First, there is the argument that clients generally do not want the right to control the representation. Richard Epstein suggests that the fact that market forces have not produced a contractual right of informed consent in the doctor/patient relationship indicates that patients do not want such

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99. MODEL CODE, *supra* note 21, EC 7-8, states:

> In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.

MODEL RULES, *supra* note 21, MR 2.1, states:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral . . . factors, that may be relevant to the client's situation.

100. As Charles Fried has said:

> [I]n very many situations a lawyer will be advising a client who wants to effectuate his purposes within the law, to be sure, but who also wants to behave as a decent, moral person. It would be absurd to contend that the lawyer must abstain from giving advice that takes account of the client's moral duties and his presumed desire to fulfill them. Indeed, in these situations the lawyer experiences the very special satisfaction of assisting the client not only to realize his autonomy within the law, but also to realize his status as a moral being.

Fried, *supra* note 37, at 1088.

101. MODEL RULES, *supra* note 21, MR 1.16(b)(3), states:

> [A] lawyer may withdraw from representing a client . . . if . . . a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.

102. One study found that 30% of the attorneys believe that the lawyer should be in charge, 52% believe that the lawyer should obtain client consent for important decisions, and only 18% believe that the client sets the limits. *The Lawyer-Client: A Managed Relationship?*, 12 ACAD. MGMT. J. 76 (March 1969), *cited in* D. ROSENTHAL, *supra* note 11, at 113, n.29.

103. Epstein, *Medical Malpractice: The Case For Contract*, 1976 AM. B. FOUND. RES. J. 87, 127.

104. *See supra* note 6 for the theory of Binder & Price.

a right;[105] if patients wanted the right to make choices in medical care, this right would have emerged from doctor/patient negotiations.[106] The same argument could be made concerning the legal profession; broader client control has not emerged because clients have not demanded such a right.

However, it is likely that ordinary medical patients and legal clients do not think it appropriate to question the decisions of a professional.[107] It may be that patients and clients have not chosen to control medical treatment and legal representation because doctors and lawyers have not presented them with these options.[108]

Binder and Price suggest counseling methods that would deter clients from allowing lawyers to influence them.[109] They suggest that when a client has difficulty making a decision, "providing the client with the option of choice by the lawyer should usually be a last resort,"[110] and that when clients ask them for their opinion, "lawyers should refrain from stating what they would do."[111] Binder and Price want attorneys to actively discourage the client from allowing the attorney to control the representation because of a legitimate concern that the client has come to the attorney with preconceived notions that the attorney should make the decisions. However, as one commentator has suggested, Binder and Price would have the attorney "unilaterally, manipulatively impose the goal of full participation."[112]

The right of client control is based on the assumption that, with sufficient information, the client can make intelligent choices in the representation. Client control should extend to the right to have the attorney make some choices. Attorney control of choices during legal representation does not violate the client's autonomy as long as the client makes an informed choice for attorney control.[113] The attorney, however, should make

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105. *See* Epstein, *supra* note 103, at 95, 127.

106. *See id.* at 95. Epstein has argued that the amount of information that the doctor should give the patient should be decided as a matter of contract. *See id.* at 95, 127.

107. *See* Spiegel, *supra* note 11, at 79.

108. A Canadian study of 1025 adults found that for 50%, the quality they most desired in a lawyer is that the lawyer explain the details of their case. *See* Martyn, *supra* note 50, at 308 n.4.

109. Binder & Price suggest a method of attorney/client decisionmaking that in many respects is advocated in this article. *See* D. BINDER & S. PRICE, *supra* note 6.

110. *Id.* at 154.

111. *Id.* at 186.

112. Ellmann, *supra* note 6, at 743. Ellmann is also critical of what he suggests are Binder & Price's manipulative techniques for obtaining from the client information that the client might be reluctant to give. *Id.* at 735. Ellman states that "(l)awyers who seek to implement the principle of client decision-making fully should offer their clients less intimacy, but more advice." *Id.* at 754.

113. Gerald Dworkin makes the following argument:

> Someone who wishes to be the kind of person who does whatever the doctor orders is as autonomous as the person who wants to evaluate those orders for himself. This view differs from others in the literature. R. P. Wolff, for example, says (in the context of the citizen and the state) "[t]he autonomous man . . . may

it clear to clients that they have the right to control the significant decisions in the representation, and they should explain to clients the advantages of client control.[114]

5. The Additional Expense of Client Choice

Client choice is likely to add to the cost of legal representation.[115] The lawyer will have to spend time educating the client on the law and the implications of the various options. Is the benefit of client control worth the cost of the extra attorney and client time involved?[116] As with other questions in the representation, the client should resolve this question. As argued in the prior section,[117] clients should be able to decide what issues they will control. The lawyer should inform the client about the advantages of client control and the additional expense that it will require. It is the client that will bear the expense of the representation, and the client should decide whether the added expense of client control is worth it.[118]

IV. Potential Directions For the Development of Client Control: A Broadened General Standard or the Continued Identification of Specific Choices For the Client

As noted previously,[119] courts have purported to adopt an ends/means standard for determining what choices are for the client and what choices

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> do what another tells him, but not because he has been told to do it. . . . By accepting as final the commands of the others he forfeits his autonomy. but his conception of autonomy not only has the consequence that no government is legitimate but also that such values as loyalty, objectivity, commitment, and love are inconsistent with being autonomous.

G. Dworkin, *supra* note 38, at 108-09 (quoting R. Wolf, In Defense Of Anarchism 14 (1970)).

114. *See supra* text accompanying notes 48-65.

115. *See* Schultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 Yale L.J. 219, 294 (1985); *see also supra* note 67.

116. Spiegel argues that the benefits of client control are greater than the additional cost in time and money. *See* Spiegel, *supra* note 11, at 111-12.

117. *See infra* text accompanying notes 109-14.

118. In contingency fee cases the lawyer's share of the recovery might be adjusted to pay for the additional time required. In situations in which an insurance company, the government, or someone else provides an attorney for the client, the client should still have the right to control the representation. For the reasons argued in prior sections, client control is an important aspect of competent representation, and courts should require those who provide attorneys for others to provide competent representation.

Mark Spiegel poses the problem of non-fee-paying clients who make unreasonable demands on their lawyers. He suggests, "open confrontation with the choices involved," Spiegel, *supra* note 11, at 122-23, but does not suggest a standard by which the lawyer, or ultimately a court, might resolve the issue if the client does not agree with the lawyer. The general standard that is proposed herein, which would allocate to the client those choices which the reasonable client, in the position that the lawyer knows or should know the client to be in, would want to make, would resolve the problem in a fair manner, if, in such cases, the hypothetical reasonable client is assumed to be a fee-paying client.

119. *See supra* notes 22-23.

are for the lawyer, but it is a standard which they often ignore and which would be difficult to apply if they did not. The significant development of the right of client control has resulted from the identification of specific choices that are for the client.[120]

If courts decide to expand the right of the client to control legal representation, there are two directions that they can take. Courts can identify, as they have done in medical malpractice informed consent cases, an intelligible general standard for determining which decisions are for the client, or they can continue to identify specific decisions that are for the client.[121] This section will discuss the advantages and disadvantages of adopting a general standard as opposed to the continued development of specific rules. It will propose that courts both create a general standard for identifying decisions that the client should make and continue to identify specific decisions that, as a matter of law, are for the client.

A. Advantages of a General Standard Rather Than Merely Identifying Specific Choices That Are For Clients

The identification of specific choices that are for clients, without the identification of a workable general standard, has several weaknesses. First, the identification of specific decisions for clients fails to take into consideration the individual characteristics of clients. If courts limit themselves to identifying specific choices that are for clients, the choices assigned to clients will be limited to the choices that can be made by the least sophisticated client. This is illustrated by the choices that courts presently reserve for clients. The choices[122] are those which almost any client would be able to make. Courts cannot reserve more difficult questions for every client because not every client would be able to make them. Clients have different levels of sophistication. More sophisticated clients who want to control more sophisticated questions should be entitled to do so. A general standard can be formulated to take into consideration the characteristics of the individual client.

A second problem with rules that identify specific choices for clients is that they do not take into consideration the facts of specific cases. They do not give the client the right to make choices that may in a particular case be very important to the client. Consider the "Long Black Veil" case, which was posited by David Luban. A criminal defendant does not want to call an alibi witness, the wife of his best friend, at trial because at the

120. *See supra* text accompanying notes 28-32.

121. As discussed *supra* in text accompanying notes 22-32, although the courts and lawyer codes speak in terms of an ends/means standard of client/attorney decisionmaking authority, what they actually do is identify specific choices that are reserved for the client, irrespective of the ends/means standard.

122. *See supra* notes 28-32 and accompanying text.

time of the crime he was in bed with her.[123] Courts have not allowed clients to determine what witnesses will be called,[124] but it seems here, given the importance of the decision to the client, that the client should have the right to make the decision.[125] Courts may not want to reserve the decision of what witnesses to call for the client in every case, but a general standard which reserved for clients those decisions which a reasonable person in the position the lawyer knows or should know the client to be in,[126] would allow the client to make such a decision.

Finally, the failure of the courts to identify an intelligible general standard makes it difficult for an attorney to determine who should make choices that courts have not identified previously as choices for the attorney or the client. For example, in a Pennsylvania Supreme Court case, Rizzo v. Haines, an attorney was held liable for the failure to inform the client of the opposing attorney's statement of his settlement authority and the judge's opinion of the case's settlement value.[127] No prior case had identified this as information that the client was entitled to have, nor the choice to make a counter-offer as a choice the client was entitled to make. The lack of a workable general standard for determining what decisions are for clients makes it difficult for attorneys to decide what information and choices they must give to clients.

B. What General Standard?

If courts are to adopt a meaningful general standard for determining what choices the client is entitled to make, there are several possibilities. First, the courts could hold attorneys to the standard of the practice of others in the profession. This is the standard to which courts generally hold attorneys[128] and physicians[129] in malpractice cases.

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123. Luban, *supra* note 24, at 456. The hypothetical is based on the M.J. Wilkin and D. Dill song:

The judge said, "Son, what is your alibi?
If you were somewhere else then you won't have to die."
I spoke not a word, though it meant my life
For I had been in the arms of my best friend's wife.

Id.

124. *See supra* note 28.

125. In Luban's opinion: "paternalistic action on the part of lawyers is unjustified" and lawyers should not override "their clients' competently held values in the name of their clients' interest." Therefore, in the case of the "Long Black Veil", the client should decide "[w]hat things are worth dying for?" Luban, *supra* note 24, at 489.

126. Such a standard is proposed *infra* at text accompanying notes 147-50.

127. 520 Pa. 484, 555 A.2d 58 (1989). *See also infra* text accompanying notes 167-82.

128. *See, e.g.*, Spiegel, *supra* note 11, and cases cited therein.

129. Courts hold the doctor to the standard of the ordinary member of the profession within the community. *See* PROSSER AND KEETON ON THE LAW OF TORTS 185-186 (5th ed. 1984) [hereinafter PROSSER & KEETON], and the plaintiff must establish the ordinary standard through expert testimony. *Id.* at 188.

Though some courts apply the standard of the profession in medical informed consent cases,[130] several courts have held that the practice of the profession should not determine whether the doctor has given sufficient disclosure.[131] The District of Columbia Circuit Court of Appeals, in *Canterbury v. Spence*, has given the most thorough justification for not allowing the medical profession to determine what the doctor should reveal in informed consent cases,[132] and its reasoning is instructive for cases concerning control of legal representation.

First, the court points out that the circumstances of each patient is unique, and therefore, no standard practice within the medical profession could meet the needs of each patient.[133] The same argument applies to the question of client choice. Each client is unique, and therefore, no standard practice within the legal profession limiting the specific choices that are for the client would be sufficient to protect the interests of clients.

A second justification that the *Canterbury* court gives for not allowing the medical profession to set the standard of informed consent is that the question of what information patients need to make an informed choice is not a matter of professional expertise.[134] Unlike the standard of care in many other medical malpractice cases, the issue of what information the patient needs to make a reasonable choice is not so complex[135] that a layperson is not qualified to determine it. This argument also applies in the

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130. *See, e.g.*, Cross v. Huttenlocher, 185 Conn. 390, 440 A.2d 952 (1981); Di Filippo v. Preston, 53 Del. 539, 173 A.2d 333 (1961); Wallace v. Garden City Hosp. Osteopathic, 111 Mich. App. 212, 314 N.W.2d 557 (1981), *rev'd*, 417 Mich. 907, 330 N.W.2d 850 (1983); Bivens v. Detroit Osteopathic Hosp., 77 Mich. App. 478, 258 N.W.2d 527 (1977), *rev'd*, 403 Mich. 820, 282 N.W.2d 926 (1978). However, some of the courts that apply the standard established by the profession do not limit the standard to the practice of those within the local community, as they do in other medical malpractice cases. *See, e.g.*, Sinz v. Owens, 33 Cal.2d 749, 205 P.2d 3 (1949); Tallbull v. Whitney, 172 Mont. 326, 564 P.2d 162 (1977); King v. Williams, 276 S.C. 478, 279 S.E.2d 618 (1981); Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967); Hundley v. Martinez, 151 W.Va. 977, 158 S.E.2d 159 (1967).

131. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 792 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) (court held that lay witness testimony can competently establish that physician should have disclosed particular risk information); Aiken v. Clary, 396 S.W.2d 668 (Mo. 1965). *See also* Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972); Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972).

132. The *Canterbury* court's discussion of whether the medical profession should set the informed consent standard is discussed in Schneyer, *supra* note 70, at 150-56.

133. We cannot gloss over the inconsistency between reliance on a general practice respecting divulgence and, on the other hand, realization that the myriad of variables among patients makes each case so different that its omission can rationally be justified only by the effect of its individual circumstances.

Canterbury, 464 F.2d at 784.

134. *Id.* at 784-85.

135. *See, e.g.*, Note, *Physician's Duty to Warn of Possible Adverse Results of Proposed Treatment Depends Upon General Practice Followed by Medical Profession in the Community*, 75 HARV. L. REV. 1445, 1447 (1962) ("highly complex skills are not involved"). *But see* Note, *Physician Has a Duty to Inform Patient of Risk Inherent in Proposed Treatment*, 109 U. PA. L. REV. 768, 772 (1971) (medical profession is best qualified to set standard).

client control cases. The question of what choices a reasonable client would want to make is not generally a question which requires technical legal judgment.

Additionally, the *Canterbury* court suggests that members of the medical profession have a bias in favor of retaining control and the law should not allow them to determine what information they will convey.[136] Lawyers also are likely to have a bias in favor of retaining control of legal representation.[137] The custom of the legal profession as to client decisionmaking authority should be treated as custom generally is treated; it should merely be admitted into evidence,[138] and should not establish the controlling standard.

Bellow and Moulton present another possible standard for the allocation of decisionmaking authority. They state that attorneys make "technical decisions" and that clients make "decisions that affect the client's inmost concerns."[139] They offer two justifications for such a dividing line, each of which seems to focus on a different aspect of the word "technical." First, they suggest that some issues "are too 'technical' for a layperson."[140] Here, "technical" is used in the sense of "difficult." Though the difficulty of the decision is an important factor in determining whether the client should make it, some difficult questions may be so important to the client that the client should make them, even though they require the lawyer to give the client a substantial explanation.

Second, Bellow and Moulton state that:

> In the giving of legal advice . . . a distinction is recognized between the "important" decisions—those which affect the client's inmost concerns—and decisions which involve more or less technical aspects of the client's problem.[141]

Here "technical" appears to mean those decisions that merely implement the client's choices, and is contrasted with those decisions that "affect the client's inmost concerns." Although the importance to the client of the decision is a very relevant factor in deciding whether a decision should be allocated to the client, there are problems with an "inmost concerns"/technical standard. One objection is suggested by the term, "inmost con-

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136. *Canterbury*, 464 F.2d at 784. Schneyer suggests that this is the most influential argument of the court. *See* Schneyer, *supra* note 70, at 155.

137. As Judge Learned Hand said concerning another profession, the law should not allow the custom of a group to establish the standard of care because "a whole calling may have unduly lagged in the adoption of new and available devices." The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

138. *See* PROSSER & KEETON, *supra* note 129, at 193-95.

139. G. BELLOW & B. MOULTON, *supra* note 6, at 1030-31. It is not clear whether they advocate this as a standard or merely describe what they perceive to be the prevailing practice. Spiegel has suggested that the Bellow & Moulton test is vague. *See* Spiegel, *supra* note 11, at 123 n.345.

140. G. BELLOW & B. MOULTON, *supra* note 6, at 1030.

141. *Id.* at 1031.

cerns." The proposed standard appears to be entirely subjective. Courts should not require attorneys to allow clients to make decisions that are important to the client unless attorneys know or should know of the importance of the decision to the client.[142] Also, an "inmost concerns"/ technical standard would not resolve whether the lawyer or the client should make many of the choices that arise. Many issues are merely of some concern to the client and involve some technical difficulty; this standard does not identify who should make such choices.

Mark Spiegel suggests that courts allocate the responsibility for decisionmaking based on the interests of the client, the attorney, and society.[143] The lawyer codes, of course, protect some of the interests of society by limiting the options of the client. As to choices involving the interests of society that the professional codes does not resolve, Spiegel suggests, as argued herein, that lawyer control might result in decisions that are less in the interest of society than client control.[144] As between the lawyer[145] and the client, an interests standard apparently would leave almost all decisions to the client, because the client will have the greater interest in almost all decisions in legal representation.[146] However, an interests rule would be impractical in light of the many decisions that must be made in the course of legal representation.

The law of medical informed consent may give help in the development of a general standard for identifying the choices that the client should make. Most courts require that doctors disclose "material risks."[147] In Canterbury v. Spence, the court said:

> A risk is . . . material when a reasonable person, in what the physician knows or should know to be the patient's position, would

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142. The general standard that is advocated herein would hold attorneys responsible only if they know or should know of the importance of the choice to the client. *See supra* text accompanying notes 147-50.

143. *See* Spiegel, *supra* note 11, at 117-23. Rather than replace the ends/means standard with "another definitional categorization," Spiegel suggests that courts "begin to consider specific lawyering decisions and allocate them either to the lawyer or client in accordance with" their interests. *Id.* As argued *supra* at text accompanying notes 121-26, the problem with merely allocating specific decisions to the client or lawyer is that this does not take into consideration the individual characteristics of the client or the case. A general standard that does take into consideration individual characteristics of the client is suggested *infra* at text accompanying notes 147-50.

144. *See* Spiegel, *supra* note 11, at 120-21.

145. Spiegel suggests that lawyers' interests are protected by their right to withdraw from representation. *See id.* at 126-32.

146. Spiegel suggests that some decisions will be for the attorney under this division of authority. "Even if the client chooses the witnesses to be called at trial, the lawyer still determines the order of proof and the details of eliciting testimony, including the framing of questions." *See id.* at 125. What questions to ask a witness may, however, be very important to the client. One of the client's goals may be to maintain a good relationship with a witness.

147. Canterbury v. Spence, 464 F.2d 772, 792 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 23 Cal. App. 3d 313, 100 Cal. Rptr. 98 (1972); Berkey v. Anderson, 1 Cal. App. 3d 790, 82 Cal. Rptr. 67 (1969); Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972).

> be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy."[148]

This materiality standard establishes the information that the doctor must convey to the patient. It can be used to formulate a standard, not only for the information that lawyers should convey to the client, but also the choices that the lawyer should allow the client to make. Courts should require lawyers: 1) to do a reasonable amount of client interviewing to determine if the client has any special needs or interests; 2) to allow the client to make those choices which a reasonable client, in what the lawyer knows or should know the position of the client to be, would want to make; 3) to enable the client to make the choices intelligently;[149] and 4) to communicate to the client in a manner that will enable the client to comprehend the choices that he or she must make.[150]

In determining what decisions a reasonable client in the position of the client would want to make, the attorney should take into consideration the following factors: 1) the effect that the choice may have on the client; 2) the complexity of the matter to be resolved; 3) the sophistication, experience, intelligence, and knowledge of the client; and 4) the interest that the client expresses. Each of these factors is important in determining the importance to the client of control over choices and the ability of the client intelligently to make those choices.

Note that the standard for determining what choices the client should make is objective in some respects and subjective in others. The standard is objective in that the lawyer is only required to allow the client to make those choices that a reasonable client would want to make. This limits, to some extent, the autonomy of the client, but such a limitation is necessary so that a lawyer will be able to comply with the standard. The standard should not require the lawyer to be a mind reader. The proposed standard is subjective in that the lawyer must attempt to determine whether there are special characteristics of the client that would lead the client to want to make choices that an ordinary client would not want to make. Attorneys cannot avoid responsibility on the basis that they made the choice that a reasonable client would have made.

C. The Continued Identification of Specific Choices For the Client

Though, as argued in a previous section,[151] there are advantages to a general standard for determining the choices that are for the client, there are also advantages to the identification of specific choices that are for the

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148. Canterbury v. Spence, 464 F.2d at 787 (quoting Waltz & Scheuneman, *Informed Consent in Medical Malpractice*, 55 CALIF. L. REV. 1396, 1407-10 (1967)).

149. Binder & Price provide a helpful method for enabling the client to make informed decisions. D. BINDER & S. PRICE, *supra* note 6.

150. *See* Simpson, *Informed Consent: From Disclosure to Patient Participation in Medical Decisionmaking*, 76 NW. U.L. REV. 172, 183 (1981).

151. *See supra* text accompanying note 122-27.

client. When courts identify specific choices that are for the client as a matter of law, attorneys do not have to wrestle with whether clients should make these choices, nor does the finder-of-fact, in a malpractice action, have to wrestle with whether or not the attorney should have allowed the client to make them.[152]

Courts are not limited to either establishing a general standard for decisions that are for the client or identifying specific choices that are for the client. They can do both. They should require an attorney to allow a client to make choices which a reasonable client, in the position that the attorney knows or should know the client to be in, would want to make. Courts should supplement such a general standard with rules of law that require the lawyer to allow the client to make choices in specific situations.[153] They should continue to reserve specific choices for the client which are generally of great importance to clients and which clients generally are capable of making.[154] The following section identifies several choices as likely next steps in the development of the client's right to control legal representation.

V. NEXT STEPS TOWARD CLIENT CONTROL: THE CLIENT'S RIGHT TO CONTROL NEGOTIATION AND TO PURSUE ALTERNATIVES TO LITIGATION

As argued in the prior section, attorneys should have a duty to allow clients to make those decisions that a reasonable client, in what the attorney

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152. In medical informed consent cases, courts have not generally identified specific choices that are for the patient. It would be more difficult for courts to do so in the medical informed consent cases than in the client choice cases for three reasons. First, the choices that courts explicitly give to clients in legal representation are major choices that arise very often. With only a few rules, courts have been able to take care of a great many of the client choice cases that arise. Courts could not do this in medical cases. There are innumerable medical procedures that doctors perform, and courts would have difficulty listing a few specific rules that would identify what choices the patient should have in a substantial number of cases.

A second reason that courts might be more hesitant to adopt rules of law specifying the disclosure required in medical informed consent cases is that judges are not experts in the medical field. However, most of them have been practicing attorneys. They can determine from their own experience what legal representation questions would be appropriate for the client.

Finally, it would be difficult to establish specific standards for the medical profession because the risks of and alternatives to medical procedures are always changing. What is reasonable disclosure one day will be unreasonable in light of newly developing alternatives to treatment. This can be contrasted with legal representation, in which the risks of a jury trial or a criminal defendant taking the stand probably have not changed substantially since early common-law days.

153. Whether or not courts adopt a general standard, they will probably continue to identify choices that lawyers must allow clients to make. As argued *infra* at text accompanying notes 183-200, courts should explicitly require that the following decisions be made by the client: what style and strategy to adopt in negotiation, whether to make settlement offers, what offers to make, when to make them, and whether to pursue mediation or arbitration of a dispute.

154. *See infra* text accompanying notes 28-32.

knows or should know to be the position of the client, would want to make. However, the right of client control has developed to this point as the right of the client to decide specific issues that arise during representation, and, whether or not courts recognize a broad general right on the part of the client to make significant choices within legal representation, courts should continue to identify specific choices that are for the client.

It is likely that the next steps in the development of a duty to allow clients to control representation will be the recognition of duties to allow the client to make significant decisions concerning negotiation and to allow the client to choose alternatives to litigation. First, during negotiation, in addition to the right to choose to accept or reject a settlement offer, the client should have the right to choose the style and strategy of negotiation, when to make settlement offers, and what to offer. Second, the client should be allowed to choose whether to attempt to resolve disputes through mediation or arbitration. Each of these choices presents potential benefits and risks to clients and clients should be informed of the risks and benefits of each option and allowed to make the choices in light of them.

A. The Client's Right to Control Negotiation

1. The Interests of the Client in Negotiation Decisions

The outcome of negotiations is generally of great importance to clients in legal representation, whether the lawyer is negotiating a transaction or the resolution of a dispute. In negotiation of a transaction, if a favorable agreement is lost because the lawyer does not involve the client in decision-making, then the client has lost the benefit of the favorable agreement. In negotiation of a dispute, avoiding litigation can have several potential advantages to the client. It can limit uncertainty, speed resolution, and enable the parties to tailor a settlement to meet their special needs.[155] If an attorney fails to negotiate a settlement that could have been obtained had the client controlled the negotiation, the case is tried, and the client loses, the client has lost the benefit that the client would have had if the parties had settled.

Many decisions that are made during negotiation are likely to affect the outcome. Some choices enhance the likelihood that a settlement, if obtained, will be favorable to a client, but also create a greater risk of deadlock. It is the client that will suffer the most significant loss if there is a bad settlement or if there is a deadlock, and the client should control the significant decisions during negotiation.

2. Negotiation and the Lawyer's Conflict of Interest

Courts require a lawyer that is representing both a defendant in a civil case and the defendant's liability insurance company to provide the defen-

155. *See* Dunlop, *The Negotiations Alternative in Dispute Resolution*, 29 VILL. L. REV. 1421, 1423 (1984).

dant with a substantial amount of information that will affect the decision whether or not to settle. The attorney must:

> advise and counsel a client as to all facts, circumstances and consequences which are necessary to enable the client to make an informed decision on matters such as the likelihood of an excess verdict and the desirability of attempting settlement within the policy limits.[156]

This duty is based on the conflict of interest between the insurance company and the defendant, both of whom are clients of the attorney.[157] However, this is not the only situation in which a conflict of interest is likely to interfere with an attorney's decisionmaking during negotiation. Often, there is a conflict of interest between the lawyer and the client in negotiation decisions, and the lawyer should always have the responsibility to allow the client to make significant negotiation decisions.[158] Conflicts of interest between the lawyer and the client during negotiation are both likely to arise and likely to affect the lawyer's actions.

Several types of conflicts of interest are likely during negotiation of a dispute because lawyers have a great interest in whether or not a case is litigated, and the lawyer's interest often differs from that of the client. First, the financial arrangements between the attorney and the client may create a conflict of interest. If lawyers are handling a case on a contingency fee basis, it is generally in their interest to get a quick settlement, even if substantial negotiation or litigation might generate a larger recovery for the client.[159] Second, the workload of the attorney may create a conflict of interest. If lawyers are overworked, it will be in their interest to settle cases quickly, whereas if they are underworked and they are employed on an hourly basis, it will be in their interest to negotiate for a longer period of time or litigate.[160] Third, potential publicity from the trial of a case may create a conflict of interest. In some cases, it may be in a lawyer's interest

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156. Garris v. Severson, Merson, Berke & Melchior, 252 Cal. Rptr. 204, 206 (Cal. Ct. App. 1988) (Order not published).

See also C. WOLFRAM, *supra* note 23, at 430 (citing Rogers v. Robson, Masters, Ryan, Brumund & Belom, 81 Ill.2d 201, 407 N.E.2d 47, 49 (1980) (although defense lawyers were employed by company, insured was also their client; as such, lawyers owed duty to client independent of insurance policy to obtain client's permission to settle claim); *accord* Lieberman v. Employers Ins. of Wausau, 84 N.J. 325, 419 A.2d 417 (1980)).

157. *See* C. WOLFRAM, *supra* note 23, at 430 (citing Rodgers v. Robson, Masters, Ryan, Brumund & Belom, 81 Ill.2d 201, 407 N.E.2d 47, 49 (1980)).

158. A previous section discussed the risk that lawyers will have conflicts of interests with their clients that will affect the results of the representation. *See supra* text accompanying notes 62-65.

159. *See* D. ROSENTHAL, *supra* note 11, at 96-99 ("[F]or all but the largest claims, an attorney makes less money by thoroughly preparing a case and not settling it early." *Id.* at 105); *see also* Clermont & Currivan, *supra* note 62, at 536.

160. *See* Strauss, *supra* note 11, at 329-30 ("[t]he attorney's concern about his or her time, profit, and other personal interests affect, perhaps subconsciously, the choices made for the client.").

to litigate a case and get some publicity, rather than negotiate a settlement.[161] In cases that lawyers are likely to lose, they may be tempted to settle rather than risk negative publicity. Finally, the interest of the lawyer in developing a reputation for handling cases in a certain manner may run counter to the interest of the client. For example, a lawyer may want to develop a reputation for hardball negotiation, and may not want to undercut that reputation by taking a conciliatory approach, even when a conciliatory approach would be in the interest of the client.

In addition to the likelihood that the lawyer and client will have a conflict of interest in negotiation, a conflict of interest is more likely to influence the attorney's actions in negotiation than in litigation. Whereas litigation takes place in public, in front of the client, the judge, and, in some cases, the press, negotiation generally take place in private between the attorneys. During negotiation, the client is not present to oversee the behavior of the attorney, and attorneys do not risk bad publicity from a performance that is influenced by their own interests. An attorney for the opposing side is likely to be more than happy to quietly take advantage of an attorney that is ineffective because of a conflict of interest. The effects of these conflicts of interest can be diminished if the client has the right to make the significant negotiation decisions.

3. The Ability of the Client to Make Negotiation Decisions

It may be that there is justification for leaving much of the decisionmaking authority with the lawyer in litigation, where many of the decisions are technical or urgent,[162] but negotiation decisions, generally, are not so technical or urgent as litigation decisions. Negotiation choices may be difficult, but, generally, the client can understand the risks and benefits of the alternatives.[163] The lawyer should play an important role in explaining the likelihood of various results under the alternatives, but lawyers should allow clients to make the choices in light of their own values and risk preferences.

In many situations, the client may have advantages over the attorney in making negotiation decisions. The client may know the opposing party and have a better understanding than the attorney of how that party is likely to react to various strategic behavior. The client also may have a better knowledge of some aspects of the subject over which the parties are negotiating. This knowledge may enable the client to think of creative means of arranging a deal or settling a case that will benefit both sides.[164]

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161. *See, e.g.*, Rizzo v. Haines, 520 Pa. 484, 487, 555 A.2d 58, 64 (1989) (court found that lawyer wanted case to go to trial, rather than settle, so that he could get "a reputation as a negligence attorney").

162. *See supra* text accompanying notes 86-90. However, as this article argues *supra* at text accompanying note 90, the client should be involved in many litigation-related decisions.

163. For a discussion of some of the negotiation decisions that courts should reserve for clients, see *supra* text accompanying notes 183-200.

164. An initial decision that attorneys often do not even consider is the question of who

These abilities justify client control of negotiation decisions.[165]

4. Beyond the Settlement Offer Precedent

Courts have established that lawyers must have client authority before they make settlement offers and that they must present settlement offers to clients.[166] This right is justified by the importance of the decision to the client and the likely conflict of interest between the lawyer and the client. The settlement offer rules, however, do not sufficiently protect the interest of clients in controlling settlement choices. There are many other choices that are made during negotiation that are important to the client.

A decision by the Pennsylvania Supreme Court in 1989 suggests a willingness on the part of courts to broaden the choices attorneys must give to clients during negotiation. In *Rizzo v. Haines*,[167] the plaintiff had been injured when a Philadelphia police car struck the plaintiff's car in the rear.[168] The plaintiff was paralyzed.[169] Plaintiff, represented by an attorney, brought suit against the city of Philadelphia.[170] During the course of a settlement conference, the trial judge suggested a settlement figure of $550,000.[171] Plaintiff's attorney immediately rejected this figure.[172] Later, during the course of the trial, the attorney for the city told plaintiff's attorney, "Look, I've got more than 550, what do you really want," to which plaintiff's attorney's only reply was "$2 million," the amount of the plaintiff's previously rejected offer.[173] The plaintiff's attorney never discussed the judge's suggested settlement figure or the city attorney's statement of authority with the plaintiff.[174] "[T]here was also evidence that [plaintiff's attorney] considered the opportunity to try the case to be a cornerstone in building his reputation as a successful plaintiff's attorney."[175] The case was tried and the jury awarded the plaintiff a verdict of $450,000.[176]

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does the negotiating. In recent years, there has been a growing interest in having direct negotiation between the parties to a business dispute. Such negotiations can yield superior results to those conducted by the lawyers because the parties to the dispute are more familiar than their attorneys with their business and can respond more quickly and creatively to proposals. They can look at the complete business picture, unconstrained by the parameters imposed by legal doctrine. *See* Lieberman & Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 429-30 (1986).

165. It is unlikely that an attorney will be held liable for the failure to present the option of client negotiation to a client because the practice has probably not yet received sufficient publicity for a court or jury to conclude that the reasonable attorney would present such an option to the client.

166. *See supra* cases cited at note 32.

167. 520 Pa. 484, 555 A.2d 58 (1989).

168. Rizzo v. Haines, 520 Pa. 484, 488, 555 A.2d at 60 (1989).

169. *Id.*

170. *Id.*

171. *Id.* at 492, 555 A.2d at 62.

172. *Id.*

173. *Id.*

174. *Id.* at 494, 555 A.2d at 62-63.

175. *Id.* at 495, 555 A.2d at 63.

176. *Id.*

The plaintiff brought a malpractice suit against his attorney. In the trial against the attorney, the city attorney revealed that he had had authority to settle the initial suit for $750,000.[177] For the malpractice cause of action, the trial court awarded the plaintiff $300,000,[178] which represented the difference between the verdict obtained in the original trial and the city attorney's settlement authority. The Pennsylvania Supreme Court affirmed the trial court's order, which stated that:

> [Plaintiff's attorney] did not properly discuss [the City's] inquiry-offer with the plaintiff. He did not properly disclose [the trial judge's] recommendation or [the city attorney's inquiry]. He did not comply with a duty to properly inform plaintiff and to assure that plaintiff heard and understood.[179]

The Pennsylvania Supreme Court also pointed to a policy justification of encouraging settlement as one of the grounds for its decision.[180]

Though the court cited the rule that the lawyer should convey settlement offers to a client,[181] that rule, by itself, does not explain the decision. The city's attorney never gave the plaintiff's lawyer an offer of $550,000,[182] much less $750,000. The city's attorney merely stated that he had authority to settle for $550,000 and requested a counter-offer. The court expanded the right of clients to be informed of settlement offers to include the right to be informed of the judge's settlement recommendation, statements by the other side of their settlement authority, and requests of the other side for a counter-offer.

Rizzo, however, suggests far more than that the attorney merely must report to the client the judge's recommendations and the opposing attorney's statements of authority and requests for counter-offers. If the plaintiff's attorney had merely told the plaintiff, "The judge suggested settlement at $550,000, the city attorney said he has authority to offer that much, but that is not enough money and I said that wasn't enough," it is unlikely that the parties would have reached settlement. However, if plaintiff's attorney had informed plaintiff of the judge's and city attorney's statements and had allowed plaintiff to control the settlement negotiations, it is

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177. *Id.* at 494, 555 A.2d at 62.

178. *Id.* at 489, 555 A.2d at 61.

179. *Id.* at 497, 555 A.2d at 64.

180. The court stated:

> "[v]oluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustments of matters in dispute, as for the most wholesome of reasons they certainly should. When the effort is successful, the parties avoid the expense and delay incidental to litigation of the issues; the court is spared the burdens of a trial and the preparation and proceedings that must forerun it.

Id. at 498, 555 A.2d at 65 (quoting Rothman v. Fillette, 503 Pa. 259, 267, 469 A.2d 543, 546 (1983), which quoted Autera v. Robinson, 419 F.2d 1197, 1199 (D.C. Cir. 1969)).

181. *Id.* at 499, 555 A.2d at 66.

182. *Id.*

reasonable to assume that the parties would have settled. Implicit in the court's judgement may be a requirement that clients control significant negotiation decisions.

5. What Negotiation Decisions For the Client?

Cases have clearly established that the client has the right to choose whether or not to accept settlement offers from the opposing side,[183] and that clients must approve of settlement offers that their attorneys make. Other decisions during negotiations are also sufficiently important that they should be made by the client.

Assuming that a client wants to attempt to negotiate an agreement or a settlement, a basic question concerning the conduct of the negotiation will be what style and strategy to adopt. The style of negotiation is the interpersonal behavior of the negotiator in dealing with the other side, and may be either competitive or cooperative.[184] Both competitive and cooperative styles of negotiation can be successful. One study found that:

> [E]ffective competitive lawyers are dominating, forceful, attacking, aggressive, ambitious, clever, honest, perceptive, analytical, convincing, and self-controlled. Effective cooperative lawyer-negotiators, on the other hand, were found to be trustworthy, fair, honest, courteous, personable, tactful, sincere, perceptive, reasonable, convincing, and self-controlled.[185]

Though each style can be effective, each carries its own strengths and risks. Competitive bargainers are less likely to give away too much, however a competitive style "generates tension and encourages negotiator mistrust" and creates a greater risk of deadlock.[186] A cooperative style may not yield terms that are as favorable to the client, but a cooperative style reduces the risk of deadlock, requires less negotiation time, and generally produces a higher joint outcome for the parties.[187] The client should have the right to choose the negotiation style.

Whereas the style of negotiation involves the manner of interpersonal behavior with the opponent, the selection of a strategy controls the substantive choices. There are two types of negotiation strategies, adversarial and problem-solving.[188] Whereas an adversarial strategy assumes that there is a given pie to be divided and that any concession to the other side will

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183. *See* cases cited *supra* at note 32.

184. *See* R. BASTRESS & J. HARBAUGH, *supra* note 13, at 390.

185. *Id.* at 391 (citing G. WILLIAMS, EFFECTIVE NEGOTIATION AND SETTLEMENT (1981) (study of lawyer-negotiators in Denver and Phoenix)).

186. *Id.* at 392 (citing G. WILLIAMS, *supra* note 185).

187. *Id.*

188. Adversarial and problem-solving strategies can be used in combination with either a competitive or cooperative bargaining style. *See id.* at 393-97; Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 818 (1984).

be a loss to the client, problem-solving negotiation attempts to resolve conflict in a manner that will create a bigger pie and enable both parties to win.[189] Problem-solving negotiators attempt to discover the needs of both of the parties and, together, create solutions that meet those needs.[190] Bastress and Harbaugh contrast adversarial and problem-solving strategies as follows:

> Adversarials proceed linearly to develop their plans, concentrating on creating and defending positions along the bargaining continuum. Planning by problem solvers, on the other hand, focuses on identifying needs and brainstorming to develop solutions for mutual gains. Adversarials engage in positional argument while problem solvers tend to explore interests. Adversarials make offers to which they appear to be committed. Problem solvers advance proposals that invite opponents to accept, reject, or modify based on how the proposals intersect with their interests. Adversarials are more likely to restrict information flow, problem solvers are more inclined to exchange data. Adversarials reject the opponents' offers summarily and make concessions along the continuum. Problem solvers explain why solutions are acceptable or unacceptable in whole or in part based on a needs analysis. They also seldom make concessions, as their adversarial colleagues do, but instead shift to another proposal that more completely addresses the parties' mutual problems.[191]

Adversarial and problem-solving strategies each have potential benefits and risks for the client. Problem-solving negotiation can help both parties if it enables the parties to develop a creative solution that is mutually beneficial. If the parties want to have a continuing relationship, it may be important to each of them that the other benefit from the ultimate resolution of the dispute. However, if the problem is such that the client's only goal is to obtain as much as possible of a pie of a given size, then adversarial bargaining is likely to produce the greater gain.[192] If a party attempts problem-solving and fails to produce a creative solution to the problem, that party may have revealed weaknesses to the other side that will be damaging. The choice of what strategy to employ during negotiation carries with it risks and benefits for the client, and the client should have the right to choose the negotiation strategy.

When to make offers and what offers to make are significant choices during negotiation,[193] especially when the lawyer applies an adversarial

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189. *See* R. BASTRESS & J. HARBAUGH, *supra* note 13, at 381; FISHER & URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981); Menkle-Meadow, *supra* note 188, at 783-85 & 809-13.

190. *See* Menkle-Meadow, *supra* note 188, at 801-17.

191. R. BASTRESS & J. HARBAUGH, *supra* note 13, at 383.

192. *See id.* at 402.

193. Rosenthal found that less than 20% of attorneys discuss the initial settlement demand with the client. *See* D. ROSENTHAL, *supra* note 11, at 113.

negotiation strategy.[194] The closer a party's offer is to a reasonable settlement figure, the more likely it is that a case will be settled, but the less favorable the final settlement figure is likely to be.[195] The party to make the first concession usually does worse in negotiation,[196] and small, infrequent concessions are likely to yield the most favorable results.[197] However, toughness in granting concessions may result in deadlock.[198] Before attorneys make offers, they must obtain client approval,[199] but the right of the client is merely the right to veto any proposed offer. Courts should require lawyers to inform clients of the risks and potential benefits of various offers and allow the client to choose when to make offers, and what offers to make.[200]

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194. Rather than focusing on offers and counter-offers the problem-solving negotiator proposes multiple solutions to the problems of the parties and then discusses with the opponent how each of them might meet the needs of the parties. *See* R. BASTRESS & J. HARBAUGH, *supra* note 13, at 501. Once the parties have agreed on the general outline of an agreement, however, they may shift to adversarial exchanges of offers and counter-offers to determine the final terms.

195. *See id.* at 497-99 (unreasonable initial offers maximize client's return, but create "an extraordinarily high incidence of deadlock"); *id.* at 520 ("a grudging approach to the size and the number of concessions results in the maximum payoff to the negotiator," but extreme levels of toughness create a risk of deadlock).

196. *See* G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: NEGOTIATION 115 (1981) and studies cited therein.

197. *See id.*

198. The failure to make a concession could lead to a failure to settle because it carries with it:

> (b) the danger that the opponent will become discouraged and end the negotiation prematurely;
>
> (c) the danger that one's own side or the opponent will become so committed to an unviable position that agreement is impossible;
>
> (d) the danger that further maneuvering now will leave too little time in the future to work out an agreement.

Pruitt, *Indirect Communication and the Search for Agreement in Negotiation*, 1 J. APPLIED. SOC. PSYCHOLOGY 205 (1971), *quoted in* G. BELLOW & B. MOULTON, *supra* note 196, at 108.

> If [an initial demand] is high enough it will (i) protect counsel from underestimations of his or her opponent's minimal settlement point; (ii) conceal counsel's own minimal settlement point; and (iii) permit counsel to make concessions (and demand counterconcessions) which still perform these concealment/protective functions. . . . On the other hand, if the initial demand is too high, it may (i) be dismissed and have no effect on opposing counsel's decisions; (ii) cause opposing counsel to believe that threats or other cost-imposing tactics are necessary; (iii) produce an expectation of deadlock (opposing counsel might then begin preparing for trial, incurring costs which would later have to be recovered).

G. BELLOW & B. MOULTON, *supra* note 196, at 100.

199. *See* cases cited *infra* note 32.

200. This article has focused on the right of the client to recover in a malpractice action against an attorney for the failure to involve the client in decisionmaking in a civil trial, but the right to make choices concerning negotiation in a criminal trial is also very important. The criminal defendant's right to be informed of a plea bargain offer is clearly established. The criminal defendant should also have the right to decide whether to initiate plea bargaining. *See* United States ex rel Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982); Harris v. State, 437 N.E.2d 44 (Ind. 1982).

B. *The Client's Right to Pursue Alternative Methods of Dispute Resolution*

In recent years, there has been a substantial growth in interest in alternative means of dispute resolution.[201] The major alternatives to litigation and negotiation are mediation and arbitration.[202] In mediation, the parties meet with a neutral third party, generally chosen by the parties, who attempts to facilitate the parties' negotiation of a settlement.[203] The mediator helps to facilitate negotiation by helping to define the problem and suggesting options for its resolution.[204] Mediation is like negotiation, in that the parties must reach agreement for there to be a resolution of the dispute. In many cases, agreements worked out by the parties through mediation are subject to the review of counsel before final approval by the parties.

In arbitration, an arbitrator, generally chosen by the parties, conducts a hearing and resolves the dispute.[205] The parties generally are represented by counsel. Arbitration is like litigation in that a third party, the arbitrator, decides how to resolve the dispute. The ground rules of the arbitration generally are created by the agreement of the parties. They determine how many arbitrators there will be, how the arbitrators will be chosen, what rules of evidence will apply, and whether or not the decision may be appealed. Courts have generally upheld agreements to binding arbitration.[206]

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201. *See, e.g.*, J. FOLBERG & A. TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984); S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION (1985) [hereinafter S. GOLDBERG]; J. MURRAY, A. RAU & E. SHERMAN, PROCESSES OF DISPUTE RESOLUTION 247 (1989) [hereinafter J. MURRAY]; L. RISKIN & J. WESTBROOK, *supra* note 6; Edwards, *supra* note 19; Fiss, *supra* note 19; Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985); Lavorato, *Alternative Dispute Resolution: One Judge's Experience*, ARB. J. 64 (1987); Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29 (1985); McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985); Nelson, *The Immediate Future of Alternative Dispute Resolution*, 14 PEPPERDINE L. REV. 777 (1987); Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420 (1982); Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982); Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1 (1985).

202. Other forms of alternative dispute resolution include the mini-trial (lawyers present their cases to the principals of institutional clients, who then, with the help of an advisor, seek to reach agreement) and mediation/arbitration (begins as mediation, proceeds to arbitration if the parties do not agree). L. RISKIN & J. WESTBROOK, *supra* note 6, at 173-88. Each of these has proven to be helpful in resolving some disputes, but they have not yet become so common or so widely known that the failure of an attorney to alert clients to their use should subject the attorney to liability for malpractice.

203. *See* J. MURRAY, supra note 201, at 247; L. RISKIN & J. WESTBROOK, *supra* note 6, at 83-90. A mediator facilitates a settlement by controlling the communication and information exchange between the parties, establishing a positive emotional climate and developing procedures to generate options.

204. *See* J. MURRAY, *supra* 201, at 248. Normally mediators attempt to be only facilitators, and do not interject their views or values, but in recent years some mediators have become more activist and even promote particular solutions. *See id.* at 248-50.

205. *See* L. RISKIN & J. WESTBROOK, *supra* note 6, at 3-4.

206. *See* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974); Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960); Bailey v. Bicknell Minerals, Inc., 819 F.2d 690 (7th

There are risks and potential benefits to both mediation and arbitration. An attorney should inform the client of these risks and potential benefits and allow the client to choose whether to pursue these means of dispute resolution.[207]

1. The Potential Benefits and Risks to the Client of Mediation and Arbitration

Mediation and arbitration may differ from litigation in time required before resolution of the dispute, cost, effect on the future relationship of the parties, likely result, and procedural protections.

a. Time and Attorneys' Fees

Mediation and arbitration may save the client both time and money.[208] They can save the client time in two respects. First, the parties generally can arrange to have the dispute mediated or arbitrated at a much earlier date than they could have a trial. In litigation, the delay between the filing of a complaint and the trial of a case can be substantial. For example, in 1985, in Los Angeles County Superior Court it took an average of thirty-six months for civil cases to get to trial.[209] Parties can begin to mediate or arbitrate a dispute as soon as they agree on a mediator or arbitrator and arrange for a meeting.[210]

Mediation and arbitration can save the client time in a second respect. Once one of these methods of dispute resolution begins, it may require a shorter amount of attorney and client time than litigation or attorney

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Cir. 1987); O'Malley v. Wilshire Oil Co., 59 Cal.2d 482, 381 P.2d 188, 30 Cal. Rptr. 452 (1963); Retail Clerks Union, Local 770, AFL-CIO v. Thriftimart, Inc., 59 Cal.2d 421, 380 P.2d 652, 30 Cal. Rptr. 12 (1963); Posner v. Grunwald-Marx, Inc., 56 Cal.2d 169, 363 P.2d 313, 14 Cal. Rptr. 297 (1961).

207. Implicit in the suggested duty of the attorney to involve the client in decisionmaking concerning alternatives to litigation is the assumption that attorneys will know about alternatives. An attorney should know about mediation and arbitration. These methods of dispute resolution have been widely discussed in bar association journals, as well as in scholarly publications. *See* articles cited *supra* note 201.

208. Pearson, *supra* note 201, at 435.

209. 1986 JUDICIAL COUNCIL OF CALIFORNIA ANNOTATED REPORT, pt. II, table T-17, at 144, *cited in* Petillion, *Recent Developments in Alternative Dispute Resolution*, 14 PEPPERDINE L. REV. 929, 931 (1987).

210. Though the parties can arrange for mediation at an early date, if the parties fail to resolve a dispute through mediation, and then have to get a trial date, the mediation may delay the resolution of the dispute. The parties can avoid this problem if they set a trial date and mediate the dispute pending the trial.

Parties can be certain that a dispute will be resolved at an early date if a case is arbitrated. *See* L. RISKIN & J. WESTBROOK, *supra* note 6, at 146-47. As with mediation, the parties can arrange to have a case arbitrated within a short period of time and, unlike mediation, the parties can be sure that arbitration will result in a resolution of the dispute. The client will not have the right to reject the decision of the arbitrator, but the client can be confident that the arbitrator will reach a decision.

negotiation. In some cases, mediation will resolve a dispute faster than attorney negotiation, in some cases it will not. Some characteristics of mediation may expedite resolution of a dispute. When the parties meet directly with each other during mediation, they can answer each other's questions and make offers and counter-offers without delay. On the other hand, during mediation, the parties may spend time dealing with underlying emotional conflicts that are not related to the specific problem in dispute.

Arbitration generally will require a shorter amount of time than litigation. The arbitrator is typically an expert in the subject matter of the dispute, and may understand the facts of the case more quickly than a judge or jury.[211] Arbitration results also may not be subject to appeal, and thus arbitration may prevent the long delay that can accompany appellate review.

In addition to the potential time savings, the parties may save attorneys' fees through mediation or arbitration. In mediation, generally, the parties meet with the mediator, without their attorneys. Negotiations between the parties during mediation will require less expense than negotiation for a similar amount of time by attorneys. Mediation requires only one professional fee, the fee of the mediator, during the time of the mediation. However, this savings may be offset, to some extent, by the expense of having an attorney review the agreement. If the mediation is successful, the parties will probably save money. If the mediation is unsuccessful, however, the parties will pay the mediator's fees, as well as their future attorneys' fees.

Mediation creates the largest savings of time and money in cases in which the parties reach agreement and attorney negotiation would not have been successful. Of course, it is difficult to tell whether or not any one case that has been settled through mediation would have been settled through attorney negotiation, but it appears that mediation is somewhat more successful at resolving disputes than attorney negotiation.[212] Therefore, if the parties mediate, the client is likely to save time and money if the mediation is successful. When the client knows the other party, the client may be best able to determine whether mediation is likely to lead to an agreement.

The attorneys' fees in arbitration are likely to be somewhat less than the attorneys' fees in litigation. In arbitration, attorneys represent the parties in hearings that are like trials in many respects. The arbitrator is typically an expert in the subject matter of the dispute, and so the hearing may be shorter, requiring less attorneys' fees than a trial.[213] However, the parties will generally have to pay the expense of the arbitrator, and this may reduce

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211. *See* Lieberman & Henry, *supra* note 164, at 431.

212. *See, e.g.*, Pearson & Thoennes, *Divorce Mediation: Strengths and Weaknesses Over Time*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 57-58 (H. Davidson, L. Ray, & R. Horowitz eds. 1982).

213. *See* Lieberman & Henry, *supra* note 164, at 431.

the savings of attorneys' fees created by the shorter hearing. The parties are likely to have a big savings in time and attorneys' fees if they agree that the decision of the arbitrator will be final and thereby avoid the expense of an appeal.[214]

b. The Future Relationship Between the Parties

Litigation discourages communication and trust between the parties.[215] They are adversaries: one party wins, the other party loses, and victory is reduced to a money judgment.[216] Litigation is likely to increase friction and animosity between the parties. The friction that litigation creates can be especially troublesome in commercial cases in which the parties want to maintain a future business relationship,[217] and in child custody cases in which the parties must maintain a future family relationship.[218]

Possibly the greatest value of mediation is that the parties are likely to have a better future relationship after mediation than after litigation.[219] Whereas litigation and attorney negotiation are likely to inhibit communication between the parties, one of the central goals of mediation is to create trust and communication between the parties.[220] Maintaining a good relationship with the other party may be important to the client.

c. Results

The likely result if a case is mediated or arbitrated may be better or worse for the client than the likely result if the case is litigated. Whether, for an individual client, mediation is likely to lead to a more favorable resolution than litigation or attorney negotiation will depend on the client, the other party, the case, and the mediator. Clients with good negotiation skills, *i.e.*, clients that are intelligent, articulate, forceful, and meticulous,

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214. S. GOLDBERG, *supra* note 201, at 189-90.

215. *See* Lieberman & Henry, *supra* note 164, at 427.

216. *See* L. RISKIN & J. WESTBROOK, *supra* note 6, at 24.

217. Arbitration has flourished in situations in which the parties wish to continue to deal regularly with each other. J. MURRAY, *supra* note 201, at 248.

218. *See* Lavorato, *supra* note 201 (Iowa Supreme Court Justice Louis A. Lavorato discusses damaging nature of litigation in family disputes).

Divorce mediation, in addition to enabling the parties to maintain a relationship, may be therapeutic. Psychologist Joan Kelly has noted that the mediation process often leads to an observable reduction in the anxiety, depression and anger that can be generated in divorce. Kelly, *Mediation and Psychotherapy: Distinguishing the Differences*, 1 MEDIATION Q. 33, 36 (Sept. 1983).

On the other hand, there is a danger that if one party has dominated the other party during the marriage, the pattern of domination will continue during mediation. *See infra* notes 226-27 and accompanying text.

219. A study comparing separated parents who reached child custody agreements through mediation with other separated parents found that a substantially higher number of those that had mediated agreements were in compliance with their visitation and child support responsibilities. *See* Pearson & Thoennes, *supra* note 212, at 59.

220. *See* Lieberman & Henry, *supra* note 164, at 427.

are likely to do well in mediation. Clients that have poor negotiation skills are likely to do poorly. If the parties have had a relationship in which one party has dominated the other party, often the case in a domestic dispute, the dominant party may have a great advantage. Additionally, the party with the greater knowledge of the subject of the litigation is likely to do better in mediation.[221] Some mediators will attempt to equalize the bargaining strengths of the parties, others will not.[222]

In some cases, the results of mediation are likely to be better for both parties than would a result reached through litigation or attorney negotiation. The parties may develop a creative compromise through mediation that differs from any remedy a court has power to provide.[223] Attorneys, of course, may reach a creative compromise through negotiation,[224] but the parties will often be more familiar than their attorneys with the subject matter of the dispute and may be more likely to develop a creative compromise. For example, assume that there is a contract dispute between two commercial parties. A court may have only the option of determining which party breached and awarding damages to the innocent party. Attorneys may be concerned primarily with the dispute at issue and may attempt to compromise and settle for an amount somewhere between the likely result if plaintiff had won and the likely result if the plaintiff had lost. However, in mediation, the parties may be able to structure a new agreement in a way that will be beneficial to both parties.[225]

Studies comparing the attitudes of parties toward litigation and mediation show that the parties are more satisfied with the results that they achieve in mediation.[226] They are more likely to comply with and less likely to litigate over agreements that they have reached through mediation.[227]

An advantage of arbitration is that an arbitrator may be more likely to give a correct decision than a judge or jury. The parties can choose the arbitrator based on experience, expertise in the subject of the dispute, and reputation for good judgment. The arbitrator's expertise may be especially beneficial if the resolution of the dispute depends on trade custom and usage.[228] In a dispute concerning a complex area of business, it may be in

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221. *See* J. MURRAY, *supra* note 201, at 292.

222. This advantage may be diminished if the mediator seeks to equalize the power between the parties, but there is disagreement among mediators over whether this is a proper role for the mediator. *See* J. FOLBERG & A. TAYLOR, *supra* note 201, at 185; Lieberman & Henry, *supra* note 164, at 431.

223. Lieberman & Henry, *supra* note 164, at 429.

224. *See supra* text accompanying notes 164-65.

225. As discussed *supra* at text accompanying notes 156-61, lawyers may have interests that conflict with the interest of the client in the negotiation process. It may be in the lawyer's interest to either negotiate a quick settlement or to delay resolution of the dispute. In mediation, the client is directly involved in the negotiation process and can minimize the effect that the lawyer's self-interest might have on the results. Lieberman & Henry, *supra* note 164, at 430.

226. *See* J. MURRAY, *supra* note 201, at 248.

227. *Id.*

228. *See id.* at 391.

the interest of a client who wants a correct decision to have an arbitrator with a background in the subject area resolve it.[229]

d. Privacy

A final advantage to the parties of alternative methods of dispute resolution is privacy. Mediation sessions and arbitration hearings of private disputes are not open to the public. The information that the parties convey in the meetings will not be a matter of public record unless the result later becomes the subject of a court proceeding.[230] Privacy can be especially important to parties in a domestic dispute, who consider the matters discussed to be personal, or to parties in a business dispute, who want to avoid releasing information that might place them at a competitive disadvantage.[231]

2. Mediation, Arbitration, and the Lawyer's Conflict of Interest

The decision whether to adopt mediation or arbitration as a means of dispute resolution should be made by clients, rather than by attorneys, not only because of the risks and potential benefits to the client of each of these methods, but because lawyers are likely to have a conflict of interest over whether to pursue alternative methods of dispute resolution.

As to the decision whether to pursue mediation, an attorney's conflict of interest is likely to be great. Mediation generally is conducted by the parties, without the presence of their attorneys. The attorneys lose work because mediation generally does not require as much attorney time as negotiation or litigation.[232] Attorneys will also have a conflict of interest as

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229. A disadvantage of arbitration may be that it deprives the parties of some of the procedural and constitutional protections of litigation. *See* Pearson, *supra* note 201, at 440. Generally the parties agree that the arbitrator is not bound by the rules of evidence and that the decision of the arbitrator is not appealable. An appellate court will not vacate an arbitration award if the arbitrator is mistaken in interpretation of the law, unless the arbitrator shows a manifest disregard of the law. *See* L. RISKIN & J. WESTBROOK, *supra* note 6, at 143. The Eighth Circuit Court of Appeals has stated:

> The present day penchant for arbitration may obscure for many parties who do not have the benefit of hindsight that the arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law. . . .No one ever deemed arbitration successful in labor conflicts because of its superior brand of justice.

Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir. 1986).

230. *See* J. MURRAY, *supra* note 201, at 391.

231. *See* L. RISKIN & J. WESTBROOK, *supra* note 6, at 148.

232. Leonard Riskin has said:

> Legal fees are generally based upon a portion of the amount recovered or on an hourly rate. Mediation threatens to reduce the amount recovered, because in settling their dispute, the parties may wish to include nonmaterial considerations: for instance, to trade money for respect or recognition. The lawyer who is paid by the hour—to the extent he is motivated by fees—also may view mediation dimly. Whether the mediation is performed by the lawyer himself or another mediator, it

to whether to pursue mediation or arbitration if they are not familiar with these processes.[233] If a client wishes to pursue mediation or arbitration and the lawyer is not experienced with these methods of dispute resolution, the lawyer may have to refer the case to another attorney. In light of this risk, lawyers that are not familiar with alternative means of dispute resolution will be tempted to avoid presenting clients with these options.

3. Policy Considerations

Courts may be inclined to recognize a cause of action for the failure to allow the client to choose mediation or arbitration, not only because this is an important decision for the client, but also because such a cause of action will encourage mediation and arbitration of disputes. Courts may want to encourage mediation and arbitration because these methods of dispute resolution may help to relieve overloaded courts and encourage reconciliation. On the other hand, alternative means of dispute resolution may limit the quality of justice. This section discusses each of these arguments.

a. Overloaded Courts

As noted in a prior section, the delay before a case can be tried may be substantial.[234] This delay occurs, in part, because of the great increase that has occurred in the number of cases that are filed. For example, between 1960 and 1980, the number of cases filed per capita in the Federal District Courts nearly doubled.[235] This creates problems, not only for individual litigants, but also for the legal system. Numerous commentators and judges have advocated alternative dispute resolution as a means of relieving the backlog of cases in the court system.[236]

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is likely to save some of the lawyer's time. Thus, the lawyer who brings mediation into a case that he could handle in an adversary manner will often earn less than he otherwise would have on that case.

Riskin, *supra* note 201, at 49.

If attorneys handle arbitration cases, the temptation to avoid arbitration will not be as great because the parties are generally represented by their attorneys during arbitration.

233. *See id.* at 49-51.

234. *See infra* text accompanying note 209.

235. Galanter, *Reading the Landscape of Disputes: What We Know And Don't Know (And Think We Know) About Our Allegedly Contentious And Litigious Society*, 31 UCLA L. REV. 4, 37 (1983).

236. *See*, Lavorato, *supra* note 201; McThenia & Shaffer, *supra* note 201.

Former Chief Justice Warren E. Burger, speaking to the American Bar Association, said that reliance on the adversarial process as the principal means of resolving disputes is:

> a mistake that must be corrected. . . . For some disputes, trials will be the only means, but for many claims, trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.

Address by Former United States Supreme Court Chief Justice Warren Burger at the American Bar Association Mid-Winter Meeting 1984, *quoted in* Nelson, *supra* note 201, at 777.

An example of the effectiveness of mediation at resolving cases quickly and promptly is the New York "Neighborhood Justice Center" program,[237] in which volunteers from the community mediate interpersonal, neighborhood, domestic, consumer, landlord-tenant, and minor criminal disputes.[238] The neighborhood justice centers have been able to resolve a substantial number of disputes quickly, at a very small cost to the state.[239] It may be that many of the disputes that such programs resolve would otherwise have been litigated.

This article advocates the extension of malpractice liability to attorneys who fail to allow clients the choice of whether to pursue mediation or arbitration. Adoption of this proposal may initially create some new attorney malpractice suits. Eventually, however, the number of suits that are avoided because clients choose to pursue alternative means of dispute resolution are likely to greatly outnumber the attorney malpractice causes of action that the cause of action would initially generate. Once courts clearly establish the right of the client to choose alternative means of dispute resolution, the number of situations in which attorneys fail to present these options to the client should greatly diminish.

b. The Value to Society of Reconciliation

The ultimate goal of many advocates of alternative methods of dispute resolution is not merely dispute resolution, but reconciliation of the parties.[240] This can benefit, not only the individuals involved,[241] but society as a whole. Reconciliation of the parties can reduce the likelihood of future disputes and prevent conflict from escalating into serious, violent, criminal confrontation. As noted previously, the New York neighborhood justice mediation program resolved many disputes that might have otherwise been litigated. It also may be that without mediation, some of the disputes would have led to violence.[242]

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237. Sander, *supra* note 201, at 6.

238. *See* L. RISKIN & J. WESTBROOK, *supra* note 6, at 84.

239. For the fiscal year ending March 31, 1986, New York's 48 centers handled 18,541 disputes among 60,703 persons. 1985-1986 N.Y., THE COMMUNITY DISPUTE RESOLUTION CENTER PROGRAM ANN. REP., *cited in* Petillon, *supra* note 209, at 934. There was successful resolution of 88% of the cases going to mediation. *Id.* On the average, the Centers disposed of cases in 14 days from filing to disposition, and the average time required to resolve a dispute was 84 minutes. *Id.* The average cost to the state was $88.87 per settled case. *Id.*

240. *See* McThenia & Shaffer, *supra* note 201.

241. *See infra* text accompanying notes 215-20.

242. The report of the New York Neighborhood Justice System, discussed *supra* at note 239, states:

> The dispute resolution process can reduce crime and prevent situations from escalating into serious often violent criminal matters. It can teach people to manage conflict constructively in a peaceful, effective manner. If each community has access to a dispute resolution center, individuals and groups can have a forum for dialogue and mutual understanding and satisfactory agreements.

Petillon, *supra* note 209, at 935.

c. Will Informal Justice Inhibit the Development of Justice?

There is a concern among some legal scholars that alternative means of dispute resolution will dispense inferior justice[243] in three respects. First, it is argued that alternative methods of dispute resolution create a risk of injustice in individual cases; the more powerful party might take advantage of the less powerful party.[244] Since mediation often does not rely on substantive or procedural rules of law or procedure or on other protections of the adversarial process, less powerful individuals and groups may be treated unfairly. They may be forced into an inferior settlement because they need funds immediately or because they cannot afford the expense of litigation.[245] In litigation, however, judges lessen the impact of inequalities, for example, by asking questions at trial or inviting *amici* to participate.[246]

Second, beyond the risk that alternative means of dispute resolution will yield unjust results in individual cases, is the risk that removing cases from the judicial system will reduce the ability of the system to develop just rules of law. Courts will not be confronted with the opportunity to develop precedents that benefit the disadvantaged. This is an especially great risk if alternative means of dispute resolution become the primary methods of dispute resolution that are available to the poor. As to many issues, there is a genuine social need for an authoritative interpretation of law.[247] If the problems of the poor are increasingly handled through alternative means of dispute resolution, the judicial development of legal rights for the poor may diminish.[248]

A third argument against alternative methods of dispute resolution is that through their use, those not responsible to the public may resolve issues of great significance to the public. One of the values of adjudication is that it vests the power of the state in highly visible officials who act as trustees for the public, and are therefore answerable for their actions.[249] Owen Fiss argues on behalf of litigation that the job of the courts "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in" the law.[250] Federal Circuit Court Judge Harry T. Edwards is troubled, for example, by settlement of environmental disputes through negotiation and mediation. Negotiation over environmental protection standards that Congress or a governmental agency

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243. L. RISKIN & J. WESTBROOK, *supra* note 6, at 115. McThenia and Shaffer have suggested that this argument is based on the assumption that it is the state that dispenses justice. They argue that justice is not something that people generally get from the state, but that it is something that people get from each other. *See* McThenia & Shaffer, *supra* note 201, at 1664-65.

244. *See* Fiss, *supra* note 19, at 1076-78.

245. *See id.* at 1076.

246. *See id.* at 1077.

247. *Id.* at 1073.

248. *See* Edwards, *supra* note 19, at 679.

249. *Id.*

250. *See* Fiss, *supra* note 19, at 1085.

has enacted may yield results that are inconsistent with the rule of law.[251] There is a danger that private groups will set environmental standards, without the democratic checks of governmental institutions.[252]

Based on these problems with alternative means of dispute resolution, some have argued that we should not adopt rules that push parties toward alternative dispute resolution.[253] The proposals advanced herein would not impose on anyone the duty to engage in alternative methods of dispute resolution, but it would probably lead to greater use of alternative methods of dispute resolution and may therefore take some disputes out of the judicial system.

Nevertheless, clients should have the right to choose how their cases are handled. If a client wants a case to be handled in a way that will establish a rule that will be beneficial to society, that should be the client's choice. But, if a client wants to pursue a method of dispute resolution that may require less expense, less time, and less conflict, the client should be able to do so.[254] It may be helpful to consider a medical analogy. In some medical cases, it might be better for society if a patient underwent a new, experimental treatment, but, based on the principle of autonomy, we allow medical patients to control their destiny. The client should control the way that a case is handled, just as the patient controls the choice of medical treatment.

C. The Cause-in-fact Issue: What Loss, if Any, Has the Lawyer's Failure to Allow the Client to Control Negotiation and to Pursue Alternatives to Litigation Caused?

In an attorney malpractice case, the plaintiff must show, not only that the attorney acted negligently, but that the attorney's negligence was a cause-in-fact of the client's loss. Even if a client can establish that an attorney violated a duty to allow the client to control negotiation and choose other alternatives to litigation, it may be difficult for the client to establish that the loss of that right has caused a substantial loss.

Even if a lawyer fails to allow the client to control a decision concerning negotiation, mediation, or arbitration, the client would not have benefited from the right of control if any of the following would have occurred: 1) the client would have made the same choice that the attorney made; 2) the opposing party would not have agreed to the client's proposal to settle, mediate or arbitrate; or 3) the proposal of the client, if accepted, would not have produced a better result for the client than the attorney achieved. Therefore, to recover in a client control cause of action, clients will probably

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251. Edwards, *supra* note 19, at 677.

252. *Id.*

253. *See, e.g.*, Fiss, *supra* note 19.

254. Owen Fiss has stated that he would "not urge that parties be 'forced' to litigate, since that would interfere with their autonomy." *See id.* at 1085. This article argues that to fail to give clients the option to pursue alternatives to litigation interferes with their autonomy.

have to show that, given the opportunity, they would have made a different choice than the one made by the attorney, that the other side would have agreed to the client's proposal, and that the dispute would have been resolved under terms that would have been more beneficial to the client than the result that the attorney achieved. Clients will also have to show the extent to which they would have benefited had the attorney pursued the client's choice. This section will consider these requirements.

1. Showing Cause-in-Fact in the Client Choice Cases—Part One: Would This Client (or Would a Reasonable Client) Have Made a Different Choice?

Even if clients can show that the attorney should have allowed them to control negotiation or choose an alternative to litigation, an attorney's failure to do so has not caused a client any loss if the client would have made the same choice as the attorney. However, it may be difficult to reconstruct the decision that the client would have made had the attorney given the client the opportunity. Courts are faced with similar causation problems in cases in which an attorney has failed to present a settlement offer to the client and in medical malpractice informed consent cases.[255]

In the settlement offer cases, courts apply a subjective causation test and require clients only to show that had the lawyer presented them with the offer, they would have accepted it.[256] This type of subjective causation test carries great risks for lawyers. At the trial of the action against the attorney, the client is asked a hypothetical question, "If your attorney had presented you with this settlement offer, would you have accepted it?" It is unlikely that even honest clients, answering such a question, would be able to divorce themselves from the fact that the trial of the case was unsuccessful and the fact that they will lose the possibility of recovery from the attorney if they testify that they would have rejected the settlement offer.

The medical informed consent cases present courts with a similar causation issue. The majority of jurisdictions have found that a subjective test, requiring the patient merely to show that he or she would have made a different choice than the doctor, would unfairly place doctors at the mercy of the patient's biased speculation.[257] These courts apply an objective

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255. The medical informed consent cause-in-fact problem is discussed in Waltz & Scheuneman, *Informed Consent Therapy*, 64 NW. U.L. REV. 628, 649 (1970).

256. *See, e.g.*, McDonald v. Hutto, 414 F. Supp. 532 (E.D. Ark. 1976); People v. Mason, 29 Ill. App. 3d 121, 329 N.E.2d 794 (1975); Rubenstein & Rubenstein v. Papadakos, 31 A.D. 2d 615, 295 N.Y.S. 2d 876 (1968) (client denied recovery where she admitted that she would not have accepted settlement).

A minority of medical informed consent cases apply a similar rule and require that patients merely show that they would not have had surgery had the doctor told them of its risks or alternatives. *See, e.g.*, Scott v. Bradford, 606 P.2d 554 (Okla. 1979).

257. *See, e.g.*, Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir. 1983); Canterbury v. Spence, 464 F.2d 772, 792 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 23 Cal. App. 3d 313, 100 Cal. Rptr. 98, (1972); Wooley v. Henderson, 418 A.2d 1123 (Me. 1980); Macy v. James, 139 Vt. 270, 427 A.2d 803 (1981).

causation test in the informed consent cases. They require that patients show, not only that they would have made a different choice, but that a reasonable patient, knowing of the risk of or the alternatives to the proposed treatment, would not have had the treatment that caused the harm.[258]

Courts could, of course, apply a similar objective standard in the client control cases. They could require that the client show that a reasonable client would have made the same choice that the client claims that he or she would have made. However, such a requirement would substantially limit the right of clients to make their own choices.[259] If a court recognized a right of client choice and then adopted such a causation rule, it would be taking back with the hand of causation what it purported to give with the hand of duty. Such a court might as well say that lawyers may choose for the client as long as they make the choice that the reasonable client would make. The client would lose the right of autonomy.

On this issue of causation, it does not appear that there is an alternative to either putting the lawyer at the mercy of the client's less than objective hindsight under the subjective standard, or significantly undercutting the right of client choice under the objective standard. As between the two, the subjective standard is preferable for several reasons. First, for all of the reasons suggested elsewhere in this article, the client's right to choose is of sufficient importance that it should not be undercut. Second, lawyers can protect themselves from the risk that they will be subject to the client's hindsight by allowing the client to control choices concerning negotiation and alternatives to litigation. Third, as with some other difficult tort causation questions, as between an innocent plaintiff and a negligent defendant, the law should err on the side of the innocent plaintiff.[260] Finally, even under the subjective standard the lawyer is not entirely at the mercy of the client.[261] The trier-of-fact must believe that the client would have made a different choice if the lawyer had given the client the opportunity, and it is unlikely that the trier-of-fact will believe that the client would have made an extremely unreasonable choice.[262]

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258. *See, e.g.*, Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir. 1983); Canterbury v. Spence, 464 F.2d 772, 792 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 23 Cal. App. 3d 313, 100 Cal. Rptr. 98, (1972); Wooley v. Henderson, 418 A.2d 1123 (Me. 1980); Macy v. James, 139 Vt. 270, 427 A.2d 803 (1981).

259. *See, e.g.*, Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir. 1983); Canterbury v. Spence, 464 F.2d 772, 792 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 23 Cal. App. 3d 313, 100 Cal. Rptr. 98, (1972); Wooley v. Henderson, 418 A.2d 1123 (Me. 1980); Macy v. James, 139 Vt. 270, 427 A.2d 803 (1981).

260. *See, e.g.*, Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); Sindel v. Abbot Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) (shifting burden to negligent defendants to show that they did not cause plaintiff's loss), *cert. denied*, 449 U.S. 912.

261. *See* Spiegel, *supra* note 11, at 133-36.

262. Doctors have a similar risk under a subjective standard in the medical informed consent cases. *See Canterbury*, 464 F.2d at 790; Sard v. Hardy, 281 Md. 432, 444, 379 A.2d 1014, 1025 (1977).

2. Showing Cause-in-Fact in the Client Control Cases—Part Two: Would the Client's Choice Have Yielded a Different Result, and, if so, What Result?

To show that the lawyer's failure to allow them to control negotiation and choose alternatives to litigation caused them damages, clients must not only prove that they would have made a different choice than the attorney made, but also that the opposing side would have agreed to the client's proposal, and that the ultimate result would have been more favorable to the client. The proof required of the client will be somewhat different in the negotiation and mediation cases than in the arbitration cases.

a. The Negotiation and Mediation Cases: Would the Client and the Opponent Have Made an Agreement, and, if so, What Agreement?

When clients allege that the lawyer should have allowed them to make decisions concerning negotiation or allowed them to pursue mediation, they must show that the opposing party would have agreed to negotiate or mediate, and that the parties would have reached an agreement that would have been more favorable to the client than the result the attorney achieved.

Courts confront a similar difficult causation issue when clients allege that attorneys acted incompetently in litigation.[263] In those cases, the trier-of-fact must determine what result the parties would have achieved had there been a trial. In the litigation malpractice cases, the courts conduct a trial-within-a-trial. They retry the issues of the original case, complete with the evidence that the parties would have presented in the original trial, and allow the new trier-of-fact to determine how the case would have been resolved had the attorney handled it properly.[264]

In the client control cases, courts could also allow the plaintiff to try and reconstruct before the trier-of-fact the result that would have been achieved had the attorney allowed the client to control the negotiation or mediation decisions. The client could reconstruct the negotiation or mediation through the testimony of the parties to the initial action. The client and the opposing party could testify to the offers, counter-offers and agreement that they would have been willing to make.[265] This was the method that the Pennsylvania Supreme Court permitted in the *Rizzo* case, discussed earlier.[266] The court allowed into evidence the settlement authority

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263. Some courts in the attorney malpractice cases have placed the burden on the attorneys to show that their negligence did not cause a loss to the plaintiff. *See* Moormen v. Wood, 117 Ind. 144, 147, 19 N.E. 739, 741 (1889).

264. *See* C. WOLFRAM, *supra* note 23, at 218.

265. There is, of course, a risk that the opportunity to win in the action against the attorney will affect the client's testimony on this issue.

266. Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (1989). *See supra* text accompanying notes 167-82.

of the opposing party and allowed the client to testify that he would have agreed to settle for that figure.[267]

Though courts should allow clients to reconstruct negotiations or mediation if they can, often it will be difficult for them to do so for several reasons. First, in some cases, unlike *Rizzo*, the opposing party may not have given his or her attorney any settlement authority, and the opposing party may find it difficult to reconstruct how he or she would have responded to various offers. Second, it may be difficult to get the opposing party to accurately reconstruct the settlement negotiations that would have occurred. The opposing party may have ill feelings toward the client or the client's attorney and may be inclined to damage the case of one or the other. The opposing party may not want to waste further time on the case. In addition, the opposing party, the opposing attorney, or the liability insurance company that defended the opposing party in the initial action may want to preserve the confidentiality of their negotiation practices. Knowledge of these practices might be a great help to attorneys who oppose them in future negotiations. Third, after the initial case has been litigated, it will be difficult to reconstruct the effect that the threat of litigation would have had on the parties during negotiation or mediation. In both negotiation and mediation, the threat of impending litigation helps to spur the parties to settle. Finally, mediators do things with the parties, such as allowing them to vent emotions, that are designed to prepare the parties emotionally for reconciliation. It may be impossible to reconstruct the effect of these methods on the parties after the dispute has been litigated.

Rather than require the client to reconstruct the negotiations or mediation, a court could allow an expert to testify to the result that the parties would have likely reached had they negotiated or mediated the case. Experts could base such an opinion on their experience in negotiation or mediation,[268] on statistics that show the likely results of negotiation and mediation, and on the factors that are likely to lead to a successful or unsuccessful result. In malpractice cases in which plaintiffs allege that the attorney erred at trial, courts generally have not allowed experts to testify to the result that likely would have occurred had the attorney acted competently,[269] but the difficulties of reconstructing the negotiation or mediation in court may justify allowing expert testimony as to the likely outcome had the client controlled negotiation or had the parties mediated.

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267. *Rizzo*, 520 Pa. at 484, 555 A.2d at 58.

268. Rosenthal, in his study of the effect of client involvement on results in automobile personal injury cases, used a panel of experts including plaintiffs' attorneys, insurance companies' attorneys, and an insurance company adjuster to determine the reasonable value of cases. D. ROSENTHAL, *supra* note 11, at 37. For a more thorough discussion of the Rosenthal study, see *supra* note 57. The parties could use similar experts for the cause of action proposed in this article. *Cf.* C. MCCORMICK, HANDBOOK ON LAW OF DAMAGES 31 (1935) (before verdict, value of lawsuit is estimate of value if won times the probability of winning).

269. *See* C. WOLFRAM, *supra* note 23, at 218.

b. The Arbitration Cases: Would the Opponent Have Agreed to Arbitration and Would Arbitration's Result Have Differed From Litigation's Result?

When clients allege that the lawyer should have allowed them to pursue arbitration, they must show that the opposing side would have agreed to arbitration and that the arbitrator would have made a more favorable decision than the decision that the court reached in the litigation. It may be that an arbitrator would have reached a different result than that obtained through litigation. As argued earlier in this article, parties to an arbitration are likely to choose an arbitrator that is familiar with their business, and such an arbitrator may render a better decision than a judge or jury that is less familiar with it.[270]

However, it is highly unlikely that, following a trial, a court would hold that an arbitrator would have reached a different decision than reached by the trial court. To do so, the court would either have to conclude that the trial court had resolved the case incorrectly and that an arbitrator would have resolved it correctly, or that the court had resolved the issue correctly and an arbitrator would have resolved it incorrectly. A court would be unlikely to hold that the original court erred due to its lack of expertise and that an arbitrator would have decided the case correctly. A court might decide that the original case was lost based on the failure of the lawyer to properly handle the case, but if that is the client's argument, he or she is likely to bring a malpractice action based on the attorney's lack of competence at trial rather than the attorney's failure to allow client control. A court is also unlikely to allow the client to recover based on the theory that the original court decided the case correctly and that an arbitrator would have decided it incorrectly. The court would be unlikely to assume that an arbitrator would have decided the case incorrectly and, even if it did, it would be unlikely to hold that clients should get the recovery they would have gotten from an errant arbitrator.

Though clients are unlikely to recover the difference between what they would have recovered in arbitration and what they recovered in litigation, it may be that courts will allow them to recover other losses suffered due to the failure of the lawyer to allow them to pursue arbitration. A big advantage to the parties in arbitration is that an arbitrator can resolve a dispute quickly and the parties can avoid the risk of an appeal.[271] It may be that a client, deprived of the right to pursue arbitration, could recover damages suffered as a result of a delayed trial decision or an appeal from a trial decision.

VI. Conclusion

The right of the client to control the important decisions during legal representation should be a part of the client's right to autonomy. Client

270. *See supra* text accompanying notes 228-29.

271. *See supra* notes 206, 211 and 214 and accompanying text.

control will generally yield better results for the client, will limit the effect of conflicts of interest that accompany the attorney/client relationship, and will build on the precedent of medical informed consent. Courts should extend the right of client control, both by giving the client the right to control those decisions which a reasonable client, in what the lawyer knows or should know to be the position of the client, would want to control, and by continuing to identify specific choices that, as a matter of law, are for the client.

Whether or not courts adopt a general standard of client control, they should identify the significant choices in negotiation, and the choice whether to pursue mediation or arbitration, as decisions that are for the client. These choices are of great significance to clients and are within the competence of clients. Client control over the decision to use alternative dispute resolution is likely to lead to greater use of mediation and arbitration, a reduction in the load on courts, and more reconciliation among litigants. If clients can show that the failure of the attorney to allow them to control negotiation decisions and to choose mediation or arbitration caused them to suffer loss, courts should allow them a malpractice recovery.

Cultivating the Art of Effective Client Communications

Volume 37 Number 5

By Marcia Pennington Shannon

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The ability to communicate effectively with clients can have an immense impact on a lawyer's practice, and on the success of the law firm as a whole. So do you and the lawyers you supervise know how you rate on the communication factors that lead to satisfied clients?

When questioned, most lawyers believe that the end results they achieve are the best predictors of client satisfaction. But most clients, in comparison, say the way in which services are delivered is essential to their overall satisfaction with their lawyers.

Moreover, consider these recent findings by the BTI Consulting Group, based on 2,800 interviews with corporate counsel: 70 percent of those surveyed do not recommend their primary firm to others; 87 percent would replace a current firm if given good reason; and most cited poor communication as a key determinant.

It seems clear, then, that putting a strong focus on good communications is at the heart of successful, loyal and long-lasting client relationships. Yet many lawyers do not focus at all on how they communicate with clients. Fortunately, it's possible for any law practice to improve the situation with a little effort.

The following provides some good starting points to help you and the lawyers you supervise gauge where you as individuals can make improvements.

A CCQ Self-Assessment Exercise

There are numerous factors involved in effective client communications, which taken together you can think of as your "client communication quotient" (CCQ). To see how you stack up, take a moment to complete the CCQ assessment exercise on the next page. Think carefully to be sure you rate yourself honestly in determining which box to check next to each factor.

Now, look back through your responses to the exercise. Do you find that most of them are in the "often" and "always" columns? Then congratulations! It seems you make a laudable effort to communicate effectively with your clients, and you should have strong and lasting relationships with them. You especially know that you are demonstrating excellent CCQ if you frequently get new business through referrals from current and past clients.

If, however, some of your responses fall in the "sometimes" or "never" column, then obviously those are factors that could use your attention. So, as your next step, you'll want to take some

time to focus in on those factors and assess how you can improve your performance in those areas.

Strategies to Help Improve CCQ
While the specific strategies for improving CCQ factors may vary among individual lawyers, here are some top tactics that will get you going.

■ **Identify things that are getting in your way.** There are two aspects to this. First, as with most things, self-awareness is essential—which in this case means understanding your own personality, strengths, weaknesses and limitations, when it comes to your communication style. An assessment tool like the Myer-Briggs Type Inventory (MBTI) can help with this.

Second, are there workload constraints or doings in the office that make it impossible to be responsive on a regular basis? As examples, constant interruptions, poor task management, outdated technology or lack of knowledge within the team can all be barriers to effective communication with clients. Once you identify what's getting in your way, you can determine appropriate steps to address those issues.

■ **Become more "client aware."** This means taking a proactive approach to understanding your clients, including their characteristics, their backgrounds and the environments in which they work and live. Getting to know your clients beyond their current legal issues gives you deeper insights into their perspectives and objectives. Most importantly, this information can be very useful in relating to them, structuring the feedback that you give to them, and addressing issues from their points of view.

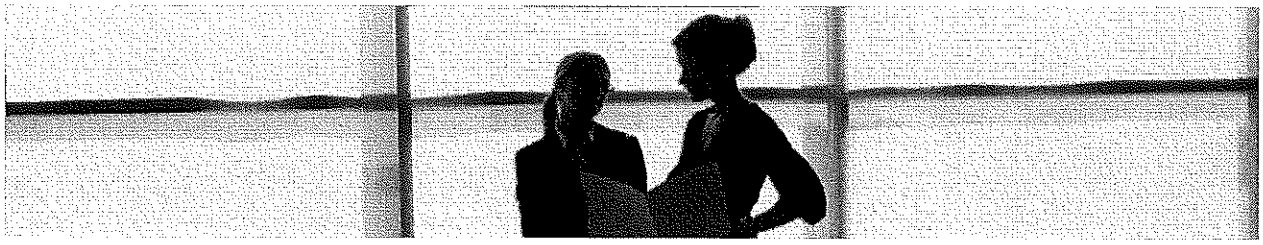
Also (though it should go without saying), it's important to regularly update clients on the progress of their matters—especially if a project is going to be delivered later than you intended. In addition, include your clients in the decision-making process and discussions of various solutions. Remember, this isn't just about your expertise and "telling" them what to do. This is about a partnership between you and the client as you help them address their legal issues.

■ **Develop your listening skills.** Active listening improves every relationship. I know this is a big statement, but it is absolutely true. So make it a point to hear and understand your clients when you are talking with them. Really pay attention to what is being said. Ask questions to stimulate thought and build clarity. And be sure you don't make assumptions or jump right into problem-solving mode. Yes, you want to help solve the problem, but are you clear about the issues? Have you truly heard what the client's needs and concerns are, and what his or her perspectives are about the issues involved?

Simply put, we humans want to be heard! Listening carefully, asking clarifying questions and reflecting back to your client what you have heard —all while avoiding legalese—are the foundations of effective communication.

In the end, putting an energetic focus on your client communications will absolutely be worth the effort. Developing strategies that bring about positive changes in client communications will raise their satisfaction with your services and have a lasting positive impact on the

relationships—leading to a stronger and more profitable practice, and greater overall satisfaction with your work, too.



LAW PRACTICE
THE BUSINESS OF PRACTICING LAW

AVOIDING MALPRACTICE – ARE YOU AT RISK?

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FEATURES

HOW TO HANDLE DIFFICULT CLIENTS – Pointers That Will Help You Stay Sane and Safe

By Justice Carole Curtis

Nearly every lawyer from time to time agrees to take on a difficult client, be it knowingly or unwittingly. Although this client may task nerves to the breaking point, taking certain steps can help avert disagreements and possible malpractice claims.

Lawyers are usually fairly clear about their role in a representation, but that role may appear to be less clear when you're dealing with a difficult client. Your first imperative, then, is to get clear on who does what.

Establish Your Role with the Client

Your role is to analyze a given situation and offer a solution to the problem presented, or a means of achieving the goal the client has presented. Sometimes, there are several possible solutions or means, all of which should be offered to the client. Don't forget that "do nothing" is always a possible solution, too. Your role then is to advise on the consequences of the different courses of action. It is the client's job—and not the lawyer's—to decide which course

of action to follow. After all, it is the client's life, or business, or litigation, or estate that's at sake.

Difficult clients, however, are sometimes totally unwilling to make decisions about their legal issues and want the lawyer to do it for them. Do not do it. Let some other influential person in their life help them with the decision. Your job is to help the client understand the choices.

Be Thorough in Your Documentation

Document everything you possibly can, including phone calls, voice-mail messages and e-mail messages. Confirm the client's instructions to you in writing, and confirm your instructions to the client in writing. Include the possible consequences of various courses of action the client may be contemplating. Save messages and instructions in your usual way as part of the permanent record of the file. This is good advice for any representation, but it's especially important for difficult clients. They have a way of turning on the lawyer more often and with more damaging consequences than other clients.

Thus, in this context, documenting means recording sufficient details to assist you in a future disagreement. Remember, a record with insufficient details won't be of much use to you if there's a subsequent dispute over who said what to whom and when. This means you should record at least the following for all exchanges relating to the matter:

- The client's name
- The file name
- Who the contact was with
- The date of the contact
- The nature of the contact (phone call, meeting, voice mail, e-mail or the like)
- How long the contact took
- The details of who said what, including what the lawyer said
- Any instructions given during the contact

Inputting the information into a practice management software program can make this task less cumbersome and more reliable than just jotting it down on paper.

In notes of meetings or conversations, it's especially important to record not only the information the client gave to you, but also the information and advice you gave to the client. In disputes between lawyers and clients, this may be the biggest area of disagreement—and one of the least documented. Moreover, in litigation between the lawyer and client, where there is disagreement about the information provided or the legal advice given to the client and that advice is not documented, courts have often preferred the client's evidence on this issue.

Be Calm and Clear

It requires more patience than usual to deal with difficult clients. You will need to be calm *and* very clear with them about everything. The more information you give in writing—and as early in the representation as possible—the less likely there will be misunderstandings.

Also, explain what they should expect regarding their interactions with you and your staff. Be sure they understand whom to deal with on which issues—for example, whom to call to get certain types of information, and when they need to speak directly to their lawyer and when they can deal with staff instead. Many difficult clients want to deal only with the lawyer at every turn, which is expensive, not very efficient and not often necessary.

Make patience your watchword. Do not let the difficult client turn you into the difficult lawyer, or the unhappy lawyer, or the depressed, yelling or swearing lawyer. If you find you are becoming the difficult lawyer, perhaps it is time to transfer the file to another lawyer.

Include Your Staff in the Plan

Usually, the staff will easily be able to identify the difficult client—they may, in fact, know a client is difficult before you do. But they also need to know the risks of acting for the difficult client, so they can behave in ways that minimize those risks, especially in terms of documenting contacts, instructions or information. Make sure they deal with this client the same way you do, using an extra dose of patience.

However, difficult clients are often much more difficult with the staff than they are with the lawyers. Trust your staff and believe them when they describe the client's behavior. Deal directly and promptly with the client concerning any inappropriate treatment, to ensure that the client understands what the staff 's role is in the representation and, more importantly, to ensure that the behavior is not repeated. No client is more important than the people who work for you, so institute a zero tolerance policy on abusive behavior toward your people.

Manage Expectations from the Outset

Some clients' expectations or goals are outside the realm of the services you can provide, or the outcomes you can achieve for them. That's why it's important to have a frank discussion with clients, as early as possible, to identify what their expectations are in retaining a lawyer to deal with this particular issue. While clients' unrealistic expectations take many forms, they fall into the following general categories:

- Expectations about service
- Expectations about time
- Expectations about costs

- Expectations about results

If the client has service expectations that are impossible to meet—such as the lawyer always returning phone calls within 15 minutes or performing significant work for free—be clear from the outset that you cannot provide that level or kind of service. If the client has expectations that are unrealistic or very expensive, such as having the matter concluded on a rushed timeline or all work done by the most senior lawyer on the team, be clear about whether you can meet that expectation, or what alternative will be provided, as well as the costs that will be involved.

Remember, too, the difficult client is also a client who is likely to be unhappy about fees, so you need to establish mutual expectations concerning billing and payment procedures for your services. It's especially important to bill clients with high service expectations frequently and regularly, and to provide as much detail as possible, so they can understand the cost of those expectations.

However, the most essential thing to establish during discussions with clients is what results they want to achieve. Clients who are unlikely to be successful in achieving their goals need to be told that explicitly from the start of the representation, or at the earliest possible moment in the representation. It is far more important to be honest with clients who cannot achieve their goals than it is with clients who can. If the client cannot, or will not, accept your assessment of the matter, perhaps the client should find another lawyer.

About the Author

Justice Carole Curtis sits on the Ontario Court of Justice in Toronto. Previously she was the sole proprietor of the firm Carole Curtis, Barristers and Solicitors, working in all areas of family law for 30 years. An earlier version of this article appeared in *LawPRO Magazine*'s Spring 2004 issue.

What I've Learned: Tips and Advice for Working with Vulnerable Clients

BY MERF EHMAN

> "Our backgrounds, experiences, beliefs, and assumptions create a context in which we relate to clients."

On my first day as a legal aid law clerk, I was handed a stack of intake sheets and told to interview all of the walk-in clients. I was confident that I could handle the straightforward task of filling out an intake sheet. My first client came in. The beginning questions went well — name, address, and date of birth. Then I asked her what brought her into our office.

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Several hours later, I determined that she wanted legal help because her landlord was stealing her furniture and replacing it with exact replicas.

Now, after having the privilege of working with thousands of low-income clients, I know that working with clients is both an art and skill that takes knowledge and practice. In my experience, there are three key areas to a successful attorney-client relationship: context, structure, and productively addressing behavioral issues.

Context

Our backgrounds, experiences, beliefs, and assumptions create a context in which we relate to clients. Understanding our assumptions and beliefs about poverty, inequality, and the role of the legal system in peoples' lives can be helpful when working with low-income people.

Some questions to ask yourself: What do I think causes poverty? What do I think about welfare? What are my assumptions about the legal system? For example, do I think the system is fair? Do I have any fears

about people who have mental health issues? What are my concerns about working with people who may have a different background than I do? Do I assume that my client has food, water, and adequate shelter?

One key for me is to keep an open mind about a client. This can be challenging. A client came into our office pushing a loaded shopping cart, wearing many layers of clothes, and who was generally unkempt. I assumed this person was homeless. This was incorrect. The client showed us eviction paperwork; I assumed he was there for help with that problem. This was also incorrect. The client stated he wanted legal help because many years ago, the state doubted his true identity and also stole his family's blueberry farm and would not give it back. I thought this was a delusion. I was incorrect. The government had taken the family's blueberry farm by eminent domain and paid them for it. The client's mother kept the money from the state in a bank account and when she died, it went to the state and remained in the abandoned property fund. The client had no identification, so the state would not release the funds to him and the deadline for him to claim the funds was approaching. Due to my assumptions, I almost missed an important legal issue.

Another factor involved in context is place. You may interact with your client in a variety of settings such as your office, a courtroom hallway, a hospital room, a coffee shop, the local community center, the public library, or on the phone. Each of these places can impact your ability to interact with the client. There may not be privacy or your client may be uncomfortable in the surroundings. Be aware of where you are and where your client is located. She may be calling from a bus, waiting room, or street corner. Keep in mind that your ability to obtain information from a client can vary depending on where the interaction takes place. Be flexible about where to meet with your client. Your client may be more relaxed at, and find it easier to get to, a local coffee shop than your office.

Structure

Create a roadmap for each client interaction. First, state the amount of time you have for the interaction. If a client wants to address issues that are outside the scope of the meeting, you can gently

remind the client of the amount of time left. The client can then choose to spend the time on the outside issue or go back to the pertinent issues. You can also let the client know up front how often and in what format you will contact the client.

Next, clarify your role and the client's role. Clarify what you can do and what you cannot do for the client. Some clients have not worked with an attorney before, so explaining the attorney role is key. When I first started practicing, I represented a client in court. We won the case on a motion to dismiss, but the client was extremely upset. She explained to me that she did not understand that she would not be permitted to speak and tell her story at the hearing. She felt the court did not understand that she did nothing wrong and that she was a good person. I did not clearly explain my role to the client. Over the years, I realized that many clients assume they will be able to talk directly to the judge — just like on *Judge Judy* — and might not understand the attorney's role. I learned to explain each step of the process and when and if the client would be expected to speak.

End your roadmap discussion by talking about expectations. Know ahead of time and be able to communicate to your client what you expect from the client. This could include informing you if the client's address or phone number changes and specifying that the client should contact you if he receives certain paperwork. You should also address the best means to contact the client such as by mail, phone, email, or in-person meetings.

Ask the client about her expectations and discuss any that might be unrealistic and explain why that is the case. As with all clients, explain your expectation regarding what costs you expect the client to pay, statutory attorney fees you may receive, and any other routine matters. Sometimes it helps to read the retainer and other documents aloud.

Behavioral Issues

Once you start interacting regularly with your client, issues may arise. The most common concerns I have heard from pro bono attorneys are clients who might relay inaccurate information or clients who do not follow instructions. In my practice, I use a three-step process when these situations arise. First, I decide if it impinges on the client in-

terview or the attorney-client relationship. If it does not, then I do nothing at that point and continue the interaction. I make a point to talk about the problematic behavior to a colleague if needed. If I determine that the behavior does impact my ability to work with the client, then I describe the problem to the client. For example, I might say to a client who provided inaccurate information: "You told me that you always pay your rent on time, but your landlord gave me three notices that you were late with your rent. If a judge hears you say that you paid your rent on time and then the landlord shows him these notices, then the judge may think you are not telling the truth." Then I evaluate the client's response. In the above scenario, the client explained to me that she was charged a late fee only if she paid after the fifth of the month, but if she did not pay on the first of each month, then her landlord would give her a late payment notice. She assumed that she was late only if she paid after the fifth of the month. If the client's response is not satisfactory, then try to engage in mutual problem-solving. Ask the client what suggestions he may have to resolve the issue. During this stage, focus on the needs of the case rather than on the client's actions. For more help, *Getting Past No* by William Ury has great strategies for moving past an impasse.

In the last decade, I have had only one client relationship that I terminated due to a client's behavioral issue. Almost all client interactions can be interesting and rewarding on many levels. A pro bono attorney can make a difference for a client and may learn a little something along the way.

Merf Ehman is the managing attorney at Columbia Legal Services in the Seattle office. She has been a legal aid lawyer since 1998.

Dealing with Difficult People

How to recognize and manage different types of problem clients while maintaining professionalism and integrity

BY MARK MAYS

"I hope you don't mind my referring people to you," I told an attorney friend over lunch. He'd been working for some years in the field of workers' compensation, and I didn't know if he was still taking new referrals.

"No, that's great… so long as you don't mind if I don't accept them as clients," he replied. I quickly reassured him that I always gave three referral names.

He went on to say that he had become quite clear on a few things related to his practice. He explained: "A few years ago, someone came to see me who was very aggressive. He bullied my secretary, and loudly insisted upon seeing me immediately. Hearing the commotion, I invited him into my office. I sat down behind my desk, but, rather than sit in one of the chairs, he stood, looked down at me, and told me exactly what we were going to do."

"'No, actually, we're not going to do any of those things,' I said. He looked perplexed.

"'What do you mean?' he asked.

"'Because I'm not going to be your lawyer.'

"'Why the hell not?'

"'Because I don't like you. And the truth is that if I don't like you, you are not going to get good legal representation from me. To be honest, yours would not be the first phone call I'd return if I had several messages waiting. I wouldn't want to expand upon my conversations with you, so I might not have all the information I needed, and you wouldn't be able to communicate with me very effectively, which is important in representing you. I'm going to give you the names of several people who might like you. Talk with them. I'm sure they would do a better job.'"

The person left a bit bewildered, but my friend had realized that he was at a point where it was important for him to control his practice, which begins at the outset of the relationship.

I have thought a lot about what he said. I thought he was quite blunt, bordering on rude. (I also wished that I had that much nerve or wealth.) But I also realized that he was right. Things seldom get better, and if they start off horribly wrong, there is often a bigger problem down the road. And our emotional reaction to a client can affect how well we represent or respond to him or her.

It's a different way of thinking than I was used to. As a psychologist and a healthcare provider, I have always seen it as my job to cope with, tolerate, or try to ignore certain things in order to be of help. After all, in healthcare, the implicit contract of the relationship is based on the assumption that the person is ill, we are there to help, and to do so professionally means to deliver services in a respectful way, whether it's reciprocated or not.

But compatibility of style, or even circumstances in our own lives, can make our capacity for patience and tolerance fluctuate. My friend was blunt, but he probably did a service to his client, as well as whoever the client went to see subsequently for legal representation.

But not everyone is in a situation where they can decide who they represent. There are agency positions in which cases are assigned. Even in private practice, there are economic circumstances and "practice politics" which dictate who one represents.

Difficult clients are typically either well-functioning people going through a tough but temporary situation, or individuals with ongoing patterns of difficult behavior. It's important to distinguish what endures and is a pattern that will persist, as opposed to what's more situational and likely more manageable. Here are a few of the most commonly seen types of problem clients:

Frightened: Frightened clients can make demands upon our time and our resources, and want reassurance and predictability where none can honestly be given. Their anxiety and distress can be contagious; we can find ourselves a bit taxed, tired, or tense after interacting with them.

Taking the initiative and reminding them that they are remembered and that they matter, and are neither neglected nor abandoned, can be extremely helpful. Status letters can be sent every few weeks, merely letting a client know that nothing has happened recently, and that it is the natural order of things for matters to take

awhile. It's sometimes just as important to communicate something, rather than to communicate something meaningful.

Embarrassed: Clients who are embarrassed can pose a problem, because their embarrassment might make them avoid disclosure, or avoid doing certain essential things, such as completing interrogatories or making timely responses. Often, people are embarrassed about things that they believe are unique to them, but which are really quite normal. Sometimes it's helpful to communicate the normalcy of their situation indirectly, by mentioning that "People often feel that they are the only ones who have ever ..." or "What I almost always see in these situations is ...." Other matters are just downright embarrassing, and it may be best simply to directly address the issue with the client, since it will have to be dealt with sooner or later.

Difficult clients are typically either well-functioning people going through a tough but temporary situation, or individuals with ongoing patterns of difficult behavior. It's important to distinguish what endures and is a pattern that will persist, as opposed to what's more situational and likely more manageable.

Angry: Angry clients can create the temptation to form alliances with their anger, not merely with their cause of action. Many people are involved in litigation because they feel wronged, and want the wrong righted *right now!* They are often looking for an attorney who can hold their opponent's arms behind their backs so that they can beat them up with no ill consequence. It's tempting, but a mistake, to jump on that bandwagon. Reinforcing anger is a bad idea, both because it's unpleasant to be around and because it can paint one into a corner if litigation is seen as a moral crusade, rather than a legal exercise. One cannot negotiate from a moral position.

Unreasonable: Then there are people who just don't understand what a reasonable expectation might be. Many have never before encountered a legal situation and may have very unrealistic expectations about an attorney's availability, the time it takes for matters to resolve, or the amount of energy involved in assisting an attorney prior to litigation or dispute resolution. It's our job to communicate all of this.

Let clients know that others in your office can usually provide information in a quick and equally accurate way, and designate your secretary, paralegal, or legal assistant the resource to contact. Help your client understand that talking to staff can result in quick responses and reduced costs.

Personality disorders: Finally, there are those who pose problems no matter what the situation. These are, most often, people with personality disorders. They are not individuals who are merely going through tough times, but those who tend to create tough times, more often for others than for themselves. A personality disorder is, by definition, a long-standing maladaptive pattern of behavior of a magnitude to interfere with social and vocational functioning. These patterns may interfere with an individual's capacity to resolve conflicts, communicate effectively, maintain agreements, or maintain some balance between the emotional and the rational as one makes decisions and manages behavior.

Personality disorders come in all "shapes and sizes," but they can be divided into these categories, or clusters:

- **Cluster A (odd)**: schizotypal, schizoid, or paranoid personality disorders
- **Cluster B (dramatic)**: antisocial, borderline, histrionic, or narcissistic personality disorders
- **Cluster C (anxious)**: dependent, obsessive-compulsive, or avoidant personality disorders

Three personality patterns are particularly relevant in legal practice: the antisocial personality, the narcissistic personality, and the borderline personality.

The antisocial personality disorder can, in its more full-blown version, include long-standing patterns of disregard for limits, rules, and authority. The formal diagnostic criteria include such characteristics as failure to conform to social norms with respect to lawful behaviors; deceitfulness; impulsivity; irritability and aggressiveness; consistent irresponsibility; and a lack of remorse at having hurt, mistreated, or stolen from another.

More often seen is the less severe personality trait disturbance with antisocial characteristics. A trait disturbance suggests that this pattern of behavior is present, but with less severity than a personality disorder. Individuals with this personality trait disturbance are typically quite impulsive. It's hard for them to "keep on track," since the temptations of the moment, their immediate desires, and the habit problems that may arise from such a personality type (such as gambling, drinking, or drug use) may keep them from performing consistently and reliably.

Those with antisocial personality traits prompt an attorney to confirm their statements and reports, and warrant extremely clear, detailed, and enforceable agreements.

The borderline personality disorder is very misunderstood. In fact, it doesn't "border" on anything, and it is *not* a reflection of a person who is near to psychosis. It refers to a personality type that is excessively emotional, quickly changeable, and extremely ambivalent. These individuals are emotionally determined, impulsive, and self-defeating. Their views towards other

people can change quite abruptly. These are people who can go from idealizing someone to castigating them, with very few midpoints in between.

It is sometimes quite difficult for an attorney to maintain some sense of professional distance while simultaneously being caring and responsive to a client's needs, given the potential overwhelming involvement demanded by this personality type with emotionality, changeability, and "high maintenance" behavior. Such loss of attorney perspective can inadvertently accentuate the risk of later conflict.

With a borderline personality, the professional attorney would be well-advised to maintain consistent boundaries and to not veer off course from how one typically deals with clients. Beware of rearranging appointment times, making variations in billing arrangements, or going "the extra mile" in situations in which one might not typically do so.

The narcissistic personality disorder might be seen as the "prince" or the "special person." They often exhibit a sense of entitlement and are more likely to be male than female, although there is a sense of entitlement found in many conditions and situations across gender lines. They are typically condescending, dismissive of others, and arrogant.

These are people who remember slights, affronts, and insults forever. A "wounded narcissist," as the phrase is used, can be quite vengeful and can engage in protracted conflict because of how they were treated. The narcissistic personality disorder will likely pose a long-standing problem, since conflicts may occur, and reoccur, due to emotional slights. These are the clients for whom not mediation, but arbitration, may be well advised. These are the people for whom court files can take several volumes. These are people not to offend.

Difficult people (or people who behave in difficult ways) are not uncommon in legal practice. There are ways in which we can limit or manage those who are typically less well-functioning, and, in the process, maintain integrity and professionalism in our practices, as well as protect our capacity to continue to practice. Finally, there really are those people we just don't like, and, when the circumstances are right, maybe my friend who refuses to work with them has a point.

Mark Mays, Ph.D., J.D. is a clinical psychologist and an attorney.

Civility in Our Conversations about Race and Culture

BY JUDGE MARY I. YU

Can we talk about race? Can we genuinely engage our friends, neighbors, and colleagues in a serious conversation about race and culture without inflicting pain or guilt upon one another? Can you recall the last conversation you may have had about the topic and how it ended?

Our temptation may be to politely decline or avoid at all costs any discussion on the state of race relations or the impact of multi-cultural growth in our community because of our fear of being misunderstood. We worry about not being heard or perhaps we dread discovering what someone's "true" opinions might be about the topic. We wonder who we can trust with our stories or honest questions.

But as lawyers and leaders in our community, should we be afraid of the conversation just because it is difficult? The fact is, we are becoming a multi-cultural and multi-racial community. Recent events involving police use of force in minority communities have called into question the integrity of our criminal justice system. The need for the discussion could not be more timely or important. Dare we try?

The principles underlying the practice of civility can guide us into the conversation and dictate the rules of the discussion. As noted in *Bar News* articles by Paula Lustbader and Stella Rabaut, civility is more than politeness; "civility is courage with kindness." The practice of civility permits us to listen with our hearts to the experiences of others; to comprehend the feeling of alienation and of being an outsider. Civility calls us to step outside of our own lived experience and to engage in a sincere exploration of another through the simple art of listening before speaking. Civility challenges us to reflect

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and ponder upon what we have heard before making a judgment. Civility calls us to a state of compassion and empathy.

An active and civil engagement about a difficult topic such as race would also permit us to reveal our own biases, share our unfamiliarity of traditions and practices, and expose our ignorance of certain facts without causing personal pain to another. And when we inadvertently cause pain to another, civility requires an apology and a request to rewind and start over. At the same time, the practice of civility also requires vulnerability; it means that some of us must take the risk of sharing the pain of being on the receiving end of bigotry, both real and perceived, with the hope that the listener might better understand its impact.

Finally, the practice of civility requires patience and restraint: patience in having to repeat what has been said by others so many times before and in having to share once again; and restraint from reacting at an emotional level to what we think we heard.

You might ask yourself, "Why bother? It sounds like a lot of work! So why even have the conversation?" We need to have the conversation because of our unique role and function in a democracy and the pressing need to restore faith in our system of justice. Despite the colossal progress we have made towards achieving equality for all across this nation, there still exists a massive racial chasm that gets exposed through high-profile cases in our criminal justice system, or even by remarks made by a Supreme Court justice.

In their 2010 study *Justice in America: The Separate Realities of Black and Whites*,[1] Mark Peffley and Jon Hurwitz offer a rigorous examination of how the different realities of African Americans and European Americans influence the respective perceptions of justice and the legal system. These scholars offer extraordinary insight into how the radically different experiences of African Americans and whites explain the polarized views of our legal system and whether they believe justice will be delivered fairly. The conclusions are troubling and offer a compelling reason to get engaged in a conversation about race. Frankly, in order to better understand the lived experiences of one another, we must wade into the muddy waters of having a candid conversation about the topic. We must "bother" with listening and learning about the many forms of racial injustice experienced by communities of color and find ways we can move forward together.

As lawyers, we are responsible for maintaining a system of justice that is not only fair in its application of the law, but that is also perceived as fair by the broader community. We stand in a unique position to explore and address the specific "systems" or institutional practices that directly impact how members of minority communities experience or perceive our courts and what we do, particularly in our criminal justice system. The discussion cannot and should not be delayed; the restoration of confidence in our system of justice needs to be the focus of conversation in our personal and professional lives. We *can* talk about race and we *can* do it with civility.

This series produced in association with:

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Judge Mary I. Yu has been on the King County Superior Court since 2000. She is the Washington State Superior Court Judges' Association representative to the Judicial Division of the American Bar Association; a member of the Superior Court Judges' Association Civil Law and Procedure Committee (chair from 2005–2008); and past-president of the Judge Dwyer American Inn of Court, Seattle Chapter.

NOTE

1. Peffley, Mark and Hurwitz, Jon, *Justice in America: The Separate Realities of Blacks and Whites*, Cambridge University Press, 2010.

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AMERICAN BAR ASSOCIATION • PRESIDENTIAL DIVERSITY INITIATIVE

DIVERSITY IN THE LEGAL PROFESSION

THE NEXT STEPS

REPORT AND RECOMMENDATIONS

Race and Ethnicity
Gender
Sexual Orientation
Disabilities

ABA Presidential Initiative Commission on Diversity
(2009-2010)

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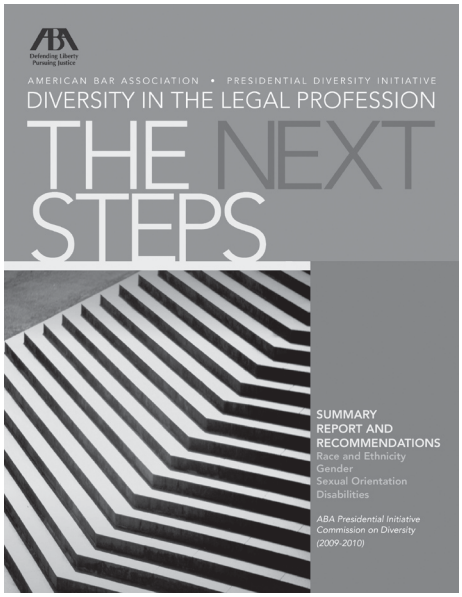
Race and Ethnicity ❖ Gender ❖ Sexual Orientation ❖ Disabilities

FOCUSING ON

Law Schools ❖ Law Firms/Corporate Law Departments
Government/Judiciary ❖ Bar Associations



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Special acknowledgement to YOU—the readers—for reviewing this Summary Report and Recommendations, and taking responsibility for doing your part to enhance diversity in the legal profession. Thank you.

EXECUTIVE SUMMARY

Several racial and ethnic groups, sexual and gender minorities, and lawyers with disabilities continue to be vastly underrepresented in the legal profession. From a racial/ethnic perspective, Whites constitute about 70% of working people over age 16, yet they represent 89% of all lawyers and 90% of all judges, according to 2009 census data. Each year, the numbers of lawyers with disabilities and openly lesbian, gay, bisexual or transgendered (LGBT) lawyers increase slightly, but their respective representation remains less than 1%. For example, in 2009 NALP (Directory of Legal Employers) reported that only about 47% of reporting law offices had even one openly LGBT lawyer, and most are clustered in just four large coastal cities. Most law offices do not collect data on disabilities, but the 18% that do report data (about 110,000 lawyers) identified only 255 lawyers with a disability.

This Report devotes its pages to specific recommendations for increasing diversity in the different sectors of the profession, namely law firms and corporations, the judiciary and government, law schools and the academy, and bar associations. The Report's recommendations reflect and incorporate the multiple experiences, false starts, insights, frustrations and new beginnings that represent the many different ways that diversity works within the different sectors of the legal profession. Each page incorporates the input of dozens of voices and localities; each page summarizes and synthesizes this multi-vocal and multigenerational dialogue about transforming the legal profession by making it more inclusive. This Report is the product of numerous surveys, hearings, summits, and workshops the ABA held throughout the country over the last year. It could not exist without the contributions of hundreds of individuals who joined together to advance this crucial project.

The overarching message is that a diverse legal profession is more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes. To provide a conceptual and normative context, the Report articulates and re-emphasizes four rationales for creating greater diversity within the legal profession and draws attention to similar diversity efforts and reporting in the medical profession. Compelling arguments for diversity in the legal profession include:

The Democracy Argument: Lawyers and judges have a unique responsibility for sustaining a political system with broad participation by all its citizens. A diverse bar and bench create greater trust in the mechanisms of government and the rule of law.

The Business Argument: Business entities are rapidly responding to the needs of global customers, suppliers, and competitors by creating workforces from many different backgrounds, perspectives, skill sets, and tastes. Ever more frequently, clients expect and sometimes demand lawyers who are culturally and linguistically proficient.

The Leadership Argument. Individuals with law degrees often possess the communication and interpersonal skills and the social networks to rise into civic leadership positions, both in and out of politics. Justice Sandra Day O'Connor recognized this when she noted in *Grutter v. Bollinger* that law schools serve as the training ground for such leadership and therefore access to the profession must be broadly inclusive.

The Demographic Argument. The U.S. is becoming diverse along many dimensions and we expect (and hope) that the profile of GLBT lawyers and lawyers with disabilities will increase more rapidly. With respect to the nation's racial/ethnic populations, the Census Bureau projects that by 2042 the U.S. will be a "majority minority" country.

In February, 2010, the *Journal of Academic Medicine* issued a major report by Drs. Louis W. Sullivan and Ilana Suez Mittman on the state of diversity in the health professions. Typically, the rationales for diversity in medicine have emphasized that minorities are more likely to provide service to minority communities; that minorities improve communication, comfort level, trust, and decision making in the patient-practitioner relationship; and they improve the quality of advocacy in health policy reform. The evidence is compelling that a diverse medical profession contributes to greater equity and the elimination of health disparities.

Drs. Sullivan and Mittman observe, however, that traditionally the medical profession has defined the role for health professionals from underrepresented groups as a narrow and circumscribed one that focuses almost entirely on the needs of minority communities. They urge that future efforts re-frame the arguments and re-envision opportunities for minority health professionals to excel and to lead within the larger profession and society. This Report's recommendations share that aspiration and are grounded in the conviction that benefits from diversity flow to the entire society.

Emerging Issues: The Report includes a set of Emerging Issues, identified collaboratively by the scholars and the Practitioner Working Group members from the myriad issues raised during the information gathering process. These ten issues provide short descriptions of new developments that will affect the ways in which the legal profession responds to the challenges posed by understandable demands for inclusion, complex personal and group identities, and a society under stress from increasing inequalities and international competition.

This Report is not prescriptive and is not a checklist of to-do's for the profession. The Report is a tool to challenge assumptions, provoke curiosity, generate conversations, enable dissenting voices, and encourage new partnerships and coalitions. To echo President Obama, our task is to "form a more perfect union." This Report documents the most recent step taken by the American Bar Association to do so.

Defending Liberty
Pursuing Justice

Carolyn B. Lamm
President

AMERICAN BAR ASSOCIATION

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Dear Colleagues:

It is with great pleasure that I accept this impressive report from the ABA Presidential Initiative Commission on Diversity.

Last bar year, then-ABA President H. Thomas Wells Jr. launched a comprehensive initiative to assess the "State of Diversity in the Legal Profession." The ABA conducted a qualitative survey, held four regional hearings with testimony from representatives of all sectors of the profession, held an invitational summit in June with more than 200 participants, and conducted a summit follow-up program at the 2009 ABA Annual Meeting. A team of legal scholars prepared summary reports of each stage from this year-long process. We thank Past President Wells for his dedication to and support of this important effort.

As ABA president, I commissioned the scholars to analyze the extensive information gathered last bar year and develop a substantive report and recommendations. Our goal was to produce a practical, well-designed report that the ABA and others can use as a functional roadmap for advancing diversity in the legal profession, and I believe we have succeeded. I wish to thank the sponsors of the project, LexisNexis and Walmart, for their support.

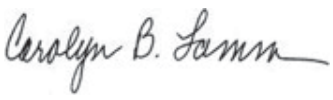
ABA leadership is fully committed to this process. I hope you share that commitment because much more needs to be done to make the legal profession fully reflect the communities we serve.

I invite you to read this report and use it as an ongoing tool to increase diversity in your area of the legal profession.

Building a more diverse profession is not a quick-fix, short-term goal. It is an ongoing campaign, one in which the ABA has been engaged for decades. We are committed to continue it as long as it takes. We are committed to see a bench that reflects our population and a profession in which every lawyer has the opportunity to achieve all of which they are capable.

Many thanks to Judge Ellen F. Rosenblum, chair of the Presidential Commission on Diversity, and to the commission members, scholars, working group, staff, sponsors, and others who helped produce this useful report.

Sincerely,



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Dear Colleagues:

As a participant in the June 2009 ABA Presidential Diversity Summit, I was encouraged by the energy, expertise and enthusiasm of the presenters and attendees. They demonstrated a genuine commitment to taking a candid look at the state of diversity in the legal profession and exploring how we must proceed to gain real advancement. From their diligent discourse and feedback from countless others throughout the year-long information gathering process, we now present this final report and recommendations on The Next Steps for Diversity in the Legal Profession.

The publication you now hold represents a compilation and analysis of a massive amount of information: transcripts from four regional hearings, extensive responses to a qualitative survey, exhaustive notes from the Summit's breakout sessions, and a volume of comments captured at the Annual Meeting roundtable discussions. The Herculean task of sifting through and making sense of it all was masterfully managed by our team of legal scholars, led by Professor Margaret Montoya from the University of New Mexico. I extend sincere thanks to Professors Montoya, Tucker Culbertson, and Marc-Tizoc González.

To ensure that the report reflects a broad range of perspectives from all aspects of our profession, a select group of diversity and legal practitioners worked closely with the Legal Scholar Team. The input of these practitioners has been invaluable and deserves our heartfelt appreciation. I would also like to thank the members and commend the staff of the ABA Presidential Initiative Commission on Diversity, Cie Armstead, Katy Englehart and Veronica Munoz, who not only coordinate this project but also manage the ABA Presidential Diversity Program Series: Strategies for Success, which is a series of CLE programs designed to help diverse lawyers advance their legal careers.

Most importantly, I thank you for taking time to review this report—and take action. After you have read the report, if you wish to make comments, please provide them to the ABA Center for Racial and Ethnic Diversity for inclusion in our online version comment section.

In the 21st century, the legal profession faces no greater challenge than the imperative to advance diversity throughout our ranks. It is incumbent upon each one of us to do something that will make a real difference. Use this report and recommendations to motivate yourself and encourage others, both within and outside the ABA, to take the *next steps towards a more diverse and inclusive legal profession*.

Sincerely,

Ellen F. Rosenblum
Chair, Presidential Commission on Diversity

PREFACE

In August 2008, then-ABA President H. Thomas Wells, Jr., launched an examination of the State of Diversity in the Legal Profession. The Commission he established—chaired by Hon. James A. Wynn, Jr., and Eduardo R. Rodriguez—set out to ask: Where are we with diversity in the legal profession and what are the next steps we need to take to gain real advancement? After a year of posing those questions to a wide range of stakeholders throughout the profession, we now have answers and recommendations.

GATHERING THE INFORMATION

This Report and Recommendations reflect information presented and discussed throughout the year-long information gathering process, particularly addressing diversity from a race, ethnicity, gender, sexual orientation, and disability perspective. The process included four major phases.

Regional Hearings—A total of 58 legal professionals provided testimony in four regional hearings:
February 2009: Boston, MA, at the ABA Midyear Meeting
March 2009: Atlanta, GA, co-sponsored by **The State Bar of Georgia**
March 2009: San Francisco, CA, co-sponsored by **The Bar Association of San Francisco** and **The State Bar of California**
April 2009: Columbus, OH, co-sponsored by **The Ohio State Bar Association**

Qualitative Surveys—During a six-month period, we heard from over 150 representatives from bar associations, legal employers (private, public, non-profit), courts, legal academy, corporate legal department, and others who completed an online State of Diversity survey.

Diversity Summit—Held in June 2009, this event brought together 200 thought-leaders and decision-makers in the legal community who have a commitment to sustaining the relevance and viability of diversity in our profession.

Diversity Roundtables—At the ABA Annual Meeting in August 2009, we conducted eight roundtable discussion using topics gleaned from the Diversity Summit. Over 80 participants contributed to these thought-provoking, courageous conversations.
Summary Reports of each phase of the process are available on the ABA Diversity Center's website: http://new.abanet.org/centers/diversity/Pages/presidentialdiversityinitiative.aspx.

USING THE INFORMATION

Continuing the commitment, current ABA President Carolyn B. Lamm appointed Hon. Ellen Rosenblum to lead the next phase of the project. The project's Legal Scholar Team and Practitioner Working Group analyzed the Summary Reports to produce this final Report and Recommendations. Modeling the structure of the Regional Hearings and Summit, this Report focuses on four categories of the profession:

- ❖Law Schools and the Academy
- ❖Government and the Judiciary
- ❖Law Firms & Corporate Law Departments
- ❖Bar Associations

In distilling this immense mountain of information, the reviewers recognized the challenge of summarizing and prioritizing the multiple—often competing—voices on such a complex topic as diversity. Their task was exacerbated by the wide-ranging nature of the audience that will use this Report. For example, consider how different readers will review the Report based on their familiarity with diversity issues. Laden with diversity fatigue, some seasoned campaigners for the cause may carp: "We tried these same recommendations back in 1993, and they didn't work." Those same recommendations may elicit motivating excitement from diversity newcomers.

Whatever your diversity experience or perspectives, this Report offers something that will help you determine your next steps for promoting diversity in the legal profession. Individuals and organizations are encouraged to identify the recommendations that align with their own interests and resources. These recommendations are not designed to be exhaustive or comprehensive. They do, however, offer strategic starting points for taking actions that will move the legal profession closer to being fully diverse and inclusive.

TAKING THE NEXT STEPS

This Report represents a strategic point on a continuum, not a culmination of a project. ABA leadership maintains its support of this ongoing process. The ABA and its constituent entities will carefully review these recommendations to identify which ones we can implement.

Share the Report. Direct colleagues to the online version, accessible from the ABA Diversity Center's website (http://new.abanet.org/centers/diversity). A limited number of printed editions will also be available upon request to the ABA Diversity Center (diversity@staff.abanet.org).

Give us your feedback. The Diversity Center's Website will feature a special Comment Page to post readers comments about the Report. The Report is designed to spark candid dialogue and debate about what directions the legal profession should take now and in the future to advance diversity.

Inform us of existing programs and initiatives that address any of these recommendations. Contact the ABA Diversity Center so we can tell others about these programs and encourage replication of the successful ones.

THE FOLLOWING OUTLINE SUMMARIZES KEY POINTS FROM BREAKOUT SESSIONS AT THE ABA JUNE 2009 DIVERSITY SUMMIT. AS INTENDED, THOSE DISCUSSIONS GENERATED MORE QUESTIONS THAN ANSWERS. UTILIZE THIS SUMMARY TO CONTINUE THE DIVERSITY DIALOGUE THAT WILL STIMULATE ACTION STEPS.

LEGAL ORGANIZATION'S SELF-REFLECTION

How is the organization modeling diversity in its leadership and actions?

- How can the organization's conferences and programs advance diversity in the profession?
- Does the organization's leadership, including internal subgroups, reflect diversity commitments and goals?
- Does the organization's budget, when considered as a moral document, reflect its values and priorities? Where does the organization commit its resources (money, time, clout)?
- What are the organization's demographics? How do they compare with the entire profession and that of specific states and regions?
- Can larger or national bar associations, such as the ABA, shift their focus from large firms to include small firms, partnerships, and solo practitioners that reportedly constitute 80% of American lawyers?
- Can larger or national bar associations, such as the ABA, work more closely with the specialty bar associations where most diverse attorneys are affiliated?

A PARADIGM SHIFT FOR THE LEGAL PROFESSION

What forces are causing the profession to change?

- The US recession amidst a global economic crisis.
- The new racial/ethnic and gender demographics of the workforce, as well as the emerging diversity groups—LGBT and the disabled.
- "Post-affirmative action" and "post-racial" generations of law students and new lawyers.

PIPELINE PROJECTS

Aligning projects to ensure educational inclusion and excellence from grade school to high school, college, law school, bar exam and into the profession.

How can larger bar associations, corporations and nationwide-entities best use their national or broader infrastructure?

- As a champion and voice for diversity, disseminating rationales and data that support diversity, access and success.
- As a lobbyist at federal and state levels for effective educational reform and investment to create equal opportunity.
- As a repository for best practices to "plug the leaks" and "clear the clogs."
- As a clearinghouse of data, research, projects and information.
- As a promoter of innovations.

REPLICATING SUCCESS AND LINKING SCHOLARSHIP TO SUCCESS "ON THE STREETS"

How can larger organizations, including academia, help develop valid metrics and evaluation methods to measure the effectiveness of diversity work in various locales?

- What resources exist to inventory and propagate the efforts of large law firms and corporations that have already developed in-house diversity metrics?
- Which diversity entities could serve as collaborative partners with national bar associations—such as, research centers like the CUNY Center for Diversity in the Legal Profession; Berkeley Warren Institute on Race, Diversity and Ethnicity; or Stanford Center on the Legal Profession?
- How can the larger or national bar associations better collaborate with law professor organizations that are dedicated to social justice research and teaching with a focus on diversity in the legal profession, like LatCrit, Inc. or SALT (Society of American Law Teachers)?
- What concrete possibilities exist for joint research ventures with dedicated fundraising plans, e.g., conducting a comprehensive literature review of diversity legal scholarship?
- How should diversity be taught? What is the curriculum? How has it already been included in some core courses, e.g., 1L writing courses, elective courses or seminars?

FRAGMENTATION AND REINVENTING THE WHEEL

- How can we minimize the impact of fragmentation of diversity projects and continual re-learning, which wastes efforts and resources?
- Is there a model that bridges the chasms between legal practice, theory, teaching, and research? If not, can the ABA (and/or another national organization) develop such a model?
- What diversity "lessons" can the ABA and the legal profession glean from and share with other professions, such as medicine?
  - For example, clinical psychologists have espoused both scientist-practitioner and scholar-practitioner models.

DIVERSITY NETWORK

Can the ABA (and/or another national organization) design and implement a diversity-conscious network of diversity partners with defined roles or resources for diversifying the profession? Network partners can include:

- Law firms and corporations—employers of diverse attorneys.
- Law schools—educators, where diversity norms, knowledge and skills are inculcated.
- Minority/specialty bar associations—large pools of diverse lawyers.
- Professors—experts on issues of identity and diversity; scholars of color; and women, LGBT, and disability advocates.
- Other professions with analogous methods and approaches to diversity.
- Public and private schools—settings for pipeline projects.

THE STARTING POINT: WHAT IS DIVERSITY? WHY IS IT A PRESSING PRIORITY FOR THE LEGAL PROFESSION?

When we talk about increasing diversity in the profession, we are addressing a history of laws, practices, and employment decisions that excluded broad sectors from participation in the political, economic, and social activities and benefits of this society. Since the early 1980s, the ABA has played a leadership role in fashioning efforts to fully incorporate members of the affected groups into the legal profession, starting with law students and extending to lawyers engaged in all types of legal work, including judges at the federal, state, local, and tribal levels. The specific groups that fall within ABA diversity programs and policies include racial and ethnic minorities, women, persons with disabilities, and the LGBT (lesbian, gay, bisexual, and transgender) community.

The Democracy Rationale

Democracy is a political arrangement that must be conceived, taught, defended, extended and painstakingly implemented. In our country's 233-year history, lawyers and their clients have been in the vanguard of these political, constitutional, and legislative struggles.

The United States occupies a special place among the nations of the world because of its commitment to equality, broad political participation, social mobility, and political representation of groups that lack political clout and/or ancestral power.

Diversity is the term used to describe the set of policies, practices, and programs that change the rhetoric of inclusion into empirically measurable change. Civil society, and especially professional organizations such as the ABA, occupies a crucial role in legitimizing, facilitating, and instantiating the changes that are implicit in diversifying the larger society and its professions. Without a diverse bench and bar, the rule of law is weakened as the people see and come to distrust their exclusion from the mechanisms of justice.

The Business Case

The rapid movement of people, financial instruments, culture, technology, and political change across international borders places new expectations on the ability of lawyers, law firms, corporations, and legal institutions to respond and adapt to the multinational and cross-cultural dimensions of legal issues.

A diverse workforce within legal and judicial offices exhibits different perspectives, life experiences, linguistic and cultural skills, and knowledge about international markets, legal regimes, different geographies, and current events.

In many instances, corporations are ahead of the legal profession in diversifying their professional and technological workforces. It makes good business sense to hire lawyers who reflect the diversity of citizens, clients, and customers from around the globe. Indeed, corporate clients increasingly require lawyer diversity and will take their business elsewhere if it is not provided.

The Leadership Argument

As Justice O'Connor reminded us in her opinion in the* Grutter *case, this society draws its leaders from the ranks of the legal profession and that is one reason why diversity is a constitutionally protected principle and practice.

EMERGING ISSUES

COMPLEXITY AND DIVERSITY: BOLD NAÏVETÉ AND FATIGUED EXPERIENCE

As many more decision-makers—in and outside of the legal profession—act to increase diversity, the approaches, rationales and perspectives necessarily become more varied. Managing diversity requires adapting to this evolving environment. Compounding this environmental change, for the first time in American culture, four generations co-exist in the workplace. In the diversity arena, these generational differences are often competing and divisive.

Besides differences based on age, those who have worked on diversity issues for years can come into conflict with those who are relatively new to this arena. The former group may complain of diversity fatigue as a response to the continual recycling of issues that had seemingly already been discussed and resolved. The latter group—novice diversity champions—may appear naïve in their lack of a nuanced analysis of the issues and an inability to sometimes concede that compromise and ambiguity can be positive outcomes.

The nation's demographic profile is changing to expand the proportion of women, racial/ethnic minorities, LGBT, and the disabled who now have the credentials, experience, and expectations of rising to the highest levels of leadership.

TRENDS

- While law firms have increasingly come to recognize that diverse corporate clients and international markets often require lawyer diversity, ***the recession is drying up monies for diversity initiatives and creating downsizing and cutbacks*** that may disproportionately and negatively affect lawyer diversity—thereby undoing the gains of past decades.
- Similarly, the increasing cost of legal education makes attending law school and the ***debt burden*** exceedingly difficult for poor and working class people. Because income and wealth converge disproportionately with race, ethnicity, gender, sexuality and disability, the cost of legal education in our current economy must be a central site for advocacy in the interest of a diverse legal profession.
- Nevertheless, legal institutions tend to acknowledge ***the need for comprehensive diversity strategies***.
  - Some bar associations have incorporated diversity goals in their strategic plans or are reviewing past diversity efforts in order to recommit themselves to diversify the profession.
  - Some firms incorporate diversity goals into their annual employee evaluations and prepare regular accountability reports with empirically substantiated data on lawyer diversity. Other firms have hired full-time diversity professionals as part of the management team with budgets and oversight of key functions.
  - Law schools in collaboration with the LSAC are becoming more adept at using the LSAT as one part of admissions programs that recruit, evaluate and enroll a diverse applicant pool. Some law schools have established diversity-oriented centers or offices to focus resources on increasing the enrollment of diverse students and to engage in outreach to students earlier in the educational pipeline.
- ***Consensus on the need for the legal profession to help dramatically improve the P-20 (pre-school through advanced degree) pipeline appears to exist***. Students, lawyers, judges, and clients are increasingly involved in pipeline activities, which emphasize law and civic engagement, aim to keep diverse students in school, facilitate the involvement of students' families, and help all students improve their academic performance to pursue higher education.
- Effective models exist for ***meaningful mentoring and leadership training*** to enhance the skills of diverse attorneys. ***Robust models of diversity training*** have also been developed on bias (which is often implicit), discrimination (which is often unconscious,) and attitudinal and cultural opposition to diversity.
- Relatively well-established diversity bar associations have now accumulated enough resources to institutionalize their programmatic work. Conversely, relatively newer diversity organizations operate on shoestring budgets, over-rely on individual charismatic volunteer leaders, or find it difficult to access collaborations with majority bar associations. Similarly, small local bar associations, especially those in rural locales, tend to lack the resources to engage diversity initiatives beyond the efforts of exceptional individuals.

DISAPPOINTMENTS

- Despite decades of reports, task forces, and goals, ***in 2000 the legal profession remained about 90% Caucasian***, with the national population at that time being about 70% Caucasian. Demographic projections for the legal profession for 2010 are not suggesting that much progress has been achieved.
- The legal profession is less racially diverse than most other professions, and racial diversity has slowed considerably since 1995.
- Diversity programs may sometimes be little more than box checking on forms or seem like costly and time-wasting training sessions.
- ***Even when diversity efforts were successful at recruitment, they often failed to improve the retention of diverse attorneys***, as documented in the 2006 ABA Commission on Women in the Profession's report, *Visible Invisibility: Women of Color in Law Firms*.
- Few linkages, bridges, or collaborations exist between the diversity work of the legal academy and that of legal practitioners.
- While some firms and law schools now empirically review the results of their diversity programs, for many years such programs lacked theoretically grounded ways to measure their goals and effects, and today ***relatively few diversity programs are designed with self-assessment mechanisms***.
- There is no one convenient location for finding up-to-date statistical data on the topic of diversity in the profession. The data that exist are pigeonholed into different categories, e.g., students, judges, women.
- Law schools and law firms still tend to chase the top part of the diverse applicant pool rather than focus on increasing the size of the pool.
- While the legal profession has achieved some diversity in the "lower ranks," diversity remains thin in the "higher ranks" of law firm managing and equity partners, general counsels, state or federal appellate judges, and tenured law professors.
- ***By presuming the centrality of law firms, the legal profession has failed to address the reality that the majority of lawyers are in solo practices or very small partnerships***; hence diversity efforts have been significantly stymied.
- The unique challenges and profound exclusion faced by American Indians cannot be adequately addressed by conventional inquiries regarding racial diversity. For example, there is still not one American Indian federal judge.
- Diversity programs are unsuccessful if the definitions used in, and the norms underlying, those programs are not made clear to an organization's members, incorporated into the core mission of the organization, and energetically owned by members—especially those who are senior and/or in leadership positions.
- All pertinent stakeholders agree that it is crucial to establish quantitative measures with which we can assess our progress and assign accountability. However, we must define these quantitative measures in a sophisticated manner that takes into account the multidimensionality and locality of identities. Moreover, quantitative measures alone are insufficient if they are not coupled with qualitative data drawn from direct communication with applicants, employees, and clients.

NEW DIRECTIONS

- Understanding diversity work as ongoing and evolving rather than static allows for a different approach to programming which may circumvent **diversity fatigue.** Even as some forms of exclusion are ameliorated, others will persist, and new forms will emerge. If we understand equal access and inclusion as tasks uniquely charged to the legal profession throughout U.S. culture and history, diversity work is less likely to be viewed as incriminating and hostile, and more likely to be viewed as a core function of the profession itself.
  - Moreover, the legal profession increasingly recognizes that: (1) ***diversity encompasses identities beyond race and gender,*** and (2) race and gender cannot be addressed adequately under rubrics of "white/non-white" and "male/female."
  - Recognizing a more expansive and sophisticated conception of diversity may also incite greater suspicion and fatigue among those who are either opposed to or not sold on prioritizing diversity within the legal profession. We must develop and deploy a persuasive and accessible theoretical framework which identifies the logical and historical connections among irreducibly distinct forms of identity discrimination.
- ***Different types of law firms need different types of diversity programs and policies.*** Large law firms and corporate general counsel offices have different opportunities and challenges than small firms and solo practitioners. Minority owned firms, as well as women-, LGBT-, and disabled attorney-owned firms also face unique opportunities and challenges in advancing diversity.
- State bars and bar associations are beginning to ***realize the need for a paradigm shift along the educational pipeline***. Diversity programs that "take the long view," such as law-oriented pipeline programs focused on high school, college or even middle school are following other professions with robust pipeline programs, such as math and science curricula developed by engineering schools.
- Training programs for prospective judges beginning five and ten years prior to their actual pursuit of a judgeship exist and should be supported.
- Indeed, diversity programs that create partnerships among legal professionals, their business clients, foundations, community organizations, and schools generate mutual support and productive pressure among partners in the interest of diversity.
- Some researchers—such as, Professor Marjorie Shultz and her collaborators at UC Berkeley—are in the process of developing new ways of ***evaluating law school applicants by identifying the wide range of skills and capacities needed to be an effective lawyer***.
- Similarly, some law schools' diversity efforts include tried and tested ***conditional admissions programs*** that provide opportunities to students whose LSAT scores would normally prevent their admission; those students' academic success have defied their predicted grades.
- Some law schools are developing alliances with other professional schools and adapting their diversity programs. ***Cultural competence education*** in medical schools is a notable example.

- Some law schools and bar associations offer insights about ***the different meanings and possibilities of diversity contingent on regional differences and differences between metropolitan areas and rural communities or small cities***.
- Some law offices and judges have developed diversity initiative advisory committees. Some elder lawyers suggest the legal profession needs President Obama to call on lawyers to diversify and commit to pro bono activities as President Clinton did in 1999.
- Such partners have recognized that ***retaining diverse lawyers means actually changing the way of doing business***, which could improve the workplace environment for all attorneys but is feared to be less profitable.
- Indeed, some law firms have begun to tie employees' compensation to their demonstrated commitment to diversity in recruiting, mentoring, and work assignments.
- Majority and minority bar associations are realizing the need to collaborate in ways that do not undercut the membership of either bar association while recognizing their different access to resources.
- Legal professionals can benefit from implementing and supporting the practices of many businesses and corporations, whose commitments to diversity have been more energetic and effective.
- It is productive to forge and foreground alliances among different affinity groups within the profession, whose needs and interests are distinct but convergent. For example, ***primary caregivers (who are most often women) and lawyers with certain disabilities share an interest in flexible scheduling, telecommuting, and sabbaticals.*** Similarly, poor people and primary caregivers share an interest in law schools that provide part-time and evening class options.
- Web-based databanks and social networking sites could become an invaluable asset for diversity work across the country, allowing individuals and organizations to share effective models, strategies, and structures. Similarly, ***not only "best practices" but also "preferred partners" could be publicized, thereby spreading "the best of the best" work on diversity informed by visitors' unique professional, geographical, cultural, and demographical identities***.
- Can, or should, the bar exam evaluate the skills necessary to deliver services in diverse legal environments?
- How should hiring officials or committees consider diversity activities shown on resumes or reported through the media?
- Should the legal profession's unique role in advancing democracy and promoting equality become a central component of professional responsibility curricula in law schools?

EMERGING ISSUES

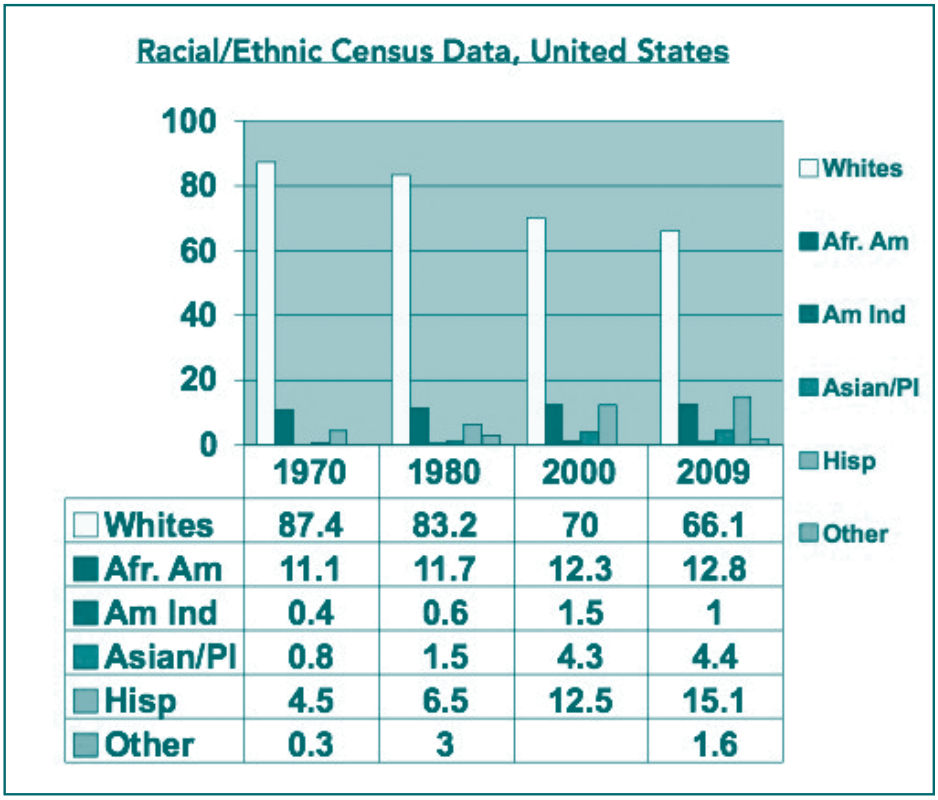
EMPLOYMENT DISCRIMINATION AND FIREFIGHTER CASES

Two recent cases have sparked more questions than answers on what steps employers may take where avoidance of discrimination against one group may mean perceived discrimination against another group.

During the confirmation hearings for Justice Sonia Sotomayor, the Second Circuit decision in Ricci v. DeStefano loomed large. J. Sotomayor joined the majority in deciding that City of New Haven could lawfully disregard the results of a written test in which white firefighters has scored higher than most minorities because the City claimed it was responding to the requirements of Title VII. In 2009, the Supreme Court overturned the decision by raising the evidentiary requirements for employers that seek protection within Title VII when creating a diverse workforce.

In another firefighter case, on January 21, 2010, a federal district court ordered New York City to hire 293 Black and Hispanic firefighters with retroactive backpay and other damages after concluding that the City had intentionally violated Title VII by using discriminatory written entrance exams.

DATA



	1970	1980	2000	2009
Whites	87.4	83.2	70	66.1
Afr. Am	11.1	11.7	12.3	12.8
Am Ind	0.4	0.6	1.5	1
Asian/PI	0.8	1.5	4.3	4.4
Hisp	4.5	6.5	12.5	15.1
Other	0.3	3		1.6

The Demographic Rationale for Diversity

Changing U.S. Demographics: Getting older and more diverse.

An aging population:

38.7 million: Number of U.S. residents 65 and over in 2008

88.5 million: Projected number of U.S. residents 65 and over in 2050

A more ethnically and racially diverse population:

46.7 million: Number of Hispanics residing in the U.S. in 2008

132.8 million: Projected number of Hispanics residing in the U.S. in 2050

41.1 million: Number of black residents of the U.S. in 2008

65.7 million: Projected number of black residents of the U.S. in 2050

15.5. million: Number of Asians residing in the U.S. in 2008

40.6 million: Projected number of Asian residents of the U.S. in 2050

Source: U.S. Census Bureau
http://www.usnews.com/articles/opinion/2008/08/18/data-points-changing-us-demographics.html

Recommendations for LAW SCHOOLS AND THE ACADEMY

Law schools play a particularly important role in advancing the value of diversity in the legal profession. Law schools identify the faculty talent that educates and produces new scholarship and the student talent that continually renews the profession. Law schools also choose the knowledge, skills, and values that form the legal canon and create an identity for lawyers and other legal professionals by transmitting a set of normative behaviors, ethics, and narratives. In short, law schools occupy a central role in forming and transforming the intellectual capital, the group identity, and culture of the profession. For this reason, law schools are crucial to the project of making the profession more diverse.

Law schools contribute to the ongoing transformation of the profession from one that has historically been dominated by white men from the upper classes to one that is inclusive of persons from many different backgrounds with different perspectives, cultures, abilities, worldviews, and tastes. Diversity in law schools, as in other institutions, affects all areas of activity. Consequently, a few law schools have taken innovative action to diversify across all areas—student admissions, hiring, promotion and tenure, curriculum, staff development, mission and vision statements, pipeline programs and partnerships—as well as across many axes of difference, such as gender, race, ethnicity, sexual orientation, and disability. Other law schools have focused primarily on student admissions. Diversity in law schools entails changes along many dimensions supported by leadership from faculty, administration, staff, students, alums and other outside constituents.

As law schools enact a diversity agenda, they can strengthen the consensus about the value of diversity to the profession and the larger society using oral and written messages but, most importantly, through educational and management practices, such as the appointment of a full time Chief Diversity Officer, that reflect equity and inclusion. Specifically, law schools can change perceptions, challenge stereotypes and reduce unconscious bias when they hire, promote and tenure a broadly diverse faculty and staff to teach and mentor broadly diverse student bodies. By creating a diverse learning environment, law schools can model how to create a work force with the skills that will be needed by a more international, pluralistic and mobile client base. The society has already come to expect that lawyers are culturally proficient and able to communicate easily with people from many different backgrounds and life experiences.

Lawyers and judges play a special leadership role within our vibrant democracy. In *Grutter v. Bollinger,* the 2003 Supreme Court decision on affirmative action, Justice O'Connor acknowledged the need for a diverse and representative legal profession because of its leadership role within the society. This is increasingly urgent because the United States is changing rapidly in its demographics, and law schools must respond by educating lawyers that mirror that diversity. Thus, law schools must advocate for greater inclusion, equity, and diversity as well as transform their pedagogical, scholarly and management practices and policies to accelerate the pace of change. Listed below are some of the actions that can be taken by law schools to enhance their existing diversity programs.

RECOMMENDATIONS

Culture: Building Consensus / Creating Accountability

- Encourage law schools to make commitment to diversity an integral part of their mission and educational philosophy; explore ways law schools can be held accountable for their diversity efforts.
- Disseminate different rationales for diversity: such as, the democracy argument, the business case, a demographics rationale, and Justice O'Connor's leadership analysis.

EMERGING ISSUES

MATHEMATICAL MODELS OF DIVERSITY

One of the persistent myths is that creating a diverse workforce is at odds with high quality outcomes. What if someone told you that he could unequivocally disprove this myth? Or, in other words, precise mathematical models could prove that in many instances diversity trumps "smarts" and produces better results? That is what University of Michigan Professor Scott E. Page has accomplished and what he explains in his book, The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies (Princeton University Press).

As Page stated in a 2008 interview in the NY Times, "What the model showed was that diverse groups of problem solvers outperformed the groups of the best individuals at solving problems. The reason: the diverse groups got stuck less often than the smart individuals, who tended to think similarly. The other thing we did was to show in mathematical terms how when making predictions, a group's errors depend in equal parts on the ability of its members to predict and their diversity. This second theorem can be expressed as an equation: collective accuracy = average accuracy + diversity." www.nytimes.com/2008/01/08/science/08conv.html

- Follow the lead of the medical profession, which analyzed racial and ethnic health disparities based on a Congressional mandate with funding, and analyze the justice disparities caused by a legal profession that is not diverse.
- Create greater respect for dissenting voices and cultural and stylistic differences so that diverse faculty, students, and attorneys do not feel the need to assimilate thereby diluting the benefits of diversity
- Commit to diversity beyond simply adopting a diversity statement. Law school leaders (*i.e.*, dean, faculty) must take a visible role in diversity efforts and be in attendance at diversity events.
- Define diversity beyond racial, ethnic and gender diversity. Educate law schools that mental and physical disability is a crucial component of diversity within law schools and the legal profession and reasonable accommodations, in many instances, are not cost prohibitive.
- Require law schools to teach diversity courses in a problem-solving format, comparable to how ethics is taught.
- Disseminate information on creating inclusive learning and work environments, for example, by using materials on privilege and unconscious bias.
- Follow the law firm and general counsel "Call to Action" model to develop an effective means of holding law schools more accountable for diversity results
- Give a clear message to law schools about the importance of diversity in the classroom, emphasizing that it is NOT a 'sidebar' issue, but a crucial part of what lawyers should be learning.
- Require training for students dealing with diversity in the legal context as well as for older faculty, lawyers and judges who may have less exposure to diverse professionals.
- Use the term "diverse" rather than "minority," as the latter is not as inclusive and may have a more negative connotation than the former.
- Assist law schools in understanding what they can do to promote diversity through the ABA, such as working with the Section on Legal Education and Admissions to the Bar.

COLORADO CAMPAIGN FOR INCLUSIVE EXCELLENCE

In 2006, Deans Beto Juárez (U-Denver) and David Getches (U-Colorado) formed the Deans' Diversity Council and convened a group of leaders from all sectors of the legal profession to improve the recruitment and retention of diverse attorneys. An emphasis was placed on mentoring diverse attorneys based on such research findings as:

- The cost of a lost associate will be at least $500,000.
- Many law firms resist mentoring despite its proven benefits.
- Two types of mentors are needed: Career development and psychosocial
- Mentoring is strengthened by peer networks.

For more information, see www.colegaldiversity.org.

Planning

- Plan, design, and create comprehensive diversity strategies for legal institutions, including law schools, that differ in cultural and institutional norms, populations, goals, etc. (i.e., a "one size fits all strategy" will be ineffective).

- Educate law school applicants about planning for the financial aspects of a legal education, including the risks associated with mortgaging their futures (*i.e.,* acquiring excessive student loans) and that they are not guaranteed to secure employment with a $150,000 a year salary.
- Work with expert consultants to plan, design and implement diversity education programs that can be used for pipeline outreach efforts by the bench and bar.

A DISTURBING TREND IN LAW SCHOOL ADMISSIONS

In 2009, Columbia Law School's Lawyering in the Digital Age Clinic, in collaboration with Society of American Law Teachers (SALT), completed its revision of "A Disturbing Trend in Law School Admissions." They found a 7.5% drop in the representation of African-American students entering the class of 2008 compared to 1993, with an 11.7% decline in Mexican-American students during that period. This trend is especially disturbing because the number of applicants held relatively constant and average undergraduate grade-point averages and LSAT scores improved over the 15-year period. For more information, visit http://blogs.law.columbia.edu/salt/.

Accountability

- Strengthen the AALS Membership Review process so that it evaluates all aspects of diversity in law schools.
- Strengthen the diversity components and promote the proper use of the *U.S. News and World Report* rankings.
- Conduct regular and detailed review of the effectiveness of pipeline programs in order to encourage collaborations among colleges, secondary schools, school districts, bar associations, student groups, and community organizations to develop programs for students, especially those before middle school, through which law schools can demonstrate their capacity to amplify the critical thinking, reading, and writing skills for students at different levels of the pipeline.

Diverse Faculty: Hiring and Retention

- Create a Blue Ribbon task force to examine the differential rates of tenure for diverse faculty, and implement effective strategies to improve retention and promotion rates based on its findings.
- Give diversity activities credit as an academic activity; and support scholarship, research, and publications in this area, including using financial incentives for diversity work as part of faculty pay.
- Expand the desired skill set requested for faculty candidates in order to attract and identify diverse faculty candidates. For example, schools should consider recruiting practitioners rather than candidates with the traditional law review, clerkship, and minimal practice skill set.
- Convince law school deans and, where necessary, university presidents to support financial incentives for law school faculty engaged in diversity-related work even when faced with budget cuts and/or other initiatives competing for funding; and tap diverse faculty expertise on diversity issues
- Expand recruitment efforts beyond the small number of select schools from which 75% to 80% of faculty matriculate.

PRE-LAW SUMMER INSTITUTE

The Pre-Law Summer Institute for Native Americans and Alaskan Natives (PLSI) is an intensive two-month program which prepares American Indian and Alaska Native individuals for the rigors of law school. PLSI essentially replicates the first semester of law school. Likened to boot camp by many former participants, PLSI concentrates its content into eight weeks of instruction, research and study, teaching students the unique methods of law school research, analysis, and writing.

The success of PLSI in providing a nationally respected pre-law orientation can be traced to its original and continuing intent — that it be based on sound legal education principles, and not function as a philosophical, political, or cultural training ground. For more than two decades, the American Indian Law Center has remained dedicated to providing valid training in the skills required for the study of law.

The PLSI program has been running for over 40 years and around one thousand students have passed through it. It has been the most successful program of its kind in the country and has spawned a few other programs, some of which have also become important, like the LSAC PLUS programs.

For more information, visit the PLSI website: http://www.ailc-inc.org/PLSI.htm

- Prioritize diversity by making more monetary incentives available to law school faculty who are doing diversity-related work.
- Build effective pipelines for future diverse law professors: identify women and diverse students who possess those characteristics that would make them successful in academia, and, for interested students, assist in mapping out a career path.
- Support diverse candidates in interviewing, hiring, and tenure processes.

Educational Practices: Admissions, Law School Debt

- Use the American Medical Association publication "Roadmap to Diversity" as a model for creating toolkits for improving law school admissions for diverse students (Coleman AL, Palmer SR, Winnick SY. *Roadmap to Diversity: Key Legal and Educational Policy Foundations for Medical Schools.* Washington, DC: Association of American Medical Colleges; 2008).
- Take a more holistic approach to reviewing applicants, not only considering LSAT scores and undergraduate GPAs, but also other factors that can help predict success in law school.
- Promote proper use of LSAT scores based on the Law School Admission Council guidelines published in its "Cautionary Policies Concerning LSAT Scores" at http://lsacnet.lsac.org/publications/CautionaryPolicies.pdf.
- Provide funding for the LSAT prep courses and preparatory materials to diverse law school applicants who cannot afford them.
- Create or encourage the creation of supplemental bar examination workshops; and create or encourage the creation of academic support programs to work with students of color and address nonacademic factors.
- Encourage collaborations among law firms, bar associations and the corporate sector to fund scholarship/mentoring programs that would guarantee payment for three years of college, payment for three years of law school, or a job upon graduation from law school.
- Encourage law school career service professionals to inform diverse students about career opportunities as well as the importance of federal clerkships, law review, moot court, and maintaining a high GPA.

- Encourage law schools to develop a series of professional development workshops for 3L students from underrepresented groups, such as "crash courses" on how to survive and thrive at work, developing resumes, and interview coaching.
- Fund studies on how law school costs can be reduced.
- Restructure inappropriate practices regarding lending for legal education, such as cutting off legal education credit or redlining students who will be least able to pay back debt.
- Encourage government to provide subsidies to address the situation of rising law school costs and increased debt burdens.
- Innovate to lower law school indebtedness: create alternative delivery systems (distance learning), reduce the length of law school, and create tax incentives, such as treating a law degree as a capital asset.

Data Collection, Law School Rankings

- Identify the data that already exists (e.g., LSAC data); coordinate the data bases (NALP, NCBE, ABA); and identify the portals/sources that need to be connected.
- De-emphasize national *U.S. News and World Report* rankings because of the adverse impact upon applicants of color.

DIVERSIFYING THE LEGAL PROFESSION: 40+ YEARS

CLEO: The Council on Legal Educational Opportunity is committed to diversifying the legal profession by expanding legal education opportunities to minority, low-income and disadvantaged groups. Since its inception, more than 8,000 students have participated in CLEO's pre-law and law school academic support programs, successfully matriculated through law school, passed the bar exam and joined the legal profession. CLEO alumni, many who had less than traditional academic indicators of success, yet were given an opportunity to attend law school, are represented in every area of society, including: private law firms and corporations, law schools, federal and state judiciaries, and legislatures across the country. For more information, visit http://www.cleoscholars.com/.

- Educate the public regarding the *U.S. News and World Report* rankings: what they mean and do not mean.
- Educate employers (law firms, judges) on the deleterious effect of using rankings or LSAT scores to identify potential interviewees; explore ways to hold them accountable for misuse of such data.
- Explore the use of a supplement to the LSAT, like the test of "lawyer effectiveness" being developed at UC-Berkeley by Prof. Margery Schultz and her collaborators.

Pipeline Practices

- Promote broader use of pipeline diversity databases (e.g., ABA/LSAC Pipeline Diversity Directory), listing the different programs and the contact person; encourage development of tool kits, best practices, and funding opportunities.
- Establish a blog, video conferencing, electronic bulletin board or other virtual resource for people to post concerns, issues, solutions, and success stories regarding diversity and pipeline programs.

EMERGING ISSUES

CAN YOU BRING YOUR WHOLE SELF TO WORK?

Advancing diversity and inclusion does include increasing the numerical representation of underrepresented groups within a workforce. True advancement, however, involves more than increased numbers. The culture of the workplace must actively allow and respect diverse ways of being, speaking, dressing and interacting.

All too often, attorneys whose race, ethnicity, gender, sexual orientation, or abilities place them in the minority at their workplace are compelled–explicitly or covertly–to try and perform socially in a way that erases the affective dimensions of their identities. Such compulsion undermines inclusion and leads to attrition. Countering these covert, often unintentional, forms of exclusion requires active acceptance of not only different identities in the abstract, but also different and perhaps seemingly unconventional ways of being.

- Develop pre-law school boot camps, like the HBCUs.
- Create a long-term mentoring program that links a diverse professional to every child who says he or she wants to be a lawyer or judge.
- Add programs such as Street Law to law school curricula to promote pipeline outreach.
- Connect the effects of low educational attainment (high dropout rates and low graduation rates) on professional education; gain support from the legal profession for public school educational reform.
- Connect law students and law schools with practitioners on pipeline initiatives in underrepresented communities in the early secondary school stages.
- Urge law schools, law firms, and all individuals in the profession to donate and direct financial and other resources to expand civic education and service learning.

Career Enhancement

- Forge strong ties between affinity bar associations and law schools in order to create opportunities for diverse students. Incentivize attorney members of the bar to participate in law school activities for diverse students, such as mentoring programs.
- Take an active role in getting diverse law students to become involved in the national and local bar associations while in law school (rather than waiting until they are into practice) and championing diversity issues. If membership fees are cost prohibitive for students, perhaps law firms or corporations could assist in paying fees.
- Develop a professional development system for new attorneys who recently passed the bar to teach law practice realities and skills for success, such as how to bill, how to manage time, and how to practice.
- Encourage law schools to gather employment data for their graduates based on diversity characteristics.
- Require law firms to report diversity data as part of the interviewing process.
- Encourage law students from under-represented groups to seek government employment.
- Partner with bar associations and the ABA Section on Legal Education and Admissions to the Bar to define diversity problems and identify solutions.
- Partner with bar associations to do mentoring and also encourage the schools to offer training in mentoring and follow-up with mentors and protégés.
- Improve the pipeline to a more diverse judiciary, such as encouraging judges to reach out and mentor law students.
- Facilitate better communication between employers and law schools regarding diversity issues and diversity research.

Recommendations for LAW FIRMS AND CORPORATE LAW DEPARTMENTS

Attorneys in private practice –especially those in management positions and those with seniority—are in a unique position to advance diversity in the legal profession. Given the large percentage of the legal profession employed in private practice, and the powerful appeal of private practice for aspiring lawyers, the ways in which private practitioners advance or ignore diversity issues have a massive impact on the perception and reality of the profession as a whole.

Many in private practice have recognized that a multi-dimensionally diverse workforce is crucial for commercial success and competitive edge. Given the steady globalization of markets and changing demographics of the United States, private practitioners must retain diverse workforces in order to most effectively serve and appeal to their diverse clients. This state of affairs grounds the "business case for diversity," which alone is sufficient impetus to prioritize diversity programming.

There are other grounds, though, for private practitioners, like all legal professionals, to recommit to energetic and innovative efforts to make our profession more diverse and inclusive. The legal profession has historically held a unique cultural position in American society, not only administering but reflecting ideals of fairness and justice. Also, the profession has historically provided access to income and wealth commensurate with the "American Dream." Historically, racial and ethnic groups, women and other marginalized groups have recognized that a law degree accelerates their social and economic mobility. If any part of our profession – especially the vast and powerful fields of private practice – fails to be diverse and inclusive, we are sending meaningful symbolic messages to members of underrepresented groups, especially those of lower socioeconomic status.

The current economic downturn has made it exceedingly difficult for private practitioners to support their clients, employees, and programs. As such, this call to invigorate and expand diversity programming may seem to present a profound financial challenge. Many of the recommendations herein, however, involve altering and addressing existing practices and cultures in the workplace, and may not necessitate significant financial commitments. Nonetheless, financial commitment is crucial for diversity work, despite – and because of – this economic downturn. These pecuniary considerations underlie several of the recommendations, such as: the assignment of deferred or furloughed associates to diversity programming; and the cultivation of alliances with bar associations, non-profit organizations, and schools that have existing pipeline diversity programs in need of financial support to stay afloat.

Addressing another critical issue will help conserve financial resources: advancement and retention of diverse lawyers. Employers must undertake serious efforts to render work cultures more sensitive and inclusive. Taking effective steps to prevent the systemic and shameful attrition of attorneys from underrepresented groups—especially women attorneys of color—will improve the workplace for everyone and curb an expensive loss for any organization. Many corporate clients have initiated diversity programs and standards for themselves and their preferred legal partners. These initiatives, and many others, demonstrate not only the importance but also the viability and the value to private practice of undertaking systemic and serious re-orientations of "business as usual" in the interest of diversity and inclusion.

The following recommendations are meant to serve a wide range of legal professionals: large and small firms, corporate counsel, and solo practitioners. These recommendations are also designed to serve those organizations that have already established diversity programs as well as those that have not. These recommendations are suggestive and not exhaustive, and must be interpreted and applied according to each individual organization's needs and resources.

EMERGING ISSUES

TRIBAL COURTS & NATIVE AMERICANS

Judicial and government employees at all levels must solicit training and research on tribal law and Native cultures. Interactions among tribal, state, and federal courts are changing rapidly in multiple fields involving business, property, and crime. Tribal courts have continuously developed sophisticated and particularized approaches to the interests and injuries of Native individuals.

Cultural competence and sensitivity regarding Native cultures are imperative, and must be undertaken in particular, local ways based on the Native constituencies in a given area. Moreover, state and federal judicial and government organizations can learn from, and model best practices of, tribal courts that have designed innovative legal approaches to violence, illegal drug use, and other matters in ways that best reflect tribal values and thus best serve Native peoples.

RECOMMENDATIONS

Planning

- For existing firm/law department diversity programs:
  - Re-examine prior diversity goals and programs.
  - Gather new quantitative and qualitative data on numerical representation and work culture.
  - Update goals and programs in light of this data, the organization's specific challenges and resources, and this report's general recommendations on "rethinking diversity."
  - Draft, publicize, and implement an updated diversity and inclusion action plan, which includes measureable goals and mechanisms for regular assessment and meaningful accountability.
- Tie compensation to advancement of diversity goals.
- Using recent reports and research, develop persuasive arguments to present the tangible benefits of diversity to decision-makers (e.g., assignment partners, practice group leaders).
- Retain diversity experts as consultants or professional staff to achieve and maintain diversity and inclusion goals and accountability.
- Formalize a succession plan for diversity at all levels of the organization.
- Develop and disseminate rebuttals to inaccurate assertions that commitments to diversity amount to impermissible reverse discrimination. Emphasize that holistic, multidimensional diversity programming differs profoundly from—and thus avoids the alleged harms of—polices aimed at superficial, one-dimensional demographic representation.

Culture

- Sponsor regular trainings on multiple dimensions of diversity and inclusion—especially for leaders charged with ensuring accountability within the organization.
- Ensure that diversity programming investigates and addresses work cultures that inhibit inclusion and retention (e.g., those which involve implicit bias, unconscious discrimination, micro-aggressions, micro-inequities, or covert opposition to diversity and inclusion).
- Create affinity groups—internal to the organization or in collaboration with other organizations and bar associations—for employees from underrepresented groups.
- Encourage alliances among affinity groups to address common issues.
- Host or participate in town halls, retreats, and other events for attorneys from underrepresented groups.
- Coordinate and prioritize diversity programming with assignment, business development, and client relationship management systems.
- Examine and, where necessary, alter all policies to ensure they are inclusive of LGBT and other employees (e.g., single parents and those caring for relatives other than spouses and children) whose families and obligations differ from those of "nuclear" heterosexual families (e.g., domestic partner benefits, adoption leave, etc.).

- Explore viable ways to engage heterosexual, white men as vocal and visible champions of diversity efforts.
- Meaningfully address work/life balance by exploring how to expand part-time and work-at-home arrangements.
- Address legacy systems that function as glass ceilings for billing credits for attorneys from underrepresented groups.
- Diversify client relationship leadership.

Assessment and Accountability

- Develop and standardize surveys or other devices that can particularly help smaller law departments and law firms assess the success of diversity programming.
- Regularly assess the state of diversity in the work environment, such as through biennial employee surveys, interviews and focus groups that address not only numerical representation, but also cultural receptivity to difference.
- Build self-assessment mechanisms into all diversity and professional development programs, featuring both qualitative and quantitative measures of success.
- Develop a diversity committee structure with an institution-wide oversight group.
- Develop office and departmental diversity committees for local implementation and information gathering.
- Provide senior leadership support by having the Diversity Committee chair report directly to Firm Chairman, Managing Partner, or other comparable level position. Assign each affinity group a management committee sponsor of a different demographic group.
- Regularly provide diversity metrics to management committee, office heads, and practice groups.
- Implement confidential, anonymous "exit interviews" to determine the causes of—and develop programs to prevent—attrition by attorneys from underrepresented groups.
- Tie compensation to achievement of diversity goals.
- Make diversity contributions and services by associates and partners compensable (e.g., through revenue generating or billable hours mechanisms).
- Incorporate diversity into preferred provider criteria and electronic billing systems.
- Hold provider law firms accountable for their diversity efforts, as Microsoft and Walmart have done.
- Establish and regularly revise processes for analyzing data on diversity programming relevant to recruiting, retention, assignments, and promotion.

Hiring, Retention and Advancement

- Develop interviewing and hiring models that enable assessment of talent beyond the highest levels of the diverse applicant pool.
- Create programs where attorneys from underrepresented groups receive access to high-profile client assignments.
- Implement secondment programs or rotational assignment programs that allow attorneys from underrepresented groups to work directly with or at the client for development of substantive relationship-building, rainmaking and other skills.
- Provide business development training targeted to income partners from underrepresented groups.

- Focus on mentoring across difference and provide skill building and accountability mechanisms to foster an energetic mentoring culture.
- Retain diversity experts to facilitate discussions between management and employees from underrepresented groups.
- Partner with law schools to create and implement "third-year residencies" for law students to increase the likelihood of success and retention.

Outreach

- Host annual diversity summits for preferred provider law firms.
- Communicate personally and regularly with external partners about the value and importance of diversity and inclusion.
- Partner with, and provide financial and personnel support for, pipeline programs run by bar associations, schools, and other groups for primary, secondary, college and law school students.
- Sponsor and participate in externship and scholarship programs for law students from underrepresented groups.
- Explore strategic ways to use social media technology to deliver and support diversity programming.
- Promote disability accessible websites in the legal profession, as noted in the ABA's August 2007 resolution.
- Develop and implement initiatives to allow furloughed or deferred associates to work on diversity initiatives.
- Collaborate to conduct and issue a diversity report to President Obama comparable to the "Bar None" report issued to President Clinton in 2000 by Lawyers for One America.
- Provide, and encourage clients to request, evidence of the firm's or law department's commitment to diversity through diversity data on recruitment, retention, assignments, and promotion.

EMERGING ISSUES

COGNITIVE PSYCHOLOGY AND UNCONSCIOUS BIAS

The intersection of unconscious bias and social justice is gaining popularity as a panel, program or research topic in the legal profession. Since 2003, the Equal Justice Society (EJS) has studied this issue. Its website explains:

> Our signature project on this issue is the collaboration with the California Teachers Association (CTA) to assess racial bias in the classroom and school environment and its impact on student achievement.

"Implicit (unconscious) bias and stereotyping are gaining increasing attention as a possible explanation of unequal treatment in a number of settings including education, employment, health care and law," said Dr. James Outtz, an industrial and organizational psychologist, who leads the research team on behalf of EJS and CTA. Unconscious bias has been defined as "implicit attitudes, actions or judgments that are controlled by automatic evaluation without a person's awareness."

Research indicates that we use the cognitive process of "categorization" to simplify and make more efficient our internal processes for perceiving others (e.g. sex, race, or age). This process, however, often results in application of stereotypes that unconsciously influence how we think and what we do relative to persons different from ourselves. In the context of social power relationships, this type of categorization frequently has a detrimental impact on members of diverse groups. How to recognize and counter this unconscious bias warrants additional study.

Recommendations for GOVERNMENT AND JUDICIARY

Advancing diversity and inclusion in the judiciary and government is especially important. These fields not only administer, but also represent democratic rule of law in our multicultural society. The absence of diversity and inclusion in the judiciary and government can malign the legitimacy of not only lawyers, but also of the law itself. Consequently, increasing the number of attorneys and other employees from underrepresented groups within the judiciary and government is of the utmost importance.

Throughout the regional hearings from which this report has been developed, commenters gave numerous accounts of total, or near total, exclusions of persons from underrepresented groups —especially people of color—from judicial benches of all sorts. They also reported open hostility to untraditional gender performance by female attorneys. For example, women are urged to appear "feminine" through clothing styles or makeup, and women of color are counseled to tone down such racial and ethnic markers as braided hair or ethnically distinctive jewelry.

Thus, despite the high visibility of President Barack Obama's election and Justice Sonia Sotomayor's appointment, the actual state of diversity among judicial and government offices remains woefully inadequate. Addressing these problems requires internal institutional work, alliance with those outside the judiciary and government, and proactive professional development of future colleagues. Institutionally, it is imperative to advocate on behalf of processes that make the appointment and election of judges and government officials more transparent and equitable.

Institutionally, it is crucial actively and continually to develop cultural competence as regards the unique experiences and injuries that affect individuals based on their race, color, ethnicity, language, economic status, sex, gender, sexual orientation, age, and abilities. This entails securing knowledge about the history and narratives of under-represented groups within the locality. Communication and linguistic skills necessary to interact effectively with persons from different backgrounds, worldviews and educational levels will also improve cultural competence.

Externally, members of the judiciary and government should partner with bar associations, community organizations, and schools at all levels to discuss and advance diversity and inclusion within their fields. Members of the judiciary and government to must communicate that the aspirations of attorneys from underrepresented groups to join the judiciary and government are possible. Subsequently, they can mentor and develop those aspiring attorneys, such that their success becomes probable.

The following recommendations are intended to guide members of the judiciary and government as they seek to diversify their workforces, address the needs of their diverse clients, and defend the legitimacy of our public institutions.

RECOMMENDATIONS: JUDICIARY

Culture, Assessment and Accountability

- Develop, implement, and evaluate initiatives to increase the number of judges from underrepresented groups on the state and federal bench.
- Advocate transparency in the process of selecting judges, appointments, and influential government employees; and stress that a diverse and inclusive bench is required for institutional credibility.
- Modify the criteria and questions for judicial candidates to make them more inclusive (e.g., extend emphases beyond trial experience).

- Advocate the adoption of rules requiring judges to engage in continuing legal education, such as two hours every two years on: pro se and indigent litigants; pro bono representation; and the impact of race, ethnicity, gender, sexual orientation, disability, and language on litigants and litigation.
- Seek out and regularly conduct trainings on the importance of diversity on the bench, as well as among judicial clerks and staff.
- Establish teams to assist judicial candidates from underrepresented groups with their applications, write letters of recommendation to the governor's judicial appointments secretary, and interact with the media.
- Ensure that judges from underrepresented groups get meaningful assignments and opportunities to advance.
- Address the political appointment processes from within to make diversity important to the players by appealing to self-interest as well as the greater good.
- Identify, and promote reforms of, state judicial systems that hinder diversity on the bench.
- Advocate public financing of judicial elections.
- Hire staff specifically to address access to justice and fairness in the courts, including pro se and indigent litigant representation, pro bono activities, racial, ethnic, and gender fairness, and matters of disability, and foreign language interpretation.

Hiring, Retention, and Advancement

- Organize events discussing the value of diversity and inclusion for judicial and government offices, recognizing that this value may differ from that expressed by the "business case" for diversity in private practice.
- Partner with bar associations to host events in which judges and members of nominating commissions demystify the process of applying for judicial positions.
- Speak out on diversity within the profession by participating in minority bar association programs, community meetings, and law school events.
- Encourage the participation of lawyers from underrepresented groups in local and state bar associations' judiciary committees.
- Assist bar associations in hosting purely social events where diverse members can mingle informally with judges, thereby enhancing the lawyers' interest and confidence in becoming judges.
- Identify, mentor and coach potential candidates to the bench long before they are actually viable candidates; this may include assisting with applications and conducting mock interviews.
- Collaborate with diverse bar associations to identify candidates for judicial employment at all levels, and to assess and address matters involving recruitment, retention, and advancement.
- Review the attorney evaluation process to ensure that it is free of implicit bias.

RECOMMENDATIONS: GOVERNMENT

Culture, Assessment and Accountability

- Gather data, establish goals, and propose reforms of the selection processes for the judiciary at the state, federal, and local levels.

- Advocate transparency in the process of selecting judges, governmental appointments, and influential government employees; and emphasize that diversity and inclusion throughout all levels of government are required for institutional credibility.
- Address the income disparity between public and private practice.

Hiring, Retention, and Advancement

- Encourage federal and state governments to implement loan forgiveness programs for law school graduates who agree to serve in government positions.
- Organize events discussing the value of diversity and inclusion for government offices, recognizing that this value may differ from that expressed by the "business case" for diversity in private practice.
- Identify and reach out to segments of government that are not already convinced of the importance of diversity.
- Collaborate with bar associations in hosting purely social events where members can mingle informally with government attorneys, meet potential mentors, and develop connections.
- Establish mentoring programs matching government attorneys with law students, college students, and younger attorneys.
- Work with minority bar associations to identify candidates for government employment at all levels, and to assess and address matters involving recruiting, retention, and advancement.
- Institute a leadership academy to help attorneys from underrepresented groups seek and attain, and advance in, government work.

EMERGING ISSUES

CROSS-DISCIPLINARY INSIGHTS: CULTURAL COMPETENCE

Can the legal profession's diversity efforts benefit from the medical profession's experiences with cultural competence? How can we collaborate across disciplines?

Nowhere are the divisions of race, ethnicity and culture more sharply drawn than in the health of the people in the United States. Despite recent progress in overall national health, there are continuing disparities in the incidence of illness and death among African Americans, Latino/Hispanic Americans, Native Americans, Asian Americans, Alaskan Natives and Pacific Islanders as compared with the US population as a whole. What similarities exist between approaches to address health disparities and how justice disparities should be addressed?

The delivery of high-quality primary health care that is accessible, effective and cost efficient requires health care practitioners to have a deeper understanding of the socio-cultural background of patients, their families and the environments in which they live. Culturally competent primary health services facilitate clinical encounters with more favorable outcomes, enhance the potential for a more rewarding interpersonal experience and increase the satisfaction the individual receiving health care services. Both the Joint Commission on the Accreditation of Healthcare Organizations, which accredits hospitals and other health care institutions, and the National Committee for Quality Assurance, which accredits managed care organizations and behavioral health managed care organizations, support standards that require cultural and linguistic competence in health care. Would the legal profession and its clients benefit from requiring legal practitioners to have cultural and linguistic competence?

Recommendations for BAR ASSOCIATIONS

As organizations comprised primarily by lawyers (though also encompassing judges, law students, law professors and other legal workers), bar associations play a central role in advancing the value and reality of diversity—understood broadly as a multidimensional concept—in the legal profession.

At the national, state, regional and local level, bar associations help shape the norms of the profession regarding the value of diversity to the legal profession. When bar associations prioritize diversity, new lawyers are introduced to a milieu that values the presence and distinctive skills of people across race/ethnicity, gender, sexual orientation, disability and other dimensions of social identity, culture, privilege and power. When bar associations do not prioritize diversity, then new lawyers are introduced to milieus that exclude or marginalize those who do not already constitute the numerical majorities of the legal profession, which often leads to alienation, dissatisfaction, a dearth of potential mentors to socially diverse law students and a paucity of diverse law firm partners, corporate counsel, tenure-track law professors, appointed government attorneys and judges.

In other words, the public good of a critical mass of socially diverse lawyers in the dawning twenty-first century United States is substantially advanced.

Note: This section includes a set of recommendations specifically targeted to the American Bar Association, which may be implemented by the ABA overall and/or its individual Sections, Divisions, Forums, and other pertinent subgroups.

RECOMMENDATIONS

Culture: Building Consensus, Establishing Common Definitions and Understanding

- Develop explicit definitions about particular kinds of diversity and ensure they are consistent with the self-identification standards of each community of interest.
- Make bar association diversity statements and initiatives open-ended rather than limited to fixed categories so not to omit, exclude or elide forms of diversity that are slowly gaining social recognition, such as transgender identification.
- Target special diversity efforts to social groups that are historically underrepresented within the profession's diversity efforts, such as disabled, LGBT and Native American lawyers.
- Develop programming, initiatives and research that address the intersectionality of identity, or how diversity crosses categories of difference, e.g., disabled or LGBT lawyers amongst Native American nations or racial/ethnic minority groups.
- Encourage and support collaboration between and amongst mainstream bar associations and diverse affinity bar associations. Beyond such linkages, consider developing internal affinity groups for specific populations of diverse lawyers.
- Work to help change the culture of the legal profession so that more lawyers feel free to overcome fears of publicly identifying as having a disability or being LGBT. Beyond accessibility, bar associations should promote welcoming inclusiveness for all diverse attorneys.
- Institute continuing legal education, as part of regular bar association programming, on the elimination of bias and affirmative training on diversity in the profession (including making "service learning" qualify for CLE credit) to socialize new lawyers toward valuing diversity in the profession.

- As to disability in particular, educate leaders and members on how to avoid impermissible inquiries and assumptions about what a person with disabilities can or cannot do, and the potential affirmative obligation (similar to religious accommodations) to make reasonable accommodations for people with disabilities—even if this involves reasonably different treatment than for individuals without disabilities.

Planning: Assessment & Accountability

- Develop diversity data, programming, and initiatives targeted to sectors of the legal profession outside of large law firms and corporate legal departments; focus on government, public interest, and small and solo practitioners, which account for the majority of private practice attorneys nationwide.
- Adopt formal diversity statements and establish formal diversity plans that commit the bar association to make measurable progress on diversity based on defined performance criteria and established timetables, including metrics on LGBT and disabled attorneys. (*See* Bar Association of San Francisco for reference).
- Include in bar association diversity plans measures to ensure diverse representation throughout the leadership, presidencies, executive committees, committee chairs, membership, speakers, program attendees and administrative staff of the association.
- Ensure that diversity planning adequately includes the oft-forgotten dimension of disability.
- Educate bar association leaders and members in the considerable *abilities* (which are often underutilized) of attorneys with disabilities.
- Emphasize the importance of and resources regarding disability literacy and etiquette; lack of understanding and/or insensitivity undermines efforts to increase accessibility and welcoming inclusiveness.
- Prepare bar association leaders on dealing with and reasonably minimizing costs and liability concerns potentially associated with providing accessibility and welcoming inclusion to attorneys with disabilities.
- Promote disability access, as far as practicable and beyond minimal required levels, to all bar association programs and resources, including websites and other electronic media.
- Develop comprehensive public relations and communication strategies consistent with the bar association's diversity plans to ensure broad dissemination to all quarters of the legal profession and all other stakeholder groups in diversity efforts—utilizing various media, including social media platforms and traditional print media.

Pipeline Practices: Outreach & Mentoring

- Develop and implement mechanisms to equip bar associations to serve as public education advocates. Fundamental changes in American education are necessary in order to develop a critical mass of diverse law applicants, law students, lawyers and leaders of the legal profession.
- Continue to support, fund, and expand the development of pipeline programs that help diverse youth imagine and work toward joining the legal profession—as early as elementary or middle school, and particularly in high school and college.

EMERGING ISSUES

INTERSECTIONALITY: OUR PLURAL IDENTITIES

It is crucial to recognize that none of our identities is singular. Our race, ethnicity, color, sex, gender, sexuality, ability, age, accent and other attributes coexist. Consequently, we must consider the various particular intersections of identities and recognize the unique circumstances that attend such intersections. For example, a lesbian African-American associate may have particular concerns and face particular harms that cannot be addressed by programming aimed at sexual orientation, race, or gender in isolation. Moreover, many individuals identify as members of multiple racial, ethnic, national, gender, and other groups. Engagements with and characterizations of identity must make room for these multi-faceted identifications.

EMERGING ISSUES

DIVERSITY DEFENSE: INCLUSIVE MULTI-DIMENSIONAL DEFINITIONS

Properly designed approaches to diversity and inclusion do not run afoul of contemporary jurisprudence on colorblindness, gender-blindness, or reverse discrimination. Courts have frequently found that considerations of identity – and commitments to diversity – are permissible so long as they do not one-dimensionally and categorically equate a single, overbroad definition of identity (e.g., non-white) with a particular outcome.

Diversity proponents must research and prepare clear statements on how their diversity initiatives consider race, ethnicity, color, sex, gender, sexuality, age, ability, accent, and economic status among other factors in holistic, multi-dimensional ways that differ fundamentally from the forms of affirmative action (e.g., quotas and set-asides) which courts have prohibited.

- Collaborate and encourage development of systems and protocols to track the operation and success of pipeline diversity programs over time to ensure efficacy and sustainability. See, e.g., CSIRE (continuity, sustainability, impact, replicability and evaluation) criteria developed by The State Bar of California's Diversity Pipeline Task Force.
- Seek opportunities to incorporate into diversity programs targeted efforts to increase the ranks of self-identifying attorneys with disabilities (which will depend in part on societal progress in encouraging self-identification, admitting to the bar, and employing individuals with disabilities).
- Partner with local high schools, university student organizations and advocacy organizations to support the aspirations of diverse students to become lawyers. (See, e.g., For People of Color, Inc., http://www.forpeopleofcolor.org.)
- Encourage development of mechanisms to define and require diversity curriculum in accredited law schools; collaborate to support these efforts.

Leadership Development: Networking and Mentoring within the Legal Profession

- Encourage all members—younger and mature generations—to use emerging technologies of networking to truly integrate and knit together the entire legal community (including bar-association leadership, man of which tend to use new technologies less often).
- Facilitate the use of mentoring circles as a means of expanding access to the limited number of senior diverse lawyers who can serve as role models within the profession.
- Ensure that mentoring programs provide opportunities to integrate into substantive programs, committee work and the social fabric of bar associations those attorneys with disabilities, less experience, or who otherwise may feel unwelcome.
- Collaborate to develop national and regional leadership academies to identify, develop, and place diverse lawyers in positions of leadership throughout national, state and local bar associations.
- Explore the feasibility of including on the governing boards of large national and state bar associations representation from constituent affinity bars.
- Develop collaborative relationships amongst and between national, regional, state and affinity bar organizations to maximize impact, coordinate resources and ensure the continuity of messaging, data, and programming regarding the collective diversity efforts within the geographic legal communities they serve.
- Coordinate efforts among relevant national and regional affinity bar organizations to promote diversity on the bench by supporting diverse judicial candidates and assisting with the development of programs that groom diverse lawyers for judicial service.

Recommendations for the American Bar Association

- Establish an Association-wide diversity plan and encourage each pertinent entity (e.g., Section/Division/Forum) to have its own functional diversity plan that assigns responsibility for diversity directly to entity leadership.
- Coordinate the development of a Diversity Impact Statement (comparable to an Environmental Impact Statement) to shape the dialogue and provide continuity of efforts around diversity within the profession.

- In collaboration with relevant national and regional affinity bar organizations, coordinate efforts to centralize data collection and reporting about diverse populations within the legal profession.
- Design, administer, and report on—in consultation with disability-rights organizations—a comprehensive survey in which attorneys identify (with appropriate confidentiality) their disabilities and their needs, wishes, and experiences related to being attorneys with various disabilities.
- Promote and encourage broader use of the ABA Diversity Center website, which includes a central calendar of diversity events sponsored by ABA groups and other organizations.
- Promote and encourage broader use of the ABA/LSAC Pipeline Diversity Directory, an online searchable database of law-related pipeline programs nationwide.
- Work collaboratively to develop a standardized diversity index for law schools.
- Serve as a clearinghouse for information and resources relating to the development, implementation and results of successful legal internship and clerkship programs.
- Collaborate with the legal academy to explore more effective diversity-minded recruiting practices that place appropriate reliance on all relevant qualifications for admission, rather than the presently over reliance on LSAT scores and the UGPA.
- Collaborate with the American Bar Foundation to ensure diversity-related research and scholarship receive funding and publication priority.

EMERGING ISSUES

DIVERSITY: A JOURNEY (NOT A DESTINATION)

How we view our efforts to improve diversity in the legal profession must evolve to reflect changes in society. Today, diversity must be seen as an ongoing practice, and not an end-state. It requires sustained long-term commitment, leadership, innovation, and continuous financing. Like financial planning, marketing, and client relations, diversity must hold a permanent position within legal organizations' standard operations. National and international demographics, constituencies of legal organizations, and social conditions influencing inclusion and opportunity are continually changing. Such regular change requires us to evaluate, modify, and improve our work on diversity—perpetually. Diversity is not a destination but a journey.

Walmart Drives Diversity Within its Legal Department and Beyond

– Walmart's Commitment to Diversity Reflects Its Respect for Its Associates and Customers –

Walmart believes that a diverse and multicultural workforce is the foundation for excellence. Diversity is also the foundation for an inclusive and sustainable business. The Legal Department has advanced diversity initiatives internally and externally with the same focus – striving for excellence in its legal representation.

Walmart Legal Department's Dedication to Internal Diversity:

- In 2002, Walmart's Legal Department began its journey toward building a more effective legal department by recognizing that it would reach its highest potential by identifying and recruiting the finest diverse attorneys. Walmart pinpointed not only diversity, but also integrity, experience, academic credentials, and the ability to produce results, as keys to building and maintaining a world class legal department.
- The Walmart Legal Department is widely credited with attracting some of the nation's best legal talent, and in the process, created one of the most diverse and effective legal departments in corporate America.
- Today, of the more than 150 lawyers that comprise Walmart's legal department; 42 percent are women and 34 percent are attorneys of color.
- Walmart's Legal Department has a strong record of promoting women and minorities to management positions within the department and for supporting its associates as they are promoted into the company's business units.

In addition to its in-house legal team, Walmart's Legal Department strongly advocates for diversity across the legal profession. Walmart's efforts are seen in three key areas: partnering with a significant number of bar associations, trade organizations, non-profits, NGOs and other entities to raise awareness about diversity and inclusion and advance opportunities for their members, partnering with outside counsel that not only support diversity in the profession but take action to achieve it, and supporting pipeline programs that open the profession to greater participation by all interested, talented individuals.

Walmart Legal Department's External Diversity Leadership:

- Walmart's Legal Department was an early signatory to the "Call to Action", a corporate commitment by Fortune 500 companies to advance diversity in the legal profession and is an active member of the Leadership Council on Legal Diversity.
- Walmart evaluates outside counsel on three criteria: performance, cost-effectiveness and diversity.
- Walmart's Legal Department encourages its outside counsel to integrate diversity as a key component of their business model and requires that law firms assign diverse attorneys to work on Walmart matters.
- Walmart's Legal Department also works to increase the diversity of the legal profession by supporting programs whose primary purpose is to increase the number of diverse students in the legal education pipeline.

Recent Accolades:

- Founding Sponsor Award, Hispanic National Bar Foundation, 2008
- President's Award, National Asian Pacific American Bar Association, 2009
- Corporation of the Year Award, National Bar Association Commercial Law Section, 2010

LexisNexis is committed to diversity and inclusion

As a global organization, we value people of all cultures, races, religions, nationalities and ethnicities, regardless of gender, gender identity and/or expression, age, disability or sexual orientation. We are committed to promoting a diverse workforce and strive to create a work environment that respects individuals and their contributions, and fosters innovation.

- LexisNexis is a major supporter of the American Bar Association, Judicial Clerkship Program. JCP brings minority law students, judges and former law clerks together in an effort to introduce the clerkship experience. LexisNexis, a participating partner of this effort from the beginning of the program, will join JCP in celebrating the program's 10th anniversary at the 2010 ABA Midyear Meeting.
- Achieved the top rating of one hundred percent in the Human Rights Campaign (HRC) Foundation 2010 Corporate Equality Index and Best Places to Work survey on lesbian, gay, bisexual and transgender (LGBT) equality in corporate America. This recognition is based on the latest HRC survey and independent research. The HRC Foundation is the nation's largest lesbian, gay, bisexual and transgender civil rights organization.
- Sponsor of The Minority Corporate Counsel Association (MCCA) 10th Annual Creating Pathways to Diversity® Conference.
- Partnered with the MCCA to celebrate the launch of the MCCA Community on LexisNexis® Martindale-Hubbell® Connected by offering two special LexisNexis Martindale-Hubbell Connected Fellowship Awards. The MCAA and LexisNexis Martindale-Hubbell selected two recipients who received a $15,000 fellowship funded by LexisNexis Martindale-Hubbell to assist in furthering the educational and professional objectives of two, third-year law students who anticipate graduating from law school in 2010.
- The LexisNexis® Diversity Supplier Program provides a means of fostering economic growth within the business community and brings more diversity entrepreneurs into the mainstream of the American free enterprise system. The objective of the LexisNexis Diversity Supplier Program is to expand purchasing relationship with small, minority-owned, women-owned, disabled veteran-owned, veteran-owned and Hubzone business concerns.
- LexisNexis has a number of affinity groups that advance community, helping drive diversity initiatives and mentoring. The groups include but are not limited to LexisNexis Women Connected, The African American Network, Gay & Lesbian Alliance, a Multicultural Group and a Veterans Group.
- LexisNexis is committed to giving low-income people access to justice through pro bono work. We donate our services to lawyers who share our commitment—lawyers working for firms, corporations and nonprofit legal services organizations around the globe—and mobilize our own attorneys to volunteer for pro bono work. We are a corporate sponsor of Probono.net (www.probono.net), an innovative nonprofit organization that works to ensure access to legal services for those who cannot afford a lawyer. The Probono.net site has helped more than 50,000 attorneys find pro bono opportunities, training events, mentors and resources that allow them to provide legal assistance to low- and moderate-income people. Probono.net also helps in excess of three million people each year with questions about their legal rights and helps them find free legal aid in their communities.
- In 2008 LexisNexis sponsored the American Bar Association's National Training Institute on Civil Remedies for Human Trafficking Victims, training approximately 100 pro bono attorneys on remedies for victims.
- In July 2008, LexisNexis sponsored the first World Justice Forum in Vienna, during which over 450 governmental and non-governmental leaders from all parts of the world assembled to develop collaborative actions to strengthen the Rule of Law. In conjunction with this event, LexisNexis launched the Rule of Law Resource Center. This free online community connects those working to advance the Rule of Law by providing relevant information, expert commentary and other resources. The Center has enjoyed nearly 20,000 visits since its inaugural months in 2008 and continues to be a key global initiative for LexisNexis.

LEGAL SCHOLAR TEAM

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DIVERSITY PRACTITIONER WORKING GROUP

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THE **ABA CENTER FOR RACIAL AND ETHNIC DIVERSITY (www.new.abanet.org/centers/diversity/)** provides the framework for effective utilization of ABA resources committed to diversity; improves coordination and collaboration of diversity efforts throughout the Association; and helps to maintain racial and ethnic diversity as a priority issue for the Association, in support of ABA's Goal III. The Center is comprised of three racial and ethnic diversity entities.

ABA Commission on Racial and Ethnic Diversity in the Profession provides services for racially and ethnically diverse lawyers, judges, and others who are in the legal profession. The Commission's projects include: Minority Counsel Program; Spirit of Excellence Award; and, Goal III Report.

ABA Coalition on Racial and Ethnic Justice addresses and provides services on social justice matters related to racial and ethnic bias in the justice system. COREJ's projects include: Overrepresentation of Juveniles of Color in Juvenile Justice Project; Natural Disaster Response & Social Justice Strategies Initiative; and, Election Protection.

ABA Council for Racial and Ethnic Diversity in the Educational Pipeline provides services to increase diversity among students in the educational pipeline to the legal profession. The Pipeline Council's projects include: ABA/LSAC Pipeline Diversity Directory; Judicial Clerkship Program; and, Regional Pipeline Diversity Roundtables and Workshops.

THE COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW (http://www.abanet.org/disability) promotes the ABA's commitment to justice and the rule of law for persons with mental, physical, and sensory disabilities; and, to promote their full and equal participation in the legal profession. Its current projects include National Law School Disability Programs Directory (online), National Mentor Program for Lawyers and Law Students and with Disabilities, and the Paul G. Hearne Award, which is given annually to an individual or organization that has performed exemplary service in furthering the rights, dignity, and access to justice for people with disabilities.

THE COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY (http://new.abanet.org/sogi/Pages/ default.aspx) works to secure equal treatment of persons in the ABA, the legal profession and the justice system, and to remove barriers to professional advancement without regard to sexual orientation or gender identity. SOGI has been working on ways to increase LGBT attorney membership in the ABA. It has also worked with American Bar Endowment to expand coverage to include domestic partners and American Bar Insurance to expand their coverage to LGBT attorneys and their domestic partners.

THE COMMISSION ON WOMEN IN THE PROFESSION (http://www.abanet.org/women) is committed to secure the full and equal participation of women in the ABA, the legal profession, and the justice system. One of its major projects is the Women of Color Research Initiative, which examines the professional trajectory of women of color. The first phase of this project explored diversity and inclusion in the experiences of lawyers in law firms. The second phase will study the experiences of lawyers in the government sector; and the third research phase will focus on the perspectives of lawyers in the Fortune 500 legal departments. Another highly respected Commission project is its annual ABA Margaret Brent Women Lawyers of Achievement Awards.

DIVERSITY AT THE ABA

1973 Commission on Mental and Physical Disability Law created to promote the rule of law for persons with mental, physical, and sensory disabilities and their full and equal participation in the legal profession.

1980 ABA President calls for "a better understanding of the concerns and problems of minority lawyers" to determine constructive and meaningful ways to address these problems.

1986 Goal IX—*To promote Full and Equal Participation in the Profession by Minorities and Women*—adopted.

1986 Commission on Opportunities for Minorities in the Profession created; later becomes the Commission on Racial and Ethnic Diversity in the Profession.

1987 Commission on Women in the Profession created to assess the status of women in the legal profession, and identify barriers to advancement.

1992 Presidential Task Force on Minorities in the Justice System created; later becomes the Coalition on Racial and Ethnic Justice.

1995 Spirit of Excellence Award established to recognize individuals who have contributed to the advancement of racial and ethnic diversity in the profession.

1999 ABA Presidential Advisory Council on Diversity created to focus on improving diversity in the pipeline to the profession; later becomes the Council for Racial and Ethnic Diversity in the Educational Pipeline.

2000 ABA Legal Opportunity Scholarship Fund created to encourage racial and ethnic minority students to attend law school and to provide financial assistance to those in need.

2001 ABA Center for Racial and Ethnic Diversity created as coordinating body for diversity efforts throughout the ABA.

2007 Commission on Sexual Orientation and Gender Identity created to secure equal treatment of persons in the ABA, the legal profession and the justice system.

2008 ABA restructured its Mission & Goals, and identified diversity as one of only four Association priorities. The new Goal III is to:

"ELIMINATE BIAS AND ENHANCE DIVERSITY"

with the following objectives:
Promote full and equal participation in the association, our profession, and the justice system by all persons.
Eliminate bias in the legal profession and the justice system.

2009 ABA Presidential Diversity Summit - Diversity in the Legal Profession: The Next Steps?

2010 Release of "ABA Presidential Diversity Initiative - Diversity in the Legal Profession: Next Steps" Report and Recommendations.


AMERICAN BAR ASSOCIATION
Defending Liberty
Pursuing Justice

Taking to Task Race and the Criminal Justice System

Examining Assumptions, Investigating Possible Causes, Ensuring Fairness

BY ROBERT S. CHANG

In the wake of comments on race and crime reportedly made on October 7, 2010, by two Washington State Supreme Court justices, concerned community members came together to form what became the Task Force on Race and the Criminal Justice System. This column gives a brief overview of the Task Force and its work to date. Convened by the Honorable Steven C. González, chair of the Washington State Access to Justice Board and King County Superior Court judge, and by me, the first Task Force meeting was attended by representatives from the Washington State Bar Association, the Washington State Access to Justice Board, the commissions on Minority and Justice and Gender and Justice, and all three Washington law schools, as well as leaders from nearly all of the state's specialty and minority bar associations, and other leaders from the community and the bar.

We met because the simplistic notion that black overrepresentation in our prisons occurs because blacks commit more crimes does not fit with our sense of how racial and ethnic minorities are treated in today's society and in our criminal justice system. We agreed that we share a commitment to ensure fairness in the criminal justice system. We realized quickly, though, that it was important not to proceed on assumptions that unfair treatment existed. The Research Working Group was created to investigate disproportionalities in the criminal justice system and, where disproportionalities exist, to investigate possible causes. We examined differential commission rates, facially neutral policies, and bias as possible contributing causes.

We released our *Preliminary Report on Race and Washington's Criminal Justice System* and presented our findings on March 2, 2011, when the Task Force met with the Washington State Supreme Court at the Temple of Justice in Olympia. In our executive summary, we noted that existing Washington research had found the following with regard to specific topics, agencies, and time periods studied:

- In Washington's juvenile justice system, similarly situated minority juveniles face harsher sentencing outcomes and disparate treatment by probation officers.
- Defendants of color were significantly less likely than similarly situated white defendants to receive sentences that fell below the standard range; among felony drug offenders, black defendants were 62 percent more likely to be sentenced to prison than similarly situated white defendants.
- With regard to legal financial obligations, a common though largely discretionary supplement to prison, jail, and probation sentences for people convicted of crimes, similarly situated Latino defendants receive significantly greater legal financial obligations than their white counterparts.
- Disparate treatment has been discovered in the context of pretrial release decisions, which systematically disfavor minority defendants.
- Regarding the enforcement of drug laws, researchers have discovered a focus on crack cocaine — a drug associated with blacks stereotypically and in practice — at the expense of other drugs, and that the focus on crack cocaine results in greater disproportionality, without a legitimate policy justification.
- This disparity in drug-law enforcement informs related asset forfeitures, which involve distorted financial incentives for seizing agencies and facilitate further disparity.
- With regard to the Washington State Patrol, researchers have found that although racial groups are subject to traffic stops at equitable rates, minorities are more likely to be subjected to searches, while the rate at which searches result in seizures is lower for minorities.

We concluded that race and racial bias affect outcomes in the criminal justice system and matter in ways that are not fair, that do not advance legitimate public safety objectives, and that undermine public confidence in our criminal justice system.

The Recommendations/Implementation Working Group presented a set of recommendations to the Washington State Supreme Court. The Community Engagement Working Group is broadening our engagement beyond the legal community and is working to develop regional hubs in different parts of the state.

The Education Working Group, co-chaired by the deans of the three Washington law schools, has been developing educational programming that includes the following: a panel discussion, "Racial Disparity and the Criminal Justice System," at the University of Washington School of Law in February 2011; a CLE on Civil and Criminal Advocacy Strategies for Protecting Civil Rights at Seattle University School of Law in April 2011; a panel at the Superior Court Judges' Association Spring Conference in May 2011; sessions at the Washington State Access to Justice/WSBA Bar Leaders Conference in June 2011; and a conference at Gonzaga University School of Law on Race and Criminal Justice in the West in September 2011.

In Spring 2012, the law reviews at each of the three law schools are planning to publish

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our *Preliminary Report*. This co-publication reflects the recognition by the three law reviews that the subject of race and the criminal justice system is an important issue that merits this historic cooperation, a first in this state and perhaps in the nation. This joint effort by all three reviews is reflective of the spirit of cooperation that has brought so many people and organizations together on the Task Force.

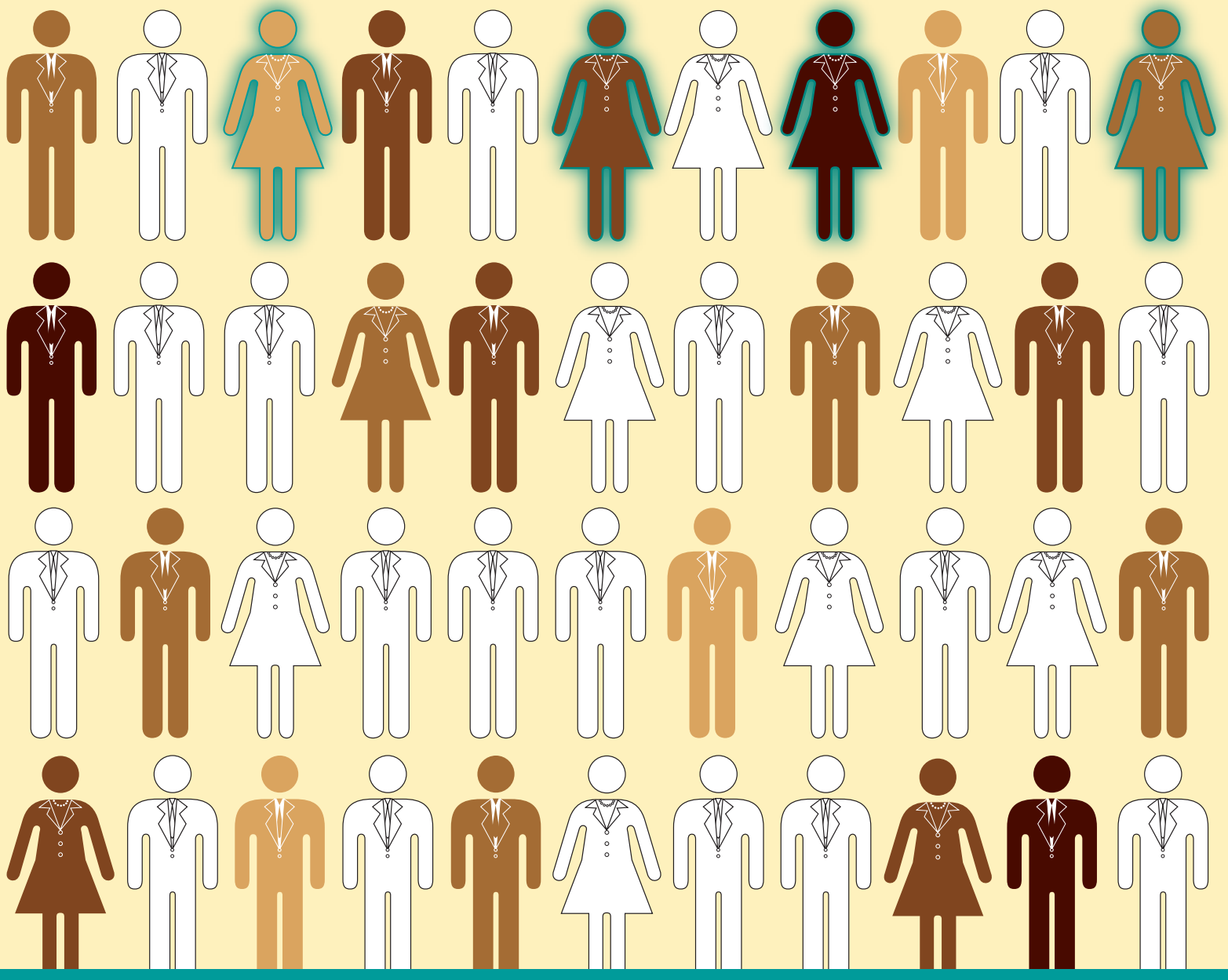
We have seen membership on the Task Force grow as more individuals, organizations, and institutions have committed themselves to learn and work together to address problems that exist in our criminal justice system. As proud as we are of our work to date, we recognize that we are at the beginning of a long road and that success is not assured. We invite engagement, feedback, and criticism. And if you find yourself so inclined, consider joining the Task Force.

The Preliminary Report *and additional information can be found at the following websites: www.law.seattleu.edu/x8777.xml (primary Task Force website); www.law.washington.edu/about/racetaskforce/default.aspx; www.law.gonzaga.edu/centers-programs/task_force_on_race.asp.*

Robert Chang is professor of law and the founding director of the Fred T. Korematsu Center for Law and Equality at Seattle University. Starting this summer, he will assume an additional role as associate dean for research and faculty development. He has received numerous recognitions of his scholarship and service and has served in leadership positions in many organizations. He is currently serving as co-chair of the statewide Task Force on Race and the Criminal Justice System.

From Visible Invisibility to Visibly Successful

Success Strategies for Law Firms and Women of Color in Law Firms



ABA Commission on Women in the Profession

AMERICAN BAR ASSOCIATION
Defending Liberty
Pursuing Justice

Commission on Women
in the Profession
American Bar Association

From Visible Invisibility to Visibly Successful

Success Strategies for Law Firms and Women of Color in Law Firms

ABA Commission on Women in the Profession

AMERICAN BAR ASSOCIATION
Defending Liberty
Pursuing Justice

Prepared for the Commission by
Arin N. Reeves, J.D., Ph.D.

Commission on Women
in the Profession
American Bar Association

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2007–2008

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Any proceeds from this publication will go toward the projects of the ABA Commission on Women in the Profession.

Contributors

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Despite our best efforts, we inadvertently may misspell or omit a name. We sincerely regret any such errors and greatly appreciate being informed of them so that we can correct our records. To report any mistakes or oversights, please contact the ABA Commission on Women in the Profession at 312/988-5715.

A Note from the Chair

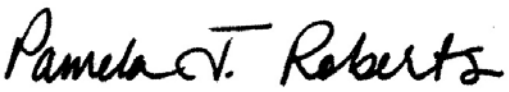
In the groundbreaking study *Visible Invisibility: Women of Color in Law Firms*, the American Bar Association Commission on Women in the Profession analyzed the challenges that women of color in private practice face, including demeaning comments or harassment; a lack of networking opportunities; denial of assignments; a lack of access to billable hours; limited client development opportunities; unfair performance evaluations; and lower compensation. Not surprisingly, these and other barriers have impacted the retention and advancement of women of color, particularly into the partnership ranks of the nation's major law firms.

According to the National Association for Law Placement (NALP), minorities hold only 5.4 percent of law firm partner positions among the ranks of the nation's major law firms.* The numbers are even more disturbing for minority women, who hold only 1.5 percent of partner positions. These statistics are troubling and reveal that law firms have a long road to travel before achieving equality within the workplace.

In 1999, the general counsel of approximately 500 major corporations affirmed the essential need for diversity in the workplace by acting as signatories to *Diversity in the Workplace—A Statement of Principle.* In 2004, seeing a need for a more aggressive statement, Roderick Palmore, then Executive Vice President and General Counsel of Sara Lee Corporation, published a *Call to Action: Diversity in the Legal Profession,* which sets forth consequences for law firms pertaining to corporate expectations related to law firm diversity. The general counsel of more than 120 major corporations have signed the *Call to Action* and pledged a willingness to enforce that commitment with consequences both positive and negative. While we commend these and other corporate initiatives, it is clear that law firms need to accelerate and intensify their efforts.

So what can a firm do to further develop its commitment to diversity? This publication offers strategies that law firms can and should implement to improve diversity within the workplace. It also provides insightful advice from 28 women of color who have reached the partnership ranks of their law firms despite the barriers standing in their way. While individual journeys may differ, their counsel and insight are invaluable. Taken together, we hope the initial study and this publication will educate and inspire new and renewed efforts.

There is no one solution for eradicating barriers within law firms; neither is there one formula for establishing a truly open and diverse profession, but the strategies outlined are a starting point. This conversation is not over, but we hope this publication, shared with you and others in your workplace, will move all to act with conviction for meaningful change.



Pamela J. Roberts
Chair
Commission on Women in the Profession

* Analysis done by NALP from demographic information collected for its *2007-2008 NALP Directory of Legal Employers.*

From Visible Invisibility to Visibly Successful:

Success Strategies for Law Firms and Women of Color in Law Firms

Highlights

From Visible Invisibility to Visibly Successful: Success Strategies for Law Firms and Women of Color in Law Firms is the follow-up publication to *Visible Invisibility: Women of Color in Law Firms* (2006), the groundbreaking national study by the ABA Commission on Women in the Profession that discusses the intersection of race and gender and its impact on women of color in law firms. This report on success strategies for law firms and women of color is the result of information, insights, and advice gathered from 28 women of color partners in national law firms and an examination of law firm practices that contributed to their success. Each of the 28 accomplished women of color who contributed to this report experienced diverse journeys and shared their varying perspectives on how they embarked on careers in law firms, their positive and challenging experiences in law firms, the leadership roles they assumed in changing law firms, and the personal strategies they employed to be successful in law firms in spite of being "the first" or "the only" woman of color in their different firms.

The interviews and analyses identified two categories of strategies that need to occur simultaneously in order for law firms to achieve sustained success with women of color: 1) institutional changes in the way law firms are run, and 2) the empowerment of individual women of color to build the support, skills, resources, and power to succeed in spite of the barriers that currently exist in law firms.

Success Strategies for Law Firms

1. Grow and sustain active outreach to women of color through the firm's recruiting efforts.
2. Develop concrete measurement tools through which progress can be tracked, analyzed, and measured.
3. Develop various channels throughout the firm in which inclusive formal and informal networking can occur, and connect the networking activities to foster greater dialogue between persons of varied backgrounds, ethnicities, and races.
4. Develop quantitative measures for tracking and analyzing the flow of work within all the practice groups in the firm, and hold leaders of practice groups accountable for ensuring that work is distributed in an equitable and unbiased way.
5. Create general categories of skills and knowledge that younger lawyers can use to monitor their own success.
6. Build systems of self-advocacy into the attorney evaluation processes, and ensure that attorneys who are evaluating other attorneys are trained to evaluate in an open, effective, and unbiased manner.
7. Integrate business development skills-building into all areas of an attorney's development in the firm.
8. Develop a succession-planning strategy for the firm that integrates the inclusion of senior associates and junior partners in key firm management committees.
9. Create an effective Diversity Committee or similar leadership structure by ensuring meaningful participation by firm leadership, clear strategic planning around diversity issues, and adequate resources to effectively execute the clear strategies.

Success Strategies for Women of Color in Law Firms

1. "Believe in yourself, and do not let anyone shake your belief in yourself."
2. "Give excellence. Get success."
3. "If you can't find mentors, you have to make mentors."
4. "It takes a village to raise a lawyer."
5. "Network, network, network."
6. "It's all about that book [of business]."
7. "Take care of yourself."
8 "Show up. Speak up."

From Visible Invisibility to Visibly Successful:

Success Strategies for Law Firms and Women of Color in Law Firms

I. Introduction and Methodology

Visible Invisibility: Women of Color in Law Firms, the groundbreaking national study by the ABA Commission on Women in the Profession that discusses the intersection of race and gender and its impact on women of color in law firms, revealed some startling realities about the experiences of women of color:

- 49% of women of color reported having been subjected to demeaning comments or other types of harassment while working at a private law firm (compared with only 2% of white men reporting the same experiences).
- 62% of women of color reported being excluded from both informal and formal networking opportunities (compared with only 4% of white men reporting the same exclusion).
- 49% of women of color reported being informally mentored by white men (as compared to 74% of white men who reported being mentored by other white men).
- 44% of women of color reported being passed over for desirable work assignments (compared with only 2% of white men reporting the same experiences).
- 31% of women of color reported getting at least one unfair performance evaluation (less than 1% of white men reported ever having received an unfair performance evaluation).

These and other disparities identified in the experiences of women of color in law firms as compared to their white male counterparts allow us to better understand why women of color have a nearly 100% attrition rate from law firms at the end of eight years. The statistics are disturbing, and they reveal the distance that law firms have yet to travel in ensuring equal opportunity for all talented lawyers who enter this important sector of the legal profession.

Following the publication of *Visible Invisibility*, and with the aspiration of making the invisible visible, the Commission on Women examined the insights of women of color who have succeeded in entering the partnership ranks of national law firms, in spite of the statistics that predicted their failure and the barriers that challenged them much of the way. This report on success strategies for law firms and women of color is the result of that effort and has been developed through information, insights, and advice gathered from women of color partners in national law firms and an examination of law firm practices that contributed to their success.

The research methodology for this qualitative study of success strategies included: 1) 19 confidential, semi-structured, one-on-one interviews with women of color partners in national law firms;[1] 2) a qualitative scan of policies, programs, and strategies that firms are undertaking to increase their overall recruitment, retention, and advancement of racial/ethnic minorities and women; and 3) confidential informal dialogues with nine women of color partners in national law firms who were specifically solicited for their feedback on the success strategies outlined in this report.[2]

The above interviews and analyses identified two categories of strategies that need to occur simultaneously in order for law firms to achieve sustained success with women of color: 1) the implementation of institutional changes in the way law firms are run, and 2) the provision of resources and support sufficient to empower individual women of color to develop the skills and network to succeed in spite of the barriers that currently exist in law firms.

1. Of the 19 initial interviewees, 9 were African American, 7 were Asian Americans, and 3 were Hispanic. Two of the interviewees had practiced for less than 10 years, 4 had practiced between 11-15 years, 5 had practiced between 16-20 years, and 8 had practiced for over 20 years. One of the interviewees was in a smaller law firm while 18 were in large national law firms.

2. Of the 9 follow-up interviewees, 3 were African American, 2 were Asian Americans, 1 was Native American, and 3 were Hispanic. One of the interviewees had practiced for less than 10 years, 4 had practiced between 11-15 years, 3 had practiced between 16-20 years, and 1 had practiced for over 20 years.

II. Perspectives and Identification of Issues by Women of Color in Large Law Firms

The 28 women of color partners who participated in the initial and follow-up component of this study were specifically identified because of their longevity and prominence in law firms, their experience with diversity efforts in their firms and professional organizations, and their willingness to contribute their time and voices to this project. The confidential interviews provided an opportunity for these women to share their unique journeys and to offer their insights into the decision-making processes that led them to pursue a legal career and the personal strategies they employed to gain and sustain success in law firms. The interviewees also were asked to comment on best practices within law firms with regard to the hiring and retention of lawyers of color, particularly women of color.

"I relied much more on my creativity to craft my career than I did evidence of what was actually around me. All of the women in my family were hardworking. They were strong. But none were professionals. I wanted to be hardworking like the women I knew, strong like them. But I also wanted to be a professional. And they told me I could, so I did."

These accomplished women experienced diverse journeys. They share, however, remarkable similarities, especially in regard to their personal resolve to be successful, their creativity and resilience in overcoming obstacles, and their unwavering faith in themselves.

Education

The 28 women of color—all trailblazers in the legal profession—had varied educational experiences leading into law school. Some attended grade and high schools where the student body was primarily composed of minority students; others attended schools where no one looked like them. Some women experienced different demographics when their families moved from one region of the country to another.

While some of the interviewees knew at a relatively early age that they wanted to pursue a career in law, others were drawn to the law later in life by the reputation and stature of the profession. One woman commented on how she was drawn to being a lawyer: "I didn't go to college wondering what I was going to do; I knew I was going to be a lawyer." Another woman noted that the legal profession was a tool for getting the decision-making power she sought: "So when I went to college . . . I did not say 'I want to be a lawyer'; I said, 'I want to be a professional; I want to be a decision maker.'"

The majority of the interviewees had neither lawyers in their families nor access to lawyers who could serve as role models in their early life experiences. Few had parents who had been professionals, and only one had a parent who was a lawyer. That said, they drew inspiration and strength from their families, but they constructed careers out of their desires to expand beyond the realities they saw around them. As one woman reflected:

> I relied much more on my creativity to craft my career than I did evidence of what was actually around me. All of the women in my family were hardworking. They were strong. But none were professionals. I wanted to be hardworking like the women I knew, strong like them. But I also wanted to be a professional. And they told me I could, so I did.

Once their desires and creativities got them into law school, the academic achievements of the women also varied. Some of the interviewees were able to get the information they needed to focus their academic journeys through ad hoc mentors and participation in various incarnations of the Council of Legal Education Opportunities[3] (CLEO) program available at the time they began their law school careers. Others struggled to figure it out on their own. Several of the interviewees followed the route traditionally ascribed to partners in large law firms: attendance at top law schools, superior academic performance, participation on law reviews, and a career progression beginning as a summer associate in a firm where their ultimate career would be made. Most, however, reported a "more scenic" progression through their law school experience. Without mentors to help them focus on the right strategies or clarify their priorities, most of the women did not have an opportunity to learn the "unwritten rules" until well into their law school experiences, sometimes after their grades had already suffered. One woman summarized her "clueless-ness about the little things" by reflecting:

> No one told me that there were good outlines already floating around the law school. I had no idea. I made my own outlines from scratch, and they were horrible. By the time I realized I had to be plugged in with the white students to get the good outlines, it was already the end of my second year.

3. The Council of Legal Education Opportunities has held workshops and institutes for disadvantaged students entering law schools since 1968. They have evolved over the years from a volunteer-run organization to non-profit project officially housed in the ABA's Fund for Justice and Education. See www.abanet.org/cleo.

I also didn't know anything about law firms. The whole interviewing thing was like a foreign language. I didn't have an interpreter. When I went to the placement office, the woman just looked at me and suggested that I interview in the public sector.

Early Career Positioning

For those women able to navigate the law school process from the outset, their careers followed the classic pattern of early entrance into large law firm culture through a summer associate program after their second year of law school. Others participated in judicial clerkships, accepted government positions, or took positions with small firms or legal service providers. A few selected their first legal position as a result of considerations such as the location of family or boyfriends. Others, as a result of somewhat mediocre grades and degrees from less than prestigious law schools, initially struggled to find career opportunities. No matter where they started, they shared the commonality of being committed to succeeding. As one woman stated, "I didn't see any job as too small or too big. I wasn't necessarily happy with where I initially was, but I knew I was going to be good. I stayed focused on that."

Once positioned in their first jobs, the interviewees were exposed to a variety of firm cultures. Typically, they were in firms that had very few women and even fewer lawyers of color. Access to mentors, sponsors, or champions was limited. Many of the women realized early in their careers that they were not going to be "adopted" by partner mentors the same way they saw their peers being mentored. Nonetheless, the thread of "making mentors" where none existed was woven through many of the women's experiences, especially in their realization that they needed to reach across to the white male partners in order for their careers to be successful. One woman recalled that "my life learning lesson . . . is that you really need mentors across races."

As the interviewees settled into their careers, their experiences varied widely. The interviewees who were litigators generally appeared to know immediately that this was their path within the profession and pursued it in their first law firm position. Others who developed transactional practices seemed less inclined initially, but grew into the area of practice they ultimately pursued—sometimes following a mentor, sometimes a client, and sometimes their own substantive interests. One interviewee noted: "Because mentoring and the work that you get go hand in hand in law firms, I wasn't sure at first if I was interested in the kind of work that my mentor did, but he wanted to see me succeed, and when I thought about the opportunities he would give me, that practice area just started looking better and better."

Most of the interviewees worked in a number or organizations or firms over the course of their careers. The movement across these entities was motivated by factors such as logical career evolution, bad experiences within firms, and changes in life course situations. As the interviewees cultivated client relationships and developed business, some were pursued or courted by their future employers.

Most of the women in this study recounted various degrees of negative experiences in their firms. Sometimes the negative experiences were general workplace issues that drove them to look for work environments where they would have greater control over their lives. One woman contacted a headhunter because she realized that the first firm in which she had taken a job was a bad fit for her: "I didn't see myself staying at that firm because people were billing an average of 2,200 hours, and that was considered a slacker, and I knew I wasn't going to sell my soul to that . . . and, I liked to spend time with my baby, and I heard about other firms with different reputations, so I contacted a headhunter."

Other times, the negative experiences were more specific to their trailblazing journeys as the first female partner of color or the first partner of color in their firms. For example, few of the large firms had either diversity committees or dedicated personnel whose efforts were focused on diversity concerns. With no organizational focus on diversity, these pioneers experienced high levels of stress and dissatisfaction with their careers, causing them to question whether they really were enjoying their careers in the law. Their dissatisfaction arose from difficulties with colleagues, encounters with both gender and racial stereotypes, problems with developing a book of business, and hurdles in gaining recognition and credit for the work they did. One woman became so stressed that she developed physical symptoms, resulting in her physician's recommendation that she take a leave of absence:

"[M]y life learning lesson . . . is that you really need mentors across races."

I took two months off. I literally just slept the first week. The second week, I started losing weight. I had gained 35 pounds since I had started at that firm. I started working out, taking yoga, and I was really happy. Then, it occurred to me . . . I don't have to go back. So, I didn't. I worked with a headhunter to find a firm that really worked for me, and I'm happy and successful.

Another woman laughed as she described her fourth year as an associate:

I was doing some environmental work and focusing on all these definitions of toxicity and waste. Air

pollution . . . water pollution . . . noise pollution . . . and one day, I walked into the firm and decided that people pollution was also a form of toxicity, and I was in a toxic environment. I stayed at that firm for another two years, but I had a better attitude about it once I decided that I was going to leave sooner rather than later.

Diversity Committees

Just as many of the women "made" their own mentors, they either initiated or became involved in "making" change in their firms as well. "As I grew up and matured, it made sense that my firm needed to grow up too," said one woman, "so I started the Diversity Committee. For about two years, there were, like, three people on the committee. But now, it's thriving." Many of the interviewees helped to create the diversity committees in their firms or have participated actively in these committees, often in leadership roles. While the goal of these committees is similar across law firms, the interviewees expressed a wide divergence in their actual operation. Some felt that, after a flurry of activity, the committee within their firm often became stagnant and ineffective; others felt that the committees within their firms were functioning well but not doing all that they could be doing. Many of the interviewees indicated that with respect to work-life balance—*e.g.*, parental leave, part-time positions—their firms had established some successful policies.

"I was doing some environmental work and focusing on all these definitions of toxicity and waste. Air pollution . . . water pollution . . . noise pollution . . . and one day, I walked into the firm and decided that people pollution was also a form of toxicity, and I was in a toxic environment. I stayed at that firm for another two years, but I had a better attitude about it once I decided that I was going to leave sooner rather than later."

Interviewees cited a number of factors that are essential elements of a successful diversity committee. These included, with regard to structure, the investment and participation of a managing partner and periodic assistance from outside consultants to help set agendas and develop plans with benchmarks. In addition, the interviewees commented that the assignment of permanent, committed staff devoted to diversity issues was critical to ensure that attorneys, particularly attorneys of color, who were growing or maintaining a practice had the administrative support needed. As one woman commented: "You can say that's a policy, but what happens on the implementation is what you've got to watch out for." Administrative support was necessary both for the successful implementation of a firm's diversity efforts and the alleviation of pressures from the women of color to whom the diversity efforts were important. Another woman observed that although the firm benefited greatly from her efforts on diversity, her compensation did not reflect her work on the issue: "I spend all year on this, and they are touting our efforts to our clients and such, and at the end of the year, I hear that they are disappointed by my hours. I realized then that I couldn't do this at the expense of my career."

"It can't just be the issue of the women of color or the men of color or the women. Everybody's got to have a stake in the outcome, and that was the key focus of it."

Some interviewees commented that unless there was a deep, firmwide commitment to diversity, a diversity committee was not likely to produce tangible results. For instance, a situation where an individual is identified and asked to undertake the responsibility of a diversity officer as an add-on to other firm responsibilities might not result in an effective outcome. One lawyer stated that at her firm, a white male partner was identified as the Diversity Partner, with the logic that if he became passionate about the plan, others would follow by the example he set. One women of color stated, "It can't just be the issue of the women of color or the men of color or the women. Everybody's got to have a stake in the outcome, and that was the key focus of it."

The interviewees expressed concern that diversity committees have been more successful in their recruiting efforts and less successful in their retention efforts. The interviewees also observed that retention, although a critical concern in diversity, was a challenge impacting all associates. One woman remarked that the sheer number of opportunities in the marketplace was a major cause of attrition of associates at her firm: "Ten years ago, if you treated people badly, what choice did they have? Now, there are firms doing good things, and the associates have choices. If we don't meet their needs, they will go elsewhere." Another woman commented that the younger generation generally expects that diversity be a key component of a good workplace: ". . . the people that are just out of law school now, people that are first and second years, I think they see the world differently. I think they do expect more inclusion . . . they expect more diversity

. . . they expect more in general." Many interviewees noted that younger lawyers of color had a different set of expectations about inclusion based on their life experiences. These expectations, combined with the continued lack of mentoring and the increased number of opportunities in the marketplace, made retention of women of color a particularly challenging issue for law firms, according to several interviewees.

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The reluctance of law firms to serve as leaders on diversity efforts was also identified as a potential weakness. As one interviewee noted: "Law firms and management are not very creative, and they are afraid to do things that other people have not done. I think it really affects diversity programs, because no one is significantly creative." Another lawyer echoed these sentiments:

> The reason why it's easy to sell a scholarship fund is because other firms are doing it, and that's all you have to say: "Well, so and so has done it and this is why you should do it." Now, if you were to sell a program that no one else has ever done, it's like pulling teeth and nobody has the time to do it. . . .

Notwithstanding their frustrations with diversity programs, many of the respondents reported personal satisfaction from their efforts to make the path easier for women of color who followed in their footsteps. One partner noted that "it was very natural for me to get involved and stay involved with this issue because it is a part of my life to change what I see around me to make it better for others. It is a part of what makes my career satisfying as a whole."

Mentoring

Mentoring was identified as both a critical element of retention and a very complex concept. The interviewees agreed that mentoring needed to be hands-on, assertive, and aggressive. There was also relative agreement that mentors should be positioned to provide advice, access to good clients and assignments, and situated in the sphere of influence within the firm. Capturing the essence of the concept while distinguishing a mentor from a sponsor, one interviewee noted: "I can be a mentor, but I can't be a significant sponsor, because I don't have the power that I'm perceived to have within the context of the firm." One key way in which mentors can make a major difference is through the assignment process—helping women of color obtain important client work in which they are trusted to do the job. In describing what the lawyers in her first firm did to mentor her, one interviewee commented:

> They did really good things in terms of assignments, but also in terms of constructive criticism and allowing you to develop. Because a lot of what happens to lawyers of color in particular is, you make a mistake and you're not allowed to learn from it and move on.

According to several of the women, mentoring was also instrumental to the development of a client base—a factor more critical to the success and mobility of a lawyer than the number of billable hours one generates. A good mentoring relationship creates an entry for the mentee into key networks, both internally within the firm and externally in key industry circles. One woman stated that "who introduces you to the right people is as critical as getting in front of the right people. People are busy. They will take a phone call from you or go to lunch with you if you say the right name."

A good mentoring relationship creates an entry for the mentee into key networks, both internally within the firm and externally in key industry circles.

The respondents agreed that ensuring a good fit between the mentor and mentee is more critical than pairing relationships along racial lines. One interviewee reflected: "I think you need mentors across racial lines and . . . I think you need both . . . . As a person of color, no matter how much anyone empathizes with you, unless they've been through it, it's kind of hard to understand the dynamic of what it is you feel and experience." Concurring, another lawyer noted: "I think we ought to be their informal ones, but they ought to have a formal one who's somebody else. And they need to get out of that notion of thinking the only mentors they can have are [of their same race.]"

III. Success Strategies for Law Firms

Based on the statistics in the *Visible Invisibility* report and the insights provided by the women of color interviewed for this study, law firms need to change these key areas of their organizational structures and cultures:

1. **Grow and sustain active outreach to women of color through the firm's recruiting efforts.**
   - Firms should participate in job fairs and develop relationships with minority student organizations. They should consider offering positions to students after their first year of law school and partner with law schools to develop programs that address the intricacies of constructing resumes and understanding the practice of law and law firm culture.
   - Law firms should integrate into their recruiting strategies the recognition that young lawyers of color have different expectations with regard to inclusion (such as broader definitions of diversity, more comprehensive diversity policies and programs, and efforts that focus specifically on work allocation, mentoring, and professional development) from the generation that preceded them, and that young lawyers generally have different expectations with regard to their career trajectories.

2. **Develop concrete measurement tools through which progress can be tracked, analyzed, and measured.** Women of color often reported how difficult it was for them to illustrate to the firms that there were impediments to their ability to succeed, because firms did not maintain data in a consistent way that allowed them to see the points at which women of color were not being included in the opportunities available within the firm.
   - Track how many women of color are hired into the firm and how many are leaving by practice area, seniority, office (if you have multiple offices), and other criteria that are specifically relevant to your firm.
   - Recognize the value of maintaining good relationships with young lawyers who leave the firm, regardless of their reason for doing so. The associate of today may be the client or referral source of tomorrow. Part of that effort should be to assist young lawyers who wish to leave the firm in finding a position that is best suited to them.
   - Implement an effective exit interview strategy where you can gather candid information about why people are leaving the firm and where they are going.

3. **Develop various channels throughout the firm in which inclusive formal and informal networking can occur, and connect the networking activities to foster greater dialogue between persons of varied backgrounds, ethnicities, and races.** Although many women of color had formal mentors assigned to them through formal mentoring programs, they felt that the more effective mentoring occurred in the informal mentoring where partners developed meaningful relationships with associates, invested in the associates' success, and eventually sponsored the associates when promotion decisions came up. Women of color often felt that white men were uncomfortable around them and, therefore, did not reach out to mentor them in this critical way.
   - Create opportunities for the firm leadership to communicate consistently to partners the importance of mentoring in an inclusive way that offers real opportunities to all lawyers hired into the firm.
   - Implement confidential upward review processes so that associates can evaluate the ways in which they feel they are being effectively or ineffectively mentored. To strengthen the impact of the upward review process, a portion of partner compensation should be linked to effectiveness ratings that partners receive from associates.
   - Create frequent opportunities (group lunches, practice group breakfasts, CLE sessions, etc.) where people can talk about their practices, client development activities, bar activities, etc., with each other. The more opportunities people of diverse backgrounds have to interact with women of color and the work they are doing, the sooner they will naturally lose some of their discomfort at the perceived differences.
   - Integrate seniority-specific opportunities for women of color lawyers to shadow, liaise, and work with more senior lawyers. For example, assign junior lawyers to a client pitch team to conduct background research on the industry, the company, and the lawyers in the target legal department. Also, consider assigning income partners and even senior associates to liaison roles on key firm committees, such as the management/executive committees, compensation committees, policy committees, etc.
   - Create active affinity groups as support mechanisms within a firm. They serve a purpose by recognizing that not all people of color experience the same issues.

4. **Develop quantitative measures for tracking and analyzing the flow of work within all the practice groups in the firm, and hold leaders of practice groups accountable for ensuring that work is distributed in an equitable and**

unbiased way. Women of color consistently cited the quantity and quality of work to which they had access as one of the primary factors influencing their decisions to stay at particular firms or to look for opportunity elsewhere.

- Develop clear measurement tools to track how work is being distributed within various sectors of the law firm. These metrics will be especially effective if they measure specific data points, such as the comparison of how women of color's quarterly hours compare with everyone's else's hours; the analysis of how many women of color are working on key clients for the firm; the analysis of how many women of color are included in client pitches *and* are given meaningful roles in the work that results from those pitches; and the comparison of the utilization rates of women of color with the utilization rates of their peers.
- Create a role for the Diversity Committee or a partner in the firm to track the above statistics on a monthly or quarterly basis to identify and correct emerging issues with associates at an early stage.
- Create accountability mechanisms by which practice group leaders are responsible for monitoring and correcting work-flow imbalances within practice groups.

5. **Create general categories of skills and knowledge that younger lawyers can use to monitor their own success.** Women of color frequently expressed frustration with the lack of transparency in regard to expectations, evaluations, and promotion decisions, which hindered their ability to identify best practices and strategies for their own careers. The lack of transparency also was cited as a barrier to women of color comparing their advancement in law firms to the advancement of their peers.
   - Develop and communicate "core competencies" for the various seniority levels and practice areas within the law firm, including specific expectations for partnership selection. For example, the core competencies for a junior associate in a real estate practice group will differ from the core competencies for a senior associate in securities litigation. Although it is challenging for law firms to create these sets of core competencies and expectations, the level of transparency that this process will engender will lead to much greater retention of women of color.
   - Create consistent opportunities within the firm (panel discussions, small group lunches, etc.) for associates to have conversations with partners and firm leaders on what the firm expects from them, what the firm expects from associates generally, how promotion decisions are made, and how the partnership election process works.
   - There should be intervention structures in place to identify and address problems experienced by young lawyers earlier in their career trajectory rather than at the point of the partnership decision.

6. **Build systems of self-advocacy into the attorney evaluation processes and ensure that attorneys who are evaluating other attorneys are trained to do so in an open, effective, and unbiased manner.** Many women of color reported that they felt their performance evaluations were unfair for two core reasons: 1) they felt that they did not receive the feedback in the course of working with someone even when they rigorously sought that feedback, and 2) they did not feel that they had a voice in advocating for themselves when no one was advocating on their behalf.
   - Develop a self-evaluation system for all associates through which they can communicate to the firm their perspectives regarding their annual objectives, what actions they took to accomplish those objectives, what challenges they faced in accomplishing their objectives, and other such self-advocacy items that allow the younger lawyers to have a meaningful voice in their evaluation process.
   - Develop and implement a leadership development curriculum within the firm that focuses on teaching younger lawyers key communication, conflict resolution, team management, and other such skills in addition to the legal skills that they are already required to master.

7. **Integrate business development skills-building into all areas of an attorney's development in the firm.**
   - Involve younger associates on pitch teams and strategically plan for greater involvement and communication with clients early in an associate's career.
   - Integrate business development skills into all formal training programs.
   - Create specific client development training workshops for senior associates who need to hone those skills in preparation for partnership.
   - Invest in business development coaches who can work with individuals on a more extensive basis during their senior associate and junior partnership years to build better networks and translate contacts into clients.
   - Identify clients who share the firm's commitment to diversity, and find ways to partner with those clients to create greater visibility and exposure to the women of color within your firm.

8. **Develop a succession planning strategy for the firm that integrates the inclusion of senior**

associates and junior partners in key firm committees.

- Assign an associate and/or junior partner liaison to the management/executive committee (or a subcommittee of that committee) to introduce and develop firm management and leadership skills to younger lawyers.
- Identify leadership and management skill sets that are necessary for firm leaders and develop workshops for younger lawyers to introduce these skills to them at a younger age.

9. **Create an effective Diversity Committee or similar leadership structure by ensuring meaningful participation by firm leadership, clear strategic planning around diversity issues, and adequate resources to effectively execute the clear strategies.** Women of color generally reported positive feelings toward the existence of Diversity Committees in their firms, but they often felt that the committees were not well supported by the leadership of the firm and that they did not have a clear strategic direction through which they could make sustainable changes.
   - Create and maintain a visible and working role on the Diversity Committee for one or two key firm leaders, and ensure that the Diversity Committee has representation from diverse groups within the firm but is not comprised only of diverse lawyers.
   - Develop and follow a detailed strategic plan for the Diversity Committee's efforts and communicate the successes of the Diversity Committee to the whole firm on a regular basis. These plans should be reviewed regularly. This includes investment in administrative support and in funding for a diversity officer whose full-time responsibility is to move the Committee's efforts forward.
   - Create an external advisory board comprising leaders from the community, academics, and/or clients to whom the firm will report on its diversity efforts on a quarterly or semi-annual basis. The external accountability can both demonstrate a solid commitment to real action and create new sources of ideas and support for the firm's efforts.
   - Create compensation systems that recognize contributions to the firm's diversity efforts.

IV. Success Strategies for Women of Color in Law Firms

If law firms diligently developed, executed, and sustained the success strategies outlined in the previous section, they would be creating an environment in which women of color could thrive. The success of women of color, however, cannot be purely dependent on or delayed by the progress that law firms need to make. Women of color need to take charge of their own careers, and they need to navigate strategically to maximize their own success in spite of the challenges and barriers that they currently face.

The following success strategies for women of color in law firms are a synthesis of the perspectives, insights, and advice shared by the women of color partners who contributed their voices to this study.

"You look around and you don't see people who look like you in the partnership, and then you deal with a bad situation where people are questioning your merit, your worth, and there is a moment where you wonder, for real, if you are good enough to make it. That's the moment where you cannot let their answer be your answer."

1. **"Believe in yourself, and do not let anyone shake your belief in yourself."** In reflecting on their paths to success, many of the women of color partners talked about a pivotal incident or two where their faith in themselves was severely tested. In many cases, their confidence was tested by something which had a taint of racial or gender bias to it. "You look around and you don't see people who look like you in the partnership, and then you deal with a bad situation where people are questioning your merit, your worth, and there is a moment where you wonder, for real, if you are good enough to make it. That's the moment where you cannot let their answer be your answer," stated one partner who said that her choice to stay in a law firm after a particularly challenging incident gave her strength to push forward from that day on. "I just never looked back after that. I figured if that's the best they have to give, I can do this because I'm still stronger than anything negative they can throw my way."

2. **"Give excellence. Get success."** Several of the interviewees talked about the need for excellence as a building block for success. Many noted that excellence was a prerequisite for success for all lawyers in law firms, but it was especially critical for women of color to be seen, first and foremost, as excellent lawyers. One partner noted that excellence in the practice of law can mean the difference between being a "woman of color

lawyer" and "a lawyer who happens to be a woman of color." Her advice to younger women of color in her firm is to "focus on excellence always" because women of color "don't get the same margin of error or second chances" that white men may be granted.

3. **"If you can't find mentors, you have to make mentors."** One experience that most of the women of color partners in this study shared is that they sought out and pursued senior lawyers to be their mentors even though they saw that many of the senior lawyers were reaching out to young white men and ignoring the women of color. As one partner stated: "Yes, it's unfair. I had to work a lot harder to get mentors than the white guys. But I didn't take it personally. I wanted to be successful, and I was going to be successful. And if the mentor didn't come to me, I went to the mentor." Another partner focused on the need to have several mentors: "It's unrealistic to think that any one mentor can take care of you. I always tried to have lots of mentors, and I had to be thoughtful about it. I figured out what I needed, and I identified people who could help me get what I needed, and I asked. Okay, sometimes I harassed, but I got my mentors. And, by the way, many of them were white men. You have to be open enough to be mentored by white men. If you go to them, they will usually be there, but they are probably scared to come to you first."

"You have to be open enough to be mentored by white men. If you go to them, they will usually be there, but they are probably scared to come to you first."

4. **"It takes a village to raise a lawyer."** Many of the women of color partners talked about the various ways in which they built support systems outside of their law firms to compensate for the lack of support systems within. The support systems were often a combination of informal women of color networking groups, minority bar associations, family, and friends. Almost all of the partners talked about the importance of women of color realizing that doing it alone was unrealistic and not an ingredient for success. As one partner said: "Women of color have to admit that we have issues asking for help. We think that it's weak [to ask for help]. That's crazy. You can't do this by yourself. You have to have help. And lots of it. You have to have help taking care of your kids, your house, and those incidentals of life, like picking up dry-cleaning, that can throw off your whole day. You have to have help in meeting the right people so you can network. You have to have help becoming a good lawyer. You have to have help in getting clients. And you have to ask for it. If it's hard for you to ask for help, practice asking with friends and family first. Then reach out to people in minority bars. And eventually work up to the white men in your firm. If you don't get help, you won't succeed."

'If you don't get help, you won't succeed."

5. **"Network, network, network."** Women of color partners frequently cited that their ability to create and deepen relationships with a broad range of people helped them overcome many of the barriers that they faced because they had someone to whom they could turn for information, advice, resources, or another job if they were looking to make an exit. They also advised that women of color proactively had to create these relationships. One partner reflected on her own experiences of starting off as a shy woman who didn't like to network: "When I was a younger lawyer, I didn't realize how critical networking was. I thought it would be enough to put my head down, do my work, do it well, and voila, success would come. I'm quite shy. I hate networking. As I started getting more senior, I realized that I didn't have the same access as people who could network. So, I decided to start networking like it was homework, a part of my job. I would set goals of meeting one new person a week, following up with one contact for lunch a week, and so on. Pretty soon, I was networking. I had a network, but I don't see myself as a schmoozer, you know. When my firm really screwed me on comp one year, I had another offer after three phone calls. When my firm found out, they realized what they had in me, and they did right by me."

6. **"It's all about that book [of business]."** Recognizing the reality that portable business is the key to success in any law firm today, many of the women cited the need for women of color to focus on strategically building their books of business. One woman discussed how she hired a coach for herself because the firm did not have adequate training on business development: "I really did see it as an investment in myself and my career. The coach helped me figure out how to network in a more targeted way specifically to make business contacts, and she and I had a weekly conference call to go over what I had done that week to stay on track. It kept me focused."

7. **"Take care of yourself."** "It's a marathon, not a sprint," said one partner, adding, "You have to take care of yourself physically, mentally, spiritually, and everything in between. Success in law firms is one part intellect and four parts stamina." Navigating the challenges of isolation, racial and gender bias, and many other barriers in the workplace can take a physical and mental toll on women of color. This toll is especially critical to recognize and resolve because practicing law in a law firm is, in and of itself, an activity of high stress. Self-care was stated by several of the women of color partners as a key strategy in setting up a successful legal career: "It sounds crazy, but the first thing I tell young women of color who come into the firm is to stay on schedule with annual physical checkups, get flu shots every November, have one physical activity that you do at least four times a week, get monthly massages, and have a therapist on standby. Go ahead and laugh, but in addition to my legal skills, it's this stuff that keeps me on my toes. They know not to mess with me because I'm ready to fight the long fight."

"It's a marathon, not a sprint."

8. **"Show up. Speak up."** Due to increasingly busy schedules, a lot of social events get skipped according to some of the women of color partners. "That is a big mistake. You have to show up. Out of sight, out of mind. You have to be visible to the people in your firm. Yes, you are tired. You are cranky. You want to go home. But you have to show up. Maybe it's only for five minutes, but you have to show up," stated one partner. Another partner took this advice further: "When you are at events, talk. Speak up. Walk up to people and talk. Talk about the weather, about anything. People pay attention to people who speak up. And if you speak up in the little ways, people will also listen when you need to speak up on the big things. The first time you open your mouth can't be when you have a problem with something."

"You have to show up."

V. Looking Ahead: Success Strategies for Women of Color in Law Firms

In order to transform the careers of women of color in law firms from visibly invisible to visibly successful, law firms have to first understand the specific issues facing women of color, and then address these issues in partnership with the women of color in their workforce. This report has outlined various strategies through which law firms can lay the foundations for women of color to have successful law firm careers and for women of color to ensure that they succeed. With consistent commitment and strategic action, the attrition statistics of women of color in law firms can be reversed, and the reversal of these statistics not only ensures true opportunity for all lawyers in law firms, but also will make law firms stronger and more competitive in an increasingly global marketplace where diversity is a critical component for sustained success.

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RPC RULE 6.1
PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to assist in the provision of legal services to those unable to pay. A lawyer should aspire to render at least thirty (30) hours of pro bono publico service per year. In fulfilling this responsibility, the lawyers should:

(a) provide legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civil, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide pro bono publico service through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civil, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate:

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

Pro bono publico service may be reported annually on a form provided by the WSBA. A lawyer rendering a minimum of fifty (50) hours of pro bono publico service shall receive commendation for such service from the WSBA.

Comment

[1] [Washington revision] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, at a minimum, the number of hours set forth in this Rule. Services

can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] [Washington revision] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means or organizations primarily representing such persons. The variety of these activities should facilitate participation by government lawyers, even when restrictions may exist on their engaging in the outside practice of law.

[3] [Washington revision] Persons eligible for legal services under paragraphs (a)(1) are those who qualify for services provided by a qualified legal services provider (see Washington Comment [14]) and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services under paragraphs (a)(1) and (2) include those rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] [Washington revision] A lawyer's responsibility under this Rule can be fulfilled either through the activities described in paragraph (a)(1) and (2) or in a variety of ways as set forth in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide

range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] [Washington revision] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving in a volunteer capacity on bar association committees or on boards of pro bono or legal services programs, taking part in Law Week activities, acting as an uncompensated continuing legal education instructor, an uncompensated mediator or arbitrator and engaging in uncompensated legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] [Reserved.]

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

Additional Washington Comments (13 - 16)

[13] Washington's version of this Rule differs from the Model Rule. Washington's Rule 6.1 specifies an aspirational minimum of thirty hours of pro bono publico legal services per year rather than fifty, but provides for presentation of a service recognition award to those lawyers reporting to the WSBA a minimum of fifty hours. Unlike the Model Rule, paragraph (a) of Washington's Rule does not specify that the majority of the pro bono

publico legal service hours should be provided without fee or expectation of fee. And Washington's Rule does not include the final paragraph of the Model Rule relating to voluntary contributions of financial support to legal services organizations. The provisions of Rule 6.1 were taken from former Washington RPC 6.1 (as amended in 2003).

[14] For purposes of this Rule, a "qualified legal services provider" is a not-for-profit legal services organization whose primary purpose is to provide legal services to low-income clients.

[15] Pro bono publico service does not include services rendered for wages or other compensation by lawyers employed by qualified legal services providers (as that term is defined in Washington Comment [14]), government agencies, or other organizations as part of their employment.

[16] The amount of time spent rendering pro bono publico services should be calculated on the same basis that lawyers calculate their time on billable matters. For example, if time spent traveling to a client meeting or to a court hearing is considered to be part of the time for which a paying client would be billed, it is appropriate to include such time in calculating the number of pro bono publico service hours rendered under this Rule.

Examining Privilege, Stereotypes, and Implicit Bias in the Workplace

KAHLIDA LLOYD AND JENNA NAND

The legal profession is one of a number of prestigious fields in America where good intentions from management are met with persistently dismal statistics on diversity in the workplace. According to the ABA Commission on Women, as recently as 2014, women are still only 34% of active practitioners in the legal profession. The inequities are even starker in private practice, where women were only 17% of equity partners in law firms. (*A Current Glance at Women in the Law*, July 2014.) For minorities (including women of color), these numbers tell an even more depressing story of attrition: ethnic minorities were 22% of associates in law firms indexed by the NALP directory, and only 7.52% of partners at law firms. (*Women and Minorities at Law Firms by Race and Ethnicity, New Findings for 2015*, Jan. 2016.) LGBT lawyers fare even worse for representation in law firms, with only 2.34% openly LGBT lawyers identified in private practice by NALP for 2015. (*LGBT Representation Among Lawyers in 2015*, Dec. 2015.) Attorneys with disabilities are so marginalized that it is difficult to find employment statistics that address their demographic separately.

The leadership in the legal profession acknowledges that there is a gap between the diversity and inclusion rhetoric and the realities of an overwhelmingly straight, white, non-disabled male workforce of attorneys. The national dialogue of diversity and inclusion has identified certain mechanisms of prejudice that persist to create discriminatory work environments. Perpetuating stereotypes in the workplace, asserting privilege, acting on implicit biases, and advocating for "diversity" without a tandem effort for encouraging inclusion can lead to discrimination.

It is a deep irony that lawyers often counsel their clients on how to avoid creating a discriminatory or impermissibly hostile work environment, yet lawyers are unable to ameliorate de facto discriminatory practices in our own profession and the nation at large. Lawyers have a civic duty to model best practices for diversity and inclusion within our own profession and as an example to the rest of the nation.

This article summarizes the discussion that took place at a panel hosted at the ABA Midyear Meeting in San Diego, California on February 5, 2016. Dozens of attorneys from various practice areas and localities were present, including notable champions of the need for diversity. As such, this article seeks to amplify awareness for those who are not yet cognizant of the mechanisms of discrimination in their respective workplaces or who are at a loss for how to remedy these disparities.

How to Undermine Privilege in the Workplace

Most of the participants in both the panel and the audience were sophisticated and well-versed on the issues related to diversity, so the roundtable discussions were quickly focused on the fluidity of privilege and in-group identification versus the "othering" of outliers. To remedy this tendency to subconsciously rely on a privilege granted by a given situation, the discussion participants encouraged each other to "know your differences and others' differences in the room." The default "privilege" in the legal profession seemingly belongs to those who fall into the majority demographic: heterosexual, non-disabled white males. However, the roundtable discussion participants explored scenarios from their everyday lives where they might unknowingly enjoy a privilege (e.g. a Caucasian person may subconsciously assert privilege over a person of color or a heterosexual person may benefit from a privilege over a LGBT person).

Once confronting the challenging and, at times, uncomfortable reality that each person may enjoy a privilege in any given social context, the discussion groups brainstormed various strategies to avoid "othering" someone different from you, who doesn't share your privilege. The first step identified was acknowledging whether one falls into a privileged category. Once a privileged status has been identified, the groups tried to determine strategies to mitigate or even nullify the impact of a privilege on a non-privileged individual. The groups universally agreed that asserting a privilege, whether deliberately or subconsciously, to gain power is not conductive to a healthy workplace environment. Discussions also led to privilege in educational institutions. In one roundtable discussion, a participant shared that, as a graduate of a Historically Black College and University (HBCU), she knew of difficulties in gaining interviews with employers only hiring from Ivy League and other top tier law schools. In addition, when an employer does hire a graduate from a historically disadvantaged demographic as a "token," pressure is placed on that one individual to represent their entire affinity group, a phenomenon defined in Supreme Court decisions on affirmative action as "role-modeling." When legal employers continue the aforementioned recruiting practices, they tend to choose candidates who perpetuate the demographic makeup of their workplaces, thus ensuring a continuation of white, straight non-disabled male privilege. Ultimately, the groups decided that the most effective way to undermine privilege is to put one's self in a position of power and wield one's influence to affect change.

Stereotypes and Implicit Bias

According to Webster Dictionary, "stereotype" is a standard concept or image

with special meaning held in common by members of a group. The roundtable discussions explored what being stereotyped meant to them. One statement that stood out from the various discussions was the assertion that people underestimate their power, and that one should not allow a stereotype to prevent one's use of power. Implicit bias is a more insidious form of stereotyping that can be difficult to confront and eradicate because the self-examination required to eliminate biases is often an uncomfortable exercise for anyone to engage in.

Although stereotypes and implicit biases are universally held to be negative mechanisms of discrimination, the discussions centered on the reality that everyone has their own stereotypes and biases of others and that we, as a profession, can only progress when everyone honestly acknowledges their blind spots. To combat the pernicious awareness that one is subject to stereotypes and implicit biases, the groups discussed strategies to immunize themselves to stereotypes and biases to which they may be subjected. The participants encouraged young attorneys from historically disadvantaged groups to remember that their employer hired them because they are competent. Young lawyers who were likely to encounter stereotypes in the legal field were encouraged to "know your capacity and speak with authority."

One of the most commonly identified barriers imposed by implicit bias that was discussed during the panel was the tendencies of employers to dole out preferred work or important based on commonalities in culture, race, gender, or national origin. A tactic discussed to combat stereotypes in the workplace would be to engage in a dialogue with one's supervisor. The panel offered some examples of effective engagement to prevent stereotypes from adversely affecting one's career. The panelists encouraged young lawyers to engage their supervisors and ask whether a preconceived notion might be affecting their workplace standing. If the employer admitted it, panelists encouraged young attorneys to request that supervisor or mentor publicize their support and help defeat that stereotype, especially when the stereotyped individual is not in the room or at the table. The panelists advised the audience to engage their supervisors and request additional assignments to combat a stereotype of incompetence by producing superior work product. Unchallenged stereotypes and implicit biases in the workplace are not healthy and can cause workplace tension that ultimately pushes women, minorities, and other historically disadvantaged groups to leave the profession entirely.

Diversity versus Inclusivity

A quote shared during the roundtable discussions captured the concepts of diversity versus inclusivity very well, "Diversity is being invited to the party; inclusion is being asked to dance." Diversity recognizes the differences among people: race, gender, age, sexual orientation, disabilities, marital status, and family responsibilities. Inclusion is the action of welcoming diversity and creating an environment where different/diverse people can succeed. Diversity and inclusivity together prompt employers and decision-makers to embrace all differences in a work place. The discussion groups concurred that having a diverse workforce is not enough, there must be implementation of inclusion. If one wants change within the workplace, one cannot promote diversity and assume that inclusivity will somehow organically occur.

Not only should an employment roster have a diverse list of individuals, one's workplace must be intentional in creating a welcoming and supportive environment for diverse individuals to succeed. When a workplace is coupled with diversity and inclusion, employers will begin to attract and retain more diverse employees. Inclusion places the onus on those in power to take action to facilitate diverse mentorships and support.

It is important that the ABA be at the forefront of undermining privilege, stereotypes and implicit bias to create diversity and inclusion in the legal community. The ABA, as a leader in the legal field, must take a hard look at itself and continue to make changes to close the gap between rhetoric and reality.

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From the Chair | CONTINUED FROM PAGE 2

and fair' don't worry about how their actions are perceived and succumb to bias more easily" (p. 25).

Based on my own life experiences, I was less surprised by research documenting the extent to which "people in underrepresented groups themselves make biased judgments and decisions based on stereotypes about their own groups" (Nalty, p. 28). The legal profession can benefit tremendously by focusing attention on the study of implicit bias and how to overcome it. I'm optimistic that this Commission will do more, through *The Innovator* and through other means, to cast a spotlight on approaches for overcoming unconscious bias in order to promote diversity and inclusion in the profession.

Will A. Gunn
Chairman