

**REVIVING A TRADITION OF SERVICE:  
REDEFINING LAWYER PROFESSIONALISM IN THE 21<sup>ST</sup> CENTURY**

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A year ago, the Standing Committee on Professionalism embarked on a reexamination of the meaning of “professionalism,” and how the American Bar Association can enhance its leadership role in promoting the fundamental traditions and core values of the legal profession in the 21<sup>st</sup> Century. A wide range of events in recent months, such as the revelations of the Justice Department “torture memoranda” and the massive layoffs and deferrals of young lawyers by large law firms, have added urgency to our task, as we, our fellow lawyers, and the public grapple with basic questions involving the professional bonds between lawyers, the nature of the client-lawyer relationship, and the lawyer’s role in society as a whole. With this predicate, we present this White Paper as a statement of the mission of the Standing Committee on Professionalism in the coming years: to define some of the new challenges facing our profession, and to guide the ABA in inculcating and enhancing professionalism among lawyers practicing in the 21<sup>st</sup> Century.

Our presentation will begin with a discussion of the ABA’s prior professionalism efforts. We will then introduce the basic outline of our program for the future, which we call by the acronym “SERVE.” We will explain in more detail the various aspects of the program, as they pertain to the particular constituencies served by the ABA: judges and the court system in general, lawyers and law firms, and legal academics and clinicians. We will close with a bullet-point summary of our recommendations.

## **The Precedents We Build On**

There is precedent for our work. In 1984, the ABA Board of Governors established a Commission on Professionalism partly at the recommendation of Chief Justice Warren E. Burger, who had expressed concern that the Bar was moving away from the traditional principles that defined the legal profession. Two years later, the Commission issued a comprehensive report, “. . . *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*” (hereinafter “the 1986 Report”), containing several recommendations to rekindle a sense of professionalism among lawyers. The Commission adopted the definition of “profession” espoused by Dean Roscoe Pound:

*The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of public service is the primary purpose.*<sup>2</sup>

The 1986 Report’s recommendations were striking at the time. They included mandatory legal ethics courses at law schools, mandatory CLE, increased regulation of lawyer advertising, mandatory retainer agreements, mandatory legal fee arbitration, increased merit selection of judges, increased use of sanctions, and more. Many of these recommendations have been implemented in various jurisdictions across the U.S.

More recently, the Carnegie Foundation for the Advancement of Teaching issued a sweeping report on the training of lawyers. The report, “Educating Lawyers: Preparation for the Practice of Law” (the “Carnegie Report”) recommended a more integrated approach to legal education, one that would combine the existing “emphasis on the well-honed skills of legal analysis” with “similarly strong skill[s] in serving clients and a solid ethical grounding.”<sup>3</sup> Many law schools have reacted by attempting to integrate ethics education into substantive coursework, and by emphasizing professionalism as part of the law school curriculum.

## **New Developments That Have Impacted the Professionalism Debate**

Though some of these endeavors have been successful, the practice of law continues to change. The most wide-ranging change is the advent of e-technology, which has affected the very fundamentals of legal practice: who prepares legal documents (lawyers rather than secretaries), where lawyers practice (at home rather than in an office), how lawyers communicate with each other (through e-mail rather than telephone), and when clients contact lawyers (at all hours). In addition, law firms have grown in size and scope, crossing national and state lines to an extent barely imaginable when the 1986 Report was written. Hourly rates have increased, in some cases to \$1,000 per hour and more, while lawyers have sought, with limited success, permission from regulators to formally practice with other professionals (accountants, real estate brokers, social workers) in an effort to better serve their clients and the public.

Meanwhile, the public mistrusts lawyers as much as ever, particularly when it comes to providing value and efficiency. A 2008 Gallup Poll found that only 18% of those surveyed would rate the honesty and ethical standards of lawyers as “high” or “very high,” garnering a lower rating than, for example, medical doctors (64%), bankers (23%) and building contractors (22%).<sup>4</sup> An ABA Section of Litigation survey found that 69% of those polled agreed that lawyers are more interested in making money than in serving their clients.<sup>5</sup> Moreover, 57% believed that most lawyers are more concerned with their own self-promotion than their client’s best interests.<sup>6</sup>

The profession’s response remains inadequate. Professionalism initiatives tend to be limited to law schools, state court systems and local bar associations (as opposed to law firms and national organizations), with uncoordinated efforts made, jurisdiction by jurisdiction, to implement proposals that often mirror recommendations found in the 1986 Report. Meanwhile, the academic debate on “professionalism” has devolved into a discussion of competing

definitions of the term, resulting in what one Professor recently called “a substantial lack of clarity and agreement.”<sup>7</sup>

### **The SERVE Program**

We must do better. The Standing Committee on Professionalism can guide the ABA towards a new, comprehensive Professionalism initiative that will be intensely practical, build on the very real gains resulting from the 1986 Report, and address recent changes in the way lawyers practice law. A five-part program will help lawyers “SERVE” clients and the public interest by adhering to standards of professionalism that the public demands and deserves:

**S – Support the Legal System.**

**E – Exemplify professionalism through enhanced teaching, technology and training.**

**R – Reaffirm access to the Legal System, promoting justice through a dispute resolution system that is available to all.**

**V – Value our place in society, integrating our core values of professionalism in each representation to provide our clients with real value while ensuring that we and our associates maintain professional values and act with integrity.**

**E – Embrace professional Excellence while establishing balance and Equilibrium in lawyers’ lives.**

Rather than revisit the efforts of the Professionalism Commission, the SERVE program seeks to expand already-existing professionalism initiatives while moving forward into newer areas, such as alternative dispute resolution, technology and values based initiatives. And it seeks to do so by coordinating the Standing Committee’s efforts with other ABA sections and committees, as well as with local bar, judicial and academic initiatives.

More specifically, the SERVE program emphasizes the following:

**Support the Legal System:** We must continue the important work recommended by the

1986 Report: emphasizing ethics education, mandatory CLE, *pro bono* involvement, judicial independence, increased judicial salaries, and the rule of law. One area that has gotten little emphasis in professionalism discussions is the continued growth of arbitration and mediation: how does this play into the values of our profession? How does the purported value of private arbitration or mediation as a less expensive and faster alternative to court-based litigation square with the goals of enhancing the rule of law and providing public, transparent dispute resolution?

**Technology:** We need to examine how e-technology affects the core values of our profession – our commitment to excellence, efficiency and civility. There is no question that computer technology allows us to perform certain tasks and communicate with our clients more quickly. But does the more rapid-fire pace of communication help or hinder the work we do? Does the increased use of e-mail communication rather than telephone calls, particularly between adverse lawyers, lead to higher costs, less efficiency and reduced civility? Do the burdens imposed by e-discovery make litigation more expensive and less accessible? Will e-technology lead to increased confidentiality issues?

**Training:** We need to do a better job of training lawyers in and after law school in the skills that mark professionalism – how to manage law offices efficiently, how to counsel clients compassionately, and how to best adhere to ethical standards when actually practicing law. We should aim to require law students to participate in clinical programs, both so they can learn these skills and so that faculty can monitor their conduct. (As the medical profession has found, misconduct in internship and other medical school clinical programs is a good indicator of problems later on.)

**Re-affirming Access:** As hourly rates climb, are we pricing the middle class out of the legal system? Our discussion of professionalism should focus on what services lawyers should continue to monopolize, and which they should not, possibly allowing the latter to be performed

by less expensive paraprofessionals. We should encourage different methods for less affluent people to find lawyers, such as legal referral services, computerized lawyer matching services and at least some multidisciplinary practice. We should continue to explore ways to price our services so that they are more affordable. Meanwhile, we must continue to emphasize the importance and monitor the discharge of our pro bono obligations.

**Value:** For our purposes, the word “value” has two meanings. *First*, we should ensure that our clients understand that we have moral and ethical *values*, and that there are limits to what we will do for our clients. A recent report by the group of law firms known as Lex Mundi entitled *Lex Mundi and Professionalism: A Statement of Shared Fundamental Values* (2008)<sup>8</sup> describes this as developing “an ethic of integrity” that “entails the lawyer’s ability to remain steadfast and consistent when the stress of delivering strong client service pushes against the lawyer’s own personal and professional values.” This may require, for example, examining whether more judicial involvement in discovery, or a more active sanctions regime, is needed to ensure compliance with discovery obligations.

*Second*, we should do more to ensure there is economic *value* to the work we do. We should take more seriously the 1986 Report’s admonition to “encourage more innovative methods that simplify and make less expensive the rendering of legal services.”<sup>9</sup> The ABA should continue to play a leadership role in finding methods other than hourly billing for charging for legal services – contingent, hybrid, flat fee and other arrangements should be explored in an effort to more closely link fee charges to results and/or efficiency. We should analyze more closely the *way* we bill our clients: are we providing enough information? Are we doing work efficiently? Can we change lawyer compensation systems so as to encourage lawyers to write off time when work was done poorly or inefficiently? Can paraprofessionals be more effectively utilized within the law firm structure to improve efficiencies and reduce costs?

**Excellence:** We should continue to foster the commitment to excellence. This should start with an increased emphasis on mandatory CLE, mentoring programs for younger attorneys, and in-firm lawyer training. But it should go beyond that to encourage better supervision within law firms and closer scrutiny of bar applicants and senior lawyers to ensure the public is properly protected.

**Equilibrium:** Lawyers cannot do their work properly, engage in public service activities, and provide proper attention to clients if they are overworked and overstressed. Nor can they do so if they fear for their jobs, or if law firm leaders place a higher premium on short term profits than on the professional stability, growth and commitment of their younger colleagues. We should examine the profession's response to the recent economic downturn and examine its impact on younger (and prospective) lawyers and on the profession as a whole. At the same time, we should encourage the current movement among law firms to enhance lawyer "quality of life," finding ways for lawyers to have a better work/life balance.

These are just ideas – some old, some very new. They will be addressed in more detail below, focusing on the various constituencies who will be asked to implement these ideas. We hope that the SERVE program will provide a guideline for our Committee's short and long-term efforts to set standards and make recommendations that the ABA, bar associations, courts, law schools and practitioners can follow to reinforce the values and enhance the stature of the legal profession in the 21st century.

### **The Successes Thus Far**

As already noted, the 1986 Report's recommendations were novel at the time, and sought the development of higher ethical, moral and qualitative standards among members of our profession. The recommendations included the incorporation of professional responsibility law into law school curriculums (though not necessarily as separate courses); the adoption of law

school Codes of Conduct and the reporting of infractions thereof to character and fitness committees; the adoption of mandatory CLE; the heightened regulation of false, fraudulent or misleading lawyer advertising; the use of written fee agreements “where feasible”; mandatory legal fee arbitration; the increased merit selection of judges; the increased use of sanctions for abuse of the litigation process; and more. They also encouraged practicing lawyers to participate in mentoring programs with young attorneys. Moreover, they emphasized the lawyer’s obligations towards the public and called for increased participation in *pro bono* activities.

Since the 1986 Report, many of these recommendations have been implemented in various jurisdictions across the United States. For example, as discussed below, bar associations and courts have established professionalism commissions, mentoring programs and *pro bono* assistance projects. These organizations have also enacted nonbinding civility codes and professionalism pledges for their members and have funded professionalism studies and reports.

**Professionalism Commissions:** Recognizing the need for organized efforts to promote professional behavior among lawyers, the judiciary and bar associations of fourteen states have founded professionalism commissions. These commissions coordinate a variety of projects and activities, including: continuing legal education programs, town hall meetings, annual symposia, mentoring programs, websites providing substantive and practical advice to lawyers, *pro bono* projects, and proposals for law reform. Several of these commissions also sponsor annual awards acknowledging outstanding lawyers who have demonstrated their commitment to traditional standards of professionalism in their practices.<sup>10</sup>

**Mentoring Programs:** Numerous state bar associations have established mentoring programs over recent years.<sup>11</sup> These programs, several of which are in their nascent stage, aim to provide networking opportunities and support to recently admitted attorneys by matching them with experienced attorneys who volunteer as mentors. These programs encourage a valuable

interchange between newer and more-experienced lawyers: the experienced lawyers provide the benefit of their experience and inculcate their “mentees” with the positive values and traditions of the profession, while the newer lawyers bring their enthusiasm, their questioning of accepted methods, and their knowledge of new technology. It is hoped that these programs will assist recent law graduates in their professional development and promote collegiality. It is also hoped that these programs will ultimately reduce lawyer discipline and improve client services.

**CLE and Legal Ethics Training:** Since 1986, legal ethics and professional responsibility have become part of the required curriculum at all ABA-accredited law schools, and most states have required prospective lawyers to take the MPRE examination in order to achieve bar admission. This has been a huge stride forward in training the legal profession to recognize the importance of ethical rules. The training, however, does not stop at bar admission. Forty-two states have mandatory Continuing Legal Education programs, including required ethics credits.<sup>12</sup> Some also have “Bridge the Gap” requirements, giving special training to younger lawyers. These help practicing lawyers keep up with new developments in their fields of practice, as well as with changes in the ethics rules.

**Pro Bono Assistance Projects:** Many bar associations encourage their members to participate in *pro bono* activities, and serve as clearinghouses for *pro bono* opportunities.<sup>13</sup> Large law firms now often have in-house *pro bono* coordinators who prospect opportunities for all firm lawyers – senior lawyers and associates, litigators and corporate lawyers – to perform *pro bono* work. These firms have come to recognize the value of *pro bono* work in emphasizing the legal profession’s leadership role in the larger community, providing a more meaningful work environment for all firm lawyers, and helping to train newer attorneys.<sup>14</sup>

**Professionalism Pledges and Civility Codes:** Bar associations throughout the country have adopted standards of professionalism and/or civility among their members.<sup>15</sup> Whether they

are adopted as codes, pledges, principles or aspirations, these standards set forth specific directives to lawyers concerning how they are expected to behave towards each other, the judiciary and the public.<sup>16</sup>

**Professionalism Studies and Reports:** Many courts and bar associations have commissioned professionalism studies. These studies gather information about how lawyers are perceived by their community, and then analyze this information to identify ways to improve professional behavior. These studies often result in reports that memorialize their findings and issue recommendations.

All of these developments represent great strides forward for our profession. Nevertheless, as shown in our Introduction, the public perception of lawyers remains overwhelmingly negative, and it has not been helped by recent headlines showing lawyers involved in large Ponzi schemes, frauds on large estates, and other defalcations. Although we can never eliminate wrongdoers from our midst, we can try harder, as a profession, to make the legal system more efficient, the day-to-day interactions between lawyers and clients more meaningful, and the professional lives of our colleagues more fulfilling. The SERVE program will help do just that.

Our SERVE recommendations are intentionally wide-ranging, as we seek to address issues important to all the constituencies served by the ABA – constituencies which in turn serve the public. We will address these constituencies *seriatem*.

### **Courts, Judges and the Legal System as a Whole**

**Prior Successes:** As already shown, a great many professionalism initiatives have focused on the legal system, and the role of lawyers within that system. Some of the ABA's initiatives in this regard over the past 25 years have been quite successful – for example, all of the states but one have adopted a form of the Model Rules of Professional Conduct, the

multijurisdictional practice rule has been implemented in a majority of jurisdictions, and a modernized Model Code of Judicial Conduct has been promulgated and is being adopted by many states. In addition, the ABA has supported the values of professionalism, the rule of law and the integrity of our court system by forming Standing Committees on Professionalism and Judicial Independence. Currently, along with its other work, the Standing Committee on Judicial Independence has just issued a report analyzing nationwide standards and procedures for judicial disqualification and recusal, and recommending that more definite and clear standards be adopted to guide judges in this important area.

**Professionalism and Discovery.** The increased costs of discovery – and of litigation generally – have raised significant professionalism questions. The Committee should consider whether enhanced professionalism demands new rules (including more stringent sanctions) and/or mechanisms (increased use of special masters, magistrates, etc.) to ensure better and speedier compliance with discovery demands, as well as to address the demands of new technology (discussed in more detail below). This should be part of reexamining a litigation culture in which it appears *de rigueur* to force your adversary to obtain at least one court order before providing meaningful document production, or (despite limitations recently added to Fed. R. Civ. P. 30(d)) to subject the opposing party to depositions lasting several days.

**Professionalism and ADR:** Still, we must push even further, focusing on the very nature of the dispute resolution system itself. The expense of litigating has caused many to turn to private, alternative dispute resolution. Courts and Congress have embraced this, noting the public policy favoring arbitration agreements.<sup>17</sup> The ABA has also supported the increased use of ADR to resolve a wide variety of disputes.<sup>18</sup>

Nevertheless, any increased speed and cost-efficiency from ADR must be weighed against the resulting decrease in legal certainty. Arbitrators are not bound to follow the law<sup>19</sup>

and courts generally will not correct errors of law unless the demanding “manifest disregard” standard is met – a rare event indeed.<sup>20</sup> The overall standards for judicial review of arbitral awards are quite limited,<sup>21</sup> giving arbitrators – who often are unsupervised and lack judicial experience – a wide range of discretion.

As a result, arbitration pits two traditional values of professionalism against each other: on the one hand, it promises a less expensive and more efficient mode of dispute resolution, thus providing (at least in most cases) better value to our clients; on the other hand, the limits placed on judicial review of arbitral awards cut against the rule of law. Our Committee, perhaps with support from the ABA Sections of Dispute Resolution and Litigation, should examine these issues, and consider whether new ADR-related initiatives should be instituted. Examples might include increasing the visibility of the proposed Code of Arbitrator Ethics, amending the Federal Arbitration Act to more clearly permit arbitration agreements that require arbitrators to follow the law, exploring collaborative law initiatives, and finding ways to make ADR services more available to clients who need but cannot afford them.

### **Those Who Train Lawyers – Legal Academics, Clinicians and CLE Providers**

**Law Schools:** The Committee must continue its efforts to encourage both law students and practicing lawyers to be trained in ethics and professionalism. We must foster our close relationship with the National Institute for Teaching Ethics and Professionalism, a consortium of five nationally-recognized centers of ethics and professionalism: The Louis Stein Center for Law and Ethics at Fordham University, The Mercer University School of Law Center for Ethics and Professionalism, the Nelson Mullins Riley & Scarborough Center on Professionalism at the University of South Carolina, the Stanford Center on Ethics, and the W. Lee Burge Endowment for Law and Ethics at Georgia State University. We will recommend including additional ethics and professionalism components in the revised ABA law school accreditation standards. We

will present CLE ethics programs through the ABA in concert with the Center for Professional Responsibility Committee on CLE. Through the Gambrell Professionalism Awards, which we bestow each year, we will continue to recognize and help promote the teaching of professionalism by law schools, bar associations and related entities.<sup>22</sup>

**Clinical Education:** Nevertheless, the recent headlines showing lawyers involved in massive Ponzi schemes<sup>23</sup>, the bribery of judges<sup>24</sup>, illegal wiretapping<sup>25</sup> and other misdeeds remind us that we cannot do enough to train lawyers in the fundamental values of our profession. In this regard, we have to keep in mind the example of our colleagues in the medical profession, who found in a recent study that medical students who commit ethical or other transgressions in clinical programs are more likely to commit misconduct later in their careers.<sup>26</sup> Law school clinicians should be encouraged to do the same. This is just one value of clinical legal education, a mode of teaching that the Carnegie Report believes should be encouraged and that provides an important opportunity to teach students practical skills and client relations. We must do more to expand these programs so that all law students who want clinical experience can get it.

**CLE:** The essence of professionalism in an adversary system, and a crucial value if that system is to be respected and work efficiently, is a civil discourse between lawyers representing opposing parties, as well as between lawyers and judges. The words of former baseball player Ryne Sandberg upon his induction into the Hall of Fame apply with equal force to lawyers working in an adversarial context:

“I was taught you never, ever disrespect your opponents or your teammates or your organization or your manager and never, ever your uniform. You make a great play, act like you’ve done it before; get a big hit, look for the third base coach and get ready to run the bases . . . . I didn’t play the game right because I saw a reward at the end of the tunnel. I played it right because that’s what you’re supposed to do, play it right and with respect.”<sup>27</sup>

If these values can be inculcated in baseball players, they can be inculcated in lawyers.

This should be considered a crucial task in the years ahead. Practical suggestions must be developed for teaching lawyers at all stages of their career techniques for dealing with difficult adversaries, the pitfalls of “scorched earth” tactics and uncivil behavior, and the risk to clients and the legal system from protracted discovery disputes.

### **Bar Associations**

Local Bar Associations around the country have begun to develop mentoring programs pairing newly-admitted attorneys with more experienced counterparts. This creates an opportunity to inculcate in younger lawyers the long-term values of the profession, as well as the mores and traditions of the local Bar, while also providing a source for networking and addressing professional problems and concerns. Our Committee should encourage the use of these programs, even in larger cities, as another way to teach important values and better integrate young lawyers, often isolated in large firms, into the profession.

### **Lawyers and Law Firms**

**New Technology:** The most striking change in law firm life in the past decade is the increased importance of e-communication. Like any new technology, e-communication is value neutral. On the one hand, it provides tremendous value to us and our clients. We now can communicate instantly and easily with our clients, adversaries and colleagues 24 hours per day, and from all over the world. We also can use electronic databases to store and transmit enormous amounts of information inexpensively, efficiently and quickly, with minimal environmental impact, greatly reducing expenses for clients and law firms.

On the other hand, lawyers and clients pay a price for all this speed and efficiency. The pace of e-communication is incessant – lawyers are constantly barraged by communications at all hours of the day and night, on workdays, weekends, holidays and vacations. This obviously creates tremendous stress on lawyers, who always feel at the beck and call of their clients and

their colleagues.

But the downside of e-technology extends far beyond the quality of lawyers' lives. The accelerated pace of legal practice affects the quality and efficiency of the work we do. *First*, e-technology has changed lawyers' expectations as to when responses to communications are required. Twenty years ago, a lawyer receiving a letter from an adversary knew she had several days to respond. Now, responses to e-mails often are expected within minutes, and lawyers who do not move quickly enough may find themselves barraged with emails accusing them of foot-dragging, or excluded from the judge or arbitrator's decision-making process. Yet responding quickly often means the response will be less thorough, more emotional, less informed by legal and factual research, and more prone to inaccuracy. This, in turn, can result in a decrease in the quality of our legal advice, a heightening of tensions between lawyers, and a reduced perception of lawyers as careful craftsmen.

*Second*, email is often a poor vehicle for resolving disputes between lawyers. Without having to actually confront and persuade their adversaries in person, lawyers can – and often do – take more aggressive positions on email than they otherwise would, using email to make a record rather than to work out problems. Moreover, without tone of voice and other gestures to soften their impact, email communications are often viewed as harsher than intended, inviting a similarly incendiary response. This can increase hostility and legal costs without any discernible gain in results or efficiency.

The incessant pace of communication, combined with the harshness and impersonality of email contact, creates a “double whammy” that the Standing Committee on Professionalism can address. Some recommendations might include: changing court rules to *require* that “meet-and-confer” sessions between lawyers to resolve discovery and other disputes take place in person or by telephone; developing initiatives and training on the etiquette of email communications; and

finding ways to change expectations in order to slow down the response time for email communications between lawyers. To put it in language familiar from past professionalism initiatives, we have to promote civility in email communications, both for our clients and for ourselves.<sup>28</sup>

**Access and Advertising:** In the past, “professionalism” has often been a code-word for restricting access to lawyers (as well as for keeping certain types of lawyers out of the game). The most notable example is attorney advertising, where for years many argued that lawyers using print advertising or other media to inform the general public of their services somehow acted inconsistently with the values and goals of the profession.<sup>29</sup>

It is high time for Bar regulators and disciplinary authorities to recognize that increased restrictions on advertising – *i.e.*, restrictions other than the basic prohibitions on solicitation and false and misleading communications embodied in Model Rules of Professional Conduct 7.1-7.4 – actually run counter to the goals of professionalism. Not only do those restrictions often demean the public by assuming it is unable to discern the puffery inherent in all advertising (including lawyer advertising) but, to the extent they discourage lawyers from advertising, they hinder the flow of valuable information to the public about the availability of legal services. This is particularly significant with regard to poor or immigrant communities, whose residents may not know lawyers or how to find them except through the media. As one “advertising lawyer” once told the principal author of this report: “Some poor people may not have a car, or even a telephone, but they do have a TV. And if they need a lawyer, their TV is going to tell them how to find one.”

Working with other ABA Sections and Committees, this Committee could continue to redefine the relationship of professionalism and attorney advertising from this new perspective, a perspective informed by the recent court decisions encouraging such advertising as well as the

minimalist approach to regulating lawyer advertising found in the ABA Model Rules of Professional Conduct.

**Increased Access for Under-served Communities:** The Committee could suggest additional ways to enhance access to the legal profession. These could include: examining the price of legal services to try to make those services more affordable; promoting unbundling of legal services; determining whether certified paralegals can perform some routine legal services (e.g., assisting in filling out immigration forms or the paperwork for an uncontested divorce);<sup>30</sup> and continuing efforts to encourage participation in pro bono legal services and provide private funding to legal services organizations.

**An Increased Focus on Values:** In the past decade, the integrity of the legal profession has found itself under renewed attack. Occasionally, as in the recent Marc Dreier indictment,<sup>31</sup> lawyers have been alleged to have committed crimes to benefit only themselves. But all too often, the lawyers' misconduct was committed in aid of a client, whether it involved hiring a private investigator to illegally wiretap the opposing party's residence, bribing a judge to obtain a favorable result, or lying to the other side to get a transaction closed.<sup>32</sup>

This reflects the dark side of the public's ambivalence with lawyers. While expressing disdain for us in general (as the poll results cited above show), those who need a lawyer often want the toughest, most aggressive lawyer they can find, encouraging them to engage in "scorched earth tactics" and worse. Of course, the blame cannot be laid solely on clients: lawyers hungry for business will often commit transgressions in their eagerness to please those who retain them.

As a profession, we have to do better. This Committee can present recommendations to encourage what the Lex Mundi study cited above called "the ethic of integrity" within the profession. At the law firm level, this can mean encouraging law firms to add "integrity points"

to the compensation process, to reward lawyers who turn down potentially troublesome clients, who properly utilize the firm's conflict check system, or who otherwise take steps to protect the firm and the legal system. Conversely, lawyers whose conduct puts the firm at risk can be penalized, even if the risk does not result in actual harm to the firm. A system of ethical merits and demerits will, of course, be highly subjective, and will be difficult to implement in larger firms. Still, financial incentives of this type should be examined because they will encourage firms to build a culture of integrity by enhancing core values.

**Law Firm Discipline:** Another way to enhance core values would be to encourage revising the Model Rules of Professional Conduct so as to provide for the regulation and discipline of law firms, not just individual lawyers, for ethical transgressions. New Jersey<sup>33</sup> and New York<sup>34</sup> have already done this. This change would recognize that many law firms have grown into nationwide or international business organizations, with systems and decision-making spread out among numerous lawyers in different cities and even different countries. Law firm discipline will enable Bar regulators to punish firms for systemic breakdowns, such as the failure to have a conflict check system, without having to identify one or more responsible lawyers.

**Alternative Billing:** We must pay heed to the result of the 2002 survey by the ABA Section of Litigation cited earlier, which found that 69% of those polled felt lawyers were more interested in making money than in helping clients. Clients obviously continue to feel that lawyers charge too much, and provide too little value for their services. Hourly billing continues to predominate, even though almost twenty years ago James Fox Miller, then president of The Florida Bar, stated: "Hourly billing promotes inefficiency and penalizes productivity. Unfortunately, in some cases it promotes outright dishonesty."<sup>35</sup> Now that hourly rates at large firms are cresting at \$1,000 or more – almost double what they were ten years ago – the sense

clients have that legal costs are excessive is understandable. Moreover, contingent fees are equally problematic, since they encourage lawyers to enter quick settlements rather than work a case for its maximum value, and because if too high they can result in a finding of unconscionability.<sup>36</sup>

The issue of costs and fees goes to the very heart of professionalism, because our services become less desirable, and our role in society diminishes, if the public feels that it is not receiving its money's worth. This Association can continue the work of the ABA Commission on Billable Hours<sup>37</sup> by encouraging lawyers to continue to develop and explore alternative fee arrangements – flat fees, value billing and hybrid hourly/contingent arrangements. But we can also go deeper, to analyze why law firms feel they must charge such high rates, whether work is being done as efficiently as it could be, whether legal services can be “unbundled” so that client needs can be addressed more cost effectively, and whether law firm compensation systems discourage lawyers from writing off time to avoid charging clients for inefficiency and poor quality work.

**Lifestyle Changes:** Lawyering has always been a time-intensive, sometimes grueling profession. Long hours of hard work performed under intense pressure has been a mainstay of lawyers since the time they rode circuit with judges and handled dozens of cases each day – if not before. But in recent years, the pressure has grown considerably. Lawyers who are not rainmakers find themselves evaluated largely based on their hourly productivity. At the same time, expectations created by the new e-technology, as well as the increasingly global nature of legal practice, often require lawyers to be available and working long beyond normal hours. The recent spate of lay-offs, often based on poor “productivity” (which in turn is determined by hours worked), only underscores the message to young and old lawyers alike that long hours are the key to survival.

Some firms have tried to buck this trend by developing “Quality of Life” committees, mentoring programs, and health club membership requirements to help ease the pressure. Job-sharing and part time arrangements also help many lawyers balance their professional and personal lives. But the ABA can play a leadership role as well. It can encourage the promulgation of court rules to enable litigators to plan and take vacations,<sup>38</sup> explore hour *limitations* for young lawyers in order to encourage job satisfaction, and help young lawyers find social networking opportunities to enrich their lives.

**Encouraging Excellence:** Developing a culture of excellence in law firms combines all the categories we have just discussed: it requires us to make the legal system function better, to have lawyers working efficiently for their clients, to manage technological change in a way that benefits both lawyers and clients, to require lawyers to act with integrity, and to minimize counter-productive stressors that affect lawyer performance. The SERVE program, by promoting core values, will both promote lawyer excellence and enhance client satisfaction.

### **A Summary of the SERVE Program Recommendations**

We summarize the SERVE Program recommendations as follows:

- Work with law schools and the ABA Section of Legal Education and Admissions to the Bar to: (a) improve, increase and measure the effectiveness of professionalism programs at law schools; (b) encourage the development of clinical and other law practice skills programs; (c) monitor the correlation between misconduct in law school (including but not limited to clinical programs) and later misconduct in the Bar; and (d) improve communications with law students and prospective law students as to character and fitness requirements for Bar admission;
- Work with the Conference of Chief Justices, the National Conference of Bar

Examiners and the American Law Deans Association to establish uniformity among states and between states and law schools regarding character and fitness requirements;

- Urge law firms to create systems of professionalism accountability, including without limitation making ethical behavior a factor in compensation;
- Urge Bar Associations, even in larger cities, to develop mentoring programs for new lawyers;
- Coordinate with the ABA Section of Litigation and the Advisory Committee on Civil Rules of the Judicial Conference of the U.S. to draft stricter discovery rules;
- Develop guidelines that apply professionalism considerations to the use of new technology, *e.g.*, by requiring lawyers to conference disputed issues personally or by telephone rather than by email, developing initiatives and training on the etiquette of email communications, and finding ways to change expectations in order to slow down the response time for email communications between lawyers;
- Coordinate with the ABA Section of Dispute Resolution regarding professionalism issues inherent in alternative dispute resolution mechanisms, including without limitation the relationship between ADR and adherence to the rule of law;
- Find ways to increase access to lawyers and the legal system by, *e.g.*, encouraging appropriate advertising, examining the use of non-lawyer professionals to provide basic services, and promoting alternative methods of billing such as flat fees, hybrid arrangements, and the unbundling of legal services;
- Encourage the promulgation of rules that allow for the regulation and discipline of law firms; and

- Continue to encourage “quality of life” and mentoring programs within law firms.

## **Conclusion**

The challenge ahead is great, despite the path-breaking work by the 1986 Commission on Professionalism, the Carnegie Foundation, and all that has been done since. The stunning technological changes and economic disruptions of recent years, as well as the growth in size and reach of our profession, require this Association to continue to keep ahead of its membership in exploring how to maintain core values.

The Standing Committee on Professionalism intends to play a leadership role in this important task in the years ahead, as it makes specific policy recommendations to implement the SERVE program. Our goal is to provide this Association with new directions that will help our profession adapt to the changing demands and challenges of modern legal practice.

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<sup>1</sup> The author wishes to thank Amelia Seewann, an associate at Frankfurt Kurnit Klein & Selz, P.C., for her invaluable assistance in preparing this paper.

<sup>2</sup> “. . . *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*” at 10 (ABA 1986) [hereinafter *In the Spirit*] (emphasis added) (citation omitted), available at [http://www.abanet.org/cpr/professionalism/Stanley\\_Commission\\_Report.pdf](http://www.abanet.org/cpr/professionalism/Stanley_Commission_Report.pdf).

<sup>3</sup> WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW at 4 (The Carnegie Foundation for the Advancement of Teaching 2007).

<sup>4</sup> See Gallup, Inc., Honesty/Ethics in Professions Poll (2008), available at <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx>.

<sup>5</sup> ABA Section of Litigation, Public Perceptions of Lawyers Consumer Research Findings (Apr. 2002) at 7, available at <http://www.abanet.org/litigation/lawyers/publicperceptions.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> See Neil Hamilton, *Professionalism Clearly Defined*, 18 THE PROF’L LAWYER 4 at 4 (Feb. 2008).

<sup>8</sup> See <http://www.lexmundi.com/images/lexmundi/PDF/Publications/SharedFundamentalValues.pdf>

<sup>9</sup> *In the Spirit*, *supra* note 2 at iii.

<sup>10</sup> See <http://www.abanet.org/cpr/professionalism/profcommissions.html> for a list and links to the Web pages of the commissions.

<sup>11</sup> See <http://www.abanet.org/cpr/professionalism/mentoring.html> for a list and links to the Web pages of the state bar mentor programs.

<sup>12</sup> See <http://www.abanet.org/cle/mcview.html>.

<sup>13</sup> See the National Pro Bono Opportunities Guide, a joint project of the ABA Standing Committee on Pro Bono and Public Service, the ABA Center for Pro Bono, and Pro Bono Net at [http://www.probono.net/aba\\_oppsguide/](http://www.probono.net/aba_oppsguide/).

<sup>14</sup> See Pro Bono Institute, Law Firm Pro Bono Project at <http://www.probonoinst.org/project.php>.

<sup>15</sup> See a list of codes, with links, at <http://www.abanet.org/cpr/professionalism/profcodes.html>.

<sup>16</sup> Admittedly, the effectiveness of these codes and pledges remains a subject of debate. Many of the codes are nonbinding, and thus may be of limited effectiveness. More importantly, values such as civility and professionalism are often viewed as antithetical to lawyers’ obligation to represent their clients zealously. Resolving this

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fundamental conflict between professionalism and zealous advocacy – or, more precisely, convincing lawyers that there is no such conflict – remains an important but elusive goal.

<sup>17</sup> See, e.g., *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1405 (2008); *Stolt Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 92 (2d Cir. 2008) (parties likely submit disputes to arbitration to “enhance efficiency” and “reduce costs”); American Arbitration Association, *Introductory Guide to AAA Arbitration and Mediation*, [http://www.aaauonline.org/upload/intro\\_guide\\_aaa\\_med\\_arb.pdf](http://www.aaauonline.org/upload/intro_guide_aaa_med_arb.pdf).

<sup>18</sup> The ABA has a long history of support for ADR, going back at least as far as the House of Delegates’ support for the proposed Alternative Dispute Resolution Act, which would have provided federal funds to states to create or improve alternative dispute resolution mechanisms, including arbitration and mediation. Currently, the ABA has a 17,000 plus member Section of Dispute Resolution, established in 1993. Relevant policies adopted by that Section and the ABA House of Delegates appear on the Section’s web site at <http://www.abanet.org/dispute/webpolicy.html>.

<sup>19</sup> See, e.g., *Westerbeke Corp. v. Daihatsu Motor Corp., Ltd.*, 304 F.3d 200, 208 (2d Cir. 2002) (award cannot be overturned for arbitrator’s failure to apply law).

<sup>20</sup> See, e.g., *Stolt Nielsen SA*, 548 F.3d at 92 n.7 (noting that since 1960, the Second Circuit has vacated some or part of an award for “manifest” disregard only in five cases); see also *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1403-04 (questioning doctrinal basis for “manifest disregard” standard).

<sup>21</sup> See 9 U.S.C. §§ 9-10 (limited to arbitral bias or misconduct, arbitrators exceeding their powers, lack of proper notice and hearing, etc.).

<sup>22</sup> See <http://www.abanet.org/cpr/awards/gambrell.html>.

<sup>23</sup> See, e.g., Benjamin Weiser, *Lawyer Pleads Guilty in \$400 Million Fraud*, N.Y. TIMES, May 12, 2009 (concerning Marc Drier’s guilty plea to allegations that he sold \$700 million of bogus promissory notes to investors).

<sup>24</sup> See, e.g., Michael Brick, *Former Judge Convicted of Bribery in Divorce Cases*, N.Y. TIMES, Apr. 19, 2007 (concerning former Justice Gerald P. Garson)].

<sup>25</sup> See, e.g., Brooks Barnes, *Pelicano and a Lawyer Convicted in Wiretapping*, N.Y. TIMES, Aug. 30, 2008.

<sup>26</sup> See Maxine A. Papadakis, M.D., et al., *Unprofessional Behavior in Medical School is Associated with Subsequent Disciplinary Action by a State Medical Board*, 79 ACAD. MED. 244 (Mar. 2004).

<sup>27</sup> Ryne Sandberg Induction Speech, 7/05, as quoted by D. Brooks, *What Life Asks of Us*, N.Y. TIMES, Jan. 26, 2009, p. 31.

<sup>28</sup> We have purposely omitted any reference to e-discovery, the requirements of which are dramatically altering the landscape of commercial litigation. We have declined to address this because, although the costs and demands of e-discovery certainly raise professionalism issues, those concerns are subsumed by the more specific questions of how e-discovery should be conducted and how it can be made more efficient. These are issues already being addressed by the ABA Section of Litigation, among many others.

<sup>29</sup> See, e.g., *Shapero v. Kentucky Bar Assoc.*, 486 U.S. 466, 490 (1988) (O’Connor, J., dissenting) (“Restrictions on advertising and solicitation by lawyers . . . act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other.”).

<sup>30</sup> See ABA MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVICES at <http://www.abanet.org/legalservices/paralegals/downloads/modelguidelines.pdf>.

<sup>31</sup> See Press Release, United States Attorney, Southern District of New York, at <http://www.usdoj.gov/usao/nys/pressreleases/January09/dreiermarcindictmentpr.pdf>.

<sup>32</sup> See, e.g., *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263 (6th Cir. 1998 (en banc) (lying to opposing counsel to discourage them from learning that party to transaction had already defaulted on bank loan).

<sup>33</sup> N.J. RULES OF PROF’L CONDUCT R. 5.1(a) (“Every law firm and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules”).

<sup>34</sup> See N.Y. RULES OF PROF’L CONDUCT R. 5.1(a) (“A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.”); 5.1(c) (“A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate.”); and 5.3 (a) (“A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate.”).

<sup>35</sup> J. Fox Miller, *The Curse of the Legal Profession*, FLA. B.J., Feb. 1991 at 6. See also WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* (1996).

<sup>36</sup> See, e.g., *Green v. Nevers*, 111 F.3d 1295, 1302 (6th Cir. 1997) (“Courts have broad authority to refuse to enforce contingent fee arrangements that award excessive fees”).

<sup>37</sup> See <http://www.abanet.org/careercounsel/billable/toolkit/bhcomplete.pdf>.

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<sup>38</sup> See e.g., NORTH CAROLINA GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS, R. 26 Secure Leave for Attorneys. See also, Melvin F. Wright, Jr., *Secured Leave for Attorneys*, 19 THE PROF'L LAWYER 1 at 26 (2008).

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