



## Federal Rules Decisions

August, 1986

Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association

**\*243 '... IN THE SPIRIT OF PUBLIC SERVICE:' A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM**

Copyright 1987 by West Publishing Company - No Claim to Original U.S. Government Works

'This report has been approved for distribution by the House of Delegates of the American Bar Association. However, the views expressed are those of the Commission on Professionalism. They have not been approved by the House of Delegates or the Board of Governors and, accordingly, should not be construed as representing the policy of the Association.'

**\*244 AMERICAN BAR ASSOCIATION COMMISSION ON PROFESSIONALISM REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

BE IT RESOLVED, That the House of Delegates of the American Bar Association directs the following with regard to the Report of the Commission on Professionalism:

1. That the House authorizes the Commission on Professionalism to distribute copies of the Report to all ABA entities and affiliated groups, to the

federal judiciary, to each state supreme court, to every law school, to all state bar associations, to those local bar associations represented in the House of Delegates, and to such other bar associations recommended by the Standing Committee on Bar Activities and Services, for their consideration, advice and comment, and,

2. That the President of the American Bar Association be authorized to appoint a Special Committee to be composed of no more than five members to receive and evaluate comments on the Report, to seek House of Delegates approval of proposals in the Report which the Committee deems appropriate for approval and to coordinate implementation of the recommendations in the Report which are consistent with Association approved policies as promptly as possible, utilizing wherever feasible the existing entities of the Association.

\* \* \*

**REPORT**

The Report of the Commission on Professionalism can be found on the pages following this preliminary statement.

Justin A. Stanley

Chairman

(This is the resolution, including amendments, passed by the ABA House of Delegates on August 12, 1986, in New York.)

TABLE OF CONTENTS

	Page
Preface	248
I. Introduction	251
II. A Quarter-Century of Rapid Change: The American Bar from 1960 to the Present	254
A. The Legal Status of the Profession Since 1960	254
B. The Changing Ways of Thinking About Lawyers' Ethic@s	257
C. The Economics of Practicing Law Today	259
III. The Meaning of Professionalism	261
IV. Summary of Recommendations	263
V. Discussion	266
A. Law Schools	

1. Ethics should be taught through more creative professional responsibility courses, the increased interweaving of ethics into substantive courses, the use of a summer reading list for entering students and the use of a film or videotape on ethics 266

2. Courses should include new methods of dealing with legal problems, such as alternative methods of dispute resolution and negotiation skills 268

3. Law professors should serve as role models for students and the highest standards of ethics should be followed within law schools 268

4. Law schools should enact codes of conduct and report serious misconduct by students to bar admissions committees 269

5. Law schools should retain high admission standards in the face of declining applications and should not lower their standards for graduation 270

B. Practicing Bar and Bar Associations

1. Experienced lawyers should assist newly admitted lawyers to face the practical and ethical issues that arise in prac- 271

tice

2. All states should require mandatory continuing legal education courses, with examinations, for practicing lawyers

273

3. The ABA should prepare a series of six to eight films or videotapes dealing with ethical and professional issues for use by law schools and in mandatory continuing legal education programs

274

4. Lawyer advertising that is false, fraudulent or misleading should be referred to disciplinary authorities for action. Such action could include requiring an advertisement to contain warnings or disclaimers

276

5. The Bar should place increased emphasis on the role of lawyers as officers of the court and of the system of justice

278

6. The Bar should study the participation of law firms and individual lawyers in business activities which may involve conflicts of interest

280

7. Lawyers should help promote the enactment of legislation that is in the public interest and should encourage consideration of the potential effect of legislation on the courts

281

8. Lawyer Fees:

a. Fee arrangements should be in writing, where practical 283

b. Fee disputes should be resolved by impartial fee review committees, the membership of which should include lay persons 283

9. Lawyers and judges should report serious misconduct they observe to the disciplinary agency or to the prosecutor's office 286

10. Bar associations should be constantly alert to seek improvements in the system of justice. This should embrace such activities as supporting an expanded use of alternative methods of dispute resolution 288

C. Judges

1. Trial judges should take a more active role in the conduct of litigation 290

2. Judges should impose sanctions on clients and counsel who abuse the litigation process 291

3. There should be merit selection of judges 292

4. State disciplinary agencies should be provided with sufficient funding and staff to do a thorough job in pursuing the full range of offenses which occur 294

5. Bar admissions committees should be given adequate funding and staff to review the fitness of candidates for the Bar 295

#### D. In General

1. Lawyers should preserve and develop within the profession integrity, competence, fairness, independence, courage, and a devotion to the public interest 296

2. All members of the Bar should resolve to abide by higher standards of conduct than the minimum required by the Code of Professional Conduct or the Model Rules of Professional Conduct 296

3. There should be increased participation by lawyers in pro bono activities 297

4. All segments of the Bar should resist the temptation to make the acquisition of wealth a principal goal of law 300

practice	
5. Lawyers should encourage innovative methods that simplify and make less expensive the rendering of legal services	301
6. Lawyers should endeavor to educate the public about the law and the legal system	302
7. The Bar should employ all its organizational resources necessary in order to assure that the legal profession remains genuinely self-regulating	303
VI. Conclusion	304
Roster of Commission Members	306
Meetings of the Commission	309
Instructions to Lawyers (Xerox Corporation)	310

**\*248 PREFACE**

The establishment of the Commission on Professionalism was authorized by the Board of Governors in December, 1984, and its formation was announced at the 1985 Midyear Meeting of the Association in Detroit. The Commission came into being as the result of a recommendation by Chief Justice Warren E. Burger, in which

then-President John C. Shepherd concurred, that the ABA study the question of professionalism. Both the Chief Justice and President Shepherd observed that the Bar might be moving away from the principles of professionalism and that it was so perceived by the public.

These observations were strengthened by similar conclusions reached by the Section of Litigation. Indeed, without the very substantial moral and financial support

given to this project by that Section, the Commission would not have come into existence. [FN1] The then-Chairman of the Section, John J. Curtin, Jr., provided helpful advice in the selection of members of the Commission. His successor as Chairman, N. Lee Cooper, served as a member of the Commission, as did its present Vice-Chairman, the Honorable Benjamin R. Civiletti.

President Shepherd supplied the Commission with the following statement of purpose:

The Commission shall examine and report on matters affecting the performance of legal services by the Bar, having in mind both how those services are being performed and how they are perceived to be performed. Thus, the Commission shall examine such matters as advertising and other forms of solicitation, fee structures, so-called commercialization, competence, and the duty of the lawyer to his or her client and to the courts before whom the lawyer practices. The Commission shall also consider efforts made by lawyers to improve the administration of justice.

The statement of these matters shall not be considered limiting. Rather, the matters named shall be taken as suggestions only. The Commission may approach the overall problem as it sees fit.

Where specific suggestions for change seem appropriate, the Commission shall make them. It is to be hoped that the Commission will be able, as well, to suggest guidelines for conduct, which, if followed, will \*249 result in a Bar of the highest principles, serving the public interest and respected for its professionalism.

The Commission membership is composed of practicing lawyers, judges, a law professor (and former law school dean), a medical doctor, a professor of sociology, and the Director of the Rand Corporation's Institute for Civil Justice.

The Commission held ten formal meetings from March, 1985 through April, 1986, at six of which testi-

mony was received from 42 witnesses. In addition, individual members, or groups of members, interviewed another 105 persons. As would be expected, these witnesses expressed the views of wide segments of our society and of the Bar.

A vast amount of writing on the subjects covered by the Commission's inquiry was made available to and studied by the Commission.

Sections and Committees of the Association were invited to name liaison members to the Commission. The following participated as liaison members in the work of the Commission: from the Judicial Administration Division-Appellate Judges Conference-Hon. Richard D. Cudahy; from the Section of Administrative Law-Prof. Victor G. Rosenblum; from the Section of Family Law-Hon. Samuel B. Groner; from the Section of Real Property, Probate and Trust Law-John A. Gose; from the Standing Committee on Ethics and Professional Responsibility-Seth Rosner; from the Standing Committee on Lawyers' Responsibility for Client Protection-Hon. William R. Robie; from the Standing Committee on Professional Discipline-Robert P. Cummins; from the Special Committee on Implementation of the Model Rules-Michael Franck; from the Consortium on Legal Services and the Public-Edmund J. Burns; and from the National Association of Bar Executives-Jack Lyle. Although the liaison members assisted substantially in the work of the Commission, their role was advisory only and they are not to be held responsible for whatever weaknesses or errors appear in our Report.

The Commission was fortunate to have Professor Thomas D. Morgan, formerly Dean of the Law School at Emory University, serve as its Reporter, and to have Richard A. Salomon serve as Special Assistant to its Chairman. Without them, the work of the Commission could not have been accomplished.

David J. Brent, who is also Director of the Section of Litigation, served as Project Director, and the Commis-

sion is indebted to him.

A project such as that undertaken by the Commission might have no end. New developments, new writings, and new insights are daily occurrences. Moreover, any one of the major problems addressed by the Commission could itself have, perhaps, been studied forever. Yet the Commission had constraints of time, available personnel and financial resources.

Our Report represents our best collective judgment on what we have observed. We have attempted to be both honest and forthright, even when conclusions reached reflect poorly on the profession.

**\*250** Within the Report are challenges that invite action directed to the organized bar, both nationally and on the state and local level, the judiciary, the law schools and, most importantly, to every individual lawyer in this country. Meeting these challenges will go far toward restoring a high level of professionalism among lawyers, both in fact and in the perception of others. Accordingly, the Commission will recommend to the House of Delegates that this report be distributed to the federal judiciary, each state supreme court, every law school and all state and local bar associations represented in the House of Delegates for their consideration. Further, we will ask the American Bar Association to see to the prompt implementation of the recommendations in the Report.

The citizens of this country should expect no less than the highest degree of professionalism when they have entrusted administration of the rule of law—one of the fundamental tenets upon which our society is based—to the legal profession.

#### **\*251 I. INTRODUCTION**

In 1787, 33 of the 55 participating members of the Constitutional Convention were lawyers. Their selfless efforts produced one of history's greatest documents of freedom. [\[FN2\]](#)

In 1967, speaking to a meeting of the Lawyers Conference on Crime Control, then-President Johnson said:

. . . There is no group which, I believe, has become or is becoming more socially conscious and more understanding of their obligations than the members of the Bar. [\[FN3\]](#)

It is not almost two hundred years since the first event and almost twenty years since the second. But today is not yesterday, and today it may be asked: Has our profession abandoned principle for profit, professionalism for commercialism?

The answer cannot be a simple yes or no. The legal profession is more diverse and provides more legal services to more people today than ever before. These are not inconsiderable achievements. Further, most lawyers, the Commission believes, are conscientious, fair, and able. They serve their clients well and are a credit to the profession. Yet the practices of some lawyers cry out for correction. Without denigrating the Bar generally, this report proposes some needed changes in the practices of law schools, practicing lawyers and judges. We believe the future of the legal profession will be bright if all elements of the profession resolve to confront their problems and deal with them forthrightly.

Lawyers, like any other group of citizens, are affected by the mores of the times. Anyone who has lived through the 50's, 60's and 70's can bear witness to the fact that we have experienced vast social change during that period.

The Bar has changed, too. In 1960, for example, only about 285,900 lawyers were admitted to practice in the United States. [\[FN4\]](#) Today, there are about 700,000. [\[FN5\]](#) It is not uncommon today to find firms of over three **\*252** hundred lawyers, with offices not only in many states, but in foreign countries as well. [\[FN6\]](#) In the 1950s and 1960s, firms of that size and geographic diversity were unknown.

There are now some 110,000 women admitted to practice [FN7] and about 40% of the law school population is female. [FN8] In 1960, there were about 7,500 women admitted to practice [FN9] and approximately 1,900 were in law schools. [FN10] In 1971, there were less than 5,600 students classified as members of minorities in law school. In 1985, there were over 12,300. [FN11]

In addition, the Bar is younger than it was in 1960. Of the over 300,000 members of the ABA, half are 38 or under. [FN12] Indeed, the median age of all lawyers in the United States today is about 38. [FN13] In 1960, on the other hand, the median age of practicing lawyers was 46. [FN14]

Thus, if it ever could have been said that the Bar was composed of persons having the same backgrounds and values, that certainly is no longer the case. We are as diverse as one could imagine.

In addition, the practice of law has now broken down into informal specialties more than at any earlier time. There is simply too much to know for all aspects of law to be practiced by everyone. Tax lawyers, probate lawyers, litigators, energy specialists and family lawyers only begin to suggest the diversity. These divisions are informal in most states, but they are real. Even lawyers in general practice do not do everything; at most, they handle matters in several areas of law and refer the rest to others. [FN15] One implication of these divisions for the Bar \*253 generally is that lawyers may feel they have more in common with practitioners in their substantive areas than with the Bar as a whole.

Perhaps many years ago it might have been expected that lawyers could run their offices inefficiently, but still successfully. That is no longer true. Computers and sophisticated management systems, together with the increased use of paralegals, make efficiency more easily attainable and clients understandably demand it. [FN16]

However, efficiency is itself costly to achieve. Further, costs generally have risen for lawyers as they have for everyone else. With those increases have come increases in billing rates. [FN17] These increases have resulted, in many instances, in pricing lawyers out of markets they served so long, such as that composed of people of modest and lower incomes.

We find today that, although clients generally think well of their own lawyers, lawyers as a group are blamed for some serious public problems. Many individuals blame lawyers for the huge increase in medical malpractice litigation, with a concomitant sharp increase in the costs of insurance protection, for example. [FN18] Many blame lawyers when public playgrounds and sports programs are threatened with a loss of liability insurance and may be forced to discontinue use of facilities for recreational activities.

Litigation is seen to consume vast quantities of time and money. [FN19] In some instances, the class action suit is perceived as benefitting only the lawyers involved. A 'scorched-earth' strategy of litigation is said \*254 frequently to squander the resources of the parties to the litigation and serve primarily to benefit the lawyers. Contingent fees, and fees generally, continue to be a subject of controversy, [FN20] and the unseemly rush of lawyers to Bhopal led to widespread condemnation of the legal profession. [FN21]

The public views lawyers, at best, as being of uneven character and quality. In a survey conducted by this Commission, under the thoughtful direction of Commission member Gustave H. Shubert, only 6% of corporate users of legal services rated 'all or most' lawyers as deserving to be called 'professionals.' [FN22] Only 7% saw professionalism increasing among lawyers; 68% said it had decreased over time. [FN23] Similarly, 55% of the state and federal judges questioned in a separate poll said lawyer professionalism was declining. [FN24]

The primary question for this Commission thus be-

comes what, if anything, can be done to improve both the reality and the perception of lawyer professionalism. Our answers to that question can be better understood if we first consider some of the profound changes in the profession that have occurred during the last quarter-century.

## II. A QUARTER-CENTURY OF RAPID CHANGE: THE AMERICAN BAR FROM 1960 TO THE PRESENT

### A. THE LEGAL STATUS OF THE PROFESSION SINCE 1960

It is always difficult to see the future. A special committee of the American Bar Association in 1959, for example, perceived a serious problem: Not enough people wanted to be lawyers. 'In the face of the country's ever-growing need for lawyers,' the ABA Special Committee on Economics of Law Practice wrote, 'the law is becoming a dwindling profession.' [FN25]

Any fears of the legal profession's withering away have certainly proved unfounded. In 1960, there was approximately one lawyer for every 627 of the nation's citizens. [FN26] By 1985, there was one for every \*255 354 citizens. [FN27] Other dramatic changes in the composition and growth of the profession have already been noted.

The Special Committee on Economics of Law Practice proposed in 1959 that lawyers as a group (1) resist the cutting of fees by selected providers of legal services, and (2) develop minimum fee schedules enforced through the discipline system. [FN28] The legal world of 1959 seemed to permit what the Special Committee proposed. Lawyers, as a 'learned profession,' were thought to be outside the reach of the antitrust laws. [FN29] But the first cracks in the Bar's insulation from concern about 'commercial' issues soon were seen in cases involving group legal services.

*N.A.A.C.P. v. Button* [FN30] was a case brought in

1963 to challenge a Virginia law against solicitation of legal business by a non-lawyer 'runner.' That law had been invoked to prevent NAACP volunteers from encouraging black citizens to use lawyers from the NAACP Legal Defense Fund in desegregation litigation. The Supreme Court recognized Virginia's right to regulate the practice of law, and indeed normally to prohibit stirring up private litigation. Making it a crime to inform people about the possibility of suing to enforce their constitutional rights, however, was held to violate the First and Fourteenth Amendments.

Given the times and the subject matter of the litigation, it was inconceivable that *Button* would have been decided any other way. *Brotherhood of Railroad Trainmen v. Virginia*, [FN31] however, took the principle developed in the civil rights case and extended it to protect solicitation of claims under the Federal Employers' Liability Act. The national union had selected law firms around the country which it considered best qualified to handle members' claims. When a member had an injury, the union recommended one of those firms to him. The Bar alleged that this constituted prohibited steering of clients to favored lawyers. Six members of the Supreme Court held otherwise and reasoned that to prohibit the union's giving 'advice' to its members would be to deny freedom of speech. In a dissent, Justices Clark and Harlan suggested that the holding 'relegates the practice of law to the level of a commercial enterprise.' [FN32]

By 1975, it was minimum fee schedules that were under the Supreme Court's scrutiny. In *Goldfarb v. Virginia State Bar*, [FN33] a private plaintiff alleged that the Virginia minimum fee schedule, under which each lawyer he consulted quoted a fee for a real estate closing equal to 1% of \*256 the value of the property he was buying, was a violation of the antitrust laws. In an opinion written by Chief Justice Burger, the Court held that the minimum fee schedule constituted prohibited price fixing. In response to the argument that law is a 'learned profession' immune from antitrust prosecution, the Chief Justice wrote, 'It is no disparagement of the practice of law as a profession to acknowledge that it has a business aspect.' [FN34] How-

ever, the Chief Justice continued, in moving to qualify the broad sweep of this assertion, ‘We also recognize that in some instances the State may decide that ‘forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.’ [FN35]

The next question presented to the Court was whether lawyer advertising was one of those matters which a state could properly regulate. In *Bates v. State Bar of Arizona*, [FN36] the Court found that there was no antitrust violation because the state policy against lawyer advertising was clear and satisfied the state action exemption to the antitrust law. However, the Court went on to hold that an absolute prohibition of lawyer advertising was an unconstitutional restriction on lawyers' freedom of speech. [FN37] Lawyer advertising can provide the public with much needed information, the Court said, and in that light stated that ‘a dvertising that is false, deceptive, or misleading of course is subject to restraint.’ [FN38]

It was not until 1978 that state regulation of a lawyer's ‘commercial’ practice was upheld. In *Ohralik v. Ohio State Bar Association*, [FN39] the respondent lawyer had been indefinitely suspended by the Ohio Supreme Court for soliciting a client in her hospital room. The lawyer visited the victim of an automobile accident, a teenage girl, while she was still in traction. The lawyer ultimately got her to sign a retainer agreement. \*257 He also obtained the oral consent of his client's passenger to his representing her against his client's insurance company. When both clients tried to discharge the lawyer, he sued both for breach of contract.

The Supreme Court upheld the State of Ohio's disciplinary sanction against the lawyer. ‘[T]he State has a legitimate and indeed ‘compelling’ interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of ‘vexatious conduct,’ the Court said. [FN40] In a companion case, *In re Primus*, [FN41] however, the Court held that discipline could not be imposed on an NAACP lawyer who, not for her own pecuniary gain, sent a letter to potential civil rights claimants about a lawsuit which was

about to be filed and in which they might wish to join.

What these cases and more recent decisions involving attempted state regulation of lawyer practices [FN42] suggest is a consistent prohibition of rules which operate to limit the extent to which members of the Bar must compete both in the acquisition of business and the charging of fees. Rhetoric about the ‘special’ character of the profession remains, but the reality is that, as a matter of law, lawyers must now face tough economic competition with respect to almost everything they do.

## B. THE CHANGING WAYS OF THINKING ABOUT LAWYERS' ETHICS

During the same period that court decisions were changing the rules under which law must be practiced, the legal profession was changing its own expressions of professional ethics. In 1960, the ethical standards of the profession were virtually the same as they had been over 50 years earlier. The Canons of Ethics had been in existence since 1908, with few amendments. [FN43]

The Canons spoke in aspirational terms. ‘[A]bove all,’ said Canon 32, ‘a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.’ [FN44]

\*258 The message was lofty, but hard to enforce. If the Bar was to rid itself of persons who victimized clients and abused the court system, both more formal disciplinary procedures and more precise statements of professional standards were required.

Thus was born the *ABA Model Code of Professional Responsibility*, [FN45] adopted by the ABA House of Delegates in 1969 and by most states shortly thereafter. It consists of three types of provisions. Nine Canons state in summary fashion the general postulates that serve as the framework for the more detailed provisions that follow. Disciplinary Rules under each Canon state propositions,

the violation of which may lead to imposition of sanctions. Some of the Ethical Considerations retain the aspirational material of the old Canons, while others largely restate or give justifications for the Disciplinary Rules. [\[FN46\]](#)

Along with the developing interest in the new Code, increased attention was being paid to ethics in law schools, and by 1974, every accredited law school in the United States was required to offer instruction in ethics. [\[FN47\]](#)

Given these developments, it was thought that the Code of Professional Responsibility might not have adequately considered all issues. Thus, the ABA Commission on Evaluation of Professional Standards was established in 1977. [\[FN48\]](#) It produced the Model Rules of Professional Conduct, which were adopted by the ABA House of Delegates in 1983.

The proposed Model Rules proved to be more controversial than the Model Code had been. [\[FN49\]](#) In part, that may have been because of new provisions. Lawyers for corporations and other organizations had duties spelled out for the first time, for example. [\[FN50\]](#) Most of the concern, however, seemed to focus on the risk of disciplinary enforcement of matters that lawyers trained under the 1908 Canons had come to think were solely matters of a not-too-demanding conscience, with disclosure of the intention of a client to commit a crime or fraud being the most controversial. [\[FN51\]](#)

**\*259** The transition from the Canons to the Code to the Model Rules was paralleled by the development of disciplinary enforcement machinery in the several states. [\[FN52\]](#) As a consequence, lawyers have tended to take the rules more seriously because of an increased fear of disciplinary prosecutions and malpractice suits. However, lawyers have also tended to look at nothing but the rules; if conduct meets the minimum standard, lawyers tend to ignore exhortations to set their standards at a higher level.

### C. THE ECONOMICS OF PRACTICING LAW TODAY

Any realistic understanding of the pressures faced by lawyers today must take account of certain economic realities. While many American lawyers have incomes in six figures, the average American lawyer in 1984 made less than \$50,000. [\[FN53\]](#) The median income was even less. The over-\$60,000 salaries now paid beginning lawyers by some Wall Street firms make provocative headlines, but they are not at all typical. [\[FN54\]](#) They have resulted, however, in additional economic pressures on those firms, the individuals working there, and on firms that are competitive with them. [\[FN55\]](#)

While undoubtedly most lawyers earn a higher income than the average American, the average income of lawyers is certainly less than many **\*260** might guess. In significant part, this is because approximately half (48.6%) of all American lawyers in private practice are in practice by themselves. [\[FN56\]](#) Only about 20% of private practitioners practice in firms with more than 10 lawyers. [\[FN57\]](#) In spite of the high visibility of large firms, American lawyers still tend to practice in relatively small units.

Further, those units, whether large or small, have high overhead costs. Those costs exist whether or not the lawyers are busy. A 1984 survey of established firms indicates that it costs \$62,000 a year to keep the average lawyer in business before he or she takes the first dollar home. [\[FN58\]](#) Thus, the average lawyer today must collect nearly \$112,000 in fees—over \$2,000 per week—to earn an average income from a law practice. Put another way, a ten member firm must bill its clients more than \$20,000 per week, or a total of over \$1 million per year, if its lawyers are to earn the average income.

We do not mean to suggest that lawyers have a right to a given level of earnings. The illustrations suggest in concrete terms, however, the enormous pressure felt by many lawyers today to generate fees.

It might seem that, charging \$75-\$100 per hour or more, a lawyer could easily generate an average income. However, not every lawyer is engaged in billable activities during every hour of every day. Further, especially in the aftermath of the Supreme Court's decisions cited earlier, lawyers have been experiencing more competition. Getting clients in the door and getting them to pay their bills has become a preoccupation for some members of the Bar.

Corporations are staffing internally to do work which they used to send to outside firms. Long-time counsel with an historical relationship to a company are being replaced by firms that promise to do the same work for less money. [\[FN59\]](#) Increasingly, groups of lawyers within firms who see themselves as bringing in a disproportionate share of firm revenues are breaking off and taking clients with them.

The available information suggests, further, that overhead costs in law firms are rising and putting a continuing squeeze on lawyer income. [\[FN60\]](#) Increasing the number of hours billed by each lawyer, trying to increase the hourly rate, or both, have seemed to many to be the only solutions. [\[FN61\]](#)

**\*261** While economic pressure cannot justify unprofessional behavior, it may help explain why some lawyers seem less selfless than before. Indeed, the economic pressure is likely to become even greater in the future as the anticipated 50% increase in the number of lawyers between now and the year 2000 intensifies the competition. [\[FN62\]](#)

### III. THE MEANING OF PROFESSIONALISM

'Professionalism' is an elastic concept the meaning and application of which are hard to pin down. That is perhaps as it should be. The term has a rich, long-standing heritage, and any single definition runs the risk of being too confining.

Yet the term is so important to lawyers that at least a working definition seems essential. Lawyers are proud of being part of one of the 'historic' or 'learned' professions, along with medicine and the clergy, which have been seen as professions through many centuries.

When he was asked to define a profession, Dean Roscoe Pound of Harvard Law School said:

The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service-no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. [\[FN63\]](#)

The rhetoric may be dated, but the Commission believes the spirit of Dean Pound's definition stands the test of time. The practice of law 'in the spirit of a public service' can and ought to be the hallmark of the legal profession.

More recently, others have identified some common elements which distinguish a profession from other occupations. Commission member Professor Eliot Freidson of New York University defines our profession as:

An occupation whose members have special privileges, such as exclusive licensing, that are justified by the following assumptions:

1. That its practice requires substantial intellectual training and the use of complex judgments.
2. That since clients cannot adequately evaluate the quality of the service, they must trust those they consult.
3. That the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good, and

4. That the occupation is self-regulating—that is, organized in such a way as to assure the public and the courts that its members are \*262 competent, do not violate their client's trust, and transcend their own self-interest. [FN64]

Again, the Commission suggests that this list of elements is useful in thinking through the issues which follow. [FN65]

Some may argue on the basis of the cases previously discussed that the legal profession is no longer 'special.' They might say that lawyers should treat their ideals as archaic, construe the rules of professional conduct as narrowly as possible, and try only to maximize their incomes. The Commission disagrees. Moreover, the testimony we have heard and the surveys we have examined indicate that the public wants the legal profession to maintain its long-held professional ideals. Indeed, the public should expect no less.

We have earlier described the diversity of the Bar, both in terms of demographics and areas of practice. One can properly ask whether any common ideas of professionalism can suffice for such a varied institution. We believe they can. While one must always be conscious of the variety within the legal profession, more united than separates us.

\*\*\*\*\*

The suggestions and conclusions which follow are grouped by the role to be played by each segment of the Bar. In discussing the practicing Bar, we want it to be clear that we are including in that category all lawyers—whether litigators or non-litigators, whether sole practitioners, members or employees of firms, government lawyers or lawyers employed by corporations, educational institutions or other entities.

It is our hope that the recommendations which follow will not be unobserved aspirations, but will represent con-

crete ways in which lawyers can inspire a rebirth of respect and confidence in themselves, in the services they provide and in the legal system itself. We believe that much can be done. Taken individually, the proposals may not appear substantial, but in the aggregate we believe they can have a significant impact. However, to be effective, they must have the support not only of every part of the legal community, but also of the citizens of this country—the public whose interests lawyers are to serve.

\*263 We first present a summary of our recommendations, and then a discussion of each.

#### IV. SUMMARY OF RECOMMENDATIONS

##### A. LAW SCHOOLS

1. Law schools should give continuing attention to the form and content of their courses in ethics and professionalism. They should weave ethical and professional issues into courses in both substantive and procedural fields. They should give serious consideration to supplementing courses in ethics and professionalism with a required summer reading list for entering students and with a film or videotape on ethics, along the lines discussed later in this report.

2. Law schools should expose students to promising new methods of dealing with legal problems. Thus, for example, consideration should be given to instruction in such matters as alternative methods of dispute resolution and processes of negotiation.

3. Deans and faculties of law schools should keep in mind that the law school experience provides a student's first exposure to the profession, and that professors inevitably serve as important role models for students. Therefore, the highest standards of ethics and professionalism should be adhered to within law schools.

4. Law schools should adopt codes of student conduct, possibly based on the Model Rules of Professional

Conduct. They should report convictions of serious infractions of law school rules to the Character and Fitness Committees, or their equivalent, of states in which the student applies for admission to the Bar.

5. Law schools should retain high admission standards in the face of declining applications and should not lower their standards for graduation.

## B. PRACTICING BAR AND BAR ASSOCIATIONS

1. Law firms should help their newly-admitted associates to face the practical and ethical issues which inevitably arise in practice. This can be done in a variety of ways, and small firms or sole practitioners should work together to sponsor programs to facilitate such training. Local bar associations and law schools should assist in such efforts.

2. In order to assure greater competence of practicing lawyers, continuing legal education courses should be strengthened and made mandatory. Where practical, some form of examination in courses taken should be required.

3. The Commission recommends that the American Bar Association prepare a series of six to eight films or videotapes dealing with ethical and professional issues. The tapes should effectively present a wide range of such issues and should use the Socratic approach so effectively used in the Columbia University Media & Society Seminar programs. If \*264 feasible, at least one such tape should be designed especially for use in law schools. The tapes also should be made available to state and local bar associations for use in mandatory continuing legal education programs.

4. False, fraudulent or misleading advertising is not constitutionally protected and should be referred to disciplinary authorities for action against offending lawyers. Appropriate measures short of disciplinary action should be considered. Such measures could include re-

quiring an advertisement to contain warnings or disclaimers.

5. The Bar should place increasing emphasis on the role of lawyers as officers of the court, or more broadly, as officers of the system of justice. Lawyers should exercise independent judgment as to how to pursue legal matters. They have a duty to make the system of justice work properly. Ideally, clients should recognize this duty and appreciate the importance to society of maintaining the system of justice.

6. The Bar should study the issue of the participation of law firms and individual lawyers in business activities, certainly where either actual or potential conflicts of interest may be involved.

7. When not representing clients before legislative bodies, lawyers should put aside self-interest and should support legislation that is in the public interest. In addition, the Bar should urge legislative bodies to consider the consequences of proposed legislation on the courts. All too frequently, such legislation, when enacted, inundates the courts with cases never contemplated by the drafters.

8. Fees are a source of misunderstanding between many lawyers and their clients. Further, the amount of fees charged by lawyers in some instances results in bitter criticism of the Bar. The Commission suggests:

a. Fee arrangements between lawyers and their clients should be in writing, where feasible.

b. If, at the end of a lawyer's services in any matter, the client believes that the fee charged was inappropriate, the client should be able to have the matter reviewed by an impartial fee review committee, possibly appointed by the state Supreme Court. All such committees or entities should include lay members.

9. Lawyers and judges should report to the appropriate disciplinary committee or prosecuting attorney any serious misconduct on the part of other lawyers and

judges which they believe would support a complaint for discipline or criminal charges.

10. Bar associations should be constantly alert to seek improvements in the system of justice. This should embrace such activities as supporting an expanded use of alternative methods of dispute resolution.

### C. JUDGES

1. Trial judges should take a more active role in the conduct of litigation. They should see that cases advance promptly, fairly and \*265 without abuse. Granting increased authority to judges runs the risk of arbitrary behavior on their part, but reviewing courts should provide whatever counterbalance is needed.

2. Judges should impose sanctions for abuse of the litigation process. Currently, the Federal Rules of Civil Procedure permit the imposition of sanctions for such abuses, and increasing use is being made of the sanctions to penalize the lawyer or the client, or both. In many state systems, the Supreme Courts have not promulgated such rules. State Supreme Courts should adopt rules similar to Rule 11 of the Federal Rules, so that authority to act is clearly given to trial judges.

3. Merit selection should be the means by which judges are chosen. The Commission believes that a bench of the quality that merit selection can provide is essential to improve our system of justice.

4. State disciplinary agencies under the control of state supreme courts are, in general, insufficiently funded and staffed. They now cannot do much more than deal with charges of theft, neglect or the commission of a felony. Adequate funding should be made available to the disciplinary agencies, enabling them to do a thorough and competent job in pursuing the full range of offenses which occur.

5. State supreme courts control admission to the

Bar. They often charge character and fitness committees or their equivalent with the responsibility of reviewing the qualifications of applicants. Adequate funding and authority should be provided to such committees so that they can do a thorough job of investigation.

### D. IN GENERAL

All segments of the Bar should:

1. Preserve and develop within the profession integrity, competence, fairness, independence, courage and a devotion to the public interest.

2. Resolve to abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct.

3. Increase the participation of lawyers in *pro bono* activities and help lawyers recognize their obligation to participate.

4. Resist the temptation to make the acquisition of wealth a primary goal of law practice.

5. Encourage innovative methods which simplify and make less expensive the rendering of legal services.

6. Educate the public about legal processes and the legal system.

7. Resolve to employ all the organizational resources necessary in order to assure that the legal profession is effectively self-regulating.

## \*266 V. DISCUSSION

### A. LAW SCHOOLS

1. *Law schools should give continuing attention to the form and content of their courses in ethics and professionalism. They should weave ethical and professional issues into courses in both substantive and procedural fields. They should give serious consideration to supplementing courses in ethics and professionalism with a required summer reading list for entering students and with*

*a film or videotape on ethics, along the lines discussed later in this report.*

We begin our recommendations with law schools, not because they represent the profession's greatest problems but because they constitute our greatest opportunities. We believe that law students should be viewed as members of the legal profession from the time they enter law school.

Each year approximately 35,000 new lawyers graduate from the nation's law schools and become active members of the Bar. On average, they are in their 20s. Assuming a normal career, they may practice for 50 years or more. What our law schools do today, then, to affect the way students see their profession will have an impact on the nature of the legal profession well into the 21st century.

A law school's impact on the professional development of its students should extend beyond simply teaching legal rules. Law schools should also confront students with hard ethical issues and give them a perspective on the legal profession—where it has been, where it is now and where it is going.

Students often enter law school with little sense of the history of the profession and the principles for which lawyers have stood. As a first step, then, law schools should expose students to the rich lessons to be learned from this history. Some observers might suggest that the values and mores of law students are fixed before they enter law school. However, that is only partly true. [\[FN66\]](#) Law professors can, we believe, positively influence the values and ethics of students by example and through creative teaching.

All ABA-accredited law schools are required today to provide 'instruction in the duties and responsibilities of the legal profession.' [\[FN67\]](#) We believe that the creative teaching of ethics and professionalism especially **\*267** profits from the imaginative use of hypotheticals and case

studies, both as a means of raising difficult ethical questions for students and as a way of stimulating their interest.

In Section V(B)(3) of this Report, we recommend that the American Bar Association prepare a film or videotape, especially designed for use in law schools, dealing with ethical and professional issues and using the Socratic approach so effectively developed in the Columbia University Media & Society Seminar programs. [\[FN68\]](#) Such a tape could serve as a supplement in law school courses and could heighten the interest of students in ethical issues as the students see experienced lawyers discussing serious ethical problems that face the profession.

Further, since ethical questions are found in all substantive areas of the law, we believe that these issues can and should be discussed when they inevitably arise in all courses. Whether it means raising the issue of solicitation or the contingent fee in a torts course, or particular conflict of interest issues which may arise in a family law setting, such enhancement of the substantive subject can be illuminating. Equally important, it can show students that their professors recognize and take such ethical issues seriously.

It is important that, wherever the issues are raised, discussion not be limited to the lowest level of conduct in which a lawyer may engage without being professionally disciplined. The minimum standards as defined in the Disciplinary Rules of the *ABA Model Code of Professional Responsibility* and *ABA Model Rules of Professional Conduct* are extremely important, but the true professional will usually demand more of himself or herself.

In this connection, we have been concerned that the Multistate Professional Responsibility Examination, prepared by the National Conference of Bar Examiners and required for bar admission in over 30 states, may unduly test only the lowest acceptable standards through technical responses to multiple choice questions. Preparation for such an examination can focus law students' attention

away from the fact that a wide range of behavior may be acceptable, but some kinds of behavior may be more appropriate than others. We are now informed that the National Conference of Bar Examiners is considering the use of essay questions for the Multi-State Bar Examination. We urge them also to consider developing an essay format for testing ethics issues.

Next, although some law schools require outside reading by their students—usually prior to their first year—many do not. The readings \*268 in schools with such programs consist largely of books relating to the profession and to the ends and meaning of law in an ordered society. The Commission believes that such an experience can set the tone for the entire law school experience. It can show students that being a professional requires more than knowing the rules they learn in contracts, property, and the like. The widespread adoption of broad-based reading lists by law schools could, the Commission believes, have a favorable impact on law students.

2. *Law schools should expose students to promising new methods of dealing with legal problems. Thus, for example, consideration should be given to instruction in such matters as alternative methods of dispute resolution and processes of negotiation.*

Upon receiving a license to practice law, a lawyer has authority to represent a client without supervision by any other lawyer. Thus, requirements of minimum competence demand that law students learn what the law is today. However, because today's new lawyer can look forward to a practice extending well into the next century, an understanding of the process of law reform and a sense of what the law can become are equally important to a student's professional training.

To take but one example, experienced litigators know that litigation should be approached on a basis short of all-out war, yet the way zealous advocacy is apparently discussed in some law school courses might make it hard to recognize this fact. Study of the costs to society of the

filing of every conceivable motion and defense and the application of 'scorched earth' tactics in every case may be hard to find in such courses.

We also urge law schools that have not already done so to familiarize students with other avenues available for the resolution of disputes. Negotiation is an art which needs to be explored carefully and practiced. If it is to be mastered, the seeds must be planted early. Similarly, law schools should be encouraged to hold negotiation simulations and to experiment with developing new forms of alternative methods of dispute resolution, including innovative mediation techniques and abbreviated case presentations.

3. *Deans and faculties of law schools should keep in mind that the law school experience provides a student's first exposure to the profession, and that professors inevitably serve as important role models for students. Therefore, the highest standards of ethics and professionalism should be adhered to within law schools.*

Law professors, along with practicing lawyers, serve as important, early examples for law students of what constitutes proper professional behavior. Law professors can transmit the wrong message through their manner and conduct both inside and outside the classroom. The first image that law students may receive is that the most successful lawyers are those who provide fast repartee and use the Socratic method with facility. As Dean Norman Redlich of New York University Law School told members of the Commission, cAs a client, I would want an attorney who was deliberative and did not immediately respond with the \*269 first idea that came to mind and who did not attempt through the course of the conference to prove his or her brilliance.' [FN69]

Other, more troubling, signals can be sent to students. These include a lack of respect for the views of others and a lack of commitment to providing *pro bono* services. [FN70] As former Dean Erwin Griswold of Harvard observed, law students frequently come to law

school with broader ideals than they take out. [FN71] And, he emphasized, this is not due to a loss of innocence or naivete by the students so much as to a diminution of their desire, as seen by example, to serve society.

Unquestionably, an important mission of law schools must be the teaching of professionalism and the setting of proper role models for law students. If there is a lack of adequate role models in law schools, lawyers may begin practice with little sense of the responsibilities to a client and to society inherent in a professional relationship.

Of course, the sensitizing of law students about ethical issues is not only the responsibility of law schools. Often, law students' first exposure to the world of practicing lawyers comes when they clerk for law firms at the end of their first year in law school and thereafter. If what they see in these firms is inconsistent with the ideals taught in law school, the best academic effort may be for naught. The education process is an 'ongoing' one for which all segments of the profession, not just the law schools, must take responsibility.

4. *Law schools should adopt codes of student conduct, possibly based on the Model Rules of Professional Conduct. They should report convictions of serious infractions of law school rules to the Character and Fitness Committees, or their equivalent, of states in which the student applies for admission to the Bar.*

Law schools are, of course, first and foremost academic institutions. They are also, however, an integral part of the legal profession and their students are, in an important sense, apprentice lawyers. Law schools should have as many do a code of ethics, including procedures for dealing with disciplinary infractions. Ideally, we believe, honor codes should be adapted, insofar as practical, from the *Model Rules of Professional Conduct* and the *ABA Standards for Lawyer Discipline and Disability Proceedings*, including provisions requiring due process and fairness. [FN72] Law schools should thereby introduce students from the outset of their careers to what it means

to be subject to professional standards and processes.

\*270 Further, we are informed that at least some serious student ethical violations are not now being reported to state bar admission authorities. Some law schools apparently find it expedient to use the threat of reporting misconduct as a means of obtaining a guilty plea to an offense. Failure to report them becomes the *quid pro quo* for the student's acceptance of law school sanctions. [FN73]

There is no reason to assume, of course, that disclosure of an infraction to disciplinary authorities will inexorably lead to a student's denial of admission to the Bar. Moreover, as former Dean Albert Sacks of the Harvard Law School has suggested, students should be given an opportunity to respond to the charges and have this information included in the file submitted to the appropriate bar admission body. [FN74]

However, knowledge of misconduct by an applicant for admission to the Bar while a student, particularly taken with other information, will often be relevant to bar admission authorities. We believe that it is not acceptable for law schools to distance themselves from all responsibility for the moral character of potential future members of the Bar. Law schools should be concerned both with preventing unqualified students from entering the legal profession and with communicating to their students that the duty of a lawyer to report misconduct is an obligation to be taken seriously.

5. *Law schools should retain high admission standards in the face of declining applications and should not lower their standards for graduation.*

Since the 1982-83 school year, the number of law school applicants has declined nationwide about 17%. For some schools, the numbers have been more dramatic. [FN75] Because many law schools are not highly endowed and depend heavily on tuition to cover expenses, the incentives exist for such schools to admit any-

one who can pay the tuition. The incentives also exist for such schools to permit a student to continue even if his or her performance would be unsatisfactory by usual standards. The Commission believes that operating in such a way would be unfair to the students and ultimately to the public.

**\*271** It is the responsibility of the faculty and administration of a law school to act professionally and not let self-interest dominate their decisions. A particular school's economic situation—even its future well-being—cannot justify an admissions policy which ignores the aptitude and ability of the school's students. Such a policy would be a disservice to that group of students who, after paying the tuition and attending law school, are likely to fail the bar examination and not enter the profession.

Needless to say, a law school's grading standards also should not be lowered to counteract a perceived fear that the school would otherwise find it hard to recruit students. Likewise, while bar admission rates should not be reduced arbitrarily out of a concern that there are too many lawyers, bar admission authorities of the several states should avoid any temptation to lower the standards for passing the bar examination simply because the traditional bar passage rate may begin to fall.

The need to maintain high admissions standards should not alter in any respect the pursuit of affirmative action and similar programs under which students are admitted who might score poorly on standardized tests, but who have other qualities indicating that they will become good lawyers. Such programs have helped the profession become more diverse and have benefitted the nation.

Unrelated to the development of such programs, which should continue to be encouraged, some law schools may have to face a dilemma in the near future of either rejecting more students and losing money, or accepting students who truly do not belong in the profession, graduating them, and having them fail the bar ex-

amination. In the view of the Commission, the responsible course for these schools to take is not a matter for debate, and accrediting authorities should pay particular attention to these issues.

It should be kept in mind that if declining enrollment threatens the existence of some law schools, consolidation of facilities or even schools may be options to consider. Another course of action that might be helpful would be for such law schools to expand their role in continuing legal education for lawyers.

## B. PRACTICING BAR AND BAR ASSOCIATIONS

1. *Law firms should help their newly-admitted associates to face the practical and ethical issues which inevitably arise in practice. This can be done in a variety of ways, and small firms or sole practitioners should work together to sponsor programs to facilitate such training. Local bar associations and law schools should assist in such efforts.*

The first three to five years of a lawyer's practice are critical to his or her successful transition from student to independent professional. Physicians have internships and residencies during this period. The legal profession has been far less attentive to this time in a lawyer's career. We believe substantial steps can and should be taken to help beginning lawyers through this period.

**\*272** For those young lawyers who go to work at medium-sized or large firms shortly after law school, the responsibility for easing the transition into practice should rest on the shoulders of those firms. Some firms already have extensive programs, but all such programs should include an emphasis on professional responsibility issues. [\[FN76\]](#)

The problem of providing similar opportunities for consultation with lawyers not in firms is more difficult. [\[FN77\]](#) Law schools can assist in organizing transition programs and, of course, an older, even retired lawyer

might be a useful mentor to a young lawyer, whatever his or her situation. [\[FN78\]](#)

Such an approach is not new. For example, a 'preceptor' program, as it was called, was once used in Pennsylvania. In most provinces of Canada, each lawyer must 'article' in a law firm for varying periods of time before being licensed. [\[FN79\]](#) Such an extensive and absolute requirement would probably be impractical in this country because of the sheer number of young lawyers who apply annually to the bars of the several states. However, this type of clerkship or apprenticeship program may be possible for a limited number of young lawyers on a voluntary basis. [\[FN80\]](#)

Efforts are underway to develop and foster relationships between younger and more senior lawyers, particularly for young lawyers who have chosen to practice on their own or in smaller firms. One such example is the American Inns of Court program, founded in 1980, which seeks to create intimate, local societies of judges and lawyers, law students, and law professors who meet on a regular basis and discuss ethical issues and the quality of legal advocacy in America. [\[FN81\]](#) Voluntary programs of this kind should be encouraged and expanded. Sections of local, state and national bar associations, particularly those with specialized areas of interest, could also institute similar programs and the Commission urges them to do so.

**\*273** As a separate but important point, ethics committees should be established by firms to serve as an independent source or outlet, apart from the supervising lawyer, for both partners and associates to seek out if they have questions or doubts. How carefully firms select an ethics committee will obviously affect its utility. Associates may avoid going to a committee because of a perceived detrimental effect on their advancement in the firm. At least some steps can be taken, however, to counteract this. For instance, memoranda can be issued by senior management encouraging contact with these ethics committees and urging 'soul-searching' without reprisal. [\[FN82\]](#)

Again, the problem of providing similar opportunities for consultation for lawyers not in firms is more difficult. Here, law schools can possibly help by publishing the names of faculty members who would be available to discuss such issues. Likewise, the doors of experienced members of the Bar should be open to such inquiries.

Of course, even young lawyers in firms could turn to colleagues outside the firms where they are employed. But it is preferable if the atmosphere within a firm does not chill professional contact within the firm and force a lawyer-particularly a younger one-to look elsewhere.

*2. In order to assure greater competence of practicing lawyers, continuing legal education courses should be strengthened and made mandatory. Where practical, some form of examination in courses taken should be required.*

The Commission strongly supports compulsory continuing legal education programs with some form of evaluation or examination. In almost every sphere of law, developments are rapid and constant. Consider some of the changes that have taken place in the past 50 years: a movement from code to notice pleading; two complete reformulations of the income tax code with innumerable 'simplifications' and 'reforms;' the Uniform Commercial Code, which has rendered much old commercial law obsolete; and changes in criminal procedure which have altered it to the point of being virtually unrecognizable to pre-World War II students of the subject. [\[FN83\]](#) Changes in the next 50 years-the likely span of many new lawyers' practices-are likely to be no less great. Even where such changes have not taken place, there is a need to hone one's skills and gain new perspectives on the same subject matter. [\[FN84\]](#)

**\*274** At present, apparently no continuing legal education courses include an examination. [\[FN85\]](#) The only requirement is usually physical presence at the location

where the course is given, attested to by a letter or an affidavit of the lawyer. There is little question that lawyers, in fact, physically attend these courses in most instances, but the question is what they get out of them.

Continuing education courses should be modified to create an incentive for actual participation and involvement in the learning process. The nature of the examination can be dictated by the subject matter. For example, skills or 'hands-on' programs, modeled on those of the National Institute of Trial Advocacy, might be evaluated other than by a written test. Still, some method of evaluation, where practical, seems essential. [\[FN86\]](#)

Admittedly, mandatory continuing legal education, particularly with examinations, might prove to be a geographic inconvenience for some practitioners. Flexibility must be exercised in the administration of these programs to prevent discrimination or undue hardship falling upon rural lawyers, lawyers in small firms and sole practitioners. In some states, correspondence courses using home videotapes, cable television, or private satellite hookups in more remote locations, should be considered.

Finally, the quality of continuing legal education courses is uneven. Some are excellent and many more are good, but many others could be much improved. Unless the courses are of excellent quality, offering them is a waste of time. Consequently, we urge that responsible authorities in the several states and at the national level make every effort to improve the quality of those courses which may be deemed inadequate. Law schools could contribute greatly to this effort. Such a move ought to lower lawyer resistance to these programs.

3. *The Commission recommends that the American Bar Association prepare a series of six to eight films or videotapes dealing with ethical and professional responsibility issues. The tapes should effectively present a wide range of such issues and should use the Socratic approach so effectively used in the Columbia University \*275 Media & Society Seminar programs. If feasible, at*

*least one such tape should be designed especially for use in law schools. The tapes also should be made available to state and local bar associations for use in mandatory continuing legal education programs.*

Too often, lawyers tend to think of ethical issues primarily as matters for personal, private reflection. Ultimately, of course, many questions do come down to matters of carefully weighed personal choice. Most questions of professional conduct, however, can be most profitably discussed and analyzed when the need for decision is not immediately at hand. Having the insights of other lawyers before a question arises can make its resolution easier when it is presented.

The problem most lawyers seem to face is finding the time or occasion for such dialogue. What is needed is a way to stimulate discussion outside of individual firms, between lawyers who differ in experience, specialty and region, as well as in age, race and sex.

The Commission suggests that an excellent stimulus for such discussions would be a series of six to eight films or videotapes presenting ethical problems and then the reactions of experienced lawyers to the issues presented. When shown in local bar association settings, the tape could be stopped periodically and the issues discussed either before or after the panelists' comments.

An excellent source for producing such tapes and the discussion materials to accompany them might be the Media & Society Program at Columbia University, whose television series 'The Constitutoin: That Delicate Balance' was a critical and public success.

We believe the series of videotapes should be made required viewing by all practicing lawyers in the United States. This could be achieved if each state supreme court adopted rules requiring such viewing. This requirement would make viewing of the tapes one of the few common experiences of all American lawyers. We believe this would tend to contribute to a greater sense of unity in the

Bar, heighten awareness of ethical considerations and help renew each lawyer's sense of professionalism.

One or more such tapes-especially designed for law schools, if feasible-could be used in conjunction with regular law school course materials.

However, in no sense should the preparation and viewing of these tapes be considered a substitute for the other recommendations we have made in this section and elsewhere, such as those regarding the teaching of ethics and professionalism in law schools and the obligations of law firms and others to continue the process with the young lawyer. [\[FN87\]](#)

*\*276 4. False, fraudulent or misleading advertising is not constitutionally protected and should be referred to disciplinary authorities for action against offending lawyers. Appropriate measures short of disciplinary action should be considered. Such measures could include requiring an advertisement to contain warnings or disclaimers.*

Although foreshadowed by earlier decisions of the Supreme Court, the *Bates* decision permitting lawyer advertising took many lawyers by surprise. The effects of the decision have been positive in many ways. Surveys suggest that many people who were formerly fearful or uncertain about consulting a lawyer have now received legal services and been satisfied with both the services and the fees. [\[FN88\]](#) The Commission has heard testimony that many people with relatively simple legal problems, who could not otherwise afford legal advice, have had their problems competently handled by entities that employ advertising and rely on volume to compensate for their lower charges. Any concerns about advertising excesses must be seen in this context.

However, members of the legal community should be exhorted on an aspirational level to use good sense and high standards in any advertising. The advertising of legal services is not the same as the marketing of home

lawn care or underarm deodorants. Indeed, some members of the public, according to a survey conducted in Florida, believe that bar associations have not done enough to curb tasteless lawyer advertising. [\[FN89\]](#) The activities of American lawyers in Bhopal created considerable public furor. [\[FN90\]](#) At the same time, it seems probable that it is principally lawyers-not clients-who are concerned about the style and message of certain legal advertising.

Nevertheless, advertising that is 'false, fraudulent, or misleading' may constitutionally be proscribed. [\[FN91\]](#) Legal advertising must flow freely, but also cleanly. Examples have been suggested to the Commission of tactics designed to lure consumers with one low price and, once they \*277 are in the door, to subject them to other charges and services. [\[FN92\]](#) An advertisement has appeared in a newspaper urging consumers to cut out a coupon for a 10% reduction in fees for 'bankruptcy-Chapter 7.' [\[FN93\]](#) Similarly, there are advertisements on television suggesting that because some plaintiffs have received a large verdict in certain cases, other claimants may. [\[FN94\]](#)

In criticizing unseemly and deceptive mass advertising on television, we must recognize that public relations abuses can and probably do occur in other ways than by mass advertising. Some law firms today use sophisticated brochures which suggest their ability to obtain particular results or which trade upon the influence of distinguished members of the firm. These practices are to be condemned as well. [\[FN95\]](#) Enforcement agencies should prosecute advertising, of whatever type, which is false, fraudulent or misleading.

A range of remedies should be available for advertising abuses. The outright prohibition of an advertisement is not the appropriate approach for every case. Other possibilities should be explored, including disclaimers warning legal consumers that results are not guaranteed. [\[FN96\]](#) Such disclaimers could help offset the inflated expectations intrinsic to many advertisements. Moreover, general notices might appear in legal advertisements alerting members of the public to places where they can turn if

they have a grievance against their lawyer.

The Commission also believes there is merit to a voluntary program of specialty certification, directed to selected areas of practice, without limiting those who are permitted to practice in such areas. Lawyers should only be able to claim that they are experts, for example, in a particular area such as real estate or probate if, after examination, they are so 'recognized' by the state in which they practice. Since advertising by lawyers is likely only to increase in the aftermath of the Supreme Court's decisions, it is in the public interest to limit false or inflated claims of expertise.

*\*278 5. The Bar should place increasing emphasis on the role of lawyers as officers of the court, or more broadly, as officers of the system of justice. Lawyers should exercise independent judgment as to how to pursue legal matters. They have a duty to make the system of justice work properly. Ideally, clients should recognize this duty and appreciate the importance to society of maintaining the system of justice.*

A far greater emphasis must be placed by the Bar on the role of the lawyers as both an officer of the court and, more broadly, as an officer of the system of justice. The profession's view has long been that the lawyer best serves the system of justice when he or she represents a client honestly and effectively, whether in court or in the office. [\[FN97\]](#) Nothing that we say should be understood as inconsistent with that general observation. However, there are limitations on such representation.

First, lawyers must avoid identifying too closely with their clients. Unless the advice provided by a lawyer is truly objective and independent, the client's own interests will not be well served. [\[FN98\]](#)

Second, lawyers must communicate openly and fully with their clients about limitations on their ability to serve. Where necessary, they should explain to their clients what their duties are to the court or to the system

of justice in a given case, beginning with the obvious prohibition against participating in any way in the giving of perjured testimony. [\[FN99\]](#)

Third, the lawyer in litigation is obliged to bring to the court's attention any authority from the controlling jurisdiction which is directly in opposition to his position, if it was not raised by an adverse party. [\[FN100\]](#) In discussions with judges around the country, we gained the clear impression that the candid citation by counsel of opposing case precedent is rare.

Discovery is one of the principal areas in which problems arise in litigation. Particularly in complex cases, litigation no longer means merely trials, but often months or years of pretrial process. Massive amounts of material are often demanded so that the costs of production \*279 will be high. [\[FN101\]](#) Excessive amounts of material are often delivered so that the costs of examination will be prohibitive. Hypertechnical interpretations of discovery requests are made so as to withhold documents. [\[FN102\]](#) Sadly, while the discovery provisions in the federal rules have been amended to provide the opportunity for parties to pare down the issues for trial early in a case, [\[FN103\]](#) counsel often do not avail themselves of this potential remedy.

In office practice, issues can arise when a client is embarrassed by poor future prospects for his company and wants to tell potential investors a more attractive story than the facts permit. [\[FN104\]](#) In yet other situations, the pecuniary interests of corporate management, who hire the outside lawyers, differ from the interests of the shareholders. Negotiations, too, present a great temptation to exaggerate or even falsify facts because 'everybody does it.' [\[FN105\]](#) The need for lawyer integrity in such cases is especially great because office lawyers are not directly subject to scrutiny by judges.

In the end, it is the responsibility of individual lawyers to ensure that abuses do not occur. As Judge Fay of the Eleventh Circuit recently declared in a decision find-

ing bad faith on the part of a lawyer conducting discovery:

No client-large or small, rich or poor, with or without influence-can be allowed to corrupt our system of jurisprudence to protect his, her or its self interests.

It is my personal observation that too many practitioners have 'sold out to the client.' While the actual numbers of those who have done so may not be great, the trend can be disastrous! Advocacy must be carried out within the rules. . . . What we must never forget is that we all serve as 'officers of the court.' Failing in this endeavor, we will lose much more than merely the case at hand. [\[FN106\]](#)

Often, it is clients who ask lawyers to prosecute or defend minor, frivolous, or perhaps not-so-minor cases through 'scorched earth' tactics.\***280** The lawyer has an obligation to the legal system in his capacity as an officer of the court to dissuade the client from pursuing matters that should not be in court in the first place, and from using tactics geared primarily to drain the financial resources of the other side. [\[FN107\]](#)

Where the two conflict, the duty to the system of justice must transcend the duty to the client. Some chief executive officers of large corporations and their general counsels have acknowledged that it is in their own self-interest to recognize the public interest in prompt resolution of disputes. The American Corporate Counsel Association has issued guidelines in the civil area-which we hope will be the wave of the future-urging inside and outside-retained lawyers representing corporations to avoid delay and frivolous filings. [\[FN108\]](#) One fine example is the set of guidelines prepared by Xerox Corporation that is attached to this report. The guidelines explicitly recognize that the interests of the client must be understood in the context of the greater public good and the efficient administration of justice. The President of Xerox wrote:

Of course, lawyers have a professional obligation to the courts as well, but the client, too, has an interest in the efficient administration of justice

above and beyond the particular issues in a given lawsuit. The professional principles that underlie the lawyer's obligation to the courts have relevance to all our citizenry. It is not a conflicting obligation but rather a limitation on their obligation to the client. [\[FN109\]](#)

6. *The Bar should study the issue of the participation of law firms and individual lawyers in business activities, certainly where either actual or potential conflicts of interest may be involved.*

The Commission has been disturbed by what it perceives to be an increasing participation by lawyers in business activities. The activities take several forms.

First, some firms now operate businesses which may provide services that those firms believe are ancillary to the practice of law-real estate development or investment banking, for example. Other firms or individual lawyers have become active in businesses which have little or nothing to do with their practice. [\[FN110\]](#)

\***281** Second, many firms now have firm investment pools which presumably are intended to increase the income of the lawyers in the firm. [\[FN111\]](#) In many instances these investment pools invest in activities of clients. For example, if a real estate developer needs equity capital for a project, the firm will supply some or all of the required equity. [\[FN112\]](#) Although this may make the client's financing efforts easier, it creates a potential or actual conflict of interest, changing the lawyer-client relationship in a very fundamental way. [\[FN113\]](#)

Finally, when a lawyer serves as a member of the board of directors of a corporate client, other potential conflicts of interest may be created. The problems of the lawyer-director have long been recognized and do not seem to be decreasing. [\[FN114\]](#)

At least three fundamental questions are posed by what is taking place. Should practicing lawyers become active in the operation of any business? Should lawyers

become investors in the business activities of clients, and if so, under what limitations? Does involvement in such business activities so distract the lawyer from his or her practice that clients suffer?

The rules of the American Society of Certified Public Accountants specifically prohibit accountants either from serving on the boards of clients that they audit or from investing in them. [\[FN115\]](#) The English barrister is prohibited from engaging in business activities, [\[FN116\]](#) as is the French *avocat*. [\[FN117\]](#)

It seems clear to the Commission that the greater the participation by lawyers in activities other than the practice of law, the less likely it is that the lawyer can capably discharge the obligations which our profession demands. The Commission views the trend as disturbing and urges the American Bar Association to initiate a study to see what, if any, controls or prohibitions should be imposed.

*7. When not representing clients before legislative bodies, lawyers should put aside self-interest and should support legislation that is in the public interest. In addition, the Bar should urge legislative bodies to consider the consequences of proposed legislation on the courts. All too frequently, such legislation, when enacted, \*282 inundates the courts with cases never contemplated by the drafters.*

While the organized bar does not speak with one voice on most legislative proposals, increased efforts should be made by individual lawyers and groups of lawyers, when not appearing on behalf of clients, to avoid actively espousing matters of lawyer self-interest. Parochial and shortsighted efforts to garner additional income for lawyers generally, or groups of lawyers, through special interest legislation, can only decrease public esteem. [\[FN118\]](#)

Admittedly, it is not always easy to divine the 'public interest.' Still, it is hard to justify how legislation aimed at

simplifying the handling of uncontested matters—clearly in the public interest and aimed at holding down fees—should ever properly be opposed by groups of lawyers. [\[FN119\]](#) We must recognize the need generally to simplify our laws for the sake of the public. As Derek Bok and others have suggested, we as a society are 'overlawed.' [\[FN120\]](#)

Federal and state legislatures contribute to the problem. In the creation of new rights and remedies, inartful drafting can result in protracted and costly court challenges. Congressional staffs frequently issue conflicting legislative histories about the same measure. In legislative drafting and the preparation of the underlying legislative history, far greater effort should be made to ensure that statutorily-created rights and remedies work as intended by their drafters.

As one example, the United States Congress does not seem to have thought through the creation of a private civil right of action for 'racketeering activity' (widely referred to as 'RICO'). One only has to look at how the statute is used today—to go after everyone but organized crime, the target intended by Congress—to see how legislative efforts can be misdirected. The federal courts literally have been flooded with such actions. [\[FN121\]](#)

Later amendment of a statute often seems harder to achieve than enactment of the appropriate legislation in the first instance. Bar associations should monitor legislative activity for the possible impact of \*283 proposed legislation on the courts and should seek later legislative correction where excessively burdensome laws have been passed. Further, both bar associations and legislative bodies should work toward a routine requirement for judicial impact statements to accompany all legislation creating new rights of action. [\[FN122\]](#)

*8. Fees are a source of misunderstanding between many lawyers and their clients. Further, the amount of fees charged by lawyers in some instances results in bitter criticism of the Bar. The Commission suggests:*

a. *Fee arrangements between lawyers and their clients should be in writing, where feasible.*

b. *If, at the end of a lawyer's services in any matter, the client believes that the fee charged was inappropriate, the client should be able to have the matter reviewed by an impartial fee review committee, possibly appointed by the state Supreme Court. All such committees or entities should include lay members.*

Contingent fee agreements—the key to the courthouse door for some litigants but long a subject of potential abuse [\[FN123\]](#)—are required to be in writing according to Rule 1.5(c) of the ABA Model Rules of Professional Conduct. A requirement that contingent fee agreements be in writing and be presented for examination by the court is likewise now in effect in some state and federal jurisdictions. [\[FN124\]](#) The Commission commends controls of this kind. In such cases, the judge should ensure that the total contingent fee bears a reasonable relationship to the difficulty of the case, the risk, and other appropriate factors, not just to the amount actually in controversy. [\[FN125\]](#)

**\*284** The Commission advocates the use of written fee agreements in all cases where practical, not merely in contingency fee matters. Such a requirement is not without precedent; a similar concept is encouraged by Rule 1.5(b) of the Model Rules of Professional Conduct. If steps are not taken by lawyers to provide more information to their clients on fees, state legislatures may do so. [\[FN126\]](#)

Certain fee practices warrant special attention. For example, double, triple or quadruple teaming on depositions, and the filing of motions to dismiss and motions for summary judgment in every case, whether or not there is any reasonable chance of success, are wasteful, wholly inappropriate tactics. The refusal to settle or resolve a case—particularly a class action suit—before a certain fee level has been reached also cannot be justified. [\[FN127\]](#) It must be noted that these types of abuses are by no means

limited to just a few specialty areas. Whenever such practices occur, they must be condemned and stopped because they are inconsistent with the lawyer's responsibility toward both the client and the system of justice. [\[FN128\]](#)

Furthermore, the practice of passing fees on to third parties for payment is fraught with the potential for abuse. Third-party fee padding can occur in a variety of settings, as when fees are paid by an estate, when one spouse pays the other's fees in a divorce settlement, or when a small specialty law firm, hired by lead counsel, handles limited aspects of a case. Such billings—including third-party payment requests—are often not subject to court review. However, where the court has an opportunity, it should carefully review the reasonableness of the fee, especially where there may be no active participant in the case who has an incentive to object to the requested amount. [\[FN129\]](#)

No single issue between lawyer and client arises more frequently or generates more public resentment than fee problems. While distinctions can be raised between sophisticated and unsophisticated users of legal services, it is desirable to have open communication on fee matters with **\*285** all clients. This includes an adequate explanation of the legal work to be performed in each case and why it needs to be done. All too frequently, clients cannot evaluate the nature and scope of the work performed. Either they do not understand the issues or they cannot make sense of the supporting records provided them, if indeed, any such supporting information is furnished at all.

One particular approach warranting increased consideration is fee arbitration, to which clients could turn as a matter of right if they believe they have been overcharged. [\[FN130\]](#) The fee dispute would be reviewed and resolved with the assistance of a panel of arbiters. While mandatory fee arbitration panels have been established in many states, New Jersey being a particularly good example, [\[FN131\]](#) these panels tend not to be publicized and sometimes include only lawyers as members. We suggest that lay persons always be included on such panels in the

future and that information about the availability of arbitration be widely disseminated. [\[FN132\]](#)

In the case of fee petitions reviewed by the courts, the Commission recommends the clustering of time in these petitions by each discrete litigation activity, as required by U.S. District Judge John F. Grady in his pretrial order in *In re Continental Illinois Securities Litigation*. [\[FN133\]](#) This useful structuring of the fee petitions by counsel would shorten the time needed for a court to review them and would quickly focus attention on whether particular activities performed were either necessary or cost effective. Otherwise, the court often must plow through mountains of computer records, with all time indiscriminately collected together. [\[FN134\]](#)

Experience indicates that the issuance of pretrial orders by judges can be useful. The orders should outline precisely the procedures to be followed by counsel and could, among other things, limit the number of lawyers participating in depositions and appearing before the court in oral arguments. Orders such as these will help minimize the size of requested fee awards.

One problem that our proposal will not solve is the extraordinary share of the expenses of accident litigation consumed by costs and lawyers' fees. In the massive asbestos litigation, for example, only about 39 cents of every dollar the companies pay will go to asbestos victims. [\[FN135\]](#) The balance will go for expenses of litigation and lawyers' fees. Similar <sup>\*286</sup> studies of auto accident claims suggest that less than 50% of the insurance dollar goes to victims. [\[FN136\]](#) There is something seriously wrong with such a situation even if there is no fee dispute between lawyer and client in any given case. Quick fixes, such as ceilings on contingent fees, [\[FN137\]](#) have been proposed at the federal level and in several states, but the problem requires much more sustained investigation in which the Bar clearly should be involved. Indeed, it could involve reconsideration of our whole 'fault' system of liability in some kinds of cases. [\[FN138\]](#)

9. *Lawyers and judges should report to the appropriate disciplinary committee or prosecuting attorney any serious misconduct on the part of other lawyers and judges which they believe would support a complaint for discipline or criminal charges.*

The increased reporting of serious misconduct of both lawyers and judges is essential. At present, hardly any such reporting occurs. [\[FN139\]](#) In part, this may be because disciplinary procedures are not understood, the process is cumbersome and many complaints seem to result in an insignificant penalty. While these inadequacies must be corrected, they cannot justify the failure to report.

Far more must be done to try to break down the attitude that the reporting of misconduct by colleagues is unseemly. To help create a more favorable environment in which such reporting can occur, lawyers must be educated far more about the disciplinary process and steps must be taken to streamline the procedure. Many lawyers and judges simply do not know how the disciplinary process operates and hence decide not to intervene when misconduct openly occurs before them.

In addition, there is the cynical view that 'nothing will happen anyway' and the investigation will go on interminably. This need not be the case. The *ABA Standards for Lawyer Discipline and Disability Proceedings* recommend procedures to professionalize the handling of disciplinary matters. [\[FN140\]](#) Undoubtedly, while the excuses noted are inadequate, <sup>\*287</sup> improving the efficiency of the process and the toughness of the sanctions will decrease the reluctance to pursue a matter through the disciplinary process.

The recent spate of indictments and convictions of lawyers, judges and other court officials in the Operation Greylord investigation in Chicago was shocking, but the underlying conduct on which the indictments were based is, unfortunately, probably not unique. Notwithstanding whether such widespread prosecutions are pursued in oth-

er jurisdictions, members of the judiciary and the practicing bar must all do far more to report instances of illegal or unprofessional conduct that come to their attention, to either the appropriate disciplinary commission or prosecuting attorney. Disciplinary Rule 1-103(A) of the *ABA Model Code of Professional Responsibility* requires a lawyer to report any ‘unprivileged knowledge of a violation of [the Code].’ Rule 8.3 of the *ABA Model Rules of Professional Conduct* requires a lawyer to report any ‘violation . . . that raises a substantial question as to [another] lawyer’s honesty, trustworthiness or fitness as a lawyer . . .’ Judges are obliged to report lawyer or judicial misconduct by Canon 3B(3) of the *ABA Code of Judicial Conduct*. [FN141] Members of the public also could assist in reporting misconduct if they were better informed by the Bar as to what constitutes a violation.

Testimony before the Commission revealed that very few lawyers or judges came forward to the United States Attorney or to the Illinois Attorney Registration and Disciplinary Commission regarding the misconduct and illegal activities that led to the indictments in the Operation Greylord investigation. [FN142] Even to date, there have been few additional reports of disclosures, although it is a reasonable inference that many persons knew of the improper activities. Ironically, judicial figures who merely refused to accept bribes, but did not report the criminal solicitations-as they were ethically required to do-have been widely praised.

Unless reports are made of misconduct and ethical violations, it will remain difficult to take any needed disciplinary or criminal action against the offending persons. Moreover, we are informed that few lawyers, if any, are ever disciplined for even knowingly failing to report the misconduct of a fellow lawyer. In view of the clear obligation to report, we \*288 urge that proceedings be brought in appropriate cases against lawyers who fail to do so. We believe that the institution of a few such proceedings will result in an improved attitude by lawyers with respect to reporting.

10. *Bar associations should be constantly alert to*

*seek improvements in the system of justice. This should embrace such activities as supporting an expanded use of alternative methods of dispute resolution.*

Constant work is necessary to improve the system of justice, such as the development of satisfactory alternative dispute resolution mechanisms to aid in the expeditious resolution of controversies. Justices Stewart, Powell and Rehnquist observed when the Federal Rules of Civil Procedure were amended in 1980:

Delay and excessive expense now characterize a large percentage of all civil litigation . . . . The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system. [FN143]

Experts estimate that in 1983 over \$33 billion was spent on legal services, representing an increase in real terms of 58.6% in one decade. [FN144] There also is evidence ‘that litigation costs may be increasing at a faster rate than overall legal services.’ [FN145] Those costs include ‘lost management time, the costs of delay and uncertainty, lost opportunities, and destroyed business relationships.’ [FN146]

The cost, delay and uncertainty associated with civil litigation falls on both plaintiffs and defendants, and it has begun to produce common ground between them: the need for fair and efficient alternative dispute resolution procedures to be explored and implemented. These procedures need not be complex or revolutionary to achieve their end. Quite to the contrary, formal settlement procedures, coupled with the involvement\*289 of a neutral mediator, appear to hold great promise for the prompt and equitable resolution of many controversies.

The Commission has examined a wealth of literature

dealing with innovative alternatives to litigation. The approaches include private mediation, arbitration, both binding and non-binding, mini-trials and other abbreviated court presentations both with and without the involvement of client principals. [\[FN147\]](#)

The Center for Public Resources, a New York-based public policy organization, has urged having business entities sign a pledge committing the company to explore alternative dispute resolution (ADR) methods before proceeding with or in lieu of litigation. More than 200 of the nation's largest corporations have signed the pledge. The problem is that the pledge will have little direct effect until the disputes involve co-signatories. Still, the ADR pledge helps get parties over the initial hurdle of making the first move and dissipates the feeling that a step toward settlement is a sign of weakness.

There is much to be gained by creating a system which compels negotiation at an early stage in the proceedings. Both plaintiffs and defendants have a substantial interest in securing a quick, inexpensive and certain resolution. Moreover, providing the parties with a neutral assessment of their positions increases the likelihood of settlement without the expenditure of the time and effort employed in frequently costly discovery and pretrial proceedings.' [\[FN148\]](#)

Even though a great deal of work has been done by the American Bar Association Special Committee on Dispute Resolution and by the Section of Litigation, among others, experimentation with alternative means of dispute resolution remains, in a sense, in its infancy. Far more must be done in this area in the future. [\[FN149\]](#) As a part of this effort, lawyers must become better acquainted with these methods and not merely react to alternative dispute suggestions raised by their clients. In addition, counsel must not assume that a client will reject out of hand remedies or approaches short of litigation; such options should be carefully and fairly discussed and evaluated with the client early in a case.

**\*290** Chief Justice Warren E. Burger put the issues into appropriate perspective when he spoke recently at the 1986 annual meeting of the American Law Institute in Washington:

The true function of our profession should be to gain an acceptable result in the shortest possible time with the least amount of stress and at the lowest possible cost to the client. To accomplish that is the true role of the advocate.

### C. JUDGES

1. *Trial judges should take a more active role in the conduct of litigation. They should see that cases advance promptly, fairly and without abuse. Granting increased authority to judges runs the risk of arbitrary behavior on their part, but reviewing courts should provide whatever counterbalance is needed.*

The role of the judiciary in the conduct of litigation should be strengthened and courts should play a more decisive role earlier in the litigation process. They should insist that disposition of litigated matters be made promptly and fairly. Pretrial procedures to limit issues should be made more effective. Litigation increasingly should be viewed as a 'last resort.'

The filing of frivolous motions and complaints, asserting unfounded defenses, pursuing abusive discovery, and taking unwarranted appeals glut our system of justice. [\[FN150\]](#) Case management techniques must be employed by judges to move matters along. Sadly, litigation today frequently resembles the dance marathons of the 1930s where the partners or, in this case the adversaries, move as slowly as possible to the music without actually stopping.

Lawyers, of course, have a very large role to play in keeping cases moving ahead efficiently. Nonetheless, although the Federal Rules of Civil Procedure have been amended to provide additional ways for litigants to pare

down the issues for trial, [FN151] counsel often have not sought such simplification. This must change. Parties do not bear all the costs of their own delay. [FN152] There is a public interest in not clogging the courts with stale cases. Unfortunately, the responsibility for the efficient movement of cases must fall upon the shoulders of the judges largely by default.

Some federal district courts have pioneered specific pretrial guidelines of their own, beyond the revised Federal Rules. [FN153] We commend such \*291 efforts. Of course, in order that there may be adequate review of the trial judge's actions, a judge should conduct the proceedings on the record when requested by counsel to do so.

2. *Judges should impose sanctions for abuse of the litigation process. Currently, the Federal Rules of Civil Procedure permit the imposition of sanctions for such abuses, and increasing use is being made of the sanctions to penalize the lawyer or the client, or both. In many state systems, the Supreme Courts have not promulgated such rules. State Supreme Courts should adopt rules similar to Rule 11 of the Federal Rules, so that authority to act is clearly given to the trial judges.*

There are indications that the federal courts are making increased use of the sanctions available under such provisions, as revised [Rules 11](#) and [26 of the Federal Rules of Civil Procedure](#). [FN154] There is widespread recognition that, in appropriate cases, sanctions should be used to penalize baseless filings, dilatory tactics and deter similar misconduct, including abuse of the sanctioning procedure itself.

In the state courts, there is a need to establish state-wide procedures to expedite the disposition of civil cases. [FN155] It is asking too much of elected judges to take it upon themselves to play the role of 'tough case manager' and to impose sanctions upon parties. [FN156] They run the risk of being singled out and punished when they are up for retention or reelection. The adoption of rules and regulations constituting a civil analogue to the scheduling

requirements of the Speedy Trial Act [FN157] should be considered by both the state and federal courts, imposing firm but realistic deadlines for each stage of a case.

While the Commission advocates the increased use of sanctions in appropriate cases to reimburse opposing parties for defending against improper action or filings, care should be exercised to make sure that the penalties do not fall unfairly upon clients. In many cases, the clients are not responsible for their lawyers' improper acts. In such cases, the courts should impose sanctions on the lawyers directly and prohibit passing the cost on to the client. In other cases, the courts may deem it more appropriate to report the misconduct to disciplinary commissions, \*292 without interfering with the status of the client's case. Of course, they could do both.

Some courts have gone a long way toward reimbursing parties for having to defend against frivolous motions and filings. [FN158] On occasion, of course, imposing sanctions on parties or their lawyers can spawn time-consuming collateral proceedings. Still, the signals sent by such penalties extend beyond the immediate case and the immediate parties; the message spreads.

Some overburdened appellate courts are now imposing sanctions for frivolous appeals. [FN159] Certainly a party should have no more right to file a frivolous appeal than to file a frivolous lawsuit in the first place.

Although the Commission does not recommend adoption of the English system of automatic fee shifting when a party with a case of some merit loses, it does seem that in cases on appeal further consideration should be given to the concept. It does not inexorably follow that a citizen's 'day in court' should include the ability to tax the limited resources of every stage of the judicial process. Whether or not such a concept should be applied would be affected by the attitude of the courts about whether or not access to the courts can be said to include a right to appellate review. The experience gained by applying the fee shifting concept to appeals could provide valuable

insights into whether to apply the concept more broadly to matters in the trial courts. [\[FN160\]](#)

3. *Merit selection should be the means by which judges are chosen. The Commission believes that a bench of the quality that merit selection can provide is essential to improve our system of justice.*

**\*293** One cannot overestimate the importance of having and maintaining the highest quality judiciary in each jurisdiction. Studies we have seen and discussions we have had with key participants in the judicial selection process make clear that judges are far less likely to punish misconduct and take other tough action if they must run for reelection or retention every few years.

The elective system has given us some very good judges, but also some bad ones. Current methods of selection in many states mean that judicial candidates must run the gauntlet of endorsements by ward and township committeemen, questions by party slatemakers about extraneous matters such as service in the precinct, partisan primary and general elections, and campaign fundraising at each step of the way. Once elected, a similar process is repeated each time another election must be faced. The result is that many of the best potential candidates never apply.

On the road to the bench, judicial candidates often become embroiled in reciprocal obligations to political sponsors, as well as to campaign contributors, many of whom are likely to be lawyers who will appear before the judge. Judges may feel under pressure to return these favors.

One aspect of judicial elections-campaign financing-has a particularly corrosive effect upon public perception of judicial independence. Even the requirement in certain jurisdictions that judicial candidates raise money through a campaign committee does not shield the candidate from fundraising. [\[FN161\]](#) No matter how hard a judge may try to be fair to contributors and noncontributors alike, the

necessity and the practicalities of campaign fundraising can only create the public expectation that judges will not be impartial. In particular, news stories emanating from Texas depict the situation there as productive of public cynicism. [\[FN162\]](#)

Interestingly, it has long been observed that popular elections of judges rarely offer accountability to the public. Voter interest is generally low, and few judges fail in retention elections. [\[FN163\]](#) Ethical restrictions **\*294** prohibit the discussion of views on specific issues and inhibit debate useful for informed voting. [\[FN164\]](#)

Because of these serious problems, some 30 states have adopted some form of appointive system for one or more levels of the judiciary. [\[FN165\]](#) Many use a nominating committee to screen and recommend highly qualified candidates. While we applaud such efforts, we must not stop there; more must be done to obtain the best qualified judges and to depoliticize the entire process.

4. *State disciplinary agencies under the control of state supreme courts are, in general, insufficiently funded and staffed. They now cannot do much more than deal with charges of theft, neglect or the commission of a felony. Adequate funding should be made available to the disciplinary agencies, enabling them to do a thorough and competent job in pursuing the full range of offenses which occur.*

Disciplinary commissions are no longer agencies of the voluntary Bar in most states. They are institutions of the state court systems, usually the state's highest court. [\[FN166\]](#)

The perspective of the personnel of disciplinary commissions throughout the country has, it seems, been too narrow. Because of limited budgets, only those ethical violations that are the easiest to prove-such as the theft or misappropriation of client funds or the commission of a felony-tend to be the subject of prosecutorial action by commissions. [\[FN167\]](#) This must change if the

public is to receive the protection it deserves. A whole range of offenses must be prosecuted when actual violations occur—including failure to communicate with the client, the charging of excessive fees and other improper practices—so as to deter wrongdoing.

The Commission also frequently heard that the penalties recommended by disciplinary commissions are often diminished or lessened by state Supreme Courts. [\[FN168\]](#) We cannot overemphasize the fact that unless tough, but fair, sanctions are meted out of offending individuals, there will be little change in the current problems facing the profession. Where possible, the proceeding for imposing sanctions on a member of the Bar, after a finding is made of sufficient basis for the case to go forward, should not be shrouded in secrecy. [\[FN169\]](#) This only fosters distrust \*295 by the public. Finally, there should be more effective follow-up with respect to disciplined lawyers.

As already noted, the budgets of state disciplinary commissions must be increased. Additional funds also should be allocated to alcohol and drug abuse programs for disabled lawyers. [\[FN170\]](#) It is urged that there be more comprehensive training and recruitment to obtain high-quality lawyers to oversee the disciplinary process and to prosecute claims.

A word of caution is in order. As disciplinary commissions and their staffs move forward in a revitalized attack on lawyer misconduct, they must avoid 'witch hunts' which exalt form over substance. This includes attempts to halt experiments in providing legal services on a mass scale. [\[FN171\]](#) In addition, as always, due process rights, including expeditious appeals, must be guaranteed to the targets of investigative or disciplinary proceedings. [\[FN172\]](#)

Preventive legal medicine can, of course, do more to improve the quality of lawyering than many steps taken after-the-fact by disciplinary commissions. As we have already suggested, [\[FN173\]](#) law firms would do well to set up ethics committees in their firms and other institu-

tional networks to deal with potential ethics problems at an early stage.

*5. State supreme courts control admission to the Bar. They often charge character and fitness committees or their equivalent with the responsibility of reviewing the qualifications of applicants. Adequate funding and authority should be provided to such committees so that they can do a thorough job of investigation.*

Greater attention must be given by the state supreme courts to their admission processes, particularly to the screening of the character and fitness of the applicants for admission to the Bar. Many inquiries in this area are cursory and some have resulted in the admission of lawyers who, it is later determined, have prior criminal records or have engaged in serious misconduct which, if known, would have prevented their admission to the Bar. [\[FN174\]](#) If such persons are admitted to the profession and engage in further misconduct, the resources expended to discipline them will many times exceed the cost of barring their entry into the profession in the first place. In addition, sanctions imposed on individuals after they enter the profession often do not prevent them from \*296 practicing and are insufficient to deter other, similarly-situated individuals from lying on their applications and entering the profession. At a minimum, state admissions committees should perform spotchecks of character and fitness applications using either paid investigators or volunteer lawyers.

In screening applicants for admission to the Bar, we of course urge that great care and sensitivity be exercised in devising procedures to ensure, to the maximum extent practicable, that so-called life style and borderline 'moral turpitude' issues do not weave their way into the process. [\[FN175\]](#)

One related issue must be mentioned. If the screening of character and fitness applications is to have any effect, state supreme courts must send a clear signal when such cases reach them. We are reminded of a recent case

in which one state supreme court, while denying present admission to an applicant because he improperly passed himself off as a police officer and made material misstatements about prior addresses and places of employment in his character and fitness application, went out of its way to indicate that the individual could apply again for admission forthwith! [FN176] The concept that time cures deceit runs roughshod over the high principles of professionalism vital to the health of the profession.

#### D. IN GENERAL

*All segments of the Bar should:*

1. *Preserve and develop within the profession integrity, competence, fairness, independence, courage and a devotion to the public interest.*

These goals, it seems to the Commission, are obvious and desirable. Every lawyer should and most lawyers do subscribe to them. What needs to be done, however, is to make them part of the fibre of every lawyer's life. That means raising the conscience of the Bar and all of its members. It means a call to action. We hope that the recommendations which we submit in this Report will move us all in that direction.

2. *Resolve to abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct.*

Surely, it is not too much to call on the American Bar Association and its members to reach for such a goal. The minimum standards are important, indeed essential, to uphold; but leadership, example and inspiration are needed as well. We call on the American Bar Association \*297 to provide the leadership and the example, which in turn will provide the inspiration. [FN177]

3. *Increase the participation of lawyers in pro bono activities and help lawyers recognize their obligation to*

*participate.*

There is a need for increasing the *pro bono* activities of the entire Bar, particularly to serve the needs of those groups that are unable to afford representation. The Commission strongly supports *pro bono* services by all segments of the profession. [FN178] The number of hours given by a lawyer in such service will in most cases be insignificant to his or her practice, while the benefits to the recipients can be considerable. A commitment of 30 to 50 hours per year would appear to be possible even for small firm lawyers, sole practitioners, corporate counsel, or government lawyers. [FN179]

The question is how *pro bono* services can best be contributed by each individual lawyer. The focus must be on the definition of 'pro bono services.' [FN180] Such a term should be broadly defined to provide ample opportunities for contributions by all types of lawyers engaged in different specialties. [FN181] Obviously, steps must be taken to ensure that, for example, probate lawyers are not assigned to try criminal cases. Sensitivity in the matching and allocation of *pro bono* services can overcome such hurdles.

It should be noted that some sole practitioners, as well as small firm and large firm lawyers, have provided and continue to provide considerable *pro bono* services. This includes the selfless work done by many minority lawyers.

\*298 Unfortunately, the efforts by all of these groups still fall short of meeting the need. [FN182] In particular, middle-range and senior partners in large firms should set examples for younger lawyers by contributing their considerable talents. Presently, far too few partners engage in any form of *pro bono* activity and, we are advised, restrictions are placed by senior management on such activity by corporate counsel and government lawyers—all sending direct signals to the associates, employees, and the public.

In addition, to avoid harming an associate's career because of his or her involvement in *pro bono* activities,

the Commission recommends that law firms court *pro bono* services as billable hours for purposes of measuring a lawyer's productivity. [\[FN183\]](#) Without such credit, the incentives to avoid *pro bono* service out of fear for one's career may be overwhelming.

Law schools have their own role to play in helping distribute needed legal services. In local communities, law schools can serve, in effect, as clearinghouses to determine what types of *pro bono* services are required. They constitute a pool of unusually skilled talent and can help minimize the mismatching of legal talent with client needs. [\[FN184\]](#)

The Commission should not be understood as recommending a mandatory *pro bono* commitment. We refrain from that for several reasons. First, it would be antithetical to the tenets of public service to have to conscript lawyers. Second, it may unfortunately create situations where lawyers unwillingly represent clients to the detriment of those clients. The Association of the Bar of the City of New York exhaustively grappled with the issue of mandatory services and concluded that such conscription would create more problems than it would solve. [\[FN185\]](#)

Still, the Commission believes that more than passive encouragement should be offered to support increased *pro bono* services. As we have asserted, such services are a moral obligation on the part of the individual lawyer. As Whitney North Seymour stated so forcefully in the 1968 Benjamin N. Cardozo Lecture:

\*299 . . . the lawyer is not just a journeyman devoted to his own interests but . . . he has a duty to his profession which includes . . . the duty to contribute at least some of his talents to the public good through the organized bar and in other ways. . .

The origin of this broad duty is in the special nature of the profession. It is a necessary corollary of the lawyer's exclusive franchise to practice law

and his vital role in the administration of justice. The public has given the franchise to a select group, deemed by learning and character worthy to enjoy it exclusively, and there arises a duty to use these qualities to serve both the private and public interest in exchange. [\[FN186\]](#)

Some flexibility in the providing of services and a financial contribution toward the providing of services by others must be acknowledged. For example, while the commitment of a law firm's talent pool to provide *pro bono* services is to be encouraged, firms that are willing to fund positions in legal service organizations should not be discouraged from these activities. [\[FN187\]](#)

Likewise, other public service-directed programs deserve increased attention. They include contributing 1% or 2% of each lawyer's income to support legal aid and related projects, [\[FN188\]](#) and creative student loan forgiveness plans that would allow law graduates to pay off their indebtedness to law schools by working in the community for a period of time with organizations providing legal services to the disadvantaged.

It should come as no surprise to anyone that the poor are among the least represented members of our society, especially in civil matters. *Pro bono* experiments, while no panacea, are a first step. Far more must be done, however, to fill this vital need, particularly because there currently is little governmental funding to support legal assistance programs for this segment of society. [\[FN189\]](#)

*Pro bono* services also can be used to assist our overworked courts. Retired lawyers or judges can serve as so-called 'adjunct judges,' to help alleviate the overcrowded dockets of the courts. These retired lawyers or judges could serve as Magistrates or Special Masters to pare down the issues in cases, facilitate or take part in settlement discussions, or take other measures aimed at improving the administration of justice. Such an experiment is under way in Connecticut, and we encourage further experimentation of this kind. [\[FN190\]](#)

**\*300** 4. *Resist the temptation to make the acquisition of wealth a primary goal of law practice.*

The Commission believes that many of the problems outlined in this Report could begin to be addressed by subordinating a lawyer's drive to make money as a primary goal of law practice. As seen earlier, [\[FN191\]](#) some lawyers make incomes of well over \$100,000 annually, although the average is far less. However, the pursuit, by any lawyer, of making money as the governing principle in a law practice is a point of departure for many problems.

This is not to condemn lawyers who earn substantial incomes. Dr. James T. Laney, President for Emory University, put the issue into proper perspective:

A fee should of course be adequate; it can ever be generous. But a professional possessing moral authority is never simply hired. I think we can see this point reflected in the gratitude that so often accompanies professional services. Such gratitude is a manifestation of a relationship built on more than contractual compensation. It doesn't replace compensation, but it often transcends it. It acknowledges that what has transpired between client and professional is of such value and importance, and meets such a need, that the client feels served in the highest way.

Clearly, such an orientation to one's work differs markedly from entrepreneurship, which emphasizes risk-taking, big operations, seizing every opportunity, exploiting the moment. Those are not the virtues or attributes that we usually associate with a professional.

. . . I do not suggest that professionals must expunge self-interest. I simply submit that being a professional means that self-interest is directed and disciplined and, at best, sublimated toward a loftier idea of interest. A professional is one who identifies with a larger public beyond his or her own good. [\[FN192\]](#)

Whether the subject is *pro bono* service or a

'scorched earth' policy in litigation, attentiveness to continuing education or a pursuit of more and wealthier clients, layers face profit or service decisions every day whether or not they recognize them.

The temptation to put profits first will always be great. Indeed, the increase in competitive pressures on lawyers may make the temptation greater now than at any period in history. However, financial reward should ultimately be the consequence of good service. Activities directed primarily to the pursuit of wealth will ultimately prove both self-destructive and destructive of the fabric of trust between clients and lawyers generally. [\[FN193\]](#)

**\*301** 5. *Encourage innovative methods which simplify and make less expensive the rendering of legal services.*

One of the most intractable problems confronting the legal profession today is the lack of access by the middle class to affordable legal services. While there may be some evidence of overlawyering in our society, there is certainly evidence of the under-representation of middle class persons. [\[FN194\]](#)

Aside from the cost of services to such groups, the Commission has heard evidence that the quality of services furnished to them is inadequate. To evaluate further these serious charges, the Commission recommends that the now decade-old American Bar Foundation survey that served as the basis for the report *Legal Needs of the Public* be brought up to date.

In addition, the limited licensing of paralegals to perform certain functions seems to be a desirable step. Possible areas for the provision of such limited services include certain real estate closings, the drafting of simple wills, and selected tax services now being performed by lawyers. [\[FN195\]](#) That is not to say that lawyers should not perform these services in the future. But, they should have to compete with properly licensed professionals. The continuing high cost of legal services requires that such approaches be considered if clients of

ordinary means are to be served at all. [\[FN196\]](#)

Care must be exercised in having paraprofessionals enter these areas and in making sure that the training, supervision and testing required is comprehensive. No doubt, many wills and real estate closings require the services of a lawyer. However, it can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required and are therefore the only ones able to advise clients on any matter concerning the law. Inroads on lawyer exclusivity have been made and will continue to be made. Lawyer resistance to such inroads for selfish reasons only brings discredit on the profession. [\[FN197\]](#)

Still, licensing standards must be rigorous because abuses by paraprofessionals do occur. An Hispanic member of the Florida Bar testified \*302 before the Commission that underground networks of 'notarios' (notaries public) at one time sprang up in sections of Miami and elsewhere, giving incorrect legal advice to immigrants who did not speak English. Where such abuses of clients occur, unauthorized practice committees of bar associations have a place.

In the past, both the public and some segments of the Bar have viewed state bar unauthorized practice of law committees as existing to protect lawyers' economic interests. Today, most bar associations recognize that such committees' sole obligation should be to protect the public from incompetent and unqualified legal service providers. However, in doing so, innovative approaches to the distribution of legal services should not be stifled, but instead should be encouraged. [\[FN198\]](#)

6. *Educate the public about legal processes and the legal system.*

The profession must work harder to educate members of the public about their rights and obligations. In part, this can be done through increased institutional advertising. [\[FN199\]](#) Bar association advertising can, for exam-

ple, show why a person needs a will or explain the elements of a standard real estate closing-thereby imparting very useful information to the public.

More creative use of television could take place in the future to explain to members of the lay public the 'whys, whens and hows' of getting a lawyer. In addition, such programs as 'dial-a-law'-providing general information on a panoply of legal subjects in pre-recorded phone messages-might also be increased.

'Lawyer in the classroom' programs, which create a bond between the legal community and elementary and high schools, also offer promise. Opportunities to address our nation's younger generation on our legal process and how it operates should not be lost. The Youth Education for Citizenship program of the ABA contributes to these goals. [\[FN200\]](#) Too few citizens of all generations understand how the adversary process operates and why lawyers, for example, need to represent both 'innocent' and 'guilty' criminal clients.

Lawyer referral networks operated by bar mass associations have provided and must continue to provide important services to the community. They need to be expanded and improved. Often however, such services \*303 only provide a client with one lawyer's name and do little to match client needs with lawyer skills. We propose using available computer programs to sort through lists of potential lawyers to find the closest matches of location and fields of practice with the client's needs. Those names can then be provided to the client, along with one-page resumes on each lawyer to give the client pertinent information with which to make a meaningful choice.

Law professors as well ought to acquaint the public about law in the areas of their expertise. Their services could be employed in teaching courses at both the undergraduate level and in adult education programs, and they could participate in programs like Columbia University's Media & Society Seminar series. As Professor Paul Freund of the Harvard Law School explained to the

Commission, law professors have an obligation to bring 'law into the consciousness and understanding of the public at large.' [\[FN201\]](#)

Finally, relations by lawyers with the press must be improved. Without interfering with the administration of justice, decisions and actions taken should be explained, to the extent practicable, to the media in their role as representatives of the public. We are not urging that lawyers and judges try their cases in the public arena rather than in the courts; rather, we are simply recognizing that the public would better understand difficult, controversial and newsworthy decisions if bar groups-or even judges-provided the press, for example, with an abstract or syllabus of decisions. [\[FN202\]](#)

*7. Resolve to employ all the organizational resources necessary in order to assure that the legal profession is effectively self-regulating.*

It has already been noted in this report that the client's trust in lawyers is based on the assumption that self-interest is not the lawyer's dominant motive in providing service. It is assumed that the organized Bar will undertake active and effective actions to regulate the performance of its members. This means that we cannot be content with merely exhorting lawyers to be virtuous as individuals, but also that the Bar collectively must use all available means both to prevent and to remedy incompetence or misconduct.

We have suggested that accrediting bodies and disciplinary committees become more active and that large, organized practice groups, such as law firms and corporate and governmental legal departments, institute formal committees to be concerned with the ethical and professional conduct of their members. It may very well be that other formal, organized mechanisms for the review, evaluation and correction of the \*304 conduct of lawyers and judges are also necessary for continuing and improving the effectiveness of the self-regulation of the legal profession.

We urge the American Bar Association, other organized bar groups and individual lawyers to consider carefully what is required, for if the conduct of the members of the profession is not regulated by lawyers with sufficient vigor to sustain the trust of the American people, other agencies will take on the task and the independence of the Bar will be at risk.

## VI. CONCLUSION

Consider this assessment of the state of the legal profession:

Lawyers are now to a greater extent than formerly business men, a part of the great organized system of industrial and financial enterprise. They are less than formerly the students of a particular kind of learning, the practitioners of a particular art. And they do not seem to be so much of a distinct professional class. [\[FN203\]](#)

One might think that these words were written today. In fact, they represented the prevailing view in 1905, as reported by Louis D. Brandeis.

Perhaps the golden age of professionalism has always been a few years before the time that the living can remember. Legend tends to seem clearer than reality. Still, it is proper-indeed it is essential-for a profession periodically to pause to assess where it is going and out of what traditions it has come.

Clearly, the legal profession is in a process of evolution. This is inevitable. The challenge for individual lawyers and the organized Bar is to understand these changes and to preserve those principles of professionalism which endure despite the changing legal landscape.

Even with our shortcomings, all is far from bleak on the legal horizon. Examples abound-even in this anti-heroic age-of lawyers who have given of themselves unselfishly and at considerable personal sacrifice to provide

their services to the public at large. [\[FN204\]](#)

**\*305** The legal profession has attracted some of the nation's best and brightest. Graduates coming out of our law schools today are probably better educated than ever before. Many of them enter the profession with high ideals. We respectfully disagree with the assertion of President Derek Bok of Harvard that the legal profession should apologize for allegedly draining away talented young people from other fields into the ranks of lawyers. [\[FN205\]](#) The nation needs the trained leadership that these lawyers represent.

Many general and specific recommendations, urgings, and aspirational goals are outlined in this report. They will ring hollow unless the Bar, the Bench, bar admissions committees, disciplinary commissions and the academic community work together to make these proposals a reality.

In 1789, Benjamin Franklin was approached by a journalist and asked, 'What say you, Mr. Franklin-are these United States of America now a Republic or are they a dictatorship?' Mr. Franklin, without pausing, retorted: 'A Republic, sir, if we can keep it.' [\[FN206\]](#)

Similarly, it behooves the legal profession to work voluntarily toward the implementation of these and other reforms that will make us more a profession 'in the spirit of a public service.' If such action is not taken, far more extensive and perhaps less-considered proposals may arise from governmental and quasi-governmental entities attempting to regulate the profession. The challenge remains. It is up to us to seize the opportunity while it is ours.

**\*306** *Roster Commission on Professionalism*

Justin A. Stanley

Chicago, Illinois

Chairman

A partner in the firm of Mayer, Brown & Platt. Former President of the American Bar Association; participant in numerous activities related to the improvement of the system of justice. Recipient of the ABA Medal in 1986.

H. William Allen

Little Rock, Arkansas

An attorney in private practice with the firm of Allen, Cabe & Lester. A past chairman of the ABA Standing Committee on Ethics and Professional Responsibility and current chairman of the ABA Standing Committee on National Conference Groups.

Hon. Sylvia A. Bacon

Washington, D.C.

A judge of the District of Columbia Superior Court. Past chairperson of the ABA Criminal Justice Section.

L. S. Carsey

Houston, Texas

An attorney in private practice with the law firm of Fulbright & Jaworski. A past chairman of the ABA Section of Tort and Insurance Practice.

Benjamin R. Civiletti

Washington, D.C.

A former Attorney General of the United States now in private practice in Washington, D.C. with the firm of Venable, Baetjer, Howard & Civiletti. Chairman-elect of

the ABA Section of Litigation.

N. Lee Cooper

Birmingham, Alabama

An attorney in private practice with the firm of Maynard, Cooper, Frierson & Gale, P.C. Immediate past chairman of the ABA Section of Litigation and the recently elected Chairman of the Conference of Section Chairmen.

**\*307** John C. Feirich

Carbondale, Illinois

A lawyer in private practice with the firm of Feirich, Schoen, Mager, Green and Associates. A past chairman of the ABA Section of General Practice.

Adrian M. Foley, Jr.

Newark, New Jersey

A lawyer in private practice with the firm of Connell, Foley & Geiser. A past chairman of the ABA Section of Litigation and of the ABA Commission on Advertising.

Prof. Eliot Freidson

New York, New York

Professor of Sociology at New York University and an acknowledged authority on the sociology of the professions. A lay member of the Commission.

Jose R. Garcia-Pedrosa

Miami, Florida

A lawyer in private practice with the firm of Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey. A member of the council of the ABA Section of Legal Education and Admissions to the Bar.

Prof. Joseph R. Julin

Gainesville, Florida

A former dean of the University of Florida Law School and a past president of the Association of American Law Schools.

Hon. Frank A. Kaufman

Baltimore, Maryland

Former chief judge of the U.S. District Court in Baltimore, now on senior status. A past member of the ABA Board of Governors.

Hon. George N. Leighton

Chicago, Illinois

A judge of the U.S. District Court, now on senior status. A past chairman of the ABA Section of Legal Education and Admissions to the Bar.

**\*308** Gustave H. Shubert

Santa Monica, California

Director of the Rand Corporation's Institute of Civil Justice. A lay member of the Commission.

James S. Todd, M.D.

Chicago, Illinois

Senior Deputy Executive Vice President of the American Medical Association. A lay member of the Commission.

John C. Shepherd

St. Louis, Missouri

Board of Governors Liaison

A partner in the law firm of Shepherd, Sandberg & Phoenix. Proposed establishment of the Commission and articulated its charge during his term as President of the American Bar Association (1984-85).

Professor Thomas D. Morgan

Atlanta, Georgia

Reporter

A former dean of the Emory University School of Law and a prolific writer in the area of legal ethics. He is a past member of the council of the ABA Section of Administrative Law.

Richard A. Salomon

Chicago, Illinois

Special Assistant to the Chairman

A partner in the firm of Mayer, Brown & Platt, a litigator, and an author of numerous articles on the legal profession.

David J. Brent

Chicago, Illinois

American Bar Association

Project Director

**\*309 Meetings of the Commission on Professionalism:**

March 8-9, 1985 Chicago, Illinois

May 24-25, 1985 Chicago, Illinois

July 7, 1985 Washington, D.C.

July 16, 1985 London, England

October 10-12, 1985 Chicago, Illinois

November 8-9, 1985 Chicago, Illinois

January 17-18, 1986 Orlando, Florida

February 8, 1986 Baltimore, Maryland

February 22-23, 1986 Chicago, Illinois

April 27, 1986 Chicago, Illinois

**\*310 To All Lawyers Representing Xerox Corporation**

Chief Justice Warren E. Burger has remarked that 'a more productive judicial system is essential for justice', and during the 16 years of his tenure he has dedicated himself to the improvement of our system of justice. Yet, despite his efforts and the demonstrable improvement in the efficiency of the federal courts, dissatisfaction still exists in the public and in the business community in particular with the burdens and costs of litigation in this country.

The notorious burden of litigation for American business has grown to the point that it can and does have a

significantly negative impact upon the financial results of many of our corporations. Whatever the reason, it cannot continue in an economic world where success demands productivity and cost effectiveness from business entities. We cannot lose sight of our system of justice as the pillar supporting our individual rights, but neither can we ignore the threat to that system if our companies do not maintain a competitive position in world markets. Unnecessary cost burdens must be addressed and eliminated.

At his confirmation hearings in 1969, the Chief Justice noted that he could not improve the efficiency of the judicial system by himself. Many in the judiciary, government and the organized Bar have followed his leadership and joined in the effort, and yet spiraling legal costs continue as a fact of life. One party to the problem who has not been involved in the solution is the litigant. Of course, no one litigant or class of litigants can provide solutions. Yet, corporations find themselves in court more often than the individual citizen and thus are in position to provide direct support to efforts at court reform. It is time for the business community to cease complaining about runaway costs and to lend its support to the efforts of the Chief Justice.

Xerox Corporation intends to demonstrate its support through the conduct of its lawyers in the courtroom. We will insist that when you appear on our behalf that you have as one of your primary objectives the support and maintenance of an efficient court system as required by the letter and spirit of the recently amended Federal Rules. Since this is consistent with your professional obligations, I do not see it as a direction that you can find objectionable.

**\*311** However, I am advised that many misuses and abuses of our judicial system are justified by practitioners on the basis of an obligation to the client. The exhaustion of deversarial opportunities is characterized as the epitome of professional dedication to the client. Our system demands dedication to the client but there must always be trade-offs. The policy question of whether zealous adver-

sary positions should be pursued despite their negative impact on the system is not often brought to the attention of the client and generally are made by the lawyer. Absent client direction, the professional most often will-and perhaps should-follow the advocate track and rationalize his or her conduct on the basis of the client's wishes.

Of course, lawyers have a professional obligation to the courts as well, but the client, too, has an interest in the efficient administration of justice above and beyond the particular issues in a given lawsuit. The professional principles that underlie the lawyer's obligation to the courts have relevance to all our citizenry. It is not a conflicting obligation but rather a limitation on their obligation to the client. I suspect many of you will accept this in principle, but considerable disagreement will exist among you as to its practical application. This is to be expected, especially where the client has given no direction as to its position on specific matters.

To the end that we may both better address the need for supporting the drive to make litigation a more efficient process, I have directed our General Counsel to establish ground rules and principles of behavior for all lawyers representing Xerox Corporation to guide their conduct in litigated matters, particularly in the context of the Federal Rules. They will apply to attorneys employed by the Company as well as to those whom we may retain. These rules must, of course, be consistent with the codes of ethics of the profession but are to specifically address those areas where it is the recognized prerogative of the client to decide upon courses of action bearing upon the conduct of litigation. The Corporation expects its interests to be protected as appropriate but not with a disregard for the need for an efficient system of justice. I believe there is ample room for improvement without any impact on the interests of the Corporation.

I trust I can count on your full cooperation with and endorsement of this effort.

David T. Kearns

President

\*312 March 22, 1985

TO XEROX ATTORNEYS:

Our profession is laboring under a perception by businessmen that we are inefficient and unconcerned by costs. Our clients are particularly critical of the economics of the litigation process. I personally believe that, insofar as the Bar as a whole is concerned, much of the criticism is warranted. Whether or not we agree as to the degree of unwarranted cost in the process, we must all agree that the perception exists and that alone is cause for concern.

I hardly need say that I applaud the views espoused by our Chief Executive Officer, David T. Kearns, in his letter on litigation practices. An efficient judicial system is key to the climate in which our businesses operate and it is shortsighted to pursue every perceived advantage in a particular law suit without giving a thought to the importance of protecting that system. His position of leadership on this issue, however, throws the challenge back where it belongs: on us, as practicing lawyers. Xerox attorneys cannot justify extreme advocacy positions on the ground that the client expects it of us. We are expected to exercise judgment, avoiding futile searches for perfection and battles which are not likely to have a substantive impact on our litigation, but we, nonetheless, are expected to protect our client. The challenge we face is not to unduly impose on the courts while protecting the interests of the Company. I am confident we can improve our practice substantially without foregoing any of the substantive rights of Xerox. I say that even though I am equally convinced that the attorneys representing this Company are already effective litigation managers.

The attached Guidelines were prepared by a committee of the American Corporate Counsel Association. Their focus is the Federal Rules, and upon three of

them in particular; but it is expected that the same principles will be applied in all courts. We intend to expand them and amend them as we gain experience with them and as the Rules themselves are expanded and amended. You should accept them as an instruction from the client with all of the professional obligations that that implies. You will not find much foreign to the practices we have followed in the past, and I hope you will use the Guidelines as a means for expanded professional leadership of the Trial Bar.

Robert S. Banks

Vice President and

General Counsel

Attachment

\*313 GUIDELINES FOR PRACTICE UNDER THE  
FEDERAL RULES

**RULE 11**

Guideline #1

**No cause of action should be pleaded unless that cause of action would be the basis for a lawsuit standing by itself.**

COMMENT:

Causes of action are often asserted in litigation which are beyond the one which motivated the lawsuit. The inclusion of these additional causes of actions is generally justified on the ground that: (a) something might occur or be discovered during the course of the lawsuit that would give vitality to these ancillary causes of actions; and (b) there is little additional cost in including these claims.

In practice an ancillary cause of action, which, standing alone would not have prompted litigation, rarely re-

sults in significant recovery. On the other hand, these claims often result in a great deal of unnecessary costs and expenses including additional discovery or motions to dismiss. Moreover, spurious claims constitute unprofessional conduct. The application of an economic test for the inclusion of a cause of action can eliminate overbearing complaints without prejudicing the Company and can eliminate an unjustifiable burden on the courts.

Guideline #2

**Whenever litigation is being filed in order to preserve rights due to the running of a statute of limitations, the attorney responsible should, prior to filing the lawsuit, seek an agreement to toll the statute of limitations for a period sufficient to make a reasonable investigation as to whether or not a lawsuit is warranted.**

**\*314 COMMENT:**

One obvious conflict between the requirements of [Rule 11](#) and the obligations of an attorney to protect his or her client arises when the attorney's ability to protect his client, for reasons beyond his control, conflicts with his ability to make as thorough an investigation as required by [Rule 11](#). In situations where an attorney is unable to make such an investigation prior to filing the complaint due to pending expiration of a statute of limitations, he or she should only file the lawsuit, if, after a diligent effort, an agreement cannot be reached with the adversary to toll the statute of limitations of sufficient duration to make a reasonable inquiry.

Guideline #3

**Upon receipt of a complaint, and if possible prior to the time an answer is due, the attorney having primary responsibility for defending the Company shall initiate discussions with opposing counsel in order to determine the following:**

**1. The precise nature of the claim;**

**2. the propriety of the lawyer's client as defendant;**

**3. the prospect of using alternative dispute resolution in resolving the claim.**

**Such discussions shall not be necessary where communications between the Company's counsel and opposing counsel were had before the filing of the complaint.**

COMMENT:

The Company's interests are not advanced by the premature preparation of papers and the resulting filing of pleadings and motions places a burden on the courts which may not be warranted. This Guideline insures that a dialogue between opposing counsel is initiated, and that the essential nature of the dispute is determined before work commences on the case.

**\*315** The lawyers are asked to candidly discuss the precise nature of the claim, e.g., not simply that the defendant was negligent, but the precise manner in which the Company is alleged to be negligent and how the harm occurred.

Finally, it is also useful at this stage to see if Alternative Dispute Resolution (ADR) is practical before work commences on the assumption of a court or jury trial.

Guideline #4

**Plaintiffs and defendants should draft pleadings in a manner that facilitates resolution of disputed issues by Rule 12(c). Rule 12(c) motions are to be made as soon as possible after the pleadings are closed.**

COMMENT:

It is the obligation of attorneys to define the issues in dispute with sufficient particularity that matters that can be resolved as issues of law on the pleadings are resolved. Combining or obfuscating issues in order to avoid Rule 12(c) motions is improper.

Parties who are capable of making Rule 12(c) motions should make such motions as soon as possible in order that the lawsuit be eliminated or refined to the essential issues of the dispute.

Guideline #5

**In initially evaluating a pleading from the perspective of plaintiff or defendant, primary focus shall be given to resolving all or as many of the issues in dispute as possible by means of a Rule 56 motion for summary judgment.**

**\*316 COMMENT:**

In the past, courts have been reluctant to grant motions for summary judgment and consequently they have not been used as often as they might. The fact remains that the use of Rule 56 motions can greatly reduce litigation costs and speed up the trial. While it is our practice to file motions on the basis of cost/benefit trade-offs, attorneys representing the Company shall not decide against filing a Rule 56 motion merely on the basis of perceived judicial reluctance to grant such motions. When a complaint is drafted or received, the application of a Rule 56 motion shall be considered at the outset. Similarly, Rule 56 motions shall be given priority consideration throughout the proceedings as papers are filed or produced by the adversary. The attorney certification requirements of [Rule 11](#) should be emphasized in such motions where appropriate.

Guideline #6

**It shall be the obligation of attorneys representing the Company to bring to the attention of the court any conduct by other attorneys of record which may merit the imposition of sanctions pursuant to [Rule 11](#).**

COMMENT:

Unprofessional conduct or actions in violation of the Rules often will not come to the attention of the Court without a specific motion. Attorneys as officers of the

court has a professional obligation to assure that the rules of court are recognized and applied. It is not the Company's lawyers to decide whether sanctions should indeed be imposed, but without their activist support, the intent of the Rules may be frustrated. The obligation requires the application of objective judgment without concern for the possibility of cross motions for sanctions.

**\*317** The purpose of the Guideline is not to cause secondary litigation over such issues. It is expected that the mere existence of the Guideline will induce attorneys to comply with the Rules and thus avoid unwanted dispute over conformity therewith. Nonetheless, without occasional motions for sanctions, the spirit of [Rule 11](#) will not be universally achieved.

This Guideline is identical to Guidelines 3 of [Rule 16](#), and 4 of [Rule 26](#).

**[RULE 16](#)**

Guideline #1

**Whether or not local rules may exempt the application of Federal [Rule 16](#), lawyers representing the Company shall within 30 days of the commencement of court litigation, prepare a strategy for addressing the case. Such strategy shall include an assessment of settlement possibilities and an identification of the key factual and/or legal issues in the case as they then appear to them. Unless early settlement seems likely, the attorneys shall also set forth the particular discovery they propose to take with respect to the issues identified. Motions which counsel feel will expedite the litigation or assist in focusing on the issues in the case will be identified and an allocation of workload under the proposed plan be decided upon.**

**The proposed strategy will be reviewed and agreed to by the General Counsel or his or her designee prior to submission of papers for the first pretrial conference.**

COMMENT:

The failure of attorneys to meet early to assess a lawsuit and to agree upon a plan for meeting the issues, leads not only to inefficiencies costly to the client but also to an imposition upon the court's time. Planning is the key to all effective enterprises, and while plans for a lawsuit may change as new material comes to light, litigation \*318 cannot be permitted to drift without purpose or direction. From the first day of filing, some things are known about the lawsuit which permit intelligent planning of a course of action. Even if nothing were known, the attorneys can plan a strategy to develop the relevant factual and legal issues based on the allegations in the pleadings and the known facts of the Company's business.

Guideline #2

**Scheduling orders are consistent with the objective of expediting litigation. Unless excused by local rule, the attorneys representing the Company shall seek the entry by the court of an order consistent with the plan agreed upon pursuant to Guideline #1 of [Rule 16](#). In no event shall an attorney seek a provision in any order for the purpose of delaying the litigation unless he or she shall advise the court of that purpose and the reasons why delay is necessary or desirable.**

COMMENT:

The direction of [Rule 16](#) is to provide for judicial management of litigation. This purpose is supported by the Company and, therefore, the attorneys representing the Company are expected to support the endeavors of trial judges to manage the court's case load. The requirements of [Rule 16](#) are consistent with the professional obligations of attorneys to the Company and with the Company's Guidelines under this Rule and [Rules 11](#) and [26](#).

While submissions under this Guideline must be in accord with the plan developed under Guideline #1, the plan itself should be treated as attorney work product and privileged. This Guideline is not intended to waive the

Company's rights in that regard.

\*319 Guideline #3

**It shall be the obligation of attorneys representing the Company to bring to the attention of the court any conduct by other attorneys of record which may merit the imposition of sanctions pursuant to [Rule 16\(f\)](#).**

COMMENT:

This Guideline is identical to Guidelines 6 of [Rule 11](#) and 4 of [Rule 26](#). Although the sanctions applied by the court may differ under the individual Rules, the basis for seeking their application is the same.

**[RULE 26](#)**

Guideline #1

**Prior to pursuing any discovery, litigation counsel shall submit to the General Counsel or his or her designee a written statement of the following:**

- 1. The particular discovery method to be used and why it is the most desirable;**
- 2. the lawyer responsible for it and the persons assisting, if any;**
- 3. the issue on which the discovery bears;**
- and**
- 4. the fact issues expected to be developed.**

**No discovery shall be instituted without approval of the General Counsel or his or her designee of the discovery proposed.**

COMMENT:

Discovery reputedly is the most abused process in litigation. A requirement that the purpose be justified along with the means proposed will curtail fishing expeditions \*320 and avoid use of procedural tools for purposes other than resolution of the substantive disputes.

The desirability of a particular discovery method shall be determined in light of its expense relative to the issues in controversy and the alternate means for discovering the facts. In no case shall discovery be recommended on the basis of the burden it will place upon other parties or the delay it will cause in the proceedings.

This Guideline is consistent with Guideline #1 of [Rule 16](#), requiring the submission and approval of a discovery plan and may be encompassed in the compliance with that Guideline.

Guideline #2

**The lawyer responsible for the discovery proposed and approved by the Office of General Counsel shall sign the discovery request pursuant to [Rule 26\(g\)](#).**

COMMENT:

Inasmuch as sanctions may be imposed upon attorneys engaged in improper discovery practice, it is incumbent upon the lawyer responsible for each item of discovery to accept professional responsibility for his actions. No attorney will be expected to sign a discovery request which has been modified from his or her proposal unless he or she shall agree with the modification.

Guideline #3

**No lawyer shall sign a response or objection to discovery unless he or she has made a personal professional judgment consistent with [Rule 26\(g\)](#) that the correct information has been provided or that the objection is appropriate and not for the \*321 purpose of delay or harassment of other parties. Objections to discovery shall not be made without prior notification to opposing counsel and an effort to dispose of the issue without court intervention.**

COMMENT:

This Guideline is consistent with the professional

responsibility of lawyers and their exposure to sanctions for improper use of discovery. No attorney can guarantee that all relevant and correct information has been provided by the client, but he or she must be reasonable in the conclusion that the professional obligation has been met.

Guideline #4

**It shall be the obligation of attorneys representing the Company to bring to the attention of the court any conduct by other attorneys of record which may merit the imposition of sanctions pursuant to [Rule 26\(g\)](#).**

COMMENT:

This Guideline is identical to Guidelines 6 of [Rule 11](#), and 3 of [Rule 16](#). Although the sanctions applied by the court may differ under the individual Rules, the basis for seeking their application is the same.

[\[FN1\]](#). The Section of Real Property, Probate and Trust Law also made a substantial financial contribution to the work of the Commission and we are grateful for their assistance.

[\[FN2\]](#). See, e.g., Burger, *Tell the Story of Freedom*, 72 A.B.A.J., May, 1986, at 54.

[\[FN3\]](#). Johnson, *Lawyers and the Public*, 53 A.B.A.J. 605, 606 (1967).

[\[FN4\]](#). B. Curran, *The Lawyer Statistical Report-A Statistical Profile of the U.S. Legal Profession in the 1980s* 4 (Am.B.Found. 1985) [hereinafter cited as Curran, *Statistical Report*]. While it may come as a surprise, the exact number of lawyers is hard to determine, even with careful study. One reason is that we have poor information on exactly how many lawyers die each year. Likewise, when a lawyer is licensed in more than one state, there is a risk of double counting. The cited study is the best available work on who and where the lawyers are, but it is only current through 1980.

[FN5]. *Id.* at 5. This is based on an estimated 675,000 American lawyers as of January, 1985, a total which grows by a net figure of about 26,000 lawyers per year. The March, 1986 monthly statistical report of the American Bar Association membership department reported a total of 691,875 actively practicing lawyers in the United States as of December, 1985.

[FN6]. See Law and Business, Inc., *The Lawyers Almanac 1986 2* for a listing of the 21 law firms with over 300 lawyers as of September, 1985. This source lists 72 firms with 200 lawyers or more.

[FN7]. This is based on an estimated 83,000 female lawyers in 1984, Curran, *Statistical Report*, *supra* note 4, at 9, and a growth rate in the number of women lawyers of 13,500 per year, *id.* at 5.

[FN8]. ABA, *A Review of Legal Education in the United States* 66 (1985) [hereinafter cited as *Review of Legal Education*]. The report indicates that 49,044 women attended law school out of a total enrollment of 124,092 in 1984-85.

[FN9]. Curran, *Statistical Report*, *supra* note 4, at 9. There were 285,933 lawyers in 1960, of whom 2.6% were women.

[FN10]. ABA, *Law Schools and Bar Admission Requirements in the United States-A Review of Legal Education* 19 (1962).

[FN11]. *Review of Legal Education*, *supra* note 8, at 68.

[FN12]. Information provided by the American Bar Association Membership Department, current as of March, 1986. The average age of members is 42, while the median age is 38.

[FN13]. Curran, *Statistical Report*, *supra* note 4, at 5-8.

Again, some estimating is necessary. The median age of lawyers in 1980 was 39. Since that date, about 197,000 lawyers have been admitted to practice while about 36,000 are deceased. Assuming that most of the new lawyers were under 35 and the deceased lawyers were over 40, a reasonable oversimplification, the median age in 1986 could be estimated to be 37-38.

[FN14]. *Id.* at 8.

[FN15]. The American Bar Foundation has commissioned a series of studies of the structure of the Bar today. *E.g.*, J. Heinz and E. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (1982); Landon, *Clients, Colleagues, and Community: The Shaping of Zealous Advocacy in Country Law Practice*, 1985 Am.B.Found.Research J. 81; Laumann and Heinz, *The Organization of Lawyers' Work: Size, Intensity and Co-Practice of Fields of Law*, 1979 Am.B.Found.Research J. 217. See also *Report of the American Bar Association Task Force on the General Practitioner and the Organized Bar* (July, 1984).

[FN16]. Much of the credit for spreading the news about better management techniques must go to the ABA Section on Economics of Law Practice. Unfortunately, some ascribe a loss of 'professionalism' to the perceived impersonality of modern business methods. This misconception is effectively answered in articles such as Reed, *Need the Pendulum Swing?*, 12 *Legal Economics*, May-June, 1986, at 27. We see no inconsistency between a lawyer's being efficient and practicing as a professional. Indeed, today it would be hard to imagine professionalism without an adequate level of efficiency.

[FN17]. A number of management consulting firms keep track of such rates. One proprietary study examined by the Commission was Altman & Weil, Inc., *The 1985 Survey of Law Firm Economics* (1985) [hereinafter cited as *1985 Survey*]. The general conclusions of the firm's 1984 study are published in 25 *Law Office Econ. & Mgmt.* 326 (1984). See also, Darby, Jr., *Are You Keeping Up Financially?*, 71 *A.B.A.J.*, December, 1985, at 66 (reporting on

a Cantor & Co. survey); Weil, *Economically, It's Been a Decade of Running in Place*, 8 Nat'l L.J., February 10, 1986, at 15.

[FN18]. See, e.g., U.S. Department of Justice, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (February, 1986); *Report of the ABA Special Committee on the Tort Liability System* (February, 1985); Willard, *Wheel of Fortune: Stopping Outrageous and Arbitrary Liability Verdicts*, Policy Review 40 (Spring, 1986). See also Dr. S. Charles and E. Kennedy, *Defendant* (1985) (first person account of a medical malpractice case); Waldholz, *Malpractice Liability: Can the Law Serve Both Doctors and Patients?*, Wall St.J., April 4, 1986, at 23 (discussion between Robert Habush of the Association of Trial Lawyers of America, and our Commission member Dr. James Todd of the American Medical Association).

[FN19]. See, e.g., Bok, *A Flawed System*, 85 Harv.Mag., May-June, 1983, at 38, 40 [hereinafter cited as Bok]. See also, Peterson, *New Tools for Reducing Civil Litigation Expenses* (Rand Corp., The Institute for Civil Justice, 1983). For a contrary view to one of President Bok's arguments, see Ramseyer, *Japan's Myth of Non-Litigiousness*, 5 Nat'l L.J., July 4, 1983, at 13, 36.

[FN20]. See, e.g., Alliance of American Insurers, *Civil Justice Reform: Ten Proposals That Can Make a Difference* 14-15 (May, 1985). For a contrary conclusion, see The Florida Bar, *Report of the Tort Litigation Review Commission* 53-58 (1984).

[FN21]. See, e.g., *Bhopal Blowup: Are Some Lawyers Vultures?*, 71 A.B.A.J., March, 1985, at 17 (describing news reaction). The ABA House of Delegates condemned the unseemly solicitation of cases at Bhopal in a resolution adopted in August, 1985. See also note 90, *infra*.

[FN22]. G. Shubert, *Survey of Perceptions of the Professionalism of the Bar* (1985) (unpublished). The survey

was a nonrandom sample of 234 corporate executives and judges.

[FN23]. *Id.*

[FN24]. *Id.*

[FN25]. ABA Special Committee on Economics of Law Practice, *Lawyers' Economic Problems and Some Bar Association Solutions 2* (1959).

[FN26]. Curran, *Statistical Report*, *supra* note 4, at 4.

[FN27]. *Id.*

[FN28]. *Supra* note 25, at 21-28.

[FN29]. Two cases heavily relied on at that time were *Federal Baseball Club, Inc. v. National League*, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922) and *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935).

[FN30]. 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

[FN31]. 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964).

[FN32]. *Id.* at 9, 84 S.Ct. at 1118.

[FN33]. 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975).

[FN34]. *Id.* at 788, 95 S.Ct. at 2013.

[FN35]. *Id.* at 792, 95 S.Ct. at 2016.

[FN36]. 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).

[FN37]. The holding had been foreshadowed in [Bigelow v. Virginia](#), 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), in which a newspaper publisher had been prosecuted for running an advertisement for abortion, legalized by [Roe v. Wade](#), 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The state said the advertisement was ‘commercial speech’ and thus outside First Amendment protection. The Supreme Court disagreed, saying that some readers had an interest in getting the information and the state could not restrict their doing so.

[FNthe] next case was [Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.](#), 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). There, a statute had made it illegal to advertise prescription drug prices. As in the case of advertising legal services, the rationale for the statute was that it was ‘unprofessional’ to so advertise. The Court conceded that there was even less political or social content to the pharmacist’s advertising than there had been to the abortionist’s, but it still held that absolute prohibition of such advertising was unconstitutional.

[FNsimilar], [Carey v. Population Services International](#), 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), the Court invalidated an ordinance prohibiting the advertisement or display of contraceptive materials. The argument that such advertising would be ‘offensive or embarrassing’ was rejected as ‘classically not’ a justification recognized under the First Amendment.

[FNin] this context, the *Bates* case, far from being a surprise or an exceptional result, was entirely consistent with this developing line of cases. For further background on the commercial speech doctrine, see Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U.Ill.L.F. 1080.

[FN38]. [Bates v. State Bar of Arizona](#), *supra* note 36, 433 U.S. at 383, 97 S.Ct. at 2709.

[FN39]. [436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444](#)

(1978).

[FN40]. [Id.](#) at 462, 98 S.Ct. at 1921.

[FN41]. [436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 \(1978\)](#).

[FN42]. The most important cases since *Ohralik* and *Primus* are [In Re R.M.J.](#), 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982) (the state may not be unduly restrictive of the categories by which a lawyer describes his or her practice), and [Zauderer v. Office of Disciplinary Counsel](#), 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) (state may not prohibit use of illustrations or the giving of general legal advice in an advertisement). *But see*, [Humphrey v. Committee on Professional Ethics](#), \_\_\_ U.S. \_\_\_, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986) (dismissing for want of a substantial federal question an Iowa Supreme Court holding, [377 N.W.2d 643 \(1985\)](#), that the ‘special problems’ of electronic media advertising could be made subject to severe regulatory restrictions).

[FN43]. The first 32 Canons were adopted in 1908. Fifteen additional Canons were adopted over the next 60 years. Persons seeking to review the official ethical statements discussed in this section can find them collected in Morgan and Rotunda, *1986 Selected Standards on Professional Responsibility* (1986).

[FN44]. ABA, *Canons of Professional Ethics*, Canon 32.

[FN45]. The Model Code was the product of the ABA Special Committee on Evaluation of Ethical Standards chaired by Edward L. Wright.

[FN46]. *Model Code of Professional Responsibility*, Preliminary Statement.

[FN47]. ABA, *Approval of Law Schools-Standards and Rules of Procedure*, Standard 203(a)(iv), (as amended 1983) [hereinafter cited as *Standards for Approval*].

[FN48]. See Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A.J. 639 (1977). The Commission on Evaluation of Professional Standards was chaired by Robert J. Kutak and, after his death, by Robert W. Meserve.

[FN49]. The Rules were vigorously debated before their adoption and have faced opposition in some states. By February, 1986, thirty months after adoption by the ABA House of Delegates, the Model Rules had become law in 11 states, in some instances after significant amendment. The status of the Model Rules can be tracked in the loose-leaf service, the *ABA/BNA Lawyers' Manual on Professional Conduct*.

[FN50]. See, e.g., *Model Rules of Professional Conduct*, Rule 1.13.

[FN51]. *Id.*, Rule 1.6. See, e.g., Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L.Rev. 1091 (1985). See also, Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn.L.Rev. 121 (1985).

[FN52]. The chief impetus for reform came from the 1970 Report of the ABA Special Committee on Evaluation of Disciplinary Enforcement, chaired by former Justice Tom C. Clark. In due course, the Joint Committee on Professional Discipline of the ABA Appellate Judges' Conference and the ABA Standing Committee on Professional Discipline produced both the *ABA Standards for Lawyer Discipline and Disability Proceedings* and the *Model Rules for Lawyer Disciplinary Enforcement*, adopted by the ABA House of Delegates in 1979. The Joint Committee has provided counsel to many states and the Standards have been highly influential. The *Standards for Imposing Lawyer Sanctions*, a set of proposed sanctions for particular kinds of disciplinable offenses, was recently proposed by the Joint Committee, and was adopted by the ABA House of Delegates in February, 1986.

[FN53]. There are apparently no good random studies of average American lawyer income. However, two careful surveys of specific samples of the Bar have been recently done. First, the American Bar Association conducted a survey of 2000 ABA members in May, 1983 and determined that the median income of the respondents was \$49,500. Smith, *A Profile of Lawyer Lifestyles*, 70 A.B.A.J., February, 1984, at 50, 52. A survey conducted in 1984 by Altman & Weil, Inc., a management consulting firm, concluded that in the participating well-established law firms in the United States, the average cash income for associates was \$38,931 and for partners/shareholders, \$114,331. *1985 Survey*, *supra* note 17, at 78.

[FN54]. One New York firm was recently reported to have announced a starting associate salary of \$53,000 per year, plus a housing allowance of \$12,000 and a year-end bonus of as much as \$20,000. *Bar Talk*, *American Lawyer*, May, 1986, at 7.

[FN55]. Judge John F. Grady of the United States District Court for the Northern District of Illinois undoubtedly expressed the view of many when he noted:

'For [the associate] to come to any conclusion other than the fact that the dollar is what the practice is all about would require some sort of superhuman mental gyration on his part, because all of the stimuli to which he's exposed indicate the exact reverse. The buck is what it's about. Get it, get it now . . . [W]hat are you worth a year later when you know something, or five years later when you know a little more? Where does it stop?'

Grady, *Commentary*, in *The Lawyer's Professional Independence: An Ideal Revisited* 30 (J.B. Davidson ed. 1985). Further, paying exorbitant beginning salaries may well have an effect on both recruitment and retention of law school faculty.

[FN56]. Curran, *Statistical Report*, *supra* note 4, at 13. In a 1984 survey of Michigan sole practitioners, 43% reported incomes of less than \$20,000. See Freedman, *Michigan Bar Survey Sings Economic Blues*, 8 Nat'l L.J.,

October 21, 1985, at 3.

[FN57]. Curran, *Statistical Report*, *supra* note 4, at 13-14.

[FN58]. *1985 Survey*, *supra* note 17, at 31.

[FN59]. The reports are not systematically collected, but they are frequent. *See, e.g.*, Greene, *Lawyers Versus the Marketplace*, *Forbes*, January 16, 1985, at 73; Berkow and Spiciarich, *Inside Counsel Gets More Competitive*, 8 Nat'l L.J., November 4, 1985, at 14; Heintz, *Elements of Law Firm Competition*, 6 Nat'l L.J., December 26, 1983, at 15.

[FN60]. Weil, *supra* note 17, at 15.

[FN61]. Such pressures are particularly great on associates in some New York and other large metropolitan law firms, where the billing of 18-20 hours a day is not unheard of. These pressures also force some lawyers to engage in questionable practices, including charging two different clients for the same period of time. *See generally*, Cramton, *Ethical Dilemmas Facing Today's Lawyer*, 11 *Bar Leader*, January/February, 1985, at 14, 17.

[FN62]. At the present rate of increase, the number of lawyers will exceed 1 million before the year 2000. Of course, the increase in the number of new lawyers could slow or be reversed. *See also* note 75, *infra*.

[FN63]. R. Pound, *The Lawyer From Antiquity to Modern Times* 5 (1953) (quoted by Hon. John F. Grady in his testimony before the Commission on May 24, 1985).

[FN64]. This definition was prepared by Professor Freidson especially for this report. Among his numerous published works on the sociology of professions are: *Profession of Medicine* (1970); *The Theory of Professions: State of the Art*, in *The Sociology of the Professions* 19 (Dingwall and Lewis, eds. 1983); and *The Changing Nature of Professional Control*, 10 *Ann.Rev.Soc.* 1 (1984).

[FN65]. Other definitions have been proposed. *See, e.g.*, the New York Court of Appeals statement in *Matter of Freeman*, 34 N.Y.2d 1, 7, 355 N.Y.S.2d 336, 339, 311 N.E.2d 480, 483 (1974):

A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and, notably, an obligation on its members, even in nonprofessional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation.

For a view that such definitions are more limiting than helpful, *see* Rotunda, *The Word 'Profession' Is Only a Label-And Not a Very Useful One*, 4 *Learning & The Law*, Summer, 1977, at 16.

[FN66]. Again, the underlying research is less extensive than one might wish. Perhaps the best formal study is Thielen, *The Influence of the Law School Experience on the Professional Ethics of Law Students*, 21 *J.Legal Educ.* 587 (1969) (finding a measurable, but not dramatic, increase in ethical awareness as a result of law school). The issue is addressed more theoretically in Zemans and Rosenblum, *The Making of a Public Profession*, Chapter 7 (1981); Richards, *Moral Theory, The Developmental Psychology of Ethical Autonomy and Professionalism* 31 *J.Legal Educ.* 359 (1981); and Cramton, *The Ordinary Religion of the Law School Classroom*, 29 *J.Legal Educ.* 247 (1978).

[FN67]. *Standards for Approval*, *supra* note 47, Standard 302(a)(iv). *See generally*, ABA Center for Professional Responsibility, *A Survey on the Teaching of Professional Responsibility* (May, 1986).

[FN68]. One series of ethics problems or vignettes has

already been prepared by the ABA Center for Professional Responsibility. The pilot of a more ambitious project recently has been undertaken by the Commission on Professionalism, the Section of Litigation and the Standing Committee on Professional Discipline in conjunction with Columbia University's Media & Society Seminars. It will consist of a civil and criminal ethics program to be presented at the 1986 ABA Annual Meeting in New York, with Professors Arthur R. Miller and Charles R. Nesson of the Harvard Law School as moderators. Later in this report, we will propose an expansion of this pilot project into a series of films or tapes suitable for use in law school courses and continuing legal education programs.

[FN69]. Interview by members of the Commission with Dean Redlich on August 27, 1985. *See also* Redlich, *Law Schools as Institutional Teachers of Professional Responsibility*, 34 J.Legal Educ. 215 (1984).

[FN70]. *See* Shaffer, *Moral Implications and Effects of Legal Education*, 34 J.Legal Educ. 190 (1984), and Cramton, *supra* note 66. A suggestion for a 'model rules of professional conduct' for law professors is presented in Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 Vand.L.Rev. 275 (1986) (suggesting additional concerns).

[FN71]. Interview by members of the Commission with former Dean Erwin Griswold, in Washington, D.C., July 7, 1985.

[FN72]. A very helpful start toward such a Code is suggested in Biernat, *Why Not Model Rules of Conduct for Law Students?*, 12 Fla.St.U.L.Rev. 781 (1985).

[FN73]. A law school Dean, interviewed by Commission members, described this as his practice.

[FN74]. Interview by Commission members with former Harvard Law School Dean Albert Sacks, at Cambridge, Massachusetts, August 20, 1985.

[FN75]. The total of persons applying to at least one law school reached a high of 65,760 in 1982-83. This year, 1985-86, it is 54,895, or a 17% decline. Law School Admission Council, *Data Bulletin*, May 1, 1986, at 1.

[FNlaw] schools are understandably secretive about their own admission experience, but it is inevitable that some schools will be harder hit than others. It can be reliably assumed that a few schools would now have to admit all or almost all persons who apply to them if they are to avoid taking a smaller first year class than in the past. *See also*, Law School Admission Council, *Demand for Legal Education into the Twenty-First Century*, July 18, 1985.

[FNinterest]ngly, the number of persons applying to at least one law school in 1985-86 has remained about the same as the number who applied in 1984-85. *See Data Bulletin, supra*. A possible sign of a reversal of the decline in applications, albeit quite preliminary, may be the 6% increase in persons expressing an interest in taking the Law School Admission Test between 1984-85 and 1985-86. *Id.*

[FN76]. Some firms regularly hold retreats for both partners and associates to discuss firm policies and directions. Such retreats would provide an excellent opportunity to discuss ethical considerations in practice.

[FN77]. Work on this problem is presently underway by the ALI/ABA Committee on Continuing Professional Education. A discussion draft of a report on its survey of 'bridge the gap' programs for young lawyers was published in November, 1984.

[FN78]. The courts can also be helpful. One very successful orientation program for new lawyers is the 'Walk Thru' program of the Los Angeles County Superior Court. *See* Crickard, *Judges Educate Inexperienced Trial Attorneys*, 67 A.B.A.J. 10 (1981).

[FN79]. The provinces and territories with this requirement, and the length of time a new lawyer must article,

are: Alberta (one year), British Columbia (ten months), Manitoba (11 1/2 months), New Brunswick (44 weeks), Newfoundland (one year), Nova Scotia (one year), Prince Edward Island (one year), Saskatchewan (one year), Quebec (six months), Northwest Territories (one year), Upper Canada (one year) and the Yukon (one year). This information was provided through communication with the Federation of Law Societies of Canada, May 30, 1986.

[FN80]. A good account of the possibilities and problems in such relationships is provided in Harper, *Learning at the Knee*, 71 A.B.A.J., December, 1985, at 70.

[FN81]. In 1983, Chief Justice Burger formed an Ad Hoc Committee of the Judicial Conference of the United States to assess this program and to promote the creation of mor Inns.

[FN82]. In effect, such committees are required by Rule 5.1(a) and 5.1(b) of the Model Rules of Professional Conduct which require partners in a law firm to create a means to assist the lawyers in their firm, including newly-admitted associates, to conform to ethical standards. Comment 2 to the Rule expressly discusses formation of these committees.

[FN83]. The ABA Standing Committee on Lawyers' Professional Liability and its National Legal Malpractice Data Center, has found that a disproportionate number of lawyers that have been in practice more than ten years are the subject of malpractice claims. Younger lawyers account for fewer claims, which suggests that failure to keep up is an important component of malpractice risk. See Gates, *The Newest Data on Lawyers' Malpractice Claims*, 70 A.B.A.J., April, 1984, at 78.

[FN84]. The State Bar of Texas has recently adopted a requirement for mandatory continuing legal education, effective June 1, 1986. The program includes required instruction in legal ethics and professional responsibility subjects.

[FN85]. There is no indication of an examination requirement in the literature and this was further confirmed in interviews with William C. Wheeler, Director of ABA CLE Courses and Publications, Mark Caldwell, CLE Director in Colorado, Austin Anderson, Director, University of Michigan Institute of CLE and Noble Foster, Director CLE, Washington State Bar Association.

[FN86]. state, however, is offering an innovative pilot program on a voluntary basis. In Colorado, attorneys may participate in a self-assessment program to test their knowledge of the Federal Rules of Evidence. If the program is successful, it will be expanded to other legal topics.

[FN86]. Ideally, of course, lawyers should be tested on performance in practice instead of through use of an examination. One such means for improving the current competence of lawyers is a system of peer review. Such a system is used frequently in the medical and accounting professions and is the subject of a proposed experiment for lawyers in Arizona. See also Special Committee on Law Practice Quality of the Maryland State Bar Association, *Law Practice Quality Guidelines: A Guidebook for Self Assessment by Practicing Lawyers* (1985). The concept of peer review is controversial and requires voluntary cooperation. We encourage further experimentation.

[FN87]. To illustrate the kind of program which could be taped for presentation to lawyers, the Commission is co-sponsoring a program with the Section of Litigation and the Standing Committee on Professional Discipline on ethical considerations in both civil and criminal litigation at the 1986 ABA Annual Meeting in New York. See note 68 *supra*, for additional information regarding this program.

[FN88]. See, e.g., Muris and McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1979 Am.B.Found.Research J. 179.

[FN89]. See, e.g., the Communications audit done in 1985

for the Florida Bar by Hill & Knowlton. The consumers did not, however, favor Bar regulation of advertising. They preferred the Bar to set guidelines with high standards for its members.

[FN90]. Commentators shared their outrage at such conduct with their readers. *See, e.g.,* Kilpatrick, *The Lawyers Get Theirs First*, Washington Post, October 22, 1985, at A19; Sitomer, *Lawyer Ethics Is On Trial In High-Profile Union Carbide Suit*, The Christian Science Monitor, April 26, 1985, at 6; *The Great Ambulance Chase*, Time, December 24, 1984, at 27. In addition, a number of newspapers and periodicals have run editorials condemning the conduct of lawyers with respect to the tragedy. *See, e.g.,* *Compensating Bhopal's Victims*, Washington Post, December 13, 1984, at A18; *The National Lottery*, U.S. News & World Report, January 27, 1986, at 80.

[FN91]. *Bates v. State Bar of Arizona*, *supra* note 36. See discussion of the case in Part II, *supra*, at the text accompanying notes 36-42. *See also*, McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U.Pa.L.Rev. 45 (1985); L. Andrews, *Birth of a Salesman: Lawyer Advertising and Solicitation* (rev. ed. 1980).

[FN92]. Presentation to the Commission by member Jose Garcia-Pedrosa, in Chicago, May 25, 1985.

[FN93]. The advertisement was run in the Washington Post, August 11, 1985, at A9.

[FN94]. In addition, a television advertisement in which a certain Washington football player endorsed a particular attorney's personal injury skills and services was condemned in District of Columbia Bar Ethics Opinion No. 142 (1984).

[FN95]. By 1984, 26% of ABA members have engaged public relations advisors. Reskin, *Lawyer Advertising Levels Off; P.R. Use Growing*, 70 A.B.A.J., June, 1984, at 48. About 80% of those using advertising and 59% of

those using public relations advisors plan to continue to do so. *Id.* at 49. The results are updated in Reskin, *PR Is for City Slickers*, 72 A.B.A.J., May, 1986, at 53. Bar publications have published favorable articles concerning the use of public relations. *See, e.g.,* Meyerowitz, *Making Public Relations Work for You*, 72 A.B.A.J., May, 1986, at 50; *Marketing Legal Services the Professional Way*, Fla.B.J., February, 1985, at 8-39; Middleton, *The Right Way to Advertise on TV*, 69 A.B.A.J. 893 (1983).

[FN96]. An example of such a disclaimer appears in the Alabama Code of Professional Responsibility, DR 2-102(A)(1)(F):

No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services.

[FN97]. *See, e.g.,* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060 (1976); Freedman, *Personal Responsibility in a Professional System*, 27 Cath.U.L.Rev. 191 (1978).

[FN98]. *See, e.g.,* the four essays in Alexander, *et al., The Lawyer's Professional Independence* (1984). *See also*, Kritzer, *The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study*, 1984 Am.B.Found.Research J. 409.

[FN99]. *See Nix v. Whiteside*, U.S. , 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). Professor Monroe Freedman points out that this kind of warning may decrease the client's willingness to tell the lawyer the truth. *See, e.g.,* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich.L.Rev. 1469 (1966).

[FN100]. *Model Code of Professional Responsibility*, Disciplinary Rule 7-106(B)(1) and Ethical Consideration 7-23; *Model Rules of Professional Conduct*, Rule 3.3(a)(3). *See also, Golden Eagle Distributing Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 129 (N.D. Cal.1984).

[FN101]. The Commission recognizes that in some instances there may be inadequate use of the discovery process. This is particularly true, we have been advised, in the representation of persons of moderate means whose lawyers may be overextended.

[FN102]. See, e.g., Segal, *Survey of the Literature on Discovery From 1970 to the Present: Expressed Dissatisfactions and Proposed Reforms* (Fed.Jud.Center 1978); Connolly, et al., *Judicial Controls and the Civil Litigative Process: Discovery* (Fed.Jud.Center 1978).

[FN103]. For example, [Rule 26\(f\) of the Federal Rules of Civil Procedure](#) provides that a party may seek a discovery conference with the court to pare down the issues for trial, including eliminating entire lines of discovery and simplifying the issues that need to be resolved by the trier of fact. In addition, [Rule 16](#), as amended, allows early judicial pretrial conferences to expedite matters and facilitate settlements.

[FN104]. See, e.g., Brown and Dauer, *Professional Responsibility in Nonadversarial Lawyering: A Review of the Model Rules*, 1982 Am.B.Found.Research J. 519; Hazard, [How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?](#), 35 U.Miami L.Rev. 669 (1981).

[FN105]. See Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 La.L.Rev. 577 (1975); Hazard, *The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S.C.L.Rev. 181 (1981).

[FN106]. [Carlucci v. Piper Aircraft Corp., Inc.](#), 775 F.2d 1440, 1454 (11th Cir.1985) (Fay, J., concurring).

[FN107]. The tensions between the duty of zealous representation and the duty to act as an officer of the court are explored in Schwartz, *The Zeal of the Civil Advocate*, 1983 Am.B.Found.Research J. 543, and a reply to it, Ball, *Comment: Wrong Experiment, Wrong Result: An Appreciatively Critical Response to Schwartz, id.*, at 565. See

also Luban, *The Adversary System Excuse*, in *The Good Lawyer* (Luban, ed. 1983); Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Calif.L.Rev. 669 (1978); Goldfarb, *Lawyers-or Hired Guns?*, Washington Post, October 17, 1985, at A23.

[FN108]. See American Corporate Counsel Association, 2 ACCA Docket, Fall, 1984, at 7.

[FN109]. Kearns, Cover Letter for Guidelines to Lawyers Representing Xerox Corporation, attached to this report at 311.

[FN110]. The practice is described in Stille, *When Law Firms Start Their Own Businesses*, 8 Nat'l L.J., October 21, 1985, at 1; Marcus, *Lawyers Branch Out From the Law*, Washington Post, March 13, 1986, at A1; and Silas, *Diversification*, 72 A.B.A.J., May, 1986, at 17.

[FN111]. See Couric, *Pooling Partners' Financial Resources*, 8 Nat'l L.J., March 10, 1986, at 19.

[FN112]. Of course, it may be said that any investment by a lawyer in his or her client, such as the purchase of a few shares of common stock on the open market, creates the same kind of conflict. Logically that appears true, but a *de minimis* rule in this area probably should be applied.

[FN113]. *Model Code of Professional Responsibility*, DR 5-104(A); *Model Rules of Professional Conduct*, Rule 1.8(a). See also, ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1482 (1982) (suggesting possible conflict).

[FN114]. See Comments to Rule 1.7 of the *Model Rules of Professional Conduct*; Lefkowitz, *The Attorney-Client Relationship and the Corporation*, 26 Rec.A.B. City N.Y. 697 (1971).

[FN115]. American Society of Certified Public Accountants, *AICPA Professional Standards*, Rule 101-8, ¶1.09 (1986).

[FN116]. Boulton, *A Guide to Conduct and Etiquette at the Bar* 20-21 (6th ed. 1975).

[FN117]. J. Hamelin and A. Damien, *Les Règles de la Nouvelle Profession D'Avocat* 100 (4th ed. 1981).

[FN118]. We recognize, of course, that lawyers often advocate legislative change on behalf of clients. In so doing, the legislature is presumed to be able to discern the public interest and the lawyer is not limited in his or her ability to assert the client's self-interest. We believe that lawyers advocating their own self-interest are in a different posture. It is this form of advocacy which we criticize here.

[FN119]. This proposition should be taken broadly, but an example may be useful. One witness told the Commission that early in his practice he was on a bar association committee considering changes in estate administration procedures. One change would have eliminated the need to file certain documents in the probate court and would have allowed small estates to be administered without a lawyer at all. 'That's bread and butter business for lawyers in my county,' a member of his committee said, and the matter was dropped with no consideration of the possible public interest in the change. Such incidents, we fear, are far too frequent and are not justifiable on any grounds.

[FN120]. Bok, *supra* note 19, at 38.

[FN121]. Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C. § 1961-1968](#) (as amended 1978). See Shapiro and Salomon, *Dealing With Racketeers: Change the Law*, N.Y. Times, September 14, 1985, at 15.

[FN122]. Ideally, legislative committees and staffs should make a careful assessment of such impact, perhaps including a 'litigation impact' statement with each bill. Even if they did so, however, an independent assessment by the Bar could help guarantee the reliability of the estimates.

[FNthe] concept of a law reform or law review commission—consisting of members of Congress and distinguished judges—to identify at an early stage administrative problems with legislation and observed difficulties in drafting has been suggested in the past. See, e.g., Friendly, [The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't](#), 63 Colum.L.Rev. 787, 802-07 (1963); Estreicher and Sexton, [A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study](#), 59 N.Y.U.L.Rev. 681, 808 (1984). See also discussion in Feinberg, *A National Court of Appeals?*, 42 Brooklyn L.Rev. 611, 627 (1976).

[FN123]. The most prominent single work on contingent fees remains F. B. MacKinnon, *Contingent Fees for Legal Services* (Am.B.Found.1964). See also Aronson, *Attorney-Client Fee Arrangements: Regulation and Review* 74-118 (Fed.Jud.Center 1980) [hereinafter cited as Aronson].

[FN124]. The New Jersey rule is at *Rules Governing the Courts of the State of New Jersey, Rule 1:21-7* (West 1986). See also Rules of the Supreme Judicial Court of Massachusetts, Rule 3:05 (West 1981). For an example in the federal courts, see General Rule 39, U.S. District Court, N.D.Ill. See, generally Aronson, *supra* note 123, at 85-87.

[FN125]. For example, if liability was conceded and damages were clearly at least \$100,000, only a low percentage of that \$100,000 would be justified. A substantial percentage of the damages over \$100,000 might be justified, on the other hand, since in our example they would be truly the product of the lawyer's skill and diligence. Our point here is that a flat one-third fee, calculated without regard to the realities of the given case, seems rarely justifiable. A concrete proposal that would tie the percentage fee to the hours required to be expended is offered in H. See, *An Alternative to the Contingent Fee*, 1984 Utah L.Rev. 485.

[FN126]. For example, California is currently considering such legislation. Cal. Senate Bill No. 1569 (introduced January 21, 1986 and last amended May 14, 1986; passed

by Senate, May 22, 1986).

[FN127]. See, e.g., *Manual For Complex Litigation 2d*, § 24.12 (1985) (encourages attention to reasonable hours expended). The testimony of Dennis J. Block, of New York, heard in Washington, D.C. on July 7, 1985, was particularly helpful to the Commission on this issue.

[FN128]. Having said this, we must recognize the other side of the coin. In some cases, lawyers may spend too little time on a case because they conclude they cannot fairly bill the client for the time which full preparation would take. Justice is not served by this practice either. See generally Kritzer, et al., *Understanding the Costs of Litigation: The Case of the Hourly-Fee Lawyer*, 1984 Am.B.Found.Research J. 559, 566-70.

[FN129]. The courts have experience setting attorneys' fees in many kinds of cases, although the effort has proved difficult in many instances. See, e.g., *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir.1973), appeal after remand, 540 F.2d 102 (3d Cir.1976); *In re Fine Paper Antitrust Litigation*, 98 F.R.D. 48 (E.D.Pa.1983), *aff'd in part, rev'd in part*, 751 F.2d 562 (3d Cir.1984). See also *Court Awarded Attorneys Fees: Report of the Third Circuit Task Force* (Oct. 8, 1985).

[FN130]. See, e.g., Devine, *Mandatory Arbitration of Attorney-Client Fee Disputes: A Concept Whose Time Has Come*, 14 U.Tol.L.Rev. 1205 (1983); Egelko, *Arbitrating Fee Disputes*, Calif.Law., January, 1985, at 21.

[FN131]. See Johnson, *New Jersey Attorney Fee Arbitration System*, N.J.Lawyer, Fall, 1985, at 9 [hereinafter cited as Johnson]; *In re Application of Li Volsi*, 85 N.J. 576, 428 A.2d 1268 (1981).

[FN132]. The eleven jurisdictions that have lay members

on their fee arbitration panels are: Arizona, California, Connecticut, District of Columbia, Georgia, Idaho, Kentucky, Maine, Minnesota, Montana and New Jersey. Johnson, *supra* note 131, at 10.

[FN133]. 572 F.Supp. 931, 934-35 (N.D.Ill.1983).

[FN134]. See, *In re Fine Paper Antitrust Litigation*, *supra* note 129.

[FN135]. Kakalik, et al., *Variation in Asbestos Litigation: Compensation and Expenses* xix (Rand Corp., The Institute for Civil Justice 1984).

[FN136]. J. O'Connell, *The Injury Industry and the Remedy of No-Fault Insurance* 7 (U. of Ill.Press 1971): 'Over half of the auto insurance dollar-56 cents-is chewed up in insurance overhead and legal fees, with only 44 cents left for actually paying traffic victims.' See also, U.S. Department of Transportation, *Motor Vehicle Crash Losses and their Compensation in the United States* (1971).

[FN137]. Ceilings on fees have been enacted in several jurisdictions. See, e.g., Compulsory Automobile Insurance Act, N.J.S.A. sec. 39-6A-4.3 (1984); The Workmen's Compensation Act, 77 Pa.Cons.Stat.Ann., sec. 998 (Purdon Supp.1983-84).

[FN138]. Tort cases are often still tried as they were when the defendant was liable only if 'at fault,' yet the substantive law in many such cases seems, as a practical matter, to impose liability where the defendant's actual fault is tenuous at best. In effect, we now have the worst of both worlds-expensive and cumbersome procedures for imposing largely inevitable liability. See, e.g., J. O'Connell, *Ending Insult to Injury: No-Fault Insurance For Products and Services* (University of Illinois Press 1975).

[FN139]. See generally, Marks and Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U.Ill.L.F. 193; and Steele and Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 Am.B.Found. Re-

search J. 917.

[FN140]. See *ABA Standards for Lawyer Discipline and Disability Proceedings* (1979) [hereinafter cited as *ABA Discipline Proceedings*]; *Model Rules for Lawyer Disciplinary Enforcement* (ABA 1979); *Standards for Imposing Lawyer Sanctions: Black Letter Rules* (ABA 1986).

[FN141]. The reluctance of judges to report misconduct is usually ascribed to (1) fear of reprisals where the judge involved must stand for reelection; (2) the added time burden imposed on the judge if the matter is pursued; and, (3) the notoriety, which could be diverting. Merit selection would eliminate worries about the first part. However, clear rules requiring reporting issued by the governing court, such as a state supreme court, would help as well. The time burden, in most instances, need not be great, since the investigating authority could conserve the time of the judge to a great degree. There need not be notoriety, since most disciplinary commissions and prosecuting attorneys have authority to initiate investigations on their own, and do not require the filing of formal charges before proceeding. See also ABA Standing Committee on Professional Discipline and the Center for Professional Responsibility, *The Judicial Role in Lawyer Discipline* (July, 1983).

[FN142]. Testimony before the Commission by United States Attorney Anton Valukas of the Northern District of Illinois and Illinois Attorney Registration and Disciplinary Commission Administrator Carl Rolewick in Chicago, October 10 and October 11, 1985, respectively.

[FN143]. [Amendments to the Federal Rules of Civil Procedure](#), 85 F.R.D. 521, 522-23 (1980).

[FN144]. Levin and Colliers, *Containing the Cost of Litigation*, 37 Rutgers L.Rev. 219, 222 (1985). See also, Cutler, *Conflicts of Interest*, 30 Emory L.J. 1015, 1016 (1981) (estimating legal services cost at \$30 billion; at that time, equal to 1.4% of the gross national product).

[FN145]. Levin and Colliers, *supra* note 144, at 227.

[FN146]. Levin and Colliers, *supra* note 144, at 226. On the other hand, some experts have doubted whether there is, in fact, a 'litigation explosion.' See, e.g., National Center for State Courts, *A Preliminary Examination of Available Civil and Criminal Trend Data in State Trial Courts for 1978, 1981, and 1984* (1986); 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 (1983); Trubek, *et al.*, *The Costs of Ordinary Litigation*, *id.* at 72. Yet, one cannot ignore the fact that last year one out of fifteen Americans filed a private civil suit-16.6 million suits in the state courts alone. In addition, it is at least clear that professional liability, product liability and municipal liability cases have substantially increased in number. See, *Product Liability: Justice Official Defends Litigation Explosion As Source of Liability Crisis*, 86 Daily Executive Reports, May 5, 1986, at A-10, A-11.

[FN147]. See, e.g., *Alternative Dispute Resolution and the Courts*, Judicature, February-March, 1986, at 252; BNA, *Resolving Disputes Without Litigation* (1985); Goldberg, Green and Sander, *Dispute Resolution* (1985); and Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 Vill.L.Rev. 1363 (1983).

[FN148]. Like any movement, the impetus for broad adoption and application of alternative methods of dispute resolution is not without its skeptics. Professors Judith Resnik of the University of Southern California Law Center and Owen Fiss of Yale Law School, for example, are troubled that ADR puts too much emphasis on getting out of court and settling disputes, thereby depriving individuals of their lawful day in court and denigrating other goals of the legal system such as establishing precedents and simply 'doing justice.' See Metaxas, *Alternatives to Litigation Are Maturing: But Are The Goals Valid?*, 8 Nat'l L.J., May 12, 1986, at 1, 6.

[FN149]. Several law schools have already undertaken

step in this direction, for which they deserve substantial credit. Indeed, the Commission is informed that at least two-thirds of the nation's law schools now list courses or seminars in negotiation or alternative dispute resolution in their catalogs.

[FN150]. See, e.g., ABA Action Commission to Reduce Court Costs and Delay, *Attacking Litigation Costs and Delay* (1984); see also Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility* 4 (Fed.Jud.Center 1984).

[FN151]. See *supra* note 103.

[FN152]. See, e.g., Kakalik and Robyn, *Costs of the Civil Justice System: Court Expenditures for Processing Tort Cases* (Rand Corp., The Institute for Civil Justice, 1982); Epstein, *Settlement and Litigation: Of Vices Individual and Institutional*, 30 U.Chi.L.Sch.Record, Spring, 1984, at 2.

[FN153]. For example, the Special Committee on Effective Discovery in Civil Cases for the Eastern District of New York, appointed by the Chief Judge Jack B. Weinstein, has issued its recommendations to address and forestall problems of discovery abuse. U.S. District Court for the Eastern District of New York, *Standing Orders of the Court on Effective Discovery in Civil Cases* (effective March 1, 1984).

[FN154]. See Shaffer, *et al.*, *Sanctions: Rule 11 and Other Powers* (ABA 1986) (and cases cited therein); Kassin, *An Empirical Study of Rule 11 Sanctions* (Fed.Jud.Center 1985); Batista, *Amended Rule 11 of the Federal Rules of Civil Procedure: How Go The Best Laid Plans?*, 54 *Fordham L.Rev.* 1 (1985); Rodes, *et al.*, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* (Fed.Jud.Center 1981).

[FN155]. The state rules that do exist are collected in Parness, *Three Suggestions for Trial Judges Overseeing Cer-*

*tification Standards*, 8 Nat'l L.J., March 3, 1986, at 28.

[FN156]. From time to time, a state trial judge does get tough. Illinois Circuit Court Judge Richard L. Curry of Chicago, for example, imposed a \$1.8 million sanction in an extended case where the plaintiff had filed pleadings which were untrue and were filed without reasonable cause to believe they were true. The order was affirmed in *Dayan v. McDonald's Corp.*, 126 Ill.App.3d 11, 81 Ill.Dec. 143, 466 N.E.2d 945 (1st Dist.1984).

[FN157]. The Speedy Trial Act of 1974, amended in 1979, is 18 U.S.C. §§ 3152-3156; 3161-3174, and 28 U.S.C. § 604.

[FN158]. See, e.g., *Golden Eagle Distributing Corp. v. Burroughs Corp.*, *supra* note 100 (sanctions imposed solely on lawyers for arguments raised, with the court's opinion to be distributed to every attorney in the firm). The numerous district court opinions that have awarded sanctions are catalogued in Shaffer, *et al.*, *Sanctions: Rule 11 and Other Powers*, *supra* note 154, at 16-135.

[FN159]. To illustrate the types of appellate court decisions that have imposed sanctions for frivolous filings and arguments, we provide selected decisions from one federal appellate court, the United States Court of Appeals for the Seventh Circuit: *Cannon v. Loyola University of Chicago*, 784 F.2d 777 (7th Cir.1986) (costs and fees in the district court and costs on appeal awarded relating to 10-year-old litigation); *Hilgeford v. Peoples Bank*, 776 F.2d 176 (7th Cir.1985) (\$500 in damages plus costs awarded for frivolous appeal), *cert. denied*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1644, 90 L.Ed.2d 188 (1986); *Lepucki v. Van Wormer*, 765 F.2d 86, 89 (7th Cir.) (costs and fees imposed against lawyer for the plaintiff; the lawyer was referred to the state disciplinary body 'for investigation because of his pattern of abuse of the judicial process'), *cert. denied*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 86, 88 L.Ed.2d 71 (1985); *Reid v. United States*, 715 F.2d 1148 (7th Cir.1983) (double costs assessed on appeal against counsel); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364 (7th Cir.) (injunction en-

tered preventing plaintiff from filing any further petitions or appeals without special leave of Court; failure to follow this procedure would result in contempt and punishment), *cert. denied*, [461 U.S. 960, 103 S.Ct. 2436, 77 L.Ed.2d 1321 \(1983\)](#).

[FN160]. The Commission recognizes that the current rash of excessively high jury verdicts may have a deterrent effect on the marketing of new products, the operation of school playgrounds and other activities which benefit the public and that this may, in time, compel a move in the direction of the English system. *See, e.g.*, Epstein, *Settlement and Litigation: Of Vices Individual and Institutional*, 30 U.Chi.L.Sch.Record, Spring, 1984, at 2, 4.

[FN161]. The requirement comes from *ABA Code of Judicial Conduct*, Canon 7B(2) and corresponding state provisions. One problem in some jurisdictions is that the judge or any other candidate must certify a list of whoever contributed over a specified amount to his or her campaign. Such a rule defeats any pretense of 'screening' the judge from knowledge.

[FN162]. *See* Moulder, *Law Firm Hired to Stop Judicial Misconduct Probe*, San Antonio Express-News, March, 1986, at 1-A; Moulder, *Big Law Firms Funding Judges*, San Antonio Express-News, March 2, 1986, at 1-A; Adler, *The Texas Bench: Anything Goes*, American Lawyer, April 1, 1986, at 1.

[FN163]. One study indicates that although the electorate's participation is not universally low, lack of interest among voters does exist and has been identified as a function of the same factors which affect turnout in the election of other officials. These include scheduling, the non-partisan ballot, and the absence of choice between competing candidates. Dubois, *Voter Turnout in State Judicial Elections: An Analysis of the Tail of the Electoral Kite*, 41 J.Pol. 865 (1979). *See also* Special Commission on the Administration of Justice in Cook County, *A Report on Judicial Selection* (1985).

[FN164]. *ABA Code of Judicial Conduct*, Canon 7B(1)(c) states: 'A [judicial] candidate . . . should not . . . announce his views on disputed legal or political issues. . . .'

[FN165]. *The Lawyer's Almanac 1986*, *supra* note 6, at 752-58. In many of these states, a retention election follows the initial term.

[FN166]. ABA Center for Professional Responsibility, *Survey of Lawyer Disciplinary Procedures in the United States* 1-8 (1984).

[FN167]. Marks and Cathcart, *supra* note 139, and Steele and Nimmer, *supra* note 139.

[FN168]. Lest there be any question that disciplinary sanctions meted out around the country can be lenient, a recent series in the San Francisco Examiner revealed that in California convicted criminals-including a burglar, a drug smuggler, a stock swindler, and a child molester-as well as a lawyer who impersonated a police officer, all continue to practice law, having received at most punishments 'ranging from a wrist slap to a few years on the sidelines.' San Francisco Examiner, *The Brotherhood: Justice for Lawyers*, March 25-29, 1985.

[FN169]. *ABA Discipline Proceedings*, *supra* note 140. Standard 3.16 would only permit public disclosure of the final disposition of a matter in which discipline has been imposed.

[FN170]. The transfer of lawyers to a 'disability inactive status' while they recover from mental or physical disability is outlined at *ABA Discipline Proceedings*, *supra* note 140, Standards 12.1-12.6.

[FN171]. The Commission is particularly concerned about reports of such abuse in connection with the attempted establishment of 'legal clinics' or national law firms to serve middle income clients.

[FN172]. Such procedures are provided in *ABA Discipline*

*Proceedings, supra* note 140, Standards 8.42-8.52.

[FN173]. See text at page 273.

[FN174]. Because of the confidentiality surrounding the process, data is limited. Virtually everyone agrees, however, that the investigations tend to be cursory. Still, the effectiveness of an intensive investigation is a subject of debate. See, e.g., the empirical work done of the process in Rhode, *Moral Character as a Professional Credential*, 91 Yale L.J. 491 (1985).

[FN175]. See Rhode, *supra* note 174, for a careful look at these issues. See also, McChrystal, [A Structural Analysis of the Good Moral Character Requirement for Bar Admission](#), 60 Notre Dame Law. 67 (1984); *Moral Character and Fitness*, 51 The Bar Examiner, August, 1982, at 6.

[FN176]. [In re DeBartolo](#), 111 Ill.2d 1, 94 Ill.Dec. 700, 488 N.E.2d 947 (1986).

[FN177]. For example, the ABA Commission on Advertising is drafting voluntary standards for the advertising of legal services. These standards will promote more informative, dignified advertisements and will discourage mere puffery.

[FN178]. See, e.g., Christensen, *The Lawyer's Pro Bono Publico Responsibility*, 1981 Am.B.Found. Research J. 1; Marks, et al., *The Lawyer, The Public and Professional Responsibility* (Am.B.Found.1972).

[FN179]. In 1980, the ABA established the Private Bar Involvement Project to encourage and assist bar associations developing programs to deliver legal services to the poor.

[FNin] New York, for example, Volunteers of Legal Services Program, Inc. ('VOLS'), a not-for-profit corporation, has obtained a commitment from many medium and large law firms in New York to provide on a yearly basis 30 hours of indigent representation (in civil and criminal

matters) *per lawyer* in the firm. This has resulted in excess of 250,000 hours of representation, in matters ranging from landlord/tenant, domestic relations and wills to criminal defense work. There is much to commend the New York experiment. Expansion of their program should be supported and similar efforts should be begun in other metropolitan areas.

[FN180]. Nothing in this section is intended to ignore the many hours contributed by lawyers to a variety of cultural and civic activities. Such work is completely consistent with professionalism and is to be applauded. We discuss here, however, a specific need for particular services that only lawyears can provide and for which other kinds of selfless activity by lawyers are not practical substitutes.

[FN181]. The term 'public interest' has been defined in the so-called 'Montreal Resolution,' adopted by both the American and Canadian bars. The definition includes representation of clients in matters involving 'poverty law,' 'civil rights law,' and 'public rights law.' It also includes representation of 'charitable organizations' and work to improve the 'administration of justice.' This is developed more fully in the report of the ABA Special Committee on Public Interest Practice, *Implementing the Lawyer's Public Interest Practice Obligation* (1977) [hereinafter cited as *PIP Report*].

[FN182]. In addition, the cutbacks of public funding for legal services have accentuated the problem. See, e.g., Cramton, *Crisis in Legal Services for the Poor*, 26 Vill.L.Rev. 521 (1981); *Gideon Undone: The Crisis in Indigent Defense Funding* (Moran ed. 1982). See also Frankel, *Justice: Commodity or Public Service* (Indiana University Poynter Center 1978).

[FN183]. No doubt, some flexibility must be developed in any such formula-for example, by limiting the number of *pro bono* hours which can supplant billable time. Still, changes must be made in this regard from current practices which penalize many associates for valuable services they have provided in the public interest. Associates

should not become 'sacrificial lambs' in pursuing *pro bono* matters.

[FN184]. Historically, of course, law school legal aid clinics have also rendered valuable direct legal services to the poor. We do not denigrate that role at all when we call for an additional commitment to help coordinate the much larger program of the Bar. For some cautious words about making law schools the primary source of legal service delivery to the poor, see Percy, *Does Legal Aid Belong in the Classroom?*, *Student Lawyer*, March, 1986, at 16.

[FN185]. Compare Special Committee on the Lawyer's Pro Bono Obligations, *Toward a Mandatory Contribution of Public Service Practice by Every Lawyer* (A.B.City N.Y. 1979) with *Pro Bono Legal Service: An Executive Committee Position*, 36 *Rec.A.B.City N.Y.* 9 (1981).

[FN186]. Seymour, *The Obligations of the Lawyer to His Profession*, 23 *Rec.A.B.City N.Y.* 311, 312-13 (1968) (the 25th Annual Benjamin N. Cardozo Lecture, at New York City, March 19, 1968).

[FN187]. See *PIP Report*, *supra* note 181, at 10-14.

[FN188]. See, e.g., the suggestion that young lawyers contribute 1% of their first-year earnings, discussed in *Harv.L.Rec.*, October 25, 1985, at 7.

[FN189]. See *PIP Rreport*, *supra* note 181. For reference to the existing volunteer programs, see ABA, *1985 Directory of Private Bar Involvement Programs*. See also *Directory of Pro Bono Services*, 41 *Rec.A.B.City N.Y.* 108 (1986).

[FN190]. See Aikman, *Volunteer Lawyer-Judges Bolster Court Resources*, *Nat'l Inst.Just.Reports*, January, 1986, at 2.

[FN191]. See text at pages 259-60 *supra*.

[FN192]. Address by Dr. James T. Laney, *The Moral Authority of the Professions*, the 1986 Robert T. Jones, Jr. Memorial Lecture at Emory University School of Law (to be published in a forthcoming issue of the *Emory Law Journal*).

[FN193]. The problems facing young lawyers who feel pressured to bill excessive numbers of hours are discussed in Cramton, *Ethical Dilemmas Facing Today's Lawyer*, 11 *Bar Leader*, January/February, 1985, at 14, 17 (citing example of a lawyer flying east to west who managed to bill 27 hours in a single day).

[FN194]. The definitive study is B. Curran, *The Legal Needs of the Public* (Am.B.Found.1977). See also Christensen, *Lawyers for People of Moderate Means* (Am.B.Found.1970).

[FN195]. See generally, Haskell, *Issues in Paralegalism: Education, Certification, Licensing, Unauthorized Practice*, 15 *Ga.L.Rev.* 631 (1981).

[FN196]. The State of Washington, for example, currently has a limited paraprofessional licensing program (See *Washington State Rules of Court*, [Admission to Practice Rule 12](#) (West 1985, as amended)). The curriculum for this program covers real estate, estate planning matters, and other subjects. Paraprofessionals must be tested for competency and their character record reviewed before they are licensed.

[FN197]. Without passing judgment on the ultimate merits of the Bar's position, it can be agreed by almost everyone that the controversy surrounding *The Florida Bar v. Furman*, 376 So.2d 378 (Fla.1979), and 451 So.2d 808 (Fla.1984), seriously damaged the Bar's public reputation. See, e.g., Frank, *Furman Fallout Swirls Over the Florida Bar*, 10 *Bar Leader*, March-April, 1985, at 4.

[FN198]. See Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors-Or Even Good Sense?*, 1980 *Am.B.Found.Research J.* 159;

Rhode, *Politicizing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *Stan.L.Rev.* 1 (1981); Michelman, *Guiding the Invisible Hand: The Consumer Protection Function of Unauthorized Practice Regulation*, 12 *Pepperdine L.Rev.* 10 (1984).

[FN199]. See, e.g., ABA Commission on Advertising, *Study on Institutional Advertising* (1980).

[FN200]. See Anderson, *Law-Related Education Deters Delinquency*, *School Safety*, Winter, 1986, at 17; Carlson, *Helping Educate Students in the Law*, *Pro Education*, April, 1985, at 49; *The Presidential Year: Working to Improve Understanding About the Law*, A.B.A.J., January, 1984, A.B.A. Annual Report 1982-83, at 22; ABA 5 *LRE Report: What's Happening in Law-Related Education* (1984).

[FN201]. Interview by a representative of the Commission with Professor Paul Freund, at Cambridge, Massachusetts, December 3, 1985.

[FN202]. One illustration of such a service is the publication, *Previews of Supreme Court Cases*, published by the ABA and Association of American Law Schools for the use of reporters. Law professors and others volunteer their time in preparing the case summaries.

[FN203]. L. B. Brandeis, *The Opportunity in the Law*, in *Legal Profession: Responsibility and Regulation* 16 (G. Hazard and D. Rhode ed. 1985) (paraphrasing Bryce).

[FN204]. The careers of Archibald Cox, Erwin Griswold, Leon Jaworski, Amalya L. Kearse, Soia Mentschikoff, Sandra Day O'Connor, and many others are well known and rightly heralded. But the work of other, less celebrated men and women is equally deserving of attention. Each year, for example, the ABA Special Committee on Lawyers' Public Service Responsibility annually recognizes lawyers who have performed outstanding *pro bono* services. In 1985, the awards were presented to the follow-

ing:

Howard Dana of Portland, Maine. Mr. Dana is the founder of the Maine Volunteer Lawyer Project. Additionally, he continues to work toward the establishment of an 'interest on lawyers' test accounts' (IOLTA) program in Maine.

Robert Hill of Hartford, Connecticut. Mr. Hill is a corporate attorney who established an in-house *pro bono* program to serve the poor in the Hartford area. He now provides assistance to corporate legal departments that are interested in beginning similar programs.

John Elliott of Charleston, South Carolina. Mr. Elliott obtained the funding necessary from state and federal sources to establish a program to provide representation for children who are the subject of custody disputes. He now consults with other states wishing to establish similar programs.

See also, Royko *Attorney Follows A Greater Law*, *Chicago Tribune*, March 22, 1985, at 3, describing the selfless acts of a Chicago lawyer in providing legal advice and assistance to an elderly woman.

[FN205]. Bok, *supra* note 19.

[FN206]. Recorded in the diary of James McHenry, who was one of President Washington's aides; published at 6 *American Historical Review* 618 (1906).

112 F.R.D. 243

END OF DOCUMENT